

January 2015

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Review was granted in the following case during the month of January 2015:

Secretary of Labor, MSHA, v. Brody Mining, LLC, Docket No. WEVA 2014-82-R, et al. (Judge Moran, November 3, 2014)

Review was denied in the following case during the month of January 2015:

Secretary of Labor, MSHA, v. Signature Mining Services, LLC, Docket No. EAJ 2012-02 (Judge McCarthy, December 5, 2014)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 13, 2015

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

v.

SIERRA ROCK PRODUCTS, INC.

Docket Nos. WEST 2010-1390-RM
WEST 2010-1391-RM
WEST 2010-1589-M
WEST 2011-315-M
WEST 2011-316-M
WEST 2011-747-M
WEST 2011-1029-M

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“the Act”). Order No. 8561260, the single order remaining before the Commission in this matter, is one of four related electrical violations for which citations or orders were issued to Sierra Rock Products by the Secretary of Labor’s Mine Safety and Health Administration (“MSHA”). The Administrative Law Judge modified the section 104(d) order to a section 104(a) citation, removed the unwarrantable failure designation, reduced the degree of negligence attributable to Sierra Rock, and assessed a penalty substantially lower than proposed by the Secretary.¹ In modifying the unwarrantability and negligence findings in the order, the Judge explicitly relied on his reasoning for similarly modifying a related electrical citation, Citation No. 8561252. 35 FMSHRC 49, 57-58 (Jan. 2013) (ALJ).

The Commission granted the Secretary’s petition for discretionary review of the Judge’s modifications to Order No. 8561260. The issues raised for review are whether the Judge erred in vacating the unwarrantable failure designation and reducing the negligence, and failing to provide a separate unwarrantability and negligence analysis, for Order No. 8561260.

We conclude that, in light of the different standards cited in Order No. 8561260 and Citation No. 8561252, and facts related to the order that were not present when the citation was issued, a separate unwarrantability and negligence analysis was required for the order. Therefore, we vacate the Judge’s penalty assessment and underlying unwarrantability and negligence findings with respect to Order No. 8561260, and remand the matter for further consideration consistent with our decision.

¹ In relevant part, section 104(d)(1) of the Act establishes additional sanctions for any violation caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.” 30 U.S.C. § 814(d)(1). Section 104(a) generally authorizes the Secretary to issue citations for violations of “this [Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this [Act].” 30 U.S.C. § 814(a).

I. Factual Background

The facts in this case are largely undisputed. Sierra Rock Products is owned and operated by Jim Hatler. His son, Barry, and two hourly employees also worked on the property on the date the order was issued. Tr. 156. On May 18, 2010, MSHA Inspector William Edminister asked Barry to demonstrate his usual method for “locking out” an outdoor electrical panel. Barry Hatler demonstrated that he or his father would open the panel door, reach inside and throw the breaker switches to de-energize the panel, then close and padlock the door. The inspector noted that the breaker switches were approximately six inches from exposed electrified components, and concluded that anyone reaching inside to throw the breaker switches would be exposed to shock hazards. Accordingly, he issued Citation No. 8561252, which alleges that the panel’s controls were not installed in such a way as to be operated without danger of contacting energized conductors, in violation of section 56.12040.² 35 FMSHRC at 50-51.

The inspector designated the citation as significant and substantial (“S&S”) based on the proximity of the breaker switches to live 480 volt connectors.³ *Id.* at 51. He also attributed the citation to high negligence and an unwarrantable failure, noting that the operator was aware of the hazard and failed to correct it, that the panel had existed in the cited configuration for some time, and that the hazard was obvious once the panel was open. Tr. 36, 42. The citation was subsequently terminated by installing a breaker switch on the outside of the panel. Tr. 44.

The next day, Jim Hatler voluntarily showed the inspector an electrical panel in the Motor Control Center (“MCC panel”) with the identical configuration, asserting that another inspector had terminated a citation issued with respect to that panel when it was in exactly the same configuration 10 to 15 years previously. Tr. 46-47. The inspector testified that Hatler did not reach in to the panel at that time, while Hatler testified that he touched some components in the panel to demonstrate the de-energizing procedure. Tr. 86-87, 168. Finding that the panel had the same configuration as the previously cited panel except that the electrified components were farther from the breaker switches, the inspector informed Hatler that it violated the same standard. Hatler countered that he believed the panel was in compliance, because of his claim that a prior inspector had terminated the citation without requiring changes to the configuration. Hatler further claimed that for ten years, no inspector had found a problem with the configuration or his de-energizing procedure. 35 FMSHRC at 51-52.

Later that day, after checking with his headquarters, the inspector told Hatler that he was going to issue an order despite the lack of past enforcement, and asked him to de-energize the MCC panel so it could be opened and the violative condition documented. The inspector told Hatler that the panel had to be de-energized before it was opened, by turning off the breaker for the plant’s main power. Hatler became angry, stated in rude terms that he was not going to shut

² Section 56.12040 states that “[o]perating controls shall be installed so that they can be operated without danger of contact with energized conductors.” 30 C.F.R. § 56.12040.

³ The “significant and substantial” language is found in section 104(d)(1) of the Act, which refers to “a violation of any mandatory health or safety standard . . . 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).

down the main power for a non-violative condition, aggressively opened the panel door, reached in, and flipped the breakers. Concluding that Hatler had exposed himself to the risk of electrical shock by reaching into the panel, the inspector issued an imminent danger order. 35 FMSHRC at 51-52; Tr. 48-52, 170-71.

The next day, the inspector issued two orders as a result of the events described above. Order No. 8561261 alleges that, like the outdoor panel at issue in Citation No. 8561252, the MCC panel was not configured to protect miners against inadvertent contact with energized components. Order No. 8561260, at issue here, alleges that Hatler failed to de-energize the MCC panel before doing work on circuits inside the panel, in violation of section 56.12017.⁴ The inspector designated the violation as S&S, on grounds that Hatler's aggressive manner of reaching into a panel with live 480 volt components was highly likely to result in a fatal injury. He also attributed the violation to unwarrantable failure and reckless disregard, noting that Hatler reached into the energized panel directly after the inspector instructed him to de-energize first, and that Hatler had a responsibility to set an example for his employees. 35 FMSHRC at 52.

II. The Judge's Findings

With respect to Citation No. 8561252, the Judge found that the configuration of the outdoor panel violated section 56.12040, and affirmed the S&S designation. However, he reduced the degree of negligence from high to moderate, removed the unwarrantable failure designation, modified the section 104(d) citation to a section 104(a) citation, and imposed a \$6,000 penalty rather than the proposed \$12,900 penalty. 35 FMSHRC at 55, 57. He reduced the degree of negligence because he found that MSHA's lack of prior enforcement with respect to the panel's configuration "helped lull Sierra Rock into believing that its procedure was safe and legal." *Id.* at 56. As for unwarrantability, the Judge determined that the panel existed in a violative configuration for a considerable length of time, there was a high degree of danger, and the violation was obvious to a trained electrician. However, he determined that Sierra Rock had not been put on notice that greater efforts were necessary for compliance, and concluded that Sierra Rock had not demonstrated the aggravated conduct required for an unwarrantable failure. *Id.*

With respect to Order No. 8561260, the Judge found that Hatler's actions in reaching into the MCC Panel to flip the breakers violated section 56.12017, and affirmed the S&S designation. Then, "for the same reasons as discussed above," he reduced the degree of negligence from reckless disregard to moderate, removed the unwarrantable failure finding, modified the order to a section 104(a) citation, and imposed a penalty of \$6,000 rather than the proposed penalty of \$52,600. The Judge also noted that Order Nos. 8561260 and 8561261 were not duplicative, because they cited different standards that imposed separate and distinct duties on the operator. *Id.* at 57-58.

⁴ Section 56.12017 states in relevant part that "[p]ower circuits shall be de-energized before work is done on such circuits unless hot-line tools are used." 30 C.F.R. § 56.12017. The Judge's finding that flipping the breaker switches constituted "work done on such circuits" has not been contested. 35 FMSHRC at 58.

III. Disposition

On appeal, the Secretary challenges the Judge's unwarrantable failure and negligence determinations, contending that the Judge failed to conduct a separate analysis for Order No. 8561260. The Secretary further contends that the Judge ignored significant aggravating factors in his unwarrantable failure determination for this order.

In modifying the unwarrantability and negligence designations associated with Order No. 8561260, the Judge referred to the "reasons discussed above" with respect to Citation No. 8561252. He did not conduct a separate unwarrantability and negligence analysis for the order. We conclude that a separate analysis was required.

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Factors indicating aggravated conduct include (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (Dec. 2009).

Emphasizing the need for contextual analysis, the Commission has held that separate unwarrantability analyses are required, even for factually related violations, where the violations involve mandatory standards that impose separate and distinct duties on an operator. *Consolidation Coal Co.*, 23 FMSHRC 588, 597 (June 2001). The relative significance of a fact or circumstance may change when different violative conduct is at issue.⁵

Here, although the panel's configuration and the de-energizing procedure are related, the relevant standards clearly impose separate and distinct duties. The standard at issue in Citation No. 8561252 involves a duty to safely configure electrical controls, while the standard in Order No. 8561260 involves a duty to de-energize before working on circuits.⁶ *See* n. 2, 4, *supra*. Facts that were given great weight by the Judge with respect to the configuration violation, such as MSHA's lack of enforcement, do not have the same relevance with respect to a failure to de-

⁵ It is well recognized that all relevant facts and circumstances of a particular case must be examined to determine whether an operator has engaged in aggravated conduct constituting an unwarrantable failure. *See IO Coal*, 31 FMSHRC at 1351; *Consolidation Coal*, 23 FMSHRC at 593.

⁶ The Judge made an implicit finding that the relevant standards impose separate and distinct duties. Citation No. 8561252 and Order No. 8561261 allege violations of the same standard, and the Judge found that Order Nos. 8561260 and 8561261 are not duplicative. 35 FMSHRC at 57; *see Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997) (finding citations non-duplicative where the standards involved impose separate and distinct duties upon an operator).

energize before working on circuits.⁷ 35 FMSHRC at 56. Other facts shared by the two violative conditions could have more or less significance depending on the cited standard. These include the length of time that the panels existed in their cited configuration, and that the panels were only de-energized in the cited manner once or twice a month. Analysis of a shared factual background is not inherently transferrable where the cited standards address different conduct.

Additionally, several events occurred after the issuance of Citation No. 8561252, but before the issuance of Order No. 8561260. On the morning of May 19, 2010, the inspector saw Hatler open the MCC Panel, may or may not have seen him reach in and touch the breaker switches depending upon the resolution of conflicting testimony, and informed him that the panel's configuration was not in compliance. Apparently, the inspector did not tell him that throwing the breakers did, or would, violate section 56.12017 but, again, there is a difference in testimony as to whether he touched the breakers at that time. Tr. 86-87, 168-69. Further, a few hours later, just before Hatler engaged in the conduct cited in the order by reaching into the MCC Panel and flipping the breaker switches, the inspector informed Hatler that he should turn off the main power switch to de-energize the panel before opening it. Tr. 48-52, 170-71. These interactions are relevant as to whether Sierra Rock was on notice regarding compliance with the cited standard. *See, e.g., IO Coal*, 31 FMSHRC at 1353; *Consolidation Coal*, 23 FMSHRC at 595 (finding that interactions between MSHA and mine personnel regarding a problem serve to put operators on heightened notice that they must increase efforts to comply with the relevant standard).

By merely referring back to his unwarrantability analysis for Citation No. 8561252, the Judge thus failed to consider all of the relevant facts and circumstances with respect to Order No. 8561260. As the D.C. Circuit has emphasized, an articulated decision is essential to the facilitation of judicial review. *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Thus, the Commission has held that a Judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994). Accordingly, this matter is remanded to the Judge for a separate unwarrantability analysis for Order No. 8561260. The Judge should particularly consider the impact on the unwarrantability factors of the different standard cited and the facts unique to the order.⁸

⁷ The record indicates that the evidence regarding the lack of enforcement was primarily in regard to the panel's configuration. Hatler testified that he raised the issue of lack of past enforcement with the inspector in order to contest the unwarrantability designation for Citation No. 8561252, on grounds that the panel had existed in the same configuration for years without a problem. Tr. 46-47, 89, 167-68. He also stated that he performed the panel de-energizing procedure for inspectors over the years and was never cited. Tr. 173. However, MSHA Inspector John Perez testified that usually the entire plant was already shut down during inspections. Tr. 225-26.

⁸ Sierra Rock argues that the citation and order are sufficiently similar that a separate analysis was unnecessary. Specifically, Sierra Rock claims that the inspector's instruction to
(continued...)

The Secretary argues that a remand is unnecessary because the record compels a finding of unwarrantable failure. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (finding remand unnecessary where the record supports only one conclusion). Specifically, the Secretary alleges that the inspector's instruction to Jim Hatler to de-energize before opening the MCC panel clearly put Sierra Rock on notice and made any belief of compliance when flipping the internal breaker switches objectively unreasonable. Therefore, the Secretary claims that Hatler's actions constituted willful misconduct which, when combined with other aggravating factors such as the degree of danger posed by the violation, compels a finding of unwarrantable failure.

Sierra Rock, on the other hand, argues that the Judge's finding of no unwarrantable failure should stand because he properly found that Sierra Rock had a reasonable and good faith belief that its conduct complied with the standard. The Commission has held that if an operator has acted on a good faith belief that its cited conduct was in compliance with applicable law, and that belief was objectively reasonable under the circumstances, the operator's conduct will not be considered the result of an unwarrantable failure when it is later determined that the operator's belief was in error. *IO Coal*, 31 FMSHRC at 1357-58 (citation omitted).

We find that the record does not compel a conclusion as to whether Sierra Rock had an objectively reasonable belief regarding compliance with the standard cited in Order No. 8561260, or as to the unwarrantability of the violative conduct more generally. While the record unquestionably establishes that Hatler willfully acted contrary to the inspector's instructions, the issue is whether Hatler willfully or recklessly acted contrary to the cited standard. The record does not conclusively establish whether the instructions put Sierra Rock on notice that de-energizing the panel via the internal breaker switches violated section 56.12017. A determination as to whether Sierra Rock was on notice may also be affected by a factual finding as to whether Hatler reached into the panel and flipped the breakers that morning without comment from the inspector.

Just as the analysis of the unwarrantability factors with respect to Citation No. 8561252 cannot be applied to Order No. 8561260 without further consideration, any finding of an objectively reasonable good faith belief with respect to the citation is not transferrable without additional analysis. On remand, the Judge should consider whether, in light of the totality of circumstances specific to Order No. 8561260, Sierra Rock had an objectively reasonable and good faith belief that its actions were in compliance with the cited standard.

It is ordinarily the province of the Judge to engage in an analysis and balancing of the unwarrantability factors in the context of the cited standard in the first instance. Here, further findings are necessary to reach a conclusion as to Sierra Rock's objective belief in its compliance with the cited standard and the reasonableness of that belief, and that determination must then be

⁸ (...continued)

de-energize does not affect the outcome of the unwarrantability analysis, because any notice it created does not undo MSHA's lack of enforcement. However, the relative weight of those factors, if any, is a determination to be made by the Judge.

weighed against other unwarrantability factors as re-examined in the context of the cited standard. Accordingly, the unwarrantable failure issue should be remanded to the Judge.⁹

As for the Judge's finding of moderate negligence, the Secretary contends that the same facts which compel a finding of unwarrantable failure also compel a finding of reckless disregard. The Commission has recognized that, although unwarrantable failure and negligence are distinct issues, the same factual circumstances may be considered for both. *Black Diamond*, 7

⁹ Commissioner Cohen disagrees with his colleagues' conclusion that the issue of Sierra Rock's alleged reasonable good faith belief should be remanded to the Judge. It is uncontradicted that Inspector Edminister told Jim Hatler to de-energize the panel by turning off the main power switch before opening the MCC panel. Tr. 50, 170-71. The fact that Hatler did not do so led to the Inspector's issuance of imminent danger Order No. 8561259 under section 107(a) of the Mine Act. The Judge affirmed the imminent danger order. 35 FMSHRC at 58-59. It is inconceivable that Hatler's angry act of putting his hand inside the electrical panel in defiance of the Inspector's explicit warning, thus creating an imminent danger, could be determined to be characterized as an objectively reasonable act of good faith. *See, Consolidation Coal Co.*, 14 FMSHRC 956, 970 (June 1992) ("[N]o operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied"). Sierra Rock's argument that the Judge made a finding of objectively reasonable good faith, Br. at 9-12, is simply bogus. The finding by the Judge which Sierra Rock relies on was that "[t]he fact that several MSHA inspectors examined the electrical panel during previous inspections and did not issue a citation or even comment on the condition helped lull Sierra Rock into believing that its procedures were safe and legal." 35 FMSHRC at 56. This finding, made in connection with Citation No. 8561252, led the Judge to reduce the negligence to moderate and vacate the unwarrantable failure finding with regard to the configuration of the electrical panel under 30 C.F.R. § 56.12040. Contrary to Sierra Rock's assertion, the Judge made no finding that Hatler's act in creating the violation of 30 C.F.R. § 56.12017 cited in Order No. 8561260 could be characterized as being done with objectively reasonable good faith. Indeed, in affirming the imminent danger order as "eminently reasonable," the Judge said:

Jim Hatler was directly in front of the open electrical panel and he was angry. He had just flipped the breakers to disconnect the power to the stacker and the bypass conveyor while the conductors at the bottom of the panel were electrified. Given Hatler's agitated state, it was not unforeseeable that he would flip the switches back on again to show the inspector how it was done.

35 FMSHRC at 59. Thus, any belief that Jim Hatler may have had -- when he reached into the electrical panel to flip the circuit breakers in the MCC room -- that his action complied with the standard despite Inspector Edminister's explicit warning, may have been in good faith, but it certainly was not reasonable.

Nevertheless, Commissioner Cohen agrees that as to the overall issue of unwarrantable failure, the record does not compel a finding one way or the other, and that the case must be remanded to the Judge for consideration of all the factors bearing on this issue.

FMSHRC 1117, 1122 (1985); *see also* *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 & n.11 (Sept. 1987). Notably, “reckless disregard” is often provided as a definition of unwarrantable failure. *Emery Mining*, 9 FMSHRC at 2003. The circumstances discussed above do not compel a finding of unwarrantable failure or reckless disregard. However, they may be relevant for a negligence analysis, particularly as they relate to the presence or absence of a reasonable belief with regard to compliance. Accordingly, remand for a separate negligence analysis for Order No. 8561260 is appropriate. In considering whether Sierra Rock engaged in aggravated conduct constituting unwarrantable failure in light of the order’s cited standard and additional facts, the Judge should also consider whether, in light of the same facts and circumstances, Sierra Rock’s conduct constituted reckless disregard or high negligence.

As a final matter, in assessing penalties, judges are to consider the six factors set forth in section 110(i) of the Act, including the operator’s negligence. 30 U.S.C. § 820(i). In remanding for reconsideration of the unwarrantability and negligence associated with Order No. 8561260, the assessed penalty must also be reconsidered in light of any changes to the Judge’s findings.

In summary, this matter is remanded to the Judge for a separate consideration of the unwarrantability factors in light of the totality of circumstances specific to Order No. 8561260. In particular, the analysis should address: the impact, if any, of the difference in the cited standards on the various unwarrantability factors; the impact, if any, of the morning interaction between Hatler and the inspector regarding the MCC Panel, and the inspector’s instructions to de-energize before opening the panel; and whether Sierra Rock had an objectively reasonable belief, based on the above facts and circumstances, that its conduct was in compliance with the cited standard. This matter is also remanded for reconsideration of the degree of negligence attributable to Sierra Rock with respect to the conduct at issue in the order.

IV. Conclusion

For the reasons above, we vacate the Judge's findings of no unwarrantable failure and moderate negligence with respect to Order No. 8561260, and remand for further analysis in light of the cited standard and the relevant facts and circumstances discussed above. We also vacate and remand the Judge's penalty assessment for Order No. 8561260 for reconsideration in light of any changes to the unwarrantability and negligence findings.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 7, 2015

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

v.

MARFORK COAL COMPANY, INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2014-269
A.C. No. 46-09091-336022

Mine: Horse Creek Eagle

DECISION

Appearances: Emily O. Roberts, U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee for Petitioner;
Melissa M. Robinson, Jackson Kelly, PLLC, Charleston, West Virginia
for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration ("MSHA"), against Marfork Coal Company, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. This docket involves two 104(a) citations, with a total proposed penalty of \$7,981.00. Prior to hearing, Respondent filed a Motion to Withdraw Contest of Citation No. 7169668, in which the mine agreed to accept the citation and pay the penalty as assessed. As a result, only one citation is left for decision here. The parties presented testimony and evidence at a hearing held on November 5, 2014 in Charleston, West Virginia.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Horse Creek Eagle mine is an underground coal mine located in Raleigh County, West Virginia. The mine is owned and operated by Marfork Coal Company, Inc. Stip. 1. The parties stipulated at hearing that Marfork is a large operator, there are no issues of jurisdiction and the penalty as proposed will not hinder the mine's ability to continue in business. Stip. 2-6, 10. The mine operates three shifts per day, two of which are production shifts.

Inspector Clarence Short issued Citation No. 7169624 on April 24, 2013 pursuant to section 104(a) of the Act for an alleged violation of 30 C.F.R. § 75.220(a)(1) at the Horse Creek Eagle mine. The citation alleges that the mine violated its approved roof control plan by failing to adequately support a 17 inch by 21 inch wide kettle bottom in #2 entry. Short determined that the condition was reasonably likely to result in an injury that was reasonably expected to be fatal, that the alleged violation was S&S, that one miner was affected, and that the level of negligence

was moderate. The Secretary has proposed a civil penalty in the amount of \$5,080.00 for this alleged violation.

The Violation

Mine Inspector Clarence Short worked as an underground coal miner for 14 years prior to joining MSHA. He has been a mine inspector for six years, and had inspected the Horse Creek Eagle mine prior to the inspection discussed here. On April 24, 2013 Short was at the mine to conduct a regular inspection and planned to begin the inspection by looking at equipment. Rocky Sexton, an employee in the mine's safety department, accompanied Short during the inspection. Both men offered testimony at hearing that, after inspecting a forklift, the two traveled by way of the scoop road to the next destination. While doing so, Short observed a kettle bottom that, in the inspector's opinion, was not adequately supported. Short measured the kettle bottom to be 17 inches by 21 inches wide and 97 inches above the mine floor. Short and Sexton observed that a portion of the kettle bottom had fallen out, and additional support, in the form of a metal strap, had been installed across the opening. Short believed that, because the strap did not touch the kettle bottom, and was not positioned in a manner that would prevent the kettle bottom from falling completely out of the roof, the strap support was not adequate. Sexton believed that Short should have observed the kettle bottom from a different angle and that the strap was adequate under the circumstances. The citation was terminated by setting a post under the kettle bottom as additional support. Based upon his observations, Short issued Citation No. 7169624 to the mine for its alleged failure to follow the approved roof control plan.

The mine's roof control plan requires that when adverse roof conditions, such as kettle bottoms, are encountered, supplemental support must be installed to adequately support the roof. Sec'y Ex. G-6, p. 4, ¶ 4.¹ The mine routinely used straps and bolts as additional support. While Short agreed that straps can be an effective way to shore up a bad roof, he explained that, in this instance, the single strap, which was off-center, was not adequate. The strap observed by Short was 10 to 12 inches below the kettle bottom, and did not adequately cover the area to prevent the kettle bottom from falling. Short testified that he took a photograph of the strap and kettle bottom which demonstrated the location of the strap across the kettle bottom. Sec'y Ex. G-4. At hearing, Short and Sexton agreed that a portion of the kettle bottom had fallen before their arrival, most likely during the mining cycle. They further agreed that the T-35 channel strap was four feet in length, six inches wide, and was near to the center across the kettle bottom. However, Short explained that the strap was not located in a position to hold the kettle bottom when it inevitably fell. Specifically, he explained that, while the kettle bottom may hit the strap when it falls, the width of the hole will allow it to fall to the mine floor. Sexton, on the other hand, testified that the strap was close to the center, was strong, and would hold the kettle bottom when it fell. Both suggested that kettle bottoms are unpredictable, and can fall at any time.

Short has extensive experience with kettle bottoms, having seen hundreds of them in his career. He explained that a kettle bottom is a petrified tree trunk, of large size, that can fall at any

¹ The cited page number corresponds to the page number of the roof control plan approved on October 14, 2010, and not the page number of the exhibit, which includes numerous supplements to the originally approved roof control plan.

time. Moreover, it cannot be determined how far up into the roof a tree extends. The petrified stumps are dense, weigh about 140 pounds per cubic foot, do not adhere to the surrounding roof, and, once exposed, must be supported. Short has had training regarding kettle bottoms and the need for immediate and adequate support. While it is difficult to know exactly what will happen, Short explained that the kettle bottom will eventually fall and the strap, if left in the condition he observed, will not catch or hold the falling material. Sexton also testified generally about kettle bottoms and added that the kettle shape in the roof is formed by the petrified tree, which is hard and slick, and it is not unusual for only the root portion to fall out, leaving a void in the roof.

Sexton, who is currently the manager at another Marfork property, believed that the strap was installed after the initial partial fall of the petrified area. He took two photos of the area to illustrate the strap from a different angle. Marfork Exs. F, G. Sexton testified that the roof probably fell during the mining cycle and he assumed it was properly supported after it partially fell out. According to Sexton, the roof was adequately supported, it had resin bolts as required, and the strap provided additional support for this area. He explained that the plates were up against the roof and the strap across the kettle bottom met the requirements of the roof control plan.

The Dictionary of Mining defines a “kettle bottom,” in pertinent part, as “[a] smooth rounded piece of rock, cylindrical in shape, which may drop out of the roof of a mine without warning, sometimes causing serious injuries to miners The origin of the feature is the remains of the stump of a tree that has been replaced by sediments so that the original form has been rather well preserved.” *Dictionary of Mining, Mineral, and Related Terms* 297 (2nd ed. 1997). The Commission and its judges have relied on the same, or similar, definitions when describing kettle bottoms and acknowledging the hazard presented by them. *IO Coal Co.*, 31 FMSHRC 1346, 1347 n. 4 (Dec. 2009); *Eagle Energy*, 23 FMSHRC 1107 (Oct. 2001); *Big Ridge Inc.*, 34 FMSHRC 2668, 2700 (Oct. 2012) (ALJ) (“Kettle bottoms are typically round or spherically shaped rock formations that are not incorporated into the layered shale roof.”); *Mountain Edge Mining*, 33 FMSHRC 1290, 1292 n. 2 (May 2011) (ALJ) (“‘Kettlebottoms’[sic] are basically coal-encrusted petrified tree stumps.”). The court finds, and the parties agree, that the area cited was a kettle bottom and was subject to the provisions of the mine’s roof control plan.

In order for the Secretary to prove a violation of section 75.220(a)(1) he must, first, establish that the provision allegedly violated is part of the approved and adopted plan, and, second, that the condition cited violated the plan provision. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1281 (Dec. 1998) (citing *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987)). Here, the roof control plan, requires that kettle bottoms have additional, adequate support. There is no question that the area cited was a kettle bottom and that the roof control plan required additional support. Further, there is no dispute that there was a strap in place across the kettle bottom and the use of such a strap is one of the ways allowed by the plan to provide additional support. The difficulty comes in determining whether this particular strap, positioned as it was in this instance, provided *adequate* support for this kettle bottom. I find that the strap did not provide adequate support and, therefore, the mine failed to comply with its roof control plan and violated section 220(a)(1).

The Commission has explained that roof control plan provisions are enforceable as mandatory standards. *Martin County Coal Corp.*, 28 FMSHRC 247, 254 (Mar. 2011) (ALJ) (citing *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987) (“JWR”). When interpreting a plan provision a judge should apply the same law which governs the interpretation of regulatory standards. *Id.* (citing *Energy West*, 17 FMSHRC at 1317). Accordingly, when the language of the plan provision is clear, the provision should be enforced as written “unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results.” *Id.* (citing *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993)).

I find that the plan provision is clear. Marfork argues that the provision is not ambiguous, and that the mine may support adverse roof conditions with the type of strap used in this instance. Marfork Br. 8,10. I agree with Marfork that the plan language is unambiguous, and that straps may be used to support kettle bottoms. However, Marfork fails to account for the plan’s requirement that the additional support “adequately support the roof.” Sec’y Ex. G-6, p. 4, ¶ 4. “In the absence of a statutory or regulatory definition of a term, the Commission applies the ordinary meaning of that term.” *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008). The dictionary defines “adequate,” the adjective form of the adverb at issue, as “sufficient for a specific requirement[.]” *Webster’s New Collegiate Dictionary* 14 (1979). The Secretary, in his brief, does not directly address whether the language of the plan is ambiguous, and instead only advances a dictionary definition of the term “adequate.” Sec’y Br. 3. He argues that the dictionary definition of the term, in the context of mine roof control, requires “support that would prevent roof material from falling on a miner. Support that would not prevent such an occurrence is inadequate.” *Id.* While I agree with the Secretary’s analysis, I base my analysis on the dictionary definition supplied here.

In the context of the roof control plan provision at issue, the additional support provided by the strap must be sufficient to satisfy the specific requirement of preventing roof falls. In this case, and as more fully discussed below, the cited strap, while an approved supplemental support device, was not positioned to provide adequate support. If the condition were left uncorrected, kettle bottom material would fall out of the openings on the side of the strap, or hit the strap, then fall. In either case, the support was inadequate and material would fall into an area where miners traveled.

Commission judges have found violations under similar circumstances where kettle bottoms were determined to be inadequately supported. In *Big Ridge Inc.*, 34 FMSHRC 2668, 2700 (Oct. 2012) (ALJ), Judge Zielinski found that the presence of multiple unsupported, or only partially supported, kettle bottoms, ranging in size from approximately 14 to 20 inches in diameter to smaller, violated section 75.202(a). While some kettle bottoms had support, the judge found that it was not adequate because the support would not prevent the entire area from falling. Moreover, in *IO Coal Co.*, 30 FMSHRC 847 (Aug. 2008) (ALJ)², Judge Barbour

² While the Commission granted review of this case, it only addressed the judge’s
(continued...)

affirmed a violation of section 75.220(a)(1) where a mine operator failed to comply with a roof control plan provision that required kettle bottoms to be addressed with supplemental support in addition to the primary support already required. There, the judge credited the testimony of an experienced inspector that he saw multiple unsupported kettle bottoms. *Id.* at 865-866.

There is no dispute that the roof control plan in place at the time required additional support in the area of this kettle bottom. The mine attempted to meet the requirements of the plan by installing the strap across the area. The violation occurred, however, because this single strap was not enough to adequately support the area. I credit the testimony of Short that the strap was off-center and the remaining petrified stump would have fallen out through the area that was not strapped, or would have hit the strap and then fallen. While I agree with Marfork that its roof control plan does not require the strap to be centered, here, I credit the inspector's testimony that the position of *this* strap did not adequately support *this* particular kettle bottom. While a different "off center" strap may provide adequate support for a different kettle bottom under other circumstances, my finding in this case is based on the credible testimony of the inspector that this strap, positioned as it was, did not provide adequate support for the kettle bottom. In any event, I find that the Secretary has demonstrated that the kettle bottom was not adequately supported and a violation of the roof control plan occurred as cited.

Gravity and S&S

Short observed the size of the kettle bottom area, and the fact that the area was traveled regularly by various miners on equipment and on foot. He testified that, given the uncertain nature of kettle bottoms, the fact that they fell in large pieces, and the fact that the area was traveled on each shift, he believed that the violation was S&S.

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

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

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of

²(...continued)

findings regarding the mine operator's alleged unwarrantable failure to comply with the standard. The Commission did not address the judge's findings regarding the fact of violation or the S&S nature of the violation. *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009).

danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

Short testified that part of the kettle bottom had already fallen out, and the remainder would eventually fall. Sexton agreed that he did not know when the remainder would fall from the roof, but it could happen at any time. Sexton also agreed that there could be a very heavy tree trunk remaining in the roof and a fall of the material could strike and kill a miner. Sexton, however, believed that the strap would catch and hold any part of the kettle bottom that fell. Short, on the other hand, stated that, given the location of the single strap, the roof fall would not be stopped, leaving a large, heavy piece of roof to fall to the ground. If any person were in the area when that heavy piece of roof fell, it would most certainly cause a serious injury or death. Short testified that he relied on his experience and has observed kettle bottoms that fell and hit the floor with a great force, crushing everything under it. He explained that a roof fall could also result in severe lacerations or, given the weight of the falling material, crush and kill a miner. The area was traveled regularly, thereby exposing miners to the roof fall. The examiner was in the area daily, and the kettle bottom was near an area where rock dust and other supplies were stored. While the scoop and front end loader have canopies, miners were often on foot, particularly when loading and unloading supplies. I find that, while the supplies may not be accessed every shift, it is fair to expect daily vehicle and foot traffic in the area. I credit the testimony of Inspector Short and find that, if the kettle bottom were left in this condition, it would fall, resulting in a serious injury or death.

The mine installed a post to add adequate support to this particular area of the roof and to abate the violation. According to Sexton, the post created an obstacle to maneuver around and made it difficult for equipment traveling in the area. However, Short explained that the post was needed to sufficiently support this area of the roof.

Roof, face and rib falls are one of the leading causes of injuries and death in underground coal mines. Safety Standards for Roof, Face and Rib Support, Final Rule, 53 Fed. Reg. 2354, 2354, 2369 (Jan. 27, 1998). To combat these hazards, Congress directed that mine operators develop and follow roof control plans tailored to the roof conditions and mining system of each mine. *See* 30 U.S.C. § 862(a) (setting forth general requirements for plans “to protect persons

from falls of the roof or ribs.”). The Commission, in echoing the concerns of Congress and the Secretary, has stated that the intent of the roof control provision is to provide broad protection against roof falls, which are the leading cause of injury and death in underground coal mines. *Elk Run Coal Co.*, 27 FMSHRC 899, 904 (Dec. 2005).

The Commission and its judges have recognized the hazardous, S&S nature of kettle bottoms. *Eagle Energy*, 23 FMSHRC 1107 (Oct. 2001); *Big Ridge Inc.*, 34 FMSHRC 2668, 2700 (Oct. 2012) (ALJ); *IO Coal Co.*, 30 FMSHRC 847 (Aug. 2008) (ALJ). In *Big Ridge Inc.*, 34 FMSHRC 2668, 2700 (Oct. 2012) (ALJ), the judge, in finding that the violation was S&S, cited the discrete safety hazard presented by an unsupported kettle bottom, being struck by a falling kettle bottom, and that a rock 14 to 20 inches in diameter “could easily result in broken bones or lost workdays, injuries that would be reasonably serious.” *Id.* at 2701. In discussing the likelihood of an injury as it relates to the S&S analysis, the judge relied upon evidence that the kettle bottoms were in an active working section where miners were exposed to the condition. *Id.* at 2702. Further, in *IO Coal Co.*, 30 FMSHRC 847 (Aug. 2008) (ALJ), Judge Barbour upheld the Secretary’s S&S designation where he found that eight miners worked and traveled in the area of the kettle bottoms. *Id.* at 868.

I have found that there is a violation of a mandatory standard. I find that the violation creates a safety hazard, that of a fall of very heavy material from the roof in an area where miners work and travel. The hazard of a roof fall of this size will lead to a very serious injury, and even death. Therefore, I find the violation to be significant and substantial.

Negligence

Inspector Short found that the violation was the result of moderate negligence. He did so based primarily on the fact that the mine had made an attempt to correct the condition and adhere to its roof control plan. He explained that the condition most likely existed since the area was first mined, about 2-4 weeks prior to the citation. While the mine installed a strap at that time, the strap did not provide adequate support. The strap should have either been up against the kettle bottom, or better positioned to block the fall of material. The mine could have used two or more straps in this large of an area. Given the inspector’s testimony, I accept his designation that the citation was the result of moderate negligence.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine act delegates to the Commission and its judges “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act requires that, in assessing civil monetary penalties, the ALJ must consider six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a

particular violation is an exercise of discretion that includes a consideration of the penalty criteria and the deterrent purpose of the Act. *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In this case, the operator is large, has no unusual history of these types of violations, and abated the condition in good faith. The inspector indicated that the negligence was moderate and, given the facts discussed above, I agree. I have discussed the gravity above and I assess a penalty of \$5,080.00 for Citation No. 7169624.

On October 27, 2014 Respondent filed a Motion to Withdraw Contest in which it sought to withdraw its contest of Citation No. 7169668, accept the citation as issued, and pay the originally proposed penalty of \$2,901.00. The Secretary does not oppose this motion. Accordingly, Respondent's motion is **GRANTED**.

III. ORDER

Given my findings, I assess a total penalty of \$7,981.00 for both the citation addressed at hearing, Citation No. 7169624, and Citation No. 7169668, which Respondent has agreed to pay as issued. The Respondent, Marfork Coal Company, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$7,981.00 within 30 days of the date of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 13, 2015

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

v.

ICG ILLINOIS, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2013-160
A.C. No. 11-02664-305974

Mine: Viper Mine

DECISION

Appearance: Michele A. Horn, Esq., Office of the Solicitor, U.S. Department of Labor, Cesar E. Chavez Memorial Building, 1244 Speer Blvd., Suite 216, Denver, CO for the Secretary

John M. Williams, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151
Beaumont Centre Circle, Suite 375, Lexington, KY for Respondent

Before: Judge Andrews

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against ICG Illinois, LLC, (“ICG” or “Respondent”) at its Viper Mine, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Act”). This case was originally assessed a civil penalty totaling \$49,140.00. Prior to hearing, the parties settled Citation Nos. 8442892 and 8420666, leaving only Citation No. 8443225, which was assessed a penalty of \$42,944.00. A hearing was held on January 14, 2014 in Springfield, Illinois at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted post-hearing briefs.

STIPULATIONS

1. ICG Illinois, LLC (“ICG”) at all times relevant to these proceedings, engaged in mining activities and operations at the Viper Mine in Sangamon County, Illinois.
2. ICG’s mining operations affect interstate commerce.
3. ICG is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ *et seq.* (the “Mine Act”).

4. ICG is an “operator” as defined in § 3(d) of the Mine Act, § 803(d), at the mine where the contested citation in these proceedings was issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Act.
6. Dennis J. Baum was, at the time the citation was issued, an authorized representative of the United States of America’s Secretary of Labor, assigned to MSHA, and was acting in his official capacity when issuing the citation at issue in these proceedings.
7. The citation at issue in these proceedings was properly served on ICG as required by the Mine Act.
8. The citation at issue in these proceedings may be admitted into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of any statements asserted therein.
9. The certified copy of the MSHA Assessed Violations History reflects the history of the citation issuances at the mine for 15 months prior to the date of the citation at issue and may be admitted into evidence without objection by ICG.
10. ICG demonstrated good faith in abating the violations.
11. The penalties assessed in this case will not affect the ability of ICG to remain in business.

Government Exhibit 5.¹

BASIC LEGAL PRINCIPLES

A. Significant and Substantial

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

¹ Hereinafter, reference to the Secretary of Labor’s exhibits will be cited as GX. Reference to Respondent’s exhibits will be cited as RX. Citations to the transcript will be cited as Tr. followed by the corresponding page number(s).

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984). The Secretary “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghioghenny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

B. Negligence

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.* Low negligence exists when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of

the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* See also *Brody Mining, LLC*, 33 FMSHRC 1329 (2011) (ALJ).

CITATION NO. 8443225

On September 18, 2012 at 8:20 a.m., MSHA Inspector Dennis Baum (“Baum”) issued Section 104(a) Citation No. 8443225 for an alleged violation of 30 C.F.R. § 75.1506(c)(1) stating,

The refuge alternative in the Main West, 006 MMU primary escapeway, is not located within 1000’ of the nearest working face. The refuge alternative is located between entries 5 and 6 at survey station 172+07 and the faces of number 5 and 6 entries are at approximately survey station 183+17, a distance of approximately 1110’.

Ex. GX-1. Baum determined that the violation was reasonably likely to result in fatal injuries to seventeen people and S&S in nature. *Id.* He further found that the violation was the result of Respondent’s high negligence. *Id.* The citation was terminated at 10:45 a.m. when a tractor was used to advance the refuge alternative to a survey station within 1,000 feet of the working face. Tr. 36; Ex. GX-1.

The cited regulation, entitled “Refuge Alternatives,” provides:

Refuge alternatives shall be provided at the following locations:

(1) Within 1,000 feet from the nearest working face and from locations where mechanized mining equipment is being installed or removed except that for underground anthracite coal mines that have no electrical face equipment, refuge alternatives shall be provided if the nearest working face is greater than 2,000 feet from the surface.

30 C.F.R. § 75.1506(c)(1).

CONTENTIONS OF THE PARTIES

The Secretary contends that Respondent violated 30 C.F.R. § 75.1506(c)(1) when it did not move the refuge alternative to within 1,000 feet of the working face. He further argues that the violation was S&S because, when viewed in light of an emergency, the extra distance could reasonably result in fatal injuries. The Secretary states that this violation was the result of Respondent’s high negligence because it was aware of the condition for, at least, an entire shift but failed to move the refuge alternative until the inspector informed it that a citation would be issued.

Respondent concedes that it violated 30 C.F.R. § 75.1506(c)(1). However, it argues that the Secretary has not proven that the substantial evidence at hearing shows that the violation is S&S. In essence, Respondent accepts that emergency circumstances should be presumed, but it argues that the Secretary presumed S&S because he did not consider the particular facts surrounding the violation, including the accessibility of SCSRs. Moreover, Respondent contends that high negligence is inappropriate because it was in the process of moving the refuge alternative before the citation was issued.

SUMMARY OF THE TESTIMONY

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

On September 18, 2012, Baum² was in the Viper Mine for an E02 spot inspection. Tr. 16. This inspection was required due to the fact that the Mine liberated more than 500,000 cubic feet of methane in a 24 hour period. Tr. 16-17. However, this inspection does not limit the inspections to methane issues; rather, inspectors are still required to enforce all Mine Act statutes and regulations. Tr. 17-18.

While looking at Respondent's examination books, Baum noticed an entry from the afternoon shift on September 17, 2012 that the refuge alternative needed to be moved inby, closer to the working face. Tr. 18-19; Ex. GX-3. A refuge alternative is "a large steel-constructed device that's designed to provide miners a place of safety in the event of a mine fire, ignition of any type or disaster where they can't get out of the mine." Tr. 21. It contains all of the supplies necessary to keep up to thirty-five miners sustained for ninety-six hours. Tr. 21-22. However, the refuge alternative was not mentioned in the preshift examination report for September 18, 2012. Tr. 20; Ex. GX-4. At this point, Baum warned Safety and Compliance Foreman Kris Oglesby³

² Baum started working for MSHA in March 2007 and received his AR card in February 2008. Tr. 15. Prior to this, he had about thirty years of experience in underground mines in which he ran nearly all of the equipment and conducted examinations. Tr. 15-16.

³ Oglesby has worked in coal mining for about twenty-nine years, all of which have been at the Viper Mine. Tr. 65-66. During this time, he has worked nearly every production position in the mine from roof bolting to examining. Tr. 66. In his current position, he conducts examinations and essentially works to ensure that jobs are being completed in the correct manner. Tr. 64, 66. He also fields any questions that arise from the workforce. Tr. 65.

(“Oglesby”) that a citation would be issued if the refuge alternative was still too far outby. Tr. 23.

Production Supervisor Gabriel Alderman⁴ (“Alderman”) arrived at the Mine on the morning at issue and reviewed the preshift examination reports to see what had been found and whether any corrective action was needed. Tr. 83. There was nothing in the preshift examination report that indicated that the refuge alternative needed to be moved. Tr. 83; Ex. GX-4. While Baum and Oglesby were looking at the preshift examination reports and the mine map, Alderman headed underground at 7:30 a.m. to begin his shift. Tr. 85, 103-104. When he arrived on the section, Section Foreman Jim Brown (“Brown”) told Alderman that the refuge alternative needed to be moved closer to the face. Tr. 85. At this point, Alderman testified that he asked the scoop operator to begin preparing the area and called Mine Manager Jerry Jones (“Jones”) for a tractor at roughly 7:40 a.m. Tr. 86, 98-99, 104-105. Depending on where the tractor was located on mine property, Compliance Coordinator Denny Alderman⁵ (“D. Alderman”) testified that it could take anywhere from between an hour and two and a half hours for the tractor to arrive at the necessary location. Tr. 111-112. In this instance, Alderman testified that it was there in about an hour. Tr. 93. Alderman further testified that it takes roughly two hours for the refuge alternative and new location to be “prepared” for the relocation. Tr. 103. A crosscut must be scooped, and floor dust must be laid in the new location. Tr. 103. Moreover, the signs and lifelines must also be moved. Tr. 103. To prepare the refuge alternative, the scoop must remove a beam that acts as roof support from the top. Tr. 102-103.

Baum and Oglesby traveled to the refuge alternative and confirmed that it was beyond the 1,000-foot requirement. Tr. 23-24, 69-70. It measured somewhere between 1,110-1,125 feet from the closest working face. Tr. 24. Baum testified that every foot counts during an emergency situation. Tr. 32-33. He acknowledged that miners carry Self Contained Self Rescuers (“SCSRs”), but these only provide oxygen and mostly benefit miners who can escape. Tr. 27-28. The alternative to the refuge alternative would be constructing a barricade big enough to seal the area with enough oxygen for the miners. Tr. 29-30. However, there have been instances where barricades have failed. Tr. 30.

⁴ Alderman has worked in coal mining for sixteen years, all of which have been at the Viper Mine. Tr. 79. He began working outby and then began working on production. Tr. 80. He eventually became a foreman and has since served as the Production Supervisor for the past five years. Tr. 80. This position is similar to a section foreman or face boss. Tr. 80-81. He oversees the production process, including ensuring that miners are working safely. Tr. 81. He also plans the present and future cutting sequence. Tr. 81.

⁵ D. Alderman has worked in the mining industry for nearly forty years. Tr. 106. He has been at the Viper Mine for thirty-one years. Tr. 106. He began outby before becoming the Construction Coordinator. Tr. 106-107. He has held managerial positions within the Mine since this time. Tr. 107. In his current position, he acts as a liaison between the Mine and MSHA inspectors. Tr. 107. He either escorts the inspectors or assigns other miners to do, but he is responsible for following up on any citations issued or suggestions made. Tr. 107.

When Baum wrote Citation No. 8443225 as S&S, he assumed, and was trained to assume, the occurrence of a disaster because the refuge alternative would only be used under conditions in which escape was impossible.⁶ Tr. 26, 45-46. He testified that 110 feet is a long distance to travel during an emergency where when visibility could be poor, miners may have to crawl and injured miners may have to be assisted. Tr. 31. This is compounded by the fact that this distance is above and beyond the 1,000 feet that would have already been traveled from the face. Tr. 32. Baum believed that fatal injuries were likely if the seventeen miners on the section could not reach the refuge alternative. Tr. 54. Because he believed the miners either would not be able to reach SCSRs during an emergency or they would be destroyed, he did not consider them as a mitigating factor. Tr. 35-36, 49. While Baum testified that he would not necessarily consider every violation of an emergency standard S&S, he would find any violation of this standard at this Mine S&S because of its particular history of methane, ignitions and 107(a) withdrawal orders. Tr. 46-47.

Baum testified that he further designated Respondent's negligence as high because no mitigating circumstances or excuses were offered. Tr. 33, 57. It was obvious to Baum that no equipment had been to the area because a thin layer of dust was undisturbed on top of the rock dust, and there were no equipment tracks. Tr. 33. Oglesby and Alderman insisted that a scoop was not capable of moving the refuge alternative; however, they also admitted that they had not tried.⁷ Tr. 34. They informed Baum that a tractor was on its way, but Baum did not consider this to be mitigating because it was only called after Respondent knew that it would likely be receiving a citation. Tr. 35, 41-42, 57. Further, the condition was reported after the afternoon shift. The midnight shift had worked, and, at 8:20 a.m. the next morning, roughly twelve hours later, nothing had been done. Tr. 35, 52, 58.

Oglesby and Alderman testified that a scoop is incapable of moving the refuge alternative because it is too heavy. Tr. 71, 86. However, both admitted that they had never attempted or personally seen anyone else attempt to move one with a scoop. Tr. 71, 87. Baum continued his inspection within the Mine. Respondent ultimately moved the refuge alternative with a tractor, and the Citation was terminated at 10:45 a.m. Tr. 56; Ex. GX-1.

ANALYSIS AND CONCLUSIONS

I find that the Secretary has proved that Citation No. 8443225 meets all four factors in the *Mathies* test and, therefore, is S&S and reasonably likely to cause fatal injuries to seventeen miners. Respondent admits that Citation No. 8443225 was validly issued. Tr. 9, 69-70. This violation contributes to the possibility that miners will be incapable of reaching the refuge alternative in the event of an emergency, such as an explosion, an ignition or a roof fall. It is the extra distance miners must traverse from the face that would result in additional and possibly

⁶ Baum specified that some of these scenarios could involve roof falls, fire, bad air or an ignition at the face that caused an explosion on the section. Tr. 26.

⁷ Baum admitted at hearing that he had never personally seen a refuge alternative moved, so he was unsure whether a scoop could actually move it. Tr. 38-39. He was mostly concerned that Respondent had not even tried. Tr. 39.

critical delays accessing the chamber. These possibilities constitute a measure of danger contributed to by the violation. The Viper Mine is subject to ten-day spot checks because it liberates more than 500,000 cubic feet of methane in a 24-hour period. Further, Baum testified that the Mine has a history of ignitions and methane issues. Because this is a working face, equipment would be running for most of the shift and could serve as an ignition source. All of this contributes to the reasonable likelihood that an explosion or ignition could occur. If this were to happen, visibility could be poor and the conditions could be disorienting, creating the likelihood that all seventeen miners on the working section would suffer from serious injuries or fatalities.

While Respondent accepts that an emergency situation should be assumed, it argues that the Secretary has presumed the S&S designation without taking into account the particular facts surrounding the violation. However, I disagree. Baum credibly testified that he would not necessarily consider every violation of this standard S&S; however, he would find every violation of *this standard at this mine* S&S. In explaining his determination, he explained that the Viper Mine has a history of ignitions, methane problems and Section 107(a) imminent danger withdrawal orders. Moreover, the refuge alternative serves to protect miners at the working face, where there would certainly be equipment moving in the area and providing ignition sources. Based on this evidence, I find that the Secretary has proven all four *Mathies* factors, and the violation is properly designated S&S.

Second, Respondent argues that it is unreasonable for Baum to have assumed that all of the available caches of SCSRs would have been destroyed. Moreover, it states that these SCSRs would reduce or negate any likelihood that injury would occur. Like Respondent, I do not assume that every SCSR would be destroyed. However, I do not agree that the SCSRs would greatly reduce or negate the likelihood of injury. While the SCSRs would increase the amount of time that the miners had access to breathable air, they could not ensure that disoriented miners would be able to reach a refuge alternative located more than 100 feet beyond the distance they are trained to travel in emergencies. Further, SCSRs are still limited in time and could not protect the miners from burns associated with fire or from falling rock during a roof fall. In these situations, the refuge alternative would still be the most important means of survival. While I find that the SCSRs are an important resource in the Mine, their availability does not change the S&S nature of this violation.

Although I affirm the Secretary's determination of S&S, I find that the violation was the result of moderate, rather than high, negligence. Baum agreed with Respondent's witnesses at hearing that there was no reason to believe that any one underground had been warned of his presence in the mine. Tr. 42-45, 68, 114. Alderman did not speak to Baum prior to going underground, and he had no reason to believe that there was a problem with the refuge alternative because nothing was included in the preshift examination report. Tr. 84-85; GX-4. While word may travel quickly in a mine, there is no evidence to suggest that Brown knew that Baum was in the area or that Alderman informed him upon arrival. Rather, the uncontroverted evidence at hearing suggests that Alderman only realized that the refuge alternative needed to be moved during his preshift conference with Brown. At roughly 7:40 a.m., Alderman called outside and told Jones that a tractor was needed to move the refuge alternative closer to the face, and the tractor arrived approximately one hour later. Further, he instructed the scoop operator to

begin preparing both the refuge alternative and the new location. The fact that the entire process was completed approximately three hours later supports the idea that Alderman independently began the process of moving the refuge alternative. In light of this, I find that mitigating circumstances exist and Respondent's negligence should be reduced from high to moderate.

The Secretary argues that Respondent's negligence is high because it could provide no mitigating evidence for its failure to move the refuge alternative. Baum credibly testified that at 8:20 a.m., when he issued the Citation, the thin layer of dust in the area around the refuge alternative was undisturbed and there were no tire tracks in the area. However, this does not account for the fact that the scoop may have been in transit to or already preparing the new location. Moreover, there would be no signs of a tractor in transit to the location of the refuge alternative. While I find it disturbing that Respondent seemingly assumes that a scoop is incapable of moving the refuge alternative, Baum had no experience or information to suggest that it was a certainty. Further, while Respondent's communication may not have been enlightening during the inspection, the testimony and evidence at hearing suggest that it was taking action to bring the refuge alternative into compliance. As such, I reduce Respondent's negligence from high to moderate.

PENALTY

It is well established that Section 110(i) of the Act grants to the Commission and its judges the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that:

[i]n assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The parties stipulated to Respondent's violation history, good faith compliance, and ability to continue in business. Further, there is no argument that the penalty is disproportionate to the size of Respondent's business. As stated above, the Secretary's gravity determination has been affirmed. However, I have determined that Respondent's negligence should be reduced due to the testimony and evidence presented at hearing. In light of this reduction, I find that \$25,000.00 is a more appropriate penalty.

ORDER

It is **ORDERED** that Citation No. 8443225 is **MODIFIED** to reduce the negligence attributable to the operator from “High” to “Moderate.” It is further **ORDERED** that ICG Illinois, LLC, **PAY** the Secretary of Labor the sum of \$25,000.00 within 30 days of the date of this Decision.⁸ Upon receipt of payment, this case is hereby **DISMISSED**.

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

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⁸ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
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January 16, 2015

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

v.

HIDDEN SPLENDOR RESOURCES, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2009-209
A.C. No. 42-02074-168807-02

Horizon Mine

DECISION ON REMAND

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor through the Mine Safety and Health Administration (“MSHA”) against Hidden Splendor Resources, Inc., 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”). Following an evidentiary hearing in this and other Hidden Splendor cases, I issued my decision on the merits. 34 FMSHRC 3310 (Dec. 2012). The Secretary appealed several issues to the Commission. On December 23, 2014, the Commission issued its decision. 36 FMSHRC _____. It affirmed and reversed portions of my decision. The Commission also remanded one issue to me, as discussed below.

In my decision, I affirmed Citation No. 6685833 in all respects. 34 FMSHRC at 3378-80. I assessed a civil penalty of \$5,000 whereas the Secretary proposed a penalty of \$6,458. The Commission remanded “the penalty associated with Citation No. 6685833 [to me] for further explanation consistent with” its decision. Slip. op at 7. The Commission did not vacate the penalty I assessed but asked for a more detailed explanation.

The citation alleged that there was an area of bad roof in a secondary escapeway in the Horizon Mine in violation of 30 C.F.R. § 75.202(a). I affirmed the violation, determined that the violation was of a significant and substantial nature (S&S), and that the violation was the result of Hidden Splendor’s high negligence. I rejected Hidden Splendor’s argument that the citation was duplicative of an unwarrantable failure order that the inspector also issued.

I assessed a penalty of \$5,000.00 based upon the six penalty criteria in section 110(i) of the Mine Act. 30 U.S.C. § 820(i). In accordance with the Commission’s order of remand, my supplementary analysis is as follows:

1. History of Previous Violations

I find that Hidden Splendor had a moderate history of previous violations for an underground coal mine of its size. Between September 2, 2006 and August 2, 2008, Hidden Splendor was issued 392 citations and orders, 81 of which were designated as S&S by the Secretary. (Ex. G-89). At the time of the hearing, it had paid the penalties for 149 of these citations and orders. Those that remained unpaid were designated as “Treasury” or “Chapter 11” on the Secretary’s Assessed Violation History Report under the column entitled “Last Status.” *Id.* On Exhibit A of the Petition for Assessment of Civil Penalty, the Secretary listed the history at 218. The Secretary assigned 12 history points under 30 C.F.R. § 100.3 (Table VI), which is in the middle of the range for history.

2. Appropriateness of the Penalty to the Size of the Mine Operator

The mine was a small to medium underground coal mine. The Secretary assigned 10 penalty points for the size of the Horizon Mine and 4 penalty points for the size of the controlling entity. (Exhibit A to Petition for Assessment of Penalty; Section 100.3 Tables I and II).

3. Whether the Mine Operator was Negligent

As stated in my opinion, I determined that Hidden Splendor’s negligence was high. 34 FMSHRC at 3380.

4. The Effect of the Penalty on the Operator’s Ability to Continue in Business

I find that Hidden Splendor did not establish that the \$5,000 penalty I assessed would negatively affect its ability to continue in business. At the time of the hearing, Hidden Splendor stipulated that, if paid in monthly installments, the proposed penalties would not affect its ability to continue in business. 34 FMSHRC at 3381. After the hearing record was closed but before I issued my decision, Hidden Splendor requested to reopen the record so it could introduce evidence concerning its ability to continue in business. I denied the motion. 33 FMSHRC 3249 (December 2011). Hidden Splendor argued that the SEC filings of America West Resources, Inc., the parent company of Hidden Splendor, revealed that its financial position had deteriorated since the date of the hearing. America West Resources has now filed for bankruptcy under Chapter 11 of the Bankruptcy Code. I am not aware of the current status of this proceeding.

5. The Gravity of the Violation

I determined that the violation was serious and S&S. I affirmed Inspector Bloomer’s determinations that a fatal accident was reasonably likely assuming continued normal mining operations and that one person would be affected by the violation.

6. The Demonstrated Good Faith in Attempting to Achieve Rapid Compliance

The evidence established that Hidden Splendor demonstrated good faith in achieving rapid compliance with the safety standard.

ANALYSIS

Considering section 110(i) of the Mine Act, I find that a penalty of \$5,000.00 is appropriate for Citation No. 6685833. I am not bound by the penalty proposed by the Secretary or by the Secretary's penalty point system. "[N]either the Act nor the Commission's regulations require the Commission to apply the formula for determining penalty proposals that is set forth in section 100.3 of the MSHA regulations." *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1152 (7th Cir. 1984). Instead, I must consider the six penalty criteria in section 110(i) of the Mine Act based upon the evidence that is presented at hearing.

The initial penalty proposed by the Secretary is based, in large part, upon the observations of the issuing MSHA inspector. He enters his determinations on the citation form and his determinations are assigned penalty points by MSHA's Office of Assessments. By necessity, an MSHA inspector spends limited time at each location while performing a regular E01 inspection. He must quickly evaluate the area and then continue his inspection. MSHA inspectors are experienced, well trained, and generally draw the correct conclusions in an efficient manner. Nevertheless, they do not have the time to deliberate upon each of the penalty factors set forth on the citation form. Commission judges, however, review the evidence presented by both parties and have the experience and legal expertise to thoroughly consider the application of each penalty criterion. This analysis is not a mechanical, penalty point calculation.

I considered a number of factors in assessing the \$5,000 penalty. In dollar terms, the difference between the proposed penalty and the penalty I assessed was not significant. The size of the mine and the company's financial condition were two of the factors I relied upon when assessing the penalty. The Horizon Mine was not a large underground coal mine. It was not secure financially. America West Resources was not a large national mining corporation. America West Resources subsequently filed for bankruptcy in early 2013. Information at MSHA's website shows that the mine has not produced any coal since the third quarter of 2012 and that the mine has been idled since that time. Although Hidden Splendor did not meet its burden to establish that a civil penalty would adversely affect its ability to continue in business, I considered the size of the mine, the size of the operator, and the financial condition of the operator at that time in my penalty assessment.¹

The level of negligence demonstrated by Hidden Splendor was high with respect to this violation.² There was no showing, however, that management knew about the hazardous condition and failed to abate it. Although I rejected Hidden Splendor's argument that the citation

¹ I note that according to information at MSHA's website, Hidden Splendor is delinquent with respect to most of the penalties assessed over the past several years. Given its bankruptcy filing, it is not clear if the Secretary will be able to collect the penalty I assessed for the subject citation.

² Although I cited the Secretary's definition of "high negligence" elsewhere in my opinion, I am not bound by that definition. 34 FMSHRC 3312; 30 C.F.R. § 100.3(d). *See Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1975 n. 4 (Aug. 2014); *Hidden Splendor Resources*, 36 FMSHRC ____, Slip op. at 11, Commissioner Cohen concurring (Dec. 23, 2014).

duplicated Order No. 6685828, that order involved the same roof conditions and I assessed a penalty of \$60,000 for a violation of section 75.380(d)(1) based upon my unwarrantable failure and high negligence findings. Thus, a significant civil penalty was assessed for the hazardous roof conditions. Finally, the hazard presented by the condition set forth in Citation No. 6685833 would have only affected one miner, the weekly examiner. Weekly examiners are trained to look for bad roof as they make their rounds.

My assessment of a penalty of \$5,000 was fair, reasonable and consistent with section 110(i) of the Mine Act.³

ORDER

I assess a civil penalty of \$5,000 against Hidden Splendor Resources for the violation set forth in Citation No. 6685833. Hidden Splendor is **ORDERED** to pay that amount to the Secretary within 30 days of the date of this decision.⁴

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

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RWM

³ After I received the remand order from the Commission I asked the parties whether they wished to participate in this remand proceeding. Counsel for the Secretary indicated that she would not provide any input and counsel for Hidden Splendor did not respond to my inquiry.

⁴ 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. The payment should reference WEST 2009-209, A.C. No. 168807.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 20, 2015

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

v.

JUSTICE ENERGY COMPANY, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2012-375
A.C. No. 46-06578-271611

Mine: Red Fox Surface Mine

DECISION

Appearances: Daniel Brechbuhl, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, on behalf of the Petitioner;
James F. Bowman, Bowman Industries, LLC, Midway, West Virginia, on behalf of the Respondent.

Before: Judge Feldman

This civil penalty proceeding is before me based on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“the Act”), 30 U.S.C. § 815(d), against the Respondent, Justice Energy Company, Inc. (“Justice”). This matter addresses the nature and extent of a variety of alleged violative conditions regarding the maintenance of mobile equipment at the Red Fox Surface Mine.

This docket concerns a total of eighteen citations, seven of which have settled. Of the remaining eleven contested citations, eight concern the risk of fire posed by motor oil or hydraulic oil accumulations on engines and other parts of mobile equipment.¹ As discussed below, determining whether the Secretary has met his burden of demonstrating by a preponderance of the evidence that the cited accumulations create a risk of fire requires: evaluating the potential, if any, for exposure of motor and hydraulic oil deposits to flashpoint temperatures and their resultant vaporization; and evaluating the potential for atomization of hydraulic oil occurring as a result of a defect in a pressurized hydraulic system. The remaining three contested citations concern maintenance defects on one bulldozer and two front-end loaders.

¹ As discussed herein, the cited oil accumulations violate section 77.1104 of the Secretary’s mandatory standards if they are located “where they can create a fire hazard.” 30 C.F.R. § 77.1104.

The Secretary originally proposed a total civil penalty of \$101,729.00 in satisfaction of the eighteen citations. A hearing was held on February 5 and February 6, 2014, in South Charleston, West Virginia. The parties' briefs have been considered in the disposition of this matter.

At the hearing, the parties advised that seven of the eighteen citations, for which the Secretary initially proposed a total civil penalty of \$20,248.00, had settled. The settlement terms included reducing the total civil penalty for these citations to \$14,579.00 based on Justice's agreement to pay the Secretary's proposed penalty in full for six citations: Citation Nos. 8131452, 8131457, 8131458, 8137017, 8137019, and 8137027. Tr. 10-11.² For remaining Citation No. 8131460, the Secretary originally proposed an \$8,893.00 penalty. The parties advised that they agreed to a reduced penalty of \$3,224.00 in satisfaction of this citation. The record was left open for a written submission of the specific settlement terms, which was filed on February 12, 2014. The written settlement motion reflects that the reduction in penalty for Citation No. 8131460 is based on the uncertainties of litigation. The agreed-upon reduction in civil penalties for this citation, when viewed in light of the entirety of the settlement terms, is not of significant magnitude to render the proffered settlement agreement unreasonable. Consequently, **the parties' settlement agreement reducing the total civil penalty for these seven citations to \$14,579.00 shall be approved** as consistent with the penalty provisions of section 110(i) of the Act.

The Secretary seeks to impose a penalty of \$81,481.00 for the eleven citations that remain at issue. All of these citations are designated as significant and substantial ("S&S").³ If the Secretary prevails in establishing the fact of the violation in any of these violations, the parties have stipulated that the cited conditions affected one person, were attributable to moderate negligence, and that these conditions will contribute to at least "lost workday or restricted duty" injuries. Tr. 15-16.

I. Background

The Red Fox Surface Mine is a highwall surface coal mine located in McDowell County, West Virginia. It is operated by Justice Energy Company, Inc., a subsidiary of Mechel Bluestone. Tr.2 91. Highwall drills, front-end loaders, and bulldozers, the pieces of equipment at issue, are used to remove overburden and extract coal from coal seams. Tr. 206-09. The Mine Safety and Health Administration ("MSHA") inspects the Red Fox Surface Mine twice each year. Tr.2 31. The conditions cited in this matter were observed during the period September 8 through September 16, 2011.

² As used herein, citation "Tr." refers to the February 5, 2014, hearing transcript. Citation "Tr.2" refers to the February 6, 2014, hearing transcript.

³ Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

II. Section 77.1104

Four of the eleven contested citations concern deposits of Chevron RPM Heavy Duty Motor Oil (“motor oil”) on engine components of mobile equipment. Similarly, four other contested citations concern Chevron Tractor Hydraulic Fluid (“hydraulic oil”) deposits on various components of mobile equipment. All eight citations allege a violation of section 77.1104 of the Secretary’s mandatory safety standards. Section 77.1104 provides:

Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate *where they can create a fire hazard*.

30 C.F.R. § 77.1104 (emphasis added).

III. Flashpoint, Evaporation, and Auto Ignition Temperature

In order to determine whether the cited motor oil and hydraulic oil accumulations create a fire hazard, it is necessary to distinguish the principles of flashpoint and auto ignition temperatures. Simply put, the flashpoint is the minimum temperature required to cause heated liquids, such as motor and hydraulic oils, to emit an ignitable vapor.⁴ Oil accumulations on hot engine parts that do not vaporize as a result of flashpoint exposure can dissipate into the atmosphere through the process of evaporation. Tr.2 at 111. The evaporation process does not produce vapors of sufficient concentration to be ignitable. Tr.2 at 112.

In contrast, the auto ignition temperature of a material is the temperature at which that material in solid or liquid form, rather than the vapor it emits, combusts. Tr.2 97, 116. The auto ignition temperature required for combustion of liquid oil is significantly higher than the flashpoint temperature required to create combustible vapors. Tr. 81-82; *see* Gov. Ex. 12. As discussed below, the principle of auto ignition is not material to the facts at issue as there is no evidence of exposure to temperatures sufficient to create auto ignition.

⁴ The Secretary’s regulations define flashpoint as “the minimum temperature at which sufficient vapor is released by a liquid or solid to form a flammable vapor-air mixture at atmospheric pressure.” 30 C.F.R. § 77.2(r). All products used at MSHA-regulated mines must have a Material Safety Data Sheet (“MSDS”), which defines that material’s flashpoint and auto ignition temperature. To identify a material’s flashpoint, as reflected on its MSDS, the material being tested is placed in a cup with an open flame at its mouth. Tr. 79. The material is then heated, causing it to emit vapors. *Id.* The flashpoint is identified as the temperature at which the flame ignites the vapors in the cup. *Id.*

IV. Motor Oil Citations

a. Summary of Citations

i. Citation No. 8137018

Upon inspection of a John Deere 844J front-end loader, Inspector Michael Carter issued 104(a) Citation No. 8137018 on September 14, 2011, alleging a violation of 30 C.F.R. § 77.1104. Citation No. 8137018 states:

Combustible material, [motor] oil and coal fines, have accumulated in the engine compartment and on the engine of the John Deere 844J front end loader. This condition poses a fire hazard on this machine.

Gov. Ex. 16. The Secretary has designated the cited conditions as S&S, asserting that they could “reasonably likely” result in the “lost work days or restricted duty” of the front-end loader operator. *Id.* The conditions were attributable to “moderate” negligence. *Id.* Inspector Carter testified that he could not identify the source of the motor oil leak and that he did not take any depth or temperature measurements. Tr.2 81. Carter further testified that coal fines, identifiable as a shiny black powder, were mixed with the accumulated motor oil. Tr. 117. The citation was abated on September 22, 2011, after Carter determined that the equipment had been washed, the cited combustible material removed, and “the leaks fixed.” Gov. Ex. 16. The Secretary seeks to impose a civil penalty of \$5,503.00 for Citation No. 8137018. Gov. Ex. 1.

ii. Citation No. 8131450

Upon inspection of a Caterpillar 992 front-end loader, Inspector Jeffrey Presley issued 104(a) Citation No. 8131450 on September 8, 2011, alleging a violation of 30 C.F.R. § 77.1104. Citation No. 8131450 states:

Combustible materials in the form of engine oil have been allowed to accumulate on the side of the hot running motor of the 992 Cat Front End Loader. This loader is run three shifts per day up to seven days per week and runs very hot.

Gov. Ex. 3. The Secretary has designated the cited conditions as S&S, asserting that they could “reasonably likely” result in the “lost work days or restricted duty” of the front-end loader operator. *Id.* The conditions were attributable to a “moderate” degree of negligence. *Id.* Presley testified that he could not identify the source of the leaking motor oil. Tr. 145. The citation was abated on September 14, 2011, after Presley determined the equipment had been washed and the cited combustible material removed. Gov. Ex. 3. The Secretary seeks to impose a civil penalty of \$7,578.00 for Citation No. 8131450. Gov. Ex. 1.

iii. Citation No. 8131451

Upon inspection of a second 844J John Deere front-end loader, Inspector Presley issued 104(a) Citation No. 8131451 on September 8, 2011, alleging a violation of 30 C.F.R. § 77.1104. Citation No. 8131451 states:

Combustible materials in the form of engine oil have been allowed to accumulate on the side of the hot running motor of the 844J John Deere Front End Loader. This loader is run three shifts per day up to seven days per week and runs very hot.

Gov. Ex. 4. The Secretary has designated the cited conditions as S&S, asserting that they could “reasonably likely” result in the “lost work days or restricted duty” of the front-end loader operator. *Id.* The conditions were attributable to a “moderate” degree of negligence. *Id.* Presley identified that coal fines were mixed with the accumulated motor oil. Tr. 146. According to Presley’s testimony, the likely source of this motor oil leak was “a seal at the top of the motor.” Tr. 147; Gov. Ex. 2, at 3. The citation was abated on September 9, 2011, after Presley determined that the equipment had been washed and the cited combustible material removed. Gov. Ex. 4. The record does not reflect that a motor seal was replaced to abate the citation. *Id.* The Secretary seeks to impose a civil penalty of \$7,578.00 for Citation No. 8131451. Gov. Ex. 1.

iv. Citation No. 8131454

Upon inspection of CO No. 794 980H front-end loader, Inspector Presley issued 104(a) Citation No. 8131454 on September 9, 2011, alleging a violation of 30 C.F.R. § 77.1104. Citation No. 8131454 states:

Combustible materials in the form of engine oil have been allowed to accumulate in and around the hot running motor of the CO#794 980H Front End Loader.

Gov. Ex. 7. The Secretary has designated the cited conditions as S&S, asserting that they could “reasonably likely” result in the “lost work days or restricted duty” of the front-end loader operator. *Id.* The conditions were attributable to a “moderate” degree of negligence. *Id.* Presley identified that coal fines and grease were mixed with the accumulated motor oil. Tr. 151; Gov. Ex. 2, at 7. The citation was abated on September 24, 2011, after Presley determined that the equipment had been washed and the cited combustible material removed. Gov. Ex. 7. The Secretary seeks to impose a civil penalty of \$7,578.00 for Citation No. 8131454. Gov. Ex. 1.

b. Fact of the Violations

The above motor oil Citation Nos. 8131450, 8131451, 8131454, and 8137018, raise similar questions concerning the combustibility and ignition properties of motor oil. As such,

whether the cited accumulations constitute violations of section 77.1104 will be addressed collectively.⁵

As a general proposition, 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 Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

As noted by Judge Manning:

The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Essroc Cement Corp., 33 FMSHRC 459, 465 (Feb. 2011) (ALJ) (citing *Allied Products, Inc.*, 666 F.2d 890, 892-93 (5th Cir. 1982)). Hence, in satisfying his burden of proof, the Secretary need not establish that a violation creates a safety hazard, unless the cited safety standard explicitly requires such a showing.

In this regard, a violation of section 77.1104 requires a showing that the subject accumulations are located where they create a risk of fire.⁶ Thus, to establish a violation of section 77.1104, the Secretary must not only demonstrate (1) the presence of combustible material, and that (2) the combustible material was allowed to accumulate, but he must also show that (3) the accumulations *are located* in an area where they can create a fire hazard. The Secretary has demonstrated elements (1) and (2) in that the subject motor oil deposits were allowed to accumulate and that the deposits are combustible. The remaining criterion requires the Secretary to demonstrate the presence of a fire hazard, *i.e.*, the potential for ignition. Whether a fire hazard exists depends on the location of the cited accumulations. *See, e.g., Id.* (holding that accumulations of hydraulic oil located in containers used to catch dripping oil from a hydraulically-operated gate system, absent proximity to sources of heat, did not create a fire hazard).

⁵ Both Justice and the Secretary addressed these citations collectively in their respective post-hearing briefs.

⁶ By way of illustration, comparison of the evidentiary requirements for demonstrating violations of section 75.400 and 77.1104 is instructive. While evidence of potential ignition sources is a factor in determining the issue of S&S, a showing of prohibited combustible coal dust accumulations, alone, is sufficient to demonstrate violation of section 75.400. In contrast, combustible accumulations, alone, do not constitute a violation of section 77.1104 unless the Secretary can demonstrate that such accumulations “can create a fire hazard.”

The evidence does not reflect, and the Secretary does not contend, that the cited equipment was capable of producing sufficient temperatures to cause the auto ignition of the subject accumulations. Consequently, evaluation of the potential fire hazard, if any, as required for a violation of section 77.1104, will be limited to an analysis of whether the cited accumulations could be exposed to temperatures reaching or exceeding their flashpoint. The MSDS for the motor oil in question identifies the flashpoint as 399 to 446 degrees Fahrenheit. Resp. Ex. 2.⁷

As noted, the dispositive question is whether the subject accumulations are located where they are exposed to sufficient heat to create a risk of fire. The Secretary has failed to present any meaningful direct evidence that the operating temperatures of the engine components in proximity to the cited accumulations could reasonably approach 399 degrees Fahrenheit, the temperature necessary to cause the motor oil to emit combustible vapors.⁸ Tr. 127, 162. Rather, the Secretary relies on supposition based simply on the fact that operation of the cited engines produces heat, instead of empirical evidence, for the proposition that internal combustion engines could produce motor oil flashpoint temperatures. For example, Inspector Presley testified:

Q: Okay. What ignition source can you identify in Citation No. ... 450? What ignition sources did you identify — or hot surfaces that were in contact with the material?

A: In 450? The motor, exhaust, and turbo.

Q: Okay. Are you saying that this accumulation was in contact with the turbo?

A: I'm saying it was in close enough proximity. It could have.

* * *

Q: But there is nothing in your notes about the turbocharger?

A: No.

Q: Okay. So what was the engine temperature of the side of the hot running engine that you mentioned in the violation?

⁷ The auto ignition temperature of motor oil is considerably higher than its flashpoint. The auto ignition temperature for motor oil is not provided in the MSDS. Tr. 81-82; *see* Gov. Ex. 12.

⁸ Inspector Cater testified that he did not take any temperature measurements because he did not have a heat gun and because, in some instances, the subject equipment had not been operated “in quite some time.” Tr. 88.

A: I couldn't tell you. Hot enough. I couldn't touch it.⁹

Tr. 263-65.

Assuming that it is difficult for MSHA inspectors to obtain actual engine component temperature measurements, the Commission has noted that, where direct evidence is not readily available, the Secretary may establish a violation by inference. *Garden Creek Pocahontas Co.*, 11 FMSHRC at 2153. However, any such inference “must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact inferred.” *Id.*

Motor oil deposits on engine components are not uncommon and may reoccur. The Secretary has conceded as much by approving the cleaning and removal of the deposits as adequate abatement without requiring any repair to remedy the source of the deposits to ensure that such deposits do not reoccur.¹⁰ See Gov. Exs. 3, 4, 7, and 16. Thus, in the absence of evidence of potential exposure to relevant flashpoint temperature, the Secretary's general assertion that motor oil deposits on hot engine components would be a fire hazard rendering use of such mobile equipment inherently dangerous is illogical.¹¹

In the final analysis, the Secretary's general reliance on the heat produced by an internal combustion engine, rather than on evidence based on actual measurements of temperature ranges capable of producing combustible motor oil vapor, lacks the requisite direct, or adequate circumstantial, evidence necessary to demonstrate that the cited accumulations create a fire hazard. Consequently, the four motor oil accumulation citations shall be vacated.

While I have concluded that the Secretary has failed to demonstrate a fire hazard, I am cognizant that motor oil is supposed to be in, rather than on, an engine. Dirty engines may constitute a violation of section 77.404(a) of the Secretary's regulations that requires that mobile equipment to be properly maintained.¹² However, this issue with respect to these four citations is

⁹ Inspector Presley also alluded to potential ignition sources caused by the arcing of defective electrical components. Tr. 265. However, in the absence of the requisite vaporization caused by temperatures meeting or exceeding the flashpoint, the cited motor oil accumulations are not sources of fuel for an ignition by an electrical arc or spark.

¹⁰ Although Inspector Carter's testimony was somewhat equivocal, a fair reading of his testimony reflects that the motor oil citations were abated by simply pressure washing the cited engine components. See Tr. 167; Tr.2 84.

¹¹ Judge Tureck has expressed a similar opinion: “Apparently the Secretary wants me to accept as a matter of faith the totally illogical contention that a truck's engine oil will catch fire at the temperature at which a truck's engine operates.” *Justice Energy Co., Inc.*, 35 FMSHRC 1590, 1594 (June 2013) (ALJ).

¹² Improperly maintained equipment can contribute to a variety of hazards. For example, motor oil deposits may contribute to the seizing of an engine causing a loss of control. While improper maintenance may constitute a violation of section 77.404(a), it does not necessarily
(continued...)

not presently before me. **Accordingly, Citation Nos. 8131450, 8131451, 8131454, and 8137018 shall be vacated.**

V. Hydraulic Oil Citations

a. Atomization Risk of Hydraulic Oil

As a general proposition, in the absence of auto ignition temperatures, the risk of fire posed by hydraulic oil is created by vaporization due to exposure to flashpoint temperatures or atomization due to defects in pressurized hydraulic oil systems. A fire hazard is created when vaporized or atomized hydraulic oil comes into contact with extremely hot engine surfaces or other sources of ignition.¹³ As previously discussed, the motor oil citations have been vacated because, although such accumulations may evaporate, the evidence does not reflect the potential presence of flashpoint temperatures sufficient to create vaporization of motor oil deposits. *See supra*, at 3. So too, with the exception of Citation No. 8137016 concerning the proximity of accumulations to the extremely hot temperatures of a turbocharger, the evidence does not reflect that the subject hydraulic oils were exposed to flashpoint temperatures sufficient to create vaporization of hydraulic oil deposits.

However, unlike motor oil, normal hydraulic oil usage relies on properly functioning pressurized lines, equipped with fittings and gaskets that can withstand such pressurization. Gov. Ex. 12. When such lines, components, and gaskets fail, it is reasonably likely that the released pressurized hydraulic oil may be atomized, and sprayed or misted onto hot engine surfaces, thus posing a serious risk of ignition and resultant fire. *Id.*

¹² (...continued)

create a fire hazard under section 77.1104. For example, the best practices in MSHA's safety alerts require removal of accumulations of motor oil and grease using solvents or degreasers formulated to clean equipment. *See* Gov. Ex. 21, at 7. However, it is only "hazardous fluid leakage," such as that caused by the failure of hydraulic systems, which requires the immediate removal of equipment from service. *Id.* at 5.

¹³ At the hearing, the Secretary proffered an MSHA investigative report of a fatal bulldozer fire accident that occurred on October 13, 2000. Gov. Ex. 21, at 10. The accident occurred when the bulldozer suddenly burst into flames shortly after misting was observed surrounding the cab of the machine. *Id.* at 12. MSHA concluded the cause of the accident was leaking oil that had been ignited by hot engine components. *Id.* at 15. The source of the leak could not be conclusively determined due to the extensive damage caused by the fire. *Id.* However, MSHA determined that the hydraulic hoses that controlled the left lift cylinder and an improper O-ring for the right lift cylinder were damaged. *Id.* The photographs in Gov. Ex. 21 of a rock truck engulfed in flames are unrelated to the October 13, 2000, accident. *Id.* at 2-3. The record was left open for the Secretary to provide relevant documents regarding the cause of that rock truck fire. Tr.2 182. The Secretary failed to do so.

The fire hazard associated with hydraulic oil leaks is succinctly explained in an Occupational Safety & Health Administration Safety Hazard Information Bulletin on Hydraulic Systems Modification:

Petroleum based hydraulic fluids are widely used. Hydraulic oil becomes hot during operations. A heated petroleum based hydraulic fluid presents a considerable fire hazard, particularly in those processes where ignition sources are usually present. A typical petroleum based hydraulic fluid has a flash point range from 300 to 600 degrees Fahrenheit and an auto ignition temperature of 500 to 750 degrees Fahrenheit. However, when hydraulic fluid is accidentally discharged under high pressure an easily ignited fine oil mist is sprayed over the surrounding area. When the mist reaches an ignition source, the result can be a torch-like ball of fire. If the mist is confined, a violent explosion can occur.

Id.

The fire hazard presented by pressurized hydraulic fluids was addressed in the Analysis of Mobile Equipment Fires, authored by the National Institute for Occupational Safety and Health (“NIOSH”). Gov. Ex. 21, at 17. In this regard NIOSH noted that 55% of all mobile equipment fires at surface coal mines during the period of 1990 to 1999 “were caused by pressurized hydraulic fluid/fuel sprayed onto equipment hot surfaces due to ruptured lines and failed fittings and gaskets.” *Id.* at 25. NIOSH further noted that such failures are more likely when equipment is utilized in excess of 5,000 operating hours. *Id.* In addition to hot engine components, NIOSH noted other ignition sources, such as flame cutting/welding and electrical short circuit arcing. *Id.* at 31.

b. Citation Nos. 8131456, 8137025, and 8137026

Citation Nos. 8131456, 8137025, and 8137026 concern similar material facts in that they all involve the pooling or depositing of hydraulic oil on engine components, presumably caused by defects in pressurized hydraulic systems. However, in all three citations, there is no evidence that the cited deposits were on, or in close proximity to, hot surfaces.¹⁴ Consequently, these three citations will be addressed collectively with respect to the facts of the violations and S&S designations.

¹⁴ The subject hydraulic oil accumulations in Citation No. 8137016 will be addressed separately because they were in close proximity to extreme temperatures caused by a turbocharger and exhaust system.

Citation No. 8131456

Upon inspection of a Caterpillar D11R bulldozer on September 9, 2011, Inspector Presley issued 104(a) Citation No. 8131456 alleging a violation of 30 C.F.R. § 77.1104. Citation No. 8131456 states:

Combustible materials in the form of hydraulic oil have been allowed to accumulate all over the inside of the machine under the operators (sic) compartment. The machine is in use and runs very hot.

Gov. Ex. 9. The Secretary has designated the cited condition as S&S, asserting that it could “reasonably likely” result in the “lost work days or restricted duty” of the bulldozer operator. *Id.* The condition was attributable to a “moderate” degree of negligence. *Id.* Presley described the accumulated hydraulic oil as “pooled” in the belly pan — a space that could be measured in square yardage. Tr. 170; 283. Presley could not identify the source of the leak, but did identify the dozer’s transmission and electrical components as potential sources of heat. Tr. 171. The condition was abated on September 21, 2011, after the dozer had been washed and cleaned, thus removing the hydraulic oil accumulations. Gov. Ex. 9. The Secretary seeks to impose a civil penalty of \$7,578.00 for Citation No. 8131456. Gov. Ex. 1.

Citation No. 8137025

Upon inspection of the CO # 841 highwall drill on September 16, 2011, Inspector Carter issued 104(a) Citation No. 8137025 alleging a violation of 30 C.F.R. § 77.1104. The citation states:

The CO #841 drill has an accumulation of combustible material, hydraulic oil, on the frame of the machine, hydraulic hoses, and the bottom of the drill mast. This condition poses a fire hazard on this machine.

Gov. Ex. 17. The Secretary has designated the cited accumulations as S&S, asserting that they could “reasonably likely” result in the “lost work days or restricted duty” of the drill operator. *Id.* The accumulations were attributable to a “moderate” degree of negligence. *Id.* The citation was abated on September 16, 2011, after the drill had been washed and cleaned, thus removing the hydraulic oil accumulations. Gov. Ex. 17. The Secretary seeks to impose a civil penalty of \$4,329.00 for Citation No. 8137025. Gov. Ex. 1.

Citation No. 8137026

Upon inspection of the CO # 823 highwall drill on September 16, 2011, Inspector Carter issued 104(a) Citation No. 8137026 alleging a violation of 30 C.F.R. § 77.1104. The citation states:

The CO #823 drill has an accumulation of combustible material, hydraulic oil, on the frame of the machine, hydraulic hoses, and the drill mast. This accumulation

is leaking from excessive oil leaks. This condition poses a fire hazard on this machine.

Gov. Ex. 18. The Secretary has designated the cited accumulations as S&S, asserting that they could “reasonably likely” result in the “lost work days or restricted duty” of the drill operator. *Id.* The accumulations were attributable to a “moderate” degree of negligence. *Id.* The condition was abated on September 16, 2011, after the drill had been washed and cleaned, thus removing the hydraulic oil accumulations. Gov. Ex. 18. The Secretary seeks to impose a civil penalty of \$4,329.00 for Citation No. 8137025. Gov. Ex. 1.

i. Fact of the Violations

As previously discussed, in circumstances where presenting direct evidence is problematic, the Secretary may establish a violation by an inference that is “inherently reasonable” and presents a “rational connection between the evidentiary facts and the ultimate fact inferred.” *Garden Creek*, 11 FMSHRC at 2153. Here, the Secretary can demonstrate the potential for atomization through circumstantial evidence as it is inherently reasonable to assume that an accumulation of hydraulic oil occurred as a result of a failure of a pressurized hydraulic system, resulting in a hydraulic oil leak. As discussed, a failure of high pressure hydraulic oil system creates a risk of atomization, and thus an increased risk of fire.

All three citations describe accumulations of hydraulic oil. In Citation No. 8131456, Inspector Presley identified a “pool” of hydraulic oil that had accumulated in the belly pan of the Caterpillar bulldozer. Tr. 170; 283. In Citation Nos. 8137025 and 8137026, Inspector Carter identified accumulations of hydraulic oil on drill frames, hydraulic hoses, and drill masts. Gov. Exs. 17, 18.

As the cited accumulations reflect the potential for atomization, which is a contributing factor in ignition and fire on mobile equipment, the Secretary has satisfied his burden of demonstrating the fact of the violations of section 77.1104 addressed in these three citations. The focus shifts to whether the cited violations were properly designated as S&S because they created a reasonable likelihood of fire.

ii. S&S

As a general proposition, 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 Division, National 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). With respect to the third element of *Mathies*, an S&S finding requires a determination that the violation contributes significantly and substantially to the cause and effect of a hazard. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984). Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 1 FMSHRC 1125, 1130 (Aug. 1985). Thus, 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). In the final analysis, the essence of an S&S violation is whether it is reasonably likely that the hazard contributed to by the violation will result in an event in which there are serious or fatal injuries. *Bellefonte*, 20 FMSHRC at 1254-55.

Here, it is apparent that the first, second, and fourth elements of *Mathies* have been demonstrated. Namely, the facts support a violation of section 77.1104 that requires a showing of an accumulation of combustible materials that pose a risk of fire, regardless of its likelihood. In the event of fire, serious injuries, if not fatalities, will occur. In fact, the parties have agreed that there is a potential for an injury of a reasonably serious nature by their stipulation that the cited conditions may result in at least “lost workdays or restricted duty.” Tr. 15-16. However, the dispositive question under the third element of *Mathies* is whether the Secretary has demonstrated that it is reasonably likely that the cited violations will contribute to fires on mobile equipment.

With regard to the accumulation of hydraulic oil in the belly pan of the Caterpillar dozer, cited in Citation No. 8131456, Inspector Presley’s general reliance on heat from the bulldozer’s transmission and electrical components as the likely sources of flashpoint heat or ignition is unavailing. *See* Tr. 171. Presley did not observe any defects with these electrical components, nor did he take any heat measurements of the transmission. Tr. 304-05. Moreover, there is no evidence of any other sources of heat in close proximity to the cited accumulation. *Id.* Significantly, Gilbert Witt, Safety Director at the Red Fox Surface Mine, testified without contradiction that the temperature of the cited hydraulic oil in the belly pan would have been the same as the ambient temperature.¹⁵ Tr.2 140.

Additionally, Presley did not identify, nor did he require Justice to determine, the source of any leak that could result in atomization. Tr. 170, 281. Significantly, Presley was more

¹⁵ The potential for atomization from faulty hydraulic systems is a sufficient hazard to support the fact of the violation with respect to the potential for a fire. However, in the absence of ignition sources, it is insufficient to support an S&S designation, which requires the showing of a likelihood of a fire.

concerned about the quantity and fact of the accumulation rather than possible sources of heat or atomization:

Q: So the problem is not that there is normal wear and tear on the engine, it's, again, the amount of accumulations that happened in terms of these four citations that you testified to? That's where the problem begins?

A: The amount of accumulations of the hydraulic oil—

Q: Yes.

A: —in and around all of the hydraulic components? Yes.

Tr. 174-75.

The extent of an accumulation alone, absent evidence of its exposure to extreme heat or ignition sources, is insufficient to render the fire hazard addressed in section 77.1104 reasonably likely to occur. In this regard, the Secretary has failed to demonstrate the requisite proximity of sources of heat to the belly pan of the dozer, or atomization at the source of the leak, necessary to present a reasonable likelihood of fire.

Finally, Presley's purported concern regarding the fire hazard posed by the belly pan accumulation is belied by his abatement of Citation No. 8131456, which required only that the accumulation be cleaned without identifying the source of the leak to prevent the leak's reoccurrence. Tr. 167; Gov Ex. 9. Given the Secretary's failure to demonstrate that a fire on the cited bulldozer was reasonably likely to occur, **the S&S designation in Citation No. 8131456 shall be deleted.**

Regarding Citation Nos. 8137025 and 8137026, Inspector Carter testified that the locations of the hydraulic oil accumulations were limited to the drill frame, hydraulic hoses, and the drill mast, rather than on the drill engine or any other hot engine components. Tr.2 87-88. As Carter testified, these locations are free from "hot surfaces":

Q. Now, this oil that accumulated here [in Citation No. 8137025], it's just on the frame and hoses; is that correct?

A. Yes, sir.

Q. Nothing on the mast or the engine?

A. The bottom of the drill mast.

* * *

Q. And [in Citation No. 8137026,], where was this hydraulic oil?

A. On the frame, hydraulic hoses, and the drill mast.

Q. Okay. Where there any hot surfaces in those areas?

A. No.

Tr.2 87-88.

Additionally, Carter did not identify, nor did he require Justice to identify, the sources of any leaks that could result in atomization. Similar to the abatement required by Presley for the belly pan accumulation in Citation No. 8131456, Carter's abatement of Citation Nos. 8137025 and 8137026 only required removal of the accumulations without identifying the sources of the leaks to prevent their reoccurrence. Tr. 108-10, 167; Gov. Exs. 17, 18. Given the Secretary's failure to demonstrate that fires were reasonably likely to occur, as the accumulations were located primarily on drill masts and frames rather than in proximity to sources of heat or ignition, **the S&S designations in Citation Nos. 8137025 and 8137026 shall be deleted.** See *supra*, n. 6.

iii. Civil Penalty

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

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

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

22 FMSHRC at 600 (*citing* 30 U.S.C. § 820(i)). 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 Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The Secretary proposed initial penalties of \$7,578.00 for Citation No. 8131456 and \$4,326.00 each for Citation Nos. 8137025 and 8137026. The Secretary has submitted documentation of Justice’s history of violations for the two-year period preceding the issuance of the subject citations, from September 2009 to September 2011. The Secretary does not contend that Justice’s violation history is an aggravating factor. It has neither been contended nor shown that the proposed penalties are disproportionate to the size of the business or that they would impede Justice’s ability to remain in business. Furthermore, Justice apparently demonstrated good faith in abating the citations.

Given the deletion of the S&S designations, reflecting that the gravity of the cited violations was not as great as originally alleged by the Secretary, **the penalties assessed for Citation Nos. 8137025 and 8137026 shall be reduced to \$2,500.00 for each citation.** Weighing the reduction in gravity with respect to the deletion of the S&S designation in Citation No. 8131456 against the obviousness and extensive nature of the cited belly pan accumulations, **the penalty for Citation No. 8131456 shall be reduced to \$3,500.00.**

c. Citation No. 8137016

Upon inspection of the CO # 834 highwall drill on September 14, 2011, Inspector Carter issued 104(a) Citation No. 8137016 alleging a violation of 30 C.F.R. § 77.1104. The citation states:

Combustible material, hydraulic oil, has accumulated in dangerous amounts on the motor (including turbo), drill mast, and frame of the CO # 834 Drill. This accumulation is dripping from excessive oil leaks on the feed jacks located on the mast. This condition poses a fire hazard on this machine.

Gov. Ex. 14.

The Secretary has designated the cited conditions as S&S, asserting that they could “reasonably likely” result in the “lost work days or restricted duty” of the drill operator. *Id.* The conditions were attributable to a “moderate” degree of negligence. *Id.* This highwall drill is used to drill holes in the mine highwall into which explosives are inserted to remove overburden. Tr. 25. Carter identified the drill mast hydraulic jacks as the sources of the oil leak. Tr. 27. When the drill mast was in a horizontal position, as was observed by Carter, the leaking hydraulic oil would drip directly into the drill’s engine compartment. *Id.* The Secretary has provided photographic evidence of hydraulic oil that had accumulated on engine components, including part of the exhaust system. Gov. Ex. 15. The citation was abated on September 22, 2011, after Carter determined that the highwall drill was taken out of service for replacement of the leaking

jacks. Gov. Ex. 14. The Secretary seeks to impose a civil penalty of \$5,503.00 for Citation No. 8137016. Gov. Ex. 1.

i. Fact of the Violation

As previously discussed, the accumulation of pressurized hydraulic oils presents a significant risk of atomization that can ultimately lead to ignition and fire. Moreover, the Secretary has presented photographic evidence that the cited hydraulic oil accumulations in Citation No. 8137016 were in proximity to the drill mast, and hot engine components such as the turbocharger and exhaust. Gov. Exs. 14, 15. Consequently, the Secretary has established the fact of the violation by demonstrating that the cited accumulations present a risk of fire, through either atomization or flashpoint vaporization, as contemplated by the mandatory standard in section 77.1104.

ii. S&S

Similar to the discussion in the previous hydraulic oil citations, the first, second, and fourth elements of the *Mathies* criteria are clearly satisfied. The third *Mathies* element requires consideration of the likelihood that the cited accumulations will result in a fire. This requires a determination of whether or not sources of sufficient heat or ignition were in close proximity to the cited accumulations.

Unlike the previous three hydraulic oil citations, the Secretary has proffered photographic evidence demonstrating that the cited hydraulic oil accumulations in Citation No. 8137016 were in proximity to, or in contact with, hot drill engine components, such as the turbocharger and exhaust. *See* Gov. Ex. 15. Significantly, Justice has conceded that the turbocharger is among the hottest components of an operating engine. Tr. 70-71. Consequently, the temperature of a turbocharger can potentially approach, or exceed, the flashpoint of hydraulic oil. The photographs reflect that hydraulic oil had accumulated on the exterior of the drill's turbocharger. *See* Gov. Ex. 15. Inspector Carter testified to the hazard created by the cited accumulations:

Q: I believe in your citation you describe something about dangerous amounts. Why is this dangerous?

A: In the pictures, it's more than just ordinary leakage. It's coming from excessive leaks. Just from all the pictures show different parts of the machine, there's areas of accumulations and it adds up to be a pretty substantial amount of hydraulic oil.

Q: And you classified this as reasonably likely to cause injury. Why did you do that?

A: Because you have the ignition source of the engine — the exhaust, turbo — and the hydraulic oil itself as being a combustible material.

Tr. 48-49.

Significantly, as distinguished from the three previous hydraulic oil citations, Inspector Carter identified the sources of the leak as defective high-pressure hydraulic jacks. Tr. 27. Moreover, it is noteworthy that the abatement required the removal and replacement of the faulty hydraulic jacks (rather than mere cleaning and removal of the accumulations, as in the previously-discussed citations). *See* Tr. 106-07; Gov. Ex. 14. Carter's identification of the source of the leak and abatement requiring repair is consistent with the Secretary's assertion that, if left unabated, the cited accumulations were reasonably likely to result in a fire. Consequently, **the S&S designation in Citation No. 8137016 shall be affirmed.**

iii. Civil Penalty

Consistent with the previous discussion of the penalty criteria in section 110(i), **the Secretary's proposed penalty of \$5,503.00 in satisfaction of Citation No. 8137016 shall be imposed**, given the fact that there is no basis to reduce the degree of gravity as asserted by the Secretary.

VI. Unsafe Operating Condition Citations

The remaining three disputed citations allege failures to maintain machinery in "safe operating condition" in violation of section 77.404(a). This mandatory standard provides:

Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

30 C.F.R. § 77.404(a).

As a general proposition, the question of whether equipment in a surface or underground coal mine is unsafe is resolved on the basis of "whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including facts peculiar to the mining industry, would recognize a hazard warranting corrective action." *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1557 (Sept. 1996) (citing *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (applying an identical standard in underground coal mines)). The operating condition of machinery is "not defined *solely* by its proper functional performance, but must also be related to the protection of miners' health and safety." *Ideal Cement Co.*, 12 FMSHRC 2409, 2414-15 (November 1990) (emphasis in original).

a. Citation No. 8131453

Upon inspection of a Caterpillar 980H front-end loader, Inspector Presley issued 104(a) Citation No. 8131453 on September 9, 2011, alleging a violation of 30 C.F.R. § 77.404(a). Citation No. 8131453 states:

The Cat 980H Front End Loader is not being maintained in safe operating condition. When checked the automatic hood lift does not work and the top right

boom lift jack at the pin has more than 1/8 [inch] of vertical slack that can cause the jack or pin to break. See citation #8131454.¹⁶

Gov. Ex. 6. The Secretary has designated the cited conditions as S&S, asserting that they could “reasonably likely” result in the “lost work days or restricted duty” of the front-end loader operator. *Id.* The conditions were attributable to a “moderate” degree of negligence. *Id.* The citation was abated on September 14, 2011, after Presley determined that the automatic hood lift was repaired and both the boom lift jack bushing and the jack pin were replaced. *Id.*; Tr.2 131. The Secretary seeks to impose a civil penalty of \$11,306.00 for Citation No. 8131453. Gov. Ex. 1.

i. Fact of the Violations

1. Automatic Hood Lift

The automatic hood lift on the Cat 980H front-end loader is a mechanism that uses power from the vehicle battery to automatically lift the hood. Tr. 180. When it is in working condition, the machine operator can raise the hood while standing on the ground by engaging the lift mechanism. Tr. 179. Presley testified that when the hood lift is malfunctioning, a miner would have to “climb up on the rear of the machine” to manually jack-up the hood, exposing the miner to slip and fall hazards. Tr. 180-81.

Justice argues that the malfunctioning automatic hood lift did not affect the safe operating condition of the loader as it was a “device of convenience” that was provided with a backup manual crank system, and that the malfunctioning hood lift had no effect on the loading tasks or safe maneuvering of the loader itself. Resp. Br. at 14; Tr. 311.

The manual hood crank system is an alternative method provided by Caterpillar for opening the hood of the front-end loader when the automatic lift mechanism is inoperable. As previously noted, determining if mobile equipment is unsafe, as contemplated by section 77.404(a), is not defined solely by its proper functional performance, “*but must also be related to the protection of miners’ health and safety.*” *Ideal Cement*, 12 FMSHRC at 2414-15 (emphasis added). Thus, the fact that the preferred automatic lift mechanism was inoperable is not dispositive. The determining question is whether the Secretary has demonstrated that use of Caterpillar’s manual hood crank system exposes miners to the risk of injury.

As an initial matter, the Secretary has not presented any evidence, nor does he even assert, that Justice was maintaining the manual hood crank backup system in an unsafe condition. Rather, the Secretary argues, in essence, that the non-functioning automatic hood lift is unsafe because it exposes miners who must access the back-up system to a danger of falling that is inherent in the back-up system’s design. However, the Secretary has not cited section 77.1710(g) that requires that miners wear “[s]afety belts and lines where there is a danger of falling.” 30

¹⁶ Citation No. 8131454 has settled and is not material to the disposition of Citation No. 8131453.

C.F.R. § 77.1710(g). Nor has the Secretary asserted that use of the manual hood crank system violates section 77.205(a), which requires a “[s]afe means of access” to “all working places.” 30 C.F.R. § 77.205(a). Having neglected to do so, the Secretary has failed to demonstrate that the inoperability of the automatic hood lift, which requires use of the backup system, constitutes an unsafe operating condition in violation of section 77.404(a), the cited mandatory standard.

2. Lift Jack Pin Slack

Citation No. 8131453 also concerns impermissible vertical slack in the Cat 980H loader’s right boom lift jack pin, cited as a violation of the maintenance provisions of section 77.404(a). Affixed to the front of the Cat 980H loader is a bucket, which is controlled by two booms and hydraulic lift jacks. Resp. Br. at 19. Each hydraulic lift jack is attached to its respective boom by a hardened steel pin within a brass bushing. Tr. 184, 305; Tr.2 129.

Presley testified that he observed 1/8 inch of vertical slack in the eye of the hydraulic lift jack, causing “a hammering action” on the pin and eye of the jack. Tr. 182, 185. Presley further testified that he first observed this slack from ten to fifteen feet away before approaching the loader to visually inspect further. Tr. 312. Upon closer observation, Presley estimated the slack to be 1/8 inch based on observation alone without reliance on any objective methods of measurement, such as a micrometer. Tr. 184. Presley opined that this rather de minimis degree of slack causes a hammering action that stresses the head, pin, and eye of the jack, which could cause these parts — the pin in particular — to break. Tr. 182-85. Thus, Presley testified that these parts require maintenance if they are not “perfectly tight,” or within “hundredths of an inch” of slack. Tr. 185-86. As a practical matter, the thrust of Presley’s opinion was that “there should be no slack between the pin and the eye of the jack itself....” Tr. 314.

According to Safety Director Gilbert Witt, however, some slack between the pin and bushing is necessary to facilitate movement; a tight fit between the bushing and pin would restrict its intended use and hasten deterioration. Tr.2 132-33. In this regard, Justice emphasizes that Presley did not rely on any Caterpillar specifications regarding the tolerance for slack in jack pins. Resp. Br. at 27-28. Moreover, Justice contends that Presley’s estimation of 1/8 inch in slack, based on observation alone, in the absence of objective methods of measurement, is unreliable. *Id.*

The question whether slack in components of mobile operating equipment constitutes an unsafe operating condition, as contemplated by section 77.404(a), is a matter of degree. *LaFarge North America*, 35 FMSHRC 3497, 3501 (Dec. 2013) (holding the amount of slack movement in a ball joint is critical to determining whether it is an unsafe condition). The evidence reflects that, given the imprecise nature of visual observation, the cited slack was between 1/16 and 1/8 inch of slack. *See* Tr. 313-14. The dispositive question is whether reasonably prudent maintenance personnel familiar with slack movement in the eye of a hydraulic lift jack used to maneuver the bucket of a front-end loader would recognize that 1/16 to 1/8 inch of slack constitutes an unsafe operating condition that requires corrective action as required by section 77.404(a). *See Ambrosia Coal*, 18 FMSHRC at 1557.

The Secretary has the burden of proving the fact of a violation by the preponderance of the evidence. Determining whether the Secretary has satisfied this burden requires weighing Inspector Presley's opinion that "there should be no slack between the pin and the eye of the jack itself" with Safety Director Witt's testimony that some slack between the pin and bushing is necessary to facilitate movement. *See* Tr. 314; Tr.2 132-33. The rub in Presley's opinion is that it is based on his purported experience, rather than any specifications provided by Caterpillar. The subjective nature of Presley's opinion is illustrated by his testimony:

- Court: Could you have cited — would you have issued the citation if the pin had 1/16 [inch] of vertical slack?
- A: Yes. There would be a safety issue there, also. It would have been a little more difficult to determine.
- Court: 1/16 of an inch would be a problem?
- A: Yes, sir.
- Court: What about 1/32 of an inch?
- A: If I had got down that kind of movement, I would probably have had to mic it to justify that it actually had 1/32 inch of movement.¹⁷
- Court: So you're saying that it should have absolutely no movement?
- A: There should be no slack in between the pin and the eye of the jack itself that would cause shock loading.

Tr. 313-14.

In this regard, Presley further testified:

- Court: But your testimony is there's no wear and tear permissible with regard to any — any movement — any slack on that pin?
- A: No, sir. There's — those fits on those pins and eyes of those jacks are in, like, three-hundredths of an inch. I mean, sure, you're going to have 400s, 500s, 600s.

¹⁷ It is difficult to imagine how Presley could rely on visual observation alone to differentiate 1/16 inch from 1/32 inch of slack in determining whether use of a micrometer was necessary.

Court: Okay. But as I say, as it deteriorates over time because of use—I mean, it’s brand new — if it’s a brand new machine, everything is perfect—

A: Tight fits.

Court: Everything is tight fitted and it’s machine perfect.

A: Yes, sir.

Court: But what — what are you basing your conclusion on that virtually any — any separation — any slack a sixteenth of an inch or more requires maintenance? What are you basing your opinion on?

A: Experience of those jacks breaking and pins breaking. I’ve had them break on equipment I’ve owned.

Court: But I’m asking, what are you basing that opinion on? You’re basing that opinion just — you’re basing that opinion on your opinion?

A: Yes. On my experience.

Tr. 315-16.

An MSHA inspector’s observations are entitled to deference with respect to questions of fact, such as the degree of slack that he reportedly observed. However, whether an inspector’s observations support allegations of an unsafe operating condition of mobile equipment, as contemplated by section 77.404(a), is a question of law. Although an inspector’s judgment that a cited condition poses a hazard is usually entitled to deference, Presley’s subjective opinion, alone, that slack as de minimis as 1/16 inch, or even as little as 1/32 inch, constitutes an unsafe operating condition, is insufficient to demonstrate a violation of section 77.404(a).

In reaching this conclusion, I am cognizant of the Commission’s decisions in *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278 (Dec. 1998) and *Buck Creek Coal*, 52 F.3d 133, 135-36 (7th Cir. 1995), that an ALJ did not abuse his discretion in crediting the opinion of an experienced inspector. However, obviously, a Commission Judge is not required to defer to an inspector with respect to the question of the law at issue, *i.e.* the fact of a violation. Rather, absent objective evidence of manufacturer or industry maintenance specifications demonstrating that virtually any slack movement is impermissible, I credit Witt’s testimony that a slight degree of slack between the pin and bushing is necessary to facilitate movement. *Cf. Extra Energy Inc.*, 36 FMSHRC ___, slip op. at 12, No. VA 2013-511 (Oct. 17, 2014) (ALJ McCarthy) (relying on objective evidence that the North American Commercial Vehicle Safety Alliance Out-of-Service Criteria supports that one inch of vertical play in a steering ball joint constitutes a hazardous condition in violation of section 56.14100(c)).

Having concluded that neither the inoperable automatic hood lift nor the approximate 1/8 inch slack in the right boom lift jack constitutes unsafe operating conditions, **Citation No. 8131453 shall be vacated.**¹⁸

b. Citation No. 8131459

Upon inspection of a CO No. 785 John Deere front-end loader, Inspector Presley issued 104(a) Citation No. 8131459 on September 10, 2011, alleging a violation of 30 C.F.R. § 77.404(a). Citation No. 8131459 states:

The CO #785 John Deere front end loader is not being maintained in safe operable condition. When checked the “kick outs” on the boom and bucket don’t work and both steering jacks on the jack end have 1/4 [inch] of slack in the fits. This creates shock loading on the jack and pin witch (sic) will break and cause loss of steering in the high congestion area this equipment is operated in.

Gov. Ex. 10. The Secretary has designated the cited conditions as S&S, asserting that they could “reasonably likely” result in the “lost work days or restricted duty” of the front-end loader operator. *Id.* The conditions were attributable to a “moderate” degree of negligence. *Id.* The citation was abated on September 14, 2011, after Presley determined that all cited conditions had been repaired. *Id.* The Secretary seeks to impose a civil penalty of \$8,893.00 for Citation No. 8131459. Gov. Ex. 1.

i. Fact of the Violation

1. Malfunctioning Kick Out

The “kick outs” on CO No. 785 John Deere front-end loader function “like a limit switch,” allowing the equipment operator to set the upper and lower parameters for bucket movement. Tr. 197. Inspector Presley explained the hazard associated with a malfunctioning bucket kick out system:

...if [the font-end loader operator] happens to be loading material and goes over a truck to dump the material and goes to kick [the bucket] back in the lock position for it to raise up and just keeps steering toward the truck, he’s going to swing the bucket through the truck.

Tr. 198.

¹⁸ Resp. Ex. 4A concerns citations, unrelated to this proceeding, issued by Presley for excessive slack that were purportedly vacated. The record was left open for Justice to proffer evidence to supplement Resp. Ex. 4A regarding the opinion of a Caterpillar-certified mechanic with respect to the degree of permissible slack in a steering jack mechanism on a front-end loader that reportedly served as the basis for vacating these citations. Tr.2 182. Justice failed to do so. Nevertheless, the Secretary retains the burden of proof that, absent zero tolerance, virtually any vertical slack movement in the pin of a hydraulic lift jack constitutes an unsafe operating condition.

In contrast, Safety Director Witt argues that the bucket kick out is a device of convenience. Tr.2 143. Witt testified that bucket kick outs are optional equipment. *Id.* Even when such kick out systems are installed, Witt testified that they are not always used by loader operators. *Id.* Witt opined that utilization of the kick out system may become an inconvenience when loader buckets are used to dump material into trucks of different sizes. *Id.*

I am unconvinced by Justice's assertion that bucket kick outs are simply a device of convenience that are not relied upon by front-end loader operators. While operators may manually maneuver the loader bucket, the kick out system is a safety mechanism provided by the manufacturer to prevent loss of control from overextension of the loader bucket. A loader operator may lose control of a loader bucket because of his inability to rely on an operable kick out switch to regain control. Presley testified to the hazard of an intermittently-functioning kick out switch:

A: ... The issue is where the kick out switch works intermittently and they're used to using that kick out switch to load trucks. In the event they go to hit their kick out switch and it doesn't function, then it's not going to raise that bucket up over the height of that equipment to dump.

Q: Well, then wouldn't he just use the manual control?

A: Well, if it's working and not working and he's used to it working, that one time it don't (sic) work is the one time you swing into a truck.

Tr. 351-52.

When a front-end loader is equipped with a kick out switch, it is reasonable to assume that a loader operator will rely on it. Accordingly, I find the malfunctioning kick out switch to be an unsafe operating condition in violation of section 77.404(a).

2. Steering Jack Slack

As described by Inspector Presley, the John Deere front-end loader in question steers via a central pivot joint. Tr. 354-59. This front-end loader is maneuvered by extending and retracting hydraulic steering jacks that span the full length of the vehicle and are located on each side of the pivot joint. *Id.* Each hydraulic steering jack is attached to the front and rear axles by a hardened steel pin within a bushing. Tr. 362-63. Presley observed 1/4 inch of slack in the eye of each steering jack, causing "a hammering action" on the pin and eye of the jack. *Id.*; Tr. 198, 202. Presley testified that he first observed this slack from ten to fifteen feet away before approaching the loader to visually inspect further. Tr. 364. Presley believed that the hammering action he observed stressed the head, pin, and eye of the jack, which could cause these parts to break. Tr. 198, 362-63. Presley opined that the fit between these parts is to be within "hundredths of an inch" of slack, so that there is no movement visible to the naked eye. Tr. 367. If the pin, jack, or eye were to break, the jack would physically come loose from the machine, causing the loader operator to lose steering control. Tr. 199-200.

In response, Justice contends that minimal movement in the eye of the steering jack is necessary for operation of the vehicle. Moreover, Justice argues that Presley did not rely on any Caterpillar specifications regarding the tolerance for slack in hydraulic steering jacks. Resp. Br. at 27-28. Consequently, Justice asserts that Presley's estimation of 1/4 inch of slack, based on observation alone, in the absence of objective methods of measurement, is unreliable. *Id.*

Once again, the threshold between tolerable slack and slack creating an unsafe operating condition is a matter of degree. Similar to the discussion of the 1/8 inch of slack cited in Citation No. 8131453, I am unconvinced by Presley's opinion, unsupported by objective evidence such as manufacturer specifications or maintenance manuals, that de minimis movement of these types of components constitutes excessive wear that rises to the level of a hazardous condition.

While the evidence does not support that the approximate 1/4 inch slack cited by Presley is an unsafe operating condition in violation of section 77.404(a), the inoperable kick out switch preventing loss of control of the loader bucket creates an adequate hazard requiring maintenance to constitute a violation of the cited mandatory standard. *See Fox Knob Coal Co.*, 33 FMSHRC 503, 510 (Feb. 2011) (supporting that if cited conditions singly or in combination render cited equipment unsafe to operate, a violation has occurred). Accordingly, **the Secretary has demonstrated the fact of the violation cited in Citation No. 8131459.**

ii. S&S

Having identified the inoperable kick out switch as a violation of the mandatory safety standard in section 77.404(a), the focus shifts to whether the cited condition was properly designated as S&S. Here, it is apparent that the first, second, and fourth elements of *Mathies* have been demonstrated. Namely, the facts support a violation of section 77.404(a) that creates a loss of control hazard. In addition, the parties have agreed that the hazard creates the potential for a reasonably serious injury that will result in at least "lost workdays or restricted duty." Tr. 15-16. However, the dispositive question under the third element of *Mathies* is whether the Secretary has demonstrated that it is reasonably likely that the cited violation will contribute to an accident causing injuries to an operator of the front-end loader.

Presley testified without contradiction that a malfunctioning kick out switch is intended to prevent loss of control of a loader, which could result in unintended contact with nearby equipment, such as a haulage truck. Under such circumstances, it is reasonably likely that the operator of the loader, or the operator of nearby equipment struck by a loader bucket, will sustain injuries of a reasonably serious nature. Consequently, **Citation No. 8131459 is properly designated as S&S.**

iii. Civil Penalties

The Secretary has proposed a penalty of \$8,893.00 for Citation No. 8131459. As noted, the parties have stipulated that the violation is attributable to a moderate degree of negligence. Tr. 15-16. Given the Secretary's failure to support the alleged excessive slack condition as a circumstance mitigating the gravity of the citation, and consistent with the criteria in section

110(i) as previously discussed, **a civil penalty of \$5,200.00 shall be imposed for Citation No. 8131459.**

c. Citation No. 8131455

Upon inspection of a Caterpillar D11R bulldozer on September 9, 2011, Inspector Presley issued 104(a) Citation No. 8131455, alleging a violation of 30 C.F.R. § 77.404(a). Citation No. 8131455 states:

The Cat D11R dozer is not being maintained in safe operating condition. When checked there is a bolt missing out of the right rear idler cap, small idler on top on the right side is loose, the bushing for the right side tilt jack is missing allowing better than 1 [inch] of slack in the fit, both lift jacks leak off, the blade tilt does not work, and has several hydraulic leaks in the center of the machine that can affect the functions of the machine.

Gov. Ex. 8. The Secretary has designated the cited conditions as S&S, asserting that they could “reasonably likely” result in the “lost work days or restricted duty” of the bulldozer operator. *Id.* The conditions were attributable to a “moderate” degree of negligence. *Id.* The citation was abated on September 11, 2011, after Presley determined that all cited conditions had been repaired. *Id.* The Secretary seeks to impose a civil penalty of \$11,306.00 for Citation No. 8131455. Gov. Ex. 1.

i. Fact of the Violations

1. Idlers

The idlers on a Cat D11R bulldozer function like pulleys or rollers upon which the bulldozer’s tracks circulate. Tr. 191-92. The idlers on this bulldozer are capped to keep debris away from their internal components. Tr. 190. The caps are secured by three bolts. *Id.* Inspector Presley observed that the cap on the large right rear idler was missing one of these three bolts. *Id.*; Tr.2 137. Additionally, one of the small right-side idlers was loose — a condition likely caused by worn out bearings. Tr. 191-92. Presley asserted that the failure of an idler could cause the bulldozer’s tracks to “lock up,” resulting in loss of control by the operator. Tr. 192.

Justice does dispute the loose right-side idler. With respect to the idler caps, Justice argues that the presence of an idler cap did not affect the safe operation of the bulldozer. For example, Safety Director Witt testified that there are similar machines that come from the manufacturer without upper idler caps installed. Tr.2 137-38.

The fact that idler caps may not be installed on some pieces of tracked mobile equipment is not dispositive. The uncontroverted testimony is that idler caps were installed on the cited bulldozer for the purpose of preventing debris from interfering with the internal components of the bulldozer’s track system. Moreover, the cited conditions include a loose right-side idler, which can further compromise the functioning of the bulldozer’s track system. I credit Presley’s testimony that a compromised dozer track system constitutes an unsafe operating condition as

contemplated by section 77.404(a) as it creates a potential loss of control hazard of a multi-ton bulldozer.

2. Malfunctioning Blade Tilt

The Cat D11R bulldozer in question is fitted with two hydraulic jacks that tilt the front blade forward and backward. Tr. 193. The brass bushing component of the right jack was missing, causing at least one inch of slack. *Id.* Presley was concerned that slack of this magnitude in this blade tilt jack was causing in a “hammering action” that added undue stress to the jack. *Id.* When Presley instructed the bulldozer operator to raise the blade and release the pressure on the system, the slack on the jack caused the blade to quickly fall back to the ground. Tr. 194, 340. Presley noted an additional malfunction of the blade tilt mechanism that was unrelated to the observed slack. Tr. 344. Presley opined that the combination of these defects presented a loss of control hazard that could have caused unexpected and violent movement of the bulldozer. Tr. 195.

Justice asserts that the malfunctioning blade tilt will not necessarily affect the safe operation of the bulldozer provided the blade is locked into position. Tr. 345-47. It argues that a skilled operator could maintain control of the blade despite these defects. Tr. 2139. Furthermore, Justice reiterates its previously-noted objections to Presley’s slack measurements: that Presley did not rely on any Caterpillar specifications regarding the tolerance for slack in blade tilt jacks and that Presley’s estimation of one inch of slack, based on observation alone, in the absence of objective methods of measurement, is unreliable. Resp. Br. at 27-28.

Justice’s assertion that a skilled operator could overcome the hazard caused by slack in the blade tilt jack and the malfunctioning blade tilt mechanism is unavailing. The Commission has held that the exercise of caution by miners does not mitigate the hazard caused by a violative condition. *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992).

With respect to the observed one inch of slack, the issue is whether the evidence demonstrates that the cited condition is hazardous in that it reflects excessive wear that will ultimately contribute to a loss of control hazard because of a malfunction of the hydraulic lift jack. As discussed herein, while deference is normally accorded to the opinion of an inspector that a cited condition constitutes a violation, according unfettered deference to such opinions concerning the ultimate fact to be determined would offend due process. Nevertheless, the one inch of slack cited in Citation No. 8131455 is as much as eight times greater than the approximately 1/8 and 1/4 inch of slack cited in Citation Nos. 8131453 and 8131459, respectively. Moreover, there was objective evidence of a defect causing excessive slack in that the brass bushing in the right lift jack was missing. In addition, Presley observed that the slack caused the raised blade to fall to the ground when pressure was released from the hydraulic jack. Consequently, the deference to be accorded to Presley’s opinion outweighs the lack of technical evidence (such as manufacturer specifications or service manuals) supporting his opinion.

3. Hydraulic Leaks

During his observation of the Cat D11R bulldozer, Inspector Presley identified hydraulic oil leaks “all over the center of the machine” accumulating into a pool in the belly of the bulldozer. Tr. 347. Presley did not take any measurements of the observed pool and he could not identify the source of the cited leaks. *Id.*

The Commission has held that citations “are not duplicative as long as the standards involved impose separate and distinct duties on an operator.” *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-04 (June 1997) (citations omitted). Although the removal of the hydraulic oil pooling in the belly pan was a requirement of both this citation and Citation No. 8131456, I do not consider the two belly pan citations to be duplicative because Citation No. 8131456 has been vacated. While, as previously discussed, the cited hydraulic oil did not constitute a fire hazard in violation of section 77.1104, excessive fluid leaks are indicative of hydraulic system defects, which render mobile equipment unsafe in violation of section 77.404(a) because they pose hazards resulting from a potential hydraulic system failure.

Consequently, the evidence supports Presley’s contention that defective idlers, a malfunctioning blade tilt, and pooling of hydraulic oil, individually and together, constitute unsafe operating conditions requiring maintenance, as contemplated by section 77.404(a). Accordingly, **the Secretary has demonstrated the fact of the violation cited in Citation No. 8131455.**

ii. S&S

Having concluded that the defects cited in Citation No. 8131455 constitute unsafe operating conditions in violation of section 77.404(a), the focus shifts to whether there is a reasonable likelihood that the hazards contributed to by these conditions will result in an event in which there is an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

Determining the likelihood of an accident caused by the subject hazardous conditions must be viewed in the context of continuing mining operations. *U.S. Steel Mining Co.*, 1 FMSHRC 1125, 1130 (Aug. 1985). Given the multi-ton nature of a bulldozer that is operated under extreme conditions, it is reasonably likely that the defects in the idlers and malfunctioning blade tilt will result in a loss of control and injury to the equipment operator. In such an event, the parties have stipulated that the resulting degree of injury would be “lost workdays or restricted duty,” which is of sufficient severity to warrant an S&S designation. Accordingly, **the evidence reflects that Citation No. 8131455 has been properly designated as S&S.**

iii. Civil Penalty

Consistent with the previous discussion of the penalty criteria in section 110(i), the cited violative conditions constitute a violation that is serious in gravity and reflective of a moderate degree of negligence. There are no mitigating circumstances to warrant a reduction of the civil

penalty imposed by the Secretary. Consequently, **Secretary's proposed penalty of \$11,306.00 shall be imposed for Citation No. 8131455.**

ORDER

In view of the above, **IT IS ORDERED** that Citation Nos. 8131450, 8131451, 8131454, 8137018, and 8131453 **ARE VACATED**.

IT IS FURTHER ORDERED that the significant and substantial (S&S) designations in Citation Nos. 8131456, 8131025, and 8131026 **ARE DELETED**. **IT IS ORDERED** that Justice Energy Company, Inc. shall pay a total civil penalty of \$8,500.00 in satisfaction of these three citations.

IT IS FURTHER ORDERED that Citation No. 8131459 **IS AFFIRMED**. **IT IS ORDERED** that Justice Energy Company, Inc. shall pay a reduced civil penalty of \$5,200.00 in satisfaction of this citation.

IT IS FURTHER ORDERED that Citation Nos. 8137016 and 8131455, designated as S&S by the Secretary, **ARE AFFIRMED**. **IT IS ORDERED** that Justice Energy Company, Inc. shall pay a total civil penalty of \$16,809.00 in satisfaction of these two citations.

IT IS FURTHER ORDERED that consistent with the parties' settlement terms, Justice Energy Company, Inc. **SHALL PAY** a total civil penalty of \$14,579.00 in satisfaction of Citation Nos. 8131452, 8131457, 8131458, 8131460, 8137017, 8137019, and 8137027.

IT IS FURTHER ORDERED that Justice Energy Company, Inc. pay, within 40 days of the date of this Decision, **a total civil penalty of \$45,088.00** consisting of a total civil penalty of \$30,509.00 for the six citations affirmed in this proceeding, in addition to \$14,579.00 for the seven settled citations.¹⁹

IT IS FURTHER ORDERED that upon timely receipt of the total \$45,088.00 payment, the civil penalty proceeding in WEVA 2012-375 **IS DISMISSED**.

/s/ Jerold Feldman

Jerold Feldman

Administrative Law Judge

¹⁹ 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.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 21, 2015

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

v.

DUKE'S SAND & GRAVEL,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. YORK 2012-97-M
A.C. No. 19-01212-275527

Mine: Duke's Sand & Gravel

DECISION

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

John Duquette, Jr., Duke's Sand & Gravel, Adams, MA, for Respondent

Before: Judge Moran

Introduction

This case concerns 22 alleged violations, 21 citations and 1 order, issued to Duke's Sand & Gravel (DS&G) by the Mine Safety and Health Administration on October 19, 2011. Each of the citations was issued under Section 104(a) of the Mine Act, and the single order was issued under Section 104(g)(1). 30 U.S.C. § 814(a), (g)(1) (2012). John Duquette, the mine operator, appearing before the Court *pro se*, has essentially conceded the validity of each of the citations, *see* Tr. 107-08, but has contested the negligence and gravity designations associated with them, whether certain of the violations were significant and substantial, and the appropriateness of the proposed civil penalties sought by MSHA.¹

A hearing was held in North Adams, MA, on April 8-9, 2014, at which MSHA Inspector Zane Burke and the mine owner, John Duquette, Jr., testified. Throughout the hearing, Mr. Duquette testified about his lack of knowledge of MSHA's standards. The Court credits the Respondent's testimony generally, but also notes that the Secretary took the operator's unfamiliarity with MSHA's requirements into account in assessing the negligence of each citation. In future proceedings, as the Court cautioned at the hearing, protestations that DS&G

¹ The Secretary proposed a total penalty of \$3,514.00 for the twenty-two violations. For thirteen (13) of those, \$100.00 was proposed, another eight (8) were assessed at \$243.00, and one proposed at \$270.00.

did not know about certain standards will not be well-received because it is the duty of mine operators to familiarize themselves with those requirements.

For the reasons that follow, the Court finds that each of the violations was established, but upon its independent application of the statutory criteria to the facts adduced at the hearing, the combined penalty has been modified to **\$2,085.00**.

Penalty Assessments

The Commission has recently spoken to the subject of penalty assessments in *Hidden Splendor Resources, Inc.*, 36 FMSHRC ___, slip op., WEST 2009-208 (Dec. 23, 2014) (“*Hidden Splendor*”), wherein it noted that “[t]he Mine Act sets forth a bifurcated penalty scheme under which the ‘Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses [the] penalty.’ *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff’d*, 736 F.2d 1147, 1151-52 (7th Cir. 1984).” *Hidden Splendor* at 3. The Commission went on to observe that

[t]he Secretary's regulations at 30 C.F.R. Part 100 apply only to the Secretary's penalty proposals, while the Commission exercises independent ‘authority to assess all civil penalties provided [under the Act]’ by applying the six criteria set forth in section 110(i). 30 U.S.C. § 820(i); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 (‘[N]either the ALJ nor the Commission is bound by the Secretary’s proposed penalties . . . [W]e find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.’); *see also W.S. Frey Co. v. Sec’y of Labor*, 57 F.3d 1068, *5 (4th Cir. 1995) (unpublished) (citing *Sellersburg*, 736 F.2d at 1152) (holding that a Judge is authorized to determine a penalty amount *de novo* based on statutory criteria).²

Id. at 3-4.

The Commission then reminded that,

[i]n a contested case, the amount of the penalty to be assessed by the Commission and its Judges is a *de novo* determination based on the criteria set forth in section 110(i), 30 U.S.C. § 820(i). *Sellersburg Stone*, 5 FMSHRC at 293. Penalties assessed by Commission Judges can be greater than, less than, or the same as

² Though the quoted language unmistakably sets forth the Commission’s role, that body went on to add that “the Commission's Procedural Rules specifically state that, ‘In determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary . . .’ 29 C.F.R. § 2700.30(b). Nor was the Judge bound by the Secretary's definition of ‘high negligence’ set forth in section 100.3(d). *See, e.g., Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) (‘We reject the Secretary's argument that the Commission must apply the standard of care set forth in 30 C.F.R. § 100.3(d) in considering whether [the operator] was negligent’); *Deshetty, emp. by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994).”

those proposed by the Secretary. *Id.* However, when it is determined, based on further information developed in an adjudicative proceeding, that penalties should be assessed which substantially diverge from those originally proposed, Judges must sufficiently explain the bases underlying the penalties assessed. *Id.*; *Cantera Green*, 22 FMSHRC 616, 622-23 (May 2000).

Hidden Splendor at 6. The Commission also noted that “the Judge did not offer any explanation for the divergence, for instance, by explaining whether he gave special weight to various criteria, and thus failed to provide the basis for meaningful review of the penalty by the Commission.” *Id.*

Penalty criteria uniformly applicable to each of the citations and the single order

Although each alleged violation will be discussed, some observations regarding the penalty criteria apply uniformly to each of them. For perspective, it is first noted that for the 21 citations and 1 order involved with this docket, 13 were proposed at penalty amounts of \$100.00 (one hundred dollars), 8 at \$243.00 (two hundred forty three dollars) and the one order at \$270.00 (two hundred seventy dollars). Therefore it is fair to note that MSHA itself proposed assessments that were on the very low range. After taking into account the 10% “Good Faith” discount it applied, 13 of the citations received the minimum penalty assessment that Part 100 allows.

MSHA cannot, under Part 100, assess a penalty less than \$100.00 (one hundred dollars), but the Court is not so restricted by those provisions. Instead, as noted above, the Court’s assessment is based upon the statutory criteria set forth at Section 110(i) of the Mine Act. For many of the matters in this litigation, the Court has determined that a penalty reduction below the proposed assessments is warranted upon considering:

The operator’s history of previous violations, for which there is no previous history;

The appropriateness of the penalty to the size of the operator’s business, which is a 1 (one) employee operation³; and

The demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations, which in this case, by any measure, could not have been more rapid and is fairly described as exemplary.⁴

A fourth factor, **the effect on the mine operator’s ability to continue in business**, is also applied uniformly to each established violation. DS&G conceded that it will be able to

³ As MSHA concedes, this mine is a one person operation. *See, e.g.*, Tr. 152, 170, 220.

⁴ Mr. Duquette was also specifically advised that, as this was the first MSHA Inspection he has ever had, the Court could take that novice status into account, but that such a view would not be available for subsequent inspections as the mine operator could no longer assert ignorance of its mine safety and health obligations. Tr. 34. In contrast, the Secretary maintained that Mr. Duquette engaged in “willful ignorance” of his obligations. Tr. 36.

continue in business, even if all of the penalties in this case were to be assessed as proposed by the Secretary.⁵ Tr. 414. Therefore this criterion does not impact the penalty assessment.

As appropriate, the remaining penalty criteria, negligence and gravity, are discussed for each individual citation and the one order.

Findings of Fact and Discussion of the remaining penalty criteria—negligence and gravity—to the citations and order

Negligence and Gravity

The Commission has recognized 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 meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, it considers what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014). Mitigating circumstances play a role in the evaluation of negligence.

The gravity penalty criterion contained in section 110(i) of the Mine Act requires an evaluation of the seriousness of the violation. In evaluating the seriousness of a violation, the Commission has focused on “the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549-1550 (Sept. 1996); *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Background

On October 19, 2011, MSHA Inspector Zane Burke⁶ arrived at Duke's Sand & Gravel in Adams, MA, in response to a complaint that a sand and gravel mine was operating without a Mine I.D. and with multiple safety violations existing at the site. Tr. 50, 53-54. Upon arriving at Respondent's mine, Inspector Burke found only a single employee present, a loader operator. Tr. 65. The Inspector noted that the operation had a double deck screen plant and a jaw crusher and he determined that the mine was under MSHA's jurisdiction. Tr. 67-68, 74. The Court agrees that Duke Sand and Gravel is properly characterized as a mine due to the excavation, crushing, and milling of gravel that takes place at the site. *See* 30 U.S.C. § 802(h)(1). Respondent does not contend that MSHA lacks jurisdiction.

⁵ Since these three factors are common to all of the citations and the order, the Court incorporates them into the penalty assessment for each violation.

⁶ At the time of the hearing, Inspector Burke had been with MSHA for ten years. Tr. 45. Prior to his time at MSHA, he worked for ten years for a sand and gravel operation. Tr. 45. Inspector Burke also had a journeyman electrician's license, which he used to perform electrical work on crushers and screen plants. Tr. 45-46.

Citation No. 8654122⁷

Failure to notify MSHA of legal identity

Section 104(a) Citation No. 8654122 alleges that Duke's Sand & Gravel failed to notify MSHA of its legal identity, in violation of 30 C.F.R. § 41.11(a), which states in part:

Not later than 30 days after . . . the opening of a new mine . . . the operator of a coal or other mine shall, in writing, notify the appropriate district manager of the Mine Safety and Health Administration in the district in which the mine is located of the legal identity of the operator.

DS&G had been operating for approximately five months at the time the citation was issued, a period of time which is well beyond the thirty day requirement in the regulation. DS&G concedes the fact of the violation, but contests the penalty amount. DS&G abated the citation by filling out a Mine I.D. application. Tr. 88, Ex. P-3. Mr. Duquette did tell the Inspector at the time of the citation's issuance that he tried to call the MSHA field office in Albany. Tr. 89. However when the Inspector attempted to verify that claim, no message from Mr. Duquette was found. Tr. 90. The Inspector considered the matter to be a paperwork violation and therefore listed "no likelihood of injury" for the gravity.

The Secretary alleges that the violation occurred as a result of moderate negligence. Section 100 defines an operator as moderately negligent when he "knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). The Inspector's notes reflect that the operator told him that he had spoken with other mine operators and thought that MSHA would come to him and give him an ID with no fine. Tr. 91-92, Gov. Ex. P-3. The Inspector's position was that Mr. Duquette would have had to assert that he didn't know anything about MSHA to qualify for low negligence. Tr. 92.

The Inspector acknowledged that, at the time of issuing the citation, Mr. Duquette showed him another MSHA Inspector's business card, which had been handed to him by another mine operator. Tr. 96. Mr. Duquette alleged that he called the number listed on that card to become informed about his MSHA responsibilities. Tr. 97. Mr. Duquette only called the number on that card; he did not call any other MSHA telephone numbers. Tr. 112. He stated that he called that one inspector and left at least one message, inquiring about MSHA, prior to the October 18, 2011, inspection. Tr. 113. While he knew that MSHA existed and that it had the authority to fine gravel mines, Mr. Duquette was not aware of much beyond that. In fact, he believed that MSHA would function in a manner similar to OSHA, where an inspection could occur but without any pre-existing obligation to register with it. *See* Tr. 109, 119-20. He did not know the full extent of the regulatory scheme, nor was he aware that he had a duty to notify MSHA that he was operating a gravel mine. Tr. 121-22.

⁷ As a point of reference only, as penalties are assessed by the Court on the basis of the statutory criteria, the proposed penalty under Part 100 is listed for each section 104(a) citation. For Citation No. 8654122, \$100.00 was proposed.

As the Court noted at the hearing, if it were to find that Mr. Duquette did try and call MSHA that effort could impact the evaluation of negligence on his part. Tr. 100. Mr. Duquette also stated that he immediately obtained the required I.D. after receiving the citation and that there was no foot-dragging on his part. In fact, the Secretary stipulated that Mr. Duquette filled out the required form while the Inspector was still on the mine property. Tr. 124-125.

Determination of the Court

When assessing a penalty, the Court must consider the following factors provided in section 110(i) of the Mine Act:

the operator's history of violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). Additionally, while the Secretary has proposed a penalty, a judge's determination is not restricted by the amount of the proposed penalty. 29 C.F.R. § 2700.30(b).

As noted above, three of the six factors have shared determinations, which are applied uniformly to each of the established violations. A fourth factor, ability to continue in business, also discussed previously, applies uniformly to each of the established violations as well, although that factor does not impact the penalty assessments in the only way it potentially could, by reducing a penalty, because DS&G concedes that, even as proposed, imposition of the penalties would not threaten its ability to continue in business.

It has also been mentioned, and MSHA has acknowledged, Mr. Duquette's good faith in addressing each citation with exemplary promptness.⁸ *See also* Exhibit A. Each penalty assessed in this case arose out of the one inspection carried out on October 19, 2013, and Mr. Duquette worked to rapidly achieve compliance with a necessarily demanding regulatory regime. Accordingly, the Court finds that, for each of the twenty-two violations in this case, DS&G exhibited good faith in achieving rapid compliance.⁹ As it pertains to this citation, Mr. Duquette's good faith in achieving rapid compliance could not have been faster.

As for negligence, Mr. Duquette's unfamiliarity with MSHA and the requirements imposed on gravel mine operators mitigates a finding of high negligence, as does his attempt to contact a mine inspector, although his efforts in that regard should have been greater. While a mine operator has a responsibility to familiarize himself with the regulations, and asserted ignorance of a regulation is not a defense to penalty enforcement, in this case, the Court finds that Mr. Duquette's lack of familiarity with MSHA warrants lowering the negligence of this

⁸ For the lone order in this docket, MSHA did not apply a percentage reduction for good faith.

⁹ The Court incorporates its determination of DS&G's good faith for each of the 22 litigated matters.

citation somewhat. Mr. Duquette is not a sophisticated operator in this industry. As noted at the time of the inspection, he had one employee, had only been in business for a manner of months, and had yet to even sell any of the gravel he was making.

The gravity of this citation was listed by the Inspector at its lowest possible level, with no likelihood of injury and no lost workdays. DS&G was in operation for five months before MSHA was aware of its existence. While the likelihood of injury is nonexistent in this citation (this is a paperwork violation), failing to file for a Mine I.D. subjected the single employee in this case to dangers that could have been prevented by safety inspections. Without knowing of the existence of a mine, MSHA cannot perform its duty of protecting miners from needlessly unsafe working conditions.

Upon consideration of the penalty criteria, the Court assesses a civil penalty of **\$50.00** for Citation No. 8654122.

Citation No. 8654123¹⁰

Failure to notify of commencement of operations

Section 104(a) Citation No. 8654123 alleges that Duke's Sand & Gravel "failed to notify the nearest MSHA field office . . . of the crushing & screening operation" in violation of 30 C.F.R. § 56.1000. Ex. P-5. Section 56.1000 requires that mine operators notify MSHA of the date that a mining operation will commence. The Secretary alleges that the violation occurred as a result of moderate negligence, but that there was no likelihood of injury since it was a paperwork violation. Ex. P-5; Tr. 134. The Inspector testified to that effect, stating that he was "trying to give the operator the benefit of the doubt that he wasn't fully aware of the . . . [56.1000] criteria." Tr. 134. DS&G abated the citation by filing the correct paperwork with MSHA. Tr. 135. The Inspector distinguished this citation from the legal identity violation, in that by MSHA learning about an operation's start-up, it can schedule its inspections. Not knowing of that, he stated, exposes miners to the potential of accidents or injuries that an inspection might uncover. Tr. 129. As a seasonal or intermittent operation, the Respondent is required to complete this form when they start and stop operation. As with the previous citation, this was another obligation about which Mr. Duquette was unaware. Tr. 134. Employing the same rationale as for the failure to notify MSHA of its legal identity, the Inspector ascribed moderate negligence to the violation. Tr. 134.

In response to the Inspector's testimony, Mr. Duquette stated he did not know about any of the violated regulations at issue in this case; if he had, he would have complied with the requirement. Tr. 135.

Determination of the Court

The negligence associated with this violation is mitigated in the sense that the failure to notify of commencement of operations and the previously-discussed violation for failure to notify MSHA of legal identity arose out of the Respondent's ignorance of the requirements. The

¹⁰ The proposed assessment was \$100.00.

Court views this violation as essentially finding more than one violation stemming from the same lack of knowledge of the regulatory duties. When considered along with the one-employee nature of the mine, a lesser penalty, for a first offense, seems more appropriate for this paperwork violation.

Upon consideration of the penalty criteria, including those which, as previously discussed, apply to each of these matters, the Court assesses a civil penalty of **\$50.00** for Citation No. 8654123.

Citation No. 8654124¹¹

Lack of guard on screening plant

Section 104(a) Citation No. 8654124 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.14112(b), which states that "[g]uards shall be securely in place while machinery is being operated." DS&G was cited under this standard because the screen plant was missing a guard on the small aggregates belt, leaving the tail pulley fully exposed. Ex. P-9. The Inspector stated that there was an exposed tail pulley that was within "hands-reach," creating an entanglement or pinch-point hazard where one could get pulled into the pulley. Tr. 143. Thus, he found that there was a danger of entanglement of human extremities, that such an occurrence would be fatal, albeit unlikely, and that DS&G's negligence in this instance was moderate. Ex. P-9.

DS&G abated the citation within the time given by the Inspector by fabricating and attaching a mesh guard to prevent people from making contact with the pulley. Tr. 165. The Inspector agreed that the mine's sole employee, the loader operator would not be exposed to the pinch point unless he got off the loader. Tr. 146. He also stated that the likelihood of an injury was "unlikely" because Mr. Duquette advised that the machine is shut down when work is done on it and, when it is operating, persons are not near it. Tr. 151. As this is a one-person operation, only one person would be exposed to the hazard. Tr. 151. The opening was eight to nine inches long and three to four inches wide. Tr. 158-159. Thus it is fair to observe that the opening was small. While any injury would be serious, the Inspector's testimony did not support his claim that it would likely be fatal, but rather that it would be permanently disabling. Tr. 161.

The Inspector marked the negligence as moderate on the basis that Mr. Duquette instructed that employees are not to travel in that area when the machine is operating. Tr. 163. The Inspector's MSHA training was that, in evaluating the negligence of a violation, they are to start with the presumption that the negligence is high and then work down from that designation if there are mitigating circumstances. Tr. 163. The Court does not analyze negligence under such an approach. It decides the appropriate negligence based on the evidence at hearing, without any presumption one way or the other. In terms of abatement, the screen mesh guard was installed "shortly after the citation was [] written." Tr. 164-165. The Inspector agreed that Mr. Duquette instructed that the guard be fixed "A.S.A.P." at the time it was cited and that this involved his calling the Berkshire County Construction Company. Tr. 165. Again, Mr. Duquette emphasized that this is a one-employee operation.

¹¹ The proposed assessment was \$100.00.

During his testimony, Mr. Duquette maintained that contact with the opening was implausible because, when it is running, rocks are being tossed out all over the place from its operation and therefore the idea that one would be able to get near that pinch point was not realistic. Tr. 170. He added that his employees are trained to not go near the machine. As he put it, even his two year old daughter would realize the need to stay away from the machine due to the falling rocks and therefore no one would be near the cited opening. Tr. 170-171.

The violation of section 56.14112(b) occurred on an Extex 5000 screen plant, which is used to separate various sizes of mined stone and gravel from one another. Tr. 143-144. The side pulley missing the guard stood about three feet from the ground, and the opening that required a guard was three to four inches high and eight to nine inches wide. Tr. 146, 158.

When the screening plant is actively sorting material, an employee running the plant would not generally be subject to any danger of entanglement because the employee would be loading the plant, in this case with a front-end loader. Tr. 145. But, if the employee were to exit the cab of the front-end loader and interact with the area of the screen plant near this tail pulley, he may become entangled. Tr. 146.

Inspector Burke testified that entanglement could result in a fatality. If a hand got caught in the belt, the belt may pull the person in all the way up to the neck, possibly snapping that person's neck. Tr. 149, 153. He further testified that he had seen fatalgrams (MSHA reports of fatal mining accidents) of this type of accident, but he did not know whether the opening in those cases was the same size as the opening in this case. Tr. 150, 162.

Based on his conversation with Mr. Duquette, the Inspector found that an injury would be unlikely because the machine would be off when the operator or his employee would perform maintenance, and when the machine is running, the employee would not be around that area. Tr. 151. Furthermore, because DS&G has only one employee, if the person running the screen plant is loading it, there is no one else exposed to the dangerous condition. Tr. 151.

Finally, the Inspector assessed that the violation was a result of moderate negligence because, first, Mr. Duquette had told his employee not to travel in the dangerous area while the machine is in operation, and, second, this was Mr. Duquette's first inspection. Tr. 163.

Mr. Duquette testified that, when the machine is running, rocks are falling down out of the hopper and onto the belt, and a competent person would know not to go near the dangerous area. Tr. 170. Because the danger is so obvious, it is extremely unlikely that any injury would occur. Tr. 171. In abating the citation, Mr. Duquette further testified that he promptly called employees from his other company to fabricate the guard. Tr. 172.

Determination of the Court

The Court finds that DS&G's negligence in this instance was lower than the government contended, as was the gravity. While a fatality could occur if a miner came into contact with the unguarded tail pulley, the possibility of a person becoming caught in the exposed area, due to the small size of the opening and the obviousness of the hazard, is low. Also, since only DS&G only

employs one miner, no person should ever be exposed to the hazard because when the machine is running, the miner should be in the cab of the front end loader, loading the screen plant with material to sort.

Upon consideration of the penalty factors, the Court imposes a penalty of **\$50.00** for Citation No. 8654124.

Citation No. 8654125¹²

Missing inspection plate on jaw crusher¹³

Section 104(a) Citation No. 8654125 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.12032, which states that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." DS&G was cited under this standard because the 1538 Telsmith Jaw Crusher was missing a seal on the motor starter control panel. Ex. P-11. The Inspector found that debris, moisture, and rodents could cause short circuits or stray current paths, creating an electrical shock hazard, that such an occurrence would be fatal, albeit unlikely, and that DS&G's negligence in this instance was moderate. Ex. P-11. The operator abated the citation by placing a knockout seal on the box. Tr. 182. A *one inch* seal was missing from the motor control and that allowed the mentioned dirt, debris, moisture, etc., to enter through that opening. Tr. 175. The seal is simply a plug to cover the opening. Tr. 176.

The crusher in question had a voltage of four hundred and eighty volts. Tr. 179. If something were to get into the control panel and create a short circuit or stray current path, Inspector Burke stated that the resulting electric shock could be fatal, depending on where the current entered the body. Tr. 178, 181. Such electrocution could happen in different ways. Rodents could chew on the wires, for example, or dust could enter the box's insulating wires, creating a current through condensation. Tr. 180. However, Inspector Burke testified that there was no sign of moisture, foreign objects, or rodent activity in the control panel, and, accordingly, characterized the likelihood of injury as unlikely. The Inspector also did not see any internal damage to the conductors. Tr. 178. He also did not see any deterioration inside the box. Tr. 185.

Inspector Burke also found that the negligence was moderate, while asserting that Mr. Duquette expressed the view that a hole of that size in the control panel was not a problem. Tr. 182. Mr. Duquette contradicted the Inspector in that aspect, testifying that he did *not* claim that a hole in a control panel was not a problem. Tr. 186. Instead, he asserted that it was the operator of the machine who made that claim. In fact, Mr. Duquette agreed that the hole needed to be plugged, and that if an injury occurred due to electrical shock from this machine it could be fatal. Tr. 186-87.

¹² The proposed assessment was \$100.00.

¹³ Also known as missing knock out seals, as described by the Secretary's attorney. Tr. 173-174.

Determination of the Court

The Court notes that the opening was minimal, being only one inch in diameter and that, as the Inspector testified, there was no sign of moisture, foreign objects, or rodent activity in the control panel. Therefore it agrees that the likelihood of injury was appropriately marked as unlikely. There was no testimony that this condition had been long-existing. The Court also finds that the negligence was low, not moderate, and along with consideration of the other statutory criteria, finds that a penalty of **\$50.00** is an appropriate penalty assessment for Citation No. 8654125.

Citation No. 8654126¹⁴

Exposed conduits on the jaw crusher

Section 104(a) Citation No. 8654126 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.12004, which states that "[e]lectrical conductors exposed to mechanical damage shall be protected." DS&G was cited under this standard because a conduit was exposed at two locations on the crusher. Ex. P-14. The Inspector found that the condition created an electrical shock hazard, that such an occurrence would be fatal and reasonably likely to happen, that DS&G's negligence in this instance was moderate, and that the violation was significant and substantial. Ex. P-14. The citation was abated by putting the conduit and strain relief connector back together. Tr. 197.

On the feeder belt of the jaw crusher, the Inspector observed that the flex conduit was pulled out of the strain relief connector, and the electric metal tubing (E.M.T.) conduit was pulled out of its rain-tight connector. Tr. 189. The flex conduit likely became exposed because normal vibrations of the crusher caused a clamp to slide down. Tr. 190-191.

However, even though the flex conduit was pulled out of the strain relief connector, no bare wires were exposed. Tr. 200. In order to be injured, the wires inside the conduit would have to be worn bare. At the time of the citation, they were still insulated. Additionally, even if the bare wires were exposed, Inspector Burke testified that the person touching the wires, in order to be electrocuted, would have to be a better ground than the grounding system. Tr. 201-202. During his inspection, he "didn't see anything that would indicate the grounding system was at fault," and the metal crusher frame was touching the dirt, creating a natural ground." Tr. 202. Should each of these requirements be met, however, the Inspector testified that an electrical shock from contact with the machine could be fatal. Tr. 195. The Inspector also found that Mr. Duquette's negligence was moderate, because Mr. Duquette stated that he did not see the condition before the Inspector discovered it. Tr. 196.

The strain relief connector holds the flex conduit in place. To fix the problem, the conduit and the strain relief connector were simply reconnected. Tr. 197. However, the Inspector based his conclusion that an injury was reasonably likely on the basis that he "didn't perceive it being fixed right away," but he offered no rationale to support that view. Tr. 191. He stated that the condition was obvious and he marked it as S&S because "of the exposed wires." Tr. 194. Yet, he

¹⁴ This citation was assessed at \$243.00.

marked the negligence as moderate because the operator didn't see the condition. Tr. 196. The Inspector agreed with the Court that because there were no bare wires, if one were to touch those wires no harm would result. Tr. 200. This was true with regard to both of the conditions the inspector observed. Tr. 200. Further, the Inspector did not observe any deterioration in those wires. Tr. 200. The inspector said had he observed such a problem he would have noted bare or chafed wires in his citation. Tr. 200. As he put it, "*those wires were probably in pretty good condition.*" Tr. 200-201 (emphasis added). In addition, the Inspector effectively conceded that, as he saw nothing to indicate that there was anything wrong with the grounding system, it was less likely that one would be shocked. For his part, Mr. Duquette testified that because a flex pipe is present, there would not be any steel rubbing on steel and the flex tubing is a silicone base, and for those reasons he believed it was unlikely that shaved wires would result. Tr. 204. In short, Mr. Duquette believed it was very unlikely for the wires to become bare under those conditions. Tr. 206. Also, as to the second condition, Mr. Duquette stated that the equipment was not then in service and that it was not connected, electrically, inside the box. Tr. 206. He did not relay this information to the Inspector at the time of the citation because he did not know at the time that power was not running through the conduit. He had recently bought the equipment used, and had not fully inspected it. Tr. 211.

Determination of the Court

The Secretary has alleged that this violation was significant and substantial, which denotes a more serious violation. In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained that in order to find a violation significant and substantial,

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

Id. at 3-4 (internal citation omitted).

As noted above, the applicable portion of the cited standard provides that "[e]lectrical conductors exposed to mechanical damage shall be protected." The testimony from the Secretary's witness established that there were wires present and that they were exposed.

"Conductor" is defined in section 56.2 as "a material, usually in the form of a wire, cable, or bus bar, capable of carrying an electric current." Although Mr. Duquette provided unchallenged testimony that the wires at issue were not carrying a current at the time of the inspection, nor did they carry a current after the inspection, he did not assert that claim until long after the citation was issued and it cannot be credited. While the violation was established, the condition of the wires, and the grounding system contradicts the Inspector's S&S conclusion. Finding that the violation was somewhat less than "reasonably likely" to result in an injury or illness under the accepted facts, the Court reduces the penalty to **\$143.00**.

Citation No. 8654127¹⁵

Missing guard on crusher

Section 104(a) Citation No. 8654127 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.14112(b), which states that "[g]uards shall be securely in place while machinery is being operated." DS&G was cited under this standard because the crusher was missing a guard. Ex. P-15. The Inspector found that the condition created an entanglement hazard, that such an occurrence would be fatal, albeit unlikely, and that DS&G's negligence in this instance was moderate. Ex. P-15. The citation was abated by bolting corrugated screen cloth on the access point on each side of the crusher. Tr. 220.

Inspector Burke issued this citation because the "under jaw main belt conveyor was found to have the rib tail pulley fully exposed at ground level." Tr. 215. The part of the machine that required a guard was the area of the belt beneath the jaw that received crushed material and carries it forward. Tr. 216. The Inspector thought that injury from being caught in the belt would be a fatal neck injury, through dismemberment from being pulled into the machine. Tr. 217-18. He considered it unlikely, however, because the dangerous area is underneath the crusher and not easily accessed, but a worker may access it in order to adjust the belt or shovel a clog underneath the belt. Tr. 219. He described the negligence as moderate because the operator had told his employee to turn off the crusher before working on it. Tr. 220. On cross-examination, Inspector Burke agreed that in order to get into the belt area and be caught in it, a miner would have to squeeze into the area. Tr. 221.

Mr. Duquette testified that he trained his employee not to go near the belt area when the machine was running. Tr. 224. The employee, before working on the machine, is supposed to turn off the machine and lock it. Tr. 224. Mr. Duquette also testified that it was extremely unlikely that an injury would occur because of the difficulty of getting under the crusher and into the dangerous area. Tr. 229.

Determination of the Court

Getting caught in the belt could lead to death, but the chance of an injury occurring was so remote as to warrant lowering the penalty. The employee would need to squeeze into the area for access. The Court also lowers the negligence in this instance because the danger, involving difficult access to the hazard, was not obvious and the employee had been instructed how to safely work on the machine. Considering all of the penalty factors, the Court imposes a penalty of **\$50.00** for Citation No. 8654127.

¹⁵ The proposed assessment was \$100.00.

Failure to perform ground continuity test

Section 104(a) Citation No. 8654128 alleges that DS&G violated 30 C.F.R. § 56.12028, which states that “[c]ontinuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on request by the Secretary or his duly authorized representative.” DS&G was cited under this standard because the motors on the jaw crusher and the remote generator had not been tested. Ex. P-16. The Inspector found that the condition created an electric shock hazard, that such an occurrence would be fatal and reasonably likely to occur, that the violation was significant and substantial, and that DS&G’s negligence in this instance was moderate. Ex. P-16. A licensed electrician performed the continuity resistance test, thus abating the citation. Tr. 245.

Continuity and resistance tests are performed to ensure that ground systems are functioning to eliminate fault currents that can energize metal parts of machines. Tr. 232. If the system is faulty, it can create a fatal electric shock hazard. Tr. 232. An operator is required to keep a record of the most recent test; Mr. Duquette did not have a record of the most recent test, because the equipment had never been tested. Tr. 236. The Inspector stated that Mr. Duquette “did not know there was such a thing” as a continuity and resistance test. Tr. 238.

Inspector Burke testified that an injury from this violation could reasonably be expected to be fatal because a current of electricity would be traveling through the body. Tr. 240. The lack of testing contributes to the hazard of an ungrounded machine because there are several ways a machine can be improperly or inadequately ground—for example, there could be corrosion, broken wires, dirt in connections, or the soil could be a poorer conductor than a human body. Tr. 240-241. He thought that an injury was reasonably likely because of the unknown history of the machine, which he estimated to be fifteen to twenty years old, and because he noticed broken conduits and exposed wires. Tr. 241. Inspector Burke designated the negligence as moderate because the operator did not know he was required to perform a ground test, but stated that the negligence was not low because the operator knew enough about MSHA that he should have inquired into the regulations. Tr. 244. The Inspector stated that the only time he would have found the negligence to be low would if the operator had said that he had no idea what MSHA was about. Tr. 259.

The Inspector also testified that if he had not cited the operator for any violations on the equipment, he would have marked this citation non-S&S. Tr. 247. Upon further questioning, he admitted that, other than the exposed conduits (which were non-functioning) and the knockout seal, everything on the machine appeared to be in working condition, but that he could not know the internal condition of the motors. Tr. 248.

¹⁶ This citation was assessed at \$243.00.

Determination of the Court

Under the *Mathies* criteria, the Secretary established a violation (failure to perform continuity and resistance tests), a discrete safety hazard (an ungrounded or improperly grounded machine), and that such hazard is reasonably likely to result in a reasonably serious injury, but the Court finds that the reasonable likelihood element was not established, on the evidence of record, because the attending circumstances did not support that conclusion. Because the ground continuity test is important, however, a penalty of **\$200.00** is imposed for this violation.

Citation No. 8654129¹⁷

No employee present at the mine trained in first aid

Section 104(a) Citation No. 8654129 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.18010, which states that "[a]n individual capable of providing first aid shall be available on all shifts." DS&G was cited under this standard because the operator's only employee, William Videll, was not trained in first aid. Tr. 267. Mr. Duquette was not aware of the requirement. Tr. 268. The Inspector found that the violation created a risk of death, but that the injury was not reasonably likely, and the operator's negligence was moderate. Ex. P-18.

Inspector Burke had originally issued the citation as "reasonably likely" and "significant and substantial," but lowered the likelihood when he learned that the employee had received some first aid training in the past. Tr. 271. Mr. Duquette abated the citation by enrolling his employee in a first aid training program, and he exceeded the minimum requirements by also enrolling in the training program. Tr. 273-74.

Determination of the Court

The Court agrees with the Secretary's characterization of the violation, but finds that Mr. Duquette's abatement, which exceeded good faith, warrants a reduction in the proposed penalty. The Court imposes a penalty of **\$50.00** for Citation No. 8654129.

Citation No. 8654130¹⁸

No fire extinguishers on site

Section 104(a) Citation No. 8654130 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.4200(a)(1), which states that mines are required to have "[o]n-site firefighting equipment for fighting fires in their early stages." DS&G was cited under this standard because it did not have any fire extinguisher at the mine site. Ex. P-20; Tr. 275-76. The Inspector originally found that injury was reasonably likely to occur and result in lost workdays or restricted duty, the violation was significant and substantial, and the operator's negligence was moderate. Ex. P-20. He later reduced the likelihood to unlikely and dropped the significant and substantial

¹⁷ The proposed assessment was \$100.00.

¹⁸ The proposed assessment was \$100.00.

designation. Ex. P-20. The operator abated the citation by purchasing fire extinguishers for the mine. Ex. P-20.

The Inspector stated that the mine contained several possible sources of fire, including diesel-operated vehicles, electric motors, and hydraulic pumps on the equipment. Tr. 276-77. Mr. Duquette told the Inspector that there were no fire extinguishers at the mine. Tr. 277. The Inspector found that smoke inhalation and burns were possible injuries, and that they would result in lost workdays or restricted duty. Tr. 278. He also testified that had originally intended to mark the likelihood as unlikely. Tr. 278-79. The injury was marked as unlikely because the Inspector saw few heat sources, such as torches or smoking employees, near the equipment. Tr. 279. The Inspector designated the operator's negligence as moderate because the Inspector thought that there was a fire extinguisher located on the property, but there was not. Tr. 279.

Mr. Duquette testified that, although the citation states that he purchased three fire extinguishers to abate the citation, he actually purchased eleven. Tr. 283. The Inspector had previously testified that even purchasing three would have exceeded the operator's obligation under the regulation. Tr. 281. Mr. Duquette stated that every piece of equipment at the mine now has a fire extinguisher. Tr. 282.

Determination of the Court

The Court agrees that an injury was unlikely, the operator's negligence was moderate, and the likely injury would have resulted in lost workdays or restricted duty. Mr. Duquette demonstrated good faith in abating this citation far beyond his obligation. Reading the statutory penalty criteria, one could argue that negligence and gravity, by their nature, reflect more serious penalty factors. The Court would agree that, in the majority of instances, those factors are, relatively speaking, more significant. But Congress did not so designate, elevate, or rank the various penalty factors. This may attributable to a recognition that, in a given instance, the particular facts may warrant giving additional credit, and therefore reducing a penalty, because of a mine operator's actions when cited for a violation. Here, the Court finds that such an enhanced weighting is appropriate, given Mr. Duquette's salutary reaction in purchasing far more fire extinguishers than required for this one employee operation. The Court imposes a penalty of **\$25.00** for Citation No. 8654130.

Order No. 8654131¹⁹

No newly hired experienced miner training or new miner training

Section 104(g)(1) Order No. 8654131 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 46.6(a),²⁰ which states that mines are required to "provide each *newly* hired experienced

¹⁹ At \$270.00, this Order was the highest of the proposed penalties in this docket.

²⁰ At the hearing and in his post-hearing brief, the Secretary admitted uncertainty as to whether the miner was a newly hired experienced miner, whose training is governed by § 46.6, or as simply a new miner, whose training is governed by § 46.5. Sec'y's Post-Hearing Br. 15-16. As noted, DS&G did not meet either standard's requirements.

miner with training as prescribed by paragraphs (b) and (c)” of the section. 30 C.F.R. § 46.6(a) (emphasis added). DS&G was cited under this standard because it only provided task training to its lone employee, Mr. Videll. Ex. P-22; Tr. 284. Pursuant to section 104(g)(1), Inspector Burke issued a withdrawal order. Ex. P-22. The Inspector found that injury was reasonably likely to occur and that it could reasonably be expected to be fatal, that the violation was significant and substantial, and that the operator’s negligence was moderate. Ex. P-22. The operator abated the citation by giving the employee newly hired experienced miner training. Ex. P-22.

Inspector Burke interviewed the employee, who stated that he had only received task training. Tr. 286. The Inspector determined that the employee was an “experienced miner,” apparently on the basis that he had received task training and also based on that employee’s disclosure to the Inspector of his former work experience. Tr. 284, 286-287. He determined that an injury contributed to by the violation could reasonably be expected to be fatal because of the multiple violations he had already seen at the mine site and the mine conditions, such as electrical shock hazards, roll over hazards, and entanglement hazards. Tr. 291.

Mr. Duquette testified several times that the employee had received the required training prior to the issuance of the citation, and that he just did not fill out the required form. Tr. 303-07. He also stated, however, that the employee underwent eight hours of training following the issuance of the citation in order to abate it. Tr. 307. On cross-examination, Mr. Duquette also stated that he did not train the miner on his statutory rights under the Mine Act, among other things. Tr. 314.

Determination of the Court

30 C.F.R. §§ 46.5 and 46.6 require, respectively, that mine operators train new miners and newly hired experienced miners. Both sections require the following training before work begins or within 60 days of working at a mine: introduction to the work environment; training on electrical and other hazard recognition; review of emergency medical procedures, escape plans, and firefighting procedures; instruction on health and safety standards related to tasks; instruction on HazCom program; instruction on miners’ statutory rights; review of supervisory structure and miners’ representatives; introduction to hazard reporting procedure; demonstration of self-rescue and respiratory devices. 30 C.F.R. §§ 46.5, 46.6. Mr. Duquette did not challenge the Inspector’s designation that the employee was a newly hired, *experienced* employee, *and assert that he was only a new* employee, nor would it have made sense to do so. Therefore the Court finds that, on this record, the violation of 30 C.F.R. § 46.6(a) was established. Further, at least as applied in this instance, the proper classification of the miner, as a “new miner” or a “newly hired experienced miner,” is not critical, as the miner lacked the appropriate trainer under either classification.

Mr. Duquette, at the time of the inspection, was all but unaware of the existence of MSHA. He had little to no knowledge of the depth and breadth of the Mine Act’s enforcement scheme, as he readily admitted. He did not have a HazCom program, so he could not train his employee on a HazCom program. He had no fire extinguishers at the mine, so he could not train his employee on firefighting procedures. He had no knowledge of the Mine Act, so he could not train his employee on his rights under the Act. Accordingly the Court concludes that Mr.

Duquette failed to train his employee fully under either standard and that this was not solely a paperwork violation.

The Court also finds that this violation was significant and substantial. The violation contributes to a host of hazards (shock hazards, roll over hazards, and entanglement hazards, for example) that are reasonably likely to result in a reasonably serious injury. After considering the 110(i) factors, the Court imposes the penalty assessed by the Secretary for Citation No. 8654131: **\$270.00**. An untrained miner “can expose himself to unsafe conditions and may create an accident or an injury.” Tr. 287. Mr. Duquette’s lack of knowledge notwithstanding, this is a serious violation and goes to the core of MSHA’s mission—the health and safety of miners.

Citation Nos. 8654132, 8654133, 8654134, 8654135, and 8654136²¹

No berms provided on ramps at mine site

Section 104(a) Citation Nos. 8654132, 8654133, 8654134, 8654135, and 8654136 each allege that DS&G violated 30 C.F.R. § 56.9300(a), which states that “[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.” Berms are an “impeding device constructed on an elevated roadway or ramp . . . to let the operator [of a vehicle] know he’s too close to the edge.” Tr. 323. They can be made of various materials—“gravel, stone, large stones, concrete blocks, [or guard rails]—but they have to be tall enough to reach mid-axle height of the vehicles traveling on the elevated roadway or ramp. Tr. 323. DS&G was cited under this standard because berms were not provided on several ramps at the mine site. Ex. P-24. For each citation, the Inspector found that the lack of berms was reasonably likely to cause a fatality, that DS&G’s negligence was moderate, and that the violation was significant and substantial. Ex. P-24; Ex. P-26; Ex. P-27; Ex. P-28; Ex. P-29. The Court will discuss each citation in turn.

Citation No. 8654132 concerns the jaw crusher feeder ramp. The ramp measured 33 feet long, 31 feet wide, and had a 12 foot drop-off on each side. Ex. P-24. The loader that would travel on the ramp (and all the other ramps at issue in these citations) had a mid-axle height of 26 inches. Ex. P-24. The citation was abated by constructing berms on both sides. Tr. 336.

Inspector Burke testified that the loader would travel on the ramp multiple times during each shift, and that, without berms, there was a heightened risk that fatal injuries would occur due to a rollover accident. Tr. 327. A fatality could occur due to a fatal neck injury if the loader overturned. Tr. 328. Inspector Burke also testified about fatalgrams relating to overturned vehicles in which there was no berm in place. Tr. 329; Ex. P-50; Ex. P-51. Relating to negligence, he stated that he characterized the negligence as moderate because the operator stated that he was never told about berms, but it was the Inspector’s understanding that the operator had been on mine sites in the past. Tr. 335. As for the S&S designation, the Inspector stated that he found it to be S&S because the ramp was traveled on multiple times a day, the tracks were close to the sides, and the drop off was dangerous, making a fatal injury reasonably likely. Tr. 328-29. Also, when the loader is in operation and the bucket is raised, the bucket may

²¹ Each of these five listed citations had proposed assessments of \$243.00.

block the driver's vision, making a roll-over more likely. Tr. 341. He also stated that, for each of the berm-related citations, the reasoning underlying negligence, injury, likelihood, and S&S designation were all the same.²² Tr. 330.

Mr. Duquette testified that the ramp was sufficiently wide that the loader falling off the side was unlikely. The Inspector did not agree. Tr. 341. He stated that the loader would have six to eight feet on either side of it when it was going up the ramp. Tr. 352. The loader in question is seven to eight feet wide. Tr. 358. The government did not challenge Mr. Duquette's assessment of the number of feet on each side of the loader as being six to eight feet. Tr. 353. Inspector Burke had previously testified that the tracks made by the loader were close to the edge, Tr. 328-29, but it is unclear if that assessment is at odds with Mr. Duquette's six to eight feet estimation. Mr. Duquette also stated that he had no knowledge of the berm requirement, Inspector Burke's statements to the contrary notwithstanding. He asserted that construction sites, as distinct from mining sites, are not required to have berms, and on all of the jobs he had worked on, no stockpile of material had ever been big enough to require a ramp. Tr. 350-51.

Citation No. 8654133 concerns the sand stockpile ramp. The ramp was 50 feet long, 12 feet wide, and had a 14 foot drop off on both sides. Ex. P-26. When the screen plant is running, the loader operator would drive up the ramp to the top of the stockpile, and then dump its load of sand. Tr. 357. The operator abated the citation by barricading the stockpile so that the loader could no longer drive up the ramp. Tr. 360; Ex. P-26.

Mr. Duquette stated that the Inspector's measurement of the ramp was too narrow. He asserted that the Inspector measured from track to track, not to the edges of the ramp, which would have made the ramp 14 feet wide. Tr. 366. Mr. Duquette also stated that the loader falling off of either side was not as likely as the Inspector seemed to think, since there were three to four feet on either side of the loader. Tr. 364, 367.

Citation No. 8654134 concerns the two inch crushed gravel stockpile ramp. The ramp was 27 feet long and 12 feet wide, with a 10.5 foot drop-off on both sides. The citation was also abated by barricading the stockpile. Tr. 368-69; Ex. P-27. Mr. Duquette testified that even though Duke's Sand & Gravel had been "operating" for five months, actual mining operations had only been occurring for about thirty days. Tr. 372. At the time of the inspection, he had yet to even sell any material. Tr. 376.

Citation No. 8654135 concerns the two inch stone stockpile elevated ramp, measuring approximately 35 feet long and 12 feet wide, with an 11 foot drop off. Tr. 377-78; Ex. P-28. The citation was abated by barricading the ramp. Tr. 378. Mr. Duquette asserted the same arguments that he made with regard to the previous berm-related citations. Tr. 380.

Citation No. 8654136 concerns the three inch stone stockpile ramp, which measured approximately 50 feet long and 12 feet wide, with a 12 foot drop-off on both sides. To abate the citation, access to the stockpile ramp was barricaded. Tr. 382.

²² For that reason, the Court will consider and incorporate such reasoning with respect to each berm-related citation.

Determination of the Court

The Court agrees with the Secretary's determination of negligence and S&S determinations for all but one of the citations. With respect to Citation No. 8654132, the Court finds that injury was unlikely due to the width and relatively short length of the ramp. It was 31 feet wide and 33 feet long. The eight foot loader, driving up the middle of the ramp, would have 11.5 feet on either side. Furthermore, there is not much length over which the loader operator could drift toward one side or the other. Because the Court finds that injury was unlikely to occur, the Court also finds that the violation was not S&S.

However, with respect to the other citations, the width of the ramps left only two to three feet on either side of the ramp. The lack of berms on these ramps contributed to a roll-over hazard that was reasonably likely to cause a fatal or other serious injury. Apart from that finding, the Court finds that there were mitigating circumstances that warrant reduction of each of these penalties from the amounts proposed. First, the loader operator is the only person using these ramps. This mine is not a highly trafficked area, so injury is somewhat less likely to occur. The Court also credits Mr. Duquette's testimony that he had no knowledge of the berm requirement as somewhat mitigating his negligence in this instance.

Negligence and gravity represent but two of the six criteria that are to be evaluated in assessing any penalty. Although negligence and gravity appear, by their nature, to be the more serious factors, Congress did not elevate any particular criteria over another. By not so weighing those factors in the statute itself, it is reasonable to deduce that Congress left it to the Commission, guided by the particular facts surrounding a violation, to make an individualized determination as to the relative weighing of the criteria. The Commission has recognized this principle, noting that "Judges have discretion to assign different weight to the various factors, according to the circumstances of the case." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001).

As alluded to above, in this instance the Court has determined that Duke Sand & Gravel's absence of any history of violations, the appropriateness of a penalty to the size of this one person operation and the extraordinary efforts it made in abating the violations, all operated to lower the penalties from the amounts proposed by the Secretary.

Accordingly, for Citation No. 8654132, the Court imposes a penalty of **\$100.00**. For Citation Nos. 8654133, 8654134, 8654135, and 8654136, the Court imposes a penalty of **\$143.00** each.

Citation No. 8654137²³

No dump site restraint on sand stock pile

Section 104(a) Citation No. 8654137 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.9301, which states that "[b]erms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or

²³ The proposed assessment was \$100.00.

overturning.” DS&G was cited under this standard because no dump site restraint was provided at the top of the sand stockpile ramp, which, as previously stated, measured 14 feet high. Ex. P-30. The Inspector originally found that injury was reasonably likely to occur and result in lost workdays or restricted duty, the violation was significant and substantial, and the operator’s negligence was moderate. Ex. P-30. He later reduced the likelihood to unlikely and dropped the significant and substantial designation. Ex. P-30. The operator abated the citation by barricading the ramp. Ex. P-30.

A dumpsite restraint is effectively a berm placed at the end of a ramp to provide a warning to a vehicle operator that he is approaching the edge. Tr. 386. The ramp at issue would be traveled multiple times per shift. Tr. 387. The Inspector thought any injury would result in lost workdays or restricted duty because, in the event that the loader went past the end of the ramp, he thought that it would not turn over but instead that it would “probably jar the operator . . . quite a bit to where he could receive cuts, bruises, whiplash, that type of injury.” Tr. 388. He cited the operator for moderate negligence because “the operator wasn’t aware of the standard[, h]e thought the end travel would be slow[, and h]e thought there was a restraint in place.” Tr. 391. Mr. Duquette testified that a loader operator knows not to drive to the edge of the ramp. Tr. 395.

Determination of the Court

The Court agrees with the Secretary’s characterization regarding negligence, likelihood, and injury, but upon factoring the other statutory criteria imposes a penalty of **\$75.00** for this violation, Citation No. 8654137.

Citation No. 8654138²⁴

Overhang on north sand pit

Section 104(a) Citation No. 8654138 alleges that Duke’s Sand & Gravel violated 30 C.F.R. § 56.3131, which states:

In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

DS&G was cited under this standard because a protruding overhang existed on the north sand pit face with loader track and bucket dig marks underneath it. Ex. P-32. The Inspector found that injury was reasonably likely to occur and result in a fatality, the violation was significant and substantial, and the operator’s negligence was moderate. Ex. P-32. The citation was abated by taking an excavator to the top of the wall and pushing the material down. Tr. 429.

²⁴ This citation was proposed at \$243.00.

Inspector Burke testified that the loader operator told him that he was digging into the sand face to try to get the overhang to fall down. Tr. 422. The material is dangerous because, if the loader is working beneath it, the material can fall on top of the loader. Tr. 422. The face of the wall was twenty feet high, and the amount of material that was at risk of falling was about “five or six dump truck loads.” Tr. 423. Consequently, if the loader was attempting to take down the overhang from underneath it, it would “inundate a loader cab or an excavator cab, coming through the windows and creating body crushing injuries.” Tr. 427. Such an injury is reasonably likely to occur due to the unpredictability of the sand and the loader operating underneath the pile for the duration of a shift. Tr. 428.

Mr. Duquette testified that he informed the Inspector at the time of the citation that this part of the mine was inactive. Tr. 434. Although his employee had been over there attempting to bring down the overhang, Mr. Duquette stated that he did not tell the employee to do so, and the employee should have known not to operate under the overhang. Tr. 434, 438. He stated that the part of the wall with the overhang was made of “pond sand,” which “nobody really wants,” so there would be no reason for his employee to be over there. Tr. 442. On cross-examination, the Secretary elicited testimony creating an inference that, due to poor training, the employee did not know to avoid the area with the overhang. Tr. 439.

Determination of the Court

The Court upholds the violation, and crediting the Inspector’s testimony, assesses, upon consideration of each of the statutory criteria, a civil penalty in the sum of **\$200.00**.

Citation No. 8654139²⁵

Failure to post stop sign and speed limit sign

Section 104(a) Citation No. 8654139 alleges that Duke’s Sand & Gravel violated 30 C.F.R. § 9100(a), which states that “[r]ules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, shall be established and followed at each mine.” DS&G was cited under this standard because it did not post a stop sign at the end of the mine road abutting a state highway, and it did not post a speed limit sign for the mine road. Ex. P-34. The Inspector originally found that injury was reasonably likely to occur and result in a fatality, the violation was significant and substantial, and the operator’s negligence was moderate. Ex. P-34. He later reduced the likelihood to unlikely and dropped the significant and substantial designation. Ex. P-34. The operator abated the citation by posting signs. Ex. P-34.

The Inspector stated that Route 8, to which the mine road leads, is a heavily traveled, two-lane state highway. Tr. 444. There was no stop sign directing vehicles exiting the mine. Tr. 445. He characterized the injury as fatal because any passenger car that collided with a dump truck exiting the mine would do so at a speed of 45 to 50 miles per hour. Tr. 445. He adjusted the likelihood to unlikely, however, because only the Inspector, Mr. Duquette, and Mr. Duquette’s service pickup were accessing the road—the employee did not have a vehicle. Tr. 446. Inspector

²⁵ The proposed assessment was \$100.00.

Burke assessed the negligence as moderate because Mr. Duquette said that he had not considered putting a sign up, but he thought that it was a good idea. Tr. 447.

Determination of the Court

The Court agrees with the Secretary's determination of negligence, likelihood, and injury, but finds that not only was such an injury unlikely, it was so unlikely as to warrant a reduction in the penalty. The Court imposes a penalty of \$50.00 for Citation No. 8654139.

Citation No. 8654140²⁶

Section 104(a) Citation No. 8654140 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.20008(a), which states that "[t]oilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel." DS&G was cited under this standard because it did not have any toilet facilities. Ex. P-36. The Inspector originally found that injury was reasonably likely to occur and result in lost workdays or restricted duty, the violation was significant and substantial, and the operator's negligence was moderate. Ex. P-36. He later reduced the likelihood to unlikely and dropped the significant and substantial designation. Ex. P-36. The operator abated the citation by providing a portable toilet. Ex. P-36.

Inspector Burke stated that there were no toilet facilities at the mine site. Tr. 453. Instead, the employee would go to McDonald's (a mile away) or a nearby hobby store (half a mile away). Tr. 454-55. The Inspector stated that he thought an injury/illness due to the violation could result in lost workdays because the employee would go into the woods to relieve himself, rather than going to McDonald's, would not wash his hands, and may be exposed to poison oak, poison sumac, or poison ivy. Tr. 457. The Inspector found that the operator was moderately negligent because the operator thought that the McDonald's was close enough. Tr. 461.

Determination of the Court

The Court agrees with the Secretary's determination that injury was unlikely and DS&G's negligence was moderate. But, as the Court stated in the hearing, Tr. 457-58, the injury that would reasonably be expected would be so minor as to result in no lost workdays. Based on the 110(i) factors, the Court imposes a penalty of **\$25.00**.

Citation No. 8654141²⁷

Failure to record workplace examinations

Section 104(a) Citation No. 8654141 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.18002(b), which states that "[a] record that [daily workplace] examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for

²⁶ The proposed assessment was \$100.00.

²⁷ The proposed assessment was \$100.00.

review by the Secretary or his authorized representative.” DS&G was cited under this standard because it did not record workplace exams prior to the inspection. Ex. P-38. Since this was a paperwork violation, the Inspector found no likelihood of injury, but assessed the negligence as moderate. Ex. P-38. The operator abated the citation by recording a workplace exam. Ex. P-38.

A workplace exam is a daily inspection. Tr. 466. An operator or a designated “competent person” should look at the entire area, including the equipment, for unsafe or hazardous conditions. Tr. 467. The Inspector designated the negligence as moderate because he thought that if the operator inspects other equipment he has, such as dump trucks and service trucks, “why wouldn’t he inspect the rest of the stuff on the mine site?” Tr. 469. Mr. Duquette testified that he performed workplace exams, but he didn’t know the terminology or about the recording requirement in the regulations. Tr. 471.

Determination of the Court

The Court agrees with the characterizations of the Secretary, but the operator’s lack of knowledge of the recording requirement warrants a lower penalty than that assessed by the Secretary. For much the same reasoning as that stated in the determination of the penalty for Citation No. 8654123, the Court imposes a penalty of **\$25.00** for Citation No. 8654141.

However, Mr. Duquette is again advised that in future Mine Act litigation, the Court’s indulgence, as reflected in the civil penalty reductions it has imposed in this instance, and owing to the special circumstances of DS&G’s first inspection, should not be presumed. Each case and each alleged violation stands on its own, but the history of violation will of necessity be different in future cases and the evaluation of the other factors, depending on the particular facts, may be less forgiving as well. Any notion that merely invoking the right to a hearing will result in reduced penalties is not sound, as the findings of fact may prompt the Court to adopt, lessen *or increase*, penalties where a violation is established.

Citation No. 8654142²⁸

Failure to develop and implement a HazCom program

Section 104(a) Citation No. 8654142 alleges that Duke’s Sand & Gravel violated 30 C.F.R. § 47.31(a), which states that operators must “[d]evelop and implement a written HazCom program.” DS&G was cited under this standard because it did not have such a program. Ex. P-40. The Inspector originally found that injury was reasonably likely to occur and would be permanently disabling, the violation was significant and substantial, and the operator’s negligence was moderate, but later reduced the likelihood to unlikely and removed the S&S designation. Ex. P-40. The operator was given a generic HazCom plan, abating the citation. Ex. P-40.

A Hazard Communication (HazCom) program at a single-operator mine like Duke’s Sand & Gravel must include a statement of how the program is put into practice, material safety data sheets (MSDSs) available for miners, and a list of all hazardous chemicals at the mine. 30

²⁸ The proposed assessment was \$100.00.

C.F.R. § 47.32(a), (b). The MSDSs contain firefighting and first aid information for the hazardous chemicals at the site. Tr. 477.

At Duke's Sand and Gravel, the operator had "diesel fuels, gas-operated pick-ups, [and] certain greases, [and] lubricants." Tr. 477. The Inspector found that injury was unlikely because there were few chemicals at the mine, Tr. 478, but that injury would be permanently disabling because if "any of the oils or greases . . . contacted the eyes or [were] ingested, the proper first aid treatment may not have been given," which would exacerbate any injuries. Tr. 478. The Inspector characterized the negligence as moderate because the operator did not think there were any hazardous chemicals at the mine site. Tr. 479. Inspector Burke also testified that any "hazardous materials" at the mine site could be found in somebody's garage at their home or at businesses other than mine sites. Tr. 488.

Determination of the Court

The Court agrees that an injury from this violation could reasonably be expected to be permanently disabling, but that any injury would be unlikely. Not only are the chemicals at the mine site common ones, there are so few chemicals stored at the mine site that injury from them and exacerbated by the lack of an MSDS would be quite unlikely. Based on this and the other 110(i) factors, the Court assesses a penalty of **\$50.00** for Citation No. 8654142.

Citation No. 8654143²⁹

Failure to develop and implement a written training plan

Section 104(a) Citation No. 8654143 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 46.3(a), which states that operators must "[d]evelop and implement a written plan, approved by [MSHA], that contains effective programs for training new miners and newly hired experienced miners, training miners for new tasks, annual refresher training, and site-specific hazard awareness training." DS&G was cited under this standard because it did not have such a program. Ex. P-42. The Inspector found that injury was unlikely to occur and would result in lost workdays or restricted duty, and the operator's negligence was moderate. Ex. P-42. The operator was given a generic training plan, abating the citation. Ex. P-42.

For sand and gravel operators, the plan does not have to be filed with MSHA. Tr. 493. Instead, inspectors ask to see the plan when they inspect the mine. Tr. 493. Mr. Duquette did not have a training plan implemented at the mine, but the Inspector found that he did provide task training to his employee, so injuries were unlikely to occur. Tr. 493-94. He characterized the negligence as moderate because Mr. Duquette attempted to contact MSHA but did not know that a training plan was necessary. Tr. 494. Mr. Duquette testified that he had no knowledge of the training plan requirement; if he had, he would have implemented one. Tr. 497.

²⁹ The proposed assessment was \$100.00.

Determination of the Court

The Court disagrees with the Secretary's characterization of this citation, but finds that it was nevertheless violated. The Court instead views this as a paperwork violation. The operator failed to have a plan in place, and the citation was abated when the Inspector gave Mr. Duquette a generic training plan. Abatement of the citation did not require the operator to actually train his employee. Consequently, the Court finds no likelihood of injury. Any injury that might occur would result from the operator's failure to *actually train* its employee, for which the operator was already cited. The Court assesses a penalty of **\$50.00** for Citation No. 8654143.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), the Court assesses the following penalties for the citations and order discussed above:

<u>Citation/Order No.</u>	<u>Assessment</u>
8654122	\$50.00
8654123	\$50.00
8654124	\$50.00
8654125	\$50.00
8654126	\$143.00
8654127	\$50.00
8654128	\$200.00
8654129	\$50.00
8654130	\$25.00
8654131	\$270.00
8654132	\$100.00
8654133	\$143.00
8654134	\$143.00
8654135	\$143.00
8654136	\$143.00
8654137	\$75.00
8654138	\$200.00
8654139	\$50.00
8654140	\$25.00
8654141	\$25.00
8654142	\$50.00
8654143	\$50.00
Total:	\$2,085.00

It is **ORDERED** that the operator pay a penalty of \$2,085.00 within 30 days of this order.³⁰ Upon receipt of payment, this case is **DISMISSED**.

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

Distribution:

Laura Ilardi Pearson, Trial Attorney, U.S. Department of Labor, MSHA Backlog Project, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

John Duquette, Jr., Duke's Sand & Gravel, 537 Ashland St., North Adams, MA, 01247

³⁰ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

January 23, 2015

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

v.

CONSOL BUCHANAN MINING
COMPANY, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. VA 2013-190
A.C. No. 44-04856-311430

Mine: Buchanan Mine #1

DECISION AND ORDER

Appearances: Ronald Gurka, Esq., Office of the Solicitor, U.S. Department of Labor,
Arlington, VA, for the Petitioner

Billy R. Shelton, Esq., Jones, Walter, Turner & Shelton PLLC, Lexington,
KY, for the Respondent

Before: Judge Rae

I. INTRODUCTION

A. Statement of the Case

This case comes before me upon a petition for assessment of civil penalties filed by the Secretary of Labor under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), as amended, 30 U.S.C. § 815(d), and involves two section 104(d)(1) violations¹ issued to CONSOL Buchanan Mining Company, LLC (“Consol” or “the Respondent”) by the Department of Labor’s Mine Safety and Health Administration (MSHA).

A hearing was held in Abingdon, Virginia on July 15-16, 2014, at which time the parties were afforded a full opportunity to present evidence and testimony. The parties also submitted post-hearing briefs, which I have considered in rendering this decision.

After consideration of the evidence and observation of the witnesses and assessment of their credibility, I uphold the two section 104(d)(1) violations as written and impose a total penalty of \$140,000 against Consol, for the reasons set forth below.

¹ Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

B. Stipulations

The parties have stipulated to the following facts:

1. CONSOL Buchanan Mining Company, LLC was an “operator” as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the coal or other mine at which the citation and order at issue in this proceeding were issued.
2. Operations of CONSOL Buchanan Mining Company, LLC at the coal or other mine at which the citation and order at issue in this proceeding were issued are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act.
4. The individual or individuals whose signatures appear in Block 22 of the citation and order that are at issue in this proceeding were each acting in their official capacity and as an authorized representative of the Secretary of Labor when the citation and order were issued.
5. True copies of each citation and order at issue in this proceeding were served on the Respondent or its agent as required by the Mine Act.
6. The total proposed penalty for the citation and order in this proceeding will not affect the Respondent’s ability to continue in business.
7. The citation and order contained in Exhibit A attached to the Secretary’s petition are authentic copies of the citation and order that are at issue in this proceeding with all appropriate modifications or abatements, if any.
8. CONSOL Buchanan Mining Company, LLC, is the current operator of the Buchanan Mine #1 as a result of having acquired the assets and liabilities of Consolidation Coal Company, which operated the Buchanan Mine #1 at the time the events at issue in this case occurred. CONSOL Buchanan Mining Company, LLC has thus been substituted as a party for Consolidation Coal Company in this proceeding, and CONSOL Buchanan Mining Company, LLC will be liable for any violations at issue in this proceeding found to have occurred while Consolidation Coal Company was the operator of the Buchanan Mine #1. Consistent with this substitution, any reference to Consolidation Coal Company in this proceeding shall be deemed to be a reference to CONSOL Buchanan Mining Company, LLC, and vice versa.

C. Statement of Facts

The violations at issue in this case arose from a fatal accident that occurred in the Buchanan Mine #1, a large underground coal mine in Buchanan County, Virginia. On Friday, January 11, 2012, miners Joe E. Saunders and W. David Green were assigned to transport a Freedom shuttle car through the mine during the evening production shift. Tr. 634; Exs. R-8 &

S-22 at 3; Ex. R-9 at 2; Ex. S-1 at 3; Ex. S-12.² They were accompanied by Greg Addington, a certified foreman with 35 years of underground coal mining experience. *See* Tr. 603; Ex. R-11. The shuttle car was to be moved along the haulage track on a rail-mounted lowboy hauler between two diesel locomotives. Exs. R-8 & S-22 at 3; Ex. R-9 at 2; Ex. S-1 at 3. The shuttle car's electrical panel board protruded 3 feet, 2 inches over the left rail of the track. Ex. S-2 at 18; Tr. 60; Ex. R-9 at 6; *see* Photograph S-7 (depicting overhang). Because it was a wide load, the shuttle car was positioned on an airbag and outfitted with come-alongs so it could be lifted or shifted from side to side in tight spots. Tr. 634-35.

Saunders, Green, and Addington were traveling inby in the #5 entry around 7:40 PM when the protruding left side of the shuttle car struck a water manifold (a pipe fitting with multiple outlets) at crosscut #61, knocking it off of the 6-inch water line that runs between the haulage track and conveyor belt in the #5 entry. Tr. 609, 636-37; Ex. S-12; Ex. R-8 & S-22 at 2, 4; *see* Ex. S-1 at 21 (diagram of accident site); Photographs S-8, R-37 to R-41, R-47 (investigators' re-creation of moment of impact). The 6-inch water line is part of the mine's fire suppression system and is required to have fire valve assemblies where a fire hose can be hooked up every 300 feet. Tr. 417, 488; *see* Ex. R-10. The manifold that was struck by the shuttle car was a fire valve assembly with four outlets: two capped fire hose outlets; an outlet that connected to the 6-inch water line in the mine floor; and another outlet that connected to a 2-inch pipe that supplied water to the fire suppression system for a rock dust distribution machine in an adjacent entry. *See* Ex. S-2 at 16; Ex. S-1 at 22; Tr. 51-58. The manifold was connected to the 6-inch water line with a bronze two-piece 1½-inch ball valve of the type demonstrated in physical exhibits J-1 and J-2 manufactured by Milwaukee Valve Company. *See* Ex. S-2 at 16.

The 1½-inch valve broke into two pieces at an internal threaded connection when the collision with the shuttle car occurred. Tr. 56; *see* Ex. J-1. The body of the valve is 3 inches long and houses the rotating ball that controls water flow through the valve, while the tailpiece of the valve is slightly more than 1 inch long and resembles a large six-sided nut. Ex. R-9 at 2; Exs. R-5, S-14; *see* Exs. J-1, J-2. During manufacturing the tailpiece is screwed into the body of the valve with a set of internal straight-cut threads and the threaded connection is then sealed with an adherent called Loctite. Tr. 119, 172-74, 322-24, 379; *see* Exs. J-1, J-2. After the collision, the tailpiece remained attached to the steel nipple protruding from the 6-inch water line in the mine floor, but the body of the valve had been sheared off. Tr. 641; Exs. R-8 & S-22 at 5; Ex. R-9 at 2. Thus, the water line was breached and the water manifold was left hanging off of the 2-inch pipe leading to the rock dust distribution machine. Water shot out to the roof, drenching the miners. Tr. 511-12, 525-26, 609, 620-21, 637; Ex. S-12.

Green, Saunders, and Addington moved the shuttle car out of the way, then Green and Saunders proceeded to shut the water off so they could assess the damage. Tr. 609-10, 637-39, 648-49. Green turned the water off inby, Tony Atwell (a miner from a motor crew that was on the haulage track directly behind Saunders, Green, and Addington) turned the water off outby, and Saunders attempted to turn the water off at a 6-inch shutoff valve on a crossover pipe at crosscut #62. Ex. S-2 at 7; Ex. R-9 at 2; Tr. 512, 609-10; Ex. S-12. The water that had been

² In this opinion, the abbreviation "Tr." refers to the hearing transcript. The Secretary's exhibits are numbered S-1 through S-24, the Respondent's exhibits are numbered R-1 through R-48, and the joint exhibits are numbered J-1 and J-2.

shooting out of the breached line subsided to a relatively small but consistent flow that continued to discharge the entire time the miners were trying to make repairs. Tr. 526-27, 621-23, 650-51. The miners assumed this was residual water draining from the isolated section of the water line. Tr. 623, 640, 652; Ex. R-8 & S-22 at 7.

While the men were shutting the water off and beginning to make repairs, Addington walked to a nearby crosscut to dry off and called shift foreman David Lynn Semones on his walkie-talkie to tell him the move crew had struck the water line. Tr. 610-13; Ex. S-12. Semones testified he told Addington he would send another crew to fix the water line and instructed the move crew to cut the water off and continue moving the shuttle car through the area. Tr. 576-77. Addington testified he did not hear these instructions. Tr. 612-13, 654.

Meanwhile, Green and Saunders had begun repairing the fire valve assembly without waiting for the water to bleed off. Tr. 652. They first detached the manifold from the 2-inch pipe leading to the rock dust distribution machine. Tr. 640. Next, they attempted to reattach the manifold to the steel nipple on the 6-inch water line by screwing it back onto the tailpiece of the 1½-inch valve and tightening it down with a pipe wrench. Tr. 513-14, 527-28, 641, 651-54. After the manifold was back in place, Saunders attempted to reattach the 2-inch pipe. Tr. 514-15, 643. The coupling between the manifold and 2-inch pipe was a Victaulic coupling, a type of connection accomplished with a rubber gasket that folds over two abutting pipes. Tr. 151-52. As Saunders was trying to fold the rubber gasket over the abutting pipes, water was leaking out and impeding his efforts, so he turned the 1½-inch valve at the bottom of the manifold into the off position to block the flow of water. Tr. 59; Ex. S-2 at 9-10; Ex. R-8 & S-22 at 5-7; Ex. R-9 at 3. As a result, water pressure built up under the 1½-inch valve's ball plug, causing the valve to violently break apart moments later in the same place as before. Tr. 59; Exs. R-8 & S-22 at 5-6; Ex. R-9 at 3. This time, however, the manifold was not attached to the 2-inch pipe. The manifold was blown off of the 6-inch water line and into the air, struck Saunders in the face and head, struck another miner in the shoulder, hit the mine roof 13½ feet above, then came to rest on the mine floor 23 feet 4 inches away from its starting point. Ex. S-2 at 10, 14; Ex. R-9 at 5, 8. Saunders died a week later due to the very serious injuries he had incurred.

MSHA Inspectors Mark Hlywa³ and Jason Hess⁴ conducted MSHA's accident investigation. When Hlywa arrived at the scene a few minutes after the accident had occurred, water was still discharging from the point where the manifold had been blown off of the water line and a small puddle had formed. Tr. 41-46. Hlywa visited the three shutoff valves where the miners had attempted to turn the water off and discovered that the 6-inch shutoff valve at

³ Hlywa has worked as a coal mine inspector for MSHA since June 2008. He has a B.S. in mine engineering. His prior mining experience includes working for Consol Energy for several years as a general underground employee, industrial engineer, and foreman and working for a mine equipment manufacturer for a year as a design engineer. Tr. 39-40.

⁴ Hess has worked for MSHA as a general coal mine inspector since 2007 and as a ventilation specialist since 2012. He is also trained as an accident inspector, and serves in that capacity as needed. Before coming to MSHA, Hess worked in the coal mining industry for eleven and a half years, including as a continuous miner operator and as a production, maintenance, and lead foreman. He is also a certified electrician. Tr. 122-28.

crosscut #62 was not closed all the way. To close the valve all the way, the handle needs to be turned 90 degrees until it is perpendicular to the water line and contacts the handle stop embossed on the top of the valve. Tr. 346-47. Hlywa discovered the 6-inch valve was visibly open in that the handle was not fully perpendicular to the water line and audibly open in that water was hissing where it was bypassing a small opening. Ex. S-2 at 7, 13; Tr. 63-65, 78, 147-48. Hlywa asked the miners to try to turn the water all the way off, after which the puddle at the accident site subsided, but a small amount of water continued to discharge. Tr. 48, 51, 75-76, 134; Ex. S-2 at 20. Inspector Hess, who arrived at the mine around 9:45 PM to take over the accident investigation, testified that the water was not completely shut off until the 6-inch shutoff valve at crosscut #62 was replaced with a new valve after he had left the mine that night. Tr. 134-38, 149-50; *see also* Ex. S-3 at 8-9; Tr. 156; Photograph S-11 (picture of replacement valve taken the next morning).

The evening of the accident, Hlywa, Hess, and other investigators from the company and the state examined the manifold and the two pieces of the broken 1½-inch valve. They found that the 1½-inch valve's internal threaded connection was damaged. The damage was not readily apparent to the touch or to the naked eye. However, upon close examination and measurement with a feeler gauge, the investigators found that the female threads on the body of the valve were stretched such that only a few threads on the tailpiece were engaging and holding when the two pieces were screwed together. Tr. 67, 85-87, 107-08, 143-44, 297-99; Ex. S-2 at 21, 27; Ex. S-3 at 18-20; Exs. R-8 & S-22 at 11-12; Ex. R-9 at 2.

Inspector Hess later obtained the manufacturers' information on both the 1½-inch valve (Exs. S-14, R-5) and the 6-inch shutoff valve (Exs. S-15, R-6) and sent the valves to MSHA fire protection engineer Michael Hockenberry⁵ for analysis. Tr. 165-76. Based on his correspondence with a Milwaukee Valve representative (Ex. S-20) and his review of the manufacturer's information, Hockenberry concluded the 1½-inch valve was a throwaway item that should not be reused after being taken apart. Ex. S-18; Tr. 319-29, 367-70. Hockenberry procured a brand new fully assembled 1½-inch valve (Ex. J-2) and another partly assembled exemplar valve (Ex. J-1) to compare to the accident valve. He found that the male threads on the accident valve's tailpiece were worn down or stripped, showing a 25% loss of material as compared to the exemplar valve. Ex. S-18; Tr. 310-18, 366-67. In addition, the valve's safe allowable working pressure was rated at just 600 pounds per square inch (psi), which fell below the mine's typical water pressures of 800 psi or greater. Tr. 334-39, 370-73; *see* Exs. S-14, R-5; Ex. R-7; Ex. S-5; Tr. 158-59; 465.

When Hockenberry examined the 6-inch shutoff valve, he was able to rotate the handle to within 3 millimeters of the closed position by applying less than 50 foot-pounds of torque. However, accumulated coal dust and grime in front of the handle stop prevented him from closing it the rest of the way. Ex. S-18; Tr. 349-53. According to the manufacturer's information, it should have taken 225 foot-pounds of torque to close the 6-inch valve. Exs. S-15, R-6; Tr. 355-57. The manufacturer supplies a 22.5-inch leverage bar with each 6-inch valve that

⁵ Michael Hockenberry has a Master's degree in mechanical engineering and has worked for MSHA as a Fire Protection Engineer since 2000. In this capacity, he provides technical assistance relating to fire prevention and fire suppression systems in mines. He also holds an assistant mine foreman certification in the state of West Virginia. Tr. 303-07; Ex. S-19.

can be attached to the handle with a cotter key to increase the torque exerted. Tr. 156-57, 196-99; Ex. S-5; *see* Photograph S-11 (new valve with leverage bar). At the Buchanan Mine, however, these leverage bars were customarily detached from the valves as soon the valves were brought into the mine. Tr. 89, 197, 223, 421-22, 581-82.

After the conclusion of the accident investigation, Inspector Hess issued two enforcement actions against Consol. Citation No. 8190902 alleged that the Respondent's act of reusing the 1½-inch valve after it had been pulled apart by the collision with the shuttle car constituted a failure to maintain equipment in safe operating condition, in contravention of 30 C.F.R. § 75.1725(a). Exs. S-16, R-1. Order No. 8190903 alleged that the Respondent's failure to maintain the 6-inch shutoff valve in usable and operative condition violated the requirement that firefighting equipment must be maintained in usable and operative condition under 30 C.F.R. § 75.1100-3. Exs. S-17, R-2.

The Respondent removed the cited valves from service immediately after the accident, abating the violations. Exs. S-16, S-17, R-1, R-2; Tr. 242-43. The Respondent later took more extensive steps, some partly in response to other non-contributory violations, to make the mine safer. These steps included replacing all the two-piece 1½-inch valves in the mine with valves that had a soldered connection and were rated to handle 1000 psi; repositioning the fire valve assemblies to move them away from the haulage track; partnering with MSHA to develop an action plan for equipment moves; changing the policies for fixing damaged water line components; and hanging heavy-duty steel leverage bars above each 6-inch shutoff valve in the mine. Tr. 212-16, 223-24, 242-43, 451-55; *see* Exs. R-8 & S-22 (containing enforcement actions issued by state of Virginia, with evidence of corrective actions taken).

II. LEGAL PRINCIPLES

A. Gravity/S&S

The gravity of a violation is generally expressed as the degree of seriousness of the violation. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). Gravity is measured in terms of the likelihood of injury, the type of injury expected, the number of persons affected, and whether the violation is significant and substantial (S&S). *See Energy West Mining Co.*, 18 FMSHRC 565, 571 (Apr. 1996) ("In considering the gravity of a violation, the Commission has generally considered the likelihood of an occurrence of the hazard against which a standard is directed and the severity of the resulting injury.").

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Company*, the Commission set forth the following four-part test to determine whether a violation is properly designated S&S:

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

6 FMSHRC 1, 3-4 (Jan. 1984); accord *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988); *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1075 (D.C. Cir. 1987). The inspector’s judgment is also an important element of an S&S determination. *Wolf Run Mining Co.*, 36 FMSHRC 1951, 1959 (Aug. 2014); *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 563 n.6 (Aug. 2005); *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Mathies*, 6 FMSHRC at 5. The S&S determination must be based on the particular facts surrounding the violation at issue. *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); see, e.g., *Wolf Run*, 36 FMSHRC at 1957-59 (remanding S&S finding for further consideration of relevant circumstances).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. This element is established only if the Secretary proves “a *reasonable likelihood* the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). Evaluation of the reasonable likelihood of injury should be made assuming “continued normal mining operations,” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984), i.e., the evaluation should be made “in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989).

The S&S nature of a violation and the gravity of the violation are not synonymous. Gravity is an element that must be assessed for every violation, while an S&S determination is made only in the context of enhanced enforcement under section 104(d) of the Mine Act. The gravity assessment and a finding of S&S are frequently based upon the same or similar factual circumstances, *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987), but the focus of the inquiries differs. The Commission has pointed out that the focus of the gravity inquiry “is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC at 1550; see also *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that notwithstanding likelihood of injury, some violations are serious in the context of the standard violated and the Mine Act’s deterrent purposes – for example, violations of an important safety standard; violations demonstrating recidivism or defiance on the operator’s part; or violations that can combine with other conditions to set the stage for disaster).

B. Negligence/Unwarrantable Failure

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Mine Act, an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). High negligence is defined as having occurred in connection with a violation when “[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances.” *Id.* § 100.3 Table X. The Commission has stated that a finding of high negligence “suggests an aggravated lack of care that is more than ordinary negligence.” *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC __, slip op. at 5-6, Nos. WEVA 2011-952-R & WEVA 2011-2480 (Dec. 19, 2014) (citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

More serious consequences can be imposed under the Mine Act for violations that result from the operator’s unwarrantable failure to comply with mandatory health or safety standards. The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991); *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors or mitigating circumstances exist. These factors often include (1) the extent of the violative condition, (2) the length of time the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator’s knowledge of the existence of the violation, (6) the operator’s efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *see Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2011); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries*, 23 FMSHRC at 711; *Capital Cement*, 21 FMSHRC 883, 892-93 (Aug. 1999); *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998); *see Spartan Mining Co.*, 30 FMSHRC 699, 715, 720 (Aug. 2008).

The factors listed above must be viewed in the context of the factual circumstances of a particular violation, and it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that the violation is unwarrantable. *Wolf Run*, 35 FMSHRC at 3520-21; *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1193 (Oct. 2010); *IO Coal Co.*, 31

FMSHRC 1346, 1351 (Dec. 2009). However, all factors that are relevant should be considered. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007).

C. Violations and the Notice Requirement

The Commission generally applies the reasonably prudent person test to determine whether a violation has occurred under the Mine Act. The reasonably prudent person test is a means of determining whether the operator has sufficient notice of the meaning of the cited regulation to be charged with violating it. *See LaFarge North America*, 35 FMSHRC 3497, 3500 (Dec. 2013). MSHA may charge an operator with a violation of a safety or health regulation only when the operator has actual notice of MSHA's interpretation of the regulation, or when "a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982); *see LaFarge*, 35 FMSHRC at 3501. Thus, even if the operator does not have explicit notice of a specific prohibition or requirement contained in a safety or health standard, the operator still can be charged with a violation if a reasonably prudent person familiar with the protective purposes of the cited safety or health standard would have ascertained the specific prohibition or requirement contained therein and realized that under the factual circumstances there was a violation. *LaFarge*, 35 FMSHRC at 3501; *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8190902

1. *The Violation*

Citation No. 8190902 alleges that Consol's act of reusing the 1½-inch bronze connector valve after the shuttle car struck and separated it constituted a failure to maintain equipment in safe operating condition, in violation of the mandatory safety standard at 30 C.F.R. § 75.1725(a). Exs. S-16, R-1. This regulation mandates: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be immediately removed from service." 30 C.F.R. § 75.1725(a).

As noted by the Secretary in his post-hearing brief, Consol does not genuinely dispute that a violation of 30 C.F.R. § 75.1725(a) occurred when the 1½-inch valve was returned to service after being struck by the shuttle car. The valve was a component of the mine's water supply and fire suppression systems and constituted "stationary equipment," bringing it within the ambit of the cited regulation. When the shuttle car struck the valve, the force of the impact broke the valve in two. The valve's tailpiece was still attached to the 6-inch water line but water was shooting out where the body of the valve should have been connected. Tr. 641. The body of the valve is normally connected to the tailpiece by a set of internal threads sealed with Loctite, but this internal threaded connection had been forcibly pulled apart by the collision. The witnesses uniformly testified they had not previously recognized that this type of valve could come apart. *See* Tr. 92-93, 115, 277-78, 458-59, 533, 547, 585, 633. MSHA's witnesses

testified the internal threads could not have escaped damage after being forcibly pulled apart. Tr. 68-71, 178-80, 279-81, 331-33, 398-99. Consol's witnesses seemed to agree that the valve would have incurred damage under these circumstances and should have been replaced rather than returned to service. *See, e.g.*, Tr. 427, 462-68, 555-57, 644. Indeed, the valve proved to be in unsafe condition, because it split in two again at the same threaded connection several minutes after it was returned to service and placed under pressure. Subsequent analysis of the valve revealed damage to the internal threaded connection, including stretching of the female threaded portion and loss of material on the peaks of the male threads. Tr. 67, 85-87, 107-08, 143-44, 297-99, 310-18, 366-67; Ex. S-2 at 21, 27; Ex. S-3 at 18-20; Exs. R-8 & S-22 at 11-12; Ex. R-9 at 2; Ex. S-18.

I find that the 1½-inch valve was in unsafe condition as soon as it was pulled apart by the shuttle car and should have been immediately removed from service. A reasonably prudent miner who knew the valve had been struck and forcibly pulled apart by the shuttle car would have recognized that the valve's structural integrity was compromised under the circumstances and would have immediately removed it from service. However, the Respondent placed the valve back in service instead. Under these circumstances, a violation of 30 C.F.R. § 75.1725(a) is established.

2. S&S Designation and Gravity

In assessing the gravity of this violation, Inspector Hess indicated that one fatal injury had occurred. Exs. S-16, R-1. He also designated the violation S&S. Consol does not directly dispute MSHA's gravity findings or the S&S designation.

I find that this violation meets the four elements of the *Mathies* test and therefore I uphold the Secretary's characterization of the violation as S&S. As discussed above, the Secretary has established an underlying violation of a mandatory safety standard, satisfying the first *Mathies* element. Consol's use of the 1½-inch valve while it was in unsafe condition contributed to the risk or hazard that the valve would fail again when placed under pressure during continued normal mining operations, satisfying the second *Mathies* element. The remaining *Mathies* elements are reasonable likelihood of injury and reasonable likelihood that such injury will be reasonably serious in nature.

The hazard that the valve would fail again was reasonably likely to result in injury based on the particular facts surrounding the violation. The valve was connected to a water line carrying pressurized water. The water pressure at the Buchanan Mine was known to be unusually high. Tr. 276-77, 460, 488-89, 504-05. Inspector Hess obtained water pressure measurements exceeding 800 psi, more than 200 psi greater than the 1½-inch valve's 600 psi rating. Tr. 158-59, 192-94; Ex. S-5; *see* Exs. S-14, R-5; Ex. R-7. The valve could be closed to shut off the water supply to the manifold at crosscut #61, in which case pressure would build up behind the 1½-inch valve's ball plug; failure of the valve would cause a sudden outrush of the highly pressurized water. On the night the violation occurred, the valve was closed in order to shut off the water supply to the manifold so Saunders and Green could finish repairing it. Tr. 59; Ex. S-2 at 9-10; Exs. R-8 & S-22 at 5-7; Ex. R-9 at 3. Saunders and Green were working directly above and in front of the damaged 1½-inch valve while it was under pressure, and at least seven other miners were standing nearby. *See* Tr. 525; Ex. S-13; Exs. R-8 & S-22 at 7.

The manifold was partly disassembled such that the only pipe fitting holding it in place was the damaged 1½-inch valve. Under these circumstances, it was reasonably likely that the failure of the 1½-inch valve would cause a piece or pieces of the manifold to be blown apart by escaping pressurized water, injuring one of the nearby miners. In fact, this event occurred. Considering all the foregoing facts, I find that the third *Mathies* element is satisfied.

There was also a reasonable likelihood that any injury caused by the violation would be of a reasonably serious nature. The 1½-inch valve and the other components of the manifold were heavy metal objects. See Exs. J-1, J-2. The water pressure at the mine was high enough to propel these objects through the air with sufficient force to cause serious injuries to anyone within striking distance, as evidenced by the fact that the fire valve assembly fatally struck Saunders and was propelled more than twenty feet across the #5 entry even after bouncing off of another miner and the mine roof. Ex. S-2 at 10, 14; Ex. R-9 at 5, 8. I find that the fourth *Mathies* element is satisfied, and I uphold the Secretary's S&S designation for this violation.

The gravity inquiry focuses on the seriousness of the violation and "the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). A judge can find that the gravity of a violation is very serious based solely on the potential effect of the violation. See, e.g., *PBS Coals, Inc.*, 30 FMSHRC 1087, 1091-92 (Nov. 2008) (ALJ) (finding violations that led to nine miners being trapped in a flooded section were "of the utmost gravity" even though the miners were rescued). In this case, the actual effect of the violation was a fatality. I find that this violation was extremely serious in view of its contribution to a fatality. See *Madison Branch Mgmt.*, 17 FMSHRC 859, 873 (June 1995) (Doyle and Holen, Comm'rs, dissenting on other grounds) (noting violation was very serious in view of fatality); *Spartan Mining Co.*, 29 FMSHRC 465, 481 (June 2007) (ALJ) ("Obviously, the gravity of the violation is extreme as evidenced by the fatality in this case."), *vac'd in part on other grounds*, 30 FMSHRC 699 (Aug. 2008).

3. *Negligence and Unwarrantable Failure*

Hess assessed this violation as resulting from the operator's high negligence and issued the citation under section 104(d)(1) of the Mine Act, stating that the violation resulted from Consol's unwarrantable failure to comply with a mandatory standard. The narrative portion of the citation includes the following explanation for his decision to charge unwarrantable failure:

The operator and its agent displayed aggravated conduct constituting more than ordinary negligence by allowing this damaged and separated ball type closure valve to be reused. Mine management, including the foreman assigned to supervise the miners making the repairs, were aware that the water valve assemblies were frequently struck and damaged during movement of oversized equipment. This knowledge should have prompted the operator and his agent to take extra care in the repair or replacement of these water valve assemblies. This extra care would include following the ball valve manufacture[r]'s recommendations which state that this is a throw away item and should not be repaired or rethreaded if a separation within the threaded portions occur[s]. Also management, despite the numerous previous times fire valve assemblies were struck and damaged, failed to improve the design and layout of the fire valve

assemblies in this mine to prevent them from being struck during equipment moves. This is an unwarrantable failure to comply with a mandatory standard.

Exs. S-16, R-1. Inspector Hess additionally noted that a foreman, Addington, had been in plain sight and hearing distance of the violation who could and should have stepped in to take control of the situation and prevent the valve from being reused. Tr. 206-12, 248-55, 285-88. At the hearing, Hess explained that his characterization of the 1½-inch valve as a “throwaway item” was based on the manufacturer’s recommendations and the information fire protection engineer Hockenberry had provided. Tr. 204-05, 273-75. Although mine management did not see the manufacturer’s information prior to the accident, Hess felt that the other circumstances supported a finding of aggravated conduct. Tr. 268-69, 285-86. Hess’s position was that mine management as a whole displayed a high degree of negligence because management was aware fire valve assemblies had been hit during equipment moves in the past but failed to take any action to mitigate the problem until after the fatality occurred. Tr. 212, 257, 294.

The Secretary requests that Hess’s unwarrantable failure designation be upheld, citing the high degree of danger posed by the violative condition; the obviousness of the condition; the presence of a supervisor at the accident scene; the operator’s knowledge that the water pressure in the mine was unusually high and that components of the water supply system were regularly struck during equipment moves; and the operator’s failure to take any concomitant precautions to ensure the safety of miners in the face of this knowledge. Sec’y’s Br. at 11-24.

The Respondent argues this citation should be modified to a section 104(a) citation, contending that the violation did not result from aggravated conduct and that the factors necessary for an unwarrantable failure finding are not present. Counsel for the Respondent asserts that Addington did not observe the 1½-inch valve before it was screwed back together, did not watch Saunders and Green put it back together, and was unaware of the danger posed by reattaching the two pieces of the valve. Resp.’s Br. at 16. Counsel contends that the testimony does not establish that damaging fire valve assemblies was a common occurrence during equipment moves. *Id.* at 17. Counsel further contends that MSHA did not place the Respondent on notice that greater efforts at compliance were necessary prior to the accident, nor did the Respondent have a copy of the 1½-inch valve manufacturer’s recommendations such as would have provided notice that valve repairs should not be attempted. *Id.* Counsel argues that the mine’s high water pressure was a “non-issue” that posed no hazard despite exceeding the 1½-inch valve’s 600 psi rating because the valve had a safety factor of 2.5; no other valve in the mine had ever failed; and everyone (including MSHA) was aware of the high water pressure prior to the accident. *Id.* at 18.

As noted above, factors that should be considered in assessing an unwarrantable failure determination include the length of time that the violation existed, the extensiveness of the violation, whether the operator was placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, the operator’s knowledge of the existence of the violation, and the involvement of a supervisor.

(a) Duration of Violative Condition

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1198 (Oct. 2010); *Coal River Mining, LLC*, 32 FMSHRC 82, 92 (Feb. 2010); *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1352 (Dec. 2009); *Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999). Even imperfect evidence of duration should be taken into account by the judge. *Coal River*, 32 FMSHRC at 93.

The violation at issue here is the Respondent's act of reusing the 1½-inch valve after it was struck by the shuttle car. This violation began when the 1½-inch valve was placed into service in unsafe condition. Eyewitness B.J. Davis testified that less than five minutes elapsed before the valve blew apart again, causing the water manifold to fly off of the water line and fatally strike Saunders. Tr. 515-16. Similarly, Addington estimated that five to ten minutes had elapsed. Ex. S-12. Thus, the violation lasted only a few minutes, but long enough to cause a fatal accident.

(b) Extensiveness of Violation

The purpose of analyzing the extent of a violation is to give consideration to the scope or magnitude of the violation. *E. Assoc'd Coal Corp.*, 32 FMSHRC at 1195. Sometimes extensiveness can be assessed in terms of quantity or with regard to the physical dimensions of the area affected. *Dawes Rigging & Crane Rental*, 36 FMSHRC __, slip op. at 6, No. LAKE 2011-206-M (Dec. 10, 2014) (noting that extensiveness "has traditionally been determined by examining the extent of the affected area as it existed at the time the citation was issued"); see, e.g., *Twentymile Coal Co.*, 36 FMSHRC 1533, 1539 (June 2014) (noting "geographic extent" of coal accumulations supports unwarrantable failure finding); *IO Coal*, 31 FMSHRC at 1352 (instructing ALJ to consider number and distribution of unsupported kettle bottoms in assessing extent of violation); *Jim Walter Res., Inc.*, 19 FMSHRC 480, 485 (Mar. 1997) (noting judge's finding of 200 defective rollers bears on extent of belt maintenance violations); *id.* at 486-88 (analyzing extent of accumulations in terms of their depth, length, and width); *Peabody Coal Co.*, 14 FMSHRC 1258, 1259, 1261 (Aug. 1992) (describing physical dimensions of five "large" accumulations and finding them extensive). Other factors that may be relevant to extensiveness include the number of persons affected by the violation and the measures required to abate it. See, e.g., *Dawes Rigging*, slip op. at 6 (finding violation was not extensive because it endangered only one person); *E. Assoc'd Coal Corp.*, 32 FMSHRC at 1196 (instructing ALJ to consider extensiveness of abatement measures needed to terminate the citation); *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002) (upholding extensiveness finding based on extent of employees' exposure to the hazard); *Jim Walter Res.*, 19 FMSHRC at 486 (finding that accumulation was extensive when it took 11 man-hours to clean it up).

The Commission has stated that the extensiveness inquiry "ultimately is a fact question concerning the material increase in the degree of risk to miners posed by the violation," and should account for the broad scope of the circumstances surrounding the violation. *E. Assoc'd Coal Corp.*, 32 FMSHRC at 1196. For example, in one recent case, the Commission relied on numerous factors to conclude that the coal accumulations in question were extensive, including

the depth and dryness of the accumulations, the number of men and hours required to clean them up, the number of entries affected, and a miner's testimony that the spillage was more extensive than normal. *McCoy Elkhorn Coal Company*, 36 FMSHRC 1987, 1993-94 (Aug. 2014).

In this case, the violation involved just one valve. However, the unsafe condition of the valve endangered numerous people. At least nine miners were located at the intersection of the #5 entry and the #61 crosscut in the vicinity of the valve while it was in unsafe condition. *See* Tr. 525; Ex. S-13; Exs. R-8 & S-22 at 7. The valve's failure allowed the water manifold it was supposed to be anchoring to fly a total distance of 23 feet 4 inches out into the intersection, striking two miners and the mine roof in the process. Ex. S-2 at 10, 14; Ex. R-9 at 5, 8. Thus, the violative condition was extensive in that it endangered all of the miners in the intersection.

The violative condition was also extensive in that it involved an extensive degree of damage to the 1½-inch valve. The valve had been struck by a massive piece of machinery and torn into two pieces at a threaded, sealed connection where it was never ordinarily taken apart.

To terminate the citation, the valve was immediately removed from service. This was not an extensive abatement effort, but the Respondent subsequently undertook more extensive efforts (some partly in response to other enforcement actions not at issue here) to eliminate the underlying conditions that led to the violation. State and MSHA investigators had discovered the mine had a history of water line components being struck during equipment moves because the 6-inch water line was positioned too close to the haulage track. Tr. 184-89; Ex. S-1 at 13; Exs. R-8 & S-22 at 7. Of the many witnesses with work experience at the Buchanan Mine, all but one indicated they had previously participated in equipment moves where a fire valve assembly was struck, or were aware of this occurring, or had disassembled valves during equipment moves to avoid hitting them. Tr. 102, 432-33, 466-67, 530, 547-49, 570-72, 624, 632-33. However, the mine did not have instructions or a policy in place specifically addressing what to do when water line components were struck and damaged or instructing miners not to reuse damaged components. *See* Tr. 441-45, 466-67. After the accident, the Respondent rerouted the entire water line to move it farther away from the perils of the haulage track and implemented new policies for safely repairing damaged water line components. Exs. S-16, R-1. Thus, extensive efforts were required to abate the underlying problems at the mine that had permitted the occurrence of the violation.

(c) Operator's Notice that Greater Compliance Efforts Were Necessary

An operator's history of prior similar violations or other forms of specific warnings may be relevant to the unwarrantable failure analysis. The prior violations and warnings are relevant to the extent they engendered in the operator a heightened awareness of a safety problem requiring corrective action, and to the extent they placed the operator on notice that greater efforts were necessary for compliance with the standard that was violated. *See Dawes Rigging*, slip op. at 7; *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (citing *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994)); *IO Coal*, 31 FMSHRC at 1353; *Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001); *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997).

Recently, the Commission has clarified that a significant difference exists between the forms of notice that inform an operator of the Secretary's interpretation of a safety standard (i.e., the forms of notice that are considered in determining whether the operator may properly be charged with a violation) and the forms of notice that inform an operator that greater efforts at compliance are needed for purposes of an unwarrantable failure analysis. *Dawes Rigging*, slip op. at 7 n.5. Constructive notice suffices in the former context. By contrast, in determining whether an operator is on notice that greater efforts at compliance are needed, the judge must look to the operator's history of violations, discussions with inspectors, and other forms of specific warnings from MSHA to determine if the operator has been placed on notice of a persistent unsafe condition or practice at its mine. *Id.* (citing *Consolidation Coal Co.*, 23 FMSHRC at 595; *Lion Mining Co.*, 18 FMSHRC 695, 700 (May 1996); and *Peabody Coal Co.*, 14 FMSHRC 1258, 1262 (Aug. 1992)); *but see Windsor Coal Co.*, 21 FMSHRC 997, 1004 (Sept. 1999) (directing ALJ to consider all relevant record evidence not limited to specific warnings from MSHA, including shift book reports, to determine whether operator was on notice of recurring safety problem in need of correction); *Jim Walter Res., Inc.*, 19 FMSHRC 480, 485 (Mar. 1997) (noting management's prior receipt of complaints about recurring problem bears on notice).

As discussed above, it was common knowledge at the Buchanan Mine and mine management was aware that components of the 6-inch water line alongside the haulage track were at risk of being struck and damaged during equipment moves. *See, e.g.*, Tr. 432-33 (safety supervisor's testimony showing he had previously discussed such incidents with miners); 571 (shift foreman's testimony stating fire valves would be struck once every eight or ten moves and it was "always something you were aware of"). In fact, the shuttle car that Green, Saunders, and Addington were transporting on January 11, 2012 had struck a fire valve assembly earlier that very day as it was being moved through the mine during the previous shift. Tr. 176-78, 255; Exs. R-8 & S-22 at 3.

The Secretary argues that a 2008 injury at the mine had placed mine management on notice that working on water manifolds was hazardous. Sec'y's Br. at 21. A manifold had been propelled into a miner's face by pressurized water in 2008, giving the miner a broken nose and lacerations that required sutures. Ex. S-21. The Secretary contends that because mine management was aware of this accident and was also aware that fire valves were frequently struck during equipment moves, it was on notice of a hazard that needed to be addressed. Sec'y's Br. at 21. I agree that the evidence shows mine management was aware of a recurring problem bearing on the safety of equipment at its mine.

However, MSHA was not aware of this problem. MSHA did not issue any violations or warnings to the Respondent or engage in any discussions with mine management that would have placed the Respondent on notice that greater efforts were required to comply with 30 C.F.R. § 75.1725(a) in terms of ensuring water line components were being maintained in safe operating condition. Mine management's awareness of the general problem with water line components being struck does not constitute specific notice that the Respondent was required to take greater efforts in order to comply with § 75.1725(a). *Cf. E. Assoc'd Coal Corp.*, 32 FMSHRC at 1199 (rejecting Secretary's argument that operator's experience maintaining roof put it on notice that greater efforts at compliance with roof safety standard were necessary).

(d) Obviousness of Violation

The obvious nature of a violation can constitute a factor supporting an unwarrantable failure finding. *E.g.*, *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3521 (Dec. 2013); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1770 (Nov. 1997).

This violation was very obvious. The internal threaded connection between the 1½-inch valve's two pieces had multiple, very fine threads. Tr. 96, 144-47, 395, 563. Any person familiar with valves or threaded connections of any sort would know that the valve required multiple turns and proper alignment to put back together. Here, the testimony was that the threads were not carefully checked for damage and Saunders reattached the two pieces of the valve forcibly with a wrench. Tr. 514, 527-28, 641, 652-54. This should have been an indication that the connection was not properly resealed. MSHA's witnesses testified it would be "intuitive to believe" (Tr. 331) the valve's internal threaded connection sustained damage when it was forcibly pulled apart by the shuttle car without being unthreaded. Tr. 68-71, 178-80, 279-81, 331-33, 398-99. I agree. Any person familiar with such a valve would readily understand that if it is shorn apart by blunt force, the threads would be damaged. Whether the damage was visible or not, it would be evident to any reasonable person familiar with the mining industry that this valve was damaged beyond use.

Moreover, even if it had not been obvious that the 1½-inch valve's internal threaded connection was damaged, the valve itself plainly was in no condition to be safely placed back in service after being torn apart by the shuttle car. The valve manufacturer's Installation, Operation, and Maintenance Manual (Exs. S-14 and R-5), which is freely available online, (Tr. 380), states: "Repair or replacement of two piece ball valves internal parts is not recommended. Damage can occur to the body and tailpiece during disassembly that would make the valve inoperable." Consol's supplier testified that the manufacturer will not sell individual parts for these valves and he has never heard of anyone disassembling or attempting to repair them. Tr. 538-40. The valve was commonly regarded by miners as a single unit and most witnesses said they were unaware before the accident that it could come apart. *See* Tr. 92-93, 115, 277-78, 458-59, 533, 539, 547, 585, 633. However, after being struck by the shuttle car, it had broken into two pieces. Tr. 641. The Loctite that ordinarily seals the seam between the body and tailpiece, creating the impression that the valve is one piece, would have been noticeably disrupted and the seal destroyed. The inner chrome ball plug and the very guts of the valve would have been exposed. It would have been very obvious that the valve was no longer in safe operating condition and should not have been placed back in service.

(e) Degree of Danger Posed by Violation

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3522 (Dec. 2013); *Coal River Mining*, 32 FMSHRC at 94; *IO Coal*, 31 FMSHRC at 1355; *see, e.g., Midwest Material Co.*, 19 FMSHRC 30, 34-35 (Jan. 1997); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988).

The violation at issue here was highly dangerous. While this violation was occurring, water was discharging from the breached location on the water line in a constant stream, even though the miners had tried to turn the water off before making repairs to the breached manifold. Tr. 526-27, 621-23, 643, 650-52. The miners had not tried to bleed off residual water before performing the repairs and had not checked to make sure the shutoff valves were closed all the way. Tr. 647, 652. In fact, the 6-inch shutoff valve at crosscut #62 was not completely closed. This allowed water to flow into the damaged 1½-inch valve while it was in unsafe condition. In light of the unsafe condition of the valve, the proximity of the miners who were making repairs to the manifold, the known high water pressure⁶ at the mine (see Tr. 276-77, 459-61, 488-89, 504-05), and the fact that water continued to flow into the valve and the partly disassembled manifold, it should have been obvious that the violative condition posed a very high degree of danger, a danger that was unfortunately realized when the 1½-inch valve failed a second time while the victim was working directly in front of it.

(f) Operator's Knowledge of Existence of Violation

An operator's actual or constructive knowledge of the existence of a violation is relevant to the unwarrantable failure analysis. Constructive knowledge may be established where the operator reasonably should have known of the violative conduct. *Coal River Mining, LLC*, 32 FMSHRC 82, 90-92 (Feb. 2010) (finding that knowledge may be established where operator's awareness of predicate circumstances meant it reasonably should have known of violation); see also *E. Assoc'd Coal Corp.*, 32 FMSHRC at 1199; *IO Coal*, 31 FMSHRC at 1357; *San Juan Coal Co.*, 29 FMSHRC at 133-34; *Drummond Co., Inc.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991); *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-04 (Dec. 1987).

As discussed above, this violation was very obvious. Addington, a foreman and agent of the operator, was present at the scene of the violation. Addington should have recognized the obvious violation that was occurring in front of him.

The Respondent contends Addington did not observe any damage to the 1½-inch valve and was unaware it had separated in two because Green and Saunders had already put the manifold back on the fire tee when Addington returned to the scene of the accident after calling a supervisor. Resp.'s Br. at 16. However, Addington reasonably should have known of the violation in his capacity as the miners' supervisor, even though he did not participate in the attempt to put the manifold back together. He knew that an oversized piece of equipment had just struck and breached this component of the water line, necessitating repairs. As the person with supervisory authority, he should have assessed the condition of the water line components that had been struck by the shuttle car and supervised the efforts to repair them. At the very least he should have inspected the valve and ensured the water was cut off. If he had done so, he would have realized that Green and Saunders were reusing a valve that had been torn apart by blunt force. Instead, however, Addington apparently spent several minutes drying off in a

⁶ Although I agree with Inspector Hess's suggestion that the valve could have failed at a lower pressure (Tr. 277), I reject the Respondent's argument that the high water pressure at the mine was a "non-issue" (Resp.'s Br. at 18). The valve's 600 psi pressure rating and safety factor of 2.5 became irrelevant once the valve was damaged. Under the particular circumstances of this case, the mine's high water pressure contributed to the dangerousness of the situation.

nearby crosscut before returning to stand some distance behind Green and Saunders as they were working without providing any instructions or supervision. *See* Tr. 528-34, 610-16, 622, 642, 657. As the supervisor at the scene, Addington was also the point of contact with shift foreman Semones. Addington should have heeded Semones' order to continue moving through the mine and let another crew come to check and repair the valve. In short, Addington was in a position to know of the violative condition and of the need to address it. Addington's knowledge is imputed to the Respondent.

(g) Operator's Efforts in Abating Violative Condition

An operator's prior efforts to abate a violative condition are relevant to the unwarrantable failure analysis, as is the level of priority the operator places on abating conditions for which it has received notice that greater compliance efforts are required. *See IO Coal*, 31 FMSHRC at 1356. However, abatement efforts undertaken after the issuance of the citation are not relevant. *Id.* ("The focus on the operator's abatement efforts is on those made prior to the citation or order.") (citing *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996)); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997); *cf. Consolidation Coal Co.*, 22 FMSHRC 328, 332 (Mar. 2000) (finding that intention to abate in future is irrelevant).

Despite the obviousness and dangerousness of this violation and the presence of a foreman, the Respondent did not remove the 1½-inch valve from service or otherwise abate the violative condition. There is no indication the Respondent would have abated the violation if a fatal accident had not occurred. The mine had no standard method for handling a situation when a component of the water line was struck during an equipment move, *see, e.g.*, Tr. 433, 441-45, 466-67, even though members of mine management such as the mine's safety director and training coordinator were aware that this was a problem, *see* Tr. 432-33, 463. Thus, although shift foreman Semones had directed a different crew to come repair the water line instead of Addington's move crew, Tr. 576-77, there is no indication the different crew would have replaced the defective valve either. Addington also testified that if he had heard Semones direct a different crew to repair the water manifold, he would have ignored the instruction and allowed Green and Saunders to finish their ill-fated repair attempts. Tr. 616-17.

Additionally, even before the events of January 11, 2012, the Respondent had the knowledge and opportunity to take action that could have prevented the 1½-inch valve from being struck by the shuttle car or ensured that miners were better prepared to make repairs in the event of a collision. As discussed above, mine management was aware that components of the water line along the haulage track were sometimes struck and damaged during equipment moves. Addington even testified that he looked for replacement valves before they started the equipment move but none were on hand. Tr. 624, 627; *see* Ex. S-12. Yet it was not until after a fatality occurred that the Respondent moved the water line away from the haulage track, developed an action plan for equipment moves, and overhauled its training policies for repairing water line components. Thus, despite mine management's awareness that damage resulted from equipment moves, management apparently was not sufficiently prepared to respond to such an occurrence. I consider this a failure to abate the violative condition as well. Although MSHA did not specifically warn or instruct Consol to undertake these efforts beforehand, this does not relieve

Consol of responsibility for taking appropriate measures to address known problems potentially bearing on safety in its mine.

Consol's valve supplier testified that it costs \$42 to replace a 1½-inch valve. Tr. 538. Thus, the cost of replacing this throwaway valve would have been low. The cost of implementing a policy of replacing instead of reusing torn up parts would also have been low, while the probability of injury and the seriousness of the injury that actually resulted from the failure to implement such a policy or replace the valve were very high. In this context, the Respondent's failure to abate the violative condition was egregious.

(h) Involvement of a Supervisor

Because supervisors are held to a higher standard of care and entrusted with heightened safety responsibilities, the Commission takes into account the extent of supervisors' involvement in the violation in determining whether the operator's conduct was unwarrantable. *See Coal River Mining*, 32 FMSHRC at 90-92 (remanding for ALJ to consider supervisors' involvement in assessing whether operator had knowledge of violation); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001); *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). Their violative conduct can be imputed to the operator. *Capital Cement*, 21 FMSHRC 883, 892-93 (Aug. 1999).

The Secretary argues that foreman Addington's involvement in the violation is a significant aggravating factor in this case. Sec'y's Br. at 13-19. The Respondent has sought to minimize Addington's involvement in the accident.

At the time of the accident, Addington had 35 years of underground coal mining experience and had typically served as a section foreman in the past, but for the past six months to a year he had regularly worked as an outby foreman as well. Tr. 603-06. He had never worked an equipment move before. Tr. 607. Semones testified that he assigned Addington to the equipment move because Addington was an "extra" foreman that night and he wanted him to gain experience by observing Green and Saunders, who had performed equipment moves before. Tr. 567-68, 597. Addington testified his understanding was that he was to serve as "an extra person to help watch." Tr. 607.

Despite these suggestions that Addington was not acting as a supervisor, the evidence unequivocally shows he was a foreman and was in charge of the move crew on the evening of the accident. Semones acknowledged that he expected Addington to act as a foreman. Tr. 597-99. The rank-and-file miners who testified at the hearing referred to Addington as the "boss" and agreed he was in charge. Tr. 525, 534, 650, 654, 658, 661. Saunders and Green may have had more experience than Addington at equipment moves, but assigning experienced miners to a task does not relieve the operator of the responsibility of providing adequate supervision. To the extent the Respondent is arguing it should be relieved of liability because Addington did not have the requisite experience and training to fulfill his duties as a foreman, I reject this argument. If Addington's ability to fulfill his duties was a concern, the Respondent should have assigned a different foreman or ensured that Addington received the appropriate training before he was put in charge of a move crew. Otherwise, an operator could always limit its liability by assigning foremen to tasks with which they are not familiar or for which they are not fully trained. In

addition, if Addington was unsure what to do when the shuttle car struck the water line, this should have spurred him to stop his men from doing anything until after he had called Semones and received instructions on how to handle the situation properly.

Testimony was elicited suggesting Green and Saunders were top notch employees who took it upon themselves to fix the manifold without Addington's instructions or involvement. *E.g.*, Tr. 434, 514, 544-45, 578. This does not relieve Addington of his supervisory duties. Similarly, apparently in an attempt to explain why a foreman might not seem to be in charge during an emergency or when a problem arises, Semones testified "our people are empowered at the mines." Tr. 595-96. But this is not an excuse for a foreman's inaction in the face of an emergency or problem. An operator should not permit an atmosphere where it is left to rank-and-file miners to determine what to do in a hazardous or unusual situation.

The Respondent argues in its closing brief that Addington was unaware of the danger posed by this violation because he did not know the 1½-inch valve had broken apart. Resp.'s Br. at 16. However, as discussed above, this violation was very obvious and Addington should have been aware of what was going on under his watch. He knew the shuttle car had struck and sheared off a component of the water line and he observed water continuing to discharge from the breached manifold even after the miners had tried to isolate the line. He certainly should have investigated these extraordinary circumstances. Instead, he simply stood by. The Respondent adduced testimony that Green and Saunders did not detect any damage to the threads of the 1½-inch valve and tightened it down with a wrench, Tr. 512-14, 527-28, 641, 651-54, but the Secretary contends that this is irrelevant because Addington should have been supervising them and should have known better than to re-thread the valve. Sec'y's Br. at 19. I agree. As a foreman entrusted with responsibility for the safety of his men, he should have known that when a valve, particularly one that is commonly regarded as a single unit, is torn in two by blunt force, the threads must be damaged and a new valve should be installed. In fact, he apparently did have some inkling that valves struck during equipment moves should be replaced because he looked for replacement valves before he went underground. Tr. 624, 627; Ex. S-12. But Addington's inaction prevented him from learning the 1½-inch valve had broken apart and instructing his men to replace it.

In sum, I find that Addington's conduct demonstrated an inattention to safety that supports a finding of unwarrantable failure in connection with this violation.

(i) Analysis and Weighing of Unwarrantable Failure Factors

I find that the obviousness of this violation and the high degree of danger it posed are significant aggravating factors in this case. *See Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013) (stating that dangerousness, alone, can be enough to justify an unwarrantable failure finding); *Windsor Coal Co.*, 21 FMSHRC 997, 1006 (Sept. 1999) (noting that Commission has relied upon obviousness and dangerousness to support an unwarrantable failure finding). In addition, the involvement of a foreman is a significant aggravating factor. Addington was in plain sight of the violation and should have known it was occurring. As the Respondent's agent, Addington was in a position to step forward and take action to avert the accident that resulted

from the violation. Yet he failed to do so, despite the obviousness of the violation and the clear dangerousness of the situation.

The Respondent argues that the fact that MSHA did not provide notice that greater efforts at compliance were necessary is a significant mitigating circumstance in this case. Resp.'s Br. at 17. However, I find that lack of notice by MSHA is not a significant mitigating factor in light of mine management's general awareness of an ongoing problem with striking and damaging water line components, and in light of the obviousness and dangerousness of the violation, which should have signaled to mine management that the situation that arose on January 11, 2012 required special care. *See Mach Mining, LLC*, 35 FMSHRC 2937 (Sept. 2013) (finding lack of notice by MSHA not a mitigating factor where even without such notice, reasonably prudent person would have recognized frustration of purpose of cited regulation in light of obviousness and extent of violative condition). Lack of notice by MSHA need not be the deciding factor in an unwarrantable failure determination. *See San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007) (remanding with reminder to consider all relevant factors when ALJ relied almost exclusively on notice factor to conclude unwarrantable failure was not present). I find that the notice factor is less relevant to this case than the Respondent's failure to take any action to abate the violation or avoid the injury that resulted despite the obviousness, dangerousness, and involvement of a supervisor.

Although this violation involved just one valve, the violation was extensive in the sense that it placed nine miners in danger and involved extensive damage to the valve. Although the violation lasted for only a few minutes, a violation that exists for a relatively short period of time can properly be deemed an unwarrantable failure when other factors so warrant. *Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010); *see, e.g., Midwest Material Co.*, 19 FMSHRC 30, 34-36 (Jan. 1997) (upholding unwarrantable failure finding when violative condition lasted only a few minutes but posed a high degree of danger, involved a foreman, and may have continued but for occurrence of accident); *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1145-48 (Oct. 1998) (same). I find that the aggravating factors discussed above – particularly obviousness, dangerousness, and involvement of a supervisor – justify a finding of unwarrantable failure in this case and I uphold the Secretary's unwarrantable failure designation.

For all the reasons discussed above, I find that the Respondent displayed an aggravated lack of care that constituted more than ordinary negligence in connection with this violation. Accordingly, I uphold the Secretary's finding of high negligence. *See DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC __, slip op. at 5-6, Nos. WEVA 2011-952-R & WEVA 2011-2480 (Dec. 19, 2014) (stating that high negligence "suggests an aggravated lack of care that is more than ordinary negligence").

B. Order No. 8190903

1. *The Violation*

Order No. 8190903 alleges a violation of 30 C.F.R. § 75.1100-3, which mandates: "All firefighting equipment shall be maintained in a usable and operative condition." Specifically, the

order alleges that the 6-inch shutoff valve⁷ at the #62 crosscut was not maintained in usable and operative condition in that (1) dirt and grime had built up on the outside of the valve and obstructed the path of the handle, and (2) there was no leverage bar nearby that could be used to turn the handle. Exs. S-17, R-2. The Secretary argues that the 6-inch valve could not effectively shut off the water supply due to those two contributing factors. Sec'y's Br. at 25.

The Respondent argues that Order No. 8190903 should be vacated because MSHA did not provide reasonable notice that it considered lack of leverage bars to constitute a violation of the cited safety regulation. The Respondent contends that the sole reason Inspector Hess issued Order No. 8190903 was because of the mine's failure to keep the manufacturer-issued leverage bar attached to the 6-inch valve, but the sole reason the valve did not close all the way was the accumulation of material around the handle stop that allowed a 3-millimeter opening where water could pass through. Resp.'s Br. at 13. The Respondent further contends that MSHA was well aware that leverage bars have always been removed from shutoff valves in the mine for safety reasons, but has never previously had a problem with this practice. *Id.* at 11-13. Therefore, the Respondent argues it did not have fair notice that MSHA interpreted the broad safety regulation at 30 C.F.R. § 75.1100-3 to prohibit the practice. *Id.* The Respondent further asserts that a safeguard requires all mobile equipment at the mine to be provided with a jack and jack bar that could be used to close the 6-inch shutoff valves. *Id.* at 12.

The Respondent's argument ignores the fact that Order No. 8190903 does not charge a violation solely because the Respondent failed to keep the manufacturer's leverage bar on hand. Rather, the order charges that the valve was inoperable in that it could not be closed all the way due to both the missing leverage bar and the Respondent's failure to maintain the valve in clean condition.

The Respondent has essentially conceded a violation of 30 C.F.R. § 75.1100-3 by conceding that the 6-inch valve could not effectively perform its intended function of shutting off the water supply. The valve could not be closed completely. Before the fatal accident, Saunders attempted to close the valve in order to isolate a section of water line so the manifold could be repaired, but water continued discharging. Tr. 526-27, 621-23, 652. After the fatal accident, investigators discovered that the cited 6-inch valve was partially open and was the source of the discharging water. Ex. S-2 at 7, 13; Tr. 63-65, 78, 147-48. The flow lessened somewhat after Inspector Hlywa asked the miners to try to shut the valve all the way off, but water continued to ooze out and the flow was not completely blocked until the valve was replaced. Tr. 48, 51, 75-76, 134-38, 149-50, 589; Ex. S-2 at 20. Michael Hockenberry, MSHA's fire protection engineer, later determined that the 6-inch valve could not be closed all the way even when 50 foot-pounds of force were applied with a torque wrench; the handle was arrested 3 millimeters from the stop by the built up material in front of the stop. Tr. 349-53; Ex. S-18. Thus, as conceded by the Respondent, the shutoff valve was inoperable in that it could not be closed all the way.

The Respondent argues it did not have fair notice of the Secretary's interpretation of § 75.1100-3 in that it was not on notice that MSHA considered removal of the manufacturer's

⁷ The valve is a necessary component of the mine's water delivery system and is identified on the mine's fire protection map. Thus, it constitutes firefighting equipment within the meaning of 30 C.F.R. § 75.1100-3. *See* Tr. 363-64; Ex. R-10.

leverage bars to be a violation. The Respondent's customary practice at its mine was to detach the bars from the valves because they stuck out and could be struck by passing equipment. Tr. 89, 197, 421-22, 581-82. Also, the bars did not always provide sufficient leverage to open and close the valves due to the high water pressure at the mine. Tr. 195, 223, 428-29, 435-36. MSHA had not previously issued any citations or other warnings to the mine regarding its practice of detaching the leverage bars.

Notwithstanding the Respondent's lack of explicit notice from MSHA with respect to the leverage bars, a reasonably prudent miner would have recognized under the circumstances that a violation was occurring when the 6-inch shutoff valve failed to perform its intended function of shutting off the water. The miners assumed the water flowing out of the breached pipe was residual water draining from the isolated section of the water line, Tr. 623, 640, 652, but this was not a reasonably prudent assumption. First of all, a reasonably prudent miner would have allowed the residual water to bleed off before attempting repairs to the water manifold. Moreover, a reasonably prudent miner would have recognized the water was a problem because the flow was consistent and did not decrease in volume.

At the hearing, counsel for the Respondent questioned whether MSHA had performed any calculations to determine how long it would have taken for residual water to drain from the isolated section. Tr. 229-38. But by the testimony of Consol's own witness, water was still coming out of the breach point approximately 90 minutes after the accident. Tr. 589. No calculations are needed to establish this was more than residual drainage. A foreman, Addington, was within plain sight of the manifold while repairs were underway and admittedly noticed that water was discharging at a consistent rate, but took no action to address this obvious problem. Tr. 623. A reasonably prudent supervisor would have checked the shutoff valves or at least instructed the miners to cease repair efforts until the water bled off, which would have led to the realization that the shutoff valve was not in operable condition. Under the circumstances, explicit notice of the Secretary's interpretation of § 75.1100-3 was not necessary. *See LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

As for the Respondent's argument that a safeguard at the mine requires all mobile equipment to contain a jack and jack bar, the Respondent has not provided a copy of the referenced safeguard. Inspector Hess testified that if such a safeguard exists, it may be satisfied without providing a jack and jack bar on some equipment. Tr. 295-96. More importantly, there is no evidence a jack bar was available at the scene of the accident. *See* Tr. 148, 421. I reject the Respondent's suggestion that a safeguard requiring jack bars somehow mitigates or refutes the fact of the violation. I find that this violation occurred.

2. Gravity and S&S Designation

Inspector Hess characterized this as an S&S violation. In assessing gravity, he noted that one fatal injury had occurred. Exs. S-17, R-2. The Respondent disputes the S&S finding, arguing that the violation was not S&S because the lack of a leverage bar played no role in the fatality. Resp.'s Br. at 15. In support of this argument, the Respondent asserts that it took only 50 foot-pounds of torque to close the 6-inch shutoff valve to the position where the handle would have been stopped by the material buildup, and therefore a leverage bar would not have

prevented the accident from occurring because the sole reason the valve would not close was the built-up material on it. *Id.*

First, I reject the Respondent's argument that the lack of a leverage bar played no role in this accident. Although it took only 50 torque-pounds for Hockenberry to squeeze through the built-up material in the path of the handle in order to close the valve as far as it could go, the evidence shows the valve was not closed that far at the time the accident occurred, whereas a leverage bar obviously would have helped move the valve handle closer to that position. Several facts support this conclusion. Before the accident, the water discharging from the valve was described not as a trickle but as a constant flow that was large enough to disrupt the miners' efforts to repair the manifold and to build up rapidly under the damaged 1½-inch valve, causing it to blow apart in just a few minutes. *See* Tr. 58-61; Ex. S-2 at 9-10; Exs. R-8 & S-22 at 5-6. Afterward, when the 6-inch valve had been closed as far as possible (i.e., to 3 millimeters), the flow of water was reduced and was described as an ooze. Tr. 76, 134, 589. The defective 6-inch shutoff valve must have been open substantially more than 3 millimeters before the accident based on these differing amounts of bypassing water. A leverage bar would have helped the miners close this substantial gap, reducing the amount of pressurized water escaping and thereby reducing the hazard, even though the valve still would not be completely closed. Yet the evidence does not show that a leverage bar was available to push through the built up material before the accident. Green did testify that Saunders used a bar to attempt to close the valve at crosscut #62. Tr. 639-40, 646-47. However, Inspector Hess testified that during the witness interviews he had conducted to prepare MSHA's accident report, Green had said Saunders closed the valve with his hand as best he could then tapped the handle a few times with a hammer. Tr. 261. Hess had included this finding in the accident report prepared before the hearing. Ex. S-1 at 4. Having observed the witnesses' demeanors, I find that Hess is a more credible witness than Green, whose inconsistent subsequent account is not corroborated by any other evidence that a bar was available near the shutoff valves the night of the accident. The Respondent's failure to provide a leverage bar contributed to the miners' inability to close the valve and therefore contributed to the fatality.

Turning to the S&S inquiry, I uphold the Secretary's S&S finding for this violation. The Respondent violated a mandatory safety standard, satisfying the first *Mathies* element. The violation was the Respondent's failure to maintain the 6-inch valve in usable and operative condition in that the valve was incapable of being fully closed. This contributed to the hazard that water would bypass the valve when it was supposed to be closed, satisfying the second *Mathies* element.

The hazard that water would bypass the valve was reasonably likely to result in an event that would cause an injury, considering the particular facts surrounding this violation. The water pressure at the mine was unusually high. Tr. 276-77, 460, 488, 504-05; *see* Ex. S-5. The miners tried to close the 6-inch valve to prevent the mine's highly pressurized water from flowing into the area where they were working on the damaged manifold at crosscut #61. Nine miners were in the vicinity of the damaged manifold. Ex. S-13; Exs. R-8 & S-22 at 7; Tr. 525. The manifold was partly disassembled and not all of its components were anchored securely to the water line. Under these circumstances, it was reasonably likely that allowing pressurized water to bypass the 6-inch shutoff valve and flow toward the damaged manifold would cause a piece or pieces of the

manifold to be blown apart by the pressurized water, injuring a nearby miner. Thus, the third *Mathies* element is satisfied.

There was also a reasonable likelihood that any injury caused by the violation would be of a reasonably serious nature. The water pressure at the mine was high enough to propel heavy pipe fittings through the air with sufficient force to cause serious injuries to anyone within striking distance, as evidenced by the fact that the manifold fatally struck Saunders and was propelled more than twenty feet across the #5 entry even after bouncing off of another miner and the mine roof. Ex. S-2 at 10, 14; Ex. R-9 at 5, 8. Therefore, I find that the fourth *Mathies* element is satisfied. Because the four *Mathies* elements are met, I uphold the Secretary's S&S designation for this violation.

Because the 6-inch shutoff valve was incapable of being fully closed, pressurized water bypassed the valve and accumulated in an area that should have been dry and isolated during repair work. After a few minutes, the built up water blew the top of the 1½-inch valve off of its tailpiece, resulting in a fatal injury. In view of this violation's direct contribution to a fatality, I find that its gravity was extremely serious.

3. Negligence and Unwarrantable Failure

Inspector Hess characterized this violation as resulting from the operator's high negligence and issued the order under section 104(d)(1) of the Mine Act, stating in the narrative portion of the order that the violation resulted from unwarrantable failure to comply with a mandatory safety standard:

The operator and its agent displayed aggravated conduct constituting more than ordinary negligence through two failures which resulted in the occurrence of this accident. First the operator failed to ensure that the 6-inch ball valve in use at this mine was provided with the necessary leverage handle to be used when closing and opening the valve. These valves are provided with these leverage handles when purchased from the manufacturer to provide the necessary leverage when opening and closing the valve. It is the responsibility of the consumer to maintain them for use. The second display of aggravated conduct was on the part of the foreman assigned to supervise the miners making the repairs. The negligence [sic] on the part of this foreman was his failure to provide adequate supervision of the miners making the repairs. This foreman was aware that it was a common practice for the fire valve assemblies in this mine to be struck and damaged during the movement of oversized loads. This foreman was also aware of the extremely high water pressures at this mine. These factors should have prompted this foreman to take extra care and provide guidance and instruction to the miners including to ensure that the water line was properly isolated to prevent an inadvertent pressure build up. The foreman was in the immediate area and in plain sight and sound during the repair and took no actions to ensure that the repairs were being conducted properly and safely. This is an unwarrantable failure to comply with a mandatory standard.

Exs. S-17, R-2. At the hearing, Hess reiterated that the 6-inch shutoff valve was not provided

with any readily available tool to close it despite the fact that the manufacturer provided a leverage bar for each valve, leaving it up to the miners to figure out what they would use to close the valve and whether it would be sufficient. Tr. 222-27. Although he conceded that MSHA had not cited this condition in the past, he disagreed that MSHA had “allowed” Consol to remove the leverage bars, noting that Consol was the one that had installed the valves and MSHA had not been aware that the leverage bars were insufficient. Tr. 239-42. Hess also emphasized that a foreman had been present and had noticed water discharging continuously even though only a relatively small section of the water line had been isolated, so the foreman should have realized this was not just residual water draining and checked the shutoff valves. Tr. 224, 227.

The Secretary contends Hess’s unwarrantable failure designation should be upheld, particularly arguing that the Respondent’s failure to provide any sort of leverage bar for the 6-inch valve constituted aggravated conduct. The Secretary contends this condition was extensive, existed for years, and posed a high degree of danger in light of the high water pressure at the mine. Sec’y’s Br. at 28-29. The Secretary further asserts that the Respondent knew of the violative condition and was on notice that greater efforts at compliance were necessary, yet took no action to abate the condition. *Id.* at 29-32.

The Respondent argues that the violation did not result from aggravated conduct. The Respondent asserts that Addington, the foreman who was present, played no role in the attempts to shut off the 6-inch valve and there was nothing he could have done to assist the miners closing the valve. Resp.’s Br. at 14. The Respondent also notes that the miners who attempted to close the valve thought that it was fully shut and would not have been able to hear water bypassing the valve because the belts were running. *Id.* Finally, the Respondent argues that MSHA’s failure to take prior enforcement action against the mine for not maintaining the leverage bars on the valve is a major factor weighing against a finding of aggravated conduct. *Id.*

After considering the following factors, I uphold the unwarrantable failure designation.

(a) Duration of Violative Condition

Although definitive evidence of duration is not available, I find that the 6-inch shutoff valve was in violative condition long enough for the condition to have been noted by shift examiners. Grime and coal dust had accumulated on the valve such that the path of the handle was obstructed. This would not have happened in one shift.

As for the Respondent’s failure to provide a leverage bar, the leverage bar would have been detached from the valve when it was brought into the mine. Tr. 89, 197, 421-22, 581-82. Shift foreman Semones testified leverage bars were usually propped against a timber or placed at a sign nearby. Tr. 581-82. Hess, on the other hand, almost never saw leverage bars in the mine and was of the impression that once detached the bars would usually disappear into the dust. Tr. 197, 223-24. I find that the Respondent effectively discarded the leverage bars as soon as they were brought into the mine.

(b) Extensiveness of Violation

This violation was not extensive in that a single valve was inoperable. However, this violation endangered nine miners. All of the miners were at risk who were in the vicinity of the damaged water line components that were blown apart when pressurized water bypassed the 6-inch valve. *See* Ex. S-13; Exs. R-8 & S-22 at 7; Tr. 525.

Additionally, this violation stems from extensive underlying violative conduct on the Respondent's part. Specifically, even though only one valve was at issue here, the Respondent failed to maintain leverage bars for all of the 6-inch valves throughout the mine. Similarly, although the violation could be terminated simply by removing the cited valve from service, the Respondent later took the more extensive step of providing leverage bars for all the 6-inch valves throughout the mine. Tr. 223-24. This extensive abatement step, while laudable, shows that the underlying conduct leading to the violative condition was extensive because it involved many valves.

(c) Operator's Notice that Greater Compliance Efforts Were Necessary

There is no evidence MSHA issued any prior citations or otherwise warned the Respondent that greater compliance efforts were needed in order to maintain shutoff valves in safe condition in the mine. Members of mine management knew that miners sometimes had trouble closing the 6-inch valves, *see, e.g.*, Tr. 428-29, 434-36, and that the manufacturer's leverage bars were customarily detached from the valves due to clearance issues, Tr. 581-82. However, MSHA had not specifically notified the Respondent that these problems took the valves out of compliance with 30 C.F.R. § 75.1100-3.

(d) Obviousness of Violation

This violation was very obvious.

First, the two underlying conditions that caused the violation (accumulation of grime and coal dust on the valve handle's track and failure to maintain a leverage bar nearby) could have been easily recognized during an on-shift examination.

It also should have been obvious that the 6-inch valve was not functioning properly and therefore was not in safe, operable condition on the night of the accident. After the miners had tried to close the valve, they saw that water continued to flow at a consistent rate into the section of the water line that was supposed to be isolated while the manifold was repaired. Tr. 526-27, 621-23, 643, 650-52. The flow of water was especially noticeable because it impeded Green's and Saunders' efforts to reattach the manifold to the 2-inch pipe to the rock dust distribution machine, to the point that they closed the 1½-inch valve at the bottom of the manifold to stem the flow. Tr. 59; Ex. S-2 at 9-10; Ex. R-8 & S-22 at 5-7; Ex. R-9 at 3. A foreman, Addington, was standing in plain view of the repair work after returning from his phone call with Semones and observed pressurized water flowing continuously from the relatively small section of the water line that was supposed to be isolated. Tr. 621-23. The water line had just been struck with a large piece of equipment, an aberrant occurrence necessitating examinations and supervision to

abate. Addington should have been focused on finding the damage and on the lookout for potential hazards in this situation. The escaping water should have alerted the miners, particularly Addington, that something was obviously very wrong.

Additionally, the 6-inch valve was found to be visibly and audibly open when checked after the accident. Ex. S-2 at 7-8, 13; Tr. 63-65, 78, 147-48, 275-76. The Respondent argues that the hiss of the bypassing water may not have been audible while the belt was running. Resp.'s Br. at 14. However, had Addington acted as a foreman should have and investigated the cause of the flowing water, it would have been obvious as soon as he looked at the 6-inch shutoff valve that the handle was not perpendicular to the water line.

(e) Degree of Danger Posed by Violation

The Respondent's failure to maintain the 6-inch valve in operable condition posed a high degree of danger under the circumstances. The water pressure at the mine was unusually high. Tr. 276-77, 460, 488, 504-05. The violation allowed highly pressurized water to flow into a section of pipe that was intended to be dry and isolated while repair work was performed. This section of pipe had just been struck by a large piece of equipment with enough force to breach the line, meaning water pressure was flowing into an area of piping that had just sustained severe damage. The two miners making the repairs were working directly in front of the damaged area, and at least seven other miners were gathered in the vicinity. *See* Ex. R-13. The violative condition caused a fatality, further demonstrating the high degree of danger it posed.

(f) Operator's Knowledge of Existence of Violation

This violation was very obvious, as discussed above. Numerous miners, including foreman Addington, saw the water continuing to flow out of a section of the water line that was supposed to be isolated. Tr. 621-23. Under these circumstances, the Respondent should have known a shutoff valve was not functioning properly.

The Respondent also had reason to know that leverage bars were not customarily maintained with the 6-inch valves in the mine and that the 6-inch valves were generally coated in grime and coal dust. It was apparently common knowledge in the mine that leverage bars were not maintained with the valves, *see* Tr. 195-97, 223, and the many photographs submitted to the record show that the 6-inch water line was essentially buried in dust. *E.g.*, Photograph R-32; *see also* Tr. 523-24 (miner's testimony that all the valves were dirty because they had been in the mine a long time). As noted above, these underlying conditions that caused the violation were obvious and could have been easily discovered during a pre-shift exam.

(g) Operator's Efforts in Abating Violative Condition

Despite the obviousness of this violation, especially the water continuing to flow after the water line was supposed to be isolated; the high degree of danger the violation posed; and the presence of a foreman, the Respondent did not abate this violation and remove the 6-inch shutoff valve from service until after a fatality had occurred.

Additionally, as was the case with the 1½-inch valve, the Respondent had the knowledge and opportunity long before the fatality occurred to undertake measures that could have prevented the violation from occurring or from being as severe. Specifically, the Respondent could have made sure that leverage bars were provided at every 6-inch valve so that miners would be able to close them. As seen in the many photographs submitted to the record, the 6-inch water line at the Buchanan Mine #1 was essentially buried. *See* Tr. 46. One of Consol's foremen referenced the corrosive effects of high acidity and salt in the mine atmosphere, which caused components of the water supply system to rust together, potentially making it more difficult to turn the valve handles once they were in the mine. Tr. 575, 587. In addition, the mine was known to have abnormally high water pressure. Tr. 276-77, 460, 488, 504-05. Mine management was aware that under these conditions, the leverage bars supplied by the valve manufacturer did not always provide sufficient force to open or close these valves. *See* Tr. 195, 428-29, 435-36, 592-93. The mine's safety supervisor, Darrell Johnson, had heard miners mention the manufacturer's leverage bars were not strong enough and were too short to provide adequate leverage, especially after the valves were taken underground and "the dampness and rust and things set in." Tr. 428-29, 435-36. Nonetheless, the Respondent did not make available any tools that could provide sufficient leverage to operate the valves and did not even ensure that the manufacturer's leverage bars were always available. In short, the Respondent made no effort to address a known, widespread problem, even though the solution could have been as simple as training miners to use a specific available tool to operate the valves. It was left to the miners to find a tool to use and judge its efficacy.

(h) Involvement of a Supervisor

A foreman, Addington, was present while the 6-inch valve was allowing water to bypass and had every reason to recognize an unsafe condition, yet failed to take action to abate the dangerous condition. He did not provide any instructions to the miners, who shut off the water on their own without his help or direction. He did not remind the miners to wait until the residual water drained from the isolated section, nor did he investigate to make sure the water was completely shut off. He saw water flowing from the manifold, Tr. 621, 623-24, yet still he failed even to ask the miners if they had checked the shutoff valves to confirm they were in the "off" position. Green testified he did not remember doing so. Tr. 647. In short, Addington's behavior did not conform to the high standard of care expected of supervisors.

The Respondent asserts that failure to adequately supervise is not an aggravating factor in connection with this violation because Addington had nothing to do with Green's and Saunders' attempts to turn off the 6-inch shutoff valves. Resp.'s Br. at 14. But the Secretary contends that as a supervisor, Addington should have known to check to be sure that the shutoff valves were completely closed in light of the steady stream of discharging water, the amount of time it continued to flow, the very small area of pipe that should have been isolated, and the fact that the slight change in elevation would not have created what was described as a "fountain" of water flowing from the pipe. Sec'y's Br. at 28. I agree that under these circumstances, Addington displayed a disregard for the safety of his men in failing to investigate the situation. Further, his complete lack of involvement in shutting off the valves does not mitigate his conduct because as the person with supervisory authority, he should have in fact provided supervision.

(i) Weighing the Factors

This violation involved just one valve, but was extensive in that it endangered nine miners and stemmed from extensive underlying negligence in the Respondent's failure to maintain leverage bars for the 6-inch valves throughout the mine despite the knowledge that closing the valves presented problems. The underlying conditions that contributed to the violation, missing leverage bars and failure to maintain the 6-inch valve in clean condition, had lasted for a lengthy indeterminate period before the violation was abated. I find that these are aggravating factors. However, the most important aggravating factors for this violation are the obviousness of this violation, the high degree of danger it posed, the involvement of a supervisor who should have known this obvious violation was occurring, and the Respondent's concomitant failure to take any abatement action before a fatality occurred. I find that these factors support a finding of reckless disregard for safety and higher than average negligence.

The Respondent argues that MSHA's failure to take prior enforcement action against the mine for missing leverage bars is a "major factor" showing this violation did not result from aggravated conduct. Resp.'s Br. at 14. However, I find that lack of notice by MSHA is not a significant mitigating factor in light of mine management's general awareness of the conditions that caused the violation, and in light of the obviousness and dangerousness of the violation, which should have alerted the Respondent that heightened care was needed. *See Mach Mining, LLC*, 35 FMSHRC 2937 (Sept. 2013). As noted above, lack of notice by MSHA need not be the deciding factor in an unwarrantable failure determination. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007). The Commission has emphasized that while all relevant factors must be considered, a judge may properly accord unequal weight to the factors or determine that some factors are not relevant. *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520-21 (Dec. 2013); *E. Associated Coal Corp.*, 32 FMSHRC 1189 (Oct. 2010); *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). In this case, the lack of notice by MSHA that greater compliance efforts were needed is outweighed by the very significant aggravating factors discussed above. For the reasons discussed above, I uphold the Secretary's unwarrantable failure finding.

For all the reasons discussed above, the Respondent displayed an aggravated lack of care that constituted more than ordinary negligence in connection with this violation. Accordingly, I also uphold the Secretary's finding of high negligence.

IV. CIVIL PENALTIES

A. Legal Principles

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties under the Mine Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect of the penalty on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. *Id.*; *Mize Granite Quarries, Inc.*, 34 FMSHC 1760, 1763-64 (Aug. 2012).

A penalty assessment is an exercise of discretion bounded by proper consideration of the statutory penalty criteria and the deterrent purposes underlying the statutory penalty scheme. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000); *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *see also Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-69 (Aug. 2012) (explaining deterrence is “central tenet” of penalty scheme and permitting ALJ to consider potential deterrent effect beyond the six penalty criteria); *Cantera Green*, 22 FMSHRC 616, 620 (May 2000) (noting “broad discretion” accorded to ALJs). The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA’s Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Cantera Green*, 22 FMSHRC at 621; *Sellersburg Stone*, 5 FMSHRC at 293; 29 C.F.R. § 2700.30(b). However, in considering the six penalty criteria and assessing a penalty, the ALJ must make findings of fact sufficient to give the operator notice of the basis for the penalty and to provide a factual basis upon which the Commission can perform its review function. *Martin Co. Coal Corp.*, 28 FMSHRC 247 (May 2006); *Cantera Green*, 22 FMSHRC at 620-21; *Rushford Trucking*, 22 FMSHRC at 600-01; *Sellersburg Stone*, 5 FMSHRC at 292-93; *see also* 29 C.F.R. § 2700.30(a).

B. Penalty

For each of the two violations the Secretary seeks a \$70,000 civil penalty, which is the maximum penalty allowed under section 110(a) of the Mine Act. The Secretary asserts the proposed penalties are appropriate under the circumstance, noting in particular that both of the violations directly contributed to a fatality, that both resulted from the Respondent’s high negligence, and that the Respondent is an extremely large mine operator. Sec’y’s Br. at 34. The Respondent, on the other hand, contends that the civil penalty for the two violations should not exceed \$20,000. The Respondent offers no supporting arguments for this position beyond the arguments already rejected above with respect to the gravity of the violations and the negligence associated with the violations.

The Secretary concedes that the Respondent has a low history of previous violations. Sec’y’s Br. at 32-33; *see* Exs. S-23, S-24. Consol is a very large operator. The parties have stipulated that the proposed penalties will not affect the Respondent’s ability to continue in business. *See* Stipulation 6. I have taken into account the appropriateness of the penalty to the size of the operator’s business as well as the desired deterrent effect of civil penalties in comparison to the size of the operator and its overall resources. *See Black Beauty*, 34 FMSHRC at 1864-69; *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1505 (Sept. 1997). I have also taken into account the Respondent’s demonstrated good faith in its attempts to achieve rapid compliance with the Mine Act after the fatal accident.

As discussed in detail above, the gravity of these violations is extremely serious and the operator demonstrated high negligence in connection with both violations. I find that gravity and negligence are the most important penalty criteria in this case and warrant the imposition of a high penalty. *See Musser Engineering, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010) (permitting gravity and negligence to be weighed more heavily than other penalty factors); *Spartan Mining*

Co., 30 FMSHRC 699, 724-25 (Aug. 2008) (same); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (same).

After consideration of all the evidence and the six statutory penalty criteria, I assess a penalty of \$70,000 for each violation.

ORDER

It is hereby ORDERED that CONSOL Buchanan Mining Company, LLC pay a total penalty of \$140,000 within thirty (30) days of the date of this order.⁸

/s/ Priscilla M. Rae

Priscilla M. Rae

Administrative Law Judge

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⁸ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 27, 2015

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

v.

HIGHLAND MINING CO., LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. KENT 2013-112
A.C. No. 15-02709-303146

Docket No. KENT 2013-480
A.C. No. 15-02709-311244-02

Mine: Highland No. 9 Mine

DECISION AND ORDER

Appearances: Paige I. Bernick, Esq., & Angele Gregory, Esq., U.S Department of Labor,
Office of the Solicitor, Nashville, TN for the Secretary

Jeffrey K. Phillips, Esq. and Candace Smith, Esq., Steptoe & Johnson,
Lexington, KY for Respondent

Before: Judge Andrews

STATEMENT OF THE CASE

This case is before the undersigned Administrative Law Judge on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Highland Mining Co., LLC ("Respondent" or "Highland") pursuant to Section 104 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d). A hearing was held in Henderson, KY on May 19-20, 2014 at which the parties submitted testimony and documentary evidence. After the hearing, the each party submitted two post-hearing briefs, and the Secretary submitted a reply brief.

PROCEDURAL HISTORY

Between March 27, 2012 and November 27, 2012, MSHA Inspectors conducted several inspections at Respondent's Highland No. 9 Mine and issued citations and orders for alleged violations of the Mine Act. Respondent filed timely contests to several of those citations and orders.

Docket No. KENT 2013-112 contained six citations and was assessed a total civil penalty of \$16,657.00. At the start of the hearing, the parties informed me that they had settled four of the six citations, leaving only Citation Nos. 8508532 and 8508512 for hearing. A Decision Approving Partial Settlement was issued on September 2, 2014.

Docket No. KENT 2013-479 contained one citation and was assessed a total civil penalty of \$11, 597.00. Although Citation No. 8511143 was heard, the parties informed me after the hearing that they had reached a settlement in this docket. A Decision Approving Settlement was issued on October 10, 2014.

Docket No. KENT 2013-480 contained sixteen citations and was assessed a total civil penalty of \$31,876.00. Prior to hearing, the parties settled fourteen of the sixteen citations, leaving only Citation Nos. 8511144 and 8511145 for hearing. A Decision Approving Partial Settlement was issued on August 15, 2013.

KENT 2013-112

I. Stipulations

The parties have entered into several stipulations, admitted as Parties' Joint Exhibit 1.¹ Those stipulations include the following:

1. Highland Mining Company, LLC is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.
3. Highland Mining Company, LLC has an effect upon commerce within the meaning of Section 4 of the Federal Mine Safety and Health Act of 1977.
4. Highland Mining Company, LLC operated Highland No. 9 Mine, Mine Identification Number 1502709.
5. Citation number 8508512 is complete, authentic, and admissible.
6. The inspector notes for the citation identified in paragraph 5 are complete, authentic, and admissible.
7. Citation number 8508232 is complete, authentic, and admissible.

¹ Hereinafter the Joint Exhibits will be referred to as "JX" followed by the number. Similarly, the Secretary's Exhibits for KENT 2013-112 will be referred to as "GX" and Respondent's Exhibits will be referred to as "RX." Secretary's Exhibits for KENT 2013-480 will be referred to as "SX" and Respondent's Exhibits will be referred to as "HX."

8. The inspector notes for the citation identified in paragraph 7 are complete, authentic, and admissible.
9. Government Exhibit 5, the R-17 violation history for Highland No. 9 Mine, is complete, authentic, and admissible.
10. The Highland No. 9 Mine produced 3,950,732 tons of coal in 2012, and had 1,079,470 hours worked in 2012.
11. The proposed penalty will not affect Highland Mining Company, LLC's ability to remain in business.
12. Respondent, Highland Mining Company, LLC, abated the citations involved herein in a timely manner and in good faith.

(JX-1) (*see also* Transcript at 9-10).²

II. Citation No. 8508232

A. Summary of Testimony

Inspector Paul Hargrove³ was at Highland No. 9 on April 1, 2012 in order to conduct an EO1 inspection.⁴ (Tr. 61). On April 10, he arrived at 7:30 a.m., during the production day shift, to inspect outby equipment and travel belt lines. (Tr. 62). Upon arrival, he told Travis Little, the safety director, and Bryan Branson, that he was there for an inspection, distributed Miners' Rights documents, and told the company he needed a miners' representative.⁵ (Tr. 62-63, 89). He

² Hereinafter the transcript will be cited as "Tr." followed by the page number.

³ MSHA Coal Mine Inspector Paul Raymond Hargrove was present and testified for the Secretary. (Tr. 58-59). Hargrove graduated from high school in 1966, received an associate degree in 1972, and started in the mines in March 1975. (Tr. 59, 61). He worked for several companies on various equipment. (Tr. 59-60). He held current surface and underground high and low electric and mine foreman certifications in Kentucky and Illinois. (Tr. 60). Hargrove began at MSHA in February 2006. (Tr. 60). He received 21 weeks of training in three to four week sessions punctuated with two to three months of on-the-job training with an authorized representative. (Tr. 60). He received refresher training at the Academy one week each year (or two weeks every two years), regularly online, and quarterly at the district. (Tr. 61).

⁴ An EO1 inspection is a regular inspection of the mine in its entirety, including the belt line, air, equipment, rock dust, respirable dust, and noise. (Tr. 62).

⁵ Bryan Keith Branson appeared at hearing and testified for Respondent. (Tr. 105). He started in the mines on November 2, 1993 and worked for several companies running various
(continued...)

also reviewed the pre-shift books for the No. 1, 2, 3, 4, 5, and 6 units, the outby areas, and the belt. (Tr. 63, 99). No hazards, including loose ribs, were listed. (Tr. 63, 99). He then went underground with Branson and met Allen Thomas, the miners' representative. (Tr. 89, 63, 108). Hargrove first inspected the mantrip and then traveled the 6-B belt line. (Tr. 64). Branson remembered checking the 6-A belt line while walking outby on the travel side. (Tr. 109).

At 10:09, Hargrove found a loose roof and rib in violation of §75.202(a) in the belt travelway (an area 33-36 inches wide area with a roof measuring 7 feet, 2 inches). (Tr. 54, 64, 71-72, 80). The loose rib was 16 feet long, 2-3 feet high, 7 to 10 inches thick, and a 1-inch gap existed between the rib and the solid coal about 52 inches above the mine floor. (Tr. 64-65, 88-89, 120). The rib was made of coal and rock and weighed a couple of hundred pounds. (Tr. 98-99). The rib was also undercut, meaning the lower support was removed for 7 inches. (Tr. 64). Some of the rib was already on the ground. (Tr. 71). Hargrove informed Respondent that he was going to write a citation. (Tr. 72). He then issued the citation and wrote his notes while there. (Tr. 72).

Hargrove found another loose coal rib 15 feet in length, 5 feet high, and 14 inches thick five or six crosscuts from the first on the same belt line. (Tr. 67). He noticed this loose rib after he had written the notes for the initial condition and then added the new one. (Tr. 67). The area was not flagged off and he ordered Respondent to do so. (Tr. 68).

As a result of these conditions, Hargrove issued Citation No. 8508232 (GX-3) under §75.202(a). (Tr. 72-73). That regulation required support or control to be provided in areas where miners work or travel to protect miners from loose coal or rock falls. (Tr. 73). The method of control, whether bolts or timbers, was not important. (Tr. 73). In Hargrove's opinion, this area was not adequately supported because the ribs gapped and were going to fall. (Tr. 73).

Citation No. 8508232 was marked as "Reasonably Likely" to occur because the cited gap in the first rib was large and pulling farther apart, meaning the rib was going to fall. (Tr. 65, 73-74, 94-96, 101-102). Further, the area was undercut and lacked support, which increased the chances that the rib would fall. (Tr. 65, 73-74). The tight entry (33-36 inches wide) increased the likelihood of injury. (Tr. 66-67, 100, 111). Also, the primary support in the area, the coal pillars, faced increased pressure as parts of the pillar began to break off, creating the risk of further falls. (Tr. 73-74). Hargrove could not definitively say when the ribs would fall, but it could have been at any time. (Tr. 103).

⁵ (...continued)

equipment and conducting examinations. (Tr. 105-106). Two years before the hearing, he moved to the Safety Department as a safety supervisor. (Tr. 106-107). Branson's duties as safety supervisor included traveling with the inspectors, correcting hazards, and making sure miners wore their personal protective equipment. (Tr. 108-109). He had mine foreman papers, an electrical card, MET and MET instructor certification, a surface card, a mine rescue trainer certification, an underground instructor certification (state and federal), and a shot fire card. (Tr. 107). Branson did not take any notes but did record conditions when he reached the surface. (Tr. 124). Branson was confident he could remember details from two years earlier. (Tr. 124-125).

Branson did not believe that the first rib was loose. (Tr. 109). Examiners carried pry bars and if one saw a loose rib, he would have pulled it down. (Tr. 82-84, 111-112, 117). Branson carried a 3-foot pry bar and testified that he pulled loose ribs during Hargrove's inspection but, despite his efforts for several minutes, could not pull the cited rib. (Tr. 111-113, 116, 119). He did not believe it was loose rib because he could not pull it down. (Tr. 113, 115). Branson did not believe the length of the pry bar was important because examiners begin to pry from the side and if the rib was loose, any pry bar would pull it. (Tr. 120-121, 124-125). Hargrove told Branson to flag off the area and have someone else remove it or timber it. (Tr. 113). Branson hung danger ribbon from pin plates inby and outby to block the area. (Tr. 114). Hargrove conceded that the cited area was flagged rather than corrected and believed that Branson attempted, and failed, to pull down the rib. (Tr. 89-90, 103).

Hargrove also believed the second rib was loose and that someone from the safety department quickly pulled it with a 4-foot pry bar. (Tr. 79, 102, 116). The general rule is the larger the gap the looser the rib, but in this situation the first condition (with a gap) was not pulled while the second condition (with no gap) was pulled. (Tr. 91, 96, 102). Branson did not believe this rib was loose either. (Tr. 116). It took him 2 to 3 minutes to pull it. (Tr. 116). He believed loose ribs would fall in a matter of seconds when pressure was added. (Tr. 116-117).

The citation was marked for lost workdays/restricted duty type injuries because Hargrove wanted to give the benefit of the doubt that no one would be seriously injured. (Tr. 74). However, he was familiar with incidents where miners were permanently disabled or killed by roof falls causing spinal injuries. (Tr. 70, 74-75). Such injuries would occur when a rib fell on a miner and pinned a miner to the floor or belt structure or when a rib burst and hit a miner. (Tr. 66, 70, 75). Injury would be caused by unstable roof and loose footing. (Tr. 70).

The cited condition was marked as affecting one person: the belt examiner, belt mechanic, or belt cleaner, or anyone else sent to work on the belt. (Tr. 68, 75, 80-81-82). The most likely person to be injured would be the mine examiners who regularly traveled the belt. (Tr. 75). The belt cleaner did not regularly travel this area to clean or adjust belts. (Tr. 68, 81-82). There might be more than one person in the area during a production shift. (Tr. 82).

The citation was marked as S&S because Hargrove believed it was reasonably likely to cause a serious injury as a result of the large area, the size of the rib, and the location in an area where miners normally worked or traveled. (Tr. 75-76). Hargrove believed that if he had not pointed out the condition, it would have eventually injured a miner. (Tr. 76). Branson disagreed with the S&S designation because he could not pull down the first rib and the chances of someone being hit by the second rib were slim. (Tr. 112, 117). An examiner would only be in the area twice a day and would only be exposed to the conditions for a few minutes. (Tr. 81, 117). Hargrove believed exposure would occur in two places. (Tr. 82). Branson testified that this rib could have fallen in a few hours, weeks or months or it might never fall. (Tr. 117-118, 123). But he did not think it was ready to fall on April 10. (Tr. 117-118, 123-125).

This condition was marked as "moderate negligence," because that was what Hargrove observed and told the operator. (Tr. 76). However, when Hargrove arrived at the 6-C header, he

found the initials “BM” dated 4/10 at 9:44 a.m., indicating an examination.⁶ (Tr. 71, 77-78). An examiner would have to travel past the cited area to get to the 6-C header. (Tr. 72, 100). Given the initials and the examination, Hargrove would cite Respondent for high negligence. (Tr. 76-79). Further, when miners worked in this area a pre-shift and on-shift exam would be conducted. (Tr. 67-68, 78, 81). The condition would be obvious to someone in the area because part of the rib had already fallen across the belt entry and the gap was large. (Tr. 66, 77). Without the gap, a rib, like the second one, may have been difficult to see. (Tr. 66, 96-97). When the citation was issued, no mitigating circumstances were offered. (Tr. 78).

Branson disagreed with the inspector’s negligence designation and believed that belt examiners traveling through the area would try to pull any hazardous loose ribs. (Tr. 114, 122). While there was enough rib material to fill a wheelbarrow on the ground when they arrived, Branson could not tell how long the material had been there. (Tr. 109-110). Further, Branson did not believe it was possible to tell from looking whether it had been pulled or fallen down. (Tr. 109-110, 114-115). He believed it was likely pulled down by an examiner, which meant someone was taking care of roof and rib conditions. (Tr. 114-115, 122). Branson opined that if an examiner attempted to pull down the rib but failed, then was no hazard. (Tr. 122). However, he conceded the examiner should have tried a larger bar or noted and flagged the rib so it could be monitored. (Tr. 122-123). Hargrove did not believe that this coal had been pulled down by examiners. (Tr. 83). He did not see the rib fall, but based this belief on experience. (Tr. 83). Hargrove’s notes showed that he told Respondent to clean up pulled coal ribs in the area, but he was referred to clean up after abatement, not previously pulled ribs. (Tr. 94-95).

Branson also disagreed with the negligence designation because the condition could have arisen after the examiner passed. (Tr. 118). The examiner may also have been examining the top or the belt line at the time causing him to miss the rib. (Tr. 118, 121). If an examiner had seen it, he would have pulled it because that was what he was trained to do early in the job. (Tr. 118). Hargrove conceded that he was walking outby, while an examiner would be traveling inby and thus might see different things. (Tr. 86-88). However, he noted that Respondent was supposed to inspect the belt in its entirety and that the first rib was visible from both directions. (Tr. 87-88, 99-100). Further, there was material was blocking the direction of travel. (Tr. 100).

Hargrove believed the condition existed for a few shifts because of the dull, oxidized condition of the coal and the coal and rock dust present. (Tr. 66, 68, 77, 92). Fresh coal and dust would be shiny. (Tr. 68, 77, 92). Further, the existence of the gap showed that the condition had been present for a while. (Tr. 65). In his notes, Hargrove wrote the first condition existed for an “unknown” length of time and did not list a time for the second condition. (Tr. 93, 95, 101). However, he also stated the condition appeared recent, meaning within a few shifts (though he did not make that explicit in the notes). (Tr. 66, 68, 91-94, 101). Branson believed that the condition looked fresh, though he could not say how recent. (Tr. 115-116). It did not appear to him to be full of rock dust and was black in color. (Tr. 115).

⁶ The belt examiners were union, non-management employees. (Tr. 45). However, when belt examiners are conducting an examination, they are agents of the operator. (Tr. 54, 99, 121, 144).

This mine had rib conditions in the past, including falls in the intake, travelways, and supply road. (Tr. 68-69, 71). In the cited area, Respondent had to drop off two entries because of bad top and water. (Tr. 70-71). Hargrove testified that he warned Branson on April 3 that Respondent needed to better monitor loose roof and ribs in the belt entries, travelways, and on the units. (Tr. 69, 84-85). This comment was not part of the initial preconference, it was a specific note, but they would discuss the ribs at the preconference also. (Tr. 85-86).

The condition was abated when the loose ribs were pulled, though Respondent could have controlled the ribs with bolts or timbers. (Tr. 71-72, 78, 103). The first condition was not abated for 24 hours but the belt continued to run and be examined. (Tr. 97, 102). Hargrove did not stay to view the termination. (Tr. 102). He was not sure how they pulled down the first rib, but the second was pulled down with a 4-foot pry bar. (Tr. 78-79, 102-103).

B. Contentions of the Parties Regarding Citation No. 8508232

With respect to Citation No. 8508232, the Secretary asserts that Respondent violated 30 C.F.R. §75.202(a), that this violation was reasonable likely to result in a Lost Workday/Restricted Duty injury to one miner, that the violation was S&S, and that it resulted from moderate negligence. (GX-3)(*Secretary's KENT 2013-112 Post-Hearing Brief* at 16-20). The Secretary presumably believes that the proposed penalty of \$1,530.00 is appropriate.

Respondent argues that Citation No. 8508232 was not valid and should be vacated. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 27-32). It further argues that, in the event the citation is found to be valid, that a Lost Workday/Restricted Duty injury was unlikely to occur and that the violation was not S&S. (*Id.* at 36-37). It also believed that its actions would be better characterized as showing no negligence. (*Id.* at 32-35). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the citation is found valid, reduced pursuant to its proffered gravity and negligence determinations.

C. Findings of Fact and Conclusions of Law Regarding Citation No. 8508232

The findings of fact in this, and other sections, are based on the record as a whole and the Administrative Law Judge's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the ALJ has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the ALJ has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the ALJ'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).

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §75.202(a).

On April 10, 2012, Inspector Hargrove issued a 104(a) Citation, No. 8508232, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

The coal ribs along the 6-B belt line are not being supported or controlled to protect miners from fall of coal ribs. A loose coal rib located between crosscut #45 and crosscut #46 on the 6-B belt line, that measure 16 feet in length, 3 feet in height, and 7 inches to 10 inches thick is gapped open 1 inch. Also the loose coal rib has been undercut, bottom support removed for a depth of 7 inches along the 16 feet of loose coal rib. Also between crosscut #39 and crosscut #40 a loose coal rib that measured 15 feet in length, 5 feet in height and 4 inches to 13 inches thick. The 6-B belt line is travel by miners two times a day.

Standard 75.202(a) was cited 47 times in two years at mine 1502709 (47 to the operator, 0 to a contractor).

(GX-3).

The cited standard, 30 C.F.R. §75.202(a) (“Protection from falls of roof, face and ribs”), provides the following:

(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

30 C.F.R. §75.202(a). As Judge Lewis noted in *Emerald Coal Resources, LP*, “[t]he comments accompanying the final rule recognize the high death toll caused by inadequate roof support and the need for mandatory roof controls. 53 FR 2354-01, 2354 (Jan. 27, 1988); *see also United Mine Workers of America, Int’l. Union v. Dole*, 870 F.2d 662, 664 (D.C. Cir.1989) (recognizing that roof falls are among the most serious hazards to miners).” 2013 WL 6529526, *30-31 (Sept. 23, 2013)(ALJ Lewis).

In order to prove a violation of 30 C.F.R. §75.202(a), well settled Commission case law holds that “the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard.” *Canon Coal, Co.*, 9 FMSHRC 667, 668 (April 1987); *see also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998). According to Judge Manning, the objective standard formulated by the Commission must be used to evaluate three requirements of §75.202(a): (1) the cited area must be an area where persons work or travel; (2) the area must be supported or otherwise controlled, and (3) such support must be adequate to protect persons from falls or bursts of rib. *Oxbow Mining, LLC*, 2013 WL 1856627, *13 (April 11, 2013)(ALJ Manning); *see also Emerald Coal Resources, LP, supra* at 31.

At hearing, Secretary's counsel presented credible evidence to support the issuance of Citation No. 8508232. Specifically, Inspector Hargrove testified that many people worked in the cited area from time to time, including belt mechanics and cleaners. (Tr. 68, 75, 80-81-82). Most importantly, an examiner traveled the area on a regular basis. (Tr. 75). Therefore, this was an area where miners worked or traveled. Further, Secretary's counsel presented evidence that two large, loose ribs existed within 6 crosscuts of one another. (Tr. 54, 64, 67, 71-72, 80, 88-89, 98-99, 116, 120). The first rib was 16 feet long, 2-3 feet in height, 7 to 10 inches thick, and gapped open 1 inch about 52 inches above the mine floor. (Tr. 64, 88-89, 120). The rib weighed a couple of hundred pounds and was undercut. (Tr. 64, 98-99). The Secretary argued that this rib was essentially hanging off the solid rib and about to fall. (*Secretary's KENT 2013-112 Post-Hearing Brief* at 16). The second rib was 15 feet in length, 5 feet high, and 14 inches thick. (Tr. 67). At hearing Hargrove credibly testified that the conditions he observed indicated that the area was not adequately supported and that a rib fall hazard was present. (Tr. 73). This means that a reasonably prudent person familiar with the protective purpose of the cited standard would believe that the support provided would be inadequate to protect persons from falls or rib bursts; these ribs were loose and would fall. Therefore, I find that the Secretary met his burden, showing by a preponderance of the evidence that Respondent violated 30 C.F.R. §75.202(a).

In its brief, Respondent argued that this violation was invalid. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 27-32). However, Respondent's argument was not compelling.

Specifically, Respondent argued that a violation of 30 C.F.R. §75.202(a) only occurs where there is a "hazard" and that neither rib here constituted a hazard. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 27-28). Respondent claimed that the only evidence supporting the existence of a hazard was Hargrove's testimony. (*Id.* at 28). Respondent believed that the objective evidence supported a finding that neither the first nor the second rib was in danger of falling. (*Id.*). As to the first rib, Respondent contended that not every unbolted, gapped open rib would constitute a hazard and that there was no evidence to suggest that this rib would not stand for a hundred years. (*Id.* at 29). In support, Respondent cited Branson's testimony that he could not pull the rib with a yard-long pry bar, despite his best efforts. (*Id.* at 29-30, Tr. 90, 112-113). It argued that despite Hargrove's initial belief about the rib, once Branson proved unable to pull it down, it was clear no hazard was present. (*Id.* at 31). As to the second rib, Respondent noted that Branson testified that it would not fall without help. (*Id.* at 31-32). Further, Hargrove testified that the rib was not gapped open and Respondent argued this meant it was not a hazard. (*Id.*). At worst, Respondent argued, the evidence regarding these two ribs was in equipoise; with Hargrove arguing that a hazard existed and Branson arguing that it did not. (*Id.* at 29). In light of the Secretary's burden, Respondent argues that this establishes grounds to vacate the citation.

Respondent's argument essentially boils down to an assertion that Inspector Hargrove's testimony, including the conclusions he drew from the conditions observed, was insufficient evidence to support a 30 C.F.R. §75.202(a) violation. However, Respondent's specific assertions about the insufficiency of evidence are not supported by the record. Respondent's claim that no evidence was presented to suggest that the first rib was a hazard or would not stand for another hundred years was belied by the fact that Hargrove credibly testified that both ribs would fall given continued, normal mining operations. (Tr. 65, 73-74, 76, 103). Similarly, Respondent's

contention that the second rib was not hazardous because Hargrove testified it was not gapped was contradicted by further testimony from Hargrove that, despite the lack of a gap, this rib was a hazard. (Tr. 116).

Respondent's discomfort with this citation appears to stem from the fact that it is supported primarily with testimony from Inspector Hargrove. (*See Respondent's KENT 2013-112 Post-Hearing Brief* at 28). However, no further evidence, beyond the testimony of an inspector, is necessary to support the citation. *See Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995); *see also Martin County Coal Corp.*, 2014 WL 2154273, *9 (April 29, 2014)(ALJ Feldman) (holding that an inspector's testimony is given substantial weight in determining whether a violation of 30 C.F.R. §75.202(a) has occurred). As noted *supra*, I credited the testimony of Hargrove that the cited rib conditions constituted a hazard to miners working or traveling in the area. (Tr. 73). Despite Respondent's doubts, this testimony is evidence and, in this case, it is supported by the Hargrove's observations at the time of the citation and the other record evidence. Therefore, it is sufficient to support this citation.

Finally, it is true that Branson also presented evidence regarding these ribs and that this evidence contradicted Hargrove's observations. Most notably, Branson observed that the ribs were difficult, or even impossible, to pull down. (Tr. 112-113). However, that does not necessarily mean that the evidence is in equipoise or that the citation should be vacated. As the Administrative Law Judge, I am not required to grant all testimony evidence equal weight; I am entitled to make credibility determinations. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981); and *Twentymile Coal Co.*, 2014 WL 2920576, FN 7 (June 13, 2014). Those determinations are entitled to substantial deference. *Id.* I credited Hargrove's testimony over Branson's testimony both because of their respective demeanors at hearing and because Hargrove's testimony provided a more reasonable interpretation of the conditions observed. Specifically, Hargrove credibly testified that, under continued, normal mining operations that the rib would eventually fall. (Tr. 65, 73-74, 76, 103). Hargrove also credibly reported that the pillars in the mine, or any mine, were under great pressure and that conditions could change quickly. (Tr. 73-74).

On the other hand, Branson's testimony that a rib that was gapping open an inch or another rib that was pulled down with a 3-foot pry bar were likely to remain in those positions indefinitely was incredible. (Tr. 117-118, 123). Properly supported ribs do not gap (as the first rib did) and they cannot be pulled down after a few minutes with a short pry bar (as the second rib was). There is no reason to believe these improperly supported ribs would simply stay in place indefinitely. Mines are dynamic places and these ribs are under enormous pressure. Further, workers and golf carts move through this narrow entry, possibly bumping the ribs. That is the reason support is mandated. Under Respondent's assessment, as colored by Branson's testimony, a rib would not be hazardous until it fell to the ground because, until that time, no one could say for sure when it would fall. It might be an hour or it might be a hundred years. Branson's testimony was self-serving and did not comport with the evidence, the history of mining, or common sense. Therefore, I find that Hargrove's testimony on this point was more credible and supports a finding that the citation was valid.⁷

⁷ Respondent provided several arguments to prove that Inspector Hargrove's testimony, (continued...)

2. The Violation Was Unlikely to Result in a Lost Workday/Restricted Duty Injury And Was Not Significant And Substantial In Nature.

Inspector Hargrove marked the gravity of the cited danger in Citation No. 8508232 as being “Reasonably Likely” to result in a “Lost Workday/Restricted Duty” Injury to one person. (GX-3). With the exception of the likelihood, these determinations are supported by a preponderance of the evidence. Hargrove also determined that the violation was S&S. (GX-3). This determination was not supported by the preponderance of the evidence.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is S&S “if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

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

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

Regarding the first element of S&S - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. § 75.202(a).

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. Inspector Hargrove credibly testified that, under continued normal mining operations, these ribs would eventually fall and that they would be a hazard to miners in the area. (Tr. 65, 73-74, 76, 103). It was a matter of when, not if, those unsupported ribs would fall and expose miners in the area to a safety hazard.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was not met. The Commission clarified the third element of the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct.

⁷ (...continued)

in general, was not credible. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 37-40). Specifically, it argued that Hargrove was cagey when answering questions about pry bars, that he made mistakes in his notes, that he exaggerated his ability and simply guessed at the time the condition existed and the weight of materials, and that he stated different heights for the coal ribs at different times. I decline the opportunity to determine that Inspector Hargrove, as a rule, was not credible at hearing. As noted *supra*, Hargrove was credible on the issue the validity this citation. However, I considered Respondent's objections to Hargrove's testimony, where relevant, when considering each of these specific issues.

2010) (“PBS”). The Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury.” *Id.* at 1281. Importantly, it stated that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* The Commission also emphasized the well-established precedent that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996). The likelihood of the hazard being realized must be considered assuming normal continued mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (Jun. 1986).

Analysis under the third prong of *Mathies* hinges on whether a miner would be injured, assuming that the hazard is realized. In this instance, the hazard contributed to was a rib fall in a belt entry area. However, having determined that the rib would fall does not necessarily make an injury likely. The question is not just whether the rib would fall but whether it would expose miners to a hazard. In this instance, in order for a miner to be injured, he/she would have to be next to the rib at the instant that hazard was realized, meaning when the rib fell. Here, the uncontested evidence is that, on an average day, only examiners would travel through the cited area. (Tr. 68, 75, 80-82). Further, Hargrove testified that the examiners only traveled the entry during production shifts and would only spend a few minutes near these ribs during the day. (Tr. 81, 117). That means during the 24 hours a day the mine was operating in some capacity, a miner would only be injured by the rib if it happened to fall during the handful of minutes when the miner were present. While it is certain that the ribs here would fall and also that miners would travel in the area, it would take an improbable coincidence for these two events to occur simultaneously. I do not believe that the Secretary carried his burden of showing that it was reasonably likely a miner would be injured by a rib fall in this area. Therefore, I find, even assuming the rib fall, that the likelihood of an injury was “Unlikely” rather than “Reasonably Likely and that the third prong of *Mathies* was not met. This violation was not S&S.

I stress here that this holding is limited to the specific factual circumstances present here. I do not hold that a violation of 30 C.F.R. §75.202(a), or a loose rib in general, can never be S&S. In fact, given the immense danger presented by roof and rib falls, it is probable that most loose ribs in working areas of the mine would give rise to S&S violations. However, given the isolated nature of the area at issue here, the Secretary was unable to carry the burden with respect to the third prong of *Mathies*.

In its brief, the Secretary argued that this violation was reasonably likely to occur and therefore S&S. (*Secretary’s KENT 2013-112 Post-Hearing Brief* at 17-18). However, The Secretary’s argument was not compelling.

The Secretary’s points regarding gravity in its brief primarily deal with the likelihood that the rib would fall. (*Secretary’s KENT 2013-112 Post-Hearing Brief* at 17-18). As noted *supra*, I have found that a rib fall was a virtual certainty barring abatement, but that a rib fall was not enough to meet the Secretary’s burden. The Secretary’s only argument with respect to the likelihood that miners would face the hazard of a rib fall was that the two separate ribs increased the time of exposure. (*Id.* at 17). However, Hargrove and Branson’s testimony that exposure would last no more than a few minutes was made in light of the fact that there were two loose

ribs. (Tr. 81-82). Therefore, there is no reason to believe that exposure to a rib fall was reasonably likely. The designation of “Unlikely” is the most reasonable and, as a result, Citation No. 8508232 is not S&S.

Having determined that this situation does not meet the third prong of the *Mathies* test and is therefore not S&S, it is not necessary to consider the fourth prong. However, for the purpose of determining the gravity of this violation, it is still necessary to consider the severity of the injury that would result if a miner were affected. The testimony that if a miner were struck by a falling rib the injuries would be, at the very least, severe enough to cause lost workdays/restricted duty was essentially uncontested. (Tr. 74). Also, only one miner would be affected by this condition at a time. (Tr. 68, 75, 80-82).

Therefore, I find that the cited violation was not S&S, was unlikely to occur, that if it did occur it would result in lost workday/restricted duty injuries to one miner. I will now turn to the S&S designation in this matter.

3. Respondent’s Conduct Displayed “Moderate” Negligence.

In the citation at issue, Inspector Hargrove found that the operator’s conduct was moderately negligent in character. (GX-3).

Standard 30 C.F.R. §100.3(d) provides the following:

(d) Negligence. Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.

In 30 C.F.R. §103(d), Table X, the category of high negligence is described thusly: “The operator knew or should have known of the violative condition or practice and there are no mitigating circumstances.” Conversely, moderate negligence is shown when “[t]he operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances.” Low negligence is reserved for situations where there are “considerable” mitigating circumstances.

I find that Respondent should have known about the violation and that there were some mitigating factors. With respect to knowledge, well-settled Commission precedent recognizes that the negligence of an operator’s agent is imputed to the operator for penalty assessments and unwarrantable failure determinations. *See Whyne Supply Co.*, 19 FMSHRC 447, 451 (Mar.

1997); *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is defined as someone with responsibilities normally delegated to management personnel, has responsibilities that are crucial to the mine's operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000) *see also* 30 U.S.C. §802(e) (an agent is "any person charged with responsibility for the operation of all or part of a...mine or the supervision of the miners in a...mine."). In this matter, all of the witnesses agreed that the belt examiners, while hourly union workers, were agents of Respondent. (Tr. 45, 54, 99, 121, 144).

With respect to the instant violation, the evidence shows that Respondent's belt examiners should have known the ribs were not properly supported. Inspector Hargrove credibly testified that the gapping rib was obvious. (Tr. 66, 77). Further, he noted that some material had already fallen across the travel way, meaning that the examiner would have to pass over it while walking the area. (Tr. 66, 77). Hargrove also testified about the large size of the loose ribs, which also support a finding that the conditions were obvious. (Tr. 64, 67, 88-89, 98-99, 120). He also credibly testified that the condition had existed for several shifts. (Tr. 66, 68, 77, 92). He supported this claim by noting that the coal had oxidized and become dull, a condition that would take some time to occur. (Tr. 68, 77, 92). Perhaps most importantly, Hargrove explained that the condition would not have had to exist for very long to be observed by Respondent; an examiner had passed through the area and left his date, time, and initials at 9:44 a.m. on the day of the citation, while Hargrove had issued the citation at 10:09 a.m. (Tr. 71-72, 77-78, 100). The condition would only have to have existed a few minutes for it to be present when the examiner entered the area. It is extremely unlikely that two independent loose ribs spontaneously occurred in the minutes between the examination and inspection. I find that a preponderance of the evidence supports a finding that the condition was present when the examiner traveled through the area before 9:44 a.m. and that, as a result, Respondent knew or, at the very least, should have known the condition was present.

Respondent presented several arguments to support a claim that it was not negligent. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 32-35). However, Respondent's arguments are not compelling.

First, Respondent contests the Secretary's definition of the term "obvious" and argues that the condition was not obvious and therefore, it neither knew nor should have known about the condition. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 32). Respondent characterizes the Secretary's argument regarding negligence thusly: "the condition existed for several shifts; the condition was thus there when Highland's examiner went through the area; Hargrove saw it, so it was obvious, so Highland's examiner should have seen it; but he didn't, so he was negligent." (*Id.*). Respondent argues that the Secretary's position is untenable because under that standard, any condition would be negligent. (*Id.* at 9). Respondent characterizes the Secretary's position as follows: in order to be cited the condition must be observed by the inspector, if he observes it must be obvious, if it is obvious then there is negligence. (*Id.* at 9).

It seems that Respondent has attempted to extrapolate a broad principle from the Secretary's allegations, namely that something that is found by the inspector is *ipso facto*

obvious. However, there is no basis for Respondent's assertions and it is unnecessary to reach any supposed broad principle in this case. The Secretary never made a general statement that any condition that was found by the Inspector was obvious or that all violations inherently result from an operator's negligence. Instead, Inspector Hargrove credibly testified that this particular condition was obvious for the reasons described *supra*. It is not necessary to determine whether Respondent would be held responsible for other, less obvious conditions simply because the inspector found it. The facts in the present case show that both ribs were large and loose and that one of them was gapping an inch from the solid rib. (Tr. 64, 67, 88-89, 98-99, 120). Therefore, Respondent should have known about them.

Second, Respondent contends that even assuming, *arguendo*, that the condition would have been obvious at the time of the citation, there is no evidence on record that the condition actually existed during the last examination. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 32). Respondent further contends that in his notes, Inspector Hargrove wrote that the condition was "recent" and that a finding of recent "does not support characterizing the citation with any level of negligence." (*Id.* at 32-33). Respondent also argued that the notes said that the length of time the condition existed was "unknown." (*Id.* at 34-35). Similarly, it noted that at various times during the hearing, Hargrove testified that the condition had existed "a while," that it "appeared recent" and that it had been present "a couple of shifts." (*Id.* at 33). Respondent argued that these phrases were too vague to serve as a basis for determining the length of time the condition existed. (*Id.*).

The length of time a condition existed is not, in and of itself, a factor in determining negligence. Instead, the length of time a condition existed is used to determine how much notice an operator had of the cited condition. If a condition existed for a considerable time, then presumably someone knew or should have known about the condition. In the instant case, even if we ignore the evidence that the condition existed for a couple of shifts (though, as noted *supra*, I credited the evidence showing that it had), Respondent still knew or should have known about the condition. Date, time, and initials for an examiner ("BM") were found at the end of the 6-C belt entry indicating that an examiner had traveled through the cited area (the 6-B belt entry) and signed at 9:44 a.m. (Tr. 71-72, 77-78, 100). The cited condition was found and then cited at 10:09 a.m., just minutes after the examiner had traveled through the area. (Tr. 64). It is extremely unlikely that, in the short period of time after the examination occurred, but before the inspector reached the area, not one, but two massive rib sections became loose. Even if it is impossible to say for certain when the condition occurred, it must have been present in some form at the time the last examiner traveled the area. Therefore, Respondent should have been aware of the loose ribs and, at the very least, recorded the condition and flagged the area.⁸ (Tr. 123).

More specifically, Respondent argued that Hargrove's determination that the condition had existed for a couple of shifts because of the dull, oxidized color was unreliable because he "had already testified that the way to tell whether a gapped crack has existed for any period of time is whether, '[i]f you look at it, you can see light specks of local dust and rock dust on it.'" (*Respondent's KENT 2013-112 Post-Hearing Brief* at 33). Respondent then argued that Hargrove testified that no rock or coal dust was present. (*Id.* at 33-34). Presumably, Respondent meant that

⁸ The fact that there were no flags or notations further indicated that the material had fallen, rather than been pulled down.

Hargrove's testimony indicated that the only way to determine the age of a gap was the existence of dust and that observation of the dull, oxidized coal was not helpful in determining the age.

Respondent's characterization of the Inspector Hargrove's testimony is deeply flawed. The Inspector's actual testimony on this point was, "Coal, when it first breaks loose is really shiny. After it begins to oxidize, the air gets to it and it gets a duller color to it. If you look at it, you can see light specks of local dust and rock dust on it. This one wasn't shiny. It had already started to oxidize, so it had fell [sic] a couple of shifts prior." (Tr. 68). While it is true that Hargrove later testified that he did not see dust behind the gap, the existence of dust is not dispositive here. (Tr. 91-92). As Hargrove's actual testimony shows, he did not imply, as Respondent asserts, that the existence of dust is the definitive evidence used to determine the time a gap existed. Instead, he carefully explained the process by which oxygen slowly turns shiny, fresh coal into dull coal over time. (Tr. 68). He also testified that the coal here was not shiny, indicating that this process had occurred and that the gap in the coal was not fresh. (Tr. 68). Based on the color of the coal he determined it had been present for a couple of shifts, which he explained at hearing, was what he meant by "recent." (Tr. 68, 91-92). Nothing in Hargrove's statement indicates that the existence or non-existence of dust in any way affects the process of oxidization or that the absence of dust somehow negates the dull color of the coal. Therefore, I reiterate that I credit Hargrove's testimony that the condition existed for at least a couple of shifts.

Having determined that Respondent was negligent, I also find this negligence was mitigated to some degree by the fact that the second condition was slightly less obvious and the ribs were somewhat difficult to pull. Unlike the first rib, the second rib was not gapped, making it less obvious. (Tr. 66, 96-97). An examiner may have passed the area without noticing it. While the examiner should have found the condition, the failure to do so in this instance is understandable. Both ribs, but in particular the first one, were somewhat difficult to pull down. (Tr. 112-113, 116). An examiner may have observed the condition and wrongfully, but not unreasonable, believed it was not a hazard. While this would not excuse Respondent's failure to at least flag and record the loose ribs, it does slightly mitigate the negligence. (Tr. 123). Therefore, a finding of "moderate" negligence is appropriate.

In addition to the mitigating circumstances outlined above, Respondent argued that there were further, considerable mitigating circumstances, necessitating a lower negligence finding. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 35). However, Respondent's arguments are not compelling.

First, Respondent argued that people traveling from different directions would see different things. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 35). Both Hargrove and Branson testified that this was the case. (Tr. 86-88). However, this is not material to the issue. If Respondent's examiners cannot see hazardous conditions in the mine because of their direction of travel, it is Respondent that is responsible for the blind spots. Ignorance, willful or otherwise, is not rewarded by the Act. As discussed *supra*, the conditions present here *were* obvious and Respondent should have known about them.

Second, Respondent argued that it abated both rib conditions as quickly as possible. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 35). This point is uncontested. (JX-1, 12). However, abatement after the citation has already been issued is not a mitigating factor. Abatement efforts before a citation is issued indicate that an operator was aware of a problem and was attempting to correct it. After the citation, abatement simply means that the operator can follow direction and justifiably wishes to avoid a future 104(b) Order.

Finally, Respondent argued that the Secretary did not prove that it should have been aware of the cited condition. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 35). The issue of knowledge has been discussed at length, *supra*. Respondent should have known about the condition, this is not a mitigating factor.

4. Penalty

In this matter, the Secretary proposed a penalty of \$1,530.00 for Citation No. 8508532. The Commission has affirmed that ALJs are not bound the Secretary's proposals. *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013) (*see also* 30 U.S.C. §820(i) and 29 C.F.R. §2700.30(b)). The Commission also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id.* at p. 2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)). I find that a deviation from the Secretary's proposed assessment is warranted herein and will evaluate the factors contained in 30 U.S.C. §820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – in the two years preceding this violation the Plant was cited 47 times for this condition. (GX-3).

(2) The appropriateness of the penalty compared to the size of the Operator's business - The Highland No. 9 Mine produced 3,950,732 tons of coal in 2012, and had 1,079,470 hours worked in 2012. (JX-1, 10). According to MSHA's penalty assessment guidelines this gives the Highland No. 9 Mine 15 "mine size points" out of a possible 15. See 30 CFR §100.3(b). Further, even if Respondent controlled no other mines, 3,950,732 tons of coal produced would give it 9 "controller size points" out of a possible 10. *see* 30 CFR § 100.3(b). Thus, Respondent is a very large operator with a very large mine.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited moderate negligence.

(4) The effect on the Operator's ability to remain in business – The parties have stipulated that the Orders at issue here would not affect Respondent's ability to remain in business. (JX-1, 11)

(5) The gravity of the violation – As previously shown, this violation was unlikely to result in Lost Workday/Restricted Duty injuries to one miner, it was not S&S.

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

In light of the Administrative Law Judge's decision to modify the gravity from "Reasonably Likely" and "S&S" to "Unlikely" and "Non-S&S," a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$750.00.

III. CITATION NO. 8508512

A. Summary of Testimony

Archie Lewis Coburn, Jr.⁹ was at Highland No. 9 Mine on September 5, 2012 to do a spot inspection for methane liberation. (Tr. 13-14). Coburn arrived at the mine at around 2:45 p.m. and worked through the second shift. (Tr. 15). Upon arrival, he met Little, and the miner's representative, Bernie Alvey, to review the mine files and pre-shift examination books. (Tr. 15).

Coburn, Matt Birkenstock, and Alvey traveled underground to the No. 5 unit, checking the roof and ribs on the way. (Tr. 16). When at the unit, Coburn conducted an "imminent danger" run, where he checked all the faces and took air readings. (Tr. 16-17). He issued a citation for failure to record dust parameter checks on the power station date board. (Tr. 17).

Afterwards, Coburn traveled up the belt entry to leave, but at Crosscut 91 he felt air moving in the wrong direction, outby instead of inby. (Tr. 17). Coburn broke his smoke tube and then told Birkenstock and Alvey about the condition. (Tr. 18). Birkenstock went to tell the foreman while Coburn and Alvey followed the smoke down the beltline. (Tr. 18). The smoke traveled from Crosscut 91 to 15, about 300 feet. (Tr. 18, 27). While walking, Coburn found two places where the belt was out of alignment and continuously rubbing the travel-side of the belt frames. (Tr. 18-19, 27-28, 41). He inspected a total of 500 belt frames and these two were separated by seven to ten belt frames (seven to ten feet). (Tr. 41-42, 45-46). The area between them was not rubbing. (Tr. 41, 139). The belt was on and running continuously in half-inch grooves. (Tr. 19, 24, 28, 42, 53). Coburn did not know if the frames and the grooves were old and could not check for rust because the belt was moving. (Tr. 24, 42-43, 53). Regardless, he did not consider the frame's age important, the belt in the groove was a hazard. (Tr. 53). There were belt ravelings wrapped around the bottom rollers, next to the frame and sitting in the groove and there were belt shavings on the ground. (Tr. 19-20, 27-28, 38, 52-53). Ravelings occur when the edge of a belt is shredded by the frame while shavings are pieces of rubber sliced from the belt by grooves cut into the frames by the belt. (Tr. 19-20, 22, 53). As a result of these conditions,

⁹Coal Mine Inspector Coburn was present at the hearing and testified for the Secretary. (Tr. 11). Coburn graduated from high school in 1969 and served four years in the military. (Tr. 12-13). He worked for several companies running various equipment and conducting examinations. (Tr. 11-12). In 1989 he went to MSHA and received extensive training and has since received refresher training. (Tr. 12). Coburn was certified as an electrician and mine foreman. (Tr. 12). Coburn made notes contemporaneously while underground. (Tr. 39, GX-2).

Coburn issued a citation issued under Section 75.1731(b), requiring all belts to be aligned and maintained and for damaged rollers to be replaced. (Tr. 27).

According to Coburn, the cited condition was reasonable likely to result in injury because, under continued mining conditions without abatement, there was a possibility of a belt fire and smoke. (Tr. 23, 28, 47-48). To have a fire there must be oxygen, fuel, and a heat source. (Tr. 47). Here, there was oxygen, fuel from the shavings, and heat from the rubbing belt. (Tr. 49-50). The reversed air also indicated danger. (Tr. 25).

With respect to fuel, the area had accumulations, coal dust, and deteriorating belts (including shavings and ravelings) that could heat up from the friction caused by the belt rubbing and cutting the frame, resulting in a fire. (Tr. 23-24, 28-29, 53). However, there was no float coal dust on the belt. (Tr. 48-49). There was coal on the belt, but it was wet, minimizing the likelihood of a fire, though not eliminating it. (Tr. 55-57). Coburn believed coal fines and float coal dust could accumulate on the belt during normal mining operations. (Tr. 55-56). No methane or carbon monoxide was present during the inspection. (Tr. 48).

With respect to heat, this mine had created hot spots in the past. (Tr. 25). Specifically, Coburn had seen smoking misaligned belts and shavings on fire or smoking. (Tr. 25). Here, the bottom belt was rubbing the frame and the frame warmed his hands through a leather glove. (Tr. 20, 28, 51). He believed it would eventually get hot under normal mining conditions but was not yet hot enough to ignite. (Tr. 49, 51). It was not smoking or smoldering. (Tr. 46). There was a smell from the rubbing belt, but Coburn could not say how long it existed. (Tr. 46-47). Coburn did not know the temperature of the belt because MSHA no longer allowed him to use a heat measuring device. (Tr. 34-37). The belt was designed to be flame resistant, but only as a singular unit; once the belt began to deteriorate from heat or shredding it could catch fire. (Tr. 25, 37, 52). The rollers turning in the ravelings were another heat source, however they were not touching the part of the frame that was being rubbed. (Tr. 53, 57). The shavings on the ground were 12-inches away from the warm area but could have caught fire. (Tr. 38, 49-50). Coburn did not know the ignition temperature of the belt or the shavings and ravelings. (Tr. 25, 37-38).

Coburn believed the most likely injuries were lost workday/restricted duty because personnel inby or traveling the area would be affected by smoke inhalation and anyone fighting the fire could be burned. (Tr. 26, 29). He believed this level of injury was likely because the belt examiner had already passed, and the next examiner would not return until 2-2:30 a.m., 8-12 hours later. (Tr. 31, 50). The condition would worsen as the shift went on. (Tr. 31).

The citation was marked as affecting five persons because there were five people in the unit shack 43 crosscuts from the rubbing belt. (Tr. 29-30). Once the air flow was corrected, the smoke would have been moving inby, the direction of the shack. (Tr. 30-31). Also, anyone traveling the supply road or coming into the unit would be exposed. Including examiners and cleaners. (Tr. 25, 30). Coburn believed 16 people would be exposed during an evacuation because the supply road adjacent to the belt entry would be the first escape route. (Tr. 30).

This condition was marked S&S because, if the condition continued and injury occurred, it would be a lost workday/restricted duty injury from smoke inhalation or burns. (Tr. 31). Coburn believed that if the belt remained misaligned it would continue to heat up. (Tr. 56).

The condition was marked high negligence because Coburn passed the belt examiner, Guy Scisney, doing his on-shift 10 minutes prior to his discovery of the condition.¹⁰ (Tr. 21, 26, 31-32, 45). Coburn was walking on the travel side of the belt moving outby when he met Scisney driving inby in a golf cart at Crosscut 75. (Tr. 21-22, 26, 43, 131-133, 145-146). This belt was likely the last one that Scisney examined that night. (Tr. 132). He was supposed to examine the entirety of the belt twice a day for conditions with the ribs, the roof, the beltline (including alignment), shavings, ravelings, the rollers, float coal dust, rock dusting, and worn out bearings. (Tr. 26, 32, 54-55, 133-134, 139, 142-145). Examiners place date, times, and initials when examining faces, the outby installations, and air courses every 15 breaks. (Tr. 146-147).

Coburn believed Scisney would have seen the condition because it was on the travel side and was obvious. (Tr. 26, 32, 55). Coburn did not believe that Scisney had conducted an adequate exam because the air was reversed, there were two places where the belt was rubbing, and there was a loose rib. (Tr. 33). Coburn conceded that it was possible to see different things coming from one direction instead of another or while on foot instead of a cart. (Tr. 44). However, examiners are trained to identify hazards regardless of the direction of travel. (Tr. 54).

In addition to conducting exams, examiners were required to memorialize hazards in the belt book so the foreman could see them and non-production shifts could fix them (Tr. 132-134, 135, 139-140). Before the inspection, Coburn found no hazards listed in the book. (Tr. 20-21). Scisney countered that he had listed hazards. (Tr. 138). He reviewed the belt books that he filled out on September 4, 2012 (RX-1) and September 5, 2012 (RX-2). (Tr. 135-137, 147). In RX-1, Scisney wrote, “[h]eader to takeup at Crosscut 5 to 14 and 17 to 22 and 37 to 40 and 48 to 60 dirty.” (Tr. 137-138). This meant that he had observed accumulations, including ravelings that needed to be cleaned. (Tr. 137-138). RX-1 also included the notation “TR8,” meaning that a top roller needed to be changed but that the belt did not need to be turned off. (Tr. 138-139). He did not see any misaligned belts that day or he would have reported them to the foreman. (Tr. 139-142). In RX-2, Scisney wrote, “violation, header, tandem, and takeup,” meaning the belt equipment was dirty. (Tr. 140). Crosscuts 3 to 5, 45 to 48, and the tailpiece were also dirty. (Tr. 140). He also saw three bottom rollers and two top rollers that needed to be replaced. (Tr. 142-

¹⁰ Guy G. Scisney, Jr. was present at the hearing and testified for Respondent. (Tr. 127). He had worked continuously in the mining industry since December 1, 1970. (Tr. 128). At the time of the hearing Scisney was employed as a mine examiner at Highland Mine and had been since 2003 or 2004. (Tr. 127, 129). Scisney received foreman papers in 1977 and filled in as an extra examiner for 14 years for three companies. (Tr. 129-130). As an examiner, he would examine belts, pre-shift units, pre-shift outby installations, check for hazards, look out of the welfare of miners, and try to comply with state and federal law. (Tr. 127). Scisney was a union rep, not management. (Tr. 127-128). He was certified as a mine emergency technician and received the Joseph Holmes Award for working 43 years without an injury or unexcused absence. (Tr. 128). Scisney’s threw his actual notes out after transferring them to the record book. (Tr. 147-148).

143). That day, Scinsey would have passed Crosscuts 65 to 67, where Coburn issued the citation for misaligned belt. (Tr. 141). Scisney did not believe the belt was misaligned that day and that he would have noticed it, even if it was a single spot. (Tr. 141-142).

In addition to the exam, Coburn believed the shavings and ravelings indicated that the condition had existed for some time. (Tr. 22). The condition was present when he arrived. (Tr. 22-23). While Coburn was not sure how long the belt was rubbing, it would take 16 to 24 hours for the belt to cut a groove and days to cut half an inch. (Tr. 22, 24, 32, 36-37). Coburn believed it had been running for while despite the fact that it was only warm. (Tr. 36-37, 49).

At the time the citation was issued Coburn did not see, and Respondent did not raise, mitigation. (Tr. 33). Scinsey testified that he did not agree with the negligence designation because if the belt had been out of line he would have known and told the foreman. (Tr. 143).

The condition was abated when Alvey adjusted the belt and rollers. (Tr. 18, 26, 33, 40). This took less than 30 seconds. (Tr. 33, 40). The belt was not shut down. (Tr. 40). After the inspection, Coburn told management about the citation and held meetings with them about ensuring proper air direction and proper recording of conditions in the belt book. (Tr. 27).

B. Contentions of the Parties Regarding Citation No. 8508512

With respect to Citation No. 8508512, the Secretary asserts that Respondent violated 30 C.F.R. §75.1731(b), that this violation was reasonably likely to result in Lost Workday/Restricted Duty injuries to five miners, that the violation was S&S, and that it resulted from high negligence. (GX-1). (*Secretary's KENT 2013-112 Post-Hearing Brief* at 6-12). The Secretary presumably believes that the proposed penalty of \$10,437.00 is appropriate.

Respondent concedes that Citation No. 8508512 was validly issued. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 6). However, it argues that a Lost Workday/Restricted Duty injury was unlikely to occur and that the violation was not S&S. (*Id.*). It also believes that its actions would be better characterized as showing no negligence. (*Id.*). Finally, Respondent presumably believes that the penalty should be reduced pursuant to its proffered gravity and negligence determinations.

C. Findings of Fact and Conclusions of Law Regarding Citation No. 8508512

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §75.1731(b).

On September 5, 2012, Inspector Coburn issued a 104(a) Citation, No. 8508512, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

The 2nd. South belt line was not being maintained in safe operating condition or properly aligned. The bottom belt was rubbing two belt stands that were warm to the touch. One was between crosscut 66-67, one was between crosscut 65-66. Belt

raveling's [sic] were present around the bottom belt rollers and on the mine floor. The belt had cut into the belt frames 1/2 inch.

Section 75.1731(b) was cited 45 times in two years at mine 1502709 (45 to the operator, 0 to a contractor).

(GX-1).

The cited standard, 30 C.F.R. §75.1731(b). ("Maintenance of belt conveyors and belt conveyor entries."), provides the following:

(b) Conveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components.

30 C.F.R. §75.1731(b).

At hearing, Secretary's counsel presented credible evidence to show that the 2nd South belt was rubbing against the belt structure in two places, roughly ten feet apart. (Tr. 18-19, 27-28, 41, 45-46). This condition was caused by a misalignment of the belt. (Tr. 139). Nothing was presented to undermine this evidence.

In its brief, Respondent conceded that, based on the evidence provided at hearing, the violation was validly issued. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 6). In light of this fact, and the evidence presented, I find that Respondent violated 30 C.F.R. §75.1731(b).

2. The Violation Was Reasonably Likely to Result in Lost Workday/Restricted Duty Injury To Five Miners And Was Significant And Substantial In Nature.

Inspector Coburn marked the gravity of the cited danger in Citation No. 8508512 as being "Reasonably Likely" to result in "Lost Workday/Restricted Duty Injury" to five miners. (GX-1). The inspector also found this violation was S&S. (GX-1). These determinations are supported by a preponderance of the evidence.

Regarding the first element of S&S - the underlying violation of a mandatory safety standard – it has already been established that Respondent violated 30 C.F.R. §75.1731(b).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation was also met. As discussed *supra*, the Secretary presented credible evidence that, as a result of misalignment, the 2nd South Belt was rubbing belt structure in two locations. (Tr. 18-19, 27-28, 41, 45-46, 139). The Secretary presented further credible evidence that the belt had cut into the belt structure half an inch. (Tr. 19, 24, 28, 42, 53). As a result of this rubbing and cutting, there were belt ravelings wrapped around the bottom roller, belt shavings collecting on the floor, and friction. (Tr. 19-20, 23-24, 27-29, 52-53). Inspector Coburn credibly testified that the belt structure warmed his hand through his leather gloves, meaning the chance for fire and smoke was already increasing

because of this condition. (Tr. 20, 28, 51). Coburn believed that, with continued normal mining conditions, the belt would continue to heat up to the point that it would catch on fire. (Tr. 51). Coal particles on the belt, broken pieces of the belt, and the shavings on the floor would likely be the fuel. (Tr. 23-24, 28-29, 53). In the past Coburn had found smoldering and smoking shavings at this mine. (Tr. 25). Therefore, the rubbing belt clearly contributed to a discrete safety hazard, miners being injured by fire or smoke. (Tr. 26, 29).

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. It is reasonably likely that, in the event of a fire, the five miners in the unit shack, would be affected by the smoke or by the fire, resulting in injuries. (Tr. 29). Miners sent to fight the fire would also be affected and injured. (Tr. 26, 29). In this matter, the hazard contributed to was realized and an injury would occur as a result. Therefore, I find this an injury was reasonably likely and that the third prong of *Mathies* was met.

Under *Mathies*, the fourth and final element that the Secretary must establish is that there was a “reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984). In the event of a fire, the Secretary presented credible evidence that miners would suffer lost workday/restricted duty injuries from smoke inhalation. (Tr. 26, 29). Further, miners would face similarly severe burn and smoke inhalation injuries when fighting the fire. (Tr. 26, 29). These types of injuries are sufficiently serious to support an S&S designation. See *Amax Coal Co.*, 19 FMSHRC 846 (May 1997)(upholding judge's S&S finding based on evidence of smoke inhalation or burns, which would constitute serious injury). In fact, Respondent conceded that, in the event of a fire, serious injury would occur. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 13). Therefore, the fourth prong of *Mathies* is met.

Further, I note that an inspector's opinion that a violation is S&S is accorded substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d at 135-36. In this matter, Inspector Coburn credibly testified that the condition was S&S. (Tr. 31). As a result of the inspector's opinion and, more importantly, the factors discussed above, I find that the Secretary proved the violation was S&S by a preponderance of the evidence.

Respondent presented several arguments for the proposition that this citation was not reasonably likely to result in injury and not S&S. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 12-25). However, none of these arguments were compelling.

First, Respondent argued that the Secretary used the wrong standard in establishing the likelihood of a fire. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 13-14). While Respondent concedes that “Reasonably Likely” does not mean “more likely than not,” it asserts that a “mere possibility” or a claim that a fire “could” happen is insufficient to sustain an S&S violation. (*Id. citing U.S. Steel Mining Co.*, 18 FMSHRC 862, 865-868 (1996); *Oxbow Min. LLC*, 2013 WL 1856627, *25 (Apr. 11, 2013)(ALJ); *Energy Fuels Coal Inc.*, 14 FMSHRC 1804, 1812 (Nov. 1992)(ALJ); *Brown v. Payton*, 544 U.S. 133, 151 (2005)(Souter, J. dissenting); *Johnson v. Texas*, 509 U.S. 350, 367-368 (1993). Respondent cites to testimony from Inspector Coburn wherein he is asked why he believed the condition was reasonably likely to result in

injury and he stated, “[b]ecause if normal mining were to continue and this condition were to be allowed to stay present, then the possibility of a mine fire was there.” (*Id.* at 13 *citing* Tr. 28-29).

It is true that Inspector Coburn said on two occasions at hearing the he was concerned about the possibility of a mine fire. (Tr. 23, 28-29). However, these statements, taken out of the overall context of the Inspector’s testimony, fail to convey the actual content of Coburn’s testimony. For instance, Coburn stated, when specifically asked why he believed the condition was S&S, that “if the conditions were to continue and an injury were to occur, it would result in a lost workday or restricted duty injury.” (Tr. 31). Further, when asked if the conditions present could cause a fire stated, “Yes ma’am. If the conditions continued and the belt stayed out of alignment, it’s just going to worsen. You are going to deteriorate the belt, there are going to be more shavings, the heat’s going to build up.” (Tr. 56). Perhaps most persuasively, Coburn stated, “[i]f it continued, normal mining continued, it would continue to rub. All it was going to do was get hotter.” (Tr. 51). Taken as a whole and considering specific instances in which he was asked about the condition, Inspector Coburn’s testimony indicates that he believed under normal mining conditions, that a fire was going to occur. Inspector Coburn’s use of the word “possibility” might have been somewhat confusing, but the overall meaning of his testimony is clear: this belt would continue to heat up until smoke or a fire occurred.

It is instructive that Judge Moran faced a nearly identical situation, an alleged S&S violation of 30 C.F.R. §75.1731(b) issued by Inspector Coburn at Highland No. 9 Mine, and found the same thing. Moran found:

The Respondent has referred to the Inspector's statement of the *possibility* that a belt fire could ensue if the condition remained uncorrected, and that such a statement does not satisfy the S&S standard, as that description means a fire was not “reasonably likely to occur.” R's Br. at 8. The Court views that as an inaccurate characterization of the law and the Inspector's expression... The Court adopts Inspector Coburn's recounting of the events, including the circumstances leading up to the discovery of the problem. It also takes into account, the Inspector's view as to whether the condition was S&S. Even if it declines to find that the belt had been out of line for “at least 48 hours,” the condition was S&S. Inspector Coburn was not contending that there was a likely ignition at the time he found the violation. However, he added that “*if normal mining would have continued* [with] the belt being out of alignment, the temperature would increase along with the possibility of a fire.” Tr. 185.

Highland Mining Company, LLC, 35 FMSHRC 221, 236 (Jan. 2013)(ALJ Moran) (emphasis in original)(footnotes omitted). Like Judge Moran, I find that the weight of the Inspector’s testimony indicates that a fire or smoke was reasonably likely under continued normal mining conditions and I credit that testimony.

Furthermore, even without considering Coburn’s specific answers to questions, the evidence supports a finding that a fire or smoke was likely. The belt was traveling 700 to 750 feet per minute. (Tr. 23). It was rubbing against a frame and actually cutting into the metal. (Tr. 18-19, 24, 27-28, 41-42, 53). This condition was causing heat that would continue to increase if

the belt continued to rub. (Tr. 51). The mine was full of combustible material including coal and belt material. (Tr. 23-24, 28-29, 53). Under these conditions, I would find a fire was likely even if Inspector Coburn had not been asked his opinion.

Respondent's second argument was that the necessary elements for the "fire triangle" (oxygen, fuel source, and ignition source) were not present at the mine, meaning no fire was possible. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 14). Respondent is argued that there was not a confluence of factors present to create a fire. (*Id.* at 19 *citing Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (1997)). Specifically, Respondent asserts that there was neither a fuel source nor an ignition source with respect to this rubbing belt. (*Id.* at 14-23). I will consider each argument in turn.

With respect to the fuel source, Respondent argues that several possible combustible materials proffered by the Secretary (and some that are not) would not actually serve as a fuel source. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 14). For example, Respondent argued that no methane was present at the cited location. (*Id.* at 14, *citing* Tr. 48). Respondent was correct that no methane was found at the time of the citation, as Coburn testified that his gas detector did not go off. (Tr. 48). However, nowhere in Coburn's testimony or in the Secretary's briefs does the Secretary assert that methane was a fuel source. The Secretary cites accumulations of coal and belt material, not methane. (Tr. 23-24, 28-29, 53). The S&S finding in this matter does not stand or fall based on whether methane was present. With that noted, I am not wholly convinced that methane is not a potential fuel source. While no methane was detected, this mine was on a 15-day spot for methane, meaning that it liberated 250,000 cubic feet of methane in a 24-hour period. (Tr. 16). Even though no methane was present at the time, the Commission has consistently recognized that a sudden buildup of methane in a gassy mine can reasonably be expected. *Twentymile Coal Co.*, *supra* at *3 (*citing U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1130 (Aug. 1985)). Simply because no methane was found at the time of the inspection does not mean that, under continued normal mining operations, that methane could not be present later.

Respondent also argued that no factual testimony was presented to support the Secretary's assertion that pieces of the belt could act as a fuel source. (*Id.* at 14-15). Respondent noted that the belt is flame retardant and that while the Secretary asserts it can become combustible when it breaks down, it provides no evidence beyond Coburn's testimony. (*Id.*). Relatedly, Respondent noted that Coburn was unsure how hot the belt would need to get in order to catch on fire. (*Id.* at 15 *citing* 37-38). Further, the broken belt material was not near the place where the belt was rubbing the stand, so Respondent did not believe that those materials would get any warmer. (*Id.* at 16-17, *citing* Tr. 38, 49, 59).

As Judge Steele noted, a fire retardant belt is not a fire proof belt; it still produces friction and can still ignite fuel sources. *Raw Coal Mining Co., Inc.*, 2013 WL 3865340, *12-13 (June 4, 2013)(ALJ Steele); *see also Aracoma Coal Company, Inc.*, 32 FMSHRC 1639, 1642 (describing a fire that resulted from frictional heat caused by a misaligned, fire-resistant belt). For purposes of analyzing whether a violation is S&S, a "hazard continues to exist regardless of whether caution is exercised." *Amax Coal Co.*, 19 FMSHRC at 850 *citing Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992). Fire retardant belts reduce, rather than eliminate, the risk of fire. The existence of a flame retardant belt does not excuse Respondent from its obligation to maintain

the belts. If the drafters of the regulations believed that a fire retardant belt was sufficient to prevent the risk of fire and smoke, 30 C.F.R. §75.1731(b) would require that belts be either aligned to prevent rubbing or be flame retardant. It does not. It requires all belts, even fire retardant belts, to be aligned to avoid rubbing to prevent the risk of fire and smoke. It is significant that Inspector Coburn had found smoldering material caused by belt friction at this very mine in the past. (Tr. 25, *Highland Mining Company, LLC*, 35 FMSHRC at 227). I credit the testimony of Inspector Coburn that, under continued normal mining conditions, this belt would continue to deteriorate and the heat would continue to increase. (Tr. 25, 37, 51-52). These two factors, working in concert, would result in a smoke or a fire. The flame retardant belt may slow the process, but it would not eliminate the risk.

Coburn's inability to say the exact temperature at which the belt would ignite was immaterial. He credibly testified that the belt would continue to heat up until it smoked or caught on fire. (Tr. 51). The fact that Coburn had seen belts at this mine smoldering before indicates first-hand knowledge of the necessary conditions for a fire. (Tr. 25). One does not need to know the combustion point for the head of a match to know that it can catch fire.

Similarly, the fact that the broken material was 12 inches from the warming belt stands is immaterial. While those particular pieces of belt were not close enough to the belt frame to maintain heat, they were still a fuel source. (Tr. 38, 49, 57). As the belt continued to run in the grooves cut into the belt frames, more pieces of the belt would be deposited on the floor. When the belt grew warmer some of these pieces and fibers, or perhaps coal dust, would ignite. When these ignited and fibers fell to the bottom, they could land on top of the accumulation of combustible material and ignite them as well. Therefore, the currently existing belt pieces, as well as the future pieces of belt in the area, would constitute a fuel source.

The final fuel source disputed by Respondent was coal accumulation. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 17-18). Respondent argued that Inspector Coburn did not know how hot coal would have to be to catch on fire. (*Id.* at 17 *citing* 49). It further argued that the coal present was not float coal dust and that the area was wet. (*Id. citing* 48-49). It stated that the only thing that the Secretary had proven was that dry coal could catch fire. (*Id. citing* 24, 55-56).

Settled Commission precedent supports the proposition that wet coal will eventually dry out. *See Utah Power & Light*, 12 FMSHRC 965, 969 (May 1990) (*citing Black Diamond Coal Company*, 7 FMSHRC 1117, 1120-21 (Aug. 1985) (dampness in coal does not render it incombustible and wet coal can eventually dry out in a mine fire and ignite); *see also Mid-Continent Resources, Inc.*, 16 FMSHRC 1226, 1230 (Jun. 1994) and *Amax Coal Co.*, 19 FMSHRC at 849. While the coal present at the cited area was wet, any coal will eventually dry and serve as a fuel source. Further, if a fire started from some other source, the coal would be rapidly dried and immediately be added as a fuel source. I find no reason to discount coal as a fuel source at the cited location.

Having considered Respondent's arguments regarding the fuel sources, I turn now to consider the claim that the area lacked an ignition source. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 19-23). Respondent noted that Coburn made no observations that determined

how long the belt had rubbed the frame and that he did not look for rust on the frames. (*Id.* at 19 *citing* Tr. 43). Respondent pointed out Coburn conjectured it lasted 16 hours, 16-24 hours, or days but that it was only warm to the touch. (*Id.* *citing* 20, 22-24, 32, 36). According to Respondent, Coburn's only argument was that under normal mining conditions it would catch on fire. (*Id.* at 20 *citing* 23, 28-29, 51). But, it opined that Coburn could not explain how it would not get hot enough to burn in a day of rubbing but would get hot enough in a few hours. (*Id.* at 21 *citing* Tr. 19). Instead, Respondent alleged that heat from the rubbing would be lost to the surrounding area and reach an equilibrium at simply warm. (*Id.* at 21 *citing* *Highland Min. Co.*, 34 FMSHRC 2612 (2012)).

I find that Inspector Coburn's testimony on the length of time the condition existed was credible. The belt had cut half an inch into the belt frame. (Tr. 19, 24, 28, 42, 53). This amount of cutting would take time occur and Coburn's estimate of 16-24 hours was reasonable and based on his experience. (Tr. 22, 24, 32, 36-37). While it is true that Coburn was unable to check the belt frame for rust (presumably to determine if the grooves cut in the belt frame were old) this was because the belt was actually moving in the groove. (Tr. 42-43, 53). While Coburn acknowledged that it was possible that these cuts were old, I find that it is highly unlikely that this belt happened to go out of alignment in two separate places and that those two separate places just happened to be at locations where old frames had already been cut half an inch deep by belts in the past.¹¹ Therefore, I find that the belt was rubbing and cutting for 16-24 hours and that the friction caused by this rubbing was an ignition source.

I also find that the fact that the belt frame was only warm to the touch at the time of the inspection does not undermine the fact that it is an ignition source. Coburn credibly testified that the belt frame felt warm to the touch even through his leather gloves. (Tr. 20, 28, 51). That would require a considerable amount of heat. (Tr. 20, 28, 51). Respondent was correct that the Secretary did not prove that the belt would get hot enough to burn in the next few hours or that the inspector had caught the condition "just in the nick of time." (*Respondent's KENT 2013-112 Post-Hearing Brief* at 21 & 24). But, the Secretary was not required to prove those things. As noted earlier when considering the gravity of a violation, the likelihood of that hazard being realized must be considered assuming normal continued mining operations without abatement. *Consolidation Coal Co.*, 8 FMSHRC at 899. The same is true when that consideration occurs in an S&S analysis. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (Jul. 1984), *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1221-1222 (Jun. 1994) (*citing* *U.S. Steel Mining Co. Inc.*, 7 FMSHRC at 1130): *see also* *Highland Mining Company, LLC*, 35 FMSHRC at 236. While the belt was not hot enough to ignite at the time of the citation, Coburn credibly testified that if the condition continued, it would eventually get hot enough to cause a fire. (Tr. 51). Finally, there is no evidence on the record to support a claim that the heat from the belt would reach equilibrium and stay warm, rather than become hot. The only evidence on point is Coburn's credible testimony that it would continue to heat up. As a result, I believe the rubbing belt was an ignition source.

¹¹ Of course, it was also possible that Respondent's frames were riddled with grooves cut by misaligned belts and that any place where the belts went out of alignment would necessarily come in contact with old grooves. However, if that were the case, it would not speak well of Respondent's care and attention to its belt. Regardless, there is no evidence on record to support a claim either that these frames were old or that the frames were in general disrepair.

Therefore, the preponderance of the evidence supports the Secretary's determination with respect to the likelihood of injury, the severity of that injury, and the S&S designation.

With respect to the number of persons affected, the Secretary presented credible evidence that if smoking or a fire were to occur, five miners were located in a unit shack near the cited condition and would be affected. (Tr. 29). In fact, this condition was in a belt entry directly adjacent to an escapeway, meaning miners evacuating the area would also be affected by the fire and smoke. (Tr. 30).

In short, the preponderance of the evidence shows that Citation No. 8508512 was reasonably likely to result in lost workday/restricted duty injuries to five persons and was S&S.

3. Respondent's Conduct Displayed "Moderate" Negligence Rather Than "High" Negligence.

In the citation at issue, Inspector Coburn found that the operator's conduct was highly negligent in character. (GX-1). While substantial evidence supports a finding of negligence, that negligence is better characterized as "moderate" in light of the existence of some mitigating factors.

With respect to knowledge, the factual situation presented here is substantially similar to that in Citation No. 8508232. Specifically, a mine examiner passed through the cited area just minutes before the Inspector discovered and cited the violative condition. (Tr. 21, 26, 31-32, 45). The examiner was walking along the entry where the belts were rubbing and did not correct, record, or flag the cited condition as he should have. (Tr. 123). As discussed *supra*, the cited condition had existed for 16-24 hours and, therefore, was present when the examiner passed it. (Tr. 22, 24, 32, 36-37). As with the previous citation, the examiner was an agent of Respondent and his actions were imputable to the operator. *Whayne Supply Co., supra*; *Rochester & Pittsburgh Coal Co., supra*; and *Southern Ohio Coal Co., supra*. As a result, Respondent knew or should have known about the cited condition but took no action. Therefore, Respondent was negligent.

Respondent argued that it did not have knowledge of the cited condition and therefore, cannot be negligent. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 6-11). However, Respondent's arguments are not compelling.

First, Respondent argues that it did not have actual knowledge of the condition. (*Respondent's KENT 2013-112 Post-Hearing Briefs* at 6). Respondent's briefing on the issue of negligence in general indicates an uneasiness with the "knew or should have known" standard used in evaluating negligence. As Respondent notes with respect to Citation No. 8508512, "the Secretary does not allege that Highland *actually* knew...but only that Highland *should have*." (*Id.* at 9, emphasis in original).

While Respondent is correct that the Secretary did not allege that Respondent actually knew of the cited condition, he does not have to prove actual knowledge. As Respondent noted in its own brief, the definition of the various degrees of negligence are found at 30 C.F.R.

§103(d), Table X and those definition include the phrase “knew or should have known.” (*See Respondent’s KENT 2013-112 Post-Hearing Brief* at 9). Respondent’s discomfort with being held responsible for conditions it “should have known” about is noted, but that is the standard under the rules (and under every legal standard of basic negligence with which I am familiar).

Second, Respondent once again contends that the condition was not obvious and challenges the Secretary’s definition of that term. (*Respondent’s KENT 2012-112 Post-Hearing Brief* at 6-11). As with Citation No. 8508232, Respondent characterizes the Secretary’s definition of negligence as being self-serving: the issuance of the citation necessarily implies that it is obvious. (*Id.*). It further argues that Scisney was the best possible examiner to check the area and that, despite his diligence, he did not notice the condition. (*Id.* at 11).

For the same reasons noted regarding Citation No. 8508232 *supra*, I do not find this argument to be persuasive. Inspector Coburn was not elucidating a general proposition for what is or is not obvious. Instead, he clearly testified that in his opinion this particular condition was obvious. (Tr. 26, 32, 55). There were two separate areas where the belt was rubbing the belt frame. (Tr. 18-19, 27-28, 41). This condition was clearly visible from the travelway. (Tr. 26, 32, 55). Respondent had had problems with hot spots in the past, meaning that it had notice to look for conditions that might be less obvious on the belt lines. (Tr. 25). Further, Inspector Coburn testified that he had specifically addressed this problem with Respondent just a few days earlier, meaning it knew that it was supposed to take special care with the belts. (Tr. 69, 84-85).

Relatedly, Respondent’s claim that the condition was not obvious simply because Scisney did not see it goes too far. It essentially makes the mirror argument that Respondent found so offensive when it alleged the Secretary was making it; namely that if Scisney did not see the condition then it could not be obvious. If such a broad, general principle will not work for the Secretary, it will not work for Respondent either. Such a definition would reward willful ignorance. Based on the evidence on record, I find that the condition was obvious and that Respondent knew or should have known about it.

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. The evidence showed that Respondent placed their most qualified belt examiner in the area. (Tr. 127-130). Among his other credentials, Scisney had never missed a day of work as a result of injury. (Tr. 128). Respondent reasonably believed that Scisney was the most competent person to inspect the area. Further, Scisney was not a member of management and therefore had less incentive to ignore conditions. (Tr. 127-128). The evidence shows that Scisney had not been shy about correcting conditions in the past. (Tr. 135-147). This shows that Respondent was putting some emphasis on ensuring the safety of the belts. While in this particular case Scisney made a mistake and failed to notice two pieces of belt rubbing the belt frame, that does not wholly negate the impulse that led to his appointment. I find no other mitigating factors in this case. However, in light of this mitigating circumstance, a finding of high negligence is not appropriate; with respect to Citation No. 8508512, Respondent was moderately negligent.

The Secretary argues that there are no mitigating circumstances and that the “High” negligence designation is appropriate. (*Secretary’s KENT 2013-112 Post-Hearing Brief* at 12

and *Secretary's KENT 2013-112 Reply Brief* at 1). Specifically, the Secretary notes that the examiner traveling through the area should have been checking the belts and the fact that he was zipping through the area on his golf cart was no excuse for failure to find the condition. (*Id.*).

As I found *supra*, Scisney's examination was clearly deficient. It is entirely possible that earlier examinations before Scisney's were also deficient. The condition was present and obvious and should have been noticed. However, Respondent made some good-faith effort to ensure the safety of the belts and reasonably relied on Scisney to find the conditions. That does not change the fact that the condition existed or that Respondent was responsible for it, but I find that it somewhat mitigates Respondent's negligence.

In addition to placing the most experienced examiner in this belt area, Respondent claims that several other mitigating factors indicate a finding of "Low" is more appropriate. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 11-12). However, these arguments are not compelling.

First, Respondent argued that Scisney's inability to find the condition was the result of different point of views for the examiner and opposed to the inspector. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 11). As I discussed with respect to Citation No. 8508232, the direction of travel is immaterial; Respondent's examiners are required to find hazardous conditions regardless of the method or direction of travel.

Second, Respondent argued that the Secretary did not contend that Respondent had actual knowledge, only that it should have known. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 11). The issue of knowledge and the legal basis for the "knew or should have known" standard have been discussed at length, *supra*. Respondent's lack of actual knowledge is in no way a mitigating circumstance as it should have known about the condition.

Third, Respondent argued that the Secretary alleged no history of belt problems. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 11). That is simply false. The Secretary presented uncontested evidence that Respondent had been cited 45 times at Highland Mine No. 9 in the two years prior to this citation. (GX-1). Further, one of the cases cited above, *Highland Mining Company, LLC*, shows that Respondent was held liable for an S&S violation of the standard cited here. 35 FMSHRC at 236.

Fourth, Respondent argued that Coburn's testimony about how long the condition existed was speculative and contradicted by the physical evidence. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 11-12). As discussed *supra*, Coburn credibly testified that the condition had existed 16-24 hours and the physical evidence supported this testimony. (Tr. 22, 24, 32, 36-37). There is nothing speculative or unreliable about this evidence and Respondent presented no evidence to counter it.

Fifth, Respondent argued that no one suggested the firefighting equipment was inadequate. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 12). Respondent is correct; there is no reason to believe that the firefighting equipment would be insufficient to stop a fire. However, by the time a fire occurs, it is far too late. Miners are already in danger. *See Buck*

Creek Coal, Inc. v. MSHA, 52 F.3d at 136 (“The fact that Buck Creek has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are presumably in place (as MSHA regulations require them to be) precisely because of the significant dangers associated with coal mine fires”); *see also Amax Coal Co.*, 19 FMSHRC at, 850. Further, compliance with some MSHA regulations does not excuse non-compliance of others. This is not mitigation.

Sixth, Respondent argued that there were no damaged, stuck, or broken rollers. (*Respondent’s KENT 2013-112 Post-Hearing Brief* at 12). This is not entirely true; Inspector Coburn did not allege any broken or damaged rollers that day, but Scisney did. (Tr. 142-143). With that noted, it is true that none of these conditions were in the direct vicinity of the rubbing belt. (Tr. 142-143). Regardless, the fact that Respondent did not violate other standards in the cited area in no way mitigates its violation of the current standard.

Finally, Respondent argued that the condition was abated in 30 seconds. (*Respondent’s KENT 2013-112 Post-Hearing Brief* at 12). To the extent that this shows that Respondent was not actually aware of the cited condition (because if they had, correcting it was simple and inexpensive), I consider it relevant. However, as already repeatedly held, Respondent should have known about the condition and was therefore negligent. To the extent that Respondent wishes to have credit for correcting a condition after it was cited, I refer to my reasoning with regarding to Citation No. 8508232. This is not a mitigating factor.

In light of the finding that there were mitigating circumstances here, but that they were not substantial, I find that Respondent was moderately negligent.

4. Penalty

In this matter, the Secretary proposed a penalty of \$10,437.00 for Citation No. 8508512. I find that a deviation from the Secretary’s proposed assessment is warranted herein and will evaluate the factors contained in 30 U.S.C. §820(i) to explain that deviation. Those factors are as follows:

(1) The Operator’s history of previous violations – in the two years preceding this violation the Plant was cited 45 times for this condition. (GX-1).

(2) The appropriateness of the penalty compared to the size of the Operator’s business - The Highland No. 9 Mine produced 3,950,732 tons of coal in 2012, and had 1,079,470 hours worked in 2012. (JX-1, 10). According to MSHA’s penalty assessment guidelines this gives Highland No. 9 Mine 15 “mine size points” out of a possible 15. See 30 CFR §100.3(b). Further, even if Respondent controlled no other mines, 3,950,732 tons of coal produced would give it 9 “controller size points” out of a possible 10. See 30 CFR § 100.3(b). Thus, Respondent is a very large operator with a very large mine.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited moderate negligence, rather than high negligence.

(4) The effect on the Operator's ability to remain in business – The parties have stipulated that the Orders at issue here would not affect Respondent's ability to remain in business. (JX-1, 11)

(5) The gravity of the violation – As previously shown, this violation was reasonably likely to result in Lost Workday/Restricted Duty injuries to five miners and was S&S in nature.

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

In light of the Administrative Law Judge's decision to modify the negligence of the citation from "High" to "Moderate," a reduction in the penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$9,000.00.

KENT 2013-480

I. Stipulations

The parties have entered into several stipulations, admitted as Parties' Joint Exhibit 2. Those stipulations include the following:

1. Highland Mining Company, LLC is subject to the Federal Mine Safety and Health Act of 1977, as amended ("The Mine Act") and to the jurisdiction of the Federal Mine Safety and Health Review Commission;
2. At all relevant times, Highland Mining Company, LLC, and the mine, Highland 9 Mine (Mine ID 15-02709), mined and produced coal, which entered commerce, or had operations or products which affected commerce, within the meaning of the Mine Act;
3. Highland Mining Company, LLC, is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the administrative law judge has the authority to hear this case and issue a decision;
4. Highland Mining Company, LLC, was an "operator," as defined in the Mine Act, at the mine, Highland 9 Mine, (Mine ID 15-02709), when the citations and order at issue in this proceeding were issued;
5. The mine, Highland 9 Mine, (Mine ID 15-2709), is a "coal or other mine" within the meaning of the Mine Act.
6. Highland Mining Company, LLC, is a larger operator;
7. Imposition of a reasonable penalty will not affect the ability of Highland Mining Company, LLC, to remain in business.

8. Each of the citation and orders at issue in these proceedings was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Highland Mining Company, LLC.

(JX-2) (*see also* Tr. 157).

II. Citation Nos. Nos. 8511144 and 8511145

A. Summary of Testimony

On November 8, 2012, Kirby Smith¹² and Joe Pollard¹³ inspected Highland No. 9 Mine. (Tr. 163, 165). They, along with Little and miners' rep Larry Baker, Jr., were together the entire time.¹⁴ (Tr. 165, 186-187, 218, 264-265, 336). Pollard was assigned to conduct a quarterly inspection of the mine. (Tr. 215). Smith's was present for a monthly supervisory mine visit. (Tr. 166, 218). Smith asked Pollard which belts had not been inspected and Pollard identified the first main north belt. (Tr. 166). Pollard chose this belt because the record book indicated that the area "needs dusting" three straight days and he wanted to check it out. (Tr. 216-217).

¹² Kirby Grant Smith was present at the hearing and testified for the Secretary. (Tr. 159). He was a senior special investigator at MSHA. (Tr. 159). Before joining MSHA in 1978 he worked in the mining industry for six years running various equipment. (Tr. 160-161). He was a certified Alabama mine foreman and electrician and conducted various kinds of exams. (Tr. 161-162). Smith had held several specialized positions. (Tr. 160). As a senior special investigator, he investigated 105(c) complaints, accidents, and hazards. (Tr. 160). Smith took photos during the inspection before abatement. (Tr. 167-168, 175, 187-190, 196, 223). He relied on them to refresh his memory. (Tr. 175, 200). His photos did not state the location, so he could not tell where they were taken. (Tr. 187). Smith did not coordinate his photos with Pollard, but Pollard stated they accurately confirmed some of the conditions he saw. (Tr. 223-224).

¹³ Sammy Joe Pollard, Jr. was present at the hearing and testified for the Secretary. (Tr. 212). Pollard had been a coal mine inspector for MSHA since March 2009. (Tr. 212, 276). Before that, Pollard worked in the mining industry on various equipment. (Tr. 212-214). Pollard was a certified foreman in Illinois and Kentucky. (Tr. 213). He worked as a foreman for about two years and conducted pre-shift exams (including exams of ribs and belts). (Tr. 213-214). When inspecting belt, he would look for obvious hazards including loose roof, ribs, coal dust, bad rollers, belt rubbing, and air conditions. (Tr. 213-214). Pollard took 40 pages of notes, which included arrival time, enforcement actions, and actions taken. (Tr. 228-229, SX-2).

¹⁴ Travis Little was present at the hearing and testified for Respondent. (Tr. 334). Little was employed in Respondent's Safety Department. (Tr. 335). Little had worked in the industry for 19 years working on various equipment and working in mine rescue. (Tr. 335-336). He was certified as an underground and surface miner and foreman in Kentucky, he was an MET, an EMT, an MET instructor, an underground instructor, and a CPR instructor. (Tr. 336). Little took notes, but they were in his desk and he did not give them to Respondent's attorney. (Tr. 360).

The inspection group traveled to the first main north belt. (Tr. 263-264, 337). When they reached the farthest inby point and entered the entry they found mine examiner Terry Doss checking the belt.¹⁵ (Tr. 167, 218, 264, 312, 337-338, 347). Doss told Pollard that he had just finished a normal examination from the head drive to the takeup. (Tr. 219, 301, 304, 318-320). Doss reported that there was some material accumulated under the belt and in the walkway, but that there were no other conditions. (Tr. 219, 279-280, 312, 338, 351). He had shut down the belt to clear the hazard, but had not removed all the material. (Tr. 308). He also called and texted the manager (to create a record) to report the cleanup. (Tr. 309). Doss testified that Pollard was unhappy with the buildup and said he was going to inspect it. (Tr. 312).

The inspection group then began at the tailpiece and traveled to the header. (Tr. 220, 260). Smith and Pollard looked at the belt alignment, the frictional points of the belt, the rollers, the ribs, the direction of the air, and the roof. (Tr. 167-168). Pollard issued four citations along the beltline. (Tr. 186, 221). He cited them for float coal dust, accumulation of extraneous material, loose ribs, and belt rubbing rollers creating strings and cords. (Tr. 167-168, 220-221). He spoke with Little about each condition. (Tr. 174-175, 224, 257). Little testified that they did not see any hazardous conditions before Crosscut 18. (Tr. 338). During the inspection, Pollard did not see any accumulations that matched Doss' description. (Tr. 219-220).

Pollard issued a 104(d) order for float coal dust under 30 C.F.R. §75.400, an accumulation of combustible material. (Tr. 221, SX-1). Pollard believed the standard was violated because there was float coal dust on the manifold, the belt structure, the framing, the waterline, and the floor. (Tr. 171, 177-178, 201, 208-210, 220-223, 290-291). The accumulations started about two crosscuts outby the tailpiece and stretched uniformly across the 2,000 foot length of the belt entry, except for the ribs. (Tr. 208, 222-223, 233-234, 259-261, 281, 289). Pollard determined the citation was necessary based on a visual examination of the coal buildup on the mine floor, belt frames, and ribs. (Tr. 272, 305). Visual determinations can vary from person to person (even between inspectors). (Tr. 272-273). Doss believed the belt needed to be dusted again, but not to the extent that immediate action was needed. (Tr. 310).

The citation was marked as reasonably likely to result in injury or illness. (Tr. 228). Pollard believed that a fire or explosion was highly likely, or at least possible, as a result of the float coal dust. (Tr. 225, 227, 244-245). An explosion or fire requires fuel, oxygen, and an ignition source. (Tr. 225, 244-245). The ignition source was the rubbing belt. (Tr. 178, 226, 244-245). The fuel source would be the explosive and volatile float coal dust and extraneous materials. (Tr. 178, 224-225, 244-245). Coal dust would act to increase the magnitude of an explosion. (Tr. 209). Many mine disasters occur because of coal dust. (Tr. 224).

¹⁵ Terry Edwin Doss was present at the hearing and testified for Respondent. (Tr. 294). He spent 17 years in the mining industry running various kinds of equipment. (Tr. 295-296). Doss was a certified miner and foreman in Kentucky but he was a union member, not management. (Tr. 295-297). At the time of the hearing, he was laid off but at the time of the citations he worked as a belt examiner for Respondent and conducted various examinations. (Tr. 298-299). At hearing, Doss did not review his notes because, thinking the issue was over, he had thrown them out six months earlier, saving only the inspection books. (Tr. 321-322).

There was roughly 3-4 inches of rock dust throughout belt area and, in Pollard's opinion, Respondent was doing alright with rock dusting. (Tr. 262-263, 271). He did not know when the area had last been rock dusted or when it was scheduled to be dusted again. (Tr. 273-274). However, Pollard found coal dust sitting on top of the rock dust. (Tr. 220). Rock dust is normally white, but here it was gray to black, indicating float coal dust. (Tr. 172, 177-178, 209, 222, 261, 305). Doss often requested that this area be dusted because it got dark quickly. (Tr. 297-298, 311). However, there was no float coal dust in the area where the belt was rubbing. (Tr. 210-211, 281). Pollard did not take a sample of the dust for testing and had never used an on-the spot dusting device. (Tr. 262, 271-272). Under MSHA standards, an accumulation that is 80% rock dust will not propagate or cause ignition. (Tr. 262). Little and Doss believed that the bottom of the mine was gray in color because the rock below the coal seam was gray and because it was wet, he did not see float coal dust or combustion hazard. (Tr. 261-262, 305-306, 311, 349). Doss conceded that even wet areas needed to be rock dusted. (Tr. 331).

With respect to water, the entry alternated between high, dry areas and low, damp areas, including the wettest area around the tailpiece (Pollard estimated about 40 percent of the entry was wet from rib to rib). (Tr. 200, 210, 220, 232-233, 260, 274, 280, 320, 361). Little testified that no area in the entry was dry, but that some areas had standing water and others did not. (Tr. 361). Doss testified that some areas were dry but that the whole entry was damp. (Tr. 320). Pollard believed the water came from the water sprays and from the mine floor. (Tr. 220, 232, 280). Doss believed the water came from the top and the bottom and was related to poor roof conditions. (Tr. 302). He and Little testified that the hangers and belt line were wet. (Tr. 302, 306, 310-311, 349). Pollard testified that if the water had come from the roof, it would have washed the coal dust off the structure but did not. (Tr. 233, 361-362). Pollard testified that the wet areas still had float coal dust. (Tr. 233, 280). Doss testified wet coal dust would not burn and, in fact, would stop an explosion. (Tr. 306, 330-331). Pollard testified that wet areas could make an ignition less likely but might not stop one. (Tr. 260-261). However, the water in the area did not affect his decision regarding the likelihood because there was still float dust on the belt structure in the wet areas. (Tr. 234). He also believed wet or dry float coal dust would be picked up and act as fuel during an explosion. (Tr. 234).

Pollard was equipped with a gas detector, but it never sounded for CO. (Tr. 282). Respondent's belt line also had gas sensors that would shut down if it sensed CO before there was a fire. (Tr. 282). Pollard did not check if the system was working properly. (Tr. 282).

Pollard marked the citation as causing, at a minimum, lost workdays/restricted duty injuries from burns or smoke inhalation. (Tr. 234). He marked the condition as affecting two people because there was a belt examiner and belt cleaner in the area. (Tr. 234-235). Also, an explosion would affect anyone on the adjacent supply road. (Tr. 235).

Pollard marked the condition as being the result of high negligence because Doss was at the tailpiece but observed only the shoveled material. (Tr. 235). A person with a cap lamp should have seen this condition. (Tr. 289). Also, there was no coal dust in the air, indicating that the dust had been present for some time. (Tr. 274, 283, 289). Similarly, Doss had listed that the "belts need dusting" in the belt book for three consecutive days, countersigned by management, showing an obvious dust condition that needed corrected. (Tr. 217, 227-231, 235-238, 283, 306-

307, 329, SX-2 p. 43, 48, and 53). No corrections were listed, and there was no indication of recent rock dusting.¹⁶ (Tr. 238, 258, 274-275, 330). If Doss saw the condition for three days he should have seen it on the fourth day, but he did not list it. (Tr. 227, 289). Pollard believed the belt would have continued to worsen until the next exam. (Tr. 227, 245). Doss testified his notes referred to water, mud, and coal flakes and that he did not know if the material was combustible. (Tr. 307). He explained that a condition might be in the book five days before correction but that if there was an immediate hazard, he would have acted immediately. (Tr. 329-330).

Pollard marked the condition as an “unwarrantable failure,” meaning he deemed it “aggravated conduct constituting more than ordinary negligence” because the examiner listed it in the book as needing dusting for three days and no corrective action was taken. (Tr. 239). In fact, Doss examined the area on the fourth day when the citation was issued and said everything was good. (Tr. 239). This was the first 104(d) action that Pollard had ever issued. (Tr. 239-240). While Pollard told Little underground that he was going to issue the citations he did not mention the (d) Order until an hour or two later. (Tr. 240-241, 257, 270). Pollard did not recall Little saying much in response, but Little did not recall being told of the citations at all. (Tr. 258, 338-339). Pollard did not mention the (d) Order because he wanted to confirm his beliefs with his supervisor first and eventually did so. (Tr. 240-241, 339-241). He had been trained to tell operators about Orders underground, and his failure here was an error. (Tr. 270). Little believed a supervisor told Pollard to issue the Order. (Tr. 339). He was surprised at the Order because he believed hazards should be removed immediately. (Tr. 339, 350). Doss did not find out about the (d) Order until after his shift. (Tr. 328). The next day he told Pollard the Order was a good lesson on documenting conditions; the (d) Order helped him learn. (Tr. 328-329).

Generally, belts are immediately taken out of service after a (d) order is issued. (Tr. 352-353). Neither Pollard nor Smith gave Respondent any orders or instructions on whether to shut down the belt. (Tr. 184-185, 243-244, 280, 339). Pollard’s failure to do so before he left the area or issued the Order was a mistake because he had all of the criteria necessary. (Tr. 244, 270-271). In Smith’s experience, a belt is only shut down when an imminent danger exists and must be secured but did not believe here that there was such a danger. (Tr. 184-185). Pollard believed there was no imminent danger after abatement. (Tr. 244). Little and Doss testified that Little spoke with Pollard and Smith about shutting down the belt, but they said they wanted to continue to run the belt. (Tr. 313, 338). Little testified that he would have shut the belt down if he had been informed there was a (d) Order. (Tr. 350-351). However, he conceded that once he received the Order he did not shut the belt down. (Tr. 352, 354-355).

To abate this condition, Respondent rock dusted the area and belt structure. (Tr. 241, 243). Pollard returned to the belt and terminated the Order at 10:40 the next day. (Tr. 241-242).

Pollard issued another citation for belt rubbing under 30 C.F.R. §75.1731(b). (Tr. 245-246, SX-5). That standard required belts to be aligned to prevent them from rubbing against the

¹⁶ The foreman, having signed, was responsible for corrections. (Tr. 238-239). MSHA had spoken with Respondent many times about not listing conditions in their books and failing to make or record corrections. (Tr. 242-243, 259, 275). Pollard did not believe that Respondent had simply forgotten to record corrections here, there was no recent rock dust. (Tr. 283).

structure or components. (Tr. 246). Here, Pollard and Smith observed frictional contact between a misaligned belt and the metal frame of a bottom roller, causing heat.¹⁷ (Tr. 168-169, 221, 246, SX-7). The belt was operating and rubbing during the inspection. (Tr. 169-170, 196, 198, SX-7, HX-3(1-U)). The belt was drifting from the left hanger and making intermittent contact with the structure. (Tr. 170-171, 199, 226, 278, 286, SX-8). It was rubbing more often than not and had had created a pile of filings and rubber shavings beneath the roller. (Tr. 226-227).

Pollard marked this citation as “Reasonably Likely” because, along with the float coal dust, it would have caused an ignition or explosion. (Tr. 246-247). The structure was already hot; Pollard could not hold it with his bare hand. (Tr. 170, 226, 247). It was hot enough to cut metal if left unabated. (Tr. 169-170). The belt and surrounding area were dry and there was float coal dust on top of the rock dust present. (Tr. 286-288, 320, SX-8). Pollard did not touch the rail with the rock dust and there was no combustible material in contact with the point of contact. (Tr. 200, 281, 292-293, SX-8). There was no smoke or smell of smoke. (Tr. 278). Pollard did not have a heat stick or heat pencil. (Tr. 282-283). Pollard marked this citation as likely to result in “Lost Workdays or Restricted Duty” injuries from burning or smoke inhalation. (Tr. 247). Pollard marked this citation as likely to affect 2 people because there was a belt examiner and belt cleaner in the area. (Tr. 248). Further, the belt entry was parallel to the travelway and anyone in that area would also be affected. (Tr. 248).

Pollard marked this citation as resulting from “moderate negligence” because the belt was intermittently rubbing the structure. (Tr. 248, 278). It was possible that the belt was not rubbing when Doss observed it, if it were rubbing all the time he would have made it high negligence. (Tr. 248, 278). Nonetheless, Pollard was able to notice the condition because it was rubbing and there was a pile of shavings underneath. (Tr. 248). Doss saw shavings, but did not see belt rubbing. (Tr. 323). The heat indicated that the belt had been rubbing for a while. (Tr. 226). Doss had experience with misaligned belts and testified that they can occur quickly from rollers failing from heat. (Tr. 298). He testified that he did not see the belt rubbing in the cited area during his exam. (Tr. 317, 320-321). He had aligned other belts before the inspection. (Tr. 309, 317-318, 321). If he had seen the belt rubbing here he would have corrected it. (Tr. 318, 322).

Pollard testified that the condition was abated when Little adjusted the rollers and trained the belt at 10:40. (Tr. 243, 248-249). Little did not recall aligning any belts. (Tr. 350, 357).

Smith also observed cords and fibers filling roller bearings on a return idler and on a support bracket. (Tr. 173, 176, 315, SX-9, SX-10). Cords and fibers can be created when misaligned belts rub and fray on the frame structure. (Tr. 173). However, Smith believed this condition came from the centerline spans that stream down from the center of the entry, because they were thicker than belt fiber. (Tr. 173-174). Smith knew from experience that this condition could cause mine fires; it had caused CO monitors to go off in the past. (Tr. 173). The material would tighten on the rollers and bearings causing friction and hot embers to fall to the floor. (Tr. 173-174, 176). Even if the material came from the flame resistant belt, the inner webbing was flammable, according to MSHA tech support. (Tr. 173). Doss had seen some of this material during his exam. (Tr. 314). The ripped string material was always present but no one told Doss

¹⁷ Smith did not recall stating in his deposition that the photographs did not show physical contact with the belt conveyors. (Tr. 198-199).

did not believe it was a hazard here because it was not a large wad. (Tr. 314-315). Little saw the material and discussed with Pollard and Smith whether it was a hazard. (Tr. 357-358).

Pollard also wrote Citation No. 8511141 because there was extraneous material (buckets, timbers, old belt rollers, and other items) in the entry. (Tr. 220, 251, 277, 333, SX-15). These items were a danger as a source of friction; belts would produce heat from rubbing accumulations of material. (Tr. 252). However, none of the material was touching moving structure at that time so it was only a potential ignition source and a fuel source if a fire started elsewhere. (Tr. 277-278). All of this material should have been removed but there was no indication this was being done. (Tr. 252). Pollard believed one person conducting an exam with a cap lamp should have seen this material. (Tr. 288-289). Doss testified that he usually wrote up and removed the material but did not do so here. (Tr. 333-334). He asserted that federal inspectors have never considered the material a problem before. (Tr. 333).

Pollard also issued Citation No. 8511142 for loose roof, broken, and unsupported ribs that failed to meet the roof and rib control plans, including two ribs that had fallen on either side of the belt in the header area. (Tr. 168, 180, 220, 250-252, SX-16). Pollard did not list the location in this citation because there were so many ribs. (Tr. 194-195, 280-281, 285). Smith observed one loose, unsupported rib that had separated 12 inches from the top as well as another loose, overhanging rib. (Tr. 178-179, 181-183, SX-12, SX-13). The bottom of the first rib looked intact, but had stress fractures. (Tr. 179, 355-356, SX-12, SX-13).

During the inspection, Smith advised Respondent about MSHA policy requiring loose ribs to be, flagged (to notice the hazard), pulled, or supported while Pollard issued the citation. (Tr. 163, 168, 179-182, 325-326). Doss did not recall this conversation, but Little may have. (Tr. 324, 327-328, 356). If flagged, the condition should have been reported to management. (Tr. 181-182). Doss conceded that the ribs were not flagged. (Tr. 326-327). Smith and Pollard recalled Little and Baker pulling ribs during the inspection and recording others that were too tight for future correction but Little did not. (Tr. 168, 179, 194-195, 220, 276-277, 284, 350, 355). Doss and Little agreed that the cited ribs should have been pulled if possible, but did not believe they could be. (Tr. 325, 332, 356). Doss pulled a rib at the tailpiece before encountering Pollard, Little recalled seeing it. (Tr. 309-312, 321, 349-350). Doss tried to pull other cracked ribs, but they would not fall. (Tr. 316, 325). He tried to pull one loose rib three times before. (Tr. 325, 327). Smith and Pollard noticed some ribs down, but could not tell if they were pulled or fell before the inspection. (Tr. 194, 275).

In addition to flagging or pulling, there were other measures that could be used to secure ribs, including truss bolting and timbers wedged between the roof and the floor. (Tr. 191, 276, 303, 333). Truss bolting involved anchoring 6-8 angled bolts to a stable top which allowed the top to hold more weight and provided a fall warning. (Tr. 303). Truss bolting may not help the ribs. (Tr. 303). Here, there were some truss bolts from Crosscut 18 to the tail, but only as needed. (Tr. 303-304). Further, Respondent was not bolting the area at the time of the citations but increased their use after the citation. (Tr. 333). In addition to bolts, there were heavy-duty, round, (usually dry) crosscutter timbers wedged along the entire entry. (Tr. 302-303). Pollard and Smith believed that timbers could be used to support ribs when used properly, but that they were inadequate for large, loose ribs and would be knocked out in a fall. (Tr. 190-192, 276). In

Smith's opinion, the timbers present were a mere "token effort" to support the ribs. (Tr. 193). Some loose ribs had no timbers (though Pollard could not say how many there were). (Tr. 193, 284-285). Also, Smith believed that simply wedging timbers without a crossbar and leg support was insufficient. (Tr. 191). Doss testified that MSHA had previously stopped him from using timbers, but that he had started using them again after the instant citations. (Tr. 317, 326).

Pollard believed the ribs were dangerous; they could fall and crush a miner or pin a miner against the belt. (Tr. 179-180). Rib conditions, including rolls and bursts, were a leading cause of injury in coal mines. (Tr. 180, 297). The fact that some ribs could not be pulled was not important to Pollard because they could fall at any time. (Tr. 284). Little agreed that all ribs, not just loose ribs, were a hazard. (Tr. 326). The ribs were located where examiners and mechanics walked. (Tr. 179). A bit box hand from one rib, indicating exposure to workers. (Tr. 181).

Pollard testified that a single person with a cap lamp should have found the obvious. (Tr. 288). One of the ribs was cracked top to bottom and white rock dust was visible. (Tr. 182). Miners, particularly examiners, must always be aware of ribs and should see any conditions that the inspector noticed at a glance. (Tr. 253, 288, 297). In Pollard's view, the conditions did not occur after Doss' exam. (Tr. 253). Some of the loose ribs had rock dust behind them, indicating they had been loose for a while. (Tr. 283-284). Other ribs had missing plates that were in other areas, indicating they had been missing for a while and moved after they fell. (Tr. 284).

Pollard wrote another citation, No. 8511145, for an inadequate on-shift examination under 30 C.F.R. §75.362(b). (Tr. 249, 273, SX-6). He testified that this standard required operating belts to be examined by a certified person for hazards and violations on production shifts. (Tr. 249-250). Here, Pollard found that the other cited conditions indicated the exam was inadequate. (Tr. 250). He believed these conditions had existed during Doss' exam because he had just finished and they could not have arisen in so short a time. (Tr. 250, 273).

This citation was marked "Reasonably Likely" because miners were required to work in the area and, as a result of the poor exam, the conditions would continue. (Tr. 255). The citation was marked for "Lost Workdays or Restricted Duty" because miners could suffer burns, smoke inhalation, broken bones, and cuts or lacerations. (Tr. 255). Two people, the belt examiner twice a day and the belt cleaner, would travel this area. (Tr. 255). Also, the supply road was in constant use and miners using it would be affected by an explosion. (Tr. 255).

This citation was marked as the result of "high negligence" because Pollard did not believe that Doss could travel the belt line and not see the conditions. (Tr. 256). Doss should have seen the extraneous materials. (Tr. 251-252). Further, Doss had listed the dust in the book for three days (it was possible those exams were adequate). (Tr. 256, 273). Pollard conceded that he traveled the entry moving outby, while Doss traveled inby and that it was possible to see different things from different directions. (Tr. 266-267, 288). Further, it was dark and there were four members in the inspection group with lamps while belt exams were conducted by one examiner. (Tr. 265-266). Pollard agreed that four lamps illuminated more than one, but believed one lamp would light the area. (Tr. 267). Doss testified he shut down belts when needed, including that day. (Tr. 316). Smith told Doss that he needed to do a better job of examining the

area, but every inspector says that. (Tr. 323). However, he agreed that he could have done a better job that day; he was always learning ways to improve. (Tr. 324).

To abate the citation, a meeting with on-shift examiners was held on recognizing and recording hazards. (Tr. 257). Little worked with management on ribs and rock dust. (Tr. 256).

B. Timing Issue

Before discussing the specifics of both of the citations at issue with respect to the testimony summarized above, I would like to first address an argument Respondent made regarding the timing of both of these citations. In short, Respondent argues that the time each citation was issued, according to the time listed on the Inspector's citation forms, does not match the location shown on Respondent's tracking system.¹⁸ (*Respondent's KENT 2013-480 Post-Hearing Brief* at 37-40, Tr. 340, 345, 360, SX-5). For instance, Respondent noted that at 9:40 when the citation for extraneous material from the tailpiece to the header was issued, the tracking system indicated that the inspection group was closer to the tailpiece than the header, meaning the examination had just started. (*Id.* at 39-40, Tr. 346-348, SX-5, p. 9). Similarly, Citation No. 8511143 for float coal dust across the entire entry was issued at 10:15 a.m., before Little reached the header. (Tr. 348). Respondent asserts that similar discrepancies exist with respect to the other citations. (*Id.* at 40). As a result, it argues that Inspector Pollard did not actually see the conditions and that he only decided to write the citations after speaking with his boss. (*Id.*).

I credit the testimony of Inspector Pollard that he wrote his citations when he believed that he had enough evidence to justify the citations. (Tr. 268-270). He sometimes knew he was going to issue a citation, but not the extent of the condition until he finished the inspection. (Tr. 268-269). For instance, Pollard testified he had seen a citable condition for extraneous material at 9:40, but finished the inspection and saw it spanned the whole entry. (Tr. 269-270). He often cited in this manner. (Tr. 269-270). While he wrote citations that covered the entire entry, I find that it was reasonable that he not wait until he saw the entire entry, if what he saw in a small area of the entry was sufficient to justify a citation.

Further, I am not convinced that using the tracking system to line up the inspector's notes with the location of the examination group is accurate. The entry at issue here was a mere 2,000 feet long. According to Little, the system monitored 500 feet inby and outby each tracker. (Tr. 362-363). While no one testified as to how many trackers were in the area, according to these facts two trackers could cover the entire area of the belt entry. Further, if a miner was picked up on a tracker at the far end of its range and then walked towards the tracker, passed it, and then was picked up on the other, far end of its range, that miner would travel 1,000 feet (or half the entry) while still being shown as standing in the same area. (*See* Tr. 359, 362-363). The wide area between the trackers, and the problems that this could cause, was demonstrated by the fact that, at one point, the tracker showed Little move 12 crosscuts in 9 seconds. (Tr. 359). I find that the tracker data, for the purpose of determining the location of the inspection group at the exact moment of each citation, is not accurate and will not be considered.

¹⁸ Respondent's tracking system had sensors every 500 feet that would record a miner's location. (Tr. 340-342). Little was always within 500 feet of Smith and Pollard. (Tr. 359).

Finally, I decline to find, in the absence of any other evidence, that MSHA inspectors and investigators fabricated conditions at the Highland No. 9 Mine. If Respondent wanted to make a claim that a conspiracy existed to frame the operator for some nefarious purpose, it would need to produce some actual evidence showing the existence of such a plot. For now, we will stick to the more prosaic pursuit of dealing with the facts on the record.

C. Contentions of the Parties Regarding Citation No. 8511144

With respect to Citation No. 8511144, the Secretary asserts that Respondent violated 30 C.F.R. §75.1731(b), that this violation was reasonably likely to result in a Lost Workday/Restricted Duty injury to two miners, that the violation was S&S, and that it resulted from moderate negligence. (SX-5)(*Secretary's KENT 2013-480 Post-Hearing Brief* at 9-13). The Secretary also believes that the proposed penalty of \$1,657.00 is appropriate.

Respondent argues that Citation No. 8511144 was not valid and should be vacated. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 10-13). It further argues that, in the event the citation is found to be valid, that the violation was not S&S. (*Id.* at 17-22). It also believed that its actions would be better characterized as showing no negligence. (*Id.* at 13-17). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the citation is found valid, reduced pursuant to its proffered gravity and negligence determinations.

D. Findings of Fact and Conclusions of Law Regarding Citation No. 8511144

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §75.1731(b).

On November 8, 2012, Inspector Pollard issued a 104(a) Citation, No. 8511144, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

Conveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components. The 1st Main North conveyor belt is rubbing a bottom roller hanger between the #11 and #12 crosscuts. The hanger was hot to the touch

The Beltline was in operation at the time of inspection

Section 75.1731(b) was cited 46 times in two years at mine 1502709 (46 to the operator, 0 to a contractor).

(SX-5).

The cited standard, 30 C.F.R. §75.1731(b). ("Maintenance of belt conveyors and belt conveyor entries."), provides the following:

(b) Conveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components.

30 C.F.R. §75.1731(b).

At hearing, Secretary's counsel presented credible evidence to show that, at the time of the inspection, the 1st Main North conveyor belt was operating and rubbing a bottom roller hanger between the #11 and #12 crosscuts. (Tr. 168-170, 196, 198, 221, 246). The contact with the structure was intermittent (though the belt rubbing more often than not) and drifting from the left hanger. (Tr. 170-171, 199, 226-227, 278, 286). The rubbing had created a pile of filings and rubber shavings beneath the roller. (Tr. 226-227). Therefore, I find that the Secretary met his burden, showing by a preponderance of the evidence that Respondent violated 30 C.F.R. §75.1731(b).

In its brief, Respondent argued that this violation was invalid. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 10-13). However, Respondent's argument was not compelling.

Specifically, Respondent argues that the photographs introduced by the Secretary to prove the existence of this violation do not show the belt rubbing the structure. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 11). It notes that Smith admitted that SX-7 was not clear right after stating that it showed the belt making contact. (*Id. citing* Tr. 169-170). With respect to SX-8, Respondent argues that Smith conceded that the belt in SX-8 is shown moving away from the left hanger, but tried to say that this meant the belt was drifting. (*Id. citing* Tr. 170-171). Respondent also argues that Smith admitted that he testified that the pictures did not show physical contact between the belt and structure. (*Id. at* 11-12 *citing* Tr. 198-199). Respondent instead pointed to Doss' testimony that, after he corrected one misaligned belt, the belt was not rubbing, as shown in the pictures. (*Id. at* 12 *citing* Tr. 317-323).

Upon review, I found the photographs SX-7 and SX-8 to be extremely dark and difficult to discern. I cannot tell from the photographs whether the belt was rubbing or not. However, Respondent was not cited for being photographed with rubbing belts. In fact, the person who issued the citation (Inspector Pollard) was not the person who took the photographs (Investigator Smith) and his determinations regarding the cited condition were made wholly independent of the photographs. As noted *supra*, I credit Inspector Pollard's testimony that the belt was rubbing the structure in the cited area. (Tr. 221, 245-246). Whether the photographs depict the cited condition is only material if I believe that Inspector Pollard lied about the rubbing belts in order to frame Respondent and that the Secretary chose to expose its own fraud by submitting photographs that undermined the plot. I see no reason to believe such a bizarre series of events transpired here. Instead, I find that the photographs are of little probative value but that the testimony of Inspector Pollard and Investigator Smith clearly establishes the existence of a violation.

Respondent also argued that the Secretary presented no physical evidence of the cited condition. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 12). It noted that the Smith's photographs did not show rubbing, that Pollard did not take the photographs, and that the inspector did not use a heat pencil to substantiate the heat of the rubbing belt. (*Id. at* 12-13). It argues that the evidence MSHA could have provided, but did not, would have been exculpatory. (*Id. at* 13).

As noted with respect to the other citations discussed *supra*, testimony is evidence. Inspector Pollard and Investigator Smith credibly testified that the belt was rubbing. (Tr. 221,

245-246). Even in the absence of photographs, the testimony credibly established that the belt was rubbing. The testimony to the effect that the belt structure was hot to the touch, that there were belt shavings on the floor, and that there were belt ravelings on the rollers further confirms that a condition existed. I see no reason to disbelieve the two inspectors.

With respect to the heat pencil, the fact that the structure was hot is important in considering the likelihood or negligence. The evidence regarding the heat of the belt will be discussed in the sections concerning gravity and negligence *infra*. However nothing in the cited standard requires that the rubbing belt caused heat. Heat may indicate that the condition exists, but the absence of heat does not mean that it definitely did not. Even if the belt had become misaligned and started rubbing just minutes before the inspection and had not yet caused any increase in heat, there would still be a violation. The validity of this citation does not hinge on the heat of the rubbing belt and even if the Secretary's failed to provide any evidence as to the temperature of the belt (which is not the case here, as the inspector testified about the heat), a citation can be appropriate. Therefore, I find that the citation was validly issued.

2. The Violation Was Reasonably Likely to Result in Lost Workday/Restricted Duty Injury To Two Miners And Was Significant And Substantial In Nature.

Inspector Pollard marked the gravity of the cited danger in Citation No. 8511144 as being "Reasonably Likely" to result in "Lost Workday/Restricted Duty Injury" to two miners. (SX-5). Pollard also determined that the violation was S&S. (SX-5). These determinations are supported by a preponderance of the evidence.

Regarding the first element of S&S - the underlying violation of a mandatory safety standard – it has already been established that Respondent violated 30 C.F.R. §75.1731(b).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. As discussed *supra*, the Secretary presented credible evidence that the belt was rubbing the structure in a dry area between crosscuts 11 and 12 in the 1st Main North belt entry. (Tr. 221, 245-246, 286-288). The Secretary presented further credible evidence that this rubbing had caused a pile of belt shavings to accumulate under the structure. (Tr. 226-227, 323). Friction from the belt rubbing had warmed the area to the degree that Pollard could not keep his hand on the structure, making a fire or smoke more likely. (Tr. 170, 221, 226, 247). It was hot enough to cut metal if left unabated. (Tr. 169-170). Float coal dust in the entry, coal particles on the belt, accumulations of material on the floor, and the belt shavings would act as a fuel source for a fire or explosion. (Tr. 225, 227, 244-247, 278, 286-288, SX-8). The cited condition clearly contributed to the danger of a fire, inundation of smoke, or explosion in the entry. (Tr. 221, 246-247).

Respondent presented several arguments for the proposition that there was no confluence of factors that could result in a fire, smoke, or explosion. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 17-21). However, none of these arguments are compelling.

Respondent argued that the necessary elements for the “fire triangle” (oxygen, fuel source, and ignition source) were not present meaning that no fire was possible. (*Respondent’s KENT 2013 Post-Hearing Brief* at 17). Respondent argued that there was not a confluence of factors present to create a fire. (*Id.* at 17-18, *citing Enlow Fork Mining Co.*, 19 FMSHRC at 9). Respondent makes several points related to this argument and I will consider each in turn.

First, Respondent argued that there was no explanation for how something that was merely too hot to hold would cause an ignition. (*Respondent’s KENT 2013 Post-Hearing Brief* at 18). It cited *Highland Min. Co.*, for the proposition that holding a structure and feeling the heat was not enough to support a finding that a fire was likely. (*Id.* at 19, *citing* 34 FMSHRC 2612 (2012)). According to Respondent, without objective measurements of temperature, Inspector Pollard’s testimony was mere conjecture. (*Id.*) Relatedly, it argued that because the belt was rubbing only intermittently that it would lose heat and reach an equilibrium before it could become hot enough to serve as an ignition source. (*Id.* at 18-19).

I credit the testimony of Inspector Pollard for the proposition that the hot belt structure indicated that the frictional contact was causing heat and that this heat would have grown into an ignition source if left unabated. The exact temperature of the belt structure and Inspector Pollard’s failure to use a heat pen were far less important than the observed facts: the belt structure was so hot that Pollard could not keep his hand on it and it would continue to get hotter. (Tr. 221, 226, 247). Eventually, it would get hot enough to produce smoke or even cause ignition. There is no basis, whether in the record or in common sense, for Respondent’s assertion that the heat from the frictional forces here would “top out” at a level below which the hazard would be realized.

Furthermore, Judge Rae’s decision in *Highland Min. Co.*, 34 FMSHRC 2612 does not in any way imply that the heat observed by touching a structure is insufficient as proof of the likelihood of a fire. There, Judge Rae found:

With regard to the heat source present, Yates could not say how long it would take for the roller hangers to become sufficiently hot to cause a belt fire, or even if a belt fire would occur. (Tr. 286, 313.) On the other hand, Cowan who was with Yates during the inspection, testified at his deposition that after Yates felt the roller hanger, Cowan removed his glove to feel the roller hanger as well. He found it to be warm to the touch but not warm enough to raise a concern. He also observed the belt running over the hanger and found the belt was only occasionally rubbing on the hanger. Cowan also scaled the rock that concerned Yates and had a difficult time prying it loose. (Cowan dep. at pp. 17-20.) There was no evidence of methane or electrical equipment in the entry. This evidence is not sufficiently convincing to support the proposition that it was reasonably likely that the misaligned belt would result in an ignition, should coal or other accumulations fall on the belt, under continued normal mining conditions.

Id. at 2620.

Judge Rae's reasoning clearly relies on the fact that the inspector did not know if a belt fire would occur. In the instant matter, Inspector Pollard credibly testified that a fire, smoke, or explosion was reasonably likely. (Tr. 246-247). Further, In Judge Rae's case the testimony from the operator's ventilation coordinator that he touched the structure and found it warm, but not enough to raise concern, was additional support for the Judge's ruling. But the Judge in no way held that the observed heat is not enough evidence to support a finding. Contrast the ventilation coordinator's testimony that the structure was warm, but not a concern, with Inspector Pollard testimony in the instant matter that he could not keep his hand on the material because of the intense heat. The situations are clearly different. Finally, Judge Rae noted that there were no accumulations or belt shavings in the area. 34 FMSHRC at 2619. That indicates that the situation was less serious than here, where float coal dust, extraneous material, and belt shavings were found. (Tr. 246-247, 278). In short, Judge Rae considered the observed temperature as part of all the circumstances present and found that, in that situation, a fire was not likely. I have considered all the present circumstances with respect to the instant matter and found that a fire was reasonably likely.

Respondent also argued that a fire was not likely to occur because the belt rubbing and the float coal dust were not in the same place at the same time. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 19-20 citing Tr. 200, 211, 281).

It is true that Inspector Pollard testified that the float coal dust was not directly on the belt structure where he found the frictional heat. (Tr. 200, 281, 292-293). However, he also credibly testified that there was float coal dust on the manifold, the belt structure (including the rails holding the rollers and roller frames), the framing, the waterline, and the mine floor. (Tr. 201, 208, 220-223). He credibly testified that the accumulations started about two crosscuts outby the tailpiece and stretched most of the 2,000 feet length of the belt entry. (Tr. 222-223, 233). Most importantly, the dust was largely uniform throughout the area. (Tr. 261, 281). While one location directly next to the warm area was devoid of float coal dust, the dust was all over the area.¹⁹ A piece of belt shaving, a piece of coal on the belt, or ravelings on the belt could have been ignited from the cited condition and fallen to the mine floor, where coal dust and other extraneous material was accumulated. While the fuel source was not located at the exact spot where the belt was rubbing, the area was essentially surrounded by fuel sources. As a result, smoke, fire, or explosion was reasonably likely.

Respondent also argued that the belt was wet and therefore unlikely to combust, there were water sprays, and CO monitors. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 20). For the reasons discussed with respect Citation No. 8508512, this argument fails. Wet coal will eventually dry out and additional precautionary measures do not eliminate the risk of hazard. Smoke, fire, or explosion was still reasonably likely.

Respondent also argued that the inspectors were not seriously concerned about a mine fire because, even though they were asked by Respondent's employees, they chose not to shut down the belt that day. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 20-21). It notes that

¹⁹ As will be discussed *infra* with respect to Citation No. 8511145, Respondent has essentially conceded that the Inspector's observations with respect to the location and amount of float coal dust were accurate.

Pollard and Smith's explanations for this failure (that it was a mistake and that belts are only shut down for imminent dangers, respectively) are post-hoc rationalizations covering up the fact that there was no danger. (*Id.* at 21).

Regardless of what the inspectors thought, at the time, an objective analysis of the observed conditions indicated that there was a reasonably likelihood of a hazard. There was a belt rubbing against the belt structure creating heat, there were belt shavings and ravelings, and there was float coal dust and other accumulations. This was a dangerous situation that could have resulted in smoke, a fire, or an explosion. Whether the inspectors recognized the danger at the time is not important. However, with that noted, I see no reason to disbelieve Inspector Pollard's explanation that he made a mistake in delaying the issuance of his first 104(d) Order and should have shut down the belt at the time. I decline the opportunity to teach Inspector Pollard a lesson on being decisive and communicating clearly at the expense of the health and safety of miners.

In light of the fact that smoke, fire, or explosion was reasonably likely, I find that the second prong of *Mathies* is met.

The third element of the Mathies test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. It is reasonably likely that, in the event of a fire, the two miners in the entry would be affected by the smoke or by the fire directly, resulting in injuries. (Tr. 248). Miners sent to fight the fire would also be affected and receive injuries. In the event of an explosion, miners in the entry, or even in the adjacent travelway, would be affected and could suffer injury. (Tr. 248). Therefore, I find this an injury was reasonably likely and that the third prong of *Mathies* was met.

Respondent argued for the proposition that no injury was reasonably likely. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 21-22). However, that argument was not compelling.

Respondent argued that even if the belt rubbing could cause a fire, that was merely a possibility and too remote and speculative to sustain an S&S designation. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 21-22). It argued that the Secretary's interpretation was so broad as to encompass all citations. (*Id.* at 22). It cited *U.S. Steele Min. Co., Inc.*, for the proposition that the hazard contributed must result in an event in which there is an injury. 7 FMSHRC 1135, 1129 (1985). It argued that an injury must be more than just possible.

Respondent suffers the same confusion about the nature of the *Mathies* test post-*Musser* as many other operators. I will attempt to clarify the issue here. The question of whether smoke, fire, or an explosion would be likely in this situation is not properly considered under the third prong of *Mathies*. That issue, whether the violation contributed to the hazard of smoke, fire, or explosion, was considered at length in the discussion of the second prong of *Mathies* *infra*. For purposes of the third prong of *Mathies*, it does not matter if the violation itself would cause an injury. *Musser*, 32 FMSHRC 32 at 1281. After the second prong, the violation is no longer under consideration; the hazard contributed to is the issue. Specifically, the question with respect to the third prong of *Mathies* is whether the hazard contributed to would be reasonably likely to result in injury. Here, the hazard contributed to (smoke, fire, or explosion) would be extremely

dangerous in the mine and an injury would be very likely. Therefore, the third prong of *Mathies* is met.

The fourth and final prong of *Mathies* – a reasonably likelihood that the injury in question will be of a reasonably serious nature – was also met. Under *Mathies*, the fourth and final element that the Secretary must establish is that there was a “reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984). In the event of a fire or explosion, the Secretary presented credible evidence that miners would suffer lost workday/restricted duty injuries from burning or smoke inhalation. (Tr. 247). Further, miners in the adjacent travelway would be affected in the event of any explosion. (Tr. 248). As with Citation No. 8508512 *supra*, miners fighting any fires would also be affected by burns and smoke inhalation. (Tr. 26, 29). These injuries would be sufficiently serious to result in an S&S designation. Therefore, the fourth prong of *Mathies* is met.

Once again, I note that an inspector’s opinion regarding S&S is accorded substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC at 1278-79, *Buck Creek Coal, Inc.*, 52 F.3d at 135-36. Here, Pollard credibly testified that the citation was S&S. As a result of the inspector’s opinion and, more importantly, the factors discussed above, I find that the Secretary proved the violation was S&S by a preponderance of the evidence.

Therefore, the preponderance of the evidence supports the Secretary’s determination with respect to the likelihood of injury, the severity of that injury, and the S&S designation.

With respect to the number of persons affected, the Secretary presented credible evidence that if smoke, fire, or explosion were to occur that the belt examiner and belt cleaner would be affected. (Tr. 248). Further, the miners in the belt entry would also face injury. (Tr. 248). Pollard marked this citation as likely to affect 2 people because there was a belt examiner and belt cleaner in the area. (Tr. 248). Further, the belt entry was parallel to the travelway and anyone in that area would also be affected. (Tr. 248).

In short, the preponderance of the evidence shows that Citation No. 8511144 was reasonably likely to result in lost workday/restricted duty injuries to two persons and was S&S.

3. Respondent’s Conduct Displayed “Moderate” Negligence.

In the citation at issue, Inspector Pollard found that the operator’s conduct was moderately negligent in character. (SX-5). The substantial evidence supports this designation.

With respect to knowledge, the factual situation presented here is substantially similar to that in Citation Nos. 8508232 and 8508512. A mine examiner had passed through the area just minutes before the inspector discovered and cited the violative condition. (Tr. 219, 301, 304, 319-320). In fact, the inspector found the examiner, Doss, just as he was completing his examination. The examiner had traveled the belt entry and past the area where the rubbing belts had been discovered but did not correct, record, or flag the cited condition as he should have. (Tr. 250). The heat indicated that the belt had been rubbing from a while. (Tr. 226). As with the

previous citation, the examiner was an agent of Respondent and his actions were imputable to the operator. *Whayne Supply Co., supra*; *Rochester & Pittsburgh Coal Co., supra*; and *Southern Ohio Coal Co., supra*. As a result, Respondent knew or should have known about the cited condition but took no action. Therefore, Respondent was negligent.

I credit Pollard's testimony that he marked this citation "moderate negligence" because the belt was intermittently rubbing the structure in one place. (Tr. 248, 278). It was possible that the belt was not rubbing when Doss observed it. (Tr. 248, 278). If it had been rubbing all of the time, he would have made it high negligence. (Tr. 248). Nonetheless, Pollard was able to notice the condition because it was rubbing and there was a pile of shavings underneath. (Tr. 248). Also, the heat indicated that the belt had been rubbing for a while. (Tr. 226).

Respondent argued that it did not have knowledge of the cited condition and therefore, cannot be negligent. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 15-17). However, Respondent's arguments are not compelling.

First, Respondent argues that the condition was not present at the time of the examination. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 15-16). It noted that even Pollard said that the belt might not have been rubbing when he looked at it. (*Id. citing* Tr. 248). Doss confirmed that the belt was not rubbing in the location. (*Id.*). Respondent argued that if the condition did not exist at the time of an examination, but then cropped up later, it cannot be negligent because it neither knew nor should have known. (*Id.*).

It is true that Inspector Pollard testified that the belt may not have been rubbing at the time of the examination and that Doss testified that it was not. However, that does not negate the fact that Respondent should have known about the cited condition. While the intermittent rubbing made the condition slightly less obvious, there were still indicators that Doss should have noticed. Most importantly, Pollard testified that there was a pile of shavings underneath the belt that were obvious to him and should have been an indicator to Doss that the belt was rubbing. (Tr. 248). Doss should have seen these belt shavings and known that the belts were misaligned. The heat of the belt was also an indicator that a condition existed. (Tr. 248). While the heat of the belt structure would only be obvious if Doss felt the frame, he should have been particularly diligent for ignition sources in light of the fact, as noted *supra*, that the entire entry was covered in float coal dust. (Tr. 201-208, 220-223, 233-234, 259-260, 272). Therefore, I find that Respondent should have known about the cited condition and, as a result, it was negligent.

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. As discussed *supra*, Pollard conceded that the belt might not have been rubbing when Doss was in the area. (Tr. 248). Doss credibly testified that he did not notice the condition during his examination. (Tr. 317, 320-321). The belt was only rubbing the structure intermittently. (Tr. 170-171, 199, 226, 248, 278). In light of these facts, I find that the condition was only somewhat obvious and that, while he should have found the condition, Doss likely believed there was no rubbing belt. In light of this mitigating circumstance, I find that Respondent was only moderately negligent.

Respondent argued that it should be found to have exhibited “Low” or “No” negligence as a result of this condition. However, none of its arguments are compelling.

First, it argued that the fact that Doss conducted a timely examination and had no “actual subjective knowledge” of the condition was a considerable mitigating factor. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 16). I found that the fact that the condition was not particularly obvious to be a mitigating factor. However, as discussed at length *supra*, whether Respondent had actual subjective knowledge is immaterial to a negligence finding. While the condition was somewhat hidden, Doss still should have known about it. As a result, I do not believe this to be a “considerably” mitigating factor.

Second, Respondent also asserted that the examination was properly conducted, citing to its argument with respect to Citation No. 8511145. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 16.). For the reasons discussed in the section regarding that citation *infra*, the examination was not adequate. As a result, the examination cannot be considered a mitigating circumstance.

Third, Respondent argued that the Secretary alleged no history of belt problems. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 16-17). It further argues that it was not on notice that this condition was a concern. (*Id.* at 17). As with Citation No. 8508512, that assertion is simply false. The Secretary presented uncontested evidence that Respondent had been cited 46 times at Highland Mine No. 9 in the two years prior to this citation. (SX-5). Further, this condition was cited after Citation No. 8508512 above, where Respondent was cited for a rubbing belt and the condition discussed in *Highland Mining Company, LLC*, 35 FMSHRC at 236. Further, as noted *supra*, the area was covered in float coal dust, so Doss should have been very aware of any possible ignition source. Therefore, Respondent had been cited extensively for rubbing belts and should have known to pay special attention to that condition.

Finally, Respondent argued that Pollard’s testimony about how long the condition existed was speculative. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 17). I do not find this to be the case. Pollard testified that the condition had existed for some time because of the heat of the structure and the amount of shavings. (Tr. 226, 248). Pollard in fact, does not speculate as the exact amount of time the condition existed. However, as Doss had just passed through the area, it would not need to have existed long for it to have been present during the last examination.

4. Penalty

In this matter, the Secretary proposed a penalty of \$1,657.00 for Citation No. 8511144. Having affirmed the Secretary’s determinations in all respects, no deviation from the proposed penalty is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$1,657.00.

E. Contentions of the Parties Regarding Citation No. 8511145

With respect to Citation No. 8511145, the Secretary asserts that Respondent violated 30 C.F.R. §75.362(b), that this violation was reasonably likely to result in a Lost

Workday/Restricted Duty injury to two miners, that the violation was S&S, and that it resulted from high negligence. (SX-6)(*Secretary's KENT 2013-480 Post-Hearing Brief* at 13-18). The Secretary also believes that the proposed penalty of \$3,689.00 is appropriate.

Respondent argues that Citation No. 8511145 was not valid and should be vacated. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 23-35). It further argues that, in the event the citation is found to be valid, that the violation was not S&S. (*Id.* at 36-37). It also believed that its actions would be better characterized as showing no negligence. (*Id.* at 35-36). Finally, Respondent presumably believes that there should be no penalty or, in the event the citation is found valid, reduced pursuant to its proffered gravity and negligence determinations.

F. Findings of Fact and Conclusions of Law Regarding Citation No. 8511145

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §75.362(b).

On November 8, 2012, Inspector Pollard issued a 104(a) Citation, No. 8511145, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

An inadequate on-shift exam was conducted on the 1st Main North beltline on 11/08/2012 on the day shift, the following hazards were found during an MSHA inspection;

- 1] Loose unconsolidated ribs.
- 2] Accumulations of float coal dust.
- 3] Belt rubbing bottom roller hanger.
- 4] Extraneous Materials located in belt entry.

Citation #'s [sic] 8511141, 8511142, 8511143, and 8511144 were issued in conjunction with this citation. In order to abate this citation, the Operator is required to conduct a meeting with all personnel required to conduct an on-shift examination and discuss recognizing, reporting, and recording hazards, also the importance of making adequate on-shift exams.

Section 75.362(b) was cited 2 times in two years at mine 1502709 (2 to the operator, 0 to a contractor).

(SX-6).

The cited standard, 30 C.F.R. §75.362(b). ("On-shift examination."), provides the following:

(b) During each shift that coal is produced, a certified person shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (a)(3) of this section along each belt conveyor

haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

30 C.F.R. §75.362(b).

In short, the standard requires an adequate examination of active belt entries during each shift. This includes a requirement that any hazardous conditions found be recorded. *See e.g., Excel Mining LLC*, 2013 WL 8540990, *19-20 (Aug. 15, 2013)(ALJ Biro)(“the duty to record hazardous conditions observed by an examiner during an onshift examination is implicit in 30 C.F.R. § 75.362(b)”); *TRC Mining Corp.*, 2013 WL 1856600, *9 (Mar. 7, 2013) (ALJ Zielinski) (internal citations omitted) (“The Commission has held that the preshift standard requires a preshift examiner to find and record a hazardous condition in a preshift examination book. Section 75.362(b) imposes a virtually identical requirement.”); *Bledsoe Coal Corp.*, 2012 WL 5178246, *30-31 (Oct. 2, 2012) (ALJ Moran)(holding that the standard requires operators to conduct adequate exams and that an exam is not adequate if it does not report hazards). Judge Barbour succinctly explained the way in which the standard should be applied:

It is beyond doubt that the requirement of section 75.362(b) to conduct an on shift examination during each shift when coal is produced, carries with it the obligation that the examination be sufficient to detect existing hazardous conditions. In other words, subsumed in the standard is the obligation that the examination be adequate. Among the ways of proving that an operator has not met this requirement is to show that a hazardous condition existed in an area that was subject to an on-shift examination, that the hazardous condition continued to exist after the examination and that the hazardous condition was not recorded in the surface examination book.

Twentymile Coal Co., 34 FMSHRC 2138, 2171 (Aug. 9, 2012) (ALJ Barbour) *rev'd on other grounds*, 2014 WL 4387695 (Aug. 25, 2014). Further, Judge Feldman suggested that adequacy of an on-shift examination should be analyzed based on what a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have done in the situation. *Martin County Coal Corp.*, 2014 WL 2154273, *14 (Apr. 29, 2014)(ALJ Feldman)(citations omitted).

In the instant matter, Inspector Pollard and Investigator Smith credibly testified about 4 conditions along the 2,000 foot expanse of the First Main North belt entry. They included rib violations, accumulations of float coal dust along the entry, belt friction, and extraneous material.

With respect to the ribs, Pollard and Smith presented evidence that there were loose, unconsolidated ribs along the length of the entire entry. (Tr. 168, 220 252, 285, SX-16). At least two of the ribs that Pollard observed were obvious. (Tr. 250-251). Smith saw a rib that had separated leaving a 12-inch gap. (Tr. 178-179, 181, SX-12). This particular rib was loose and unsupported. (Tr. 179). Smith saw another rib that was separated, loose, and overhanging. (Tr. 181-183, SX-13). This was a hazardous condition because loose ribs could fall and strike a

miner. (Tr. 179-180). The miner could be pinned to the belt structure. (Tr. 179-180). Injuries from rib conditions were very common in the mining industry. (Tr. 180, 297). Injuries from such a hazard could include broken bones, cuts and lacerations, or other lost workday/restricted duty type injuries. (Tr. 255). Examiners and mechanics traveled in the area with the broken ribs. (Tr. 179). No rib conditions were recorded in the examination book.

With respect to the accumulations, there was float coal dust located on the manifold, the belt structure, the framing, the waterline, and the mine floor. (Tr. 201, 208, 220-223). The accumulations started two crosscuts outby the tailpiece and stretched across the entry belt entry. (Tr. 222-223, 233). The dust the inspectors observed was largely uniform throughout the area and therefore obvious. (Tr. 261, 281). Doss had listed that the area needed to be dusted for three days prior to the subject inspection. (Tr. 227-231, 235-238, 283, 306-307, 329, SX-3 p. 43, 48, and 53). The float coal dust contributed to the hazard of smoke, fire, and explosion. (Tr. 225, 227, 244-245). Injuries could include smoke inhalation, burns, or even death in the event of an explosion. (Tr. 234). Examiners and mechanics worked in the area while other miners traveled on the adjacent travelway. (Tr. 234-235). No accumulations of this kind were recorded in the examination book. (Tr. 310).

The issue with belt rubbing has been discussed at length with respect to Citation No. 8511144, *supra*. I incorporate the findings made with respect to that citation here. This condition was not recorded in the examination book.

Finally, with respect to the extraneous material, Pollard testified that he found buckets, timber, old belt rollers, and other items accumulated in the entry. (Tr. 220, 251, 277, 333, SX-15). He credibly testified that these items were a danger as a source of friction; they were allowed to accumulate under the belts and produce heat from the belt rubbing against them. (Tr. 252). They could also serve as fuel in the event of a fire starting elsewhere. (Tr. 252, 278). They may have also served as a tripping hazard. Pollard believed one person conducting an exam with a cap lamp should have seen this material. (Tr. 288-289). Doss conceded that the material was present at the time of the examination and that it was not recorded. (Tr. 334).

In light of the existence of these hazardous conditions, most of which were obvious, and the fact that these conditions were not recorded or corrected, I find that Respondent violated 30 C.F.R. §75.362(b)

In its brief, Respondent argued that this violation was invalid. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 23-35). Essentially, in its argument the Respondent seeks to undermine Citation No. 8511145 by showing that the underlying conditions were not hazardous and therefore cannot form the basis of an inadequate examination citation. Essentially, Respondent argues that the conditions with the ribs, float coal dust, and rubbing belt either did not exist or were not sufficient to support this citation. However, Respondent's argument was not compelling. I will first make a general point about Respondent's position and then consider each of Respondent's arguments as to each issue in turn.

Put broadly, Respondent's argument with respect to this citation is that the underlying citations were invalid and therefore the examination was adequate. However, Respondent's actions, both before and after the hearing, effectively bar it from taking this position. On October 10, 2014, I issued a Decision Approving Settlement with respect to KENT 2013-479. This decision formalized a settlement agreement filed by the parties in this matter. As part of that agreement, Respondent agreed to pay a penalty of Citation No. 8511143 (for float coal dust). The citation was modified from a 104(d)(1) Order to a 104(d)(1) citation and the penalty was reduced. However, the body of the citation containing the condition observed, as well as the gravity and negligence cited, remained unchanged. Similarly, Judge McCarthy issued a Decision Approving Settlement with respect to KENT 2013-984 on September 17, 2014. In that decision, the Citation No. 8511142 (for loose ribs) was modified from an 104(d)(1) citation to a 104(a) citation. However, other than the removal of the unwarrantable failure designation, this citation remained unchanged as it relates to the condition observed, gravity, and negligence.

While an operator is free to admit or deny the existence of a violation for purposes of settlement, agreement to pay a civil penalty necessarily establishes that, for proceedings under the Act, the alleged violation is conceded by the operator. *AMAX Lead Company of Missouri*, 4 FMSHRC 975, 978-919 (June 1982). Further, a settlement agreement that binds a party to pay a civil penalty is permitted to serve as a basis for the implementation of the entire enforcement and compliance scheme of the Act. *Id.* As the Commission held in *Old Ben Coal Co.*,

[A] penalty under the Mine Act is predicated upon the existence of a violation. *See, e.g., Tazco, Inc., supra*, 3 FMSHRC at 1896-98; *Co-op Mining Co.*, 2 FMSHRC 3475, 3475-76 (December 1980). Therefore, an operator cannot deny the existence of a violation for purposes connected with the Mine Act and at the same time pay a civil penalty. For purposes of the Act, paid penalties that have become final orders reflect violations of the Act and the assertion of violation contained in the citation is regarded as true."

7 FMSHRC 205, 209 (Feb. 1985) *citing AMAX, supra*. In short, agreement to pay a civil penalty necessarily establishes, for any future purpose under the Act, that the citation was valid (even if it is not expressly admitted or even denied). Respondent cannot claim that citations that it has already agreed to pay are invalid.

This is consequential for our purposes here. Respondent has agreed to pay civil penalties with respect to Citation Nos. 8511142 and 8511143. As a result, these citations are final orders reflecting violations of the Act and, most importantly, the assertion of violation contained in the citations are regarded as true. That means, with respect to Citation No. 8511142, Respondent has conceded:

The Operator failed to support or otherwise control the roof, face and ribs of areas where persons are required to work or travel in that there is a loose, unconsolidated coal rib located at x-cut 26 1/2 on the 1st Main North Beltline. The Coal Rib measured 15 ft. Long, 54 inches high, and was from 1 to 10 inches thick. Also loose, unconsolidated coal ribs were observed along the walkway through out the entire 1st Main North Beltline entry and adjoining cross-cuts. In

addition there is 2 areas along the beltline, 1 x-cut outby the tandem drives which are unsupported in that the corners have rolled off leaving 1 area measuring 6ft. By 6 ft and 1 area measuring 6ft. By 7 ft. unsupported. There is also an area measuring 8ft. By 11 ft and is 25 ft. from the 1st Main North Belt Head Roller which is not being supported in that there is 2 roof bolts with no plates...

Standard 75.202(a) was cited 47 times in two years at mine 1502709 (47 to the operator, 0 to a contractor)...

(SX-16). Further, Respondent has conceded that the citation was reasonably likely to result in lost workday/restricted duty injury to two miners and that the violation was S&S. (*Id.*). Finally, Respondent conceded that its negligence was high (though not an unwarrantable failure). (*Id.*).

With respect to Citation 8511143, in agreeing to pay a settlement, Respondent has conceded:

Float Coal Dust has been allowed to accumulate on the rock dusted surfaces of the mine floor, belt structure, and water line on the 1st Main North Beltline from the tailpiece to the header, which is a distance of 2000 ft. The Accumulations on the mine floor were from rib to rib and includes the adjoining x-cuts.

This Beltline was in operation at the time of inspection.

Management engaged in aggravated conduct constituting more than ordinary negligence by allowing this condition to exist.

This violation is an unwarrantable failure to comply with a mandatory standard.

Standard 75.400 was cited 159 times in two years at mine 1502709 (159 to the operator, 0 to a contractor).

(SX-1). Further, Respondent has conceded that the citation was reasonably likely to result in lost workday/restricted duty injury to two miners and that the violation was S&S. (*Id.*). Finally, Respondent conceded that its negligence was high and that the violation was an unwarrantable failure. (*Id.*).

In light of the settlement agreements described above and the final orders created as a result of those agreements, Respondent can no longer maintain that Citation Nos. 8511142 and 8511143 are not hazardous. In making a settlement agreement, Respondent has conceded the validity of those citations and the gravity and negligence determinations therein. Those citations clearly establish clear hazards as it relates to rib conditions and the float coal dust condition. Therefore, my consideration of whether the on-shift examination was adequate must be made with those hazards established as facts. Given those hazards, I reiterate my finding that Citation No. 8511145 was valid and that the instant on-shift was inadequate.

Respondent's specific arguments about the conditions cited on the day of the examination all seek to establish that no hazard existed. I will address each of these arguments because I believe that the record establishes that hazards, in fact, existed. However, given Respondent's concession that the underlying citations were valid (as well as my own findings with respect to Citation No. 8511144) this consideration is not really necessary. Respondent has already agreed that these violations (and the hazards that flowed from them) existed for purposes of the Act. All of its arguments to the contrary are therefore barred.

With respect to ribs, Respondent argued that the rib conditions were not hazardous. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 23-28). It noted that Doss testified that he saw the cracked ribs, attempted to pull them down, but found that they were not loose. (*Id.* at 23). It essentially argues that there was no fall hazard here because, while the rib was cracked, there was no chance of an imminent fall. (*Id.*). It argues that a cracked rib is different from a loose rib. (*Id.* at 26). Respondent noted that Pollard admitted that the rib had been in the cracked condition for some time, and thereby conceded that it had done so without causing a fall or danger. (*Id.*). Respondent summarized by saying that the Secretary had only proven a cracked rib, not a violation of §75.202(a) at the time of the examination or that the exam was inadequate. (*Id.* at 27-28).

I credit the testimony of investigator Smith and Inspector Pollard that the ribs in this entry were in fact hazardous. (Tr. 179-180). I further credit Pollard's testimony that while some of the ribs could not be pulled, they were still hazardous because they could still fall at any time. (Tr. 284). Even Little testified that ribs are hazardous. (Tr. 326). Despite these hazards, the ribs were not recorded or flagged in any way. (Tr. 326-327). Pollard's concerns over rib conditions were justified by the fact that they were a leading cause of injury in coal mines. (Tr. 180, 297). The large gap observed by Inspector Smith was not merely a "crack," it was an indication that these ribs were not fully secured. (Tr. 284). I see no reason to find, as a matter of law, that a rib was not hazardous because a miner with a 3-foot pry bar could not pull it down after a few moments of effort. The intense weight of the coal as well as the various stresses that the mining environment placed on the rib were far greater than the miner's leverage. Even if the examiner could not pull the rib, the rib could still have fallen at any time. Further, even if Doss attempted to pull the ribs and found that he could not, that does not excuse his failure to flag the ribs or record their existence so that miner would be aware that the rib could fall in the future.

In a related argument, Respondent asserted that Pollard could only discuss one loose rib in particular and did not know how many loose ribs were present. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 24-25). As Respondent sees it, "[h]e excused his failure by saying that he simply could not be bothered to fill out a 'bunch of continuation pages' in his notebook. (*Id.* at 25). Similarly, Smith had a camera but only took a photograph of one rib. (*Id.*). Respondent claims that, other than the one rib discussed at length, all other alleged rib conditions should not be considered. (*Id.*).

The Secretary provided credible testimony that there were loose ribs throughout to entry. (Tr. 168, 220, 252, 285). I see no reason to believe that Pollard fabricated the existence of other loose ribs in order to frame Respondent. Pollard further discussed one of the loose ribs at great length which provided valuable, general information about the hazards posed by the ribs. The

same is true of Smith's photograph. I do not believe the Secretary's failure to document, at length, each of the instances in which Respondent did not meet the requirements of the Act should be held against the Secretary from an evidentiary standpoint. In depth testimony about each rib would have been needlessly cumulative.²⁰ The record clearly establishes several loose, hazardous ribs.

Respondent also argued that Doss had found one loose rib during his examination and he had corrected it. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 25). All of the other ribs found by MSHA were not loose enough to pull. (*Id.*). According to Respondent, this showed that Doss was diligently addressing rib problems and that the examination was adequate. (*Id.*).

Doss testified that he saw and pulled a single loose rib during his examination. (Tr. 309-312). He also testified that he tried, and failed, to pull other ribs at other times. (Tr. 316, 325). However, as Pollard explained, the inability to pull a rib does not mean that those ribs were not hazardous. (Tr. 284). Further, even if Doss could not pull the ribs that does not excuse his failure to record or flag the ribs as potential hazards in the future.

Next, Respondent argued that every violation does not give rise to an inadequate examination and that an on-shift should be considered in light of what a reasonably prudent person would do in the same circumstances. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 26). It asserted that even if there was a valid rib citation, that does not necessarily prove the examination was inadequate. (*Id.*). Respondent argued that the standard is for an adequate examination, not a perfect examination, and that the Secretary does not merely need to prove Doss "could have done a better job." (*Id.* at 26-27).

Respondent is correct that not every violation should give rise to a citation for inadequate examination. Perhaps an entry with a single loose rib and no other conditions would be a poor candidate for such a citation. A perfect examination is not required. Of course, no one has argued that a single rib condition would be sufficient to form the basis for the instant citation. Doss' examination was a far cry from "just shy of perfect." There were rib conditions throughout the entire entry. (Tr. 168, 220, 252, 285). There was dry float coal dust spread evenly throughout the entry. (Tr. 201, 208, 220-223, 233-234, 259-260, 272). There was a belt rubbing the belt structure. (Tr. 221, 245-246). And there was extraneous material strewn around the entry. (Tr. 220, 251, 277, 333). All of these conditions were, to varying degrees, obvious. They were simultaneously found by two MSHA officials who were not coordinating their efforts. Given the sheer number of hazardous conditions that were not recorded or corrected, the examination was clearly inadequate.

Respondent also argued that it had taken other precautions to ensure the safety of the ribs in the area. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 27). In particular, Respondent noted that it set timbers in the correct manner and installed truss bolts. (*Id.*).

²⁰ It should further be noted that in light of the discussion regarding the settlements *supra*, the Secretary may have chosen to present less evidence regarding the number of loose ribs and their exact nature because he was relying on the fact that Respondent had already admitted to the existence of these conditions.

With respect to timbers, I credit the testimony of Smith that the timbering here was a mere “token effort” and that they were not supporting the ribs. (Tr. 193). Specifically, he noted that they were not installed properly. (Tr. 191). I also credit Pollard’s testimony that the timbers were not placed everywhere; some places had loose ribs with no timbers. (Tr. 193, 284-285). I also note that Doss conceded that truss bolting did not occur in all areas of the entry and that Respondent was not truss bolting the area at the time of the citation. (Tr. 303-304).

More important than this testimony, as it pertains to safety precautions, the proof is in the pudding. If Respondent was taking meaningful efforts to ensure the safety of the ribs there might have still been some loose or cracked areas. However, the entire entry would not have been full of broken ribs, as Pollard testified it was. The fact that Respondent’s efforts were insufficient is confirmed by the fact that Doss conceded that Respondent became more aggressive in securing the ribs after the citation. (Tr. 333). If Respondent was taking proper precautions, this would not have been necessary.

Once again Respondent argued the examiner was traveling in the opposite direction of the inspection group and that people traveling in different directions can see different things. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 27). Similarly, it noted that the examination team had four head lamps instead of one. (*Id.*). This argument is rejected here for the same reasons as with the other citations at issue here; Respondent is tasked with finding conditions regardless of the direction or the number of people involved in the examination. If examiners cannot find all of the hazardous conditions present given the direction of travel and the amount of light, Respondent should use more examiners or give the examiners more lights.

In light of the foregoing, I reiterate my finding that the ribs in the entry were hazardous, obvious, and not reported. Therefore, they are perfectly appropriate as one basis for an inadequate examination citation.

As with the rib conditions, Respondent presented several argument for the proposition that the float coal dust condition could not form the basis of an inadequate examination citation. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 28-34). First, Respondent noted that while Smith testified that his photograph (SX-11) clearly showed float coal dust on top of the rock dust, the photograph showed no float coal dust. (*Id.* at 28). It argued that Smith’s photographs were practically useless and that distinguishing between the float coal dust and rock dust (which looked dark because of water) was difficult. (*Id.* at 29-30 *citing* Tr. 201-202, 261, 311, 349). This problem was especially important because Smith had no memory of the condition beyond the photograph. (*Id.* at 28 *citing* Tr. 200-201).

As with photographs SX-7 and SX-8 *supra*, I found the photograph to be dark and difficult to discern. I cannot tell what dark material is float coal dust and what is simply the darkness surrounding the flash. But, once again, Respondent was not cited for being photographed with float coal dust. Inspector Smith and Investigator Pollard credibly testified that they observed float coal dust in the area and that the float coal dust was dry and uniformly spread throughout the entry. (Tr. 261, 281). I do not believe that Inspector Smith and Investigator Pollard lied about the existence along the entry. Further, even if the photographs were clearer and I could see the black material on the structure, I would not be able to tell if it was float coal

dust or some other material (like wet rock dust). I would still rely on the testimony of the witnesses I found to be most credible. In this instance, that would be Inspector Pollard and Investigator Smith.

In a related argument, Respondent asserts that Smith also says that some photographs show adequate rock dust, but tries to “dodge” and say that the rock dust was not the point of the photographs. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 30, *citing* Tr. 203-207). It further notes that Smith admitted that at other times he would not have cited the area for the float coal dust in the photographs. (*Id.* at 30-31). While Respondent admits that Smith also stated he even though he may not have cited the condition it may still have been a violation, this was a contradiction of the inspector’s oath and the law. (*Id.* at 31).

Smith credibly testified that he took photographs of various areas of the mine entry based on conditions that he observed. He observed float coal dust, but also many other conditions. (Tr. 169-182, 208). As a result, most of his photographs were designed to show other conditions, not the float coal dust. It is entirely reasonable that some of these photographs would show varying levels of float coal dust. While there was float coal dust uniformly throughout the entry, that does not mean that every area would necessarily have visible float coal dust. Beyond that, Smith did not write the citation for float coal dust. Pollard did. Pollard’s credible observations are the primary basis for believing that float coal dust existed in this area. Smith’s observations, because they did not form the basis for the citation, simply support those observations.

Smith’s statement that the condition (as shown in the photographs) may have been a violation but that he may not have written a citation hinges on the concept of prosecutorial discretion. Perhaps Smith believed that the photographs showed a marginal case and that, in his opinion, a citation would not have been issued. It seems odd that Respondent would argue with the idea that all minor violations need not be prosecuted as though they are major violations.

Further, these photographs do not capture the entire entry. While the photographs might not have shown conditions sufficient to support a citation that does not mean that the entry as a whole did not have sufficient float coal dust to support a citation.

Finally, this is all theoretical, as Pollard, not Smith, was the actual MSHA official who issued the citation. His observation, that there was uniform float coal dust throughout the entry, was the primary basis for finding the hazard existed.

Respondent further argued that evidence regarding the alleged condition was available, but not collected and asserts that this should raise an inference that the evidence would have disproved the citation. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 31). Specifically, it notes that no sample was taken of the alleged float coal dust. (*Id. citing* Tr. 362). As a result, the citation rests on Pollard’s word, though even Pollard admitted that different inspectors might disagree. (*Id.* at 32 *citing* 272-273).

Respondent cites no authority for the proposition that an inspector’s observations about conditions is insufficient to serve as the basis for a citation. I reiterate that I credited Pollard’s testimony as it related to float coal dust. In fact, as noted earlier, nothing beyond the testimony of

an inspector is necessary to support a citation. *See Buck Creek Coal, Inc.*, 52 F.3d at 135-36. In the absence of any legal authority to the contrary, I see no reason to disbelieve the inspector's actual observations because he could have made additional observations.

Respondent also argued that Doss and Little testified that they saw no float coal dust. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 32 citing Tr. 349). It argues that Doss' request for additional rock dusting in the area was a "dangerous red herring." (*Id.* at 33). Respondent argues that Doss' earlier notations were an example of a conscientious examiner who wanted to take care of issues before action was required. (*Id.*). It noted that there was no evidence that the previous examinations were inadequate. (*Id.*). In fact, Doss' request is evidence that his examinations were adequate; Respondent's failure to follow up on those earlier requests does not mean that the examination was inadequate. (*Id.*). Respondent asserted that Pollard admitted the previous examinations were adequate. (*Id.* at 34). Respondent fears that a citation for Doss' proactive attitude towards enforcement will create a chilling effect on operators, preventing them from getting ahead of violations. (*Id.*).

The citation was issued because, *inter alia*, Pollard observed float coal dust in the entry just minutes after Doss had completed his examination and that float coal dust was not recorded. (Tr. 219, 301, 304, 319-320). Whether the previous examinations were adequate or not is completely immaterial to whether a hazard existed at the time the citation was issued. One adequate examination in the past does not inoculate against future inadequate examination, especially when the previous examination is not followed up with corrective action.

Further, the fact that Doss saw that the entry needed cleaned for three days prior to the instant citation, noted the condition, saw no change in it after his recordings, and then failed to record the condition on the fourth day does not show that Doss was a conscientious examiner or that Respondent was trying to "get ahead" of violations. It shows that conditions existed at the mine, that they were not corrected, and that if they were not corrected there were no consequences. Eventually, the examiner would stop noting the hazardous conditions at all. If the inspector had not noticed the float coal dust, there is no guarantee it would have ever been cleaned. If Doss would like to note that conditions exist before they become hazardous, that impulse is admirable. But if Respondent wishes to benefit from that admirable impulse, it must then also take action before a hazard occurs.

Once again, I reiterate my finding that the float coal dust in the entry was hazardous, obvious, and not reported. Therefore, that is perfectly appropriate as one basis for an inadequate examination citation.

As with the other conditions, Respondent presented several arguments for the proposition that the belt rubbing could not form the basis of an inadequate examination citation. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 34-35).

First, Respondent argues that the citation should be vacated and, as a result, cannot form the basis for an inadequate examination violation. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 34). For the reasons given *supra* with respect to Citation No. 8511144, this argument is rejected. The allegations in that citation are supported by a preponderance of the evidence.

Respondent also argued that even if the belt was rubbing, it may not have been rubbing while Doss conducted his examination. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 34-35 *citing* Tr. 348). It pointed to the fact that Doss testified that the belt was not rubbing at the time of the examination. (*Id.* at 35). It asserted that only a reasonable examination is needed, MSHA conceded that he may have missed the belt. (*Id.* at 35). As discussed *supra*, while the belt might not have been rubbing at the time of the inspection, the violation still occurred. Further, there were other indications (the warm belt and the belt shavings) that should have indicated to Doss that a problem had occurred. (Tr. 226, 248).

2. The Violation Was Reasonably Likely to Result in Lost Workday/Restricted Duty Injury To Two Miners And Was Significant And Substantial In Nature.

Inspector Pollard marked the gravity of the cited danger in Citation No. 8511145 as being Reasonably Likely to result in Lost Workday/Restricted Duty Injury to two miners. (SX-6). Pollard also determined that the violation was S&S. (SX-6). These determinations are supported by a preponderance of the evidence.

Regarding the first element of S&S - the underlying violation of a mandatory safety standard – it has already been established that Respondent violated 30 C.F.R. §75.362(b).

With respect to the second element of Mathies, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. The Commission has recognized examinations as “of fundamental importance in assuring a safe working environment underground.” *Buck Creek Coal*, 17 FMSHRC 8, 15 (Jan. 1995); *see also Jim Walter Resources, Inc.*, 28 FMSHRC 579, 598 (Aug. 2006). MSHA requires several layers of examinations, including on-shift, preshift, and weekly examinations, in order to ensure miner safety. “These examinations are designed to create a multi-layer, prophylactic approach to the identification and correction of hazardous or unsafe conditions in the mine.” *Coal River Mining, LLC*, 34 FMSHRC 1087, 1095 (May 2012) (ALJ). The Secretary presented credible evidence that there were four different hazardous conditions located in the 1st Main North belt entry, including float coal dust, rubbing belts, extraneous material, and loose ribs. The rubbing belt created friction that made a fire or smoke more likely. The belt and the area near the rubbing belt were dry and there was float coal dust on the structure. (Tr. 286-288, SX-8) The float coal dust would similarly have helped cause an ignition or explosion. (Tr. 246-247). The extraneous materials would serve as an additional fuel source in a fire. (Tr. 278). Further, the loose ribs were in danger of falling across the entry where miners worked and traveled. (Tr. 179-180, 255). Clearly, the failure to recognize and correct these conditions with an adequate examination contributed to the danger of a fire, inundation of smoke, explosion, or crushing injury. (Tr. 255).

The third element of the Mathies test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. As discussed *supra*, it is likely that in the event of a fire that two miners in the entry would be affected by smoke or by the fire directly, resulting in injuries. (Tr. 255). Miners sent to fight the fire would also be affected and receive injuries. In the event of an explosion, miners in the entry, or even in the adjacent travelway, would be affected

and could suffer injury. (Tr. 255). In the event of a rib fall, mine examiners or mechanics in the area would be affected. Therefore, the third prong of *Mathies* is met.

The fourth and final prong of *Mathies* – a reasonably likelihood that the injury in question will be of a reasonably serious nature – was also met. Under *Mathies*, the fourth and final element that the Secretary must establish is that there was a “reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984). The lost workday/restricted duty injuries that would be most likely to occur, specifically smoke inhalation and burns, would be sufficiently serious to result in an S&S designation. Broken bones or lacerations would similarly meet this standard. Therefore, the fourth prong of *Mathies* is met.

In the event of a fire or explosion, the Secretary presented credible evidence that miners would suffer lost workday/restricted duty injuries from burning or smoke inhalation. (Tr. 247). Further, miners in the adjacent travelway would be affected in the event of any explosion. (Tr. 248). As with Citation No. 8508512 *supra*, miners fighting fires would also be affected by burns and smoke inhalation. (Tr. 26, 29). The Secretary also provided credible evidence that a fallen rib could cause lost workday/restricted duty injuries like broken bones or lacerations. (Tr. 255).

Respondent presented several arguments for the proposition that the inadequate examination was not S&S. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 36). However, none of these arguments are compelling.

First, Respondent stated that “the Secretary did not put on any evidence specific to citation No. 8511145 that Doss’s alleged inadequate examination was reasonably likely to cause an injury.” (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 36). Respondent included several arguments as to why the specific conditions could not have resulted in injuries. (*Id.* at 36-37). Regardless of the merits of this claim, it is wholly irrelevant here. Respondent conflates the second and third prong of *Mathies*. As discussed at length, the Secretary does not need to prove that the violation (Doss’ examination) would result in an injury. *Musser Engineering, Inc.*, 32 FMSHRC at 1281. The Secretary need only prove that the hazard contributed to by Doss’ examination would result in an injury. *Id.* Here Doss’ examination gave rise to smoke, fire, explosion, and rib collapse hazards. Undoubtedly those hazards would cause injury.

Respondent also argued that Citation No. 8511141 (for the extraneous material) was marked as “unlikely” and further asserted that it had proven that Citation Nos. 8511142 and 8511143 were unlikely. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 36). It further argued that it had demonstrated that Citation No. 8511144 was not S&S. (*Id.*). However, as discussed length *supra*, by agreeing to settle Citation Nos. 8511142 and 8511143, Respondent has conceded the content of those citations. *Old Ben Coal Co.*, *supra*. Both citations are therefore reasonably likely and S&S. Also, Citation No. 8511144 was found S&S *supra*. As these citations form the basis for this citation, it would be reasonable that the inadequate examination that failed to catch them would also be S&S.

Once again, I note that an inspector’s opinion regarding S&S is accorded substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC at 1278-79, *Buck Creek Coal, Inc.*, 52 F.3d

at 135-36. Here, Pollard credibly testified that the citation was S&S. As a result of the inspector's opinion and, more importantly, the factors discussed above, I find that the Secretary proved the likelihood of injury, the severity of that injury, and the S&S designation by a preponderance of the evidence.

With respect to the number of persons affected, the Secretary presented credible evidence that if smoke, fire, or explosion were to occur the belt examiner and belt cleaner would be affected. (Tr. 248). Further, the miners in the belt entry would also face injury. (Tr. 248). Pollard marked this citation as likely to affect 2 people because there was a belt examiner and belt cleaner in the area. (Tr. 248). Further, the belt entry was parallel to the travelway and anyone in that area would also be affected. (Tr. 248). The loose ribs would affect the examiners and mechanics in the area. (Tr. 255).

In short, the preponderance of the evidence shows that Citation No. 8511145 was reasonably likely to result in lost workday/restricted duty injuries to two persons and was S&S.

3. Respondent's Conduct Displayed "High" Negligence.

In the citation at issue, Inspector Pollard found that the operator's conduct was highly negligent in character. (SX-6). The substantial evidence supports this designation.

With respect to knowledge, the factual situation presented here is substantially similar to the other citations discussed herein. A mine examiner had passed through the area just minutes before the inspector discovered and cited the violative condition. (Tr. 219, 301, 304, 319-320). In fact, the inspector found the examiner, Doss, just as he was completing his examination. The examiner had traveled the belt entry and past the area where all four conditions were found and did not record them. I credit Pollard's testimony that this violation exhibited "high negligence" because he did not believe that Doss could travel the belt line and not see the conditions. (Tr. 251-252, 256). Further, Doss had listed the dust condition in the book for three days. (Tr. 256, 273). As with the previous citation, the examiner was an agent of Respondent and his actions were imputable to the operator. *Whayne Supply Co., supra*; *Rochester & Pittsburgh Coal Co., supra*; and *Southern Ohio Coal Co., supra*. Furthermore, the underlying citations were the result of high levels of negligence. Citation No. 8511141 was the result of moderate negligence, Citation No. 8511142 was the result of high negligence, Citation No. 8511143 was the result of high negligence and an unwarrantable failure, and Citation No. 8511144 was the result of moderate negligence.²¹ As a result, Respondent knew or should have known about the cited condition but took no action. Therefore, Respondent was negligent.

Respondent argued that it did not have knowledge of the cited condition and therefore, cannot be negligent. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 35-36). However, Respondent's arguments are not compelling.

²¹ Once again, these are final designations based (with respect to Citation Nos. 8511141, 8511142, and 8511143) on previous settlements and (with respect to Citation No. 8511144) my findings above.

Respondent first argued that the fact that Doss listed that the area needed to be cleaned for three days before the instant citation should not be considered knowledge because of the same chilling effect on “getting ahead of the violations” that was discussed *supra*, in the section regarding the validity of this citation. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 35). For the same reasons discussed there, this argument is rejected.

Respondent next argued that a condition is not obvious just because the Inspector sees it and the examiner does not. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 35). It argued that if this were the case, any citation would be high negligence because they always involve conditions that an inspector sees but an examiner does not. (*Id.*). This is essentially the same argument Respondent made with respect to Citation Nos. 8508232 and 8508512 and is rejected for the same reason. The issue is this particular citation and what the examiner knew or should have known.

Next, it argued that the fact that Doss conducted a timely exam and had no actual subjective knowledge of the condition was a considerable mitigating factor. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 36). As discussed at length *supra*, whether Respondent had actual subjective knowledge is immaterial to a negligence finding. The issue is whether he should have known. In this case, with all of the various hazardous conditions, Doss should have known, regardless of his subjective level of knowledge.

Finally, Respondent argues that Pollard admitted that the condition cited in Citation No. 8511144 may not have been present during the examination. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 36). While Pollard admitted that the belt might not have been rubbing during the examination, he explained that other conditions (specifically, the belt shavings and heat) should have alerted Doss that something was wrong. (Tr. 226, 248). Further, the other conditions, especially the float coal dust and the loose ribs, were far more obvious and should have been recorded.

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. I do not find any conditions existed that in any way mitigates this citation. There were several obvious and very hazardous conditions in the entry, Doss conducted an examination of the area, and nothing was recorded.

Respondent argued that there were considerable mitigating circumstances with respect to this citation. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 36). However, the record does not support Respondent’s assertions.

Specifically Respondent argued that the Secretary alleged no history of violations or reason to believe that Respondent was on notice for this condition. (*Respondent’s KENT 2013-480 Post-Hearing Brief* at 16-17). While it is true that Respondent did not have a large number of citations for inadequate examinations in the recent past, it was on Notice. Doss testified that Smith told him during the inspection that he should do a better job examining the area. (Tr. 323). At hearing, Doss dismissed this advice stating “[e]very inspector tells us that.” (Tr. 323). This is a very troubling statement. Respondent apparently does not take the MSHA inspectors at their word and work to improve the way examinations are conducted. Instead, as Doss demonstrates

here, they assume the inspectors are just speaking to hear themselves talk. Respondent was clearly on notice and unfortunately chose not to take that notice. As stated previously, willful ignorance is not mitigation.

4. Penalty

In this matter, the Secretary proposed a penalty of \$3,689.00 for Citation No. 8511145. Having affirmed the Secretary's determinations in all respects, no deviation from the proposed penalty is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$3,689.00.

ORDER

It is hereby **ORDERED** that Citation Nos. 8508232, 8508512, 8511144, and 8511145 are **AFFIRMED** as amended.

Respondent is **ORDERED** to pay civil penalties in the total amount of \$15,096.00 within 30 days of the date of this decision.²²

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

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/tjb

²² 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

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 5, 2015

UNITED STEELWORKERS LOCAL NO.
5114, ON BEHALF OF MINERS,
Applicant

v.

HECLA LIMITED,
Respondent

COMPENSATION PROCEEDING

Docket No. WEST 2012-466-CM

Lucky Friday Mine
Mine ID 10-00088

**ORDER AMENDING ORDER GRANTING, IN PART,
HECLA LIMITED'S MOTION FOR PARTIAL SUMMARY DECISION**

On December 23, 2014, I issued an Order Granting, in part, Hecla Limited's Motion for Partial Summary Decision in this case. 36 FMSHRC _____. In footnote 10 on page 6 of that order, I set forth the language in the body of Citation No. 8565565 that was issued to Hecla on December 21, 2011. On page 4 of my order, I noted that Hecla and the Secretary of Labor settled that citation. I approved the settlement of this citation by order dated August 6, 2014.

On December 30, 2014, Hecla filed an unopposed motion requesting that I clarify that, as part of the settlement, the Secretary agreed to delete a sentence from the body of Citation No. 8565565. In the motion to approve settlement of that citation in WEST 2013-781-M-A, the Secretary stated that the parties agreed to strike "the following sentence from the narrative because it is inaccurate: 'The Mine Superintendent stated that the readings could not be taken because the steel liner was installed over the [pressure] gauges and the gauges could not be read.' The management agent was referring to the closure points, not the stress gauges." (Motion to Approve Settlement at 2). I approved the deletion of this sentence in my decision approving settlement.

For good cause shown, Hecla's unopposed motion to amend my December 23, 2014 order is **GRANTED**. Footnote 10 on page 6 of that order is **AMENDED** to add the following paragraph at the end of the footnote:

As part of the settlement of this citation, the Secretary agreed to delete the following sentence from the citation because it is inaccurate: "The Mine Superintendent stated that the readings could not be taken because the steel liner was installed over the gauges and the gauges could not be read."

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE NW, SUITE 520N
WASHINGTON, D.C. 20004

January 16, 2015

SCOTT MCGLOTHLIN,
Complainant,

v.

DOMINION COAL CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. VA 2014-233-D
NORT-CD-2013-04

Mine: Dominion No. 7
Mine ID: 44-06499

ORDER GRANTING COMPLAINANT'S MOTION TO QUASH SUBPOENA FOR DEPOSITION

This proceeding concerns a Complaint of Discrimination brought by Scott McGlothlin against Dominion Coal Corporation ("Dominion"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) ("Mine Act" or "the Act"). McGlothlin seeks redress under section 105(c)(3) for an adverse action allegedly motivated by his application for the protections afforded to miners afflicted with pneumoconiosis under 30 C.F.R. Part 90.¹

Before me is McGlothlin's Motion to Quash Subpoena that opposes Dominion's deposition of Sheila Kiser, a notary public who participated in the execution of a power of attorney given by McGlothlin's to his wife, Alicia McGlothlin. The power of attorney is dated May 6, 2013.

The central issue is whether Dominion knew, or should have known, that McLaughlin filed, or intended to file, for Part 90 status when it reduced McGlothlin's pay upon reassignment of his job duties in June 2013. Consistent with a January 13, 2015, conference call with the parties, this Order formalizes the granting of McGlothlin's Motion to Quash. As discussed below, the notary does not have personal knowledge that, either constitutes relevant admissible evidence, or could lead to the discovery of admissible evidence, as required by Commission Rule 56(b).²

¹ Under 30 C.F.R. Part 90, a miner determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis is given the opportunity to work without loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air ("mg/m³").

² Commission Rule 56(b) provides:

Scope of Discovery. Parties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.

As addressed in the January 13, 2015, telephone conference, Dominion seeks to discover whether McGlothlin's application for Part 90 status, dated June 14, 2013, was actually filed after that date. In addition, Dominion seeks to determine whether the signature executing the Part 90 application is the actual signature of McGlothlin. Dominion also seeks to determine, based solely on speculation, whether the notary, in concert with McGlothlin, pre-dated the execution of the power of attorney, dated May 6, 2013. If so, Dominion asserts that such action would have a bearing on McGlothlin's general credibility.

The deposition of Kiser cannot yield relevant admissible evidence. Significantly, Kiser did not notarize McGlothlin's application for Part 90 status. Consequently, Kiser has no knowledge of when the Part 90 application was signed, or by whom. Moreover, the filing of a Part 90 application is not the only relevant protected activity in this matter, inasmuch as requisite medical examinations and procedures sought in preparation for such filings are "preliminary step[s] [that come] within the statutory protection afforded to miners." *See Goff v. Youghioghenny & Ohio Coal Co.*, 8 FMSHRC 1860, 1863 (Dec. 1986).

In addition, as discussed in the telephone conference, the Part 90 application does not require McGlothlin's actual signature in the absence of evidence that he did not authorize its signing. Thus, the power of attorney is not relevant to whether McGlothlin's application was validly filed.

Finally, Dominion's assertion that Kiser's deposition may have a bearing on McGlothlin's credibility is unavailing. The question of the accuracy of the notarization date, and its impact on McGlothlin's credibility, if any, is a collateral issue, which is not subject to discovery. *See Order, Eagle Energy Inc.*, 21 FMSHRC 1176 (1180) (Oct. 1999) (ALJ) (citation omitted) (denying the Secretary's request for a subpoena as extrinsic evidence of untruthful acts are not admissible because they are deemed to be collateral in nature).

ORDER

In view of the above, **IT IS ORDERED** that McGlothlin's Motion to Quash the subpoena for the deposition of Sheila Kiser **IS GRANTED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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January 16, 2015

PARAMONT COAL CO. VIRGINIA,
LLC,

Contestant

v.

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

CONTEST PROCEEDING

Docket No. VA 2015-46-R
Safeguard No. 8213238; 05/14/2014

Mine: Deep Mine #26

ORDER OF DISMISSAL WITHOUT PREJUDICE

On or about November 12, 2014 Contestant Paramount Coal Company filed and served a Notice of Contest regarding Notice of Safeguard (“Safeguard”) No. 8213238 issued by the Secretary of Labor’s authorized representative on May 14, 2014. The Secretary filed a Motion to Dismiss, arguing that the Commission does not have jurisdiction over the Notice of Contest action, and therefore the Notice of Contest should be dismissed. Paramount contends that the Secretary’s argument is without merit and the Motion to Dismiss should be denied.¹

However, as a matter of judicial economy, I grant the Motion to Dismiss.²

Contest proceedings are initiated by filing a Notice of Contest pursuant to section 105(d) of the Mine Safety and Health Act of 1977 (“Act”) and Commission Procedural Rule 20. 30 U.S.C. § 815(d); 29 C.F.R. § 2700.20. A Notice of Contest does not place into issue any proposed penalty assessment that may subsequently be issued by the Secretary. 29 C.F.R. § 2700.21(a). Pursuant to section 105(a) of the Act, an operator may contest a proposed penalty assessment for a citation or order. “A contest of the proposed penalty assessment prompts the filing of a civil penalty proceeding and places into issue not only the proposed penalty, but the fact of violation and any special findings contained in the citation or order.” *Spartan Mining Company, Inc.*, 29 FMSHRC 99, 99 (Feb. 2007) (ALJ Zielinski); *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620-23 (Sept. 1987); 29 C.F.R. § 2700.21(b).

¹ Both parties recognized that there is a case currently pending before the Commission regarding the jurisdictional issue noted in the Secretary’s brief: *Pocahontas Coal Company, LLC*, Docket No. 2014-642-R et al.

² I decline to address the jurisdictional issue raised by the Secretary as I believe it is irrelevant to my decision to dismiss the contest case.

A contest of both the issuance of a citation and the subsequent proposed penalty assessment for the violation results in two separate proceedings before the Commission, which contain entirely duplicative issues. “There are two actions in the same forum, involving the same parties, and the same demand for relief. The contest proceeding no longer serves any useful purpose, practically or legally. As a general principle, duplicative litigation is to be avoided in the federal courts, as it undoubtedly is in other courts and adjudicative bodies.” *Spartan Mining Company, Inc.*, 29 FMSHRC at 100; *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Federal judges may stay or dismiss a suit that is duplicative of another federal court suit. *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138-39 (2d Cir. 2000). “Dismissal of contest cases, without prejudice, upon filing of the penalty proceeding would eliminate duplicative litigation, avoid reassignment and tracking problems, and result in more concise and efficient case and document captioning.” *Spartan Mining Company, Inc.*, 29 FMSHRC at 100. Indeed, in a civil penalty proceeding involving a citation or order issued for a violation of a safeguard notice, the Secretary must first prove the validity of the underlying safeguard notice when challenged by the operator, and then prove the operator’s violation of the safeguard notice. *See Southern Ohio Coal Co.*, 14 FMSHRC 1 (Jan. 1992). Therefore, as a matter of judicial economy, the contest case is hereby **DISMISSED WITHOUT PREJUDICE**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, D.C. 20004

January 20, 2015

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

SPEED MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2013-372
A.C. No. 46-05437-308060-01

Mine: American Eagle Mine

ORDER GRANTING MOTION TO AMEND PLEADINGS

This case is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary” or “Petitioner”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”). 30 U.S.C. § 815. Chief Administrative Law Judge Robert J. Lesnick initially assigned this case to Administrative Law Judge William S. Steele on March 14, 2014. Due to Judge Steele’s retirement, Chief Judge Lesnick reassigned this case to me on August 22, 2014, along with several others, and attached a copy of my Prehearing Order directing the Secretary and Speed Mining, LLC (“Speed Mining” or “Respondent”) either to settle this case or to position it for hearing. A hearing is scheduled in this matter and the related dockets for March 3–6 and March 9–13, 2015.

I. PROCEDURAL BACKGROUND – MOTION TO AMEND PLEADING

On December 22, 2014, the Secretary filed a Motion to Amend Pleading requesting that the gravity findings be modified for the three orders at issue in this case and the civil penalty assessments adjusted accordingly. (Mot. at 1.) Specifically, the Secretary seeks to amend the gravity determination in Order No. 7166095 by changing the type of injury likely to occur as a result of the alleged violation from “lost workdays/restricted duty” to “fatal,” with a concurrent increase in the assessed penalty from \$7,774.00 to \$25,810.00. (*Id.* at 2–3.) Likewise, the Secretary seeks to modify the gravity determination for Order No. 7166096 by changing the injury finding from “lost workdays/restricted duty” to “fatal,” with an increase in the penalty from \$4,099.00 to \$13,609.00. (*Id.*) Finally, the Secretary seeks to modify Order No. 7242474 by changing the likelihood finding from “unlikely” to “reasonably likely,” increasing the injury type from “lost workdays/restricted duty” to “fatal,” and marking the violation as “S&S,” with a concurrent increase in the penalty assessment from \$2,000.00 to \$25,810.00. (*Id.*)

Respondent timely filed a Response to Secretary of Labor’s Motion to Amend Pleading on January 5, 2015.¹

¹ In a letter on January 9, 2015, the Secretary requested permission to file a Reply in Support of His Motion to Amend Pleading. Commission Procedural Rule 10, 29 C.F.R.

§ 2700.10, governs the filing of motions before Commission Judges. Procedural Rule 10 does

(continued...)

II. PRINCIPLES OF LAW – AMENDING PLEADINGS

The Commission has held that modification of a citation is analogous to the amendment of pleadings under Federal Rule of Civil Procedure 15(a), which states that leave for amendment “shall be freely given when justice so requires.” *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting Fed. R. Civ. P. 15(a)). Accordingly, amendments are to be liberally granted unless the moving party has been guilty of bad faith, the amendment would purposefully or unduly delay the proceeding, or where amendment would result in a legally recognizable prejudice to the operator. *Id.* at 1290 (citing *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990); 3 J. Moore & R. Freer, *Moore’s Federal Practice*, ¶ 15.08[2], 15–47 to 49 (2d ed. 1991)).

III. ANALYSIS AND ORDER GRANTING SECRETARY’S MOTION

The Secretary states in his motion that the proposed modifications comport with the facts of the alleged violations. (Mot. at 3.) The Secretary also asserts that the increased penalties better encourage future compliance with the safety regulations promulgated under the Mine Act. (*Id.* at 4.) On the other hand, Respondent claims the Secretary’s proposal comes after excessive delay, and that the proposed penalty increase will prejudice Speed Mining. (Resp. at 2, 6.)

Respondent first argues that the Secretary’s motion should be rejected simply because of the long delay between the initial Petition for Assessment in February 2013 and the proposed modification. (Resp. at 4.) Although Respondent argues that the Secretary’s request comes after excessive delay, Speed Mining does not allege that modifications would cause any *further* delay in the proceedings. On the contrary, the Secretary has not requested that the hearing in this case be postponed.

Respondent also has not shown that the Secretary’s delayed amendment request has legally prejudiced Speed Mining. While I am similarly concerned about the amount of time this case has languished with little discernable progress, the mere passage of time does not present the kind of legally recognizable prejudice that would justify denying Petitioner’s motion.² Speed Mining has not presented evidence of a legal prejudice.³ *See, e.g., Zenith Radio Corp. v.*

¹ (...continued)

not allow for a reply to a statement in opposition. Although the Secretary has indicated that Respondent has not taken a position on his request to file a reply, the Secretary has failed to establish a basis entitling him to submit a reply. Accordingly, the Secretary’s request is denied.

² In a similar context, the Commission has found that an 11-month delay in the Secretary’s filing of a civil penalty petition was by itself insufficient to show the operator suffered a “real” or “substantial” prejudice from the delay. *See Long Branch Energy*, 34 FMSHRC 1984, 1992–93 (Aug. 2012) (analyzing prejudice in the context of Commission Rule 28(a), 29 C.F.R. § 2700.28(a), which governs the amount of time the Secretary has to file a civil penalty petition). Instead, an operator must demonstrate the prejudice by a specific showing. *Id.*

³ In support of its argument, Respondent cites to *Steir v. Girl Scouts of the USA*, 383 F.3d (continued...)

Hazeltine Research, Inc., 401 U.S. 321, 330 (1971); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 247 (D.C. Cir. 1987); *Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988). The parties have nearly two months to prepare for the hearing of this matter. Moreover, the parties have not engaged significantly in either discovery or settlement negotiations despite my notice of hearing issued October 21, 2014; consequently, amending the pleadings does not notably set back the development of this case. (*See Resp.* at 5.)

Similarly, Respondent fails to explain how the Secretary's suggested increase in the penalty assessments amounts to legal prejudice. The proposed modifications do not relieve the Secretary of his burden to prove the cited violations by a preponderance of the credible evidence. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). Furthermore, Commission Administrative Law Judges are not bound by the Secretary's proposed penalties but by the Mine Act and the Commission's interpretation of the statute. *See Mining & Prop. Specialists*, 33 FMSHRC 2961 (Dec. 2011). If the Secretary's proposed penalties are inappropriate, Respondent will have ample opportunity to show as much at hearing.

Without a showing that the Secretary's proposed amendment is motivated by bad faith, would unduly delay the hearing, or would otherwise legally prejudice Respondent, I see no reason to disallow the Secretary's proposed amendment. Here, Speed Mining's response falls well short of these rationales. Accordingly, the Secretary's motion is **GRANTED**.

It is **ORDERED** that the pleadings in Order Nos. 7166095, 7166096, and 7242474, are hereby **AMENDED** in accordance with the Secretary's motion. These three orders will be the subject of an upcoming hearing and decision.

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

³ (...continued)

7, 11–12 (1st Cir. 2004), and *Rhodes v. E.I. du Pont de Nemours & Co.*, No. CIV.A. 6:06-CV-00530, 2009 WL 3380351 (S.D.W. Va., Oct. 16, 2009). In neither case, however, did the judge deny the plaintiff's motion to amend the complaint wholly because of the passage time. In both *Steir* and *Rhodes*, permitting the amendment would have forced the re-opening of discovery to investigate the new claims, disrupting the hearing schedule and likely delaying any trial. *Steir*, 383 F.3d at 12–13; *Rhodes*, 2009 WL 3380351 at *2. Such undue delay is not present here.

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OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, D.C. 20004

January 21, 2015

SCOTT MCGLOTHLIN,
Complainant,

v.

DOMINION COAL CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. VA 2014-233-D
NORT-CD-2013-04

Mine: Dominion No. 7
Mine ID: 44-06499

ORDER EXTENDING DISCOVERY DEADLINE **AND** **ORDER GRANTING, IN PART, COMPLAINANT'S REQUEST FOR DEPOSITIONS**

This Order concerns counsel for McGlothlin's requested depositions of Dave Addair, Bobby Winchester, James Stacey, Aaron Stillwell, and Stephen Johnson. The hearing in this matter is set for February 24, 2015. The discovery deadline is currently set for Friday, January 23, 2015.

On or about January 16, 2015, counsel for McGlothlin advised Dominion Coal Corporation's (Dominion) counsel that they wished to depose Addair, Winchester, and Stacey, the following week. Dominion's counsel has represented that they are unable to accommodate the last-minute request to depose these individuals because of scheduling conflicts. Consequently, by an email dated January 20, 2015, I urged the parties to agree on a mutually-acceptable extension to the date for completion of discovery. Counsel for Dominion replied on January 20, 2015, that it does not agree to an extension of the discovery deadline. In an email dated January 21, 2015, I provided Dominion with the opportunity to voluntarily agree to an extension of the discovery date to February 10, 2015, in lieu of issuing a formal order. The email also urged Dominion to voluntarily cooperate to effectuate the timely completion of depositions of Addair, Winchester, and Stacey.

This afternoon, on January 21, 2015, in response, Dominion stated that it "does not agree to extend the discovery deadline until February 10, 2015 ... without a demonstration of good cause, which in our professional opinion does not exist here." Having declined to voluntarily agree to an extension of the discovery date, as noted in my previous email, I will accommodate counsel for Dominion's scheduling conflict by extending the date for completion of discovery. **Accordingly, the discovery deadline is extended to February 10, 2015.**

Additionally, counsel for McGlothlin has disclosed that he intends to call Stillwell and Johnson as miner witnesses. Counsel for McGlothlin seeks to depose these individuals because counsel for Dominion has obtained sworn information from them. In essence, counsel for

McGlothlin seeks to depose his own witnesses. Consequently, McGlothlin's request for subpoenas to depose Aaron Stillwell and Stephen Johnson **SHALL BE DENIED**.

ORDER

In view of the above, **IT IS ORDERED** that McGlothlin's request to depose Aaron Stillwell and Stephen Johnson **IS DENIED**.

IT IS FURTHER ORDERED that the depositions of Dave Addair, Bobby Winchester, and James Stacey be taken on or before **February 10, 2015**.

IT IS FURTHER ORDERED that Dave Addair, Bobby Winchester, and its former employee James Stacey, be made available for deposition prior to February 10, 2015. If Dominion cannot ensure the attendance of its former employee, it should provide McGlothlin with Stacey's last known address and contact information, according to its employee records, prior to **January 28, 2015**.

Dominion's failure to abide by this Order may result in an order to show cause, seeking to determine why a default judgment, based on the relief sought by McGlothlin, should not be issued in this matter.

IT IS FURTHER ORDERED that the deadline for filing and exchanging Prehearing Reports, referenced in the November 14, 2014, Notice of Hearing, be extended to **February 14, 2015**.

/s/ Jerold Feldman

Jerold Feldman

Administrative Law Judge

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January 26, 2015

JOLEEN OLSON,
Complainant

v.

CORDERO MINE, LLC,
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-420-D

Case No. DENV-CD-2014-02

Mine ID: 48-00992

Mine: Cordero Mine

ORDER GRANTING RESPONDENT'S MOTION FOR DIRECTED VERDICT

Appearances: Joleen Olson, Gillette, Wyoming for Complainant

Robin Repass, Esq., Kristin White, Esq., Jackson Kelly PLLC, Denver,
Colorado for Respondent

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). The Complainant, Joleen Olson, acting *pro se*, alleges that she was discharged on October 30, 2013 by Respondent, Cordero Mine (Cordero), for approaching a mechanic about a safety issue on October 19, 2013. Respondent denies the allegation of unlawful discrimination and maintains that Complainant was discharged for unprotected activity. A hearing was held in Gillette, Wyoming on September 9, 2014.

At hearing, after Ms. Olson's opening statement, Respondent moved for a directed verdict. The court explained the process of a directed verdict to the Complainant and then allowed Ms. Olson to present her case-in-chief before entertaining such a motion. At the conclusion of Complainant's presentation of her case, Respondent appropriately again moved for a directed verdict on the grounds that Joleen Olson failed to establish a *prima facie* case of discrimination, because no evidence was presented that she engaged in protected activity. Tr. 213. For the reasons set forth below, the court ruled in favor of the Respondent. This Order memorializes the ruling issued at the hearing.

Section 105(c)(1) of the Mine Act states, "[n]o person shall discharge or in any manner discriminate against or cause to be discharged . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act. . . ." 30 U.S.C. § 815(c)(1). A complainant

establishes a prima facie case by “presenting evidence sufficient to support a conclusion that the individual engaged in protected activity, that there was an adverse action, and that the adverse action complained of was motivated in any part by that activity.” *Franks v. Emerald Coal Res.*, 36 FMSHRC 2088, 2093 (Aug. 2014).

The Commission’s Procedural Rules do not specifically address motions for a directed verdict. However, Procedural Rule 1(b) states that “[o]n any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act . . . , the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure” 29 C.F.R. § 2700.1. The Commission has observed that a directed verdict is appropriate when the requirements of FRCP Rule 52(c) have been met. In this regard, it noted that Rule 52(c) provides that if a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment as a matter of law against the party or decline to render any judgment until the close of all the evidence. Fed. R. Civ. P. 52(c); *Essroc Corp.*, 15 FMSHRC 606, 615 (Apr. 1993).¹

Complainant Joleen Olson had worked at the Cordero mine as a warehouse employee for over 6 years. Tr. 121. Her complaint is the result of events that happened on and after October 19, 2013. On October 19th, as directed by her supervisor, Ms. Olson began the task of moving equipment baskets, from an outside area to the inside of the warehouse, using a standing forklift.² Tr. 60. Before starting this task, she advised Rory McAmis, the step-up supervisor³ that day, of her plan to move the baskets. Tr. 61. She obtained caution, or “warning,” tape and cordoned off the area where she would be working, to prevent people from passing through. *Id.* This tape was installed because the forklift she was using does not allow its operator to see directly in front of it. Tr. 67. Therefore, Ms. Olson, as the forklift operator, might not see one who was directly in front of the machine, presenting a safety hazard.

¹ In *Aluminum Company of America v. Secretary*, 15 FMSHRC 1821 (September 1993), the Commission noted that at the conclusion of the Secretary’s case, the judge entered a decision from the bench granting Alcoa’s motion to dismiss and that, as this Court does today, the judge in that matter subsequently issued a written decision confirming his bench decision. Thus, the Commission has subscribed to the view that the use of a directed verdict may be an appropriate action. A number of administrative law judge decisions have employed its use. It is clear that the Court can decide a matter after hearing the evidence without waiting for post-hearing briefs. *Secretary of Labor v. Paul Bentley*, 2013 WL 6792634, n. 20 (November 2013) (ALJ), *Sec. v. Drummond Company, Inc.*, 14 FMSHRC 2039, (Dec. 1992) (ALJ), *Secretary v. Consolidation Coal*, 11 FMSHRC 311 (March 1989)(ALJ), *Secretary v. Cyprus Emerald Resources*, 10 FMSHRC 1417 (October 1988) (ALJ), *Jim Walter Resources, Inc. v. Secretary*, 34 FMSHRC 1386, (June 2012) (ALJ), *Eastern Associated Coal v. Secretary*, 22 FMSHRC 1020, (August 2000) (ALJ).

² The forklift was also referred to as a “yale.” Tr. 60.

³ A step-up supervisor is someone that takes the place of the normal supervisor when that person is absent. Tr. 168.

After making a few trips with the forklift, McAmis requested that Olson rearrange the tape to allow the mechanics access to a particular area in order to perform their work duties. Tr. 62. Olson obliged. *Id.* Afterwards, as she was coming around a corner, Olson noticed Wayne Martinson, an employee, putting the caution tape back in place. Tr. 63. Olson questioned Martinson about his actions, to which he responded that Wayne Larson needed to take belly pans⁴ to the wash area and went through the taped area. Tr. 63. Olson then confronted Larson, telling him to use the alternate route that she left open. Tr. 64. After she reestablished the tape, Larson went through it again. *Id.* Olson again approached Larson and then she proceeded to take down the tape and stop moving the baskets until he was finished bringing the pans to the wash station. Tr. 65. She was concerned about colliding with Larson's forklift because of her forklift's limited view. Tr. 67.

Olson testified that this event upset her because Larson did not attempt to communicate with her before removing the tape, failing to follow proper safety protocol. Tr. 65-66, 69-70. She stated that she did not file a safety complaint with McAmis because she did not think she would be successful. Tr. 73. On October 21, 2013, Olson spoke with her regular boss, Anita Werner about the incident. Tr. 189-90. Complainant Olson testified that Ms. Werner did not tell her that she was wrong for putting up the caution tape. *Id.* Of significance, Ms. Olson confirmed that no adverse action was taken against her for putting up the tape. Tr. 74-75, 171.

The Court stated its view that Ms. Olson's actions installing the caution tape was motivated by legitimate safety concerns, but advised that whether those actions were protected activity was a different question. Tr. 69. Complainant then agreed that on the two occasions that day when Larson took the caution tape down, he later put the tape up again. Tr. 70-71. Ms. Olson also agreed with the Court's characterization that the dispute Ms. Olson had with Mr. Larson was an employee-to-employee dispute. Tr. 71. Importantly, Ms. Olson stated that, following her problems with Larson, she never went to any supervisor to make a safety complaint about the incidents. Tr. 72. To emphasize this important point, Ms. Olson reaffirmed that she never went to management to allege a safety complaint. She maintained that she did not make a safety complaint because she did not feel she would succeed, as she believed that management would side with Larson's position. Tr. 73. However, that failure to act, in the Court's view, was a critical omission. The Complainant's notion that she would not prevail if she made a safety complaint is not a basis to excuse her failure to do so. Further, no one from Cordero management spoke to Ms. Olson about the incident that day. Thus, no one from management criticized Ms. Olson or took any adverse action against her that day, in the wake of her employee-to-employee dispute. Tr. 74. After the incident on October 19th, Ms. Olson continued to work at Cordero until October 28th. Tr. 76. Ms. Olson affirmed that she installed caution tape and cones on occasion following the October 19th event but that no problems resulted from her installing those safety devices and that no one from Cordero management had any criticism of her in connection with those actions. Tr. 78-79.

On cross-examination, Ms. Olson agreed that, well before the events forming the grounds for her discrimination complaint, she had received a disciplinary letter, on June 28, 2013. Tr. 79. The disciplinary letter involved no safety related issues whatsoever, but rather it detailed alleged

⁴ A belly pan is located at the bottom of a bulldozer to protect the engine and transmission. Tr. 53.

violations of the company's code of conduct. Along with Ms. Olson, three other employees received disciplinary letters at that time, with each of the letters involving employees failing to get along with one another at work. Tr. 80-84, Respondent's Exhibit, R 4. Ms. Olson then conceded that the employee-to-employee frictions that prompted the June 28th letter continued. Tr. 91-100. A business record, dated July 25, 2013 was generated from these disputes. The letter summarized new events involving employee disputes with one another, with Ms. Olson being one of those employees. No safety complaints were involved in the letter and Ms. Olson signed it. R- 33, Tr. 100-101. The employee-to-employee disputes did not end there. A July 31, 2013 handwritten letter from Ms. Olson to her supervisor, which also did not contain any safety complaints, related only to the continuing "drama" of conflicts between Olson and other employees. Tr. 105. On August 7, 2013 Complainant Olson then received her "last and final" order for inappropriate behavior. Tr. 107. R-5. As with each of the other documents in this record, no safety or safety-related issues were involved.

Returning to the October 19th event upon which Ms. Olson bases her complaint, on October 22, 2013, three days later, Ms. Olson then sent Larson text messages, upon learning that he reported the October 19th incident to human resources. Tr. 116. Ms. Olson was notified that she was being terminated on October 28, 2013. Tr. 76-77.

On October 30, 2013, Olson met with human resources employee Jodi Klecker and Werner and signed her termination papers. Tr. 191-93. Olson stated that Ms. Klecker told her she was correct in hanging the caution tape and that she was not being fired for doing so. Tr. 191-92. Ms. Klecker explained to Olson that her employment was being terminated for violating her last and final warning for failing to follow Cordero's code of conduct.⁵ Tr. 193. Ms. Olson testified that she believed her termination was the result of her conflict with Larson on October 19th but she agreed with Respondent's counsel that she did not make a safety complaint to mine management and therefore was not terminated for making a safety complaint. Tr. 172.

After consideration of the facts above and the record as a whole, it is completely clear that Ms. Olson's complaint has nothing to do with protected activity under the Mine Act, but rather stemmed from wholly personal disputes she had with fellow employees. The Court expressly makes no findings about which side was correct in these employee-to-employee disputes, because it is not material to any issue under the Mine Act as *no protected activity nor any safety related complaints were involved, or even alleged to be involved, in this complaint.*

Accordingly, based on the undisputed record, the Court finds no evidence that Olson engaged in protected activity, as she testified herself in several instances during the hearing that

⁵ As noted in the body of this Order, but included here for emphasis, Respondent's counsel presented evidence at the hearing that prior to the October 19, 2013 incident, Olson had received a disciplinary letter on June 28, 2013 and a last and final warning on August 7, 2013. Tr. 80, 107; Ex. R-4. Olson also met with human resources employee Amy Clemetson on August 6, 8, 10 and October 10, 2013. Tr. 117-18, 135, 136-37, 138-39. Both warnings and all interactions with Clemetson were pertained to Complainant's employee-to-employee conflicts. As also noted, Ms. Olson testified that *none* of these interactions with mine management or human resources involved safety complaints of any kind. Tr. 101, 105, 114, 117-18, 135, 136-37, 152.

she made no safety complaints to mine management or human resources and, again based on the undisputed record, the Court finds that her disciplinary incidents prior to October 19 did not stem at all from any protected activity. Given the undisputed facts, Ms. Olson has failed to establish the first prong of a prima facie case for discrimination and this was explained to her by the Court during the hearing. Therefore, the Court finds that Cordero did not unlawfully discriminate against Joleen Olson under section 105(c)(3) of the Act and it hereby affirms its oral ruling made at the hearing in favor of Respondent's motion for a directed verdict.

If Complainant does not agree with the Court's decision in this case, she may petition for discretionary review by the Commission pursuant to Commission Procedural Rule 70. The petition must be made to the Commission within 30 days of the date of this order and be filed upon one or more of the five grounds listed in Rule 70(c).

WHEREFORE, this case is **DISMISSED**.

/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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January 27, 2015

SECRETARY OF LABOR, MSHA,
on behalf of DAVID S. WOOD,
Complainant,

v.

HIGHLAND MINING COMPANY, LLC,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING¹

Docket No. KENT 2014-257-D
MADI CD 2014-08

Mine: Mine No. 9
Mine ID: 15-02709

ORDER TERMINATING TEMPORARY REINSTATEMENT

Before: Judge Moran

Respondent Highland Mining Co., LLC, has filed a motion and a supplemental motion to terminate the temporary reinstatement of Complainant David S. Wood. Subsequently, the Secretary filed his “Position on Highland Reduction in Force.” For the reasons which follow, the Court, with conditions included, terminates, for now, its Order of Temporary Reinstatement for David S. Wood.

On March 7, 2014, this Court ordered Respondent, Highland Mining Co., LLC, (“Highland”) to temporarily reinstate the Complainant and Highland complied with that Order.² Thereafter, on December 18, 2014, Highland filed its Motion to Terminate Temporary Reinstatement, applicable to Complainant, David S. Wood. Following that Motion, on January 6, 2015, Highland filed a “Supplemental Motion to Terminate Temporary Reinstatement” (“Supplement”). On January 26, 2015, the Secretary filed his “Position on Highland Reduction in

¹ Subsequent to the temporary reinstatement proceeding, the Secretary did opt to file a Discrimination Complaint, Docket No. KENT 2014-429. That proceeding is also before the undersigned.

² A clerical error required an amended order of temporary reinstatement to be issued on March 10, 2014. The March 7th Order’s effective date remained the same.

Force” (“Secretary’s Position”). Prior to the Secretary’s filing, a conference call ensued on January 21, 2015, to discuss the motion and supplement.³

In its Motion, Highland stated that “strategic options were being evaluated for the No. 9 Mine and that a mass layoff was planned.” Motion at 1. Pursuant to its obligations, Highland notified the United Mine Workers of America of the planned layoff, and that employees, including the Complainant, Mr. Wood, would be affected by it. Highland notes that a mine operator’s temporary reinstatement obligation is tolled when it is established that “an event has occurred that would have resulted in the end of the temporarily reinstated employee’s employment even but for the earlier alleged discriminatory event.” Motion at 3. Put another way, a temporary reinstatement can be tolled where a subsequent event, such as the closing of the mine, would have terminated a miner’s employment apart from any act of discrimination.

As the Commission noted in *Sec’y of Labor on behalf of Gatlin v. Kenamerican Resources*, 31 FMSHRC 1050 (Oct. 2009):

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 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 back pay award ended upon date of layoff). As a Commission Judge reasoned, “if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination.” *Casebolt v. Falcon Coal Co., Inc.*, 6 FMSHRC 485, 499 (Feb. 1984) (ALJ) (citations omitted); *see also NLRB v. Federal Bearings Co.*, 109 F.2d 945 (2d Cir. 1940) (concluding that an employer should not be held in contempt for failing to reinstate a wrongfully discharged employee when depressed business conditions required a reduction in force). Thus, as noted by both parties (Pet. at 5; S. Resp. at 12), Commission precedent recognizes that a change in circumstances may be relevant to tolling economic reinstatement in a

³ The Secretary failed to file a response to either the motion or the supplement, a perplexing situation, which failure was raised by the Court during the conference call. It was explained to the Court that the parties had been communicating with one another about the motion and the supplement and Highland acknowledged that to be the case. However, the Court had not been notified at all about those discussions. The Court then reminded both parties, but particularly the Secretary in this instance, that if the party receiving the motion wishes to be heard in opposition to it, there is an obligation to file its statement within 8 days following service, per 29 C.F.R. §2700.10(d) of the Commission’s Procedural Rules. At a minimum, the parties should have emailed the Court. The Secretary’s Position also speaks to another docket, involving a different Highland employee, similarly impacted by the layoff at the #9 mine and incorrectly listing the undersigned as the assigned judge. That other Docket, KENT 2014-483-D, is assigned to Judge Lewis.

temporary reinstatement proceeding. *See generally Sec'y of Labor on behalf of Shepherd v. Sovereign Mining Co.*, 15 FMSHRC 2450 (Dec. 1993) (remanding to Judge to determine effect of operator's layoff on Judge's temporary reinstatement order). We therefore hold that the Judge erred in concluding that a miner must remain temporarily reinstated notwithstanding changing circumstances at the mine. The Commission has also recognized in remedial contexts that an operator has the burden of establishing “facts which would negative the existence of [back pay] liability to a given employee or which would mitigate that liability.” *See, Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 770, 779 (May 1989) (citations omitted). The Commission has stated that, “[s]pecifically, the burden of showing that work was not available for a discriminatee, whether through layoff, business contractions, or similar conditions, lies with the employer as an affirmative defense to reinstatement and backpay.” *Id.* In such circumstances, the operator must make such a showing by a preponderance of the evidence.

Gatlin, 31 FMSHRC at 1054.

Highland thus accurately observes that “[i]n the context of temporary reinstatement, ‘a discriminatee is entitled to back pay **only for the period during which he would have worked but for the unlawful discrimination.**’” Motion at 3 (emphasis in motion). In its Supplement, Counsel for Highland informed that, as of “December 31, 2014, operations at the No. 9 Mine were permanently closed.” Supplement at 1. Accordingly, Highland asserts that it “has demonstrated that [its] mass layoff would have resulted in the end of Wood’s employment even but for the allegedly discriminatory events, Highland should be permitted to lay off Wood.” Supplement at 3. It therefore requests that the Court terminate its March 10, 2014, amended temporary reinstatement order. *Id.*

In the Secretary’s Position on the Highland Reduction in Force, he agrees that the temporary reinstatement order for Mr. Wood should be suspended and that Mr. Wood should be placed in non-pay status.⁴ The Secretary notes that he reserves the right to seek to re-open this matter should similarly situated employees be recalled to work at the Highland Mines or should a successor operator take over operations at the mine. Further, the Secretary moves that the Respondent be placed under an Order requiring it to inform the Court and the Secretary of Labor’s Counsel “should similarly situated employees be recalled to work at a mine owned or operated by Respondent or should the company be sold to an entity who is recalling similarly situated employees for work at mines which were owned or operated by Respondent.” Position at 1-2. The Court agrees and this Order incorporates the Secretary’s requests, as noted above.

⁴ It is again noted that the Secretary’s position also speaks to a different employee of Highland. The parties will need to present these issues to Judge Lewis, the judge handling KENT 2014-483-D.

ORDER

For the reasons listed above, the Temporary Reinstatement of Complainant David S. Wood in Docket No. KENT 2014-257-D, **is hereby terminated, effective January 28, 2015.** The Secretary retains the right to seek to re-open this matter should similarly situated employees be recalled to work at the Highland Mines or should a successor operator take over operations at the mine. The Court also orders that the Respondent is to so inform the Court and the Secretary of Labor and its Counsel should similarly situated employees be recalled to work at a mine owned or operated by Respondent or should the company be sold to an entity who is recalling similarly situated employees for work at mines which were owned or operated by Respondent.

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

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David S. Wood, 558 S. Seminary St., Madisonville, KY 42431

Judge John Lewis, Federal Mine Safety and Health Review Commission, 875 Greentree Road, 7 Parkway Center, Suite 290, Pittsburgh, PA 15220

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January 28, 2015

SECRETARY OF LABOR, MSHA,
on behalf of DAVID S. WOOD,
Complainant,

v.

HIGHLAND MINING COMPANY, LLC,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING¹

Docket No. KENT 2014-257-D
MADI CD 2014-08

Mine: Mine No. 9
Mine ID: 15-02709

AMENDED² ORDER TERMINATING TEMPORARY REINSTATEMENT

Before: Judge Moran

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² There was a clerical/technical error in the original issuance of this Order on January 27, 2015, requiring the issuance of this Amended Order. There are no substantive changes in this Amended Order.

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ORDER

For the reasons listed above, the Temporary Reinstatement of Complainant David S. Wood in Docket No. KENT 2014-257-D, **is hereby terminated, effective January 28, 2015.** The Secretary retains the right to seek to re-open this matter should similarly situated employees be recalled to work at the Highland Mines or should a successor operator take over operations at the mine. The Court also orders that the Respondent is to so inform the Court and the Secretary of Labor and its Counsel should similarly situated employees be recalled to work at a mine owned or operated by Respondent or should the company be sold to an entity who is recalling similarly situated employees for work at mines which were owned or operated by Respondent.

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

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