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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

July 31, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket Nos. WEST 2015-64 WEST 2014-930-R
PEABODY TWENTYMILE MINING, LLC	

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

DECISION

BY THE COMMISSION:[1]

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). It concerns Citation No. 8481807, which was issued to Peabody Twentymile Mining, LLC ("Peabody Twentymile" or "Peabody"), by the Department of Labor's Mine Safety and Health Administration ("MSHA") for an alleged violation of 30 C.F.R. § 75.333(e)(1)(i).[2] The citation stated that Peabody had improperly used

[1] The votes of the four Commission members regarding whether to affirm the judgment below were evenly divided. All four members join in the Factual and Procedural Background section of this decision. However, Commissioners Cohen and Jordan, writing separately, urge affirmance of the Judge's decision, while Acting Chairman Althen and Commissioner Young join in one opinion urging reversal.

[2] Section 75.333(e)(1)(i) provides in relevant part that

> [e]xcept as provided in paragraphs (e)(2), (3) and (4) of this section all overcasts, undercasts, shaft partitions, permanent stoppings, and regulators, installed after June 10, 1996, shall be constructed in a traditionally accepted method and of materials that have been demonstrated to perform adequately or in a method and of materials that have been tested and shown to have a minimum strength equal to or greater than the traditionally accepted in-mine controls. . . . In-mine tests shall be designed to demonstrate the comparative strength of the proposed construction and a traditionally accepted in-mine control.

30 C.F.R. § 75.333(e)(1)(i).

polyurethane spray foam to seal the perimeter of a concrete block ventilation stopping. MSHA issued the citation under section 104(a) of the Mine Act and designated that it was the result of moderate negligence and was unlikely to cause a lost workday or restricted duty injury. The citation was not marked as significant and substantial. Pursuant to these designations, MSHA proposed that Peabody Twentymile pay a civil penalty of $162.

Peabody Twentymile contested the citation and the proposed penalties before a Commission Administrative Law Judge. After a hearing on the merits, the Judge issued a decision on November 30, 2015, finding that Peabody violated section 75.333(e)(1)(i) and assessed a $162 penalty against the operator for that violation.[1] 37 FMSHRC 2635 (Nov. 2015) (ALJ). Peabody filed a petition for discretionary review of the Judge's decision, which we granted.

As stated in footnote one, two Commission members vote to affirm the Judge's decision, and two Commission members vote to reverse the Judge's decision. As a result of this vote split, the Judge's decision will stand as if affirmed. *Pa. Elec. Co.*, 12 FMSHRC 1562 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

I.

Factual and Procedural Background

A. Factual Background

Peabody operates the Foidel Creek Mine, a large underground coal mine in Colorado. The mine contains over 1,000 ventilation stoppings, which separate intake air from return/belt air, in order to protect miners working at the face from noxious air and to maintain the integrity of miners' designated escapeways. Tr. 30, 48-49, 98, 100, 104.

The mine's approved ventilation plan recognizes that Peabody constructs two types of stoppings: temporary metal panel stoppings, known as Kennedy stoppings; and permanent concrete block stoppings. Construction of Kennedy stoppings involves inserting vertically adjustable 12-inch wide metal panels into the entry forming a wall and then using sheet-metal flagging at the edges to get the stopping snug against the ribs. *See* Tr. 35-36; Peabody Ex. D, p. 5 (diagrams of Kennedy stopping). MSHA has recognized that a Kennedy stopping may be sealed with polyurethane foam, a non-strength-enhancing material. Tr. 35-37, 39, 53.

The method of constructing dry-stacked concrete block stoppings at the mine was very different from that used to construct the Kennedy stoppings. Block stoppings were created by: (1) scaling down loose material on the ribs and roof, including old roof control material;

[1] The docket containing Citation No. 8481807 originally contained a total of six issuances related to conditions at Foidel Creek Mine, which the operator contested. In his decision, the Judge also approved a partial settlement of the five other violations that were contained in the docket, and assessed a total penalty of $3,020 for all six violations.

(2) creating a level base on the mine floor; (3) dry-stacking rows of three-inch thick cinder blocks (eight-inch wide "half blocks"); (4) placing wooden wedges between the last cinder block on each row and the adjacent rib, and between the top of the final row and the roof; (5) applying mortar or other strength enhancing sealant material with a trowel to cover the face of the cinder blocks; and (6) prior to the issuance of the citation in this case, sealing the perimeter of the stoppings (sides and top) by injecting the same polyurethane foam used in the Kennedy stoppings. *See* Tr. 32-35, 44, 116-18, 125; Peabody Ex. B, at 1-3.

The perimeter of a stopping is sealed to ensure that air does not leak through the stopping, i.e., to ensure to the extent practicable that the air travelling through adjacent air courses remains separated and does not mix, so that the working face and escapeways do not become "contaminat[ed] . . . with harmful gases." Tr. 30-31, 35. Because they use panels and flagging, the Kennedy stoppings create a tighter fit along the ribs and roof than do concrete block stoppings. The gaps in a Kennedy stopping can vary from a "small seam" where the panels are butted tight onto the rib or roof to up to four inches depending on the shape of the rib and the conditions in the mine. Tr. 36. The gaps with the block stoppings generally range from 0 to 6 inches so that as a general matter the gaps at their widest points may have been up to 2 inches wider than with a Kennedy stopping at their wide points. Tr. 47. The purpose of the polyurethane foam is to seal the perimeter of the stopping to prevent air from flowing through it. Tr. 39.

On August 5, 2014, MSHA Inspector Yasser Akbarzadeh observed that the perimeter of a block stopping separating the intake entry from the belt entry on the 13 Left working section, MMU 008-0, was sealed with Touch 'n Seal foam. Sec. Ex. 2, at 13-15 (inspector notes). On the following day, Inspector Akbarzadeh issued Citation No. 8481807, alleging a violation of 30 C.F.R. § 75.333(e)(1)(i), for failure to construct the stopping using "a traditionally accepted method." Sec. Ex. 1, at 1-3 (citation/modified citation). After consulting with MSHA District Manager Russell Roytee and Assistant District Manager James Preece (who had accompanied Akbarzadeh on the inspection and pointed out the violative condition), the inspector modified the citation later the same day to allege, among other things, that the perimeter of a "cinder block stopping" was not "sealed with mortar," but instead "sealed with touch N seal [sic] foam measuring approximately 0 to 6 inches along the ribs and roof." Sec. Ex. 1, at 1-3; Tr. 19-22, 43. On August 12, 2014, Peabody contested the citation.

Before the issuance of the disputed citation, Peabody had consistently used polyurethane foam to seal the edges of both its block stoppings and Kennedy stoppings. In 1983, the original ventilation plan for the mine allowed for sealing with "other approved sealants" which the operator's witnesses testified included polyurethane foam. Tr. 139-40, 144. In 1991, MSHA approved a ventilation plan that explicitly allowed for the use of polyurethane foam. Tr. 138-39; Peabody Ex. D. The MSHA-approved plan provided: "Foam application for ventilation devices will be limited to sealing cracks and perimeters of ventilation devices." Peabody Ex. D, at 7. That application was approved in subsequent plans, including ones in 2000 and 2011. Peabody Ex. D, at 9; Sec. Ex. 3; Sec. Ex. 11, at 2; Tr. 138-39.

The 2011 Plan was in effect at the time of the citation and, with regard to polyurethane foam, provides: "Application of foam for ventilation device installation will be limited to sealing

the perimeter and joints of such devices. Foam may be used to repair ventilation device doors and holes in stoppings up to 4 inches by 4 inches in size." Tr. 91, 108; Sec. Ex. 3 (June 8, 2011, ventilation plan, p. 11). That language does not limit the application of polyurethane foam to metal Kennedy stoppings. Tr. 91. At the hearing, Assistant District Manager Preece testified that this language was implicitly limited to Kennedy stoppings because polyurethane foam is, "approved for Kennedy stoppings and not block stoppings." Tr. 49. However, he stated that the plan should not have been approved "because it doesn't differentiate between the two." Tr. 59-60. Witnesses for the operator testified that they uniformly believed that there was no limitation on using the foam on block stoppings. Tr. 107-08.

Witnesses for the operator testified that MSHA had never cited the mine or required management to change the construction method in the past despite this history and the fact that hundreds, or even thousands, of block stoppings at Foidel Mine were sealed with polyurethane foam and inspected by MSHA. Tr. 107-08, 123. Preece testified that he had inspected the mine "multiple times" over the years, yet he had never issued a citation before. Tr. 42. MSHA Inspector Barry Grosely had also inspected the mine on numerous previous occasions and had issued only one citation for sealing block stoppings with polyurethane foam. Tr. 166. [2]

Regardless of this enforcement history at Foidel Mine, Preece testified that he had always used strength-enhancing mortar to seal the perimeter of block stoppings. Tr. 34-35, 64-65. Preece testified that polyurethane foam was not strength-enhancing, which was especially important when stoppings were constructed of dry-stacked blocks, and was not fire-rated, which

[2] Inspector Grosely testified that during the years Peabody used the polyurethane foam, he cited Peabody on one occasion for an excessive application of Touch 'n Seal foam at a Kennedy stopping because in some places it had applied 16 or 17 inches of the material. Sec. Ex. 9 (citation); Tr. 71-73, 75, 76. In discussing the use of polyurethane foam to seal stoppings at the mine, Inspector Grosely testified that his concerns went beyond workmanship of the single stopping cited and concerned the method of construction for both Kennedy and block stoppings. Tr. 169. Inspector Grosely testified that he "was very adamant" about telling Peabody that the polyurethane foam "wasn't doing anything for the stability of the stopping . . . , and with a block stopping it would not enhance . . . the strength of the stopping." Tr. 169-70. Grosely testified that he told Peabody that foam should only be used in block stoppings as a secondary sealant material to address minor cracks occurring in the face and perimeter areas after perimeters were properly constructed with a primary sealant of strength-enhancing bonding material (such as mortar). Grosely told Peabody that "the interface between where the block meets the coal rib . . . should be filled with mortar or some strength enhanced material." Tr. 78.

Mine Foreman Ronald Hockett was familiar with this citation. He testified that the company had been cited because "there was lack of workmanship in the stopping, and there was an excessive amount of foam that was used." Tr. 120. He asserted that it was not a typical stopping built in the mine. In short, he asserted that the problem was a single, poorly made stopping rather than a systemic problem with the nature of construction. His understanding was that foam sealant could be used on the perimeter of stoppings, but not in excess. Tr. 120, 123-24.

meant that it could burn out in the event of a fire and allow the spread of smoke. Preece noted that the manufacturer's brochure states that the "Touch 'n Seal Mine Foam Ventilation Control System" is a "non-strength enhancing mine sealant" used to "[s]eal metal stoppings" and "[r]epair damaged block stoppings." Sec. Ex. 11, at 1-2 (brochure); Tr. 38-39. Grosely testified that it is possible to install the foam insulation in a "superficial" manner that does not fill the gaps or create a tight seal. Tr. 164, 167.

Preece testified that polyurethane foam could be used along the perimeter of Kennedy stoppings because any gaps in the tight-fitting metal panels were small. By contrast, on block stoppings, polyurethane foam could only be used "as a repair [of] minor cracks and holes" and "is not used on [the] initial build of the stopping[s]." Tr. 44. Preece stated that the traditionally accepted method of constructing block stoppings, after stacking and wedging the blocks, is to apply a bonding material to the face of the blocks and to the perimeter of the stoppings. Indeed, Preece indicated that, if properly constructed, newly constructed block seals should not require the application of any foam at all. In sum, Preece testified that application of Touch 'n Seal is not a traditionally accepted method of sealing the perimeter of block stoppings. Tr. 39, 44-45, 47 (Preece), 78 (Grosely), 156-57 (Preece).

B. The Judge's Decision

In his November 30, 2015, decision, the Judge stressed that section 75.333(e)(1)(i) provides that permanent stoppings shall be constructed in a "traditionally accepted method" with "materials that have been demonstrated to perform adequately." 37 FMSHRC at 2643. Because the standard does not define what constitutes a "traditionally accepted method" of constructing stoppings, the Judge took administrative notice of the preamble to the standard for guidance in interpreting that ambiguous term. The Judge found that the list of five "traditionally accepted methods" set forth in the preamble "is exhaustive," and concluded that any methods not set forth in the preamble would require engineering tests before such methods could be adopted by an operator in lieu of the five methods enumerated. 37 FMSHRC at 2643; *see* Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9764, 9783-84 (Mar. 11, 1996). The Judge further noted that the preamble requires that the "perimeter" of cementatious masonry blocks be constructed of "strength enhancing sealant *suitable for dry-stacked stoppings*." 37 FMSHRC at 2644 (emphasis added by the Judge). The Judge noted that Touch 'n Seal, although approved by MSHA as a sealant for ventilation controls, is "non-strength-enhancing." *Id.*

The Judge held that "prior or even longstanding use of a particular sealant or construction method within a mine is irrelevant to whether a stopping is built according to 'traditionally accepted construction methods.'" *Id.* at 2643. The Judge also rejected Peabody's attempt to analogize the sealing of perimeters of its block stoppings to the sealing of the perimeters of metal Kennedy stoppings. The Judge concluded that Peabody's block stoppings are "much more similar to lightweight cementatious block stoppings than [to] metal panel stoppings." *Id.* at 2644.

Finally, the Judge rejected Peabody's argument that the language of the mine's ventilation plan permitted it to construct block stoppings in the manner for which it was cited. The Judge noted that the language in the plan did not clearly permit Peabody to use polyurethane foam as a primary sealant of the perimeter of block stoppings. The Judge held, moreover, that

the language of a mine-specific plan cannot in any event be elevated to render meaningless the language of a specific applicable standard. *Id.* at 2645. Finally, he held that "any inquiry into prior MSHA inspectors' acceptance of similar construction techniques at the Twentymile Mine is immaterial." *Id.* As a result, the Judge concluded that Peabody violated section 75.333(e)(1)(i) when it sealed the perimeter of the cited block stopping with non-strength-enhancing foam rather than strength-enhancing mortar, and affirmed the citation. *Id.* The Judge also upheld MSHA's negligence and gravity designations and assessed the penalty proposed by the Secretary of Labor. *Id.* at 2645-47.

II.

Disposition

Commissioner Cohen would affirm the Judge's finding that the stoppings at the Foidel Creek Mine were not constructed using a "traditionally accepted method" and that, as a result, the operator violated 30 C.F.R. § 75.333(e)(1)(i). In affirming the Judge, he would hold that the Secretary's interpretation of the cited standard is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), but not under *Auer v. Robbins*, 519 U.S. 452 (1997).

Commissioner Jordan would also affirm the decision of the Judge below but, unlike Commissioner Cohen, would hold that the Secretary's interpretation is entitled to *Auer*, as opposed to *Skidmore*, deference.

Acting Chairman Althen and Commissioner Young would reverse the Judge. They would find that the requirement for construction of stoppings in a "traditionally accepted method" has a plain meaning and that the operator's use of polyurethane foam clearly meets the standard. They would also hold that, even if section 75.333(e)(1)(i) were ambiguous, the Secretary's interpretation would not be entitled to deference.

Commissioner Cohen, in favor of affirming the Judge:

I would affirm the Judge's finding that the stoppings at Foidel Creek Mine were not constructed using a "traditionally accepted method" and that, as a result, the operator violated 30 C.F.R. § 75.333(e)(1)(i). In affirming the Judge, I would find that the Secretary's interpretation of the cited standard is entitled to deference under *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944) but not *Auer v. Robbins,* 519 U.S. 452 (1997).

The regulation at issue in this proceeding provides in relevant part:

> [A]ll overcasts, undercasts, shaft partitions, permanent stoppings, and regulators, installed after June 10, 1996, shall be constructed in a traditionally accepted method and of materials that have been demonstrated to perform adequately or in a method and of materials that have been tested and shown to have a minimum strength equal to or greater than the traditionally accepted in-mine controls. Tests may be performed under ASTM E72-80, "Standard Methods of Conducting Strength Tests of Panels for Building Construction" (Section 12 – Transverse Load – Specimen Vertical, load, only), or the operator may conduct comparative in-mine tests. . . .

30 C.F.R. § 75.333(e)(1)(i). Peabody Twentymile routinely constructed permanent block stoppings at Foidel Creek Mine by dry-stacking concrete blocks, placing wedges around the perimeter to hold the stopping in place, applying mortar or other strength-enhancing sealant on the face of the blocks, and then sealing the perimeter of the stopping with non-strength enhancing polyurethane foam.

The dispute here is whether Peabody Twentymile's stoppings were made using a "traditionally accepted method" of construction within the meaning of the regulation. In reaching that issue, the Judge implicitly held that the regulation was ambiguous. While the Judge did not specifically state that the regulation was unclear, he noted that it did not define what methods or materials are "traditionally accepted," and used the language of the regulatory preamble as an aid in determining the meaning of the term. This indicates that he did not believe the meaning was plain. As discussed *infra*, I agree.

The regulatory preamble lists seven methods of construction that MSHA determined were traditionally accepted and had performed adequately to separate air courses. MSHA stated, "[t]hese traditionally accepted construction methods are:"

1) 8-inch and 6-inch concrete blocks (both hollow-core and solid) with mortared joints;

2) 8-inch and 6-inch concrete blocks dry-stacked and coated on both sides with a strength enhancing sealant suitable for dry-stacked stoppings;

3) 8-inch and 6-inch concrete blocks dry-stacked and coated on the high pressure side with a strength enhancing sealant suitable for dry-stacked stoppings;

4) Steel stoppings (minimum 20-gauge) with seams sealed using manufacturer's recommended tape and with the tape and perimeter of the metal stopping coated with a suitable mine sealant;

5) Lightweight incombustible cementatious masonry blocks coated on the joints and perimeter with a strength enhancing sealant suitable for dry-stacked stoppings

6) Four-inch concrete blocks may be used in the above applications in seam heights less than 48 inches; and

7) Tongue and groove 4-inch concrete blocks coated on both sides with a strength enhancing sealant suitable for dry-stacked stoppings may be used in coal seams of any height

Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9764, 9783-84 (Mar. 11, 1996) (hereinafter "the preamble").

The Judge determined that this list of "traditionally accepted methods" of construction was "exhaustive." Because the method used by Peabody Twentymile at Foidel Creek Mine is not among those listed, the Judge determined that it was not a "traditionally accepted method" and upheld the citation. On appeal, the Secretary asserts that this is also his interpretation of the standard and argued that it is reasonable and entitled to deference.

Peabody Twentymile asserts that the Secretary's interpretation is not entitled to deference because the regulation has a plain meaning and the Secretary's interpretation is at variance with that meaning. The operator also argues that the Secretary has utilized other, inconsistent interpretations of the term "traditionally accepted methods" in the past. The operator argues that, to the extent the Judge granted deference to the Secretary's interpretation, his decision is erroneous and should be overturned.

Under the Supreme Court's decision in *Auer*, an agency's interpretation of its own ambiguous regulation is generally entitled to controlling deference. *Auer*, 519 U.S. at 461; *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). However, this interpretive power is not unlimited. In fact, in *Auer* itself the Court listed several limitations on agencies' ability to create controlling interpretations. Specifically, the court held that controlling deference would not be granted if the interpretation offered was "plainly erroneous or inconsistent with the regulation." 519 U.S. at 461, quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989).

In addition, the Court also indicated that deference should not be granted when an agency's interpretation does not "reflect the agency's fair and considered judgment." *Id*. at 462-63. In *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012), the Court elaborated on the kinds of interpretations that would not reflect the agency's "fair and considered judgment." Such interpretations would include those that conflict with prior interpretations, those that are nothing more than convenient litigation positions, and those that are *post hoc*

rationalizations advanced by an agency seeking to defend past agency action.[1] 132 S.Ct. at 2166-67.

The two arguments advanced by Peabody Twentymile and described above implicate two of the limitations placed on *Auer* deference. Specifically, the operator essentially argues that the Secretary's interpretation is plainly erroneous or inconsistent with the regulation because that interpretation ignores the plain meaning that can be determined without recourse to the regulatory preamble. The operator also argues that the Secretary's interpretation does not reflect the agency's fair and considered judgment because it conflicts with prior interpretations.

I reject Peabody Twentymile's first argument. The Secretary's interpretation is not plainly erroneous but instead reasonable, and indeed persuasive, in light of the ambiguous regulatory language, the history of the creation of section 75.333(e)(1), and the Secretary's proper concern for miners' safety. That issue will be discussed at greater length *infra*.

The operator's second argument, that the Secretary's interpretation conflicts with past interpretations used by the agency, is a more complicated issue. Courts will refuse to grant *Auer* deference to an agency regulatory interpretation when that agency has advanced more than one interpretation of a given provision and those interpretations are not harmonious. *See*, *e.g.*, *Perez v. Loren Cook Co.*, 803 F.3d 935, 941-42 (8th Cir. 2015) (the court refused to grant *Auer* deference because, "the Secretary has failed to produce a single citation, publication, or interpretation that could fairly be characterized as similar to the position the Secretary announced [here]," and its previously published interpretations differed considerably from the litigation position advanced in the case); *see* also *In re Estate of Covington*, 450 F.3d 917, 922 (9th Cir. 2006); and *Hudgens v. McDonald*, 823 F.3d 630, 638 (Fed. Cir. 2016).

Courts are concerned about the proliferation of inconsistent interpretations because of the possibility of unfair surprise. *See Independent Training and Apprenticeship Program v. California Dept. of Indus. Relations*, 730 F.3d 1024, 1034-35 (9th Cir. 2013) (an earlier agency interpretation of a regulation was wholly opposed to the litigation position and therefore created significant potential for unfair surprise). Courts are also reluctant to grant *Auer* deference to new, inconsistent interpretations because parties may rely on earlier, discarded reasonable interpretations. *See Thornton v. Graphic Communications Conference of Intern. Broth. of Teamsters*, 566 F.3d 597 (6th Cir. 2009). However, it is important to note that agencies are entitled to change their interpretations and positions over time; it is only a concern when the inconsistent interpretations creates the impression that the agency has not appropriately considered the matter. *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 878-79 (8th Cir. 2011).

[1] The Court did not newly create these categories, but instead referred to earlier Supreme Court and circuit court cases. In addition to those listed, courts have developed still further indicia that an agency's interpretation does not reflect its fair and considered judgment. *See e.g. Gonzalez v. Oregon*, 546 U.S. 243 (2006) ("anti-parroting" principle denying deference when regulation repeated language of the statute verbatim); and *Elgin Nursing Rehabilitation Center v. Department of Health and Human Services*, 718 F.3d 488 (5th Cir. 2013) (an interpretation of an ambiguous interpretation of a regulation not granted deference).

I am reluctant to grant *Auer* deference to the Secretary's interpretation of 30 C.F.R. § 75.333(e)(1)(i). There is evidence that the Secretary's application of the cited standard has been inconsistent. In this matter, the Secretary asserted that the use of polyurethane foam as a sealant around the perimeter of a block stopping is not a traditionally accepted method of construction. S. Resp. Brief at 16. However, the enforcement history shows that MSHA did not cite block stoppings sealed in this manner at this mine for over 30 years. Moreover, the Secretary routinely approved ventilation plans at the mine that permitted the use of polyurethane foam around the perimeter of stoppings. In light of the enforcement and approval history at the mine, one could conclude, as Peabody Twentymile did, that the Secretary interpreted the standard such that this construction method was considered "traditionally accepted." Such an interpretation is not consistent with the one the Secretary now asserts.

On the other hand, the evidence does not contain any unequivocal previous interpretations used by the Secretary that explicitly states that the use of polyurethane foam sealant is a "traditionally accepted method" for sealing the perimeter of stoppings constructed of dry-stacked concrete blocks. That is merely an inference that can be drawn from the enforcement history at this particular mine. An equally valid inference might be that allowing the operator to use the foam sealant was an error made by a single MSHA office and does not reflect the Secretary's general interpretation of the standard.[2]

However, the Secretary failed to establish that there was a consistent, nationally-enforced interpretation that prohibited the use of polyurethane foam around the perimeter of stoppings constructed of dry-stacked concrete blocks.[3] While it is possible that such an interpretation existed (and the lack of enforcement at Foidel Creek Mine was the result of a mistake or confusion by a single district office), there is insufficient evidence in the record to reach that conclusion. As a result, I do not believe that *Auer* deference is warranted.

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[2] The testimony from the Secretary's witness Preece that MSHA missed these violations for 30+ years because the inspectors were inexperienced was belied by the fact that he conceded that several experienced inspectors (including himself) inspected the mine. Groseley's testimony that other inspectors did not cite the condition because they were not intelligent enough to notice is offensive to the skilled, knowledgeable, and dedicated inspectors employed by MSHA and is likely not a principle the Secretary of Labor wants to extend into other cases.

[3] Contrary to Commissioner Jordan's footnote 2, I am not suggesting that the Secretary generally has a burden to establish that an interpretation be consistently enforced on a national basis in order to be accorded *Auer* deference. But here, the interpretation for which the Secretary seeks *Auer* deference was not applied at the Foidel Creek Mine at any relevant time, and the unique question in this case is whether Peabody Twentymile's use of polyurethane foam as a sealant around the perimeter of a dry-stacked block stopping is a "traditionally accepted" method of construction. As described *infra*, footnote 8, the phrase "traditionally accepted" is almost never used in federal rule making. Unlike specific descriptions of conduct which are prescribed or proscribed, the phrase "traditionally accepted" suggests an analysis which is comparative in nature. In these very unique circumstances, evidence of the Secretary's policy in other coal districts would have been useful.

However, the fact that *Auer* deference is not warranted does not mean the Secretary's interpretation is necessarily rejected; it is not even the end of the discussion regarding deference. In *Christopher*, the Court held that if *Auer* deference was not warranted for an agency's interpretation of its own regulations, it would still grant some level of deference proportional to the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking the power to control. 132 S.Ct. at 2169 citing *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) and *Skidmore,* 323 U.S. at 140. In addition to these four factors, the Supreme Court in *Mead* added several other important considerations in determining the correct level of deference, including the degree of the agency's care, the formality of the pronouncement, the agency's relative "expertness" and specialized experience, and the highly detailed nature of the regulatory scheme and the value of uniformity in the agency's understanding of what a national law requires. 533 U.S. at 228, 234. The application of these factors can produce "a spectrum of judicial responses, from great respect at one end, *see e.g. Aluminum Co. of America v. Central Lincoln People's Util. Dist.*, 467 U.S. 380, 389-90 (1984) . . . to near indifference at the other, *see e.g. Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-13 (1988)." *Id*. at 228.

The Commission has previously held that if the Secretary's interpretation is reasonable and persuasive it can be entitled to deference under *Skidmore*, regardless of whether it would meet the standard for *Auer* deference. *Resolution Copper Mining, LLC*, 37 FMSHRC 2244, 2247 n. 5 (Oct. 2015). Similarly, various circuit courts have stated that an agency's interpretation of its own ambiguous regulations may be entitled to *Skidmore* deference when *Auer* deference is not warranted. *See Independent*, 730 F.3d at 1035-36; *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432 (1st Cir. 2013); *Encarnacion ex rel. George v. Astrue*, 568 F.3d 72 (2nd Cir. 2009).

In the instant case, after considering the *Skidmore* and *Mead* factors together, I find the Secretary's interpretation of the standard to be reasonable and persuasive. As discussed above, I would find that the interpretation is not consistent with earlier pronouncements. However, many of the other factors in *Skidmore* and *Mead* cut strongly in favor of the Secretary's interpretation.

With respect to the thoroughness and validity of reasoning, I find that the Secretary's interpretation is reasonable. In fact, in light of the circumstances, I find it to be the most reasonable and persuasive interpretation of the standard. The Secretary's interpretation best comports with the language of the regulation, especially when the regulation is considered in the proper context. The Secretary's interpretation also is the most protective of the health and safety of miners.

The Judge did not err in resolving the textual ambiguity of the regulation by looking to the preamble for guidance. Context, including indications of the agency's intent at the time of the regulation's promulgation, is an important consideration in determining the meaning of a regulation. *See Gardebring v. Jenkins*, 485 U.S. 415, 429-430 (1988); *see* also *Northshore Min. Co. v. Secretary of Labor*, 709 F.3d 706 (8th Cir. 2013). In fact, courts have specifically used regulatory preambles to interpret the meaning of ambiguous regulations. *See Advanta USA, Inc. v. Chao*, 350 F.3d 726, 728-29 (8th Cir. 2003) ("we will consult the Standard's Preamble to decipher the ambiguous language); *Albemarle Corp. v. Herman*, 221 F.3d 782, 786 (5th Cir.

2000); and *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("While language in the preamble of a regulation is not controlling over the language of the regulation itself. . . we have often recognized that the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules.").

In order to understand the meaning of the term "traditionally accepted" in context, it is necessary to look not only at the preamble of the current iteration of 30 C.F.R. § 75.333(e)(2), but also the regulatory history that led to the current language. MSHA initially proposed a rule regarding the construction of stoppings in 1988. In the preamble to those proposed regulations, MSHA proposed requiring that "permanent stoppings be made of durable and noncombustible material, such as . . . concrete block, brick, cinder block, or tile." Safety Standards for Underground Coal Mine Ventilation, 53 Fed. Reg. 2382-01, 2392 (Jan. 27, 1988). The agency proposed to define "durable" material as "material that is structurally equivalent to an 8-inch hollow-core concrete block stopping with mortared joints, as tested in accordance with section 12 of the American Society for Testing and Materials (ASTM), Standard Method of Test E-72 . . . ." *Id*. at 2393. The purported reason for this definition was that an agency taskforce had determined that "8-inch hollow-core concrete block is typical of construction material used for ventilation controls in underground coal mines." *Id*. To pass the ASTM E-72 test, a stopping would need to be able to withstand the same or greater static pressure as a concrete block, which was approximately 39 pounds per square foot. *Id*. In 1992, MSHA finalized the rule, maintaining the use of the phrase "durable and noncombustible" as well as the definition of "durable," with its inclusion of the term "mortared joints" and its reference to ASTM E72-80 Section 12. Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20868-01, 20884 (May 15, 1992).[4]

However, there were apparently issues with the application of the standard and by 1994 revisions to the rule were being proposed. In those proposed rules, MSHA noted, "[t]he Agency has become aware of questions on the part of a segment of the industry relative to what are acceptable construction methods . . . for the construction of permanent ventilation controls . . . that will result in controls that satisfy the definition of durable . . . " Safety Standards for Underground Coal Mine Ventilation, 59 Fed. Reg. 26356-01, 26369 (May 19, 1994). MSHA proposed to address those questions by eliminating the definition of "durable" contained in the 1992 rule, and would instead simply require the controls be constructed to show a minimum strength of 39 pounds per square inch as tested under ASTM E72-80 Section 12. *Id*. The new rule would also allow for "alternative constructions" of ventilation controls, provided they showed the requisite minimum strength upon testing. *Id*. MSHA agreed to accept documentation showing that previously-tested controls met the strength standard. *Id*. MSHA proposed to keep a list of construction methods that met the requirements and a list of methods that did not. *Id*. MSHA also noted that dry-stacked stoppings plastered on only one side had not been shown to have the requisite strength and, barring the creation of a stronger plaster, would not be acceptable. *Id*.

[4] While the reference was to section 12 of ASTM standard "E-72" in the preamble to the 1988 proposed rule, it became section 12 of ASTM standard "E72-80" in the 1992 final rule. The requirements of the standard remained the same.

In 1996, MSHA issued the current final rule regarding the construction of permanent stoppings. As a result of "numerous comments," the final rule was considerably different from the proposed rule. 61 Fed. Reg. at 9783. The final rule eliminated the reference to "8-inch hollow core concrete blocks" and set the definition for stoppings made with "new materials or methods" as requiring durability of 39 pounds per square inch. 61 Fed. Reg. at 9783, 9834. However, it also allowed for the construction of "traditionally accepted" methods of construction that did not necessarily meet the 39 pounds per square inch durability requirement. *Id*. In justifying this decision, MSHA noted:

> Commenters questioned the appropriateness of a strength requirement of 39 pounds per square foot and the relevance of this value to the in-mine conditions. After review, MSHA continues to believe that use of the ASTM E72-80 test to determine that the relative strength of a ventilation control construction is appropriate and the final rule retains this standard.[5] However, MSHA sees merit in some of the suggestions made by commenters. Commenters suggested that some constructions cannot be tested according to the ASTM test, some constructions that are widely used in coal mines do not meet the 39 pound per square foot threshold, and the ASTM test can only be run at a limited number of locations nationwide.

61 Fed. Reg. at 9783. MSHA further stated that since the inception of the Mine Act, a number of "traditionally accepted construction methods" had been shown to be adequate for their intended function. *Id*.

It then stated, "[t]hese traditionally accepted construction methods *are*:" and listed the seven types of construction shown above. *Id*. (emphasis added). This paragraph of the preamble concluded by saying, "[t]he final rule would continue to permit *these* traditionally accepted construction methods to be acceptable for the construction of ventilation controls." 61 Fed. Reg. at 9783-84 (emphasis added). The next paragraph began, "[f]or new construction methods or materials other than those used *for the traditionally accepted constructions identified above,* the final rule requires that the strength be equal to or greater than the traditionally accepted in-mine controls. Tests may be performed under ASTM E72-80 Section 12 . . . ." 61 Fed. Reg. at 9784 (emphasis added).

With this context in mind, MSHA's intent in drafting the current language in the standard becomes clearer and the Secretary's current interpretation is shown to be persuasive. MSHA had initially promulgated a rule that required stoppings to be made with 8-inch hollow-core concrete block stopping with mortared joints or equivalent constructions meeting a strength requirement of 39 pounds per square foot. However, upon promulgating this standard, the Agency received complaints from operators who were unsure about whether their traditional methods of construction would meet the strength requirements. MSHA proposed a new rule that made the strength requirements clearer and provided for "alternative constructions" with equivalent

[5] My colleagues' description of this paragraph of the preamble, at pages 31-32 of this opinion, omits this sentence. Slip op. at 31-32.

strength. However, operators continued to object to the durability standard, claiming that they had "traditional methods" of construction which were adequate, but would not meet the test.

Taking into account operators' complaints, MSHA decided to maintain its objective strength standard, but carved out an exception for stoppings created using "traditionally accepted methods." In order to emphasize the limited nature of that exception, MSHA explicitly defined the particular methods of construction that it considered traditionally accepted. As the Judge noted, 37 FMSHRC at 2643, MSHA indicated that this list constituted the universe of accepted construction methods by noting that "traditionally accepted construction methods *are*" those listed (rather than "includes" those listed). After listing the seven methods, MSHA referred to them as "*these* traditionally accepted methods . . . acceptable for ventilation controls." Then MSHA referred to the seven methods as "the traditionally accepted constructions *indicated above.*" Thus, MSHA, in three separate sentences, denoted the seven listed methods – and only those methods – as what would be deemed to be included in the category of "traditionally accepted methods."

When seen in this context, the drafters' intent is clear and provides a reasonable basis for determining the meaning of the ambiguous phrase. The Secretary intended to create a broadly applicable, general rule regarding the strength of stopping constructions. In light of complaints regarding that rule, the Secretary created a narrow exception. To limit the scope of that exception, the Secretary explicitly defined the excepted methods.

All of the methods on the list which apply to dry-stacked concrete blocks require a coating of strength enhancing sealant.[6] However, as the Judge noted, the polyurethane foam sealant used by Peabody Twentymile is not strength enhancing. 37 FMSHRC at 2644. Therefore, the Secretary reasonably found in this case that the operator violated the standard. The strength of the Secretary's reasoning and the support shown for that reasoning in the regulatory history indicates that his view should be given weight.

In its brief, Peabody Twentymile argues that using the preamble to resolve the ambiguity in the regulation is unreasonable because (1) the plain dictionary meaning of the words are sufficient to determine the meaning and (2) the preamble is not a part of the promulgated rule and therefore cannot create a binding "exhaustive" list of construction methods.

My colleagues Acting Chairman Althen and Commissioner Young assert that the words "traditionally accepted" have a plain meaning. In support of this point, they provide unobjectionable dictionary definitions of "tradition" and "accepted." Slip op. at 25-26. However, the dictionary definitions of "tradition" and "accepted" do not make the regulatory

[6] *See supra*, slip op. at 7-8.

language clear since they do not consider the phrase "traditionally accepted" in the context of 30 C.F.R. § 75.333(e)(1)(i).[7]

As an illustration of the regulation's ambiguity, the term "traditionally accepted," taken on its face without reference to the history of its creation, could mean either the methods traditionally accepted in the industry as a whole or the methods traditionally accepted at a particular mine. While Peabody Twentymile and my colleagues look to dictionary definitions of "traditional" and "accepted" in asserting that the phrase must be given the latter interpretation, those same definitions could easily be used to support the former interpretation. The term

[7] By way of example, in *Yates v. United States*, 135 S.Ct. 1074 (2015), a commercial fisherman was charged with violation of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1519, when, after being apprehended by the National Marine Fisheries Service for possession of undersized grouper, he caused the grouper to be thrown overboard before returning to port. The fisherman was convicted under Sarbanes-Oxley of destroying and concealing a "tangible object" (*i.e.*, the fish) with the intent to impede or obstruct the government's investigation. In reversing the Eleventh Circuit, which had affirmed the conviction, the Supreme Court's plurality opinion recognized that under the dictionary definitions relied on by the Court of Appeals, the statutory term "tangible object" encompassed the fish. However, looking at the context of the term in the Sarbanes-Oxley Act – legislation designed to protect investors from financial fraud following collapse of the Enron Corporation – the Court rejected reliance on the dictionary definitions. The plurality opinion stated:

> Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). See also *Deal v. United States,* 508 U.S. 129, 132, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) (it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used").

135 S.Ct. at 1081-82. The plurality opinion quoted with approval the statement by Judge Learned Hand in *Commissioner v. National Carbide Corp.,* 167 F. 2d 304, 306 (2nd Cir. 1948): "words are chameleons, which reflect the color of their environment." 135 S.Ct. at 1083.

"traditionally accepted methods" is broad enough to easily bear either meaning.[8] But there is nothing in the record to support an assertion that non-strength enhancing polyurethane foam is "traditionally accepted" across the country to seal the perimeters of dry-stacked concrete block stoppings.[9] As noted above, the preamble cannot control the interpretation of the standard, but it provides valuable insight into an agency's intent at the time of promulgation. Given the ambiguity here, it was reasonable for the Secretary to look to the preamble to clarify the regulatory language.

I stress here again that I believe that the relevant portion of this regulation is ambiguous. My colleagues contend that because I believe the Secretary is not entitled to *Auer* deference, that I effectively agree that the words of the regulation have a plain meaning, namely the meaning

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[8] Perhaps this inherent vagueness in the term "traditionally accepted" explains why it is so infrequently used in the context of federal regulations. In Title 30, 30 C.F.R. § 75.333 is the only standard that uses the phrase "traditionally accepted." In fact, in the entire Code of Federal Regulation, the phrase "traditionally accepted' is used only twice; once in section 75.333 and once in 14 C.F.R. Pt. 60, App. B, to describe qualification performance standards in airplane training devices. The ambiguous phrase seems to be used here to bridge the gap between what MSHA originally believed the standard should be and the complaints made by commenters.

[9] My colleagues cite the ALJ decision in *Twentymile Coal Co*., 33 FMSHRC 1885, 1929, 1930 (Aug. 2011) (ALJ), *rev'd in part on other grounds*, 36 FMSHRC 2009 (Aug. 2014), as evidence that the use of polyurethane foam to seal the perimeters of dry-stacked concrete block stoppings is "traditionally accepted." Slip op. at 27. However, this case involved the storage of the polyurethane foam used at the Twentymile Foidel Creek Mine, and not the actual use of the foam. The use of polyurethane foam was not at issue in the case, and there is nothing in either the evidence or the decision to suggest that polyurethane foam is used for the sealing of perimeters of dry-stacked concrete block stoppings anywhere other than the Foidel Creek Mine.

In this context, my colleagues cite the testimony of Assistant District Manager Preece that polyurethane foam is used to seal the perimeter of Kennedy stoppings across the country. 33 FMSHRC at 1929. Kennedy stopping are recognized in the fourth "traditionally accepted construction method" listed in the preamble (understanding that "Kennedy stoppings" is another phrasing for the "steel stoppings" referenced in the preamble, Tr. 9.) My colleagues assert that "Kennedy stoppings have gaps at the perimeter substantially equivalent to those around the perimeter of block stoppings." Slip op. at 27. But Preece did not testify that the gaps at the perimeters of Kennedy and block stoppings are "substantially equivalent." According to Preece, openings sealed with foam at the perimeter of Kennedy stoppings are only two to four inches, while the gaps in the cited block stopping sealed with foam measured up to six inches. Tr. 37, 46-47. The assertion that the perimeter gaps are "substantially equivalent" is speculation on the part of my colleagues. It is refuted by MSHA's expertise, as demonstrated in the preamble to section 75.333. The fourth "traditionally accepted construction method" listed in the preamble permits "suitable" mine sealants, which do not have to be strength enhancing, for "steel stoppings." 61 Fed. Reg. at 9783. However, dry-stacked concrete blocks do require sealants which are strength enhancing. *Id*. The "substantial equivalen[ce]" my colleagues assert is not present.

they ascribe to it. Slip op. at 38. They state that I find ambiguity "not in the terms of the regulation, but in its application." *Id*.

My colleagues misunderstand the thrust of my opinion. As I noted *supra*, my colleagues use dictionary definitions of "tradition" and "accepted" to support their plain meaning argument. But in noting that those definitions were unobjectionable I also stated that they were not dispositive. Instead of resolving the issue, those definitions show why there is no plain meaning to this regulation. "Traditionally accepted" within the context of the regulation can mean multiple things. The relevant interpretations here are that the method was accepted at this particular mine or that the method was accepted at all mines. The language of the regulation does not indicate which of those interpretations is correct. Thus, the language of the regulation is ambiguous. Therefore, I looked to the preamble and the regulatory history of the provision to determine the drafters' intent. This is a process of looking at the meaning of the regulatory language in context.

Indeed, I fail to understand my colleagues' distinction between finding ambiguity in the "terms" of a regulation and in its "application." A regulation may be ambiguous in its terms (especially if poorly drafted) or it may be ambiguous (as here) because it is susceptible to different, and inconsistent, meanings.

Similarly, my colleagues state that I "implicitly concede" that MSHA "traditionally accepted" the use of polyurethane foam at the mine. Slip op. at 38. I do not concede that point. I agree with my colleagues that MSHA failed to cite the operator for using the foam for a long period of time, and that MSHA approved the use of foam in the mine's ventilation plans. That was the reason I determined that *Auer* deference was not warranted here. It is fair to say that the Secretary accepted the condition at the mine for some time. But I do not agree that acceptance of polyurethane foam around the perimeter of block stoppings at a single mine necessarily amounts to "traditional acceptance" of that method within the meaning of the regulation. What constitutes "traditionally accepted" is the crux of the case. With the context discussed *supra* in mind, I do not believe, as my colleagues apparently do, that "traditionally accepted," as used in section 75.333(e)(1)(i), necessarily means, "accepted at an individual mine for a long time."

The strengths of the Secretary's current interpretation go beyond the textual analysis outlined above. The Secretary's interpretation also demonstrates thorough and valid reasoning because the evidence demonstrates it produces safer results. At hearing, Assistant District Manager James Preece echoed MSHA's concerns contained in various rulemaking documents regarding the strength and durability of permanent stoppings. He testified that he was concerned about the use of foam because it is not strength-enhancing. Tr. 45-46. Both Preece and Inspector Barry Grosely testified that the perimeter of the blocks toppings must, like the face of the blocks, be sealed with mortar or other strength-enhancing material. Tr. 39, 44-45, 78, 169.

Nothing in the language of the regulation itself or the preamble indicates that any distinction is made between the face and the perimeter of cement block stoppings with respect to the overall strength of the stopping. Stoppings must simply be constructed with the requisite

strength.[10] Thus, Preece testified that the perimeter of the stopping should have the same strength as the face. Tr. 65. Similarly, Adam Patterson, Peabody's Continuous Miner Coordinator, agreed that "stoppings have to be of equal strength in the center and the perimeter." Tr. 103.

My colleagues contend that "Peabody Twentymile's stoppings meet the requirements specified within the third of the seven categories of stoppings in the preamble: '8-inch and 6-inch concrete blocks dry-stacked and coated on the high pressure side with a strength enhancing

[10] My colleagues take issue with my statement that the law makes no distinction between the face and perimeter of block stoppings. They note that the perimeter of the stopping is "set off at a ninety-degree angle from the face and oriented toward the rib and roof" and therefore not on the high pressure side. Slip op. at 34, n. 13. I note that the perimeter of the stopping, after the blocks are laid up, includes a gap between the stopping and the rib and roof. If that gap is left open, air would be free to move past the face of the stopping and into the next entry. When that gap is sealed, the sealant becomes part of the face of the stopping. That sealant is exposed to the high pressure side of the stopping. Hence, my colleagues are incorrect in their assertion that the perimeter of the stopping is not part of the face or a side of the stopping. *Id*.

My colleagues also note that two of the construction methods listed in the preamble, "steel stoppings" and stoppings made of "lightweight cementatious masonry block" specifically state what sealants must be used around the perimeter. They argue that this shows a distinction is made between the face and the perimeter of stoppings generally. However, I see the text of the preamble cutting in the opposite direction. The fact that the perimeter is mentioned with respect to certain kinds of stoppings but not others indicates that the distinction is only made in those specific circumstances where it is raised. The drafters clearly knew how to differentiate between the face and perimeter when that distinction was relevant. *See Sec'y of Labor on behalf of Young v. Lone Mountain Processing, Inc*., 20 FMSHRC 927, 930-31 (Sept. 1998) (use of the term "complainant" in some contexts and not others indicates that the drafters were making a distinction and knew how to use particular terms when they intended to do so); *see also Emery Mining Corp*., 10 FMSHRC 1337, 1350 (Aug. 1988) (ALJ).

For example, the preamble refers to the perimeter of steel stoppings because there is a relevant difference between the face and the perimeter of those stoppings. Steel stoppings necessarily require some sort of additional sealant around the perimeter because, unlike concrete block stoppings, no particular sealant would be used over the entire face of the stopping. The use of polyurethane foam around the perimeter of the metal stoppings at Foidel Creek Mine is appropriate because, as Preece testified, the foam is approved for use on those stoppings. Tr. 39, 49, 53. The preamble lists other types of stoppings, including dry-stacked concrete block stoppings, with no distinction between the perimeter and the face. As demonstrated with respect to steel stoppings, the drafters were able to make such a distinction when necessary. The fact that they did not do so with respect to dry-stacked concrete stoppings indicates that they did not intend for the perimeter to be treated distinctly from the face of those kinds of stoppings. According to the preamble, a concrete block stopping should simply be coated in a strength-enhancing sealant, and that includes the perimeter.

sealant suitable for dry-stacked stoppings.'"[11] Slip op. at 34. Thus, my colleagues propose that a stopping is "traditionally accepted" if it is sufficiently strong on its face but relatively weak at the perimeter. This interpretation is inconsistent with the testimony of both Preece and Peabody's own witness, Patterson. It is also inconsistent with the position taken by Peabody Twentymile during oral argument before the Commission. At oral argument, Peabody Twentymile's counsel argued that the Judge committed error in relying on the preamble. Oral Arg. Tr. 10. In so arguing, he conceded that if the Secretary had promulgated a definition of "traditionally accepted method" in section 75.333(e)(1)(i) and that definition was identical to the language of the preamble, he "would not have an argument" that the mine's stoppings complied with the standard. Oral Arg. Tr. 22-23. Hence, Peabody Twentymile itself recognizes that its stopping construction method did not comply with any of the categories of stoppings listed in the preamble.[12]

It is uncontested that the foam insulation was not strength enhancing. The manufacturer's brochure states that Touch 'n Seal Foam Ventilation Control System is a "[n]on-strength-enhancing mine sealant" used to "[r]epair damaged block stoppings." Sec. Ex. 11, p. 2 (brochure). Inspector Grosely testified that he could push his sounding stick through the foam.

[11] My colleagues erroneously assert that the "[t]he Judge clearly erred in applying the requirements for lightweight block stoppings to Peabody Twentymile's construction method . . . ." Slip op. at 33. In so saying, they erect a straw man. The Judge was obviously aware that the mine used concrete blocks rather than lightweight cementatious blocks for its stoppings. 37 FMSHRC at 2636, 2644. He referred to lightweight cementatious blocks because Peabody Twentymile had argued that a sealant which works for steel stoppings will also work for concrete block stoppings. The Judge's point was that lightweight cementatious block stoppings, which require a strength enhancing sealant for the perimeter, are more similar to concrete block stoppings than are steel stoppings. *Id.* at 2644.

[12] My colleagues vigorously dispute the significance of the statement by Peabody Twentymile's counsel at oral argument, but are curiously silent about the testimony of the operator's Continuous Miner Coordinator, Adam Patterson, that "stoppings must be of equal strength in the center and the perimeter." Tr. 103. I note that Peabody Twentymile itself, unlike my colleagues, does not contend that its method of constructing stoppings is consistent with any of the methods of construction specified in the preamble.

Tr. 73. Also, Grosely testified that polyurethane foam degrades at a much quicker rate than mortar.[13] Tr. 81.

Additionally, Preece noted that in a fire, foam could burn out, "merg[ing] the two [adjacent] airways together and compromis[ing] your escapeways" and so exposing miners to "smoke [and] gases from the polyurethane." Tr. 46, 50. While block bond has passed flammability tests, Tr. 34-35, polyurethane foam has not, Tr. 40-41.

The evidence shows that the durability and flammability of the stopping is important to the health and safety of miners. The perimeter of a stopping is sealed to ensure as far as possible that air traveling in adjacent air courses remains separate. Tr. 30, 35. If a ventilation control is inadequate for this purpose, miners would be exposed to harmful gases. Tr. 30-31. Of particular concern would be the failure of a stopping that results in noxious gases at the face or in an escapeway. Tr. 30-31. Because stoppings constructed with polyurethane foam around the perimeter would be weaker and more flammable than a stopping constructed solely with mortar or other strength-enhancing material, it would be more likely to fail and expose miners to hazards. Therefore, the Secretary's interpretation of the standard such that it bars the use of polyurethane foam as the sole sealant on the perimeter of block stoppings is both reasonable and persuasive.

My colleagues argue that I raise the "false specter" of flammability to support my belief that the Secretary's interpretation is persuasive. Slip op. at 39. They note that MSHA permits polyurethane foam to be used around Kennedy stoppings, despite the fact that they have not passed the fire test. They contend that this indicates that polyurethane foam poses no hazard when used on block stoppings. As has been discussed *supra*, metal stoppings are fundamentally different from permanent block stoppings, including with respect to the size of the gaps in the perimeter. The Secretary is in the best position to determine the safety hazards associated with the use of polyurethane foam on various, substantially different types of stoppings. The use of polyurethane foam on Kennedy stoppings, therefore, does not fundamentally impact the Secretary's determination that using the foam was hazardous here.

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[13] My colleagues argue that the fact that polyurethane foam is not strength enhancing is inconsequential. Slip op. at 41. They note that the Secretary presented no evidence showing that stoppings made without strength enhancing material around the perimeter are not "sufficiently strong." However, Preece testified that block bond enhances the strength of a stopping. Tr. 39. He also testified that polyurethane foam would not do so, it would only seal the stopping. Tr. 39. That was among the many issues that concerned Preece regarding the stopping construction method used in this mine. Further, my colleagues can point to no evidence demonstrating that concrete stoppings constructed without strength enhancing material at the perimeter are "sufficiently strong." Instead, they only cite to testimony (disputed by the Secretary's witnesses) that the foam creates a better seal. Slip op. at 41, n. 22.

Thus, having determined that the Secretary's reasoning was valid and thorough, I turn next to the agency's relative "expertness" and specialized experience. Congress delegated authority to regulate mine health and safety to the Secretary of Labor. 30 U.S.C. § 811. MSHA was created to exercise that authority and has developed a considerable body of experience and expertise on mine safety issues. The regulation at issue here, 30 C.F.R. § 75.333(e)(1)(i), is a safety standard promulgated under the Secretary's authority and utilizing MSHA's expertise. In short, this regulation is at the very heart of the agency's mission. MSHA is in the best position to determine what is, or is not, safe in the nation's mines. With respect to this standard, if MSHA believes that the use of foam as a perimeter sealant is unsafe, its view should be accorded weight.

The next *Skidmore*/*Mead* factor is an analysis of the highly detailed nature of the regulatory scheme. We have, in the past, recognized that mining is a heavily regulated industry. *Brody Mining, LLC*, 37 FMSHRC 1914, 1948 (Sept. 2015). Indeed, the Commission has described the regulatory scheme administered by MSHA as "pervasive." *Id*. Further, the obligations created by the regulations are complementary and overlapping, meaning changes in the interpretation of one standard may have an impact on others. Given the size and complexity of MSHA's role in the mining industry, its views regarding the implementation of its regulations should receive at least some weight.

Finally, I turn to the value of uniformity in the agency's understanding of what a national law requires. As noted above, MSHA has done a poor job of consistently applying this particular regulation at this particular mine. However, if it is MSHA's expert opinion that the use of foam sealant in the manner cited is unsafe, it is important that MSHA not be precluded from applying this prohibition in all of the nation's underground coal mines. As a general matter, it cannot be the case that the practice is safe at Peabody Twentymile and unsafe in other mines. But the position taken by Acting Chairman Althen and Commissioner Young implies the further conclusion that based on MSHA's past enforcement practice at this one mine, MSHA would be barred from applying a safety-enhancing policy which it may presently be using at other mines around the country. This is potentially dangerous to mine safety nationwide. Given the need for uniformity in interpretation of Mine Act regulations, the Secretary's position is entitled to weight.

After considering the *Skidmore* and *Mead* factors together, I find that the Secretary's interpretation of the standard is both reasonable and persuasive. As a result, I would find that the Secretary's interpretation is entitled to *Skidmore* deference. Therefore, I would uphold the Judge's decision that the citation in this case was properly issued.

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

Commissioner Jordan, in favor of affirming the Judge:

I would affirm the decision of the Judge below, upholding the challenged citation. In reaching this result, I agree in large part with the thoughtful analysis of Commissioner Cohen, and part ways with him in only one respect. Unlike Commissioner Cohen, who would accord deference to the Secretary's interpretation of the regulation at issue here only in so far as that interpretation has the power to persuade (and he has ably set forth the reasons he has found it to be persuasive here), I believe the interpretation is entitled to controlling deference under the standard announced in *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

As Commissioner Cohen and my other colleagues point out, at this mine the Secretary's application of the relevant standard at issue has been inconsistent. Slip op. at 10. Indeed, for over thirty years, MSHA did not cite Peabody when stoppings were constructed at the Twentymile mine in the manner the agency now seeks to prohibit. Specifically, no citations were issued on the occasions when block stoppings were sealed with polyurethane foam. *Id*. Moreover, ventilation plans submitted by the operator which indicated the presence of such stoppings were not rejected. *Id.*

Notwithstanding these facts, I would nevertheless accord *Auer* deference to the Secretary's interpretation of what constitutes "traditionally accepted methods" of constructing ventilation controls. It is common knowledge that inspections of any mine, as well as approval of a mine's ventilation plan, are conducted under the auspices of a particular MSHA District office. In light of this fact, I hesitate to conclude that the prior failure of inspectors to cite this operator or reject the ventilation plan for this mine amounts to conflicting interpretations by MSHA itself. It appears instead that the MSHA District office with jurisdiction over this mine, for whatever reason, failed to enforce the subject regulation in a manner consistent with the position set forth by the National Office when the rule was issued.

When MSHA promulgated the nationwide standard at issue here, the preamble accompanying the final rule contained the agency's explanation as to the meaning of the requirement that stoppings be built using "traditionally accepted methods." The citation under review reflects agency enforcement consistent with that explanation, which specified an exclusive list of permissible construction methods.[1] Thus, in citing this operator, MSHA was adhering to the interpretation it had set forth early on when the rule was promulgated. The fact that a particular MSHA District tolerated a construction method not listed as one of the "traditionally accepted methods" should not, in my view, negate the nationwide reach of the Secretary's notice-and-comment rulemaking authority. Consequently, I find that the Secretary's

[1] The operator never argued on appeal that using foam around the perimeter of concrete block stoppings was one of the traditional methods listed in the preamble, and in fact, conceded in oral argument that its process did not comply with any of these methods. Oral Arg. Tr. 22-23; 49-50. Consequently, I find it unnecessary to address the contention of my colleagues, Acting Chairman Althen and Commissioner Young, that the operator's method could be considered to come within one of the seven permitted by the preamble.

interpretation of the standard, as reflected in the citation under review, and the ability of the agency to require one of the specified construction methods going forward, does reflect the agency's "fair and considered judgment," and that *Auer* deference is therefore due.[2]

For the reasons set forth above, I would affirm the decision of the Judge.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

[2] Commissioner Cohen would require the Secretary "to establish that there was a consistent, nationally-enforced interpretation that prohibited the use of polyurethane foam" as a construction method, slip op. at 10, in order to earn *Auer* deference. I question the feasibility and appropriateness of requiring MSHA to put on evidence of how a safety standard is enforced at every mine in order to prevail in its enforcement of the standard at a particular mine.

Acting Chairman Althen and Commissioner Young, in favor of reversing the Judge:

This case requires an answer to one question: was Peabody Twentymile's use of polyurethane foam around the perimeter of stoppings a "traditionally accepted method" for sealing the perimeter of a stopping within the meaning of 30 C.F.R. § 75.333(e)(1)(i) on August 5, 2014? As set forth below, it was.[1]

Peabody Twentymile had used the method for 13 years without any citation or complaint by MSHA before 1996 when MSHA promulgated the regulation approving "traditionally accepted methods." After 1996, for the next 18 years, Peabody Twentymile continued to use polyurethane foam in literally hundreds or perhaps even thousands of stoppings that were subject to hundreds of inspections between 1996 and 2014 without any interpretation of the regulation by MSHA to prohibit such usage.[2]

Beyond such traditional acceptance in inspections before and after promulgation of the regulation, MSHA accepted the use of the polyurethane foam in reviewing and approving the operator's ventilation plan. Despite MSHA's litigation-driven protestations, it is clear that Peabody Twentymile's MSHA-accepted ventilation plan authorized use of polyurethane foam as a sealant around block stoppings.

By deed and word, therefore, MSHA demonstrated an interpretation of the regulation in a manner that accepted Peabody Twentymile's use of polyurethane foam. MSHA does not offer any convincing argument for a reversal of its long-standing, traditional interpretation.

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[1] In his brief, the Secretary asserts the operator is invoking the principle of equitable estoppel. Sec. Br. at 22. Equitable estoppel is "[a] defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." *Estoppel*, *Black's Law Dictionary* (10th ed. 2014). Here, the operator does not assert equitable estoppel; it asserts its use of polyurethane foam complies with the requirement of the regulation.

[2] Two years before the instant citation, an MSHA inspector who had previously inspected the mine on many occasions did issue a citation for usage of polyurethane to seal a gaping opening between a stopping and coal rib. However, thereafter, the same inspector did not issue any further citations related to use of polyurethane around stoppings despite undertaking further inspections of the mine. The only fair conclusion is that the citation related to the size of the opening rather than the use of polyurethane foam as a perimeter sealant.

I.

30 C.F.R. § 75.333(e)(1)(i) Plainly Permits Peabody Twentymile's Use of Polyurethane Foam.

A. The Terms "Traditional" and "Accepted" Have Plain Meanings.

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If so, there is no need for further inquiry. *Id.*

"The same rules of construction apply to administrative rules . . . ." *Exelon Generation Co. v. Local 15, Int'l Brotherhood of Elec. Workers*, 676 F.3d 566, 570 (7th Cir. 2012). Accordingly, the interpretation of a regulation begins with a determination of whether the language of the regulation is plain. If the language is plain, further inquiry is unnecessary and unwarranted. "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); *cf. Pyles v. Nwaobasi*, 829 F.3d 860, 865 (7th Cir. 2016) ("Where a regulatory term is undefined, we ask first 'whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' In doing so, we 'giv[e] the words used their ordinary meaning.'" (citations omitted)).

Therefore, our inquiry related to the issue of coverage begins with a straightforward inquiry into the plain meaning of the regulatory requirement that "permanent stoppings . . . installed after June 10, 1996, shall be constructed in a traditionally accepted method." 30 C.F.R. § 75.333(e)(1)(i). Specifically, the issue is whether the hundreds of stoppings with polyurethane foam around the perimeter installed by Peabody Twentymile and inspected by MSHA between 1983 and 2014 fall within that plain meaning. Without doubt, the "method" at issue in this case is the use of polyurethane foam around the perimeters of stoppings. The question, therefore, is what constitutes "traditional acceptance."

As set forth above, our starting point is the dictionary definition of "traditional" and of "accepted." *United States v. Ezeta*, 752 F.3d 1182, 1185 (9th Cir. 2014) ("To determine a word's plain and ordinary meaning, [courts] may refer to standard English language dictionaries." (citing *Smith v. United States*, 508 U.S. 223, 228-29 (1993); *United States v. Carona*, 660 F.3d 360, 367 (9th Cir. 2011))). Contrary to the Secretary's contention that the failure to define the term "traditionally accepted method" necessarily renders the term ambiguous, courts regularly find undefined terms *un*ambiguous by giving those terms their plain meaning. *See, e.g.*, *Smith*, 508 U.S. at 228 ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.").

The common, ordinary meaning of "traditional" is clear. "Tradition" means "a long-established or inherited way of thinking or acting," "a continuing pattern of . . . beliefs or practices," or "a customary or characteristic method or manner." *The Random House Dictionary of the English Language* 2006 (2d ed. 1987). "Tradition" is also defined as a "handed-down

. . . custom, . . . typical way, practice, convention, [or] . . . usage," *The Random House Thesaurus, College Edition* 736 (1984), or "an inherited or established way of thinking, feeling or doing," *Webster's Third New International Dictionary Unabridged* 2422 (1993). *See also The American Heritage Dictionary of the English Language* 1829 (4th ed. 2009) (defining "tradition" to mean "[a] mode of . . . behavior followed . . . continuously . . . ; a custom or usage"); *Webster's New World Dictionary of the American Language, Second College Edition* 1507 (1972) (defining "tradition" as "a long-established custom or practice that has the effect of an unwritten law").

The common ordinary meaning of "accepted" is equally clear. "Accept" means to "agree to, consent to, grant as satisfactory, accede to, go along with, assent to, receive with approval, acknowledge." *The Random House Thesaurus* 17. "Accept" is similarly defined to mean to "approve . . . , to agree or consent to, acquiesce in," *Webster's New World Dictionary* 8, or "[t]o regard as proper, usual, or right," *The American Heritage Dictionary* 10.

Because the words "traditional" and "accepted" have plain meanings, under the plain meaning rule, the outcome-determinative issues are whether Peabody Twentymile's usage of polyurethane foam was traditional — that is, a long-established way of acting — and whether MSHA accepted that usage.[3]

B. Peabody Twentymile Had an Established Thirty-one Year History of Using Polyurethane Foam to Seal the Perimeter of Stoppings Prior to the Citation.

The testimony of every witness with knowledge of Peabody Twentymile's construction of stoppings, operator and MSHA alike, supports a finding that Peabody Twentymile had a long-established history of using polyurethane foam. These witnesses include Ronald Hockett, a mine foreman at Peabody Twentymile's Foidel Creek Mine for 23 years, Adam Patterson, the Continuous Miner Coordinator at the mine, Lincoln Derick, a former safety manager at the mine, and Inspector Grosely, who inspected the mine numerous times, Tr. 71.

Hockett testified that Peabody Twentymile had sealed perimeters of stoppings with polyurethane foam for all 23 years that he worked at the mine. Tr. 114-15, 118-19. In addition, Patterson testified that the use of polyurethane foam was the only way Peabody Twentymile had built concrete block stoppings. Tr. 86-87, 97-98. Similarly, Derick stated that the operator was using polyurethane foam to seal block stoppings ever since he began working at the mine in 1991, Tr. 136-38, and Grosely confirmed that he was aware of the mine's ongoing use of polyurethane foam on its block stoppings, Tr. 78.

[3] Commissioner Cohen asserts that his research shows that the term "traditionally accepted" has rarely been used in regulations and that such limited usage somehow indicates an inherent vagueness. Slip op. at 15 n.8. To the contrary, rare use cuts in favor of a very deliberate usage in this regulation; there is no "inherent vagueness" in the term "traditionally accepted," and it cannot be considered a regulatory term of art. Evidence showing the attitude of the agency with respect to a particular method readily demonstrates whether the agency accepted the practice.

Moreover, a separate case decided in 2011 involved a citation issued by Inspector Preece in December 2008 for the improper storage, handling, and disposal of polyurethane foam packs — the citation did not allege that the mine's use of the foam was not "traditionally accepted." *Twentymile Coal Co*., 33 FMSHRC 1885, 1929, 1930 (Aug. 2011) (ALJ), *rev'd in part on other grounds*, 36 FMSHRC 2009 (Aug. 2014). In that case, Preece testified to the use of polyurethane foam in Kennedy stoppings across the country. As set forth in the facts, Kennedy stoppings have gaps at the perimeter substantially equivalent to those around the perimeter of block stoppings. The admittedly safe and accepted use of polyurethane foam in such stoppings simply serves to emphasize the suitability of polyurethane foam as a perimeter sealant for block stoppings. There is no doubt that Peabody Twentymile "traditionally" used polyurethane foam to seal the perimeters of block stoppings.

C. MSHA Traditionally Accepted Peabody Twentymile's Use of Polyurethane Foam.

With respect to the particular dispute in this case, the term "traditionally accepted method" unambiguously includes Peabody Twentymile's method of stopping construction because MSHA both accepted and approved it for years prior to the promulgation of the rule in 1996 and then approved and accepted the method over the next 18 years.

Until the citation issued in this case in 2014, Peabody Twentymile had used polyurethane foam around the perimeter of hundreds of block stoppings since 1983 without receiving a single citation, even though MSHA conducted numerous spot and four quarterly inspections each year. 37 FMSHRC 2635, 2637, 2641, 2646 (Nov. 2015) (ALJ); Tr. 98, 107-08, 123-24. MSHA's public records dating back to November 1, 1995, establish that over 800 inspections have occurred at the mine since 1995.[4] Preece confirmed that, based on the sheer number of inspectors going to the mine, the mine receives "quite a number" of inspection days per average year. Tr. 61-62. Furthermore, Preece and Grosely both testified that they have inspected the mine "multiple" and "numerous times," i.e., "too many [times] to count." Tr. 42, 71.[5] So, dozens of inspectors inspected hundreds of stoppings using polyurethane foam to seal the perimeter of stoppings for thirty years without issuing any citations. Tr. 98. Certainly, MSHA acceded to — that is, accepted — the operator's method of sealing stoppings.

In an effort to rebut the significance of these hundreds of inspections by numerous inspectors, during rebuttal testimony, Preece stated that the regional MSHA inspection unit relied on a number of inexperienced inspectors that were "not . . . intelligent enough" or may not have had adequate training and may not have been paying attention to the perimeter of the stoppings.

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[4] *See* Mine Inspections, U.S. Department of Labor, Mine Data Retrieval System, https://arlweb.msha.gov/drs/drshome.htm (search for Foidel Creek's Mine ID, "0503836"; then choose "Inspections," enter "1/1/1995" as the Beginning Date, and click "Get Report").

[5] Given that Preece had issued a citation for improper storage of polyurethane foam, he clearly had been aware of the mine's use of polyurethane foam to seal stoppings since at least 2008 without voicing any protest.

Tr. 157, 163.[6] MSHA's denial of its acceptance of Peabody Twentymile's usage of polyurethane foam by disparaging its own inspectors is an unseemly effort by MSHA to sacrifice the integrity and ability of its inspectors in order to sustain one citation. It is shameful and, more importantly, wholly unwarranted. On cross-examination, Preece conceded that many experienced inspectors regularly inspected the mine in the years prior to the issuance of the citation. Tr. 158-59. Thus, it is clear that MSHA had experienced inspectors who, by failing to cite the operator for over 30 years, accepted Peabody Twentymile's usage of polyurethane foam.

The demonstration of MSHA's acceptance of Peabody Twentymile's traditional use of polyurethane does not rest solely upon the hundreds of stoppings examined by MSHA inspectors for over 30 years without question or complaint. As importantly, MSHA explicitly approved Peabody Twentymile's usage of polyurethane foam in Peabody Twentymile's ventilation control plans. The mine's 1983 ventilation plan, according to Derick, included the use of polyurethane spray foam to seal the perimeters of ventilation stoppings.[7] 37 FMSHRC at 2641; Tr. 138-39. In addition, MSHA approved an addendum to the operator's ventilation plan in 1991 entitled "Use of Polyurethane or Phenolic Foams." Peabody Ex. D, at 7. The plan expressly states that the "[f]oam application for ventilation devices will be limited to sealing cracks *and* perimeters of ventilation devices." *Id.* (emphasis added).

The 1991 plan further stated that "only versa-foam . . . will be utilized." *Id.* Preece testified that versa-foam was the type of polyurethane foam used at the mine. Tr. 37-38. Furthermore, both the 2000 and 2011 plans allowed the operator to use foam to "seal[] the perimeter and joints of [ventilation] devices." Peabody Ex. D, at 9, 10. From the outset of the mine's operations, therefore, MSHA clearly and explicitly approved Peabody Twentymile's use of polyurethane foam to seal the perimeters of its stoppings.

MSHA's approval of Peabody's ventilation plan, however, is not restricted to the years mentioned above. Since the inception of the Mine Act, the Secretary has been required to review an operator's ventilation plan at least once every six months. *See* 30 U.S.C. § 863(o). In its present form, this requirement resides at 30 C.F.R. § 75.370(g), which states: "The ventilation

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[6] In a feat of Olympian disingenuity, MSHA asks that we defer to its wisdom in this case while deriding some of its own employees for lacking intelligence or judgment. Similarly, the agency asks that we defer to it now, while urging that the agency's own "acceptance" of the practice at issue here for more than three decades should not determine what is meant by "traditionally accepted." *See* discussion at Section II *infra*, slip op. at 30-42.

[7] The fact that the 1983 ventilation plan did not specifically list polyurethane foam as an approved primary sealant at the perimeter of block stoppings is irrelevant. 37 FMSHRC at 2641; Tr. 143-44. On cross-examination, the Secretary pressed Derick about the list of acceptable sealants contained in MSHA's approval of the plan and Derick acknowledged that polyurethane foam was not included in the list. Tr. 143-44. Derick asserted, however, that the list relates to "a different type of material," specifically, "the material for . . . the total surface area of a dry stacked block to prevent air leakage through the stopping." Tr. 144. Moreover, as shown above, MSHA's subsequent plans make it clear that polyurethane foam was explicitly approved by MSHA.

plan for each mine shall be reviewed every 6 months by an authorized representative of the Secretary to assure that it is suitable to current conditions in the mine." Thus, in the 31 years in which Peabody Twentymile used its method for sealing the perimeters of its block stoppings, and in the 31 years in which MSHA approved its ventilation plan addendums and did not cite the mine for the practice, a representative of the Secretary reviewed the mine's ventilation plan at least 60 times without raising the issue that the mine's use of polyurethane foam was unacceptable.[8]

In short, because MSHA traditionally accepted this method — both implicitly through allowing the longstanding, widespread practice at the Foidel Creek Mine, and explicitly through approving the practice in Peabody Twentymile's ventilation control plan — it was a "traditionally accepted method." As such, the term "traditionally accepted method" in 30 C.F.R.

[8] Rather mysteriously, Commissioner Cohen characterizes the words "traditionally accepted method" as "comparative." Slip op. at 10 n.3. More remarkably, he repeatedly and at some length asserts that he cannot determine whether "traditionally accepted" means "in the industry as a whole" or "accepted at a particular mine." *Id.* at 15, 17. It is difficult to fathom the point. Surely, in promulgating the rule, the agency was not thinking about whether the rule applied to every mine or a given mine, nor was it contemplating Commissioner Cohen's apparent theory that the agency might mistakenly accept a method for twenty years. It was contemplating exactly what it said — namely, if MSHA traditionally accepted a method, the method could continue to be used. It is traditional acceptance by MSHA that counts, and MSHA unquestionably traditionally accepted the use of polyurethane foam as demonstrated by the more than two dozen years of acceptance by scores of inspectors at thousands of stoppings and the year in, year out MSHA approval of ventilation plans relying upon polyurethane foam. As far as an attempt at finding ambiguity goes, there is no evidence, none in the record, that MSHA did not accept use of polyurethane on the perimeter of concrete block stoppings at any other mine or at any other time, and there is testimony of its use at other mines. Tr. 136. Thus, if it were important, on the record in this case MSHA accepted polyurethane over an extended period at every mine about which any evidence exists.

§ 75.333(e)(1)(i) unambiguously applies to Peabody Twentymile's use of polyurethane foam around the perimeter of dry-stacked concrete block stoppings.[9]

II.

Even Were Section 75.333(e)(1)(i) Ambiguous, the Secretary's Interpretation Would Not Be Entitled to Deference.

Even if the regulation were ambiguous, deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), would be unavailable because the Secretary is interpreting his own earlier interpretation in the preamble, and interpretations of interpretations do not receive *Auer* deference. Moreover, rather than supporting the Secretary's argument, the preamble and regulatory history instead demonstrate the Secretary's intent to continue accepting methods of construction that he had accepted before 1996. The Secretary's approval of the mine's ventilation plans provides further evidence that the Secretary's interpretation of the preamble is incorrect.

Under *Auer*, courts generally defer to agency interpretations of their own regulations when the regulation is ambiguous and the agency's interpretation is reasonable.[10] In the present case, the Secretary has asked the Commission to defer to his interpretation contained in the preamble to the regulation, stating that "the list [of traditionally accepted methods] set forth in the preamble should be read to express the Secretary's view of what methods of construction

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[9] Commissioner Cohen argues that the dictionary definitions of "traditional" and "accepted" do not place the phrase traditionally accepted in the context of 30 C.F.R. § 75.333(e)(1)(i). Slip op. at 14-15. Perhaps not, but we do. We consider the phrase not just within the context of its specific subsection, but within the context of the entire regulatory structure. The Secretary has created a comprehensive regulatory scheme for the inspection and approval of stoppings, in which (1) the Secretary inspects each mine quarterly, including its stoppings, (2) mine operators must seek the Secretary's approval for the manner in which a mine constructs its stoppings, and (3) the Secretary must review that approved method of construction at least once every six months. When presented with the question of whether a practice has been traditionally accepted, the regulatory structure requires the Secretary to continuously review and reaffirm his acceptance of each mine's method of stopping construction and inspect the actual application of that method. Of course that context is relevant, and we have fully considered it.

However, we did not stop there and close our eyes to possibly probative evidence of the meaning of "traditionally accepted." We delved into the preamble to ensure that it did not contradict our plain reading. As detailed extensively, *infra*, the preamble allows operators to use polyurethane foam around the perimeter of dry-stacked block stoppings, further supporting the application of the plain meaning of the standard.

[10] This is also known as *Seminole Rock* deference. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

may be considered 'traditional' methods." S. Br. at 14. The list referred to by the Secretary, however, is silent with respect to the perimeters of dry-stacked block stoppings, and the remainder of the preamble and the regulatory history militate against the Secretary's reading.

In 1992, MSHA issued a final rule that partly removed the criteria for approval of ventilation plans under 30 C.F.R. § 75.316-2 from Part 75 and partly moved it into other sections. Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20,868, 20,911 (May 15, 1992). The criterion detailing acceptable methods of stopping construction, at section 75.316-2(b), was moved to the newly created section 75.333(e). In relevant part, the requirement was changed to the following: "Except as provided in paragraphs (e)(2) [covering anthracite mines] and (e)(3) [covering timbers in heaving or caving areas], all overcasts, undercasts, shaft partitions, permanent stoppings, and regulators installed after August 15, 1992, shall be constructed of durable and noncombustible material, such as concrete, concrete block, brick, cinder block, tile, or steel." 57 Fed. Reg. at 20,919.

In 1994, MSHA published a proposed rule that would amend section 75.333(e)(1). Safety Standards for Underground Coal Mine Ventilation, 59 Fed. Reg. 26,356 (May 19, 1994). The agency suggested the following change:

> (e)(1)(i) Except as provided in paragraphs (e)(2), (e)(3) and (e)(4) all overcasts, undercasts, shaft partitions, permanent stoppings, and regulators, installed after (Insert the effective date of this rule), shall be constructed in a manner and of materials that results in a construction that has been tested and shown to have a minimum strength of 39 pounds per square foot as tested under ASTM E72-80 Section 12—Transverse Load-Specimen Vertical, load only.

Id. at 26,393.

MSHA stated that its reason for the change was to address questions regarding "acceptable construction methods and materials . . . that will result in controls that satisfy the definition of durable given in paragraph (a) of the existing standard." *Id.* at 26,369. MSHA's proposed rule would

> retain[] the intent and requirement of the existing standard because the 8-inch hollow-core concrete block stopping with mortared joints, to which all other constructions were tied under the definition of durable in the existing standard, has been tested and shown to have a minimum strength of 39 pounds per square foot.

Id. MSHA also noted that "solid concrete block stoppings that are dry-stacked and plastered on only one side" do not meet the 39 pounds per square foot requirement and "[u]nless a stronger plaster is developed, it is unlikely that a stopping plastered on only one side would be acceptable under the current rule or this proposed revision." *Id.*

In the preamble to the 1996 final rule for section 75.333(e)(1)(i), the standard currently in force, MSHA changed its approach. It addressed questions regarding the applicability of the ASTM test and the fact that some traditionally accepted methods of stopping construction either could not be tested or would not meet the 39 pounds per square foot requirement. Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9764, 9783 (Mar. 11, 1996). Specifically, MSHA noted that commenters had "questioned the appropriateness of a strength requirement of 39 pounds per square foot and the relevance of this value to the in-mine conditions." *Id.* MSHA found merit in those comments, stating, "[c]ommenters suggested that some constructions that are widely used in coal mines do not meet the 39 pound per square foot threshold, and the ASTM test can only be run at a limited number of locations nationwide." *Id.* As a result, MSHA's final rule "recognize[d] traditionally accepted construction methods for permanent ventilation controls, and retain[ed] the ASTM test for new materials and methods." *Id.*

In other words, MSHA recognized that methods of stopping construction that had been traditionally accepted would remain acceptable, even if they could not be tested or would not meet the 39 pounds per square foot requirement. New methods or the use of new materials must meet the ASTM test.

At this point, the preamble effectively echoes the plain language of the regulation: MSHA intended to continue allowing construction methods that it had previously allowed. However, MSHA continued the preamble discussion, enumerating seven categories of construction methods that it considered "traditionally accepted":

> [1] 8-inch and 6-inch concrete blocks (both hollow-core and solid) with mortared joints;
>
> [2] 8-inch and 6-inch concrete blocks dry-stacked and coated on both sides with a strength enhancing sealant suitable for dry-stacked stoppings;
>
> [3] 8-inch and 6-inch concrete blocks dry-stacked and coated on the high pressure side with a strength enhancing sealant suitable for dry-stacked stoppings;
>
> [4] steel stoppings (minimum 20-gauge) with seams sealed using manufacturer's recommended tape and with the tape and perimeter of the metal stopping coated with a suitable mine sealant; and
>
> [5] lightweight incombustible cementatious masonry blocks coated on the joints and perimeter with a strength enhancing sealant suitable for dry-stacked stoppings. . . .
>
> [6] 4-inch concrete blocks may be used in the above applications in seam heights less than 48 inches.

> [7] Tongue and groove 4-inch concrete blocks coated on both sides with a strength enhancing sealant suitable for dry-stacked stoppings may be used in coal seams of any height.
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> The sealants referred to in this paragraph would be applied in the thickness recommended by the manufacturer. MSHA maintains a list of sealants which may be used for the above applications. This list is available at each MSHA District Office. The final rule would continue to permit these traditionally accepted construction methods to be acceptable for the construction of ventilation controls.

61 Fed. Reg. at 9783-84.

The Secretary's argument based on the preamble language is simple but erroneous. He contends that because Peabody Twentymile's method using polyurethane foam around the perimeter is not one of the enumerated methods in the preamble, it is not a traditionally accepted method. This raises two questions. First, does the list in the preamble actually prohibit the use of polyurethane foam on the perimeter of concrete block stoppings? Second, if not, should we defer to the Secretary's interpretation or recognize that (a) the rule itself permits traditionally accepted methods, and (b) as set forth above, MSHA traditionally accepted, indeed approved, the use of polyurethane as a perimeter sealant by Peabody Twentymile?

The first question requires resolution of Peabody Twentymile's challenge to the Judge's application of the requirements for lightweight incombustible cementatious masonry block stoppings. PDR at 11. The Judge's references to this category of stoppings were integral to his decision because the preamble only addresses the perimeters of two of the seven categories of traditionally accepted stoppings. For Kennedy stoppings, non-strength enhancing sealant is acceptable. On the other hand, the preamble calls for a strength-enhancing sealant for the perimeter of lightweight incombustible cementatious block stoppings. 61 Fed. Reg. at 9783. Mistakenly, rather than categorizing the stoppings in the mine as what they really are, dry-stacked block stoppings with strength-enhancing sealant on one side, the Judge found that Peabody Twentymile's stoppings were similar to lightweight cementatious block stoppings. 37 FMSHRC at 2644.[11] Accordingly, the Judge, applying his conception of the preamble language rather than the preamble as written, held that the requirement that strength-enhancing sealant be used around the perimeter of lightweight block stoppings applied to the stoppings used by Peabody Twentymile. *Id.*

The Judge clearly erred in applying the requirements for lightweight block stoppings to Peabody Twentymile's construction method rather than the requirements for the correct category of stopping. Inspector Preece testified that the stopping at issue was a dry-stacked "concrete

[11] Although the parties did not submit evidence on this point, we may take judicial notice that cement is one ingredient of concrete. Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 90 (2d ed. 1997) (cement) ("*DMMRT*").

block" stopping, Tr. 43, and that the stopping was made from eight-inch blocks, Tr. 60-61. The amended citation referred to them as "cinder blocks." Sec. Ex. 1, at 3. Cinder blocks are one type of concrete block made by mixing cement and well-burned coal cinders as aggregate. *Webster's Third New International Dictionary* 407, 472 (cinder block, cinder concrete; concrete); *DMMRT* 90, 117 (cement, concrete).[12]

Peabody Twentymile's stoppings, therefore, meet the requirements specified within the third of the seven categories of stoppings in the preamble: "8-inch and 6-inch concrete blocks dry-stacked and coated on the high pressure side with a strength enhancing sealant suitable for dry-stacked stoppings." 61 Fed. Reg. at 9783. Clearly, the preamble does not prohibit the use of polyurethane foam around the perimeter of dry-stacked concrete block stoppings. Equally clearly, it does not require the use of strength-enhancing sealant around the perimeter. Had the Secretary wished to include the use of strength-enhancing sealant around the perimeter of dry-stacked block stoppings in the preamble language, he would have done so, as he explicitly did for lightweight block stoppings. There is no reason to infer for dry-stacked block stoppings an unwritten element that the Secretary explicitly imposes for lightweight block stoppings later in

[12] Essentially, the Secretary concedes in his response brief that the Judge erred in this regard, agreeing that Peabody used eight-inch wide blocks in its stoppings rather than lightweight cementatious blocks. Sec. Br. at 15 n.19. He asserts, however, that the preamble requires the use of strength-enhancing sealant around the perimeter of both dry-stacked block stoppings *and* stoppings constructed from lightweight incombustible cementatious masonry blocks. *Id.* at 16. He makes this baseless assertion despite the differences in language — namely, for dry-stacked blocks the preamble requires "coat[ing] on the high pressure side with a strength enhancing sealant" whereas for the lightweight cementatious blocks the preamble specifically requires "coat[ing] on the joints *and perimeter* with a strength enhancing sealant." 61 Fed. Reg. at 9783 (emphasis added).

the same sentence.[13] *Cf. Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 648 (5th Cir. 1976) (stating the rule of construction that "where a term is carefully employed in one place and excluded in another, it should not be implied where excluded");[14] *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467-68 (2001) (refusing to read language into statute that had been expressly stated elsewhere). Indeed, the operator's traditional use of polyurethane foam from 1983 forward supports the Secretary's knowledge of the use of polyurethane foam around the perimeter of dry-stacked blocks.

Additionally, as the Judge found, Peabody Twentymile also uses wooden wedges around the perimeter of its block stoppings. 37 FMSHRC at 2636; *see also* Tr. 34. Under the Secretary's reasoning, in which silence regarding the perimeter should be interpreted as prohibiting the use of anything but strength-enhancing sealant, the use of wooden wedges would be prohibited as well. Yet the Secretary did not cite the operator for that and has, in fact, has long allowed the use of wooden wedges around the perimeter. *See* Peabody Ex. D, at 3 (allowing the use of wedges in the mine's ventilation plan).

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[13] Commissioner Cohen concludes "[n]othing in the language of the regulation itself or the preamble indicates that any distinction is made between the face and the perimeter of cement block stoppings." Slip op. at 17. We see no reason for an explicit "distinction" when the difference arises from the very words used. Undoubtedly, the Secretary drafted the preamble intending the words to mean what they are commonly understood as meaning. Else, he would have provided definitions. The perimeter of the stopping is not part of the face or a side of the stopping. This distinction is entirely clear. The Secretary specified in the very same sentence what must be used around the "perimeter" of certain types of stoppings. Yet our colleague contends that there is no distinction between the face of a stopping — here, "*the* high pressure side" — and the perimeter of a stopping, which is set off at a ninety-degree angle from the face and oriented toward the ribs and the roof. He asserts that "[W]hen that [perimeter] gap is sealed, the sealant becomes part of the face of the stopping. That sealant is exposed to the high pressure side of the stopping." Slip op. at 17 n.14. According to this tortured reading, if the sealant on the perimeter becomes part of the side of the stopping then, under the words of the regulation that "newly formed" side must itself be coated with sealant. Commissioner Cohen does not consider whether the sealant that he claims has become part of the side must be sealed in an indefinitely continuing repetitive process. Of course, this is purely a pedantic debate, as the perimeter around the outer rim of a side certainly does not thereby become a "side" of the stopping rather than a distinct perimeter sealant. As the regulations clearly differentiate, the "side" is the face of the stopping wall and the perimeter is the space between the top of the side and the coal seam. Additionally, we note that Kennedy stoppings only must be constructed of steel that is a minimum 20-gauge thickness, according to the preamble. This is approximately 3/80 of an inch (0.0375 inches) thick. *See* https://www.unc.edu/~rowlett/units/scales/sheetmetal.html; https://www.tedpella.com/company_html/gauge.htm.

[14] While *Diamond Roofing* concerned language in a regulation rather than a preamble, the Secretary failed to proscribe the conduct at issue in this case in either section 75.333(e)(1)(i) or the preamble.

The preamble does not contain the Secretary's argued prohibition against the use of polyurethane foam. Therefore, the Secretary, in essence, asks us to defer to his interpretation of the preamble — an interpretation of an interpretation. Deference in such a situation was addressed relatively recently by the Fifth Circuit in *Elgin Nursing and Rehabilitation Center v. U.S. Department of Health and Human Services*, 718 F.3d 488 (5th Cir. 2013). The agency in that case issued 42 C.F.R. § 483.35(i)(2), a regulation requiring long term care facilities to "[s]tore, prepare, distribute, and serve food under sanitary conditions," and created a manual interpreting the regulation, but the manual was ambiguous as well. 718 F.3d at 491-92. The agency requested *Auer* deference for its interpretation of both the regulation and the manual's ambiguous interpretation of the regulation. *Id.* at 492. The Fifth Circuit declined. *Id.* at 493.

Upon deciding not to grant deference, the court recognized that rather than presenting a case of *Auer* or *Seminole Rock* deference, the agency, "it seems, asks us to go a step further and defer to its interpretation of the [manual]; essentially, it seeks '*Seminole Rock* squared' deference — deferring to its interpretation of its manual interpreting its interpretive regulation." *Id.* The court identified the chief problems with deferring to the agency's interpretation of its own interpretation:

> [First,] it would make it possible for agencies not only to issue ambiguous regulations, but also to write and enforce ambiguous interpretations of them. . . .
>
> Second, granting deference to [the agency's] interpretation of the [manual] would leave no role for the courts — taken to its logical conclusion, it could effectively insulate agency action from judicial review. It is not within the province of the Executive Branch to determine the final meaning of a vague document interpreting a regulation any more than it would be to interpret the final meaning of a contract entered into by the Executive Branch.
>
> Third, extending *Seminole Rock* and *Auer* to apply to agency interpretations of agency interpretations of agency regulations would allow agencies to punish "wrongdoers" without first giving fair notice of the wrong to be avoided.

Id. As a result, the Fifth Circuit declined to grant deference to the agency's interpretation of the manual. It proceeded to interpret the manual by "apply[ing] traditional tools of textual interpretation." *Id.* at 494. In doing so, the court reached a contrary conclusion from that of the agency and rejected the agency's interpretation of the regulation. *Id.* at 494-95.

The case before us presents similar circumstances to those in *Elgin Nursing*. The Secretary asks for deference to his interpretation, directing us to some of the language of the preamble and ignoring preamble language in which the Secretary recognized that by use of the phrase "traditionally accepted method[s]," he was allowing use of methods that had not been shown to meet pre-existing strength testing requirements. For the reasons stated *supra*, however, the preamble does not support the Secretary's contention that MSHA intended to prohibit use of

non-strength-enhancing sealants, such as polyurethane foam, on the perimeter of concrete block stoppings. Rather, the preamble indicates that operators *may* use such sealants under such scenarios. For the same reasons as those articulated by the Fifth Circuit, we decline to award the Secretary "*Seminole Rock* squared" deference to his interpretation of the preamble.

With *Auer* deference inappropriate, we would afford the Secretary's interpretation only the amount of deference warranted by the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The Secretary's enforcement history and his prior approval of Peabody Twentymile's construction method are highly relevant to this inquiry and support our finding that the Secretary has traditionally accepted Peabody Twentymile's construction method.[15]

Since the mine opened in 1983, the Foidel Creek Mine's ventilation plan has allowed the use of polyurethane foam to seal the perimeters of its ventilation stoppings. 37 FMSHRC at 2641. The Secretary later approved a 1991 ventilation plan addendum allowing the operator to use polyurethane foam to "seal [the] . . . cracks and perimeters of ventilation devices." Peabody Ex. D, at 7, 15. In 2000, the Secretary again approved a ventilation plan with the following provision: "Application of foam for ventilation devices will be limited to sealing the perimeter and joints of such devices." *Id.* at 9.

The Secretary fails in his attempt to inject ambiguity into the ventilation plans by arguing that they could be read to refer to repairs rather than actual construction of stoppings. Sec. Br. at 20. The 2011 ventilation plan is unambiguous: "Application of foam for ventilation device installation will be limited to sealing the perimeter and joints of such devices." Peabody Ex. D, at 10. Using the nominative "installation" to refer to the act of installing, the ventilation plan clearly allows the use of polyurethane foam during the installation phase.

MSHA has traditionally accepted Peabody Twentymile's method by failing to cite the practice until 2014 and approving ventilation plans allowing the practice since 1983, and neither the regulation nor the preamble prohibits the practice. For those reasons, even if we found the regulation ambiguous, we would find the Secretary's interpretation wholly unpersuasive due to its inconsistency with the regulation, the preamble, and the Secretary's own consistent enforcement of the regulation until 2014, and we would not afford it *Skidmore* deference.

Commissioner Jordan does not address our finding that Peabody Twentymile's method of construction meets the requirements to be traditionally accepted within the language of the preamble, and Commissioner Cohen attempts to do so only in a footnote. *See* slip op. at 16 n.13. Rather than deal with the clear language of the preamble, they principally rely upon an apparent concession by Peabody's counsel during oral argument that if the list in the preamble were

[15] This case concerns a mandatory standard that allows practices that have been "traditionally accepted," and MSHA's acceptance of Peabody's construction method through ventilation plans is clearly evidence of that traditional acceptance. The Judge should have considered the ventilation plans.

exhaustive and binding, it would not prevail. *See* slip op. at 19 (separate opinion of Commissioner Cohen); slip op. at 22 n.1 (separate opinion of Commissioner Jordan). Counsel did not identify a reason for that concession, and we did not pursue a discussion regarding the plain language of the preamble regarding dry stacked concrete blocks.

Obviously, a concession by Peabody's counsel carries some weight no matter how improvidently stated. However, unlike factual arguments, we are not bound by a party's (or even both parties') erroneous view of the law. *See Kamen v. Kemper Financial Servs. Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *see also Flamingo Resort, Inc. v. United States*, 664 F.2d 1387, 1391 n.5 (9th Cir. 1982) ("[W]e are not bound by a party's erroneous view of the law."); *United States v. Ginyard*, 444 F.3d 648, 649 (D.C. Cir. 2006) ("Although the United States has conceded error, the court is not bound by that concession on a question of law."). We place more reliance on the plain wording of the thought-out words of the preamble rather than a spontaneous response during oral argument.[16]

The question before us is whether section 75.333(e)(1)(i) prohibits the use of polyurethane foam. The Secretary has offered the preamble as essentially the only basis for his position. The significance of the preamble is a question of law, and the parties' misreading of the preamble *in a hypothetical* does not preclude us from reading it correctly. If our colleagues' view of the scope of our review were accurate, the Commission would be prevented from ever conducting its negligence analysis as described in *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016), simply because both the Secretary and the operator in a given case might prefer the Secretary's definition of negligence to our own.

Commissioner Cohen's opinion actually conforms in important and outcome-determinative respects to our opinion. He recognizes that the Secretary is not entitled to *Auer* deference. He effectively agrees that the words of the regulation are plain and, properly defined, mean exactly what we have said. He finds ambiguity not in the terms of the regulation but in its application. Thus, he does not find the terms or language of the regulation ambiguous but finds

[16] We prefer not to confuse factual questions with legal ones, as Commissioner Cohen does throughout by using non-expert testimony about which construction method is stronger to determine his purportedly legal conclusion of what section 75.333(e)(1)(i) requires. To paraphrase Commissioner Cohen's opinion, "[I]f MSHA [today] believes that the use of foam as a perimeter sealant is unsafe," slip op. at 20, then the regulation must be read to prohibit it, regardless of what the regulation and the preamble actually say. Moreover, as set out *infra*, a block stopping in the subject mine is approximately 200 square feet, weighs more than four tons, and is coated with a strength enhancing material on the side. It was with good reason that MSHA did not require the replacement of stoppings after the Judge's decision.

the regulation ambiguous because, to him, it could mean traditionally accepted in the industry as a whole or at a particular mine. Slip op. at 15.[17]

In proposing this ambiguity, he implicitly concedes, as he must, that MSHA traditionally accepted the use of polyurethane at the Peabody Twentymile mine.[18] Rather than apply the plain words of the regulation to the long usage at the subject mine, Commissioner Cohen asserts that a "valid inference might be that allowing the operator to use the foam sealant was an error made by a single MSHA office." Slip op. at 10. Of course, it strains credulity to characterize MSHA's continuous approval of Peabody Twentymile's use of polyurethane foam for over 31 years as "an error" when that approval took the form of explicit approval of its ventilation plans, at least 60 reviews of that plan, and hundreds of inspections covering hundreds of block stoppings without issuing a single citation. In turn, it defies credulity to assert that MSHA allowed an unsafe practice to exist for three decades in a large and important underground coal mine. Yet, Commissioner Cohen simply asserts that the use of polyurethane foam around the perimeter of block stoppings is "weaker and more flammable," and concludes from that assertion that the Secretary's interpretation is therefore reasonable. Slip op. at 20.

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[17] The only mine considered in this case or in the evidence is Peabody Twentymile's mine. A Peabody witness testified that he knew other mines used polyurethane as a sealant around stoppings. The Secretary did not present any evidence about the use of polyurethane foam at other mines. Commissioner Cohen acknowledges this point saying that he is concerned about MSHA not using a safety practice that "it *may presently be using* at other mines around the country." Slip op. at 15 (emphasis added). If the Secretary wants to impose a new nationwide requirement, there is a legally sound way to do so, consistent with the APA: make a rule.

[18] We recognize that dictionary definitions are not always outcome determinative if, read in the context as a whole, they are clearly inappropriate. Here, the "context" of the regulation demonstrates that the dictionary definitions are most appropriate. Indeed, the entire context is that if an operator was using a methodology that MSHA had accepted, it could continue doing so. Commissioner Cohen's reliance upon *Yates v. United States*, 135 S. Ct. 1074 (2015), actually shows the meaning of "read in context." *Yates* was a criminal case in which a plurality of four Justices expressly relied upon the rule of lenity to require any ambiguity to be resolved in the defendant's favor. More importantly, for present purposes, the plurality emphasized, *inter alia*, the title of the specific section allegedly violated, "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," and the title of the section of the Sarbanes–Oxley Act that contained the specific section allegedly violated, "Criminal penalties for altering documents." *Id.* at 1083. Further, the plurality relied upon rules of statutory construction to find that the term "tangible object" was limited by surrounding reference to "objects used to record or preserve information." *Id.* at 1077. Using these tools, the plurality writes, "It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping." *Id.* at 1087. In this case, MSHA approved previously used and accepted methods going forward. The context and the words are in full alignment.

Commissioner Cohen raises a false specter of the flammability of polyurethane foam to support his finding that the Secretary's interpretation is persuasive.[19] Such assertion conflicts with the facts that (1) polyurethane foam is accepted by MSHA as flame resistant, (2) MSHA recognizes and permits the use of polyurethane as a sealant around the perimeter of Kennedy stoppings that have wide gaps at the perimeter, and (3) Inspector Preece confused fire tests required for stoppings with flammability tests required for sealants.

Preece repeatedly acknowledged that polyurethane foam meets MSHA's test for flammability. Tr. 41, 53-54, 66-67. Under 30 C.F.R. § 75.333(f), sealants are required to pass a flammability test. Polyurethane foam has passed this test, it has been accepted by MSHA as a sealant for use in mines, and MSHA has specifically approved it as flame resistant. Tr. 53-54.

Preece offered confused and errant testimony by referring to a "fire test" at various points in his testimony. A "fire test" is not required by section 75.333(e). The record clearly reflects this fact.

Preece's confusion and misapprehension, which serve to undercut his testimony, apparently arise from his misunderstanding of a communication between him and MSHA personnel with actual expertise regarding stoppings and sealants. When Peabody Twentymile's counsel pointed out that section 75.333(e)(1)(i) only specified a strength test, Preece stated that "Mr. Cramer in technical support sent us some documentation which showed the three tests that are performed *on stoppings*. That's what they test with." Tr. 67 (emphasis added). Without doubt, Preece was not testifying from his own knowledge or expertise but rather was testifying only to an impression gained from talking with someone else. The regulations do not support his misimpression.

In fact, section 75.333(e)(1)(ii) requires a fire test only for *stopping construction material* and does not deal with the flammability of sealants.[20] Nobody asserts that polyurethane foam is a stopping construction material. It is used to seal the perimeter and any holes to prevent air passage around, over, or through the stopping. Preece clearly confused the requirements for stopping construction materials and for sealants.

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[19] Commissioner Cohen states that "[w]hile block bond has passed flammability tests, Tr. 34-35, polyurethane foam has not," crediting the testimony of Inspector Preece. Slip op. at 20.

[20] Section 75.333(e)(1)(ii) provides in relevant part:

> All overcasts, undercasts, shaft partitions, permanent stoppings, and regulators, installed after November 15, 1992, shall be constructed of noncombustible material. Materials that are suitable for the construction of overcasts, undercasts, shaft partitions, permanent stoppings, and regulators include concrete, concrete block, brick, cinder block, tile, or steel.

The regulation requires that stopping construction materials, "includ[ing] concrete, concrete block, brick, cinder block, tile, or steel," must "be constructed of noncombustible material." 30 C.F.R. § 75.333(e)(1)(ii). The term "noncombustible material" is defined in section 75.301 as material that, "when used to construct a ventilation control, results in a control that will continue to serve its intended function for 1 hour when subjected to a *fire test* incorporating an ASTM E119-88 time/temperature heat input, or equivalent." 30 C.F.R. § 75.301 (emphasis added). Section 75.333(e)(1)(ii) does not mention sealants because they are not construction materials that must meet the fire test. Instead, sealants such as polyurethane foam must meet the flammability test identified in section 75.333(f), which specifies the fire-resistance standards for sealants.

Separately, and from a practical standpoint more persuasively, mines permissibly use polyurethane foam to seal not just the perimeter but also the joints of metal Kennedy stoppings, which are widely used in the Foidel Creek Mine. Kennedy stoppings typically have gaps of 0 to 4 inches between the stopping and rib or roof and block stoppings typically have gaps of 0 to 6 inches. Tr. 36-37; Tr. 46-47.[21] The permitted use of polyurethane foam for these stoppings at the mine demonstrates that, in fact, MSHA actually does permit use of polyurethane foam as a perimeter sealant with stoppings without concern that use of the sealant creates a danger for miners of air leakage through openings at the perimeter.

Even were the sufficiency of polyurethane foam not obvious from the regulations themselves and its permissible use with Kennedy stoppings, a paper presented by an MSHA official at the 11th U.S./North American Mine Ventilation Symposium in 2006 confirms it. The paper, which discussed nontraditional construction materials, specifies first that section 75.333 "requires that . . . permanent stoppings . . . be constructed of noncombustible material." Harry C. Verakis, Technical Support, Approval & Certification Center, MSHA, *Stoppings: Technology Developments and Mine Safety Engineering Evaluations* 1 (2006), *available at* https://arlweb.msha.gov/S&HINFO/TECHRPT/minewste/stoppingstechnologydevelopment.pdf. Then, the paper states that these newer materials must meet the strength test identified in section 75.333(e)(1), the "ASTM E-72-80." *Id.* The next sentence of the paper states clearly that sealants must only meet the flammability test contained in section 75.333(f): "Also, sealants or coatings applied to ventilation controls to reduce air leakage must have a flame spread index of 25 or less. The flame spread index test specified in Part 75.333 is the ASTM E-162-87." *Id.* at 1-2 (footnote omitted). Polyurethane foam meets this standard, and Inspector Preece's confused testimony must not trump our ability to read, independently, what the Secretary's regulations require.

[21] Commissioner Cohen says that our conclusion that these gaps are "substantially similar" amounts to "speculation," slip op. at 16 n.9, and that Kennedy stoppings are "fundamentally different" in the gaps in the perimeter. Slip op. at 20. We leave it to the common sense of the reasonable person to gauge whether, with respect to preventing the passage of air through the same approved sealant, an occasional difference of 2 inches is "fundamentally" different. No evidence supports the notion of such fundamental difference.

The only other asserted safety basis for not applying the regulation's words in accordance with their plain meaning and the context within which they were written is that polyurethane foam is not strength-enhancing. Of course, the undemonstrated premise of this objection must be that a thin coating of an inch or so around the perimeter of a stopping is critical to a stopping's physical strength.

With respect to the "strength" issue, we start with the dimensions of a stopping in the subject mine. Generally, stoppings in the Peabody Twentymile mine are 17 to 23 feet wide and 8 to 12 feet tall. Tr. 116. They are composed of dry stacked concrete blocks coated on the high-pressure side with a strength-enhancing material and are wedged against the ribs and the roof. Tr. 117. The blocks weigh over 39 pounds. Verakis, *supra*, at 2 (providing measurements and weight in metric format). Assuming an average stopping is 20 feet wide and 10 feet tall and uses 8 x 8 x 16 inch blocks, the stopping will contain 225 blocks. Thus, the block stopping is an approximately 200 square-foot wall of strength-enhanced concrete blocks weighing 8,775 pounds.

The Secretary presented no evidence that Peabody Twentymile's block stoppings are not sufficiently strong, opting instead to rely on conclusory reasoning that a 200 square foot, four ton concrete block stopping with an inch or so of polyurethane at the perimeter is dangerously weaker than one that uses mortar subject to drying and cracking and stuffed by hand in small openings. There simply is no evidence in this case to support such a supposition.[22]

If one were to conclude that the traditional Peabody stopping is insufficiently strong, as Commissioner Cohen does, then for over 30 years MSHA has permitted the construction of hundreds of structurally insufficient block stoppings. If that were true, then MSHA has been scandalously negligent. Given that stoppings made with Peabody's traditionally accepted method will be allowed to remain unchanged in the mine, *see* Oral Arg. Tr. 72, MSHA does not find such stoppings as posing a threat to the safety of miners.[23] We prefer to find the obvious truth that MSHA has traditionally recognized and accepted that Peabody's coated, strength-enhanced concrete stoppings have been traditionally accepted as adequately performing the task of providing a strong stopping in accordance with the regulation.

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[22] Contrary to Preece's unsupported supposition, there is testimony that in the Foidel Creek Mine and another mine, which have pronounced cleavage and rib sloughage, polyurethane foam creates a better seal than mortar or grout because it expands to fill the space around the perimeter of stoppings rather than shrinking and cracking. Tr. 140.

[23] Were the contrary true, the Secretary would be able to assert, consistent with the text of section 75.333(e)(1), that the stoppings at the mine were *not* constructed "of materials that have been demonstrated to perform adequately." MSHA did not argue this or offer any competent evidence that the sealant here failed that test, so we must assume there is no evidence of this fact and that the Secretary's suggestion of potential danger based on deficient strength is weightless.

III.

Conclusion

Peabody Twentymile's method of construction was traditionally accepted by MSHA for 13 years prior to the promulgation of the regulation and for almost 20 years thereafter. Under the plain meaning of the regulation, such a traditional and accepted method complies with the regulation. Further, even if there were doubt, we need not defer to the Secretary's interpretation of the term "traditionally accepted method" of construction in section 75.333(e)(1)(i) because it unambiguously includes Peabody Twentymile's use of polyurethane foam around the perimeter of dry-stacked concrete block stoppings. However, even if the standard were ambiguous, the *Auer* framework would not apply to the Secretary's interpretation because the preamble does not support his argument, rendering it an interpretation of an interpretation, and under *Skidmore*, the Secretary's interpretation lacks the power to persuade given the facts of Peabody Twentymile's traditional usage not objected to by MSHA.

For these reasons, we would reverse the Judge's decision and find that Peabody Twentymile's construction of dry-stacked block stoppings is a "traditionally accepted method."

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 7, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. SE 2017-97-RM
SIMS CRANE, INC.	

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

ORDER

BY: Althen, Acting Chairman; Young, and Cohen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On December 19, 2016, the Commission received from Sims Crane, Inc. ("Sims") a motion seeking to reopen an Imminent Danger Order that had become a final order of the Commission pursuant to section 107(e)(1) of the Mine Act, 30 U.S.C. § 817(e)(1).

Under section 107(e)(1) of the Mine Act, an operator who wishes to contest an Imminent Danger Order must apply to the Commission within 30 days of issuance. The Commission is then charged with affording the operator a hearing to determine whether the Order should be vacated, affirmed, modified, or terminated. 30 U.S.C. § 817(e)(1).

On September 23, 2015, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued an Imminent Danger Order, No. 8823572, to Sims alleging that a miner was walking without fall protection where there was a danger of falling. A related citation, No. 8823573, was issued on the same day for an alleged violation of 30 C.F.R. § 56.15005.[1]

Pursuant to section 107(e)(1) of the Mine Act, the operator had until October 23, 2015 to apply to the Commission for modification or vacation of the Imminent Danger Order. The operator failed to provide that notification within the statutory period. Sim's motion indicates that it was unaware of the application requirement and that it believed it would have an opportunity to contest the Order at a later date, in a manner similar to the process for challenging a proposed penalty assessment under section 105(a). However, penalties are not assessed for an

[1] 30 C.F.R § 56.15005 provides: "[s]afety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

Imminent Danger Order under the Mine Act and no further opportunities for challenging Order No. 8823572 existed after the initial 30-day period.

On or about December 3, 2015, Sims received a Notice of Contest Rights and Instructions and a Proposed Assessment (Form 1000-179) from MSHA. Those forms concerned the proposed penalty assessment for Citation No. 8823573 and instructed the operator on the procedures for contesting that assessment before the Commission. Sims checked that it wished to contest all violations listed in the proposed assessment and requested a formal hearing. MSHA received Sims' contest on December 23, 2015. In its motion, Sims asserts that it believed that in contesting the citation and proposed assessment, it was also contesting the Imminent Danger Order.

On February 9, 2016, the operator's contest was docketed as No. SE 2016-81, designated as a simplified proceeding, and assigned to an Administrative Law Judge. On March 25, 2016 and again on June 22 or 23, 2016, Sims filed informational updates regarding this matter. In both of those submissions, the operator requested that both the citation and the Imminent Danger Order be vacated. The Secretary never objected to the inclusion of the Imminent Danger Order in Sims' filings.

On October 28, 2016, counsel for the Secretary filed a Pre-Hearing Report with the Judge. In that report, the Secretary stipulated that, "the citation and imminent danger order at issue in this proceeding were properly served upon Sims as required by the Mine Act . . ." and further that "the citation and imminent danger order at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing its issuance." The Secretary also stated that he believed "the single citation and imminent danger order in this $270 docket will be proceeding to trial." Finally, the Secretary asserted, *"[a]ll aspects of this citation and imminent danger order are at issue* . . ." (emphasis added). In Sim's motion to reopen, it asserts that these statements "reaffirmed [its] belief that the Order had been contested and that all stakeholders were aware of it."

On October 31, 2016, the Judge convened a prehearing status call. During that call the Judge raised for the first time the possibility that the Imminent Danger Order had not been timely contested. Notwithstanding the stipulations contained in the Secretary's Pre-Hearing Report, counsel for the Secretary then argued for the first time that the order had not been contested.

On November 14, 2016, a hearing was held in this matter. At the hearing, the Judge again raised the issue of whether the Imminent Danger Order had been contested in a timely manner. The Judge determined that there was no indication in the record of any challenge to the order. The record was left open after the hearing to permit Sims to provide such evidence.

On November 23, 2016, Sims argued in an email to the Judge's office that it had contested the Order at the same time as it had contested the proposed penalty assessment for Citation No. 8823573 because "the Order was referenced by number in the text of the Citation."

On January 13, 2017, the Judge issued his Decision and Order in this matter. The Judge substantively addressed the Secretary's allegations regarding Citation No. 8823573. However,

with respect to Order No. 8823572, the Judge noted that the Mine Act and the Commission's procedural rules require an operator to notify the Commission that it wishes to Contest an Imminent Danger Order within 30 days. He determined that marking the proposed assessment regarding the related citation was not the proper procedure for contesting the order. Further, even if it was permissible to challenge an Imminent Danger Order in that fashion, the Judge noted that in this case the operator filed its challenge to the proposed assessment well after the October 23, 2015 deadline. As a result, the Judge ruled that he lacked jurisdiction over the order and declined to address it substantively.

As noted above, on December 19, 2016, Sims filed a Motion to Reopen. In it, Sims requested relief from the final Imminent Danger Order pursuant to Federal Rule of Civil Procedure 60(b)(1), which provides for relief from a final judgement that was entered as a result of "mistake, inadvertence, surprise, or excusable neglect . . . ." Fed. R. Civ. P. 60(b). The operator stated that this rule was incorporated into the Commission Rules. See 29 C.F.R. § 2700.1(b). Sims argued that the assessment form was ambiguous and that it reasonably believed it had properly contested the order when it returned that form. Further, Sims argued that its "intention to contest the Order has always been clear."

On January 18, 2017, the Secretary of Labor filed an Opposition to Sims' Motion to Reopen (which he later amended). In it, the Secretary noted that the Federal Rules of Civil Procedure provide that that such a motion must be filed "within a reasonable time" and that if relief is requested under, *inter alia*, Rule 60(b)(1), the request must be made within a year of the final judgment. It noted that in this case, the order became final in October 2015 and the motion to reopen was filed in December 2016, more than a year after the final order. As a result, the Secretary argued that the motion must be denied.

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

When the Commission considers a request to reopen a proposed assessment which has become final, it usually does so in accordance with Rule 60(b)(1), under which a final judgment against a party may be relieved on the basis of "mistake, inadvertence, surprise, or excusable neglect." *See, e.g.*, *KenAmerican Res., Inc.*, 20 FMSHRC 199, 199-200 (Mar. 1998) (illness of safety director and lack of coordination between safety director and accounting department found to be inadvertence or mistake); *Austin Powder Co.*, 33 FMSHRC 581 (Mar. 2011) (operator's email to counsel requesting filing of contest inadvertently sent to inactive email account). This is the rule cited by Sims in its motion to reopen.

The Secretary correctly notes that pursuant to Rule 60(c)(1), a motion under Rule 60(b) "must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Hence, in cases seeking reopening of a final order, where the basis for the request is mistake, inadvertence, surprise, or excusable neglect, and the request is made more than one year after the order became final, the Commission has denied relief. *See*, *e.g.*, *Newmont USA Ltd*, 31 FMSHRC 808 (July 2009); *J.S. Sand & Gravel, Inc.*, 26 FMSHRC 795 (Oct. 2004).

In the instant matter, it is undisputed that Sims' motion to reopen was filed more than a year after the Imminent Danger Order became final. Thus, under our existing case law, we cannot grant relief using guidance from Rule 60(b)(1). However, that is not necessarily the end of the inquiry. As we have noted previously:

> On past and very infrequent occasions, the Commission has been guided by Rule 60(b)(6), which provides that relief from a judgment or order may be granted for "any other reason that justifies relief." Under Rule 60(b)(6), a motion seeking relief need not be filed within one year from entry of the judgment or order, although it must be filed within a "reasonable time." Fed. R. Civ. P. 60(c)(1). The Commission has considered reopening penalties which had become final pursuant to section 105(a), relying on Rule 60(b)(6), even though the motion had been made more than one year after the penalty has become final. *See, e.g., Brian D. Forbes*, 20 FMSHRC 99 (Feb. 1998) (remanding to judge where individual respondent claimed that he had no actual knowledge of the citation issued against him); *Contractors Sand & Gravel*, 23 FMSHRC 570 (June 2001) (remanding to judge to consider whether "extraordinary circumstances" exist where operator claims that it understood that assessments were included in separate settlement agreement).

Master Products Corp., 33 FMSHRC 645, 647-648 (Apr. 2011).

Master Products concerned an operator's motion to reopen a final penalty assessment under section 105(a) of the Mine Act. 33 FMSHRC at 645. As here, the Secretary opposed reopening on the grounds that the motion was filed more than a year after the order had become final. Nonetheless, upon reviewing the relevant circumstances, we ultimately determined that Rule 60(b)(6) applied to motions to reopen final Commission orders and that such a reopening was appropriate under the circumstances. That is, we determined that there were extraordinary circumstances that justified setting aside the default final order.

In that case, we noted that the operator had received a proposed assessment from the Secretary and had timely filed its contest. 33 FMSRHC at 650. However, it had mailed that contest to the wrong MSHA Office. *Id*. Nonetheless, "[a]ll of the events subsequent to the operator's timely submission led it to reasonably believe that it had properly requested a hearing." *Id*. In fact, MSHA verbally confirmed to the operator that it had received the contest. We determined that the "operator exercised diligence in pursuing its contest by making several attempts to contact MSHA and inquire as to the status of its case and responding to each correspondence it received from the agency." *Id*. The operator learned that the assessment had

become final when it received a delinquency notification. The operator repeatedly contacted MSHA via mail regarding the delinquency, but received no reply. The operator also contacted the collection agency within two days of receiving the delinquency notice to explain that it had contested the citation at issue.

We went on to explain why we found that the operator's motion, while filed over a year after the assessment had become final, was nonetheless made within a reasonable time, as required by Rule 60(c). We noted that for half of the 16-month period of default, the operator was corresponding with MSHA's Civil Penalty Compliance Office and the Department of Treasury's collection agency. 33 FMSHRC at 651. We further noted that the operator had received no response from MSHA despite "clear articulations of its understanding of the situation and express requests." *Id*. We determined that the operator's misapprehension arose from MSHA's inconsistent and misleading communication which would lead a reasonable person to conclude that the case had been properly contested and was being held up by bureaucratic delays. Put succinctly, we stated:

> Nothing in the record indicates that MSHA took any action to correct the operator's clearly-expressed understanding of the circumstances. In relying on the agency's silence and its earlier representations, Master Products failed to take further action within one year of the order becoming final because it reasonably believed that no further action was necessary.

Id. Therefore, we determined that reopening was appropriate.

The situation here is substantially similar. Sims, like Master Products, failed to properly contest an issuance before the Commission and it became a final order.[2] Nonetheless, Sims clearly believed that it had properly contested the Imminent Danger Order when it filed its contest to the related Citation. It consistently referred to both the Citation and the Order in all of its filings and expressed its intention to contest both. Further, Sims acted diligently and pursued its claim rigorously. It provided updates to the court (in which it reiterated its position regarding

[2] We have elected to proceed pursuant to Rule 60(b) in this case because the Commission has, in previous cases, considered imminent danger orders as though they are "final." *See, e.g., ACI Tygart Valley*, 38 FMSHRC 939 (May 2016). However, it is not certain that the order in this case was "final" in the fatal, legal sense applied to penalties issued pursuant to section 105(b). Unlike that section, section 107 does not contain a clause explicitly rendering an uncontested order a "final order." We believe that treating all penalties and orders as "final" is the better practice and is more consistent with the structure and language of the Act. But the fact that even the Secretary acted as though the imminent danger order remained a viable issue in the case, up until the latter stages of pretrial preparation, certainly renders this case "extraordinary."

the Imminent Danger Order) and participated in pre-hearing procedures. At no time did Sims exhibit anything but a good-faith belief that the Order was docketed for review.[3]

At all relevant times Sim's clearly expressed its understanding that it had properly contested the imminent danger order. What makes this case extraordinary, and therefore worthy of consideration under Rule 60(b)(6), is that MSHA affirmatively endorsed the operator's stated misunderstanding. Indeed, the agency behaved at all times as though it had received a timely contest. Unlike in *Master Products*, where the operator mostly experienced silence from the Secretary following the delinquency notice, the Secretary here prepared for the case as though it would involve the Imminent Danger Order. He even stipulated that the Judge had jurisdiction over the matter and made frequent references to the Order in his Prehearing Report. Further, the issuance here was not assessable and, as a result, Sims never received a delinquency notice that might have provided some indication that the Order had not been properly challenged.

It is clear that Sims took no action in the year following the final order because it reasonably believed that it had properly contested the Imminent Danger Order and was in the process of litigating the matter. Although the Secretary undoubtedly did not intend to deceive Sims, he fostered this mistaken belief. It was only after the one-year deadline had already passed and the Judge raised the issue that the Secretary argued that the Imminent Danger Order had not been contested. Under these circumstances, we conclude that it is appropriate to grant the relief

[3] Sims' failure to contest this issuance here could be characterized as a "mistake." As noted above, mistake is one of the discrete reasons for relief listed in Rule 60(b)(1), which is subject to the one-year rule in Rule 60(c). However, assuming it was a mistake, it was a mistake accompanied by extraordinary circumstances. In *Master Products*, we held that the Rule 60(b)(6) catchall provision could be used to reopen a default judgment over a year old, even if it was the result of "mistake," provided extraordinary circumstances existed. 33 FMSRC at 648-49. In reaching that conclusion, we cited the view of Rule 60(b)(6) taken by federal courts as summarized in 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2864 (2d ed. 2010), which allows for such treatment. We also noted the Seventh Circuit's decision in *Lowe v. McGraw-Hill Cos., Inc.*, 361 F.3d 335 (7th Cir. 2004), in which the Court set aside a default over a year after the judgment pursuant to Rule 60(b)(6) when the default occurred because of a "mistake." We continue to follow that guidance under the exceptional circumstances presented here.

requested by Sims and that that request was made within a reasonable time pursuant to Rule 60(c)(1).[4]

Therefore, in the interest of justice, and based on Rule 60(b)(6), we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

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

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

[4] Our dissenting colleague states that reopening this Order will serve no purpose. Slip Op. at 8. We do not agree. MSHA alleged a serious violation – the occurrence of an imminent danger. A section 107(a) violation is an "elevated" order for purposes of the Pattern of Violation Screening Criteria. Pattern of Violation Screening Criteria -2014, https://arlweb.msha.gov/pov/POVScreeningCriteria2014.pdf (last visited June 21, 2017). Standing alone, that is significant. Further, it is impossible to predict how the occurrence of such a violation might affect interests of the charged entity in other areas such as insurance and other litigation. Finally, a person charged with a serious violation of law must have a fair opportunity to contest such a charge. Absent reopening, the events connected with this violation would effectively deprive the operator of such an opportunity despite its clear intention to do so and its good faith and understandable belief that the agency also considered its challenge to be pending before the Commission.

Commissioner Jordan, dissenting:

Sims failed to contest an imminent danger order, and now asks the Commission to allow it to challenge the appropriateness of that enforcement action. Because Sims' request came more than a year after the deadline for seeking review of such order, making relief under F.R.C.P. 60(b)(1) inappropriate, and because it failed to demonstrate "extraordinary circumstances," deserving of relief under F.R.C.P. 60 (b)(6), I would deny the motion.

MSHA issued the imminent danger order on September 23, 2015. The order, written because a truck driver failed to use fall protection, was terminated one minute after it was issued (when the driver dismounted the crane on the truck to ground level). Thereafter, Sims had 30 days in which to file a notice of contest with the Commission. 30 U.S.C. § 817(e)(1); Commission Procedural Rule 22, 29 C.F.R. § 2700.22. It failed to do so.

In deciding whether "extraordinary circumstances" warrant relief in this case, it is useful at the outset to explore the effect of the operator's failure to challenge MSHA's enforcement action. Frankly one is hard-pressed to identify many practical consequences. The order was terminated one minute after it was issued and no penalty was assessed.[5] Not surprisingly, the operator's motion provides no reason why it will be better off if the Commission awards the relief it seeks.

Importantly, Sims has already challenged the citation that was issued in conjunction with the imminent danger order. The citation alleged that Sims violated the standard providing that fall protection be worn when persons work where there is a danger of falling, and a penalty was assessed in conjunction with that MSHA enforcement action.

A hearing was held, and on January 13, 2017, the Administrative Law Judge issued a decision upholding the violation but deleting the designation of "significant and substantial" and reducing the level of negligence and gravity. He also reduced the penalty from the $270.00 proposed by the Secretary to $100. 39 FMSHRC 116 (Jan. 2017). Sims filed a petition for discretionary review of the Judge's finding of a violation. The Commission granted the petition, and the case is currently pending before us.[6]

Therefore, on the issue of whether MSHA properly enforced the fall protection requirement, the operator has had the benefit of a full due process hearing, and will ultimately have appellate review of the Judge's decision. This is in stark contrast to the usual default case

[5] The operator acknowledges that no penalties are assessed for imminent danger orders. Motion to Reopen, Declaration of W. Ben Hart at 2.

[6] Thus the effect of the majority's decision to grant the motion to reopen is that part of this docket will be remanded to the administrative law judge (on the merits of the imminent danger order) while the other part of the docket (regarding the validity of the citation) will be before the Commission on appeal. This type of inefficient piecemeal litigation has the potential to create confusion. *See Eagle Energy, Inc. v. Secretary of Labor*, 240 F.3d 319, 325 (4th Cir. 2001) (refusing to hear operator's appeal when the Secretary's appeal was still pending before the Commission).

involving a motion under Rule 60, where the operator has not yet had its day in court and the government is nonetheless in the position to collect a penalty.

Turning now to the operator's request for relief, a quick review of the Commission's procedural rules would have demonstrated to the operator that a formal filing of a Notice of Contest with the Commission was necessary to contest the order. Rather than filing such pleading with the Commission, Sims did nothing until December 2015, when it received a proposed assessment from the Secretary on the related citation. It contested the penalty linked to this citation by sending in a form to the Secretary, and in so doing mistakenly believed it had effectively contested the imminent danger withdrawal order. As the operator admits, the failure by Sims to properly contest the imminent danger order "was the result of mistake, inadvertence, and/or excusable neglect." Mot. at 7. This, of course, tracks the language of Federal Rule of Procedure 60(b)(1), on which Sims' motion is based. The majority, in turn, also acknowledges that "Sims' failure could be characterized as a 'mistake.'" Slip op. at 6, n.3.

However, because Sims did not file its motion to reopen until December 2016, more than one year after the imminent danger order should have been contested, relief under Rule 60(b)(1) may not be granted. Fed. R. Civ. P. 60(c)(1); Slip op. at 4.

My colleagues look to a different provision in Rule 60 (one not relied on by Sims) to afford relief to the operator. Under Rule 60(b)(6), relief from a judgment or order may be granted for "any other reason that justifies relief." Such a motion need not be filed within one year from entry of the order. However, it must be filed within a reasonable time. Fed. R. Civ. P. 60(c)(1).

The majority grants grant relief under the stringent test set forth by the Commission and the federal courts when applying this provision. In *Pioneer Investment Serv. Co. v. Brunswick Assoc. Limited Partnership*, 507 U.S. 380 (1993), the Supreme Court set forth the "extraordinary circumstances" standard used in these cases:

> To justify relief under subsection (6), a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay. . . . If a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable.

Id. at 393.

The Commission has also adopted the "extraordinary relief" standard for 60(b)(6) cases. *See Celite Corp*., 28 FMSHRC 105, 107 (Apr. 2006). My colleagues in the majority appear to agree that this is the proper test. Slip op. at 6, n. 3.

Generally, to be eligible for relief under 60(b)(6), a party must be without fault:

> In a vast majority of the cases finding that extraordinary circumstances do exist so as to justify relief, the movant is completely without fault for his or her predicament; that is the movant was almost unable to have taken any steps that would have resulted in preventing the judgment from which relief is sought.

12 James Wm. Moore et al., Moore's Federal Practice § 60.48[3][b] (3d ed. 2017).

The federal courts have also often emphasized that Rule 60(b)(6) is utilized to prevent extreme hardship. *See e.g. SEC v. North American Clearing, Inc.*, 656 Fed.Appx. 947, 949 (11th Cir. 2016) (holding that relief under 60(b)(6) may be invoked only when an absence of relief will result in "extreme and unexpected hardship"); *Norris v. Brooks,* 794 F.3d 401 (3rd Cir. 2015) (same).

Another black-letter law concept regarding Rule 60(b)(6) is that it cannot be used simply because a party has failed to meet the one-year time limit for filing a motion to reopen under Rule 60(b)(1). Thus, in *John R. Sand and Gravel*, 26 FMSHRC 403 (May 2004), we stated:

> "[The] one-year time limit is an outside time limit for motions requesting relief under subsections (1) through (3), and may not be circumvented by utilization of subsections (4) through (6) of Rule 60(b), which are subject only to a reasonable time limit, when the real reason for relief falls within subsections (1) through (3)."

Id. at 405. *quoting Lakeview Rock Products*, 19 FMSHRC 26, 28-9 (Jan. 1999)

The federal courts are in agreement:

> Of particular concern is that parties may attempt to use Rule 60(b)(6) to circumvent the one-year time limitation in other subsections of Rule 60)(b). . . . Recognizing this concern, we have found that Rule 60(b)(1) and Rule 60 (b)(6) are mutually exclusive, such that any conduct which generally falls under the former cannot stand as a ground for relief under the latter. Where a party's Rule 60(b) motion is premised on grounds fairly classified as mistake, inadvertence, or neglect, relief under Rule 60(b)(6) is foreclosed." [internal quotation marks and citations omitted)]

Stevens v. Miller, 676 F.3d 62, 67 (2d Cir. 2012); *see also* Moore's, § 60.48[2]; *Brandon v. Chicago Board of Education*, 143 F.3d 293, 295-296 (7th Cir. 1998) (holding, in a case where the clerk of the district court consistently sent court mailings to an incorrect address, that the "unusual combination of error by the Clerk's office and neglect by the attorney" were covered by Rule 60(b)(1), and that since (b)(1) applied, Rule 60(b)(6) did not).

In short, this summary of Rule 60(b) jurisprudence indicates that the only way in which Sims may be afforded relief is if the operator can (1) make a showing of "extraordinary circumstances," which includes proving that it was faultless, (2) establish that a denial of relief will result in "extreme hardship," and (3) demonstrate that the reason it deserves relief does not fall under Rule 60(b)(1). A review of the record reveals that this burden was not met.

The central basis of the majority's decision to grant relief is its attempt to transform this garden-variety 60(b)(1) case into a (b)(6) proceeding by placing responsibility squarely at the feet of the Secretary. The majority asserts that, "[w]hat makes this case extraordinary, and therefore worthy of consideration under Rule 60(b)(6), is that MSHA affirmatively endorsed the operator's stated misunderstanding." Slip op. at 6. Despite the fact that the burden in a Rule 60(b) case is on the operator to show that relief is warranted, the bottom line here is that my

colleagues reopen this proceeding because MSHA did not tell Sims that it had not properly contested the issuance of the withdrawal order. In effect they contend that this changes Sims' acknowledged "mistake" into Rule 60(b)(6)-worthy conduct. The effect of shifting this responsibility onto MSHA, is to potentially transform many future 60(b)(1) cases of operator mistake into (b)(6) proceedings (with no one-year time limits) simply because MSHA fails to inform an operator about the problems with its case.

My colleagues base their decision to grant relief specifically on the grounds that the Secretary failed to tell the operator it had erred and MSHA "prepared for the case as though it would involve the imminent danger order." Slip op. at 5-6. As noted above, however, it is not the Secretary's responsibility to tell the operator that it had failed to effectively contest the order (although it is certainly appropriate for a Solicitor to make this argument to a Judge). Moreover, the record does not reflect how the Secretary "prepared for the case." The penalty petition which did not mention Order No. 882352 (because, of course, no penalty is assessed for an imminent danger order), a notice of appearance and prehearing report are the only pre-trial submissions from the Secretary.

The majority also faults the Secretary for referring to the imminent danger order in its prehearing report. Slip op. at 6. But even if the Secretary's prehearing report created confusion regarding the validity of the contest of the order, that confusion was short-lived, because three days later (the next business day after the filing of the Secretary's pre-hearing report), during a conference call, both the Judge and the Secretary questioned whether Sims had properly filed a contest.[7]

Thus the majority fails to make the case that "extraordinary circumstances" exist and that the operator was faultless. It provides no reason why this motion should not be considered under Rule 60(b)(1) (and thus be ruled untimely).

Moreover, the majority's opinion directly conflicts with the Commission's decision in *Celite Corp*. That case involved a late-filed contest of a penalty and a motion to reopen that was filed over a year after the order became final. There had been a miscommunication between counsel for the operator and the Secretary, wherein both apparently failed to realize that the only remedy available to Celite was for the Commission to reopen the order that had gone final, subject to the time limits of Rule 60(b). *Celite Corp.*, at 28 FMSHRC at 107. We denied relief, explaining that "[t]his misunderstanding of well-established Commission law cannot be grounds for relief under Rule 60(b)(6). *Id*. Instead, it is an error that falls squarely within the ambit of Rule 60(b)(1)." We adopted the identical rationale in *Newmont USA Limited*, 31 FMSHRC 808

[7] The majority also states that the operator is entitled to relief because it acted diligently and pursued its claim rigorously (for instance, it participated in pre-hearing procedures and filed updates to the court). Slip op. at 5-6. However, an operator's responsible litigation of its case has little or nothing to do with whether "extraordinary circumstances" exist to warrant relief under Rule 60(b)(6) and does not remove its actions from the purview of Rule 60(b)(1).

(July 2009), which involved a similar misunderstanding between the operator and the counsel from the U.S. Department of the Treasury who handled the penalty collection matter.[8]

Neither Sims nor the majority argue that a denial of the motion to reopen will result in "extreme hardship," the final factor that must be demonstrated to obtain relief under Rule 60(b)(6)). This is not surprising since, as noted above, the imminent danger order was instantly terminated, and no penalty was assessed.

In conclusion, the majority has failed to demonstrate that Sims' mistake in not following our procedural rules and filing a proper notice of contest of the imminent danger order rises to the level of "extraordinary circumstances." It has also failed to show why the case should not be considered under Rule 60(b)(1). Finally, there is absolutely no showing of hardship to the operator if its motion is denied, since the order was terminated long ago and no allegation of harm has been presented.

By re-opening this matter and sending it back to the Judge (who as previously noted issued his decision on the related citation on January 13, 2017, a decision currently on appeal before us), the majority disregards longstanding Commission and court precedent in this area to reach an outcome that ultimately will have no practical significance. Accordingly, I respectfully dissent.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

[8] *Master Products*, 33 FMSHRC 645 (Apr. 2011), on which the majority relies, is distinguishable from the instant case. In *Master Products* (a case in which I dissented), the operator mailed a penalty contest to the wrong MSHA office, but MSHA verbally confirmed that it had received the contest. *Id*. at 650. The majority in *Master Products* concluded that the operator failed to take action within one year of the order becoming final because it reasonably believed none was needed due to the agency's silence and earlier representations. *Id*. at 651. Here, nothing occurred within one year of the imminent danger order becoming final that would have led Sims to reasonably believe it had filed a valid contest. MSHA certainly never verbally confirmed that it had and, as demonstrated above, even a cursory reading of our procedural rules would have disabused Sims of the notion that it had properly filed a notice of contest of the imminent danger order with the Commission. (The Secretary's pre-hearing report, on which the majority relies, was filed after the one year period had passed, and, as noted above, any influence it might have had on Sims' belief that it had properly contested the order must have been fleeting, because on the next business day both the Judge and the Secretary raised the possibility that the contest had not properly been filed).

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July 10, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	
v.	Docket No. CENT 2016-0190 A.C. No. 23-00134-382897
BUZZI UNICEM USA	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On January 28, 2016, the Commission received from Buzzi Unicem USA ("Buzzi") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 8, 2015, and became a final order of the Commission on July 8, 2015. Buzzi asserts that MSHA received its contest late, in part due to the assessment form incorrectly listing an old address for MSHA's Civil

Penalty Compliance Office ("CPCO").[1] Buzzi's safety and health manager first sent its contest form to the old address, then re-sent the form to the correct MSHA address after the initial form was returned undelivered. Buzzi's safety and health manager later contacted MSHA to ask about the case and learned that the proposed penalty assessment had become a final order.

The Secretary opposes the request to reopen, asserting that the operator's initial attempt to send its contest form was made too late, regardless of MSHA's change of address. MSHA further asserts that the operator's motion to reopen was not filed within a reasonable time because Buzzi waited five months after receiving a delinquency notice before filing its motion to the Commission. According to MSHA's records, a delinquency notice was mailed to the operator on August 24, 2015, and this case was referred to the Department of Treasury for collection on October 29, 2015.

It is unclear from the record when Buzzi first attempted to file its contest of MSHA's proposed penalty assessment. We have previously acknowledged the problems that resulted from MSHA's address change and liberally granted operators' requests to reopen proceedings filed during that period. *See Allstate Materials, LLC,* 38 FMSHRC 645, 646 (Apr. 2016). Even assuming Buzzi's initial effort was made late, in these special circumstances, we would err on the side of concluding that the late filing was the result of an excusable mistake.

Although the Secretary also asserts that Buzzi should have filed its motion to reopen more promptly, the delinquency notice was delivered shortly after the pro se operator sent its contest to the correct MSHA address. Given the timing of these events, the operator's failure to understand that the delinquency notice indicated the proposed assessment had become a final order is, in this instance, excusable. Upon later inquiring about the citation and learning the contest had arrived late, the operator promptly moved to reopen this matter.

[1] MSHA's office moved to a new address on July 15, 2015.

In light of our past precedent addressing the relocation of MSHA's office, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
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/s/ Robert F. Cohen, Jr.
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July 10, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. ORIGINAL FUELS, INC.	Docket No. PENN 2015-185-M A.C. No. 36-09386-376805

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 9, 2015, the Commission received from Original Fuels, Inc. ("Original Fuels") a motion seeking to reopen a penalty assessment proceeding and seeking relief from the Default Order entered against it.

On March 23, 2015, the proposed assessment was delivered to the operator. On March 25, 2015, the operator timely contested the assessment. On April 6, 2015, a Petition for Assessment of Civil Penalty was mailed to the operator's physical address. The operator did not respond.

On July 10, 2015, the Chief Administrative Law Judge issued an Order to Show Cause in response to Original Fuels' failure to answer the Secretary's Petition. The Order to Show Cause stated that it would become a default order on August 10, 2015, if the operator failed to file an answer to the petition before that date.

The Commission's records show that the operator timely filed a response to the show cause order on August 4, 2015. The operator's response to the show cause order clearly sets forth its reasons for contesting the relevant penalties. In its August 4 response to the Commission, the operator further represents that it sent a copy of the letter to the Secretary . *See* Aug. 4, 2015 Letter.

The Secretary opposes the motion to reopen, asserting that the operator failed to timely respond to the petition. In his Opposition to Request to Reopen Penalty Assessment, the Secretary acknowledges the operator's August 4 response to the show cause order. Sec'y Opp. at 5. Despite this, MSHA proceeded as though the show cause order had become a default order on August 10, 2015, and mailed a delinquency notification to Original Fuels on September 29, 2015. The Secretary does not address the substance of the August 4 letter or its effective response to the Judge's Order to Show Cause.

Having reviewed Original Fuels' request and the Secretary's response, we conclude that the operator was not in default under the terms of the Order to Show Cause because it timely complied with the order. *See Vulcan Construction Materials*, 33 FMSHRC 2164 (Sept. 2011). The alleged default is a nullity. Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
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/s/ Robert F. Cohen, Jr.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 10, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	
v.	Docket No. SE 2015-112-M A.C. No. 01-03130-368269
COUCH AGGREGATES LLC	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 22, 2015, the Commission received from Couch Aggregates LLC ("Couch") a motion seeking to reopen a penalty assessment proceeding and seeking relief from the Default Order entered against it.

The Mine Safety and Health Administration ("MSHA") sent the proposed penalty assessment at issue to Couch in December 2014. Couch properly contested the assessment, listed the contesting official as its counsel, Jonathan Holloway, and provided his personal address for any correspondences. On January 16, 2015, MSHA mailed a Petition for Assessment of Civil Penalty to Couch's Alabama address, rather than Holloway's address. Respondent did not file an answer to the Petition.

On July 10, 2015, the Chief Administrative Law Judge issued an Order to Show Cause in response to the operator's failure to answer the Secretary of Labor's penalty petition. By its terms, the Order to Show Cause was deemed a Default Order on August 10, 2015, because the operator failed to file an answer within 30 days. Like the proposed assessment and the penalty petition, the Order to Show Cause was sent to the operator's Alabama address of record.

Holloway avers that he did not receive a copy of the Order to Show Cause until September 22, 2015, when counsel for the Secretary forwarded him a copy of the order via e-mail.

The Secretary opposes the request to reopen, noting that the petition was correctly mailed to the operator's address of record and received on January 19, 2015. In addition, the Secretary asserts that counsel subsequently emailed a copy of the penalty petition to Holloway on June 19, 2015, and reminded the operator's attorney that it still needed to file an answer in the matter.

Under the Mine Act and the Commission's procedural rules, the Chief Administrative Law Judge's Order of Default became a final order of the Commission 40 days after the default

occurred. *See* 30 U.S.C. § 823(d); 29 C.F.R. § 2700.70(a). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure and has granted relief on the basis of mistake, inadvertence, excusable neglect, or another reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Commission Procedural Rule 66 requires that an order to show cause be issued to a party before an entry of default against that party. 29 C.F.R § 2700.66(a). Commission Procedural Rule 7 requires that "[w]henever a party is represented by an attorney or other authorized representative who has entered an appearance on behalf of such party . . ., service thereafter shall be made upon the attorney or other authorized representative." 29 C.F.R. § 2700.7. Although Holloway was listed as counsel for Couch, Commission records indicate that the July 10 Show Cause Order in this matter was delivered to Couch's office, rather than to Holloway. Accordingly, a default order should not have been entered against the operator. Holloway received a copy of the show cause order from the Secretary's counsel on September 22, 2015, and promptly filed a request that the case be reopened that same day.

Given Holloway's prompt filing of the motion to reopen after receiving the Order to Show Cause, we find that the operator acted in good faith and filed its motion to reopen within a reasonable time upon learning of the default. In the interest of justice, we therefore reopen the proceeding, vacate the Default Order, and remand this matter to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 10, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. STEVE INGRAM, employed by JIM WALTER RESOURCES, INC.	Docket No. SE 2016-32 A.C. No. 01-01401-387866 A

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On November 2, 2015, the Commission received a motion from Steve Ingram ("Ingram") seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission.

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment for the alleged 110(c) violation was delivered on August 3, 2015, and became a final order of the Commission on September 2, 2015. A delinquency notification was mailed to the individual on October 19, 2015.

Ingram asserts that Order No. 8524966, a 104(d)(1) order, was the basis for Ingram's alleged violation under section 110(c), 30 U.S.C. § 820(c). However, as part of a settlement between the Secretary and Ingram's employer, this order was modified to a 104(a) citation. Ingram contends that by operation of law, a modification of a section 104(d) order to a section 104(a) citation precludes individual liability under section 110(c). Therefore, Ingram argues that this matter must be reopened so that the 110(c) proceeding can be dismissed.

The Secretary does not oppose the request to reopen, does not dispute Ingram's contentions, and requests that the Commission reopen this 110(c) proceeding. After the Commission reopens this proceeding, the Secretary suggests that MSHA will move to dismiss it.

Having reviewed Ingram's request and the Secretary's response, given that both parties agree that this matter should be reopened and then dismissed, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall either dismiss this matter or file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
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/s/ Robert F. Cohen, Jr.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 10, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. APPLIED MINERALS, INC.	Docket No. WEST 2016-130-M A.C. No. 42-02383-389320

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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July 25, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. THE AMERICAN COAL COMPANY	Docket No. LAKE 2009-35

DIRECTION FOR REVIEW

The petition for discretionary review filed by The American Coal Company is granted in part and denied in part. The Commission grants review regarding the first five questions presented in the petition. The Commission denies review regarding the question of whether the Judge applied the incorrect legal standard in assessing a penalty for Order No. 7490599.

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

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

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

ADMINISTRATIVE LAW JUDGE DECISIONS

THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE NW, SUITE 520N
WASHINGTON, D.C. 20004

July 12, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2016-463-M A.C. No. 16-01536-414747
v.	Docket No. CENT 2016-519-M A.C. No. 16-01536-417024
SOUTHERN AGGREGATES, LLC, Respondent	Mine: Plant 9

DECISION

Appearances: Jim DoByns, Conference and Litigation Representative, U.S. Dept. of Labor, MSHA, Dallas, Texas; Christopher Lopez-Loftis, Esq., U.S. Dept. of Labor, Office of the Solicitor, Dallas, Texas, for Petitioner;

Justin Winter, Esq. and Bryan Carey, Esq., Conn Maciel Carey PLLC, Washington, D.C., for Respondent.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") against Southern Aggregates, LLC, ("Southern Aggregates"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(d). The Secretary seeks a total penalty of $214.00 for two alleged violations of his mandatory safety standards.

A hearing was held in New Orleans, Louisiana. The following issues are before me: (1) whether Southern Aggregates violated the cited standards; (2) whether the violations were attributable to the level of gravity alleged; (3) whether the violations were attributable to the degree of negligence alleged; and (4) the appropriate penalty. The parties' Post-hearing Briefs are of record.

For the reasons set forth below, I **VACATE** one citation, **AFFIRM** one citation, as modified, and assess a penalty against Respondent.

I. FACTUAL BACKGROUND

Southern Aggregates operates Plant 9, a surface sand and gravel mine in Amite, Louisiana, which employs 11 miners. Ex. R-1 at 1. Southern Aggregates' mining process involves dredging sand from a pond into two plants consisting of belt lines, screw conveyors, a log washer, and a scale house. Tr. 20. Kevin Black, Plant 9 Vice President and General Manager, and Duane "Bull" Lanier, Plant 9 Manager, were working at the Plant at the time of the inspection. Tr. 79, 81; Ex. R-1 at 2.

On May 26, 2016, MSHA Inspector O'Neal Robertson, accompanied by Bull Lanier, conducted a regular inspection of Plant 9 that resulted in three citations, two of which are at issue in this proceeding: failure to replace a discharged fire extinguisher in the cab of an excavator (Ex. P-1); and failure to maintain a guard on the pea gravel beltline to withstand the effect of normal operation (Ex. P-3). Tr. 19, 21.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8964279

Inspector Robertson issued 104(a) Citation No. 8964279 on May 26, 2016, alleging a violation of section 56.4203 that was "unlikely" to result in an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Southern Aggregates' "moderate" negligence.[1] The "Condition or Practice" is described as follows:

> Fire extinguishers shall be recharged or replaced with a fully charged extinguisher promptly after any discharge. The five lbs. fire extinguisher in the John Deere excavator showed recharged on the gauge. The excavator is used as needed to do various clean up jobs around the plant. A miner has been using this machine since the start of his shift. A miner could receive smoke or burn type injuries from not being able to extinguish a fire at its early stages.

Ex. P-1. The citation was terminated on May 26, after Southern Aggregates replaced the extinguisher in the excavator.

[1] 30 C.F.R. § 56.4203 provides that "[f]ire extinguishers shall be recharged or replaced with a fully charged extinguisher promptly after any discharge." The Secretary's unopposed Motion to Plead in the Alternative a violation of 30 C.F.R. § 4200(b)(2) was granted on October 21, 2016.

30 C.F.R. § 56.4200(b)(2) provides that "onsite firefighting equipment shall be [s]trategically located, readily accessible, plainly marked, and maintained in fire-ready condition."

1. Fact of Violation

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152) (Nov. 1989)).

The Secretary contends that Southern Aggregates failed to replace a fire extinguisher which, according to its pressure gauge, had been discharged. In the alternative, the Secretary argues that the gauge reading demonstrated that the extinguisher was not being maintained in fire-ready condition because a miner would choose not to use it in the event of a fire. Sec'y Br. at 6-7.

Southern Aggregates, relying on the National Fire Protection Association's Standard for Portable Fire Extinguishers, argues that a gauge reading, alone, is insufficient to establish a violation of either standard, and that the fire extinguisher had not been discharged and was fire ready. Resp't Br. at 7-9 (citing 10 NATIONAL FIRE PROTECTION ASSOCIATION, STANDARD FOR PORTABLE FIRE EXTINGUISHERS §§ 7.1.7.1.1, 7.2.2, A.7.7.1.3 (2013 ed.)). It cites several cases in support of its position that the operator can rebut evidence of discharge with other indications of an extinguisher's condition. Resp't Br. at 6-8; *see Warren E. Manter Co., Inc.*, 11 FMSHRC 805 (May 1989) (ALJ) (dismissing a violation of section 56.4203 where the inspector failed to note an extinguisher's pressure gauge reading, and the operator averred that the extinguisher was full); *Paul Hubbs Constr. Co.*, 9 FMSHRC 1368 (Aug. 1987) (ALJ) (upholding a violation of section 56.4200(b)(2) where the inspector observed a "completely discharged" fire extinguisher in a trailer, and the operator failed to prove that it had been discharged by vandalism); and *Brighton Sand & Gravel*, 13 FMSHRC 127 (Jan. 1991) (ALJ) (upholding a violation of section 56.4203 by relying upon the low gauge reading).

Inspector Robertson came to MSHA in 2015, having worked in the mining industry for 21 years, with experience and training in diesel engine maintenance and fire suppression. Tr. 16-18. He had performed approximately 160 MSHA inspections, and cited fire extinguisher and guarding violations. Tr. 17-19. Robertson testified that on May 26, he inspected the cab of a Southern Aggregates excavator that had been operated recently, and observed that the gauge on a five-pound fire extinguisher displayed "recharge."[2] Tr. 24, 45, 62; Exs. P-1 at 2, P-2 at 1; Ex. R-1 at 5. He stated that the extinguisher showed no signs of damage, that the firing pin and zip-tie were intact, that he was not told that it had been used, and that Southern Aggregates diligently performs preshift examinations. Tr. 30, 45-46. He opined that the excavator operator was exposed to burn and smoke inhalation hazards because the extinguisher, possibly partially or even fully inoperable, may have been ineffective in timely extinguishing a fire. Tr. 28-29. He determined that such injury would have been unlikely, however, because the excavator operator would have been able to leave the cab in the event of a fire, and other fire extinguishers were accessible. Tr. 29.

[2] Robertson's testimony variously refers to the gauge as indicating either "discharge" or "recharge." Both terms have the same meaning and effect.

He testified that section 56.4203 requires operators to replace or recharge fire extinguishers that have been discharged, and that section 56.4200(b)(2) requires operators to maintain fire extinguishers in ready-to-use condition. Tr. 24. He explained that a fire extinguisher is operated by removing the firing (or retaining) pin, which breaks the zip-tie holding the pin in place, thereby allowing the trigger to be squeezed to release the fire extinguishing chemical. Tr. 47-49. Finding an intact zip-tie and firing pin, without more, he testified, is an insufficient basis for concluding that the extinguisher had not been discharged, considering that he has personally encountered extinguishers that have leaked propellant because of being jostled around. Tr. 67-71, 73-74. Nor would such leaks be detectible by weighing the extinguisher, he stated, because propellant weighs very little compared to the extinguishing chemical which accounts for most of its weight. Tr. 75. Instead, he explained, miners are trained to rely upon the gauge reading, which indicates the pressure of the gaseous propellant that dispenses the extinguishing chemical and, even in a fire emergency, miners would seek an alternative to using an extinguisher indicating that it needs recharging. Tr. 25-26, 70-71.

VP Kevin Black testified that he instructed an employee to deliver the cited extinguisher to him on the day of the inspection. Tr. 85. He opined that the gauge was on "recharge" because it may have been faulty, as opposed to the extinguisher having been discharged. Tr. 87. He reached that conclusion because the fire extinguisher was in good condition, the firing pin and zip-tie were intact, its weight was consistent with that of a fully charged extinguisher, the preshift examination noted no defects and, based upon his management position, any event requiring its discharge would have been reported to him. Tr. 82-86. Furthermore, he noted that miners would have replaced the extinguisher had the "recharge" gauge reading been observed. Tr. 104.

Robertson and Black both testified that during the later post-inspection close-out meeting, Black told Robertson that he had weighed the fire extinguisher and found the weight to be consistent with that of a fully-charged unit, i.e., slightly less than five pounds. Tr. 30-31, 49-50, 86. Robertson also corroborated Black's testimony that he offered to discharge the extinguisher to prove it operable, but that Robertson declined to consider its weight or a discharge test because of his uncertainty as to whether the extinguisher had been switched. Tr. 50, 88-89. Black stated that he was of the impression that Robertson would be issuing the citation in any case and, therefore, he did not discharge it. Tr. 88-89.

It is uncontested that the pressure gauge of the fire extinguisher was in the "recharge" position, that the extinguisher was otherwise in good condition, that its weight was slightly less than five pounds, and that the firing pin and zip-tie were intact. I credit Black's testimony that he would have been made aware of any event involving its intentional discharge and, in conjunction with Robertson's testimony attesting to Southern Aggregates' diligence in performing examinations, and Black's assertion that the May 26 preshift examination revealed no defects on it, I find that the low pressure reading manifested some time after the preshift examination, and that the cause was other than intentional discharge. Simply put, the Secretary has not presented sufficient evidence to establish that Southern Aggregates discharged the fire extinguisher, triggering a duty to recharge or replace it, as opposed to the "recharge" indicator being a condition of leaked propellant or a faulty gauge. Therefore, I find that the Secretary has failed to establish a violation of section 56.4203.

Such is not the case, however, when analyzing the facts under the alternatively pled standard, section 56.4200(b)(2), which requires Southern Aggregates to maintain its fire extinguishers in fire-ready condition. Robertson offered credible, unrebutted testimony that miners are trained to rely on the gauge and, therefore, would forego use of a fire extinguisher indicating "recharge" in the event of an emergency. This position is persuasive, given that fire emergencies generally leave no time for testing of firefighting equipment. Southern Aggregates' reliance on sections of the Standard for Portable Fire Extinguishers, cited to contend, in essence, that a fire extinguisher may be fire ready even if the gauge is malfunctioning, is misplaced. Those sections merely enumerate criteria for inspecting fire extinguishers, including weighing the units and checking their gauges; they do not establish that fire extinguishers are fire ready where the gauges indicate otherwise. Similarly, none of the cases cited by the operator undermines the central importance of reliance on the pressure gauge to determine fire readiness. On the contrary, the citation in *Manter* was vacated precisely because the inspector failed to check the gauge. Thus, Robertson's sole reliance on the fire extinguisher's gauge is consistent with the reasonable proposition that an extinguisher cannot be fire ready where a miner cannot rely upon the visual cue provided, especially during an emergency, to alert him immediately to its condition. Moreover, by Southern Aggregates' own account, its miners would have replaced the extinguisher had they noticed the gauge reading. Accordingly, the Secretary has established a violation of section 56.4200(b)(2).

2. Gravity and Negligence

The record establishes the unlikelihood of the excavator operator suffering injuries resulting in lost workdays or restricted duty from smoke inhalation and burns in the event of a fire, because of ease of egress from the cab and accessibility of other fire extinguishers. The Secretary argues that Southern Aggregates was moderately negligent under either standard because, as mitigation, it examines its fire extinguishers daily. Sec'y Br. at 8. As noted above, the preshift examination of the fire extinguisher was unremarkable, and the "recharge" indicator developed as the excavator was operating during the shift. No prudent operator, exercising reasonable care, would have known of the gauge movement under these circumstances and, accordingly, I find that Southern Aggregates was not negligent in violating the standard.

B. Citation No. 8964281

Inspector Robertson issued 104(a) Citation No. 8964281 on May 26, 2016, alleging a violation of section 56.14112(a)(1) that was "unlikely" to result in an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Southern Aggregates' "moderate" negligence.[3] The "Condition or Practice" is described as follows:

> Guards shall be constructed and maintained to withstand the vibration, shock, and wear to which they will be subjected during normal operation; and shall be

[3] 30 C.F.R. § 56.14112(a)(1) provides that "[g]uards shall be constructed and maintained to [w]ithstand the vibration, shock, and wear to which they will be subjected during normal operation."

> securely in place while machinery is being operated except when testing or making adjustments which cannot be performed without removal of the guard. The guard for the p gravel stacker belt had fallen off exposing the rotating shaft on the head pulley. The opening on the guard measured 3 ft. wide x 4½ ft. long. Miners come in this area as needed to do maintenance and repairs. A miner could receive entanglement type injuries from contacting rotating machinery.

Ex. P-3. The citation was terminated on May 26, when Southern Aggregates secured the guard in place.

1. Fact of Violation

The Secretary contends that a head-pulley guard had detached from its mounting points, creating an opening for miners to inadvertently contact moving parts. Sec'y Br. at 9-10. The Secretary cites two cases in which violations were found under section 56.14112(b) to support his contention that evidence of the detached guard, by itself, is sufficient to find a violation under section 56.14112(a)(1). Sec'y Br. at 10-11 (citing *Washington Rock Quarries, Inc.*, 28 FMSHRC 1080 (Dec. 2006) (ALJ); and *Jamieson Co.*, 13 FMSHRC 1500 (Sept. 1991) (ALJ)).

Southern Aggregates argues that there is no evidence that the guard had not been designed or maintained to withstand normal operation, and that the citation should be vacated. Resp't Br. at 10-12 (citing *Lakeview Rock Products, Inc.*, 19 FMSHRC 321 (Feb. 1997) (ALJ) (vacating a section 56.14112(a)(1) order where no evidence was presented that the tail-pulley guard came out of place as a result of normal operation)).

Robertson testified that section 56.14112(a)(1) requires guards to be constructed and maintained to protect miners during normal equipment operation. Tr. 33. He stated that on May 26, while the plant was operating, he climbed the catwalk of the pea gravel belt, an incline stacker beltline, until he reached the head-pulley area, situated approximately 20 to 25 feet above ground, and that miners would periodically enter this area to perform maintenance or repairs. Tr. 33, 35, 36, 39, 52-53. He was shown two photographs that he took during the inspection, which he described as depicting a metal guard that was leaning against the head-pulley mechanism and, thus, was not positioned in its designated place. Tr. 34, 37; Ex. P-4 at 1-2. He testified that the guard showed no signs of wear and tear, and was not bent, only rusted from age. Tr. 55. He determined that the guard had come askew because the tabs (zip-ties or tie wire) securing it to the frame had broken sometime before the inspection. Tr. 34, 37. He discussed this condition with Bull Lanier, who told him that miners had been working in that area a couple of days before the inspection. Tr. 39. Robertson testified that he could not remember whether, in fact, Lanier told him that the guard had been removed in order to perform maintenance but, he surmised, maintenance "very likely" explained the guard's detachment. Tr. 56, 74.

Black testified that miners access the head-pulley monthly to perform greasing. Tr. 92. When shown Robertson's two photographs of the guard, he testified that the guard was askew because the ties, either zip-ties or tie wire, holding it in place had "broke." Tr. 91, 95; Ex. P-4 at 1-2. Finally, he stated that he did not know whether maintenance had been performed in the head-pulley area before the inspection, but implied that Lanier would know. Tr. 111-12.

Commission judges have upheld section 56.14112(a)(1) violations where there is credible evidence that the conditions of normal equipment operation caused the guards to dislodge. For example, in *Northshore Mining Company*, a violation of section 56.14112(a)(1) was found upon the inspector's testimony that normal operation included exposure to corrosion from wet processes and belt vibrations which caused the guard's failure. 36 FMSHRC 426, 431-32 (Feb. 2014) (ALJ); *see also Carder Inc.*, 27 FMSHRC 839, 842-44 (Nov. 2005) (ALJ) (finding a violation of section 56.14112(a)(1) where the inspector testified that vibrations from normal operation caused the guard to become loose). Conversely, citations have been vacated where such causal evidence was lacking. For example, in *Lakeview*, a violation of section 56.14112(a)(1) for an out-of-place rear tail-pulley guard and side guard was vacated because the Secretary's evidence was limited to the danger posed by the openings between the dislodged guards, and there was no evidence that the guards detached due to vibration, shock, or wear from normal operation. 19 FMSHRC at 355-57. Similarly, in *Lehigh Southwest Cement Company*, a violation of section 56.14112(a)(1) for a damaged guard on the tail-pulley was vacated because the inspector's notes and operator's testimony indicated that the guard had been damaged by a Bobcat skid-steer loader, an abnormal event unrelated to normal operation. 33 FMSHRC 340, 352 (Feb. 2011) (ALJ).

In this case, prior to the inspection, the ties securing the guard in place had broken or been severed, and the guard had dislodged from its originally designated position. The guard was observed to be in good condition, without signs of wear or tear, and I credit Robertson's account of what he was told, that maintenance had been performed a few days prior to the inspection. Critically, no evidence was introduced as to the actual cause of the ties' compromise, and Robertson could only speculate as to the probability that the guard was displaced due to recent maintenance. Here, as in *Lakeview*, there is no evidence of the stress generally imposed on the guard by normal operation, let alone any evidence that operational stress specifically caused the ties to break. Therefore, the record provides no basis from which to conclude that the guard dislodged due to normal operation of the beltline, rather than from some abnormal incident, as in *Lehigh*, or from deliberate severance of the ties during recent maintenance. Furthermore, notwithstanding the exposure to the moving parts of the head-pulley, there is no evidence that the guard, detached and leaning against the head-pulley, would not be able to withstand the vibration, shock, and wear of continued normal operation. I note, at this juncture, that Southern Aggregates was not cited under the standard requiring that guards be secured in place. Accordingly, I find that the Secretary has failed to establish a violation of section 56.14112(a)(1), and Citation No. 8964281 must be vacated.[4]

III. PENALTY

While the Secretary has proposed a civil penalty of $114 for Citation No. 8964279, the judge must independently determine the appropriate assessment by proper consideration of the

[4] The Secretary's reliance on *Washington Rock* and *Jamieson* is misplaced because those cases arose under a distinguishable standard, section 56.14112(b), requiring that guarding be secured in place, whereas section 56.14112(a)(1) requires that guards be constructed and maintained to withstand stresses of normal operation.

six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, and based upon a review of MSHA's online records, I find that Southern Aggregates is a small operator employing 11 miners, with an overall history of violations that is neither a mitigating nor aggravating factor in assessing appropriate penalties (in the 15 months preceding the inspection, the operator had been cited for eight violations, unrelated to any standard at issue in this proceeding). As stipulated, Southern Aggregates demonstrated good faith in achieving rapid compliance after notice of the violations. Jt. Stip. 7. Since Southern Aggregates has not put forth any evidence that imposition of the proposed penalty would adversely affect its ability to remain in business, "it is presumed that no such adverse [e]ffect would occur." *Sellersburg*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sept. 1973)).

The remaining criteria involve consideration of the gravity of the violation, and Southern Aggregates' negligence in its commission. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalty is set forth below.

Respecting Citation No. 8964279, it has been established that this violation of section 56.4200(b)(2) was unlikely to cause injuries resulting in lost workdays or restricted duty, that Southern Aggregates was not negligent in violating the standard, and that it was timely abated. Based on these factors, and considering the operator's lack of negligence, I find that a penalty of $50.00 is appropriate.

ORDER

WHEREFORE, it is **ORDERED** that Citation No. 8964281 (Docket No. CENT 2016-463-M) is **VACATED**, and that Citation No. 8964279 (Docket No. CENT 2016-519-M) is **AFFIRMED**, as modified, to "no negligence."

It is further **ORDERED** that Southern Aggregates, LLC, **PAY** a civil penalty of $50.00 within thirty (30) days of the date of this Decision.[5] **ACCORDINGLY**, these cases are **DISMISSED**.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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[5] 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. Please include Docket number and A.C. number.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 12, 2017

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of, STACEY WAYNE PUCKETT, Complainant	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2017-426
v.	
PANTHER CREEK MINING, LLC Respondent	Mine: American Eagle Mine Mine ID: 46-05437

SUMMARY DECISION AND ORDER GRANTING TEMPORARY REINSTATEMENT

Appearances: Kathleen F. Borschow, Esq., Robert S. Wilson, Esq., Office of the Regional Solicitor, U.S. Department of Labor, Arlington, Virginia for Complainant;
Melanie J. Kilpatrick, Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky for Respondent

Before: Judge Feldman

This matter is before me based on an application for temporary reinstatement filed by the Secretary of Labor ("Secretary"), on behalf of Stacey Wayne Puckett, against Panther Creek Mining, LLC, ("Panther Creek") pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"). 30 U.S.C. § 815(c)(2). This statutory provision prohibits operators from discharging or otherwise discriminating against miners because they have engaged in safety related protected activity. Section 105(c)(2) of the Act authorizes the Secretary to apply to the Commission for the temporary reinstatement of a miner who has been terminated pending the full resolution of the merits of the underlying discrimination complaint. At the time of Puckett's termination on May 5, 2017, Puckett had been employed as a fireboss at Panther Creek's American Eagle Mine for approximately 18 months. App. for Temporary Reinstatement at 3.

The Secretary's application is supported by a sworn affidavit by Special Investigator Delbert Carroll, the official investigating the merits of Puckett's underlying discrimination complaint. In his application, the Secretary alleges, inter alia, that Puckett was terminated shortly after he spoke to MSHA Investigator Russell Richardson regarding a 110(c) investigation at the American Eagle Mine. *Id.* at 3-4.

The scope of a temporary reinstatement proceeding is very narrow. As discussed below, the issue to be decided is whether or not the miner's discrimination complaint has been frivolously brought. The Secretary's temporary reinstatement application is primarily based on Puckett's interviews with MSHA Special Investigator Richardson that occurred on April 13 and April 18, 2017, shortly prior to Puckett's May 5 termination.

The Secretary also relies on Puckett's reported series of complaints to mine management in February 2017 that he did not have adequate time to complete his fireboss duties. Sec'y Br. at 5 n.2. As discussed herein, since the Secretary is entitled to prevail as a matter of law in this reinstatement proceeding based on Puckett's interaction with Richardson, Puckett's alleged February 2017 complaints need not be addressed in this proceeding.

I. Procedural Background

A conference call was conducted on June 21, 2017, in order to clarify the issues. During the course of the conference call, counsel for Panther Creek represented that Panther Creek was not aware of Puckett's conversations with Richardson. Consequently, Panther Creek contended that Puckett's termination was in no way motivated by Puckett's participation in a 110(c) investigation. Significantly, however, the company did not deny that Puckett's interviews with Richardson occurred shortly prior to Puckett's May 5 termination.

Commission Rule 45(b) provides that the Secretary's assertion that a miner's discrimination complaint has not been frivolously brought shall be accompanied by a supporting affidavit setting forth the Secretary's preliminary investigative findings. 29 C.F.R. § 2700.45(b). As there appeared to be an undisputed coincidence in time between the 110(c) investigation interviews and Puckett's May 5 termination, I advised the parties that I would entertain a motion for summary decision by the Secretary supported by a sworn affidavit from MSHA Investigator Richardson. As time is of the essence, June 23 was established as the filing date for the Secretary's motion for summary decision, and June 28 was set for Panther Creek's opposition if Panther Creek believed that there were outstanding questions of material fact necessitating an evidentiary hearing.

On June 23, 2017, the Secretary filed a motion for summary decision with an accompanying brief ("Sec'y Br.") supported by a sworn affidavit from a relevant MSHA supervisory official. However, the affidavit provided was not that of Investigator Richardson, who was reportedly on vacation until June 27. Sec'y Br. at 2. In Richardson's stead, the affidavit was furnished by Supervisory Special Investigator Kelly Acord. *Id.* The sworn affidavit states that Acord is currently supervising the investigation of Puckett's discrimination complaint and Richardson's investigation of potential section 110(c) violations at Panther Creek's American Eagle Mine. Sec'y Ex. C at 1-2.

In support of the summary decision, the affidavit avers that Acord has personally confirmed with Richardson and Carroll that Puckett spoke to Richardson on two occasions – April 13 and April 18 – approximately two weeks prior to Puckett's May 5 termination. *Id.* As discussed below, not withstanding the fact that Panther Creek does not challenge Puckett's conversations with Richardson, the hearsay information provided in Acord's affidavit is

admissible in this administrative proceeding. *Mid-Continent Resources, Inc*., 6 FMSHRC 1132, 1135 (May 1984) (citation omitted) (acknowledging that "[h]earsay evidence is admissible in [Commission] proceedings so long as it is material and relevant."). Acord's affidavit is worthy of consideration, as Acord is supervising the investigations concerning Puckett's discrimination complaint as well as Panther Creek management's possible 110(c) liability.

On June 29, 2017, Panther Creek filed its opposition ("Resp't Br."). Panther Creek argues that an operator's knowledge of protected activity is an essential element of a successful discrimination complaint. Resp't Br. at 6. As such, Panther Creek asserts that "[a]t the time of Mr. Puckett's discharge, the persons who made the decision to discharge Mr. Puckett had no knowledge of any 110(c) investigation, let alone that Mr. Puckett had been interviewed."[1] *Id.* Rather, the company contends, based on an affidavit by Panther Creek Operations Manager Michael Burke, that Puckett was terminated as a consequence of his repeated failures, in the face of multiple warnings, to properly carry out his pre-shift examination duties. *Id.* at 5-6. In this regard, Panther Creek alleges that it was issued a citation on May 1, 2017, as a result of Puckett's failure to note "Date, Times, and Initials" on three separate date boards located within his pre-shift examination area. *Id.*; Resp't Ex. 1. Panther Creek also argues it is entitled to a hearing based on fundamental principles of due process as well as the requirements of the Commission's procedural rules. Resp't Br. at 4.

II. Procedural Framework

Unlike a discrimination proceeding adjudicating the merits of a discrimination complaint, the scope of a temporary reinstatement proceeding is narrow and the evidentiary burden placed on the Secretary is very low. To prevail in a discrimination proceeding, the Secretary must demonstrate by a preponderance of the evidence that the complainant participated in protected activity and that the adverse action complained of, in this case Puckett's termination, was motivated, at least in part, by that protected activity. An operator may rebut the Secretary's prima facie case or affirmatively defend. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 818 n.20 (Apr. 1981).

[1] In its opposition, Panther Creek notes that Puckett did not rely on his participation in a 110(c) investigation in his original discrimination complaint. Rather, Puckett's complaint of discrimination related solely to his discharge based on his performance as a fireboss. Miners cannot be expected to always effectively articulate the basis for their claims of discrimination. Moreover, MSHA investigations may reveal that miners have been confronted with pretextual explanations by mine operators that seek to mask a discriminatory motive. Consequently, the Commission has held that "the Secretary's decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on *the Secretary's investigation* of the initiating complaint . . . and not merely on the initiating complaint itself." *Hopkins County Coal*, 38 FMSHRC 1317, 1326 n.15 (June 2016) (citation omitted).

In determining whether there was a discriminatory motive in a discrimination proceeding, the Commission has noted that "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Accordingly, the Commission considers whether there is circumstantial indicia of motive, such as: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment. *Id.* In determining whether there is circumstantial evidence of motivation at a discrimination hearing, the judge will be required to make credibility determinations and resolve conflicts in testimony.

In contrast, a temporary reinstatement proceeding only requires that the underlying discrimination complaint is not frivolously brought. 30 U.S.C. § 815(c)(2). In this regard, in addressing the burden of proof required in a temporary reinstatement proceeding, the Eleventh Circuit Court of Appeal has stated:

> The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' -- an interpretation that is strikingly similar to a reasonable cause standard. In a similar context involving the propriety of agency action seeking temporary relief, the former Fifth Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous.*'

Jim Walter Resources v. FMSHRC, 920 F.2d 738, 747 (11th Cir. 1990) (emphasis in original) (footnote omitted) (citations omitted).

As a temporary reinstatement proceeding only requires that the underlying discrimination complaint is not frivolously brought, resolving credibility issues or conflicts in testimony goes beyond the scope of this temporary reinstatement matter. *Sec'y of Labor on behalf of Williamson v. CAM Mining,* 31 FMSHRC 1085, 1091 (Oct. 2009); *Secretary on behalf of Earl Charles Albu v. Chicopee Coal Company, Inc.,* 21 FMSHRC 717, 719 (July 1999). In this regard, the Commission has recently articulated that "in practice, in order to prevail on this very low burden of proof, the Secretary need only establish [in support of his temporary reinstatement application] protected activity and one of the circumstantial indicatives of motive." *Hopkins County Coal, LLC*, 38 FMSHRC 1317, 1326 (June 2016) (citing *Comunidad Agricola Bianchi, Inc.*, 32 FMSHRC 206, 211 n.9 (Feb. 2010) (ALJ Barbour)).

III. Analysis

A fundamental issue is whether Panther Creek is entitled to a hearing on the Secretary's application for temporary reinstatement, or, whether the question of Puckett's reinstatement can be decided summarily. It is undisputed that Puckett's conversations with Richardson are protected activity. Panther Creek neither concedes nor disputes Puckett's participation in the 110(c) investigation. However, Panther Creek asserts that it was not aware of Puckett's interaction with 110(c) investigator Richardson. Resp't Br. at 6. Nevertheless, the Commission has articulated "that the Secretary need not prove that the operator has knowledge of the

complainant's protected activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge." *Williamson*, 31 FMSHRC at 1090 (citing *Albu*, 21 FMSHRC at 718). The coincidence in time between Puckett's 110(c) interviews and his termination, consisting of approximately two weeks, satisfies the "not frivolously brought" standard. *See Hopkins*, 38 FMSHRC at 1326.

Addressing the specifics of Panther Creek's opposition, it must be noted that resolution of this application for temporary reinstatement is limited to Puckett's unchallenged protected activity with respect to his participation in the 110(c) investigation. Panther Creek's assertion that Puckett's termination was motivated by Puckett's pattern of malfeasance that culminated in the citation issued on May 1 for an inadequate pre-shift examination cannot defeat Puckett's temporary reinstatement. *See Sec'y on behalf of Deck v. FTS International Propants, LLC*, 34 FMSHRC 2388, 2391 (Sept. 2012) (citing *Williamson,* 31 FMSHRC at 1090) (holding that "an intervening event that could have constituted a non-discriminatory reason for termination" is not sufficient to defeat a temporary reinstatement application when there is a coincidence in time of two weeks between the protected activity and adverse action); *see also Williamson*, 31 FMSHRC at 1091 (holding that an operator's rebuttal or affirmative defense goes beyond the scope of a temporary reinstatement proceeding). Consequently, Panther Creek's reliance on Title VII case law, rather than Commission case law, for the proposition that "[m]ere coincidence in time is not sufficient to create reasonable cause to believe that the discharge was based on protected activity," is misplaced. Resp't Br. at 7 (citing *Scroggins v. Univ. of Minn.*, 221 F.3d 1042, 1045 (8th Cir. 2000)).

The Eleventh Circuit has addressed the resultant equities in the event that Puckett's underlying discrimination complaint is ultimately withdrawn by the Secretary or denied. The Court stated:

> Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of an employer's right to control the makeup of his work force under section 105(c) is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor.

Jim Walter Resources, 920 F.2d at 748 n.11 (emphasis in original).

Despite the fact that the coincidence in time between Puckett's protected activity and his termination remains unchallenged, Panther Creek, relying on Commission Rule 45(c) and the Commission's decision in *Sec'y on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 999-1000 (May 2012), asserts that due process requires an evidentiary hearing. Resp't Br. at 4. Rule 45(c) is procedural rather than substantive in that it sets forth the guidelines for

requesting and scheduling a temporary reinstatement hearing. Rule 45(d) sets forth the evidentiary parameters to be addressed in a temporary reinstatement hearing:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. *The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary* and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

29 C.F.R. § 2700.45(d) (emphasis added).

Obviously, Rule 45(d) contemplates affording a mine operator due process in a temporary reinstatement proceeding by providing an opportunity to be heard. Here, Panther Creek has been heard by virtue of its opposition to the Secretary's motion for summary decision. Significantly, consistent with the guidelines in Rule 45(d), Panther Creek's opposition contains sworn affidavits and documentary evidence in support of its assertions that it terminated Puckett for reasons unrelated to protected activity and had no knowledge of Puckett's participation in a 110(c) investigation. The rub is that the affidavits and documentation relied upon by Panther Creek pertain to its rebuttal and/or affirmative defense to Puckett's underlying discrimination complaint, as well as credibility issues as to knowledge, that must await resolution in a subsequent hearing on the merits. *See Williamson*, 31 FMSHRC at 1090-91 (holding that resolutions of credibility and rebuttal or affirmative defenses go beyond the scope of a temporary reinstatement proceeding).

With respect to Panther Creek's purported right to cross-examine the Secretary's witnesses, given Puckett's unchallenged protected activity, the company's opposition plainly reflects that it has no material cross-examination to conduct. If a hearing were held in this matter, it would be limited to the substance of the affidavit relied on in the Secretary's motion for summary decision detailing Puckett's participation in the 110(c) investigation. Panther Creek's assertion "that the persons who made the decision to discharge Mr. Puckett had no knowledge of any 110(c) investigation" does not challenge or rebut the substance of the Secretary's affidavit. Resp't Br. at 6. Significantly, as a matter of law, resolution of the question of Panther Creek's knowledge, or lack thereof, must await disposition in a hearing on the merits. In this temporary reinstatement proceeding, the coincidence in time between Puckett's protected activity and his discharge provides sufficient probative evidence to support the Secretary's application. Thus, there is no material cross-examination that could be conducted. Specifically, as already noted, Panther Creek does not dispute that Puckett's interactions with the investigator constitute protected activities and that there was a coincidence in time between these protected activities and the adverse action complained of. Moreover, summary decision provides the parties with a written judgment from an independent decision maker that can be appealed by an aggrieved party. That a summary decision can satisfy due process is codified by Rules 54 and 56 of the Rules of Civil Procedure.

That a hearing is not required based on the circumstances of this case is clearly evident based on application of Rule 56 of the Federal Rules of Civil Procedure. Rule 56(a) states that, "*The court shall grant summary judgment* if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). (emphasis added) The goal of adjudication is addressed in Rule 54(a) of the Federal Rules of Civil Procedure which mandates that a judgment must be a decree "from which an appeal lies." Fed. R. Civ. P. 54(a). The coincidence in time between Puckett's protected activities and his termination entitles the Secretary to a favorable judgment as a matter of law. Summary judgment provides Panther Creek, the aggrieved mine operator, with an appealable decision. Federal Civil Procedure Rules 54 and 56 are consonant with Commission Rule 67 concerning summary decision. 29 C.F.R. § 2700.67. Surely Commission Rule 45(d), when read in the context of the Rules of Civil Procedure and Commission Rule 67, mandates a hearing in a temporary reinstatement case only if it is necessary.

Finally, Panther Creek apparently relies on the Commission's reference to Commission Rule 45 in its *Shemwell* decision for the proposition that it is entitled to a hearing regardless of whether the Secretary has shown that Puckett is entitled to reinstatement as a matter of law. In *Shemwell*, the Commission stated:

> Rule 45 sets forth procedural protections that meet the "fundamental requirement of due process" because they give the operator the "opportunity to be heard '*at a meaningful time and in a meaningful manner*.'" *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990) (citations omitted). Among other things, the operator will have the opportunity to cross-examine any witnesses supporting the Application for Temporary Reinstatement. As part of those protections, a party is entitled to a hearing on an application for temporary reinstatement within 10 days of requesting one. 29 C.F.R. § 2700.45(c).

Shemwell, 34 FMSHRC at 999 (emphasis added). As previously discussed, the procedural protections identified in *Shemwell* have been satisfied by virtue of Panther Creek's supporting submissions consisting of documentary evidence and sworn affidavits in its opposition to the Secretary's motion for summary decision. The fact that Puckett is entitled to temporary reinstatement as a matter of law based on undisputed facts prevents Panther Creek from being able to present evidence in an evidentiary hearing "in a meaningful manner." Absent further direction from the Commission that outstanding material issues remain unresolved, I cannot construe *Shemwell* to stand for the proposition that a hearing is required in a temporary reinstatement proceeding even if it is unnecessary.[2]

[2] It is noteworthy that the rationale for the Commission's vacating of the summary decision in *Shemwell* included the necessity for a hearing to address "whether there was a layoff that would toll an operator's temporary reinstatement obligation," an issue that is not present in this case. *Shemwell*, 34 FMSHRC at 1000.

In resolving this matter summarily, I note that Commission Rule 67(b) provides that "[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). When considering a motion for summary decision, the court looks at the record "'in the light most favorable to . . . the party opposing the motion,' and . . . 'the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion."' *Hanson Aggregates New York*, *Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Poller v. Columbia Broadcasting Sys., Inc*., 368 U.S. 464, 473 (1962) and *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962)).

Viewing the evidence in the light most favorable to Panther Creek, its assertion that it will ultimately prevail at a full hearing on the merits because Puckett's termination was not motivated by protected activity presents a question of credibility which goes beyond the scope of this proceeding. *Williamson*, 31 FMSHRC at 1090. Simply put, there is no issue of unresolved material fact. By way of summary, Panther Creek does not contest that Puckett engaged in protected activity or that he suffered adverse action. Nor does it challenge the coincidence in time between these events that constitutes adequate circumstantial evidence that supports a non-frivolous claim with respect to knowledge and motivation. Consequently, Puckett is entitled to reinstatement as a matter of law.

Although the Secretary has demonstrated that his application for Puckett's temporary reinstatement is not frivolous, nothing herein shall be construed as a reflection on the merits of Puckett's underlying discrimination complaint.

ORDER

In view of the above, **IT IS ORDERED** that Panther Creek immediately reinstate Stacey Wayne Puckett to his former position as a fireboss, or to an equivalent position, at the same rate of pay and benefits he received immediately prior to his discharge, and with the same or equivalent assigned duties.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution: (Electronic and Certified Mail)

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July 21, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), and PHILLIP LOVELL, Complainants, v. PENNYRILE ENERGY, LLC, And GMS MINE REPAIR, Respondents	TEMPORARY REINSTATEMENT PROCEEDING Docket No. KENT 2017-0287 MSHA Case No. MADI-CD-2017-03 Mine: Riveredge Mine Mine ID: 15-19424 MSHA Case No. MADI-CD-2017-04 Mine: Riveredge Mine Mine ID: 15-19424 MVK

DECISION AND ORDER REINSTATING PHILLIP LOVELL

Appearances: Christopher M. Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, Representing the Secretary of Labor

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Before: Judge Andrews

Pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") on June 27, 2017, filed an Application for Temporary Reinstatement of miner Phillip Lovell ("Lovell" or "Complainant") to his former position with Respondents Pennyrile Energy LLC, ("Pennyrile") and GMS Mine Repair ("GMS") at the Riveredge Mine pending final hearing and disposition of the case.

According to Commission Rule 45, a request for hearing must be filed within 10 days following receipt of the Secretary's application for temporary reinstatement. 29 C.F.R. §2700.45(c). A timely request for hearing was filed on July 7, 2017, and a hearing was held on July 14, 2017, in Madisonville, Kentucky. The parties had the opportunity to present witnesses, documentary evidence, and arguments in support of their positions.

Discussion of Relevant Law

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine Act]" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1 Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

Congress created the temporary reinstatement as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Id.* at 624-25.

Temporary Reinstatement is a preliminary proceeding and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co*., 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.[1] *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement. *Jim Walter Resources,* 920 F.2d 738, 744 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it appears to have merit. S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and federal circuit courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). "Courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001).

[1] "Substantial evidence" means such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion. *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that there was an adverse action, which was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

In the instant matter, the Secretary and Lovell need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the "reasonable cause to believe" standard. Thus, there must be "substantial evidence" of both the applicant's protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel,* 21 FMSHRC 953, 957 (Sept.1999). The Commission has further considered disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

Evidence

Two Discrimination Complaints were filed with the Secretary's Application for Temporary Reinstatement. (see, Application for Temporary Reinstatement, Exhibits B and C). In each Summary of Discriminatory Action, Complainant stated, in pertinent part:

On Tuesday, May 9, 2017 I was assigned by GMS to work at Riveredge Mine pinning. I reported to my supervisor that the weld was broken on the ATRS I was working on. My supervisor told me that to continue pinning the cut was the only choice that I had. I was ultimately let go and was told that I did not have a position with Riveredge or GMS. I am requesting temporary reinstatement and any back pay, wages or bonus that I have missed because of the companies actions.

The Declaration of Special Investigator Charles Jones was also filed with the Application for Temporary Reinstatement (see, Exhibit A), and in pertinent part is as follows:

1. I am a special investigator employed by the Mine Safety and Health Administration, United States Department of Labor (MSHA). I am assigned to the District 10 Office in Madisonville, Kentucky.
2. As part of my responsibilities, I investigate claims of discrimination filed under section 105(c) of the Mine Act. In this capacity, I have reviewed and gathered information as part of an ongoing investigation arising from a complaint filed by Phillip Lovell. My investigation has revealed the following facts to date:

a. At all relevant times, Respondents Pennyrile Energy LLC (Pennyrile) and GMS Mine Repair (GMS) engaged in the operation of a coal mine and are, therefore, "operators" within the meaning of Section 3(d) of the Act.

b. The Riveredge Mine located in McLean County, Kentucky, has products that enter commerce and is, therefore, a "mine" within the meaning of Sections 3(b), 3(h), and 4 of the Act.

c. Phillip Lovell was employed through contractor GMS as a roof bolter at Pennyrile's Riveredge Mine from March of 2017 until on or about May 10, 2017. Lovell is a "miner" within the meaning of Section 3(g) of the Act. Lovell worked under the supervision of Pennyrile and GMS.

d. On or about May 8, 2017, Lovell reported a safety concern regarding a power cable to another miner while an MSHA inspector was present. A foreman verbally reprimanded Lovell and instructed Lovell to not point out safety hazards to MSHA.

e. On or about May 9, 2017, Lovell reported a safety concern regarding a roof bolter ATRS (Automated Temporary Roof Support) system to a foreman. Lovell stated his refusal to work with that roof bolter until it was repaired. The foreman made no effort to address Lovell's safety concerns regarding the roof bolter. The foreman directed Lovell to use the roof bolter immediately, and watched to make sure Lovell did so.

f. On or about May 10, 2017, Lovell called the MSHA hotline to report the roof bolter safety hazard. After MSHA responded by sending out an investigator, an hourly miner instructed Lovell to lie to the MSHA inspector by saying that Pennyrile immediately removed the roof bolter from service after Lovell reported the ATRS safety hazard. The miner also told Lovell that "We know you called" and added, "We have something waiting for you…you're in for a bad day." Lovell interpreted these statements as a threat from miners on the unit, including the foreman, made in response to Lovell's safety report to the MSHA hotline.

g. On or about May 10, 2017, Lovell discussed his concerns regarding his safety complaints and the threat made against him with Pennyrile management. Pennyrile management offered to move Lovell to another shift or another area of the mine. Lovell was interested in the possibility of GMS transferring him to work at another mine. Pennyrile management called GMS management to discuss Lovell. Directly after that conversation, Pennyrile management and GMS management informed Lovell that he was terminated from working at Pennyrile's Riveredge Mine and terminated from working for GMS. GMS management told Lovell that Lovell should have thought of the consequences before Lovell called MSHA.

h. On or about May 12, 2017, Lovell filed a discrimination complaint against Pennyrile and GMS for their unlawful acts. Lovell has asserted that the actions of Pennyrile and GMS constitute discrimination under the Mine Act.

3. Based upon my investigation of these matters, I have concluded that Lovell's complaint of discrimination was not frivolously brought.

At the hearing, a Statement of Interview taken by Special Investigator Charles Lee Jones on May 16, 2017, was admitted as Exhibit CX-1 and referred to during testimony of Complainant Lovell.

Summary of Testimony

Phillip Michael Lovell began working for GMS Mine Repair as a roof bolter at Pennyrile's Riveredge Mine in March 2017.[2] Tr. 18-19. GMS is a contract company that Pennyrile uses to supply employees.[3] Tr. 99. The employees work for GMS, and receive their benefits from GMS. Tr. 99-100.

In this position, he operated a Roof Ranger 3 Low Profile Fletcher pinner which has a double boom with two operators.[4] Tr. 35. On the dates in question, his foreman and direct supervisor at the mine was Matt Allen. Tr. 18-19. He was also supervised by Leslie Ashby, who worked for Human Resources at the contractor, GMS Mine Repair. Tr. 19. Lovell testified that he rarely spoke with Ashby, unless there was an emergency, or he had to miss work. Tr. 70-71.

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[2] Lovell had worked as a roof bolter, or pinner, since 2011. Tr. 39.

[3] Pennyrile underground superintendent, Kris Maddox, described the relationship in the following manner:

> Q. Okay. Explain, if you would, how – the relationship between Pennyrile and GMS.
>
> A. They are a contract company that we use to supply employees to us.
>
> Q. Okay. But how -- how does it work?
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> A. Like if I'm needing a roof bolter, I'll call and say, I need a roof bolter. They'll send me a list of names. I may know some of the people. I may not. And a lot of times I'll bring them out to the mines and do a brief interview and talk to them. And sometimes, I mean, I need somebody pretty quick and I'll just have to pick me the best candidate for that position.
>
> Q. And let's say you pick a candidate for that position. They come to work at your mine as a roof bolting machine operator. Are they employees of Pennyrile at that point or GMS?
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> A. They're GMS employees.☒
>
> Q. What about benefits, who pays that?
>
> A. We don't. GMS does.

Tr. 99.

[4] The other operator was referred to as a "pin partner." Tr. 35-36.

On May 8, 2017, there were MSHA inspectors at the mine on Lovell's unit. Tr. 19-20. There was a problem with the roof bolter in that it lost power, and a mechanic came out to reset the power on the roof bolter. Tr. 20. Lovell then reported to the mechanic that there was a cut in the trailer cable of the roof bolter.[5] Tr. 20-21, 36. The cable was energized and there were approximately 480 volts running through it. Tr. 21. With that many volts going through the cable, Lovell described the cut in the cable as presenting "a life-and-death situation" because it presented an electrocution hazard. Tr. 36-37. The MSHA inspector was standing behind Lovell when he reported the safety hazard, and his supervisor, Matt Allen, was standing on the other side of the bolter. Tr. 21.

Allen was shocked and acted surprised when Lovell pointed out the safety hazard while the MSHA inspector was present. Tr. 21-22. Allen pulled Lovell aside after the MSHA inspector left and told Lovell not to point out any cuts in the cable while MSHA was at the mine. Tr. 22. Lovell responded that he "was simply telling the guy not to grab on the cable that was still an energized cable." Tr. 22.

The following day, on May 9, 2017, Lovell was working as a roof bolter at the Riveredge Mine, and Allen was once again his foreman. Tr. 23. Lovell reported that there was a broken ATRS weld, which placed his life in danger.[6] Tr. 23. Lovell spoke to Allen about the issue, and Allen told him to set the ATRS. Tr. 23-24. Lovell set the ATRS and the pressure gauge went to 1,500 PSI. Tr. 24. It then dropped down to 1,000 PSI in a matter of seconds, which led Lovell to conclude that it was unsafe. Tr. 24. When the PSI drops, it indicates a warning that pressure is being lost. Tr. 39. This can lead to a piece of falling plate or a slip of heavy rock onto the miners beneath it. Tr. 39-40. Lovell told Allen that he was not going to pin it, and Allen responded that it was not a safety hazard and that Lovell did not have much of a choice. Tr. 24, 41. Allen stood over Lovell for approximately 45 minutes until he pinned the area.[7] Tr. 24-25.

After Lovell bolted the entire area and he was in the last open crosscut, a mechanic arrived to perform the weld on the ATRS. Tr. 25. Lovell talked to the mechanic about there not being rock dust or a fire extinguisher present. Tr. 25. Lovell told the mechanic that they needed to take safety precautions seriously. Tr. 25. Allen and the mechanic chuckled, and the mechanic responded that they didn't have time for that. Tr. 25.

The following day, on May 10, 2017, Lovell called the MSHA hotline to report a broken ATRS. Tr. 26. When Lovell arrived at Riveredge, people were panicking about MSHA's arrival

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[5] The cut may have been a pulled splice. Tr. 45.

[6] ATRS stands for Automated Temporary Roof Support, and it supports the roof while miners are physically underneath it pinning. Tr. 23, 37. It consists of a long arm with two steel pads. One protrudes in the shape of a T and pressurizes the top in order to temporarily support the roof while the miners pin underneath. Tr. 38.

[7] The terms "pinning" and "bolting" were used interchangeably to mean the act of roof bolting the top. Tr. 37.

that day. Tr. 26. Allen was once again Lovell's foreman that day, and he assigned him to shovel the belt on each side of the tail piece. Tr. 27. Lovell felt as if he was being punished by being assigned this task instead of roof bolting. Tr. 27.

After Lovell was finished shoveling, Allen ordered him to go to the left side to pin. Tr. 27-28. At one point, a guy on the unit told Lovell to come to the middle of the run and talk to the MSHA inspector and Allen. Tr. 28. On the way to speak to the inspector, Lovell's pin partner,

Lucan Dugger, stopped Lovell and told him to lie to the inspector and tell him that when they found the broken ATRS they backed it out, fixed it, and put it back in the run the correct way. Tr. 28, 35-36. Dugger told Lovell that if he "didn't do what he asked…they'll have something waiting for [him]."[8] Tr. 28-29. Lovell felt like his life was in danger, and did as he was ordered and told the inspector a false story. Tr. 29-30.

After Dugger walked away, Lovell pulled the two inspectors that were still standing near him and told them the truth. Tr. 29. He told them that he had called MSHA, about the roof bolter hazard from the day before, and about how he had been threatened and told to lie to them. Tr. 29-30. The MSHA inspectors did not feel comfortable leaving Lovell in the mine that day. Tr. 30.

Keith Whitehouse, who was the safety director, came underground and Lovell spoke with him. Tr. 30. Whitehouse agreed with MSHA about taking Lovell out of the mine. Tr. 31. Whitehouse felt that he should have a talk about harassment with the entire unit at the surface, with underground superintendent, Kris Maddox, present.[9] Tr. 31.

Maddox did not go underground with the miners on May 10. Tr. 84. He arrived at the bolter when the inspectors were getting ready to leave and talked to them briefly. Tr. 84-85. He also talked "for just a second" to Lovell, and Lovell made allegations that an hourly employee had threatened him. Tr. 85. Lovell refused to identify the individual. Tr. 85.

Lovell had a conversation on the surface with Whitehouse and Maddox. Tr. 31. The MSHA inspectors, Wyatt Oates, as well as a miner's representative named John Parker,[10] were

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[8] At the time, Lovell refused to reveal the identity of the miner who threatened him. Tr. 54-56.

[9] Kristsopher Steven Maddox was the underground superintendent at Pennyrile Energy. Tr. 81. He testified at hearing on behalf of Respondent, Pennyrile Energy. Maddox had over 19 years of mining experience. Tr. 81. He had worked as an hourly employee for several years, and in management for eight years. Tr. 81. He has run a roof bolter, a miner, a shuttle car, a ram car, and a scoop. Tr. 82. He has a Kentucky state mine foreman certification, as well as Kentucky state MAT certification. Tr. 82-83.

[10] John Parker testified at hearing for Respondent, Pennyrile. He was an examiner and miner's representative, which he described as representing the miners and the company. Tr. 103. He has a foreman's card, but is an hourly employee. Tr. 104. Parker did not have authority to ask or offer Lovell another position at the mine. Tr. 104-105.

present for the beginning of the conversation.[11] Tr. 31, 57, 92. They asked Lovell what happened, and he explained the previous safety hazards and threat. Tr. 32. Whitehouse and Maddox tried to resolve the situation by saying that they could get him a different position if he kept his mouth shut. Tr. 32. Maddox offered to move Lovell to another crew and another roof bolter. Tr. 58. He said that Lovell could have any position that he wanted, and Lovell replied that he wanted to explore his options.[12] Tr. 59, 89. Lovell wanted to contact GMS to find out what types of positions were available, but was told that Maddox and Whitehouse would contact GMS, and that he should not contact them. Tr. 32. They asked Lovell to step out of the office, and they called GMS. Tr. 33. Maddox then proceeded to call GMS and said that Lovell requested a transfer.[13] Tr. 95. He told them that Lovell "didn't want to be at our mines anymore, so therefore we don't want him there anymore either." Tr. 95. Maddox testified that he knew about Lovell calling MSHA, and that it was common knowledge at the mine. Tr. 101. However, he maintained that he did not make any comments to her about Lovell calling MSHA. Tr. 101. GMS told Maddox to tell Lovell "to get his things and to call when he left the mines." Tr. 95.

A few minutes later, Lovell was told to contact Ashby at GMS. Tr. 33. Lovell called Ashby at GMS and asked her if she knew what was going on. Tr. 34. She replied that she had just talked with Maddox and Whitehouse by phone and knew the situation. Tr. 34. She then said that they don't want Lovell at Riveredge any longer, and that he needs to clear his stuff out. Tr. 34. Lovell said that he should not be fired for his actions, and she replied that Lovell "should have thought of the consequences before [he] called MSHA." Tr. 34. Lovell did not receive any further calls or offers of employment, and was told not to step foot on the property of either company. Tr. 34. Lovell understood the meaning of this conversation as him being fired. Tr. 34. Lovell came back to the office briefly and told Maddox that he had been fired. Tr. 96.

Contentions

The Complainant, through the Secretary and private counsel, argue that Lovell has met his burden of establishing that his complaints are non-frivolous, and as a result he should be temporarily reinstated. The Complainant highlights his protected activities of making safety complaints on May 8, 9, and 10, as well as his call to MSHA to report safety issues. It argues that his termination on May 10 constitutes an adverse action under the Act for which both GMS and Pennyrile are liable. Further, it argues that there was knowledge, animus, and a coincidence in time between the protected activity and the adverse action.

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[11] This meeting is at times referred to as two meetings in the course of the transcript because it moved from one location to another and there were fewer people present after the move.

[12] Lovell repeatedly testified that he did not accept any of the positions offered at the meeting because he first wanted to explore his options. Tr. 58-63. Maddox testified that Lovell refused each offer, but Lovell maintained that he never refused any of the offers. Tr. 32, 89.

[13] Maddox testified that he does not have the right to fire GMS employees, but can have them removed from the mine. Tr. 100.

Respondent Pennyrile argues that management at Pennyrile offered Lovell transfers to other shifts and other positions at the mine, and that in refusing, Lovell quit his job at the mine. Pennyrile further argues that it was GMS who actually laid off Lovell. It argues that because Lovell quit his position at Pennyrile, it should not be liable for reinstatement.

Respondent GMS argues Lovell was not terminated, but was laid off.

Analysis

The scope of this proceeding is narrow. Credibility determinations are not made; conflicts in testimony are not resolved. It is well recognized by the Courts that the Secretary's burden is "relatively insubstantial". For example, beyond the scope of the hearing is testimony and/or documentary evidence that the adverse action was justified by unprotected activity alone or was also motivated by unprotected activity or other non-discriminatory grounds. For the reasons set forth below, I find that the record presents a reasonable cause to believe the instant Discrimination Complaints were not frivolously brought.

Lovell Engaged in Protected Activity

The record contains evidence of several actions over a short time period that constituted protected activities. First, on May 8, 2017, in the presence of MSHA inspectors and his supervisor, Lovell reported to a mechanic that there was a cut or pulled splice in the trailer cable of the roof bolter. Tr. 19-21, 36. This was a high-voltage cable that was energized, and Lovell viewed it as a safety hazard because it could lead to someone getting electrocuted. Tr. 21, 36-37.

On the following day, on May 9, 2017, Lovell reported to his supervisor, Allen, that there was a broken ATRS weld, which he believed placed his life in danger. Tr. 23. Allen ordered Lovell to set the ATRS, and when he tried to do so, the pressure dropped 500 PSI in a matter of seconds. Tr. 23-24. This indicated to Lovell that the pressure supporting the roof was being lost, and that as a result a piece of plate or heavy rock could fall on top of him. Tr. 24, 29-40. Lovell attempted to refuse to perform the work, but his supervisor told him that he did not have a choice, and stood over him for 45 minutes until he completed the task. Tr. 24-25, 41.

There was some testimony by others that they did not believe the broken weld presented a safety hazard. Tr. 41. However, whether the broken weld constituted a significant safety hazard is beyond the scope of this hearing. The Act does not require that a miner prove that a significant safety hazard existed, but only that he had a reasonable belief of a hazard underlying his complaint.

Following Lovell's completion of his pinning tasks, a mechanic arrived to perform the weld on the ATRS. Tr. 25. Lovell reported to the mechanic and his supervisor that there was no fire extinguisher present, and the area was not properly rock dusted. Tr. 25. They laughed, and the mechanic responded that they didn't have time for that. Tr. 25.

The next day, on May 10, Lovell called the MSHA hotline to report a broken ATRS. Tr. 26. After reporting such, another miner told Lovell to lie to MSHA and threatened him. Tr. 28-

29. Lovell reported this threat to the MSHA inspectors, as well as Safety Director Whitehouse and Superintendent Maddox. Tr. 29, 32, 84-85. Each of these safety complaints, calls to MSHA, and reports of threats constituted protected activity under the Act. 30 U.S.C. §815(c)(1).

Lovell Suffered an Adverse Employment Action

On May 10, following Lovell's report of a threat in retaliation to his MSHA call, Lovell had a meeting with, among others, Maddox and Whitehouse. Tr. 31, 57, 92. At this meeting, Lovell was offered other positions at Pennyrile Mine. Tr. 32, 58. Lovell testified that he neither accepted nor rejected any of these offers made in the meeting, because he wanted to first talk with GMS and better understand his options.[14] Tr. 32, 59, 89. Following this meeting, Maddox called GMS and told Ashby that Lovell "didn't want to be at our mines anymore, so therefore we don't want him there anymore either." Tr. 95. When Lovell called Ashby a few minutes later, she told him that he was not wanted at Riveredge any longer, and he needs to clear his stuff from the mine. Tr. 34. Lovell responded that he should not be fired for his actions, and she responded that Lovell "should have thought of the consequences before [he] called MSHA." Tr. 34.

Pennyrile's argument that Lovell quit and therefore not entitled to reinstatement under *Dolan v. F&E Erection Co*., 22 FMSHRC 171 (Feb. 2000), is misplaced. Though Respondent is correct that a miner who voluntarily quits his job is not entitled to temporary reinstatement, that is not what occurred here.[15] In the instant case, Lovell was asked in a meeting whether he wanted to be transferred to other positions. Lovell did not respond by quitting, but rather simply did not accept the offers on the spot. It was reasonable for Lovell to want to discuss the matter with his employer, GMS, and to consider the matter further. There are no indications that when he left the meeting to call GMS, he believed that he had lost his employment. Tr. 96. Therefore, I find that Maddox's calling GMS and stating that they did not want Lovell at the mine any longer constituted a "discharge…or cause to be discharged," under the Act. 30 U.S.C. 815(c)(1).

GMS similarly discharged Lovell when Ashby told him to clear his stuff from the mine and did not give him any further offers of employment. Tr. 34. GMS's counsel has conceded that Lovell was laid off, but insists that he was not terminated. Tr. 12. GMS is not alleging that there was a reduction in force or some other economic layoff that might be grounds for a tolling argument. Therefore their assertions that Lovell was laid off and not terminated is a distinction without a difference. A layoff is a "discharge" under the Act.

[14] Maddox testified that Lovell refused the offers, however conflicts in testimony are not to be resolved in this limited proceeding. *Sec'y of Labor obo Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

[15] It should be noted, however, that if a miner is essentially forced to resign, or constructively discharged, then that form of quitting is treated as an adverse employment action. *Dolan*, 22 FMSHRC at 175.

A Nexus Existed Between the Protected Activity and the Adverse Employment Action

As discussed *supra*, to obtain a temporary reinstatement a miner must raise a non-frivolous claim that he engaged in protected activity with a connection, or nexus, to an adverse employment action. Having concluded that Lovell engaged in protected activities and suffered an adverse employment action, the examination now turns to whether those activities have a connection, or nexus, to the subsequent adverse action. The Commission recognizes that direct proof of discriminatory intent is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See, e.g., CAM Mining, LLC*, 31 FMSHRC at 1089; *see also, Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Knowledge of the protected activity

According to the Commission, "the Secretary need not prove that the operator has knowledge of the complainant's activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge." *CAM Mining, LLC*, 31 FMSHRC at 1090, *citing Chicopee Coal* Co., 21 FMSHRC at 719. In the instant matter, there is sufficient evidence of knowledge by both Pennyrile and GMS management of the various protected activities to meet the evidentiary threshold.

Lovell reported the cut in the trailer cable on May 8 in the presence of MSHA inspectors and his supervisor, Matt Allen. Tr. 20-21. Lovell testified that Allen was shocked and surprised by the complaint, and pulled Lovell aside and told him not to point out cuts in the cable while MSHA was present. Tr. 21-22.

Allen similarly had knowledge of Lovell's complaint concerning the ATRS weld on May 9 because the complaint was made to Allen. Tr. 23-24. Following the problem with the drop in pressure on the ATRS, Allen ordered Lovell to continue pinning in a manner that Lovell feared was unsafe. Tr. 24-25.

Allen was also aware of Lovell's complaint concerning the lack of a fire extinguisher and rock dust because Lovell made the complaint in his presence. Tr. 25. Lovell testified that Allen and the mechanic laughed at the idea that they needed to take these safety precautions seriously. Tr. 25.

Further, there was knowledge by Pennyrile's Maddox and Whitehead, as well as GMS's Ashby, concerning Lovell's call to MSHA and the threats made to him. The meeting with Maddox, Whitehead, and others occurred in part as a response to the threat Lovell received. Further, Maddox testified that he knew about Lovell calling MSHA because it was common knowledge at the mine. Tr. 101. Though Ashby had minimal contact with Lovell generally, she too was aware of his calling MSHA. Tr. 70-71. In the conversation where Ashby fired Lovell,

she told him told that he "should have thought of the consequences before [he] called MSHA." Tr. 34.

Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and the adverse employment action. See e.g. *CAM Mining, LLC*, 31 FMSHRC at 1090 (three weeks) and *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a lay-off; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure). The Commission has stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time."' *All American Asphalt*, 21 FMSHRC 34 at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

In the instant matter, extremely close proximity in time between the protected activities and the adverse actions greatly favors a finding that a nexus existed between the protected activities and the adverse actions. The protected activities at issue here all occurred on May 8, 9, and 10, 2017. Lovell was discharged from Pennyrile and GMS on May 10, 2017, immediately after his final protected activity.

Hostility or animus towards the protected activity

The Commission has held, "[h]ostility towards protected activity-- sometimes referred to as 'animus'--is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

Although a single instance, even circumstantial in nature would suffice, here there are several indications of animus. Following Lovell's complaint about the cut in the cable, Allen told him not to make such complaints in the presence of MSHA inspectors. Tr. 22. Following Lovell's complaint concerning the broken ATRS weld and the drop in pressure, Allen ignored Lovell's concerns and ordered him to use the machine. Tr. 24-25. Following Lovell's complaint about the lack of rock dust and fire extinguisher, Allen laughed. Tr. 25. Then, on May 10, after Lovell called MSHA, Allen assigned him to shovel the belt, which Lovell felt was a form of punishment. Tr. 26-27.

Maddox's statement to GMS that they didn't want him at the mine any longer exhibited animus towards Lovell's protected activity, as did GMS's statement upon firing Lovell that he should have thought about the consequences of his actions when he called MSHA. Tr. 34, 95.

Disparate treatment

"Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). The Commission has previously held that evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id.* at 2510-2513.

Whether there was disparate treatment of Lovell was not developed on this record, but the fact that he was fired by GMS after being threatened by a miner at the Pennyrile Mine raises the question of whether other GMS employees have been treated in the same way, or given the benefit of a personnel policy of a more graduated approach to employee discipline.

Conclusion

In concluding that Lovell's complaint herein was not frivolously brought, I find that there is reason to believe he engaged in protected activities, and that there was a nexus between the protected activities and his termination. Miner Phillip Lovell is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

ORDER

It is hereby **ORDERED** that **Phillip Lovell** be immediately **TEMPORARILY REINSTATED** to his former job with GMS at the Pennyrile mine at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint **as soon as possible**. Counsel for the Secretary **SHALL** also **immediately** notify my office of any settlement or of any determination that Respondents did not violate Section 105(c) of the Act.

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

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July 24, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. LROCK INDUSTRIES, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2016-0705 A.C. No. 45-03710-416172 Mine: LRock Pit

DECISION AND ORDER

Appearances: Daniel Brechbuhl, U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

John Bredfield, LRock Industries, Toledo, Washington, *pro se* for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). This docket involves nineteen citations issued pursuant to Section 104(a) of the Act with originally proposed penalties totaling $32,256.00. The parties presented testimony and evidence regarding the citations at a hearing held in Portland, Oregon, on May 25, 2017. Based upon my review of the record, my observation of the demeanors of the witnesses, and consideration of the parties' legal arguments, I make the following findings and order.

I. APPLICABLE PRINCIPLES OF LAW

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd* 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co*., 11 FMSHRC 2148, 2152-53 (Nov. 1989).

B. Significant and Substantial

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

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation is S&S:

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

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

The Commission has explained that the term "hazard" refers to the prospective danger the cited safety standard is intended to prevent. *Newtown Energy, Inc*., 38 FMSHRC 2033, 2038 (Aug. 2016). In *Newtown*, for instance, the mine was cited for a violation of a standard requiring that equipment be locked out and tagged out while electrical work is being performed, and the Commission identified the relevant hazard to be that of a miner working on energized equipment. *Id*. The Commission has clarified that the second element of the *Mathies* test addresses the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Id.* at 2037-38. The judge must determine whether there is a "reasonable likelihood" that the hazard will occur based on "the particular facts surrounding the violation." *Id.*; *see also McCoy Elkhorn Coal Corp*., 36 FMSHRC 1987, 1991-92 (Aug. 2014); *Mathies*, 6 FMSHRC at 4. At the third step, the judge must determine whether the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, 38 FMSHRC at 2037. The existence of the hazard is assumed at this step. *Id*.; *Knox Creek Coal Corp. v. Sec'y of Labor,* 811 F.3d 148, 161-62 (4th Cir. 2016). The likelihood of injury is evaluated with respect to specific conditions in the mine. *Newtown,* 38 FMSHRC at 2038. Finally, the Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy*, 36 FMSHRC at 1990-91.

C. Negligence

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, the judge must consider "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." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2047 (Aug. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

The standard of care is higher for mine management. *Newtown*, 38 FMSHRC at 2047. The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on operators, and they are thus expected to set an example for miners working under their direction. *Id.*; *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *see also* 30 U.S.C. § 801(e).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The LRock pit is a surface sand and gravel mine located in Lewis County, Washington. LRock is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission.

All citations except one included in this docket were issued by Inspector Benjamin Burns during regular inspections. Burns has been an inspector for nine years and is familiar with sand and gravel mines, although the LRock pit is not in his usual inspection area. He began the inspection of the LRock pit on June 1, 2016. Upon arriving at the mine, he met John Bredfield, the plant manager. Bredfield informed Burns that he was too busy to accompany him on the inspection, and so Burns inspected the mine on his own.

Citation No. 8872971

In the course of his inspection, Burns observed a roadway going to the top of the stockpile at the mine. He noticed that there was no berm at the end of the stockpile, leaving a drop-off of approximately 20 feet. The Secretary's Exhibit 2, page 4, shows the saddle-shaped area where there is no berm at the end of the roadway. A loader operator onsite informed Burns that the miners had not been accessing the pile for a long time. However, Burns did observe tire tracks in the area. He noted that the tire tracks were 25 feet from the edge. To terminate the citation, the operator added a barricade to prevent access. Sec'y Ex. 2, p. 5.

Bredfield, the representative and sole witness for the company, testified that the roadway had been bermed when it was in daily use, but that the area was not active. He explained that the pile was a stockpile that had been loaded out and was no longer used. He also stated that the surface was sand that therefore was too soft to travel.

Burns cited the mine for a violation of 30 C.F.R. § 56.9300(a), which states in pertinent part that "Berms 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. . . ."[1]

LRock argues that the area was not a "roadway" within the meaning of the standard because it was no longer in use at the time of the inspection, and therefore no berms were required. The term "roadway" is not defined in the regulations, but the Commission has found that an area is a roadway "where a vehicle commonly travels its surface during the normal mining routine." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1735 (Aug. 2012), *aff'd*, 762 F.3d 611 (7th Cir. 2014) (interpreting a similar standard applicable to surface coal mines); *see also Capitol Aggregates, Inc*., 4 FMSHRC 846, 847 (May 1982). The evidence at hearing, including Burn's observations of the tire tracks and his conversation with the loader operator, demonstrated that the cited area was the primary means of access to the pile. While Bredfield claimed that vehicles no longer traveled there, nothing had been done to prevent access, such as posting signs or erecting barricades. I therefore find that the area was still a roadway within the meaning of the standard. The drop-off of 20 feet was "of sufficient grade or depth to cause a vehicle to overturn." Because no berm was provided at the drop-off, the standard was violated. I agree with the inspector that the citation was the result of moderate negligence, was unlikely to cause injury, and was not S&S, given that the area was infrequently used and there were no tire tracks close to the edge. A penalty of $484.00 is assessed as proposed by the Secretary.

Citation No. 8872972

Burns next inspected a CAT 980 H front-end loader. He noticed a fire extinguisher on the loader and saw that the tag on the fire extinguisher indicated that it had last been inspected in December 2014. A photo of the tag was introduced as the Secretary's Exhibit 3, page 3. Burns issued a citation for a violation of 30 C.F.R. § 56.4201(a)(2), which requires that

> Firefighting equipment shall be inspected according to the following schedules: … At least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively.

The Secretary argues that the fire extinguisher should have been inspected in December 2015, 12 months after the previous inspection.

Bredfield testified that the CAT 980 H has its own automatic fire prevention system and does not require a fire extinguisher. LRock argues that yearly inspections of the fire extinguisher were therefore not required. However, the language of the standard does not limit the inspection requirement only to mandatory fire extinguishers. Even if other fire extinguishing equipment was available, a miner might rely on the available fire extinguisher in an emergency. If the

[1] Section (d) of the same standard permits compliance on infrequently used roadways by providing locked gates and specific warning signs. LRock did not provide evidence of any barriers or signs in the area.

extinguisher had not been inspected and was not in operable condition, it would present a hazard to miners.

Because the fire extinguisher had not been inspected within the past 12 months, a violation is proven. I uphold the inspector's finding of moderate negligence, since the mine had had violations of this standard in the past. The violation was non-S&S and unlikely to cause injury. A penalty of $145.00 is assessed as proposed.

Citation No. 8872973

Continuing his inspection of the CAT 980 H loader, Burns asked the loader operator to pick up a typical load in the bucket and then test the parking brake while on the crusher feed ramp. The brake failed to hold, and the loader moved approximately 20 inches before the operator stopped it with the service brake. Burns issued a citation for a violation of 30 C.F.R. § 56.14101(a)(2), which requires that "If equipped on self-propelled equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it reaches."

Bredfield testified that past inspectors had not tested the brake with gravel in the bucket. The operator had tested the brake that morning without gravel and it had held. Bredfield also stated that it is common practice to put the loader bucket down before applying the brake. However, the standard states that the brake must hold the equipment "with its typical load on the maximum grade it reaches." 30 C.F.R. § 56.14101(a)(2). The bucket would be lifted when the loader was carrying the load. I find that a violation occurred. The violation was unlikely to cause injury and non-S&S because there was still some resistance in the brake, and the loader moved slowly, only a short distance. The negligence was moderate because the operator had tested the brake that day. I assess a penalty of $216.00.

Citation No. 8872974

Burns next inspected a roadway on the south side of the bank of the yard, where the stockpile is located. He estimated that the roadway was 40 to 45 feet wide. It had a steep angle drop-off of approximately 10 feet, but there was no berm in place. Burns observed haul trucks using the area to turn around and coming within 30 feet of the drop-off. The Secretary's Exhibit 5, page 4, shows a partially constructed berm, but the berm does not extend to the end of the yard. Burns believed the berm had been removed as the stockpile was loaded out.

Burns issued a citation for a violation of 30 C.F.R. § 56.9300(a), which requires that "Berms 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." He designated the violation as S&S because he observed multiple trucks close to the edge, and therefore there was potential for a rollover accident. The Secretary alleges high negligence because Bredfield, the plant manager, was in the area, and because the partially constructed berm indicates that management knew of the berm requirement.

Bredfield agreed that there was no berm in the cited area, but testified that workers were in the process of constructing the berm when Burns inspected the area. Bredfield also denied that there were trucks in the area, producing overhead photographs showing no truck activity. Resp. Exs. A & B. However, the photographs are undated and therefore of little probative value. Further, Bredfield stated that the roadway was not 40 feet wide as observed by the inspector, but rather 160 feet, leaving sufficient room for the trucks to maneuver in the absence of a berm. On cross-examination, Bredfield was asked how long the stockpile had been in place prior to the inspection, but his responses were evasive. Bredfield stated that at the time of the inspection, miners were in the process of cleaning up the area and loading out the berm in order to terminate a project. This testimony conflicts with Bredfield's earlier statement that the berm was under construction. Accordingly, I do not credit his testimony.

Based on the testimony of the inspector, I find that the area was frequently travelled and had a drop-off, and a berm was therefore required. The Secretary has proven a violation. In view of Bredfield's knowledge of the requirement, the negligence is high as assessed. I also find that the violation was significant and substantial. Applying the *Mathies* factors, the Secretary has proven a violation of a standard as discussed. The cited standard is intended to prevent an over-travelling accident. Here, such an accident was reasonably likely to occur, given that there was frequent traffic in the area and tire tracks relatively close to the drop-off. Such an accident would be reasonably likely to result in serious injury to the driver. The Secretary proposed a penalty of $7,964.00 which I find appropriate in this circumstance.

Citation No. 8872975

On the second day of the inspection, Burns examined a mobile excavator that was being operated by Bredfield. Burns observed that one of the front mirrors on the excavator was broken, and another was missing. Burns stated that the mirrors would aid the driver in safe operation of the machine because they would allow him to see out the back, left or right side.

Bredfield explained that the machine had been brought in a day or two prior to the inspection to clear material located on a steep edge. The excavator was normally stored at a shop offsite and belonged to LRock's rental division. Bredfield stated that the mirrors were useless and got in the way of entering and operating the excavator. The machine had a cab that could rotate 360 degrees and thus there was no need to operate it in reverse. He stated that no other vehicles would come around the excavator while it was operating.

The Secretary alleges a violation of 30 C.F.R. § 56.14100(b), which provides that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." I find that the mirrors affect the safety of the excavator. While I credit Bredfield's testimony that the machine is typically operated in forward motion, I also credit Burn's statement that the machine could be operated in reverse. Burns also stated that the mirrors could be used to check a blind spot, which would be aid in safely operating the machine in forward motion. While the Secretary did not address the "timely" element of the standard, Bredfield was operating the machine at the time and should have discovered and corrected the broken mirrors in a pre-operational check. I agree with the Secretary that the violation was the result of high negligence, given that Bredfield, a supervisor,

was aware of the condition. The violation was unlikely to cause injury and was not S&S, since the excavator was operated primarily with the cab facing forwards. The Secretary's proposed penalty of $722.00 is affirmed.

Citation No. 8872977

Burns next inspected a storage area, where he observed a seven-inch angle grinder located on the bottom shelf under some other tools. The disk on the grinder did not have a guard. *See* Sec'y Ex. 13, p. 3. The edges of the disk showed some wear, from which Burns inferred that the grinder had been used. He also inferred that the grinder had been in that condition for some time, based on the fact that there were other tools piled on top of it. Burns explained that the disk on the grinder rotates at high speed and the miner operating the tool would have his hand within eight and a half inches of the disk.

Bredfield acknowledged that a guard was necessary for safe operation of the grinder, but stated that the grinder was not used except for spare parts. He noted that the grinder disk had been put on upside down, and stated that this would be a signal to miners that the grinder was not in service. He explained that the mine has many of the same grinders and this one was buried under tools because it had not been used for some time.

Burns cited the mine for a violation of 30 C.F.R. § 56.14100(b), which provides that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary alleges that the violation was the result of low negligence and was S&S.

LRock argues that the standard should not apply because the grinder had been taken out of service. Section (c) of the same standard provides that defective equipment may be taken out of service to prevent hazardous use, including by "marking the defective items … to prohibit further use until the defects are corrected." 30 C.F.R. § 56.14100(c). LRock argues that the upside down disc on the grinder effectively marked it as out of service. I reject this argument. A miner could easily turn the disc over and use the grinder or use it without noticing that the disc was upside down.

I find that the Secretary has proven a violation. The absence of a guard on the grinder exposed the user to the sharp spinning edge of the disc, which was close to the trigger and thus would be close to the user's hand. The condition had most likely been present for some time, given that the grinder was buried under other tools. Because the grinder was difficult to see buried under the tools, I find that the violation was the result of low negligence as alleged.

The Secretary alleges that the violation was S&S, and I agree. The Secretary has proven a violation of a mandatory standard, satisfying the first *Mathies* element. The standard at issue guards against the hazard of a miner using a tool with a safety defect. I find that the hazard was reasonably likely to occur, because the grinder was not tagged out and was available for use. A miner could easily have flipped the disk on the grinder over and used it without the guard. The second *Mathies* element is proven. A miner using the grinder without the guard would be reasonably likely to incur an injury. The miner's hand would come within inches of the disk,

which is sharp and would be rotating at high speed. The resulting injury would most likely lead to lost workdays or be permanently disabling. The third and fourth *Mathies* elements are satisfied, and the violation is S&S. The Secretary proposed a penalty of $324.00 which is assessed.

Citation No. 8872978

Burns next examined a sand screw used to dewater sand during processing. The screw was covered by a screen, and a working deck surrounded the screen. Burns observed that there was a gap between the screen and the working deck, leaving approximately 10 inches where the screw was exposed. *See* Sec'y Ex. 3, p. 4. The working deck was approximately 10 feet above ground and was accessible via a vertical ladder. Burns explained that miners would access the area to conduct fluid level checks or to clean material off of the deck. He was concerned that a miner could reach or fall into the area and become entangled with the screw.

Burns testified that an entanglement accident with the screw fins could cause a fatal injury. While Bredfield stated that the screw moves slowly, he did not dispute that an injury could occur if someone were to come into contact with it.

Burns cited the mine for a violation of 30 C.F.R. § 56.14107(a), which provides that "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." I find that the screw fins were "moving machine parts" within the meaning of the standard because they were capable of causing injury.

LRock argues that the guarding recommended by the inspector was not necessary because the mine has a lock-out/tag-out policy that would require the screw to be de-energized before anyone performed maintenance on it. However, the Commission has found that guarding standards should be interpreted to account for "all relevant exposure and injury variables" including "the vagaries of human contact." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Consistent with this, Commission judges have interpreted guarding standards to require that guarding be adequate to prevent injury in the event that an employee carelessly disregards a lock-out/tag-out policy. *See, e.g., Climax Molybdenum Co*., 38 FMSHRC 2453, 2460 (Sept. 2016) (ALJ); *Dix River Stone Inc*., 29 FMSHRC 186, 203 (Mar. 2007) (ALJ); *Calco Inc*., 15 FMSHRC 480, 484 (Mar. 1993) (ALJ). LRock's lock-out/tag-out policy is no defense to a guarding violation and therefore I find that the Secretary has proven a violation.

The Secretary alleges that the violation was S&S, and I affirm that finding. I have found that a violation of a mandatory standard occurred, satisfying the first element of the *Mathies* test. Regarding the second element, the question is whether it was reasonably likely that the inadequate guarding on the screw would lead to a miner coming into contact with the moving screw. *See Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). Based on the close proximity of the walkway to the exposed screw, I find that such an accident was reasonably likely to occur. The inspector testified that such an accident would lead to a fatal injury, and LRock produced no evidence to the contrary. I thus find that the hazard was reasonably likely to lead to a fatal injury, satisfying the third and fourth *Mathies* elements. Because the condition had

been present for three years and had been examined by other inspectors, I find that the negligence was low. The Secretary's proposed penalty of $1,078.00 is assessed.

Citation No. 8872979

Burns next inspected a concrete rock screw that is used to clean rock before it is sent to the conveyor belt. The screw had a water manifold system mounted on one side that prevented contact with the auger from that side. However, Burns noted that there were gaps in the guarding on the top and side of the screw. The screw paddles were within 13 to 20 inches from the unguarded spots. Burns stated that miners would sometimes work in the area to adjust the valves on the water manifold. He believed it was possible for a miner to be pulled into the screw, causing a fatal injury. He cited the mine for a violation of 30 C.F.R. § 56.14107(a), the guarding standard discussed above with regard to Citation No. 8872978. The Secretary produced photographs of the screw, but it is difficult to see the moving machine parts in the photographs. Sec'y Ex. 7, p. 3-4.

Bredfield testified that miners do not work in the area because the valves on the manifold are never adjusted. He stated that the manifold was a modification he had added to the screw, and that the manifold provides more guarding on the screw than would be present in other plants. He believed that in order for someone to come in contact with the auger, the person would have to climb onto the manifold. The screw had been at the plant for three years at the time of the inspection, and no other inspectors had found a problem.

I credit the inspector's finding that the moving machine parts were within reach and that additional guarding was necessary. It would be possible for a miner to be pulled into the screw and receive a fatal injury. However, because the plastic tub above the manifold provided partial guarding, the violation was unlikely to cause injury. The negligence was low, given that previous inspectors had accepted the guarding. I assess a penalty of $216.00 as proposed by the Secretary.

Citation No. 8872980

Burns also inspected a portable rolling pressure valve. The machine had been brought in to the mine three weeks earlier for use on a specific project. Burns observed that there were two openings on the walkway on the unit, one 20 inches wide and a second 24 inches wide. The openings were located 52 and 67 inches above ground, respectively, and provided access to the unit from the ground. Burns believed there should have been chains across the openings, as there were on other equipment in the mine. He noted that injury was unlikely because of the side railings by the openings.

Burns cited the mine for a violation of 30 C.F.R. § 56.11012, which requires that "Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

LRock argues that the chains detract from safety, because a miner entering the unit would be forced to let go of the hand rails in order to lift the chain. The standard provides that where it

is impractical to install a chain, the operator may instead install warning signals. However, the mine has not provided evidence that it installed warning signals. In any event, I do not find that the chains were impractical, since the inspector observed similar chains on other equipment at the mine.

I find that the Secretary has proven a violation of the standard. There was a danger of a miner falling through the openings from the travelway, and a barrier was therefore necessary. I agree that injury was unlikely, because there were handrails in the area to provide stability. The negligence is moderate because management had provided chains on other equipment. I assess a penalty of $216.00

Citation No. 8872982

Burns next observed a lube truck that was used to transport tools around the site for maintenance. He observed a Miller 250 welder on the truck and determined that the terminals on the welder were not adequately guarded. The Secretary's Exhibit 9, page 3, shows that metal is exposed on the terminals. The welder is gas-powered, and the terminals are used to connect to the welding leads. Burns testified that if a miner were to contact the terminals with something metal, he would be shocked. He observed that while the welder was high on the truck, it was next to a handrail. To terminate the violation, the operator installed rubber guards around the terminals.

Burns cited the mine for a violation of 30 C.F.R. § 56.12023, which provides that "Electrical connections and resistor grids that are difficult or impractical to insulate shall be guarded, unless protection is provided by location."

Bredfield stated that the welder was equipped with the factory insulation. However, Burns believed that the cited part needed to be insulated because there was metal exposed. LRock also argues that the welder was located eight feet off the ground, and thus "protection is provided by location." However, because there was a handrail next to the welder, I find that contact with the part was possible. I find that the Secretary has proven a violation of the standard. Because of the welder's location high off the ground, I find that the violation was unlikely to cause injury. I affirm the moderate negligence designation because the welder was used regularly. I assess the Secretary's proposed penalty of $145.00.

Citation No. 8872983

Burns also observed that there was no protective cover over the end of the positive electrode on the welder. Without the protective cover, Burns stated that there would be "arcing," creating a potential for shock. He described seeing "burrs" on exposed metal, which indicated to him that arcing had occurred in previous uses of the welder. He was unsure of the voltage on the welder but estimated that it was at least 120 volts.

Burns issued a citation for a violation of 30 C.F.R. § 56.14100(b), which provides that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely

manner to prevent the creation of a hazard to persons." The Secretary alleges that the violation was the result of moderate negligence and was S&S.

Bredfield acknowledged that the protective cover was missing, saying that the covers were flimsy and broke easily. However, he did not believe that the missing guard created a safety hazard. He stated that arcing and shock hazards are normal parts of welding and that miners wear gloves as protection. He believed that the important guards were where the miner's hands would be, and those were present.

I affirm the citation as issued. The missing cover was a "defect[ ] on any equipment … that affect[s] safety" because it created "arcing," lessened the miner's control of the welder, and increased the risk of shock. Burn's observation of burrs on exposed metal indicates that the condition had existed for some time, and therefore was not "corrected in a timely manner." I find that the violation was the result of moderate negligence, because it had existed for some time and the welder was available for use.

Applying the Commission's *Mathies* test, I also find that the violation was S&S. A violation of a mandatory standard occurred. The hazard of a miner using the welder in its defective condition was reasonably likely to occur because the welder was available for use, and Burns saw evidence of arcing. Regarding the third and fourth steps, a miner using the welder would be reasonably likely to be shocked, and a shock to a miner would likely result in burns or other injuries of a reasonably serious nature. I assess the Secretary's proposed penalty of $722.00.

Citation No. 8872984

In addition to the welder, the lube truck also carried an angle grinder. Burns noticed that there was a split in the outer jacket of the conductor feeding the grinder. The split was approximately one and a half inches long and one quarter inch wide and there was bare copper exposed through the split. Burns testified that the split could cause a miner to be electrocuted if he put his hand on the plug to plug in the grinder.

Bredfield admitted that the outer jacket was damaged, speculating that someone may have pinched the cord in the heavy door of the lube truck. He stated that no one was aware of the defect and that no one would have tried to use the grinder in that condition.

The Secretary alleges a violation of 30 C.F.R. § 56.12004, which provides in relevant part that "Electrical conductors exposed to mechanical damage shall be protected." A "conductor" is defined as "a material, usually in the form of a wire, cable, or bus bar, capable of carrying an electric current." 30 C.F.R. § 56.2. Other Commission ALJs to address this standard have found that it is violated when "exposed cable or wiring that is capable of carrying an electrical current, thus creating a shock hazard, lacks an outer protective jacket or structure of some sort." *Recon Refractory & Constr.*, 36 FMSHRC 2265, 2274 (Aug. 2014) (ALJ); *see also Northshore Mining Co.*, 35 FMSHRC 1889, 1893 (June 2013) (ALJ); *Baker Rock Crushing Co.*, 32 FMSHRC 968, 977 (Aug. 2010) (ALJ).

I find that the Secretary has proven a violation of the standard. The cited cord was capable of carrying an electric current and had exposed wires that were unprotected. The Secretary alleges that the violation was S&S and the result of moderate negligence. I affirm the negligence designation, but find that the violation was not S&S. Bredfield testified that the grinder had not been used in its current condition. At the time of the inspection, the tool was stored in the truck and not currently in use. Bredfield stated that a miner would have noticed the split on the cord as soon as he took the machine out and would not have tried to use it in that condition. The Secretary produced no evidence to the contrary. I thus find that the hazard of a miner contacting energized wires was unlikely to occur. *cf. Baker Rock*, 32 FMSHRC at 977-78 (finding that no violation of § 56.12004 occurred because miners were unlikely to connect a damaged cable to power without first noticing the exposed inner conductors). The second element of the *Mathies* test is therefore not proven. The Secretary proposed a penalty of $2,398.00, but because the violation was not significant and substantial, I assess a penalty of $300.00.

Citation No. 8872985

Burns continued the inspection of the mine on June 7, 2016. He inspected a roadway in the southeast section of the yard near a pond. Burns noticed that there was a drop-off of approximately 10 to 15 feet, but there were no berms on approximately 300 feet of the road. Burns observed a Volvo haul truck in the area, which he learned had been operated in the area the weekend prior to the inspection. *See* Sec'y Ex. 17, p. 5. He also observed tracks on the road, which he believed were from haulage vehicles and mobile excavators. *See* Sec'y Ex. 17, p. 8. He measured that the tracks were between five inches and five feet from the drop-off. The tire tracks so close to the water concerned Burns because a vehicle could over-travel into the water. He predicted that this type of accident could cause the vehicle's driver to drown.

Burns issued this citation for a violation of 30 C.F.R. § 56.9300(a), which requires that "Berms 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."

LRock makes several arguments disputing the berm requirements. First, Bredfield testified at hearing that the roadway was not on mine property and so is outside MSHA jurisdiction. However, Burns testified that the area was on mine property. I accept the inspector's finding on this issue and find that the roadway was subject to MSHA jurisdiction. Bredfield also stated that the unbermed area shown in Exhibit 17, page 11, had only a 20-inch drop-off. Bredfield argued that berms are only required for drop-offs greater than mid-axle height of the mine's tallest wheeled vehicles, and that the Volvo truck used in the area had a mid-axle height of 31 inches. In fact, the standard requires that the "*berm or guardrail* shall be at least mid-axle height." 30 C.F.R. § 56.9300(b) (emphasis added). A berm is required wherever there is a drop-off "of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." Burns found that there was a rollover hazard even in some areas with a small drop-off, and I accept his findings.

I find that the Secretary has proven a violation of the standard. The cited roadway had a steep drop-off of 10 to 15 feet in some places creating a rollover hazard. Berms were therefore required. However, I assess the negligence as moderate rather than high as alleged, because Bredfield testified that his understanding of the height requirement was different than that of the inspector for this area of the mine. I also find that the violation was significant and substantial as alleged by the Secretary. The Secretary has proven that a violation occurred, which satisfies the first step in the *Mathies* test. The relevant hazard is that of a rollover accident from over-traveling, and I find that such an accident was reasonably likely to occur. While Bredfield stated that the road was used only once per year by excavating vehicles, I do not credit his statement, given that Burns observed a haul truck and vehicle tracks in the area. Moreover, the area lacking berms was large, creating multiple sites for a potential accident. The second element of the *Mathies* test is satisfied. A rollover accident in this area would be likely to result in a crushing or drowning injury, satisfying the third and fourth elements. I assess a penalty of $3,000.00, as I have found that the negligence was less than that assessed by the Secretary.

Citation No. 8872986

During his inspection, Burns asked Bredfield for the results of the mine's grounding systems tests. He learned that while Bredfield had completed a test of the equipment grounding conductors, he had not tested the grounding electrodes or the grounding electrode conductors. The mine had a system of ground rods that Burns believed should have been tested. However, Burns did not encounter any defects in the system. Bredfield did not believe it was necessary to test the ground rods because the mine already has more rods than are required.

Burns cited LRock for violating 30 C.F.R. § 56.12028, which requires that "Continuity 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 a request by the Secretary or his duly authorized representative."

The Secretary has interpreted the term "grounding systems" to include three components, each of which must be tested: equipment grounding conductors, grounding electrode conductors, and grounding electrodes. IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 21, at 44–45 (2003). The Secretary's interpretation is reasonable and is therefore entitled to deference. *See Tilden Mining Co.*, 36 FMSHRC 1965, 1967; *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678-79 (Dec. 2010) (citing *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994)). I find that the Secretary has proven a violation. Tests of all three components described by the Secretary were required, but only the equipment grounding conductors were tested. I also uphold the inspector's finding of low negligence because Bredfield was unaware that the two other tests were required, and he testified that they would conduct those tests from now on. I find that the violation was non-S&S and unlikely to cause injury, because the inspector testified that during his inspection he did not see any electrical hazards that could lead to a shock. I assess a penalty of $114.00.

Citation No. 8872987

Burns issued the next three citations for violations regarding a Ford F7000 fuel truck at the mine. Burns observed that the truck's tank did not have a label indicating that it contained diesel fuel. He was concerned that a miner who was not aware that the tank held diesel fuel could accidentally come into contact with the fuel. Burns testified that diesel fuel can be hazardous if the fuel touches a person's eyes or skin. However, all the miners he spoke to knew that the tank contained diesel fuel.

LRock disputes that the tank was not labeled. Bredfield explained that there was a placard on the tank with the label "1203," which he stated would be recognizable to any miner or emergency personnel as a sign for diesel fuel. Burns disagreed, stating that the 1203 placard on the tank did not mean anything to him. Bredfield stated that the truck had been at four different rock pits with only the 1203 placard on the tank, and there had been no previous questions as to the tank's contents.

Burns issued a citation for a violation of 30 C.F.R. § 47.41, which requires that "The operator must ensure that each container of a hazardous chemical has a label. If a container is tagged or marked with the appropriate information, it is labeled." A "hazardous chemical" is defined in the regulations as "Any chemical that can present a physical or health hazard." 30 C.F.R. § 47.11. A "label" is defined as "Any written, printed, or graphic material displayed on or affixed to a container to identify its contents and convey other relevant information." *Id*.

I reject LRock's argument that the 1203 placard was an adequate label for the tank. Burns, an inspector with over nine years of experience, was unfamiliar with the label. The miners onsite also made no reference to the placard when Burns was explaining the citation to them. I thus find that the placard did not "convey the relevant information" as required by the standard. The violation was the result of moderate negligence because management had attempted to comply by using the "1203" placard, but the label was not clear. This violation was non-S&S and unlikely to cause injury because all of the miners the inspector talked to knew the tank contained diesel fuel. A penalty of $145.00 is assessed as proposed.

Citation No. 8872988

Continuing his inspection of the fuel truck, Burns asked the operator to back up the truck to test the back-up alarm. He testified that he could not hear an alarm when the operator backed up the fuel truck. The miner on site informed Burns that the fuel truck was primarily stationary, and that the only time it moved was to refuel the roll crusher machine. The crusher was located roughly 200 feet from the truck. Burns estimated that the crusher would need to be refueled daily, but workers at the inspection told him it had been at least two weeks since anyone had moved the truck. The Secretary's photograph of the truck shows that it had a restricted rear view. Sec'y Ex. 14 pg. 3.

Bredfield testified at hearing that the truck was stationary 99 percent of the time. Miners frequently used pickup trucks to fuel the crusher instead of the fuel truck. If the truck did go through the pit, it would drive very slowly. He stated that the truck never had a back-up alarm

installed because other inspectors told the company that it was not necessary so long as they used a spotter when moving the truck.

Burns cited the mine for a violation of 30 C.F.R. § 56.14132(a), which requires that "manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." This standard applies to audible warning devices already existing on vehicles, but does not require the installation of a horn if one is not present. *See Nelson Bros. Quarries, Inc.*, 21 FMSHRC 1100, 1109 (Oct. 1999) (ALJ). However, a back-up alarm or similar safety measure is required by § 56.14132(b), which applies "when the operator has an obstructed view to the rear." 30 C.F.R. § 56.14132(b). If no alarm is present, the operator may also comply with § 56.14132(b) by using "An observer to signal when it is safe to back up." *Id*.

Because there was no alarm installed on the truck, I find that the Secretary should have cited the truck under § 56.14132(b) instead of § 56.14132(a). I therefore amend the citation to conform to the evidence, as is permitted under Federal Rule of Civil Procedure 15(b)(2). The amendment is appropriate because both parties discussed the use of spotters at hearing, indicating that they understood that a violation of § 56.14132(b) was being litigated. *See Faith Coal Co.*, 19 FMSHRC 1357, 1361 (Aug. 1997).

I find that the Secretary has proven a violation of § 56.14132(b). The truck had an obstructed rear view and no working back-up alarm. While Bredfield mentioned the use of spotters at hearing, no one told Burns that spotters were used at the time of the inspection. I conclude that spotters were not used consistently enough to satisfy the standard. The Secretary alleges that the violation was unlikely to cause injury and was not S&S. Because the truck was moved only occasionally, I agree that injury was unlikely. The negligence was moderate because the operator had alarms on other vehicles and thus should have been aware of the requirement. The Secretary proposed a penalty of $216.00, which is assessed.

Citation No. 8872989

Burns next tested the brake lights on the same fuel truck. He asked the operator to apply the service brake pedal, and observed that the brake lights did not come on. The Secretary's Exhibit 16, page 3, shows the brake lights unlit. As previously mentioned, this truck was mostly stationary, but the operator did move it to refuel the crusher, which had been at the mine for approximately two weeks. Burns also testified that the operator had not run the truck in two or three weeks. The inspector believed based on the frequency of use of the truck that the brake lights had not been fixed in a timely manner.

Burns issued a citation for a violation of 30 C.F.R. § 56.14100(b), which requires that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary alleges that the violation was non-S&S and that it resulted from moderate negligence.

With respect to the standard at issue, the Commission has held that the timeliness of a correction depends on when the defect occurred and when the operator knew or should have

known about the defect. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001). In *Lopke*, the Commission found that a violation of § 56.14100(b) had not been proven because the Secretary had not provided any evidence as to when the defect on the cited equipment arose. *Id*.

Here, Burns assumed that LRock had not repaired the truck's brake lights in a timely manner based on how often the crushing machine needed to be refueled. He believed the machine would need to be fueled daily, but was told that the fuel truck had not been moved in two or three weeks. I am not convinced that these facts prove that the brake lights had been broken for any length of time, or that the operator should have known of the defect. I find that the Secretary has failed to prove the timeliness element of the standard, and therefore vacate the citation.

Citation No. 8872990

Finally, Burns concluded based on the large number of violations he encountered at the mine that adequate inspections were not being conducted. He issued a citation for a violation of 30 C.F.R. § 56.18002(a), which provides that "A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." The Commission has held that in order to comply with the standard, a workplace examination "must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize." *Sunbelt Rentals, Inc*., 38 FMSHRC 1619, 1627 (July 2016).

I find that the Secretary has proven a violation. Burns specifically noted the citations for missing berms, missing guards, and damaged electrical conductors. A reasonably prudent competent examiner would have detected those violations in an inspection. Further, I find that the violation was S&S. The failure to identify numerous hazardous conditions, especially the missing berms and the guards on the welder, was likely to result in a miner working in unsafe conditions, and this would be likely to result in an accident. Such an accident would be reasonably likely to cause a serious injury, such as a crushing injury or electrocution in the case of the berms and electrical guarding. The *Mathies* elements are satisfied. However, I do not find the Secretary has presented sufficient evidence to demonstrate that the negligence was high. While Bredfield may have been the person responsible for conducting the examinations, there is no evidence in the record to support that supposition. It is not clear if he is the only management employee at the mine, or if he designated another individual to conduct an examination. Therefore, I find the negligence to be moderate and assess a penalty of $3,500.00.

Citation No. 8881854

The final citation was issued by Inspector Brent Oxier during a hazard complaint inspection. Oxier observed a miner standing on top of the shaker platform removing rock from the screens. The miner was not wearing fall protection. Oxier measured that the platform was 11 feet, 9 inches above ground. *See* Sec'y Ex. 1, p. 7. A walkway below the cited area had a handrail, but the miner was working above the handrail, and the walkway was narrow. *See* Sec'y Ex. 1, p. 5. Oxier believed the miner was in danger of falling, because his back was close to the

screen wall edge and he was bent over striking the screen with a hammer to dislodge a rock. If the miner were to step back, he could fall backwards to the walkway below or to the ground. Oxier believed that the miner's actions were common practice at the mine, because the miner was aware that Oxier was on site for an inspection. Miners told Oxier that they removed rock from the screens twice per week.

Bredfield believed that the handrail surrounding the screen provided sufficient protection. He stated that the walkway with the handrail was wider than Oxier believed, 22 inches instead of 9 inches. Bredfield also stated that a miner working to dislodge rocks from the screen would be working on his hands and knees and so not in danger of falling, and a 12 inch sideboard around the screen would prevent anyone from falling.

Oxier cited the mine for a violation of 30 C.F.R. § 56.15005, which provides that "Safety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered." I find that the Secretary has proven a violation. Because the miners were working to dislodge rocks on a platform with no hand rail, there was a danger of falling. There is no dispute that the miner observed was not wearing fall protection. Because a 12 inch barrier was present, I find that the violation was the result of moderate negligence.

The Secretary alleges that the violation was S&S. Applying the *Mathies* criteria, the Secretary has proven a violation of a mandatory standard. I find that the hazard of a miner falling from the top of the screen was reasonably likely to occur, given that the work was performed several times per month, and the miner was likely to be in an unstable position while working to dislodge rocks from the screen. While Bredfield stated that the miner would be on his hands and knees, Oxier observed someone standing. The second *Mathies* element is satisfied. Oxier believed that a miner would be more likely to fall to the catwalk below than to the ground, but he believed that such a fall would likely cause permanently disabling injury. I credit these findings and find that the third and fourth *Mathies* elements are satisfied. The violation is S&S. The Secretary proposed a penalty of $1,078.00, which I find appropriate.

III. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The Secretary calculates penalties using the penalty regulations set forth in 30 C.F.R. § 100.3 or following the guidelines for special assessments in 30 C.F.R. § 100.5. When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary then petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. Commission Judges are not bound by the Secretary's penalty regulations or his special assessments. *Am. Coal Co*., 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation

was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co*., 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id*. at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission requires that its judges explain any substantial divergence from the penalty proposed by the Secretary. *Am. Coal*, 38 FMSHRC at 1990. However, the judge's assessment must be de novo based upon her review of the record, and the Secretary's proposal should not be used as a starting point or baseline. *Id*.

With regard to the criterion of ability to continue in business, the Commission has held that the burden rests on the operator to produce evidence that the proposed penalty will affect its ability to continue in business. *Mize Granite Quarries, Inc*., 36 FMSHRC 2801, 2804 (Nov. 2014); *Broken Hill Mining*, 19 FMSHRC 673, 677-78 (Apr. 1997). In the absence of such evidence, it is presumed that no such adverse effect would occur. *Mize*, 36 FMSRHC at 2804; *Sellersburg*, 5 FMSHRC at 294. Thus, the judge may only adjust a penalty based on an operator's inability to pay when there is evidence in the record relevant to that point. *Mize*, 36 FMSHRC at 2804.

The history of assessed violations has been admitted into evidence and shows 16 violations in the 15-month period prior to the inspection. This includes two citations for missing berms or guardrails, two for inadequate guarding on moving machine parts, one for an exposed electrical conductor, and three for failure to inspect a fire extinguisher. The parties agree that the citations in this docket were abated in good faith, and the mine has raised no defense of ability to pay. LRock is a small operator. The negligence and the gravity have been discussed above with respect to each citation.

Based on these factors, I assess the penalties as follows:

Citation No.	**Originally Proposed Penalty**	**Penalty Assessed**	**Modification**
Docket No. WEST 2016-0705			
8872971	$484.00	$484.00	None.
8872972	$145.00	$145.00	None.
8872973	$216.00	$216.00	None.
8872974	$7,964.00	$7,964.00	None.
8872975	$722.00	$722.00	None.
8872977	$324.00	$324.00	None.
8872978	$1,078.00	$1,078.00	None.
8872979	$216.00	$216.00	None.
8872980	$216.00	$216.00	None.
8872982	$145.00	$145.00	None.

8872983	$722.00	$722.00	None.
8872984	$2,398.00	$300.00	Remove S&S designation.
8872985	$7,964.00	$3,000.00	Modify negligence from high to moderate.
8872986	$114.00	$114.00	None.
8872987	$145.00	$145.00	None.
8872988	$216.00	$216.00	Modify citation, no penalty change
8872989	$145.00	$0.00	Vacate.
8872990	$7,964.00	$3,500.00	Modify negligence from high to moderate.
8881854	$1,078.00	$1,078.00	None.
TOTAL	**$32,256.00**	**$20,585.00**	

IV. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $20,585.00 within 30 days of the date of this decision.

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

Distribution: (U.S. First Class Certified Mail)

Daniel Brechbuhl, Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd, Suite 216, Denver, CO 80204

John Bredfield, LRock Industries, 451 Mandy Rd, Toledo, WA 98591

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 26, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. RAIN-FOR-RENT, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEST 2016-730-M A.C. No. 04-01891-418057 VVG Eliot Plant

DECISION

Appearances: Jose Figueroa, Mine Safety and Health Administration, Vacaville, California, and Isabella Finneman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner; B.J. Walker, Esq., Rose Law Firm, Little Rock, Arkansas, for Respondent.

Before: Judge Manning

This case are before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Rain-For-Rent ("RFR") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties presented testimony and documentary evidence at a hearing held in San Jose, California, and filed post-hearing briefs. Two section 104(a) citations were adjudicated at the hearing. RFR was an independent contractor performing work at the Eliot Plant, a sand and gravel operation in Alameda County, California. Although I have not included a detailed summary of all evidence or each argument raised by the parties, I have fully considered the entire record in rendering this decision.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties agreed upon several general stipulations set forth in the bullet points below:

- Respondent Rain-For-Rent is a contractor that provides temporary liquid handling solutions, including pumps, tanks, filtration and spill containment to different industries, including mine operators in the United States, Canada and United Kingdom.
- Respondent provided services to the CEMEX Construction Materials Pacific LLC, which operates Eliot Plant, MSHA I.D. No. 04-01891, in Alameda County, CA.
- The case is subject to the jurisdiction of the Commission and the assigned judge.
- The MSHA inspector was acting in his official capacity when the citations were issued.

- The subject citations were properly served by a duly authorized representative on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevance of any statements asserted therein.
- Respondent demonstrated good faith in abating the conditions noted in the subject citations.
- Respondent had no history of MSHA violations as of the date that the subject citations were issued.
- Respondent and its representatives have at all times cooperated with the investigation.
- Respondent demonstrated good faith in addressing the conditions noted in the subject citations.

It is important to emphasise that the Commission and courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g., Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> 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.

Allied Products, 666 F.2d 890, 892-93 (5th Cir. 1982) (footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

A. Citation No. 8785486

Citation No. 8785486, issued under section 104(a) of the Mine Act on July 6, 2016, alleges a violation of section 56.13015 of the Secretary's safety standards and asserts that an air receiver tank[1] in the bed of a truck did not have a current record of inspection. Moreover, the citation asserts that the truck is used daily and that persons would suffer potentially fatal injuries in the event of a pressure vessel explosion. Section 56.13015 requires, in pertinent part, that "[c]ompressed-air receivers and other unfired pressure vessels shall be inspected by inspectors holding a valid National Board Commission and in accordance with the applicable chapters of the National Board Inspection Code, a Manual for Boiler and Pressure Vessel Inspectors, 1979."[2] 30 C.F.R. § 56.13015.

[1] The terms "tank" and "pressure vessel" are used interchangeably throughout the decision.

[2] For brevity's sake the National Board Inspection Code is referred to as the "NBIC" throughout the decision.

Inspector Nicholas Basich[3] determined that the condition was unlikely to cause an injury or illness but, if it did, the injury could reasonably be expected to be fatal. He further determined that one person was affected, the condition was not significant and substantial, and Respondent was moderately negligent. The Secretary proposed a penalty of $114.00 for this alleged violation.

The parties agreed upon the following stipulations with respect to this citation:

- The air compressor referenced in Citation [N]o. 8785486 was a Quincy model, with a 30 gallon air receiver tank, which was mounted on the Ford F-550 company service truck (company #2102).
- During the subject inspection, Respondent did not produce to the MSHA inspector, in response to the MSHA inspector's request, any documents showing that the air compressor referenced in Citation [N]o. 8785486 had been inspected by an inspector holding a valid National Board Commission and in accordance with the applicable chapters of the National Board Inspection Code.
- The alleged violation in Citation No. 8785486 has been terminated.

Summary of the evidence

Inspector Basich was at Cemex's Eliot Plant (the "mine") in July of 2016 to conduct a regular inspection. Tr. 10-11. RFR was a contractor at the mine. Tr. 11. During his inspection he observed a RFR service truck parked adjacent to the mine shop. Tr. 11-12. An air compressor and receiver tank were mounted on the bed of the truck. Tr. 12. Inspector Basich inspected the pressure vessel, relief valve and gauge. Tr. 45. As part of that inspection he looked for an identification number on the receiver tank but did not find one. Tr. 12.

Based on his observations, Inspector Basich issued Citation No. 8785486 for an alleged violation of section 56.13015 of the Secretary's safety standards. Tr. 14. He explained that the cited standard requires pressure vessels to be inspected by someone with a "valid National Board Commission and in accordance with the National Board Inspection Code [of] 1979". Tr. 14. According to Inspector Basich, an identification number can be used to determine if the tank has been inspected by someone holding a valid National Board Commission. Tr. 12. Here, Inspector Basich explained the tank did not have a stamp on it indicating that it had been inspected by someone with a valid National Board Commission and the driver could not produce documentation showing that a proper inspection had been conducted even after given the opportunity to call his office.[4] Tr. 12, 20, 29, 39-40, 60, 149.

[3] Inspector Basich has worked for MSHA for over four years. Tr. 9. In addition to standard training at the Mine Academy, he has had journeyman training and special investigation training. Tr. 10. He is trained on pressure vessels, the NBIC, and fire prevention. Tr. 10.

[4] On cross-examination, Inspector Basich confirmed that the citation was issued for failure to inspect the pressure vessel and not for failing to provide record of an inspection, which would have been cited under a different subsection of the Secretary's standard. Tr. 47

Inspector Basich agreed that, while it can be presumed that a pressure vessel has been inspected by a manufacturer, the standard requires that the inspection be done by someone holding a "valid National Board Commission[,]" and the pressure vessel needs to be inspected when it changes ownership and at the time of installation before placing the pressure vessel into service. Tr. 20, 30. On cross-examination Inspector Basich explained that, while he did not see a "manufacturer's plate" on the tank, the presence of one would not change his opinion because the tank, valves, gauges and hoses can be damaged after the tank leaves the manufacturer. Tr. 49-51. As a result, he stated that RFR could not rely on any manufacturer's plate applied to the tank since that was only proof of an inspection by the manufacturer. Tr. 50-53.

Robert Kelly George[5], the vice president for health and safety for the company doing business as RFR, testified that he conducted an internal investigation surrounding the circumstances of both citations at issue in this case. Tr. 79. He explained that RFR had pumps at the mine and the service truck driver, a mechanic, was at the mine to work on the pumps. Tr. 83. George testified that after the subject citation was issued, he contacted someone at the RFR branch and had them take photographs of the pressure vessel. Tr. 93; RX-1. George explained that the photographs show that the pressure vessel was equipped with a manufacturer's plate and American Society for Testing and Materials ("ASTM") stamp indicating that the tank had been inspected to the ASTM standard.[6] Tr. 86-88, 93; RX-1. George acknowledged that the purpose of the NBIC is to maintain the integrity of the pressure vessels after they are put into service and that the Code "requires that the air compressor be inspected when it's first put into service." Tr. 88,118. Moreover, he averred that any follow-up inspection under the NBIC was not yet due, as the tank had been in service for less than a year. Tr. 88. However, on cross-examination he conceded that he was unaware how many hands the compressor and pressure vessel went through after it was manufactured and before it ultimately ended up on RFR's truck, was not sure who installed the compressor and pressure vessel on the service truck, and had no recollection as to whether anyone with a National Board Commission had inspected the compressor after RFR came into possession of it. Tr. 119. Moreover, he acknowledged that RFR purchased the truck from a dealership and that a third party was responsible for making sure that the air compressor and pressure vessel were correctly installed upon the truck. Tr. 123-124. Finally, he conceded that, while he knew the pressure vessel had been inspected after the manufacturer's plate was attached, he could not be sure if those inspections satisfied the NBIC. Tr. 134.

[5] George currently oversees health and safety for Western Oil Fields Supply Company, doing business as RFR, and its 1600 employees. Tr. 75-76. Prior to working at RFR he worked as a fire fighter, paramedic, OSHA compliance officer, and a safety director of another private entity. Tr. 75-77. While he was trained as an OSHA compliance officer and wrote citations in that role, he is not trained on how to enforce MSHA safety standards. Tr. 77, 115. George has a master's degree in occupational safety and health, is familiar with various safety and health regulations, and is currently enrolled in law school. Tr. 78.

[6] ASTM is an international standards organization that develops and publishes voluntary consensus standards for a wide range of materials and products. The ASTM stamp presumably indicated that the tank met ASTM standards.

Fact of Violation

I find that the Secretary has established a violation. The requirements of the cited standard are twofold. First, it requires that pressure vessels be inspected by persons holding a valid National Board Commission. Second, it requires that the inspection be conducted in accordance with the applicable chapters of the NBIC.[7] Because RFR violated the first requirement, I find that consideration of the second requirement unnecessary.

Inspector Basich testified that RFR provided no record of an inspection conducted by an individual with a National Board Commission and the parties stipulated to that fact. RFR offered no evidence to the contrary. Accordingly, I find that a violation existed under the standard's first requirement. [8]

RFR cites *D&H Gravel*, 31 FMSHRC 272, 279-80 (Feb. 2009) (Judge Manning), for the proposition that a manufacture's tag on a new pressure vessel is evidence that a proper inspection was conducted. However, limited facts are available in that decision and it does not appear that the question of whether the pressure vessel was inspected by someone with a National Board Commission was raised by either party. Accordingly, I find that *D&H Gravel* is distinguishable and my ruling in that case should not be applied here.

[7] Both parties offered testimony, introduced evidence, and presented arguments regarding California state regulations as they relate to the NBIC. The NBIC states that "where any provision herein presents a direct or implied conflict with any lawful regulation in any governmental jurisdiction, the lawful regulation shall govern and such compliance shall be made." PX-4 p.4. In its brief, RFR contends that MSHA cannot constitutionally base a citation on an alleged violation of California state regulations. RFR Br. 3-9. However, no evidence was presented to show that California regulations would have exempted the tank from inspection. Consequently, no conflict existed. For the reasons set forth herein, I find that this matter can be decided based solely on the safety standard cited by Inspector Basich. Accordingly, I do not address the issue of whether MSHA can enforce state regulations where they conflict with the NBIC.

[8] RFR, in its brief, asserts that the inspection conducted by the manufacturer of the pressure vessel, as evidenced by the manufacturer's plate and ASTM stamp, satisfied the standard. Although an inspection may have been conducted, nothing in the record establishes that it was conducted in accordance with the NBIC. The placement of the ASTM stamp on the tank does not meet the requirements of the Secretary's safety standard. The purpose of the NBIC is "to maintain the integrity of . . . pressure vessels *after* they have been placed into service." PX-4 p. 3 (emphasis added). The NBIC requires that inspections be conducted "at the time of installation." PX-4 p. 5. Here, at some point subsequent to the manufacturer's inspection, the compressor and pressure vessel were installed on the service truck prior to that truck being turned over to RFR and put into service.

Gravity

Inspector Basich determined that the condition was unlikely to cause an injury or illness because the tank, relief valve and gauge were in good condition with no defects. Tr. 20-21, 46, 62. However, he stated that in the event an injury were sustained it would be fatal since a defect affecting the performance of the compressor could cause the tank to become overcharged and explode, sending shrapnel in all directions and striking persons close by. Tr. 21, 61.

I find that the gravity was extremely low. The pressure vessel, while not inspected to NBIC standards, had been inspected to ASTM standards and no signs of damage or other problems were observed by Inspector Basich. The tank had been recently installed. There was little to no likelihood that an injury causing explosion due to overcharging would occur. Nevertheless, under the Act's strict liability structure the condition constituted a violation.

Negligence

Inspector Basich designated the citation as being the result of moderate negligence because RFR should have known that the safety standard required proper inspection of the tank, yet no inspection had taken place during the six months the truck had been in service. Tr. 21-22.

I find that RFR's negligence was low. The pressure vessel was new and RFR relied, albeit in error, on the manufacturer's inspection to the ASTM standard. RFR is a large contractor but does relatively little work in the mining industry. I find that the facts in this instance weigh in favor of a low negligence finding. Accordingly, I **MODIFY** the citation to low negligence and assess a penalty of $100.00.

B. Citation No. 8785487

Citation No. 8785487, issued under section 104(a) of the Mine Act on July 6, 2016, alleges a violation of section 56.4402 of the Secretary's safety standards and asserts that a safety can full of gasoline was not labeled to indicate its contents. Further, the citation asserts that the can was located in the back of a truck that was used daily and persons were exposed to hazards associated with misuse of the can's contents. Section 56.4402 requires that "[s]mall quantities of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents." 30 C.F.R. § 56.4402.

Inspector Nicholas Basich determined that the condition was unlikely to cause an injury or illness but, if it did, the injury could reasonably be expected to result in lost workdays or restricted duty. He further determined that one person was affected, the condition was not significant and substantial, and Respondent was moderately negligent. The Secretary has proposed a penalty of $114.00 for this alleged violation.

The parties agreed upon the following stipulations with respect to this citation:

- 30 CFR § 56.4402 does not require any specific labeling on a safety can other than that the labeling "indicate the contents".

- There is no requirement under the Mine Safety and Health Act that labeling of a safety can be in specific location on the can.
- There is no requirement under the Mine Safety and Health Act that labeling of a safety can be in a specific size or color.
- There is no requirement under the Mine Safety and Health Act that labeling of a safety can be in specific language.
- The safety can which is the basis for Citation No. 8785487 was red in color at the time of the subject inspection.
- The safety can which is the basis for Citation No. 8785487 was marked with a yellow stripe at the time of the subject inspection.
- The alleged violation in Citation No. 8785487 was terminated immediately.

Summary of the evidence

While inspecting the same RFR service truck discussed above, Inspector Basich observed two red five gallon safety cans in the bed of the truck. Tr. 23, 64. While one can had the word "diesel" written on it, the other can did not have wording on it indicating the contents. Tr. 23-24. The unmarked five gallon safety can was full of gasoline. Tr. 23-24.

Based on his observations, Inspector Basich issued Citation No. 8785487 for an alleged violation of section 56.4402 of the Secretary's safety standards. Tr. 26. He explained that the cited standard requires that small quantities of flammable liquids must be kept in safety cans labeled to indicate their contents. Tr. 26. Although the gasoline was in a proper safety can, the can was not labeled to indicate its contents. Tr. 25-26, 67. The can had warning symbols, but not the words "gas" or "gasoline." Tr. 65.

George testified that he examined the subject safety can and reviewed the can manufacturer's website as part of his own investigation and believes that the can complied with the cited standard because the can was "labeled." Tr. 97-98. He explained that the subject safety can, which was red with the yellow stripe, was consistent with industry practice and met the requirements under multiple non-MSHA standards, e.g., Department of Transportation, Occupational Safety and Health Administration, National Fire Protection Association, Underwriters Laboratories. Tr. 99, 103. In particular, he noted that OSHA does not require that "gasoline" be written on the can and instead requires that a red safety can with a yellow stripe be used for "flammable liquids with a flash point below 80 degrees Fahrenheit." Tr. 100, 105. Moreover, he testified that warnings on the cited can that stated "danger, . . . extremely flammable, harmful or fatal if swallowed[,] . . . [were] additional evidence of [the can] being labeled." Tr. 102. Further, he stated that the RFR employee/driver knew exactly what was in the can and RFR's own policy says that "a red safety can will be used for gasoline . . .[, a] yellow safety can will be used for diesel . . . [and if] you vary from that, you must mark the can conspicuously with what it contains." Tr. 99-101. Finally, he stated that the benefit of color coding instead of wording is that the meaning is more universally understood. Tr. 107-109. On cross-examination he agreed that, although RFR's color policy is communicated to its employees, other workers at a mine site may not be privy to that policy. Tr. 129.

Fact of Violation

I find that the Secretary established a violation of the cited standard. The cited standard, as relevant to this matter, requires that flammable liquids shall be kept in safety cans labeled to indicate the contents. 30 C.F.R. § 56.4402. There is no dispute that gasoline, a flammable liquid, was kept in the can and that the can was a proper "safety can." Accordingly, the only question that remains is whether the can was "labeled to indicate its contents." I find that in order to comply with the standard, the can would have to be labeled to indicate that it contained gasoline. The words "gas" or "gasoline" did not appear on the can. Accordingly, I find that the can was not labeled to indicate its contents.

RFR argues that the color scheme of the can amounted to a proper label. It avers that the color scheme satisfies the labeling requirements of multiple non-MSHA regulations[9] and, as a result, it is an industry norm and should satisfy the MSHA standard. As an example, George testified that, under OSHA, the red and yellow color scheme signals that "flammable liquids with a flash point below 80 degrees Fahrenheit" are in the can. While I decline to address whether OSHA's regulation, as described by George, was satisfied, I find that MSHA's safety standard requires more. Specifically, it requires that the labeling *indicate the contents* of the safety can. It is not enough to simply provide information that indicates the characteristics of the contents of the can, i.e., the flash point and whether the material is flammable. Rather, the label must indicate the actual contents, i.e., gasoline.

The color scheme implemented by RFR, while it may have satisfied other non-MSHA regulations, did not provide the information necessary to satisfy the Secretary's standard. Although RFR asserts that the red color scheme is indicative that a safety can contains gasoline, RFR violated this rule in this instance, as evidenced by fact that RFR also used a red safety can on this very truck for diesel fuel. The other red can in the truck that day had the word "diesel" written on it. The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions[.]" *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). Having two red cans with different contents could cause confusion where one can is not labeled. Written labels[10] which indicate the contents of a safety can are intended to help avoid the guesswork of what might be in a can and help guard against the misuse of the can's contents as a result of a lapse in

[9] Although materials introduced into evidence from the manufacturer of the safety can state that the can meets multiple standards, MSHA standards are not listed. RX-3 p. 1.

[10] MSHA's HazCom standards include a definition of "label" at section 47.11. A label is defined as "[a]ny written, printed, or graphic material displayed on or affixed to a container to *identify its contents* and convey other relevant information." 30 C.F.R. § 47.11 (emphasis added). Although not directly applicable here, that definition provides that a label must indicate the contents of the container even if it conveys other relevant information such as the flashpoint. Although I agree with RFR that red cans are typically used in industry to store gasoline, I find that color alone, even with a yellow stripe, is not sufficient to meet the requirement of the cited safety standard.

attention, or fatigue. The lack of the word "gas" or "gasoline" in this instance could result in such misuse.

Gravity

Inspector Basich determined that the condition was unlikely to cause an injury or illness because the can was in good condition, and the driver was aware of the contents and was the only person accessing the bed of the truck that day. Tr. 27-28, 68. However, Inspector Basich stated that in the event an injury were sustained it would result in lost workdays or restricted duty because the misuse of a flammable liquid could lead to a fire or explosion which could result in shock or burn injuries. Tr. 28, 66.

George testified that RFR maintains a written policy and its employees are trained so that they would always know what was in the subject can. Tr. 104. The policy has never been confused in the past. Tr. 104-105. Had the policy been confused and diesel accidently been mistaken for gasoline, or vice versa, he would have known about it because it would have destroyed an engine. Tr. 104-105.

I find that the gravity was very low. There was little to no likelihood of an injury being sustained given that the container was a proper safety can, and the RFR employee was aware of the contents, trained to identify the contents based on RFR's policy, and was the only individual who would likely use the can. Nevertheless, the lack of a proper label created the potential for misusing the contents of the can. Although Inspector Basich testified that the misuse of the contents of the can could lead to a fire or explosion, I credit George's testimony and find that the far more likely outcome of the condition of the cans on the truck would be gasoline being mistakenly put into a diesel engine or diesel fuel being put in a gasoline engine, thereby ruining the engine. Accordingly, I find that, in this particular instance the condition is far less of a safety concern and more of an equipment protection issue. Nevertheless, as with the above citation, under the Act's strict liability structure the condition constituted a violation with low gravity.

Negligence

Inspector Basich designated the negligence as moderate because RFR was aware of the standard, as evidenced by one of the two cans being properly labeled. Tr. 28.

I find that RFR's negligence was low. RFR had a reasonable good faith belief that it was in compliance with the standard. While I find that RFR's color scheme does not satisfy the Secretary's safety standard, I find that its policy and training are mitigating factors. Moreover, although the Secretary argues that the word "diesel" written on the other safety can was an indication that RFR was aware of the standard, I find that RFR's policy, which required employees to "mark the can conspicuously with what it contains" only if the contents deviated from the understood color scheme, also explains why one can was marked but the other was not. Accordingly, I **MODIFY** the citation to low negligence and assess a penalty of $100.00.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). Neither MSHA's website nor Exhibit A to the Petition for Assessment of a Civil Penalty reflect any hours worked by RFR during the relevant time period. While George testified that RFR has approximately 1,600 employees, it does very little work in the mining industry. RFR did not assert that the penalties will affect its ability to remain in business. The parties have stipulated that RFR had no history of MSHA violations as of the date that the subject citations were issued. The citations were timely abated. The negligence and gravity are discussed above. Based on the penalty criteria I assess a total penalty of $200.00.

III. ORDER

For the reasons set forth above, Citation Nos. 8785486 and 8785487 are **MODIFIED** to low negligence. Rain-For-Rent is **ORDERED TO PAY** the Secretary of Labor the sum of $200.00 within 30 days of the date of this decision.[11]

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

Distribution:

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 27, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS
v.	
ALEX ENERGY, INC.;	Docket No. WEVA 2017-0007 A.C. No. 46-08787-419124 Mine: Jerry Fork Eagle
	Docket No. WEVA 2016-0530 A.C. No. 46-08977-414431 Mine: Edwight Surface Mine
ALPHA COAL WEST;	Docket No. WEST 2016-0688 A.C. No. 48-00732-417342 Mine: Belle Ayr Mine
	Docket No. WEST 2017-0011 A.C. No. 48-00732-419767 Mine: Belle Ayr Mine
	Docket No. WEST 2017-0060 A.C. No. 48-00732-422060 Mine: Belle Ayr Mine
	Docket No. WEST 2017-0155 A.C. No. 48-00732-426371 Mine: Belle Ayr Mine

CUMBERLAND COAL RESOURCES, LP;

Docket No. PENN 2016-0142
A.C. No. 36-05018-403227

Mine: Cumberland Mine

Docket No. PENN 2016-0186
A.C. No. 36-05018-405519

Mine: Cumberland Mine

Docket No. PENN 2016-0187
A.C. No. 36-05018-405519

Mine: Cumberland Mine

Docket No. PENN 2016-0250
A.C. No. 36-05018-410385

Mine: Cumberland Mine

Docket No. PENN 2016-0254
A.C. No. 36-05018-412007

Mine: Cumberland Mine

Docket No. PENN 2016-0265
A.C. No. 36-05018-412753

Mine: Cumberland Mine

Docket No. PENN 2016-0266
A.C. No. 36-05018-412753

Mine: Cumberland Mine

Docket No. PENN 2016-0313
A.C. No. 36-05018-415157

Mine: Cumberland Mine

Docket No. PENN 2016-0315
A.C. No. 36-05018-417506

Mine: Cumberland Mine

	Docket No. PENN 2017-0001 A.C. No. 36-05018-419879 Mine: Cumberland Mine Docket No. PENN 2017-0019 A.C. No. 36-05018-422195 Mine: Cumberland Mine Docket No. PENN 2017-0084 A.C. No. 36-05018-426549 Mine: Cumberland Mine
DICKENSON-RUSSELL COAL COMPANY;	Docket No. VA 2016-0223 A.C. No. 44-02277-416614 Mine: Moss No. 3 Plant Docket No. VA 2017-0008 A.C. No. 44-05311-419098 Mine: McClure River Plant
EMERALD COAL RESOURCES, LP;	Docket No. PENN 2016-0137 A.C. No. 36-05466-402236 Mine: Emerald Mine No. 1 Docket No. PENN 2016-0138 A.C. No. 36-05466-402236 Mine: Emerald Mine No. 1 Docket No. PENN 2016-0180 A.C. No. 36-05466-404377 Mine: Emerald Mine No. 1 Docket No. PENN 2016-0189 A.C. No. 36-05466-406608 Mine: Emerald Mine No. 1

	Docket No. PENN 2016-0190 A.C. No. 36-05466-407666 Mine: Emerald Mine No. 1
KINGSTON MINING, INC.;	Docket No. WEVA 2015-1034 A.C. No. 46-08625-391848 Mine: Kingston No. 1 Docket No. WEVA 2015-1035 A.C. No. 46-08625-391848 Mine: Kingston No. 1 Docket No. WEVA 2016-0252 A.C. No. 46-08625-403276 Mine: Kingston No. 1 Docket No. WEVA 2016-0362 A.C. No. 46-08625-405568 Mine: Kingston No. 1 Docket No. WEVA 2016-0363 A.C. No. 46-08932-405572 Mine: Kingston No. 2 Docket No. WEVA 2016-0411 A.C. No. 46-08625-407843 Mine: Kingston No. 1 Docket No. WEVA 2016-0412 A.C. No. 46-08932-407846 Mine: Kingston No. 2 Docket No. WEVA 2016-0473 A.C. No. 46-08625-410448 Mine: Kingston No. 1

Docket No. WEVA 2016-0474
A.C. No. 46-08932-410451

Mine: Kingston No. 1

Docket No. WEVA 2016-0509
A.C. No. 46-08625-412788

Mine: Kingston No. 1

Docket No. WEVA 2016-0510
A.C. No. 46-08932-412791

Mine: Kingston No. 2

Docket No. WEVA 2016-0537
A.C. No. 46-08932-415188

Mine: Kingston No. 2

Docket No. WEVA 2016-0539
A.C. No. 46-08625-415185

Mine: Kingston No. 1

Docket No. WEVA 2016-0587
A.C. No. 46-08625-417551

Mine: Kingston No. 1

Docket No. WEVA 2016-0588
A.C. No. 46-08932-417553

Mine: Kingston No. 2

Docket No. WEVA 2017-0012
A.C. No. 46-08932-419952

Mine: Kingston No. 2

Docket No. WEVA 2017-0181
A.C. No. 46-04343-426593

Mine: Kingston Processing

KNOX CREEK COAL CORPORATION;	Docket No. VA 2016-0237 A.C. No. 44-05236-417108 Mine: Coal Creek Prep Plant
MARFORK COAL COMPANY;	Docket No. WEVA 2016-0114 A.C. No. 46-08315-395962 Mine: Brushy Eagle Docket No. WEVA 2016-0115 A.C. No. 46-08315-395962 Mine: Brushy Eagle Docket No. WEVA 2016-0117 A.C. No. 46-09091-395966 Mine: Horse Creek Eagle Docket No. WEVA 2016-0235 A.C. No. 46-08315-402480 Mine: Brushy Eagle Docket No. WEVA 2016-0288 A.C. No. 46-08315-404630 Mine: Brushy Eagle Docket No. WEVA 2016-0289 A.C. No. 46-08315-404630 Mine: Brushy Eagle Docket No. WEVA 2016-0291 A.C. No. 46-09048-404635 Mine: Slip Ridge Cedar Grove Mine Docket No. WEVA 2016-0292 A.C. No. 46-09091-404637 Mine: Horse Creek Eagle

Docket No. WEVA 2016-0394
A.C. No. 46-09048-407030

Mine: Slip Ridge Cedar Grove Mine

Docket No. WEVA 2016-0395
A.C. No. 46-09091-407031

Mine: Horse Creek Eagle

Docket No. WEVA 2016-0396
A.C. No. 46-09091-407031

Mine: Horse Creek Eagle

Docket No. WEVA 2016-0445
A.C. No. 46-08315-408818

Mine: Brushy Eagle

Docket No. WEVA 2016-0457
A.C. No. 46-08315-409549

Mine: Brushy Eagle

Docket No. WEVA 2016-0458
A.C. No. 46-09048-409554

Mine: Slip Ridge Cedar Grove Mine

Docket No. WEVA 2016-0492
A.C. No. 46-09048-411991

Mine: Slip Ridge Cedar Grove Mine

Docket No. WEVA 2016-0493
A.C. No. 46-09048-411991

Mine: Slip Ridge Cedar Grove Mine

Docket No. WEVA 2016-0494
A.C. No. 46-09091-411993

Mine: Horse Creek Eagle

Docket No. WEVA 2016-0495
A.C. No. 46-09092-411994

Mine: Allen Powellton Mine

Docket No. WEVA 2016-0533
A.C. No. 46-08315-414427

Mine: Brushy Eagle

Docket No. WEVA 2016-0535
A.C. No. 46-09092-414435

Mine: Allen Powellton Mine

Docket No. WEVA 2016-0536
A.C. No. 46-09092-414435

Mine: Allen Powellton Mine

Docket No. WEVA 2016-0538
A.C. No. 46-09091-414434

Mine: Horse Creek Eagle

Docket No. WEVA 2016-0573
A.C. No. 46-09048-416634

Mine: Slip Ridge Cedar Grove Mine

Docket No. WEVA 2016-0574
A.C. No. 46-09091-416636

Mine: Horse Creek Eagle

Docket No. WEVA 2016-0575
A.C. No. 46-09091-416668

Mine: Horse Creek Eagle

Docket No. WEVA 2017-0006
A.C. No. 46-08315-419121

Mine: Brushy Eagle

	Docket No. WEVA 2017-0008 A.C. No. 46-09048-419129 Mine: Slip Ridge Cedar Grove Docket No. WEVA 2017-0009 A.C. No. 46-09091-419131 Mine: Horse Creek Eagle Docket No. WEVA 2017-0010 A.C. No. 46-09091-419131 Mine: Horse Creek Eagle Docket No. WEVA 2017-0049 A.C. No. 46-08315-421486 Mine: Brushy Eagle Docket No. WEVA 2017-0107 A.C. No. 46-08315-423681 Mine: Brushy Eagle Docket No. WEVA 2017-0149 A.C. No. 46-08837-425730 Mine: Coon Cedar Grove Mine
PARAMOUNT COAL COMPANY;	Docket No. VA 2016-0128 A.C. No. 44-07223-404619 Mine: Deep Mine 41 Docket No. VA 2016-0205 A.C. No. 44-06929-414196 Mine: Deep Mine No. 26 Docket No. VA 2016-0206 A.C. No. 44-07223-414198 Mine: Deep Mine No. 41

Docket No. VA 2016-0221
A.C. No. 44-06929-416391

Mine: Deep Mine No. 26

Docket No. VA 2016-0222
A.C. No. 44-07223-416392

Mine: Deep Mine No. 41

Docket No. VA 2016-0240
A.C. No. 44-05270-418835

Mine: Toms Creek Complex

Docket No. VA 2016-0241
A.C. No. 44-07322-418842

Mine: Cabin Ridge Surface Mine

Docket No. VA 2017-0003
A.C. No. 44-06929-418838

Mine: Deep Mine No. 26

Docket No. VA 2017-0004
A.C. No. 44-06929-418838

Mine: Deep Mine No. 26

Docket No. VA 2017-0005
A.C. No. 44-07163-418839

Mine: 88 Strip

Docket No. VA 2017-0006
A.C. No. 44-07223-418840

Mine: Deep Mine 41

Docket No. VA 2017-0091
A.C. No. 44-07322-427760

Mine: Cabin Ridge Surface Mine

POWER MOUNTAIN COAL COMPANY;	Docket No. WEVA 2016-0590 A.C. No. 46-06880-417549 Mine: Power Mountain Processing
REPUBLIC ENERGY (ELK RUN COAL COMPANY, INC.);	Docket No. WEVA 2016-0490 A.C. No. 46-09163-411574 Mine: Roundbottom Powellton Deep Mine Docket No. WEVA 2016-0570 A.C. No. 46-09163-416179 Mine: Roundbottom Powellton Deep Mine Docket No. WEVA 2016-0571 A.C. No. 46-09163-416179 Mine: Roundbottom Powellton Deep Mine
SIDNEY COAL COMPANY;	Docket No. KENT 2017-0027 A.C. No. 15-09724-420830 Mine: No. 1 Prep Plant
SPARTAN MINING COMPANY, INC.; Respondents.	Docket No. WEVA 2016-0491 A.C. No. 46-01544-411779 Mine: Road Fork No. 51 Mine Docket No. WEVA 2016-0526 A.C. No. 46-01544-414206 Mine: Road Fork No. 51 Mine Docket No. WEVA 2016-0572 A.C. No. 46-01544-416401 Mine: Road Fork No. 51 Mine

	Docket No. WEVA 2017-0005 A.C. No. 46-01544-418846 Mine: Road Fork No. 51 Mine Docket No. WEVA 2017-0189 A.C. No. 46-01544-427766 Mine: Road Fork No. 51 Mine
CUMBERLAND COAL RESOURCES, LLC, Contestant v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDINGS Docket No. PENN 2016-0122-R Order No. 9073630; 01/11/2016 Docket No. PENN 2016-0133-R Citation No. 9073699; 01/28/2016 Docket No. PENN 2016-0134-R Citation No. 9074040; 01/28/2016 Mine: Cumberland Mine Mine ID: 36-05018
EMERALD COAL RESOURCES, LP, Contestant v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Docket No. PENN 2016-0037-R Order No. 7030180; 09/22/2015 Mine: Emerald Mine No. 1 Mine ID: 36-05466
KINGSTON MINING, INC, Contestant v.	Docket No. WEVA 2016-0059-R Citation No. 9053591; 09/22/2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Mine: Kingston No. 1 Mine Mine ID: 46-08625
MARFORK COAL COMPANY, INC., Contestant v.	Docket No. WEVA 2016-0240-R Citation No. 9054035; 02/23/2016
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	Mine: Horse Creek Eagle Mine ID: 46-09091

ORDER OF CONSOLIDATION
DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Lesnick

These cases are before me upon ninety-seven petitions for the assessment of the civil penalties filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), and six related Notices of Contest.

It is **ORDERED** that these cases are **CONSOLIDATED** for purposes of settlement, pursuant to Commission Procedural Rule 12. 29 C.F.R. § 2700.12.

The parties have filed a joint motion to approve global settlement of the above referenced dockets. The parties propose a reduction in the total penalty from $1,606,312.00 as proposed by the Secretary to $803,156.00. The settlement amounts for the 523 citations and orders were submitted by the parties in their joint motion, and Exhibits 1 and 2 attached thereto.

In support of the penalty reduction, the parties represent that the Respondents' parent organization, Alpha Natural Resources, Inc., is currently pursuing Chapter 11 bankruptcy protection.[1] The parties further represent as follows:

> In exchange for this settlement, Alpha confirms that the Secretary will have an "Allowed Administrative Claim" in the Bankruptcy Case for the Agreed Amount that will be satisfied in full in

[1] *In Re: Alpha Natural Resources, Inc.*, et al., Ch. 11, Case No. 15-33896-KRH (Bankr. E.D.V.A. filed Aug. 3, 2015).

> accordance with the Plan. Consequently, the relief requested herein will resolve objections to the Administrative Claim in the Bankruptcy Case and the risks of litigation concerning the Affected Citations/Orders.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement and the motion to withdraw contest of Contest Docket Nos. PENN 2016-0122, PENN 2016-0133, PENN 2016-0134, PENN 2016-0037, WEVA 2016-0059, and WEVA 2016-0240, are **GRANTED**.

It is further **ORDERED** that Alpha Natural Resources, Inc., pay a penalty of $803,156.00 within thirty (30) days of this order.[2]

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

Eric Silkwood, Esq., Hardy & Pence, PLLC, 500 Lee Street East, Suite 701, Charleston, WV 25301

Dana Ferguson, Esq., U.S. Department of Labor, Office of the Solicitor, 2-1 12th Street South, Suite 401, Arlington, VA 22202

/med

[2] 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
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

July 31, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. PENN 2016-0107-M A.C. No. 36-10157-400887
v.	Docket No. PENN 2016-0144-M A.C. No. 36-10157-403006
JERMYN SUPPLY CO., LLC, Respondent	Mine: Mayfield Quarry

DECISION[1]

Appearances: John R. Slattery, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor

Christopher B. Jones, Esq., for Jermyn Supply Co., LLC, Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

This cases arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* (the "Act" or "Mine Act"). By consent of the Court and the parties, the sole question at hearing was limited to whether the federal Mine Safety and Health Administration ("MSHA") has jurisdiction over Respondent's property, the Mayfield Quarry. A hearing was held in Scranton, Pennsylvania, on March 22, 2017, where the parties presented testimony and documentary evidence. After the hearing, the parties submitted post-hearing briefs, which have been fully considered.

FINDINGS OF FACT AND CONCLUSION OF LAW

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the

[1] An Order Bifurcating Hearing was issued on October 28, 2016, by this Court. Due to the initial hearing being limited to whether the Mayfield Quarry is subject to Mine Act jurisdiction, there were no Joint Stipulations agreed to by the parties.

witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

I. SUMMARY OF TESTIMONY

Gary Merwine

On September 22, 2015, MSHA Inspector Gary Merwine inspected the Mayfield Quarry.[2] This facility had not been previously inspected by MSHA, and Merwine was instructed to inspect it by his supervisor. Tr. 15. After reviewing an overview map of the site (satellite image) of Respondent's property, Merwine traveled to the entrance where a cable was down and unlocked. Tr. 16-17. Merwine observed an excavator feeding a portable plant, which fed a second portable plant. Tr. 17. Both Portable plants and the excavator were in operation. Tr. 17.

Merwine interviewed the excavator operator, Richard Dipple, who said he was employed by owner/operator of the site, Joseph Virbitsky. Tr. 17- 18. Dipple indicated that the Pennsylvania Department of Environmental Protection ("Pennsylvania DEP") inspected the site. Tr. 18. Dipple telephoned Virbitsky, who arrived at the site within 15 to 30 minutes. Tr. 19. During this time period Merwine observed five different products of materials that "appeared [to have come] from the portable screening plants." Tr. 20. A dump truck had also entered the property, and Dipple loaded stone onto the truck. Tr. 20.

Upon arriving, Virbitsky advised Merwine that the site had been in operation for approximately 10 years and that the Pennsylvania DEP had been the only agency that had been inspecting the site. Tr. 21. Virbitsky described the following uses of the property: some of the material was used to level off the site; some of the material was used at his construction business to build foundations; and a small amount was used to go to his supply yard. Tr. 21.

Merwine explained to Virbitsky that his operation would fall under MSHA jurisdiction and that a "Legal Identity Report" ("LIR") needed to be filled out. Tr. 21-22. Merwine filled out

[2] Gary Merwine had been hired by MSHA in June of 2006 and was currently working as Mine Safety and Health Inspector. Tr. 11. He had previously worked as supervisor of the Wyomissing field office during 2010-2011 and 2014. Tr. 12. Merwine had 25 years of underground coal mining experience, working as a laborer, supervisor/miner, and owner/operator. Tr. 13. His inspector training included six four week training sessions at the Beckley Mining Academy. Tr. 13. Additionally, Merwine had revisited the Mining Academy, taking a two week advanced electrical course and a FBI course concerning the obtaining and securing of evidence and interviewing. Tr. 14.

the report based upon information provided to him by Virbitsky. Tr. 23; GX-17[3]. Merwine further indicated that Virbitsky signed and dated the report after reviewing it for correctness. Tr. 23. At Section 8 of the report, Virbitsky indicated sand and gravel was produced at the site. Tr. 24; GX-17.

Merwine then proceeded to inspect the site for possible hazards and safety violations. Tr. 24. At hearing Merwine referenced multiple photographs that he had taken of the site. Referring to the photograph in GX-9A, Merwine described the function of a "portable plant," and explained that there were two at the quarry. Tr. 25. The portable plant had material fed into a hopper which goes up onto a screen, made up of different sized holes depending upon the material desired. Tr. 25. Any material not falling through the holes proceeds to a conveyor belt and is deposited onto the ground or into a truck. Tr. 26. Material falling through the holes may be dropped onto a second screen which could have smaller holes in it, the process continuing in like fashion. Tr. 26. At the site, materials falling through the screen could fall onto a separate conveyor belt fed into the second portable plant which then screened material to different products. Tr. 26.

GX-9B was Merwine's photograph of the yellow colored excavator that Dipple was operating and feeding the blue portable plant (depicted in GX-9A). Tr. 26. The material being excavated was coming from the embankment to the left of the yellow excavator (See, GX-9B) and was being deposited into the hopper of the blue portable plant. Tr. 27. Material placed on the blue portable plant hopper would go onto three separate conveyor lines on the plant, one coming out the front of the plant, another out of the right of the plant, and the third on the left which then fed material onto a stacked conveyor belt which then fed the material to a second portable plant. Tr. 27. The purpose of having one portable plant feed into another portable plant was to make more separate products by using a different sized screen on the second portable plant. Tr. 28.

On the date of the inspection, only one of the two excavators onsite was in operation. Tr. 28. The material coming off the blue portable plant appeared to be sand. Tr. 29; GX-9C. Referring to GX-9D, Merwine indicated that the material in the foreground was consistent with sand, and the material to the right was "rock material, an aggregate material, consistent with what we identify as a four minus size." Tr. 29. The photograph contained in GX-9E was a "closer shot" of the GX-9D scene, the material, and excavator being more easily seen. Tr. 30.

In GX-9F the second (red) portable plant was photographed being fed from the first (blue) portable plant. Tr. 30-31. The pile of material to the left of the second (red) portable plant appeared to be sand product different from the material to the right of the photograph which was called "modified stone." Tr. 31.

Modified stone is stone that is smaller than a baseball but bigger than a golf ball. Tr. 31. Unwashed modified stone includes some dirt in the rock. Tr. 31. Washing modified stone can help it to meet the specifications for uses such as state road construction or other uses that specify no dirt in the (excavated) material. Tr. 31.

[3] The Secretary's exhibits will hereinafter be referred to as "GX" followed by the exhibit number. No exhibits were submitted by the Respondent.

Merwine further photographed Dipple digging material out of an embankment and putting it into the first portable plant. Tr. 31. GX-9H depicted a pile of material at the site that would be consistent with four minus stone. Tr. 32. Dipple was operating a Caterpillar front end loader, as depicted in the photograph contained in GX-9I, putting materials into a dump truck. Tr. 32. The pile of material photographed in GX-9H and GX-9I was considered by MSHA to be a four minus stone. Tr. 32-33. The photograph in GX-9J showed a front end loader used to load stone into a dump truck with three stockpiles of different material that had come from the portable plant. Tr. 33. GX-9K depicted a pile of material that MSHA would consider modified stone and GX-9L was a photograph of a separate stockpile that would be considered a sand product. Tr. 34. The picture in GX-9L depicted a stockpile of stone which, given its size, the industry would classify as "2B." Tr. 34.

Merwine described the different classifications for excavated material: sand material, which is very fine and which looks like beach sand or play box sand; 2A stone which is dime-sized or "a little smaller"; number 57 stone which is roughly a nickel size; 2B size which is approximately a quarter size; 4 minus and 6 minus which range from baseball size to a little smaller. Tr. 35. At the Mayfield Quarry site, the MSHA inspector observed sand, modified stone and 4 minus coming off the conveyor belt while the screening plants were in operation. Tr. 36.

Merwine also visited the supply yard owned by Virbitsky that was located approximately a half mile away. Tr. 36. The yard had multiple products for sale, including mulch and paving stone for sidewalks, bins with sand, and different sizes of stone. Tr. 36-37; GX-19, GX-20. There were three bins that had materials consistent with the materials being produced out of the screening plants at Mayfield Quarry. Merwine had taken photographs of the bins which contained modified stone, four minus stone, and 2B stone. Tr. 37, 38; See also GX-9N, GX-9O, GX-9P.

Virbitsky identified the types of materials processed at his Mayfield Quarry as "Modified," "Waste," and Sand. Tr. 39. Referring to his inspection and investigation data summary and field notes (GX-5), Merwine indicated that Virbitsky had identified the conveyors at the portable plant(s) as being a feed conveyor, modified conveyor, and sand conveyor. Tr. 41-43. Virbitsky further identified stockpiles at the site as sand stockpile, modified stockpile, and waste stockpile. Tr. 44; GX-5. Additionally, Virbitsky indicated that the material at the site was used for construction projects that his supply company was engaged in. Tr. 45. According to Merwine's field notes, Virbitsky indicated that material not used to level the quarry site was also used at sites by Jermyn Supply to construct buildings. Tr. 45-46. The material was further sold at his supply company, mostly as a mix to make loam. Tr. 46. Loam is a mixture of fine sand and top soil, a mixture for back filling. Tr. 46.

Virbitsky reported that his quarry site was open for approximately two weeks during the present year. Tr. 45. Additionally, in Merwine's field notes, Virbitsky reportedly indicated that the operation is operated "sporadically" during the year and is in operation "several weeks" per year. GX-5.

In depositional testimony, Virbitsky also stated that the materials from the mine were used at his construction sites to backfill foundations and for leveling off other properties owned by Virbitsky for possible resale in the future. Tr. 46.

Merwine noted that Virbitsky had obtained a "Large Non Coal Mine Operator's License" from the Pennsylvania DEP. Tr. 48; GX-10, GX-11. Virbitsky had also obtained a permit from the Pennsylvania DEP for small noncoal mining. Tr. 48; GX-12.

Referencing the Interagency Agreement between MSHA and the Occupational Safety and Health Administration ("OSHA"), Merwine opined that the sizing of the materials which he had observed at the quarry site fell within the parameters of MSHA's authority over milling. Tr. 49; GX-21.

Cross Examination of Merwine

Some of the photographs of the Respondent's site had been obtained from Merwine's supervisor, William MacDonald. Tr. 57-58. Merwine knew of no complaints from residents in the area regarding Respondent's quarry site, nor did he know what motivated MacDonald to ask him to inspect Respondent's site. Tr. 58-59.

Merwine had only observed MSHA-related activity being conducted at Mayfield Quarry on one occasion, the date of inspection, September 22, 2015. Tr. 59-60. He did not observe any further activity during his subsequent four visits to the quarry. Tr. 59-61. When he had gone to the quarry site in October and November of 2015, the cable was up and locked. Tr. 61. In December of 2015, Dipple and Virbitsky were onsite engaged in Non-MSHA related activities. Tr. 61. Virbitsky did report that some of the equipment on the site was related to his construction business. Tr. 62. Merwine did not inspect such. Tr. 62. According to Virbitsky's deposition, "a lot" of the materials on the grounds of his quarry were materials hauled from construction jobs and dumps. Tr. 62. Merwine opined that Virbitsky's quarry was affecting interstate commerce because Merwine believed that materials such as sand and gravel were excavated from the quarry and then sold at Virbitsky's nearby Jermyn Supply yard to any customer stopping by. Tr. 63.

Merwine did not dispute that some of the bins at Jermyn Supply may have contained materials from third party suppliers. Tr. 65. However, three of the bins contained materials that had the consistency of rock that was being screened at the Mayfield Quarry. Tr. 65. Merwine further conceded that he had no personal knowledge whether the materials observed at Respondent's supply yard had come from Mayfield Quarry. Tr. 65.

As to the LIR, Inspector Merwine stated that he had hand-written all the answers. Tr. 66; GX-17. For Question eight, what type of product is produced, Merwine recorded "sand and gravel." Tr. 66. Merwine based the classifications of the materials based upon his own observations at the site and not Virbitsky's actual description. Tr. 66; GX-17. Merwine categorized the quarry site as "surface open" rather than an underground mine or dimensional stone mine. Tr. 67. He did not witness any underground mining. Tr. 67.

Referring to his photograph at GX-9A, Merwine stated that the pile directly in front of the red portable plant and next to the white dump truck was identified as sand and not dirt. Tr. 68. Merwine concluded that the material was sand based upon his personal observations and Virbitsky's statement that one of the conveyor belts was a sand conveyor. Tr. 68. However, he neither took a sample from the pile nor tested it. Tr. 68. Merwine further did not know if the pile of material, which he had identified as sand, had ever been removed from Mayfield Quarry to Jermyn Supply. Tr. 69. Merwine defined sand as being "fine granular particles of rock." Tr. 71.

Based upon his experience of 11 years in the industry, Merwine opined that the pile of material depicted in GX-9E was sand and not finely graded top soil. Tr. 72. In reference to the overhead photograph of Respondent's supply yard in GX-19, Merwine did not personally know where the products in the bins came from but instead relied upon Virbitsky's statement that some of the supply had come from the quarry. Tr. 74, 75-76.Virbitsky had advised Merwine that he sold the products displayed in his supply yard to the general public but did not specifically mention sand. Tr. 75.

Merwine agreed that various bins at the supply yard contained materials that did not resemble materials observed at the quarry. Tr. 76-78; GX-20. The material depicted in GX-9N appeared to resemble the 4 minus stone observed at the quarry but Merwine did not actually know where the product had come from. Tr. 78. The modified stone pictured in GX-9O also appeared to resemble the stone observed at the quarry but Merwine was again unsure of its actual origin. Tr. 78-79. Merwine testified that the consistency of the stone pictured in GX-9O at Jermyn Supply was similar to the consistency of the stone depicted in GX-9K at Mayfield Quarry. Tr. 79-80. Merwine did not actually touch the material pictured at the quarry in GX-9L. Tr. 81.

Virbitsky never stated that OSHA, as well as the Pennsylvania DEP, inspected the quarry. Tr. 82. Merwine denied that Virbitsky had raised any objections to answering or signing the LIR (GX-17). Tr. 83-84.

On redirect examination, Merwine expressed his belief that the same materials being screened at the quarry site were being sent to the supply yard was based upon his observations of the consistency of the materials at both sites and Virbitsky's statement acknowledging such as recorded in Merwine's field notes. Tr. 85. The majority of the products sold at the supply yard would not, in Merwine's opinion, have come from Mayfield Quarry. Tr. 86.

On recross examination Merwine testified he had observed three bins of material at the supply yard containing 4 minus rock, modified rock, and 2B rock. Tr. 86. However, he did not observe any sand, only an advertisement for the sale of it on the internet. Tr. 86-87.

Joseph Virbitsky

The Respondent, Joseph Virbitsky testified the site at issue was a "borrow pile/spoil pile." Tr. 95. Virbitsky's employee had phoned him to come to Mayfield Quarry to speak with Merwine, who was already onsite. Tr. 96. Merwine had explained to Virbitsky that he was a federal agent, "higher than the FBI" and "more protected than the bald eagle." Tr. 96. Virbitsky

testified that he had not wanted to stay at the site to answer Merwine's questions and did not wish to sign the LIR. Tr. 96-97; GX-17. As to section 8 of the LIR, Virbitsky testified that he had not given the description "sand and gravel" as to the commodity produced at the site and that this had been Merwine's designation. Tr. 97; GX-17. Virbitsky further concluded that there in fact was no sand at Mayfield Quarry, although Jermyn Supply did sell sand. Tr. 96-97. Virbitsky had been essentially forced to sign the LIR form before Merwine allowed him to leave the premises. Tr. 97; GX-17.

Virbitsky testified that neither sand nor gravel was produced at the quarry nor were those materials present at the site. Tr. 98. Virbitsky defined sand as "a product that is generally washed through a process" and gravel as "a product that is produced, sized, crushed, and milled." Tr. 98.

As to the overhead photograph of Mayfield Quarry, Virbitsky disagreed that it was an accurate depiction of how the site appeared on the date of inspection, September 22, 2015. Tr. 99; GX-18. He further asserted that the pile of material depicted in GX-9A and described by Merwine as sand was in fact a pile of dirt. Tr. 99-100. Virbitsky used this "fill dirt" to level out nine properties that he owned. Tr. 100. Likewise, the photographs in GX-9D, GX-9E, and GX-9F also depicted piles of dirt, not sand. Tr. 100-101. As to the pile of material depicted in GX-9L, Virbitsky also described such as dirt, further commenting that he wished it were sand, as he would be "a millionaire." Tr. 101. Virbitsky denied that he had ever told Merwine that he took material from the quarry to Jermyn Supply for sale to the general public. Tr. 102. He also denied identifying material at the quarry in any discussion with Merwine as sand or modified rock. Tr. 102.

Virbitsky testified that his construction company was his "main focus." Tr. 103. Sometimes he took "a year or two off" from the quarry operation. Tr. 103. He received no income from the quarry operation. Tr. 103. The income would be derived from future sales of the property. Tr. 103.

Additionally, Virbitsky emphasized that there was no rock or stone taken from the quarry and sold at Jermyn Supply. Tr. 103. Any materials taken from the quarry were used to fill and grade other properties owned by Virbitsky which were located within approximately half a mile of the site within the state of Pennsylvania. Tr. 104.

Cross Examination of Virbitsky

Virbitsky further explained that the quarry site was open for no more than two weeks per year and that the workday consisted of two hours (often he completed his work at his other properties). Tr. 104. He normally would go to the site during "the driest point," October and November, to obtain material for filling potholes. Tr. 104.

On cross-examination, Virbitsky estimated that approximately "20 tons of material, 15 yards of material" would get screened in two hours' time. Tr. 105. Virbitsky had owned the property since 2002. Tr. 105. He described the activity involving the two portable plants as being that of "scalping." Tr. 105. This included "removing the dirt, rocks, and wood out of the material that's there to put it in different piles so I could use it." Tr. 105.

Virbitsky agreed with his prior deposition testimony that the material was separated into piles—small, medium, and large. Tr. 106. He further agreed that he had informed Merwine that the portable plants produced five different products, with every belt having a form of different rock coming out. Tr. 106.

In reference to the photograph at GX-9F, Virbitsky characterized the pile pictured on the right side of GX-9 as "fill rock," "over burden rock," and "unclassified with different sizes of material." Tr. 107. He agreed that the material pictured was coming off the portable plant. Tr. 107. In reference to the photograph of the quarry site at GX-9M, Virbitsky agreed that all of the material pictured had been screened by the portable plants. Tr. 107. Merwine had repeatedly described the material as 2B stone but Virbitsky described it as "smaller fill material," "smaller fill product." Tr. 107-108.

Regarding his Pennsylvania DEP license authorization, Virbitsky testified that Section 4, titled "Minerals Mined," referred to 7,542 tons of noncoal materials which were moved to different locations on the quarry site. Tr. 108-109. This figure did not refer to materials leaving the site but was a "reclamation" sum indicating materials which "a dozer just pushed…over the bank" to level off the site. Tr. 108-110; GX-10.

Virbitsky conceded that some of the material processed through the portable plants at Mayfield Quarry was used in construction projects for Virbitsky Masonry. Tr. 110. Virbitsky was asked if he recollected past deposition testimony in which he stated that "maybe on some occasions" material from Mayfield Quarry was sold at Jermyn Supply consisting of "some fill and dirt," "some spoil pile's material." Tr. 111. He agreed that some of the material screened at Mayfield Quarry by the portable plants was used to level and grade some of the properties that he owned. Tr. 112.

On redirect examination, Virbitsky again indicated that he sold various products obtained from third parties at Jermyn Supply. Tr. 114.

At hearing this Court took judicial notice of 228 pages of invoices identifying materials from third parties which were sold at Jermyn Supply. Tr. 114-115.

II. ISSUES PRESENTED

The issues before this Court are:

1. Whether the Respondent's Mayfield Quarry facility is subject to MSHA jurisdiction based on whether the Mayfield Quarry site was/is a "coal or other mine" within the meaning of Section 3(h)(1)(c) of the Mine Act;

2. Whether the products of Mayfield Quarry entered the stream of commerce or affect commerce within the meaning and scope of Section 4 of the Mine Act and;

3. Whether the Mayfield Quarry site essentially functions as a "borrow pit" where any mining activities, including the milling of materials, would be considered "*de minimis*" in nature?

III. CONTENTIONS OF THE PARTIES

A. The Secretary's Contentions

The Secretary asserts the Mayfield Quarry site, meets the definition of a "Mine" and "Operator," respectively under Section 3(h)(1), 30 U.S.C. §802(h)(1), of the Mine Act, and therefore, falls under MSHA's jurisdiction. Sec'y.'s Post-Hearing Br. 10.[4] The Secretary cites *Marshall v. Stoudt's Ferry Preparation Company*, 602 F.2d 589 (3rd Cir. 1979), and *Harman Mining Co. v. FMSHRC*, 671 F.2d 794 (4th Cir. 1981), to argue that Congress intended the Mine Act and the definition of a "mine" to be interpreted broadly, thus expanding the scope of the Mine Act, and consequently MSHA's jurisdiction. *Id*. Specifically, the Secretary contends that the language contained in Section 3(h)(1) of the Act, which defines "coal or other mine," to include "lands, excavations,. . . equipment. . .used in . . . the milling of. . . minerals," demonstrates Congress's clear intent to delegate extensive authority to the Secretary to determine what constitutes mineral milling. *Id*.

The Secretary contends his interpretation of the term "sizing," a milling process contained within the MSHA-OSHA Interagency Agreement ("Interagency Agreement"), should be entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 844 (1984). SPHB 11. To support his position, the Secretary cites *Donovan v. Carolina Stalite Co*., 734 F.2d 1547, 1552 (D.C. Cir. 1984), arguing considerable deference must be accorded to his determination of what constitutes "milling," as defined within the Interagency Agreement. *Id.* The Secretary further argues because the Respondent operates portable screening plants to screen and separate material into different sizes, the Respondent engages in "Milling" and therefore is subject to MSHA jurisdiction. SPHB 12.

The Secretary further contends that because the material screened at Mayfield Quarry is sold at the Respondent's supply yard, Jermyn Supply, and utilized in Respondent's different businesses and properties, these activities affect commerce. SPHB 15. As a result, the Secretary argues these actions are subject to MSHA jurisdiction under the Mine Act. *Id*. Moreover, the Secretary argues that even if the Respondent can establish that he did not sell any material from the Mayfield Quarry to the public, the Respondent's quarry activities still affected commerce. SPHB 16. The Secretary supports this contention by arguing that the material was utilized not only in Respondent's construction business, but also in improving nine other properties owned by the Respondent for future development. *Id.*

[4] Hereinafter, the Secretary's Post-Hearing Brief that was submitted on June 20, 2017 shall be abbreviated "SPHB," followed by the page number. Likewise, the Respondent's Post-Hearing Brief that was submitted on June 19, 2017 shall be abbreviated "RPHB," followed by the page number.

Additionally, the Secretary contends that under the test developed in *Oliver M. Elam Jr., Co.*, 4 FMSHRC 5, 6 (Jan. 1982), the Respondent is subject to the jurisdiction of the Mine Act because he engages in work normally conducted by a mine operator by performing activities to make the extracted material suitable for a particular use. SPHB 17. The Secretary argues that the reason Respondent sizes material at Mayfield Quarry is because he wants to make sure the material meets specific market specifications. *Id.*

Furthermore, the Secretary argues that the Respondent does not operate a "borrow pit" because the material at Mayfield Quarry is sized which is a part of the milling process and falls under MSHA jurisdiction. SPHB 18. The Secretary notes the Commission has traditionally applied a strict interpretation to the term "borrow pit." SPHB 18-19. The Secretary contends because the Respondent processes material through portable plants and separates stockpiles of stone, the material is not "in basically the same form," and therefore does not meet an essential requirement of a borrow pit as defined by the Interagency Agreement. SPHB 19. Thus, the Secretary asserts Respondent's work at Mayfield Quarry fails to constitute a borrow pit. *Id.*

Lastly, the Secretary contends there is no "*de minimis*" exception to activities covered under the Mine Act. SPHB 20. The Secretary cites to *State of Alaska Dept. of Transportation*, 36 FMSHRC 2642, 2645 (October 2014) and *Bonanza Materials Inc*., 15 FMSHRC 1355 (July 1993) (ALJ) in support of her argument that even if Respondent's operations are indeed intermittent, these activities would still fall under MSHA's jurisdiction because the Commission has consistently held any activity which is functionally integrated with mining activity is subject to Mine Act regulation. SPHB 21.

B. Respondent's Contentions

Conversely, the Respondent contends that Mayfield Quarry is not subject to MSHA jurisdiction, but rather OSHA jurisdiction, because the site meets the definition of a "borrow pit" as defined by the Interagency Agreement. RPHB 3. Respondent supports this contention by arguing that he does not conduct any milling activities at Mayfield Quarry, rather, he merely engages in scalping to remove wood, dirt, and rock. RPHB 4. Furthermore, the Respondent argues because the MSHA inspector did not test the materials onsite there is no way to confirm that the material in question was sand or gravel. *Id.*

The Respondent also contends that any extraction of bulk fill at the site occurs only intermittently and all of the material is utilized "relatively near the borrow pit." RPHB 4. To support this position, the Respondent cites *David Duquette Excavating*, 37 FMSHRC 744 (Apr. 2015) (ALJ), which it argues contains nearly identical facts to the instant case. *Id.* Accordingly, Respondent argues that just as in *Duquette,* MSHA does not have authority to exercise jurisdiction over Respondent's extraction of bulk fill at the Mayfield Quarry because the site meets the definition of a borrow pit, and therefore is exempt from MSHA jurisdiction. RPHB 4-5.

Finally, the Respondent contends he is not in the business of "preparing a mineral" because he does not screen the bulk fill to remove impurities or to ensure that it is appropriately

sized to be sold in the stream of commerce. RPHB 5. Thus, Respondent contends MSHA has no authority to regulate his operations at the Mayfield Quarry. *Id.*

IV. DISCUSSION

A. The Secretary's Burden of Proof and Standard of Proof

The burden of persuasion is upon the Secretary to prove the gravamen of a violation by a preponderance of the evidence. *Jim Walter Res.*, *Inc*., 28 FMSHRC 983, 992 (Dec. 2006), *RAG Cumberland Res., Corp*., 22 FMSHRC 1066, 1070 (Sept. 2000), *Jim Walter Res*., *Inc*., 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp*., 17 FMSHRC 872, 878 (Aug. 2008).

Commission precedent has held that "[t]he burden of showing something by a 'preponderance of the evidence' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'' *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *quoting Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

B. Whether the Respondent Operates a "Mine" under the Mine Act

The central issue presented in this matter is whether MSHA possesses jurisdiction over the Mayfield Quarry.[5] For the reasons set forth below, this Court finds that the Mayfield Quarry conducts mining operations. Consequently, MSHA can assert its jurisdiction over the facility.

Under the Mine Act, MSHA has jurisdiction over "each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce…each operator of such mine, and every miner in such mine." 30 U.S.C. § 803. Section 3(h)(1) of the Act defines the term "coal or other mine" as:

> (h)(1)(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a

[5] This Court notes that MSHA's jurisdiction over an individual facility must be decided on a case-by-case basis, looking to the statutory language and assessing the nature and purpose of the individual facility. *See Pennsylvania Electric Company v. FMSHRC*, 969 F.2d 1501 (3rd Cir. 1992).

> determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1).

The legislative history of the Act leaves no doubt Congress wanted "[A]ny [facility] considered to be a mine and to be regulated under this Act be given the broadest possible interpretation. . . ." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978). Congress was unambiguous that if any uncertainty existed to whether a facility or site should come under MSHA jurisdiction, those "doubts [shall] be resolved in favor of coverage by the Mine Act." *Watkins Engineers & Constructors,* 24 FMSHRC 669, 675-76 (July 2002). Although MSHA's jurisdiction is expansive, it "is not universal and must be based upon specific facts." *Clarkson Constr. Co*., *Inc*., 37 FMSHRC 450, 454 n.5 (Feb. 2015) (ALJ) (noting deference shall not be accorded to the Secretary if her interpretation of the statute is deemed unreasonable).

Under the Act, covered mining operations include the milling of mine products; however, the Act does not define the term "milling." Instead milling is defined within an Interagency Agreement between MSHA and OSHA, which delineates areas of authority between the two agencies. *See Interagency Agreement, Mine Safety and Health Administration, Occupational Safety and Health Administration*, 44 Fed. Reg. 22,827 (Apr. 17, 1979) (GX 21). The agreement defines milling as follows: "[T]he art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is the separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." *Id.* at 22,829.

As a preliminary matter, this Court must note that "The Commission and its judges have been reluctant to second guess the Secretary when she makes choices involving MSHA and OSHA coverage." *Hosea O. Weaver & Sons*, *Inc*., 28 FMSHRC 688, 692 (Jul. 2006) (ALJ). In situations where an entity is deemed to be subject to either MSHA or OSHA regulations, the Secretary merely engages in an act of "adjusting the administrative burdens between [his] various agencies." *Donovan v. Carolina Stalite Co*., F.2d 1547 (D.C. Cir. 1984). After all, it is the Secretary who has the duty to administer the statutes and if he makes an informed jurisdictional determination, the Commission has traditionally afforded broad deference to such determinations. *See e.g., Hosea O. Weaver & Sons* 28 FMSHRC at 692 (finding because MSHA inspectors possess expertise in a highly specialized field the Secretary's reliance on an inspector's determination is especially appropriate).

Here, the Secretary contends that under the Mine Act, MSHA had sole jurisdiction over the Mayfield Quarry because the Respondent conducted milling operations onsite. Specifically, the Secretary argues it is undeniable that "sizing" took place at the Mayfield Quarry. The Respondent, however, contends that MSHA did not have jurisdiction over the facility because

Respondent did not engage in sizing; rather he merely "scalped" the material to remove rock, dirt, and wood." RPHB 4.

When conducting a review of whether MSHA correctly interpreted its authority under the Mine Act, the undersigned must first ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984); *Watkins Eng'rs & Constructors,* 24 FMSHRC at 672-73.

Although the Mine Act does not specifically address what the "milling" process entails, Congress was cognizant when enacting the statute that decisions concerning complex matters in a highly technical field, such as mining, were best left to the experts. *In re Kaiser Aluminum & Chemical Co. v. Dep't of Labor*, 214 F.3d 586, 591 (5th Cir. 2000); *see also Donovan* 734 F.2d at 1552 (finding because the Secretary has the expertise in the specialized field of mining he should be given deference to determine what types of activities constitute milling). In fact, in the Act itself, Congress expressly delegated authority to the Secretary of Labor to determine "what constitutes mineral milling for the purposes" of the Act. 30 U.S.C. § 802(h)(1)(C). In situations such as here, where Congress has left the agency with the task of crafting technical definitions, deference is particularly appropriate. *Chisholm v. F.C.C.*, 538 F.2d 349, 358 (D.C. Cir. 1976), *cert denied*, 429 U.S. 90, 97 S.Ct. 247, 50 L.Ed.2d 173 (1976). Therefore, as long as the Secretary's interpretation is within reason, this Court must accord deference to his determination. *Kaiser,* 214 F.3d at 591.

Because the Mine Act is silent on the point in question, we will proceed to the second prong of *Chevron* to determine whether the Secretary's interpretation of milling was appropriate. *Chevron U.S.A. Inc*. at 843. *Chevron*'s second prong asks "whether the agency's answer is based on a permissible construction of the statute." *Id.* Deference shall be accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (*citing Chevron*, 467 U.S. at 844; *Joy Techns., Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997)). Thus, "The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected." *Watkins,* 24 FMSHRC at 673 (citations omitted).

The Secretary expressly specified in the Interagency Agreement that the following activities constitute milling: "[C]rushing, grinding, pulverizing, ***sizing*****,** concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing, and cutting stone, heat expansion, retorting (mercury), leaching, and briquetting." *MSHA-OSHA Interagency Agreement*, 44 Fed. Reg. at 22,829 (*emphasis added*). Notably, only one of these activities must be conducted for MSHA to assert jurisdiction over the facility or property. *Colorado Lava*, *Inc*., 25 FMSHRC 405, 407 (July 16, 2003) (ALJ) (finding sizing alone was enough for MSHA to establish jurisdiction over operator who failed to file a Legal Identity Report).

"Sizing," as defined in the Interagency Agreement, is "the process of separating particles of mixed sizes into groups of particles of all the same the size, or into groups in which the

particles range between maximum and minimum sizes." *MSHA-OSHA Interagency Agreement*, 44 Fed. Reg. 22,827 at 22,829; *see also* U.S. Dep't of the Interior, *Dictionary of Mining, Mineral and Related Terms* 1020 (1968). Yet, because no significant difference exists between sizing and scalping, no bright line test is available to provide clarity on which process is being conducted. *New York State Dept. of Transp*., 2 FMSHRC 1749, 1768 (July 1980) (ALJ). Instead, the factfinder must carefully scrutinize all of the relevant facts contained within the record on a case-by-case basis. *Id*.

Here, Gary Merwine,[6] an experienced MSHA inspector, immediately observed Robert Dipple, an employee of the Respondent, operating an excavator feeding extracted material into a portable screening plant, which then fed that very same material into a second portable screening plant.[7] Tr. 17. After the material was separated by the second portable plant, Merwine observed three different sized piles created in front of the second portable plant. Tr. 28; GX-9C, GX-9F.

Shortly after Dipple stopped operating the excavator so he could phone the Respondent, Merwine noticed a total of five, *separate piles,* consisting of different sized products in front of the portable plants. Tr. 20; GX-9C. Merwine testified he was certain three of the piles contained the exact products produced from the portable plants that he observed upon entering the site. Tr. 20. Once Dipple returned, he began loading one of the products, a pile of stone, into a dump truck which had arrived on site. Tr. 20. After the dump truck was loaded, the truck left the site to transport the material to an unknown destination. Tr. 20.

At hearing, Merwine testified that a benefit of operating two portable plants simultaneously is that it allows an operator to separate additional products into different sizes by using a different sized screen on the second portable plant. Tr. 28. Merwine testified he had observed the following products coming off the conveyor belts of the portable plants during his inspection: sand, modified stone, and four minus stone (both varieties of stone are types of gravel). Tr. 36. Furthermore, Merwine testified that all of the excavated material he observed being fed into the plants during the inspection had their own unique features. Tr. 35. Notably, all of the materials were of different sizes than the others. Tr. 31, Tr. 36. For example, Merwine testified that four minus stone "ranges from baseball size to a little smaller," however, "modified stone is stone that is smaller than a baseball but bigger than a golf ball." Tr. 35; Tr. 31.

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[6] Before being employed by MSHA, Merwine had spent 25 years working in the coal industry in various capacities. For the first two years he was employed as a laborer/miner. He then served as supervisor/miner for the next 13 years. His supervisory role was followed by him operating a mine as an owner/operator for 10 years. During his tenure at MSHA, Merwine worked as a supervisor of the Wyomissing field office during 2010-2011 and 2014. His inspector training included six four week training sessions at the Beckley Mining Academy. The training sessions included taking a two week advanced electrical course and a FBI course concerning the obtaining and securing of evidence and interviewing. Tr.13-15.

[7] Screening is defined as the "use of one or more screens to separate particles into defined sizes." The process is also referred to as "sizing." *See American Geological Institute, Dictionary of Mining*, *Miner*al, *and Related Terms* 486 (1997).

The Respondent admitted at deposition, and again when testifying, that he separates all of the material screened into different piles-small, medium, and large. Tr. 106. Respondent further agreed that the portable plants produced five different types of products. Tr. 106. Moreover, Respondent conceded all of the extracted material onsite (documented in Merwine photographs) were screened through his portable plants at Mayfield Quarry. Tr. 107.

The Respondent, however, did not agree with Merwine's characterization of the material and instead described it either as dirt, "fill rock," "over burden rock," or "unclassified with different sizes of material." Tr. 107. At hearing, Respondent testified that neither sand nor gravel was produced at the quarry; rather the materials Merwine observed were "dirt." Tr. 98-100. Moreover, he stated the function of the plants was to simply scalp the material to "remove the dirt, rocks, and wood out the material that's there to put it on different piles so I could use it." Tr. 105.[8] Lastly, Respondent takes issue with the process used by Merwine to identify the material during the inspection. RPHB 4. [9]

At hearing, Merwine opined that the sizing of the materials which he had observed at the quarry site fell within the parameters of MSHA's authority over milling. Based on the testimonial evidence, as well as the photographic evidence admitted at hearing, this Court finds the inspector's testimony and conclusions to be more credible.

The Commission and the D.C. Circuit have long been unequivocal, if an operator extracts sand or gravel, it will fall under MSHA's jurisdiction. *See*, *e.g.*, *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683, 688 (Apr. 1994) (operator's extraction of "sand, a mineral, from its natural deposit covered by the Mine Act."); *Donovan*, 734 F.2d. at 1548 (slate gravel quarry operator, including its conveyors, subject to Mine Act). Furthermore, both courts have upheld the Interagency Agreement's classification of sizing as mineral milling. *Id.* at 1553 (upholding Secretary's determination that a slate gravel processing facility, which did not extract but instead crushed and sized the slate for sale, constituted a "mine" under section 3(h)); S*tate of Alaska, Dep't of Transp.*, 36 FMSHRC 2642, 2649 (Oct. 2014) (finding a state agency that used a screener to size sand and gravel for road construction engaged in mineral milling).

Although Merwine did not conduct sampling of the materials at the quarry during his inspection, this does not vitiate the Secretary's case. Rather there are other persuasive evidentiary considerations that exist which corroborate the Secretary's case, such as Merwine's extensive mining experience. Indeed, the Commission has held that the informed opinion of an experienced inspector, such as Merwine, is entitled to significant weight. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that substantial evidence supported an ALJ's S&S determination). Here, the evidence submitted and testimony presented by the Secretary at

[8] Respondent alleges he used all of the screened material as bulk fill for his properties and construction projects that he was involved in. RPHB 4.

[9] Respondent's Counsel notes in his brief that Merwine did not test or take samples of the material at the quarry. RPHB 4.

hearing, sufficiently corroborates Merwine's determination that sizing took place on the property. SPHB 12.

Throughout the inspection, Merwine took numerous photographs, which captured critical moments. Merwine was able to document in real time the layout of the site and all activities being conducted on the day of the inspection. The photographs further documented Dipple excavating material from an embankment located on the property and then feeding that material into the first portable screening plant. GX-9B. Other photographs depicted what appeared to be sand coming off of the first plant (GX-9C), a pile of "rock material" to the right of the first plant (GX-9D), and the second plant being fed a sand product that was different from the rock material to the right of the first plant (GX-9F); Tr. 29-31. Lastly, Merwine documented a stockpile of four minus stone (GX-9H), Dipple loading the four minus stone into the dump truck (GX-9I), and the front end loader used to load stone into the dump truck parked with three stockpiles of different material behind it that had come from one of the portable plants. GX-9J; Tr. 28-33.

State of Alaska provides a close analogy to this case. 36 FMSHRC at 2642. In *State of Alaska*, the Commission held the agency's use of a portable screening plant to size excavated sand and gravel material constituted milling as the term is interpreted in the Interagency Agreement. *Id.* at 2649. Similar to the portable plants at issue here, the function of the portable screening plants was not merely to "scalp away large rocks, wood, and trash from the material it was extracting." *Id*. Rather, the plants were used specifically to separate material into three different sized piles of rock. *Id*. Likewise, the function of the Respondent's plants was to make various different sized products which were then stockpiled and separated on site according to size. Tr. 27-29.

The Respondent relies largely on *Duquette* to support his assertion that the plants were used solely for scalping purposes. RPHB 4. Notably, Respondent claims the facts of the present case are "nearly identical" to those in *Duquette*. RPHB 4. In *Duquette*, Judge Feldman found the Respondent's earthen material extraction site to be exempt from MSHA jurisdiction because no milling was involved in the extraction operation. *Duquette*, 37 FMSHRC at 751. Rather the Respondent extracted material stipulated by both MSHA and the Respondent, to be "generally clean fill" from an embankment. *Id*. A single scalping screen was employed only when necessary to remove large rocks, wood, and trash. *Id*. The material was then subsequently loaded onto a dump truck for transport offsite where it was used in the form it was extracted as bulk fill. *Id*.

Here, unlike *Duquette*, the material extracted was not suitable solely for bulk fill usage. Instead, the Respondent employed not one, but two, portable screening plants to separate the various types of material into different sized stockpiles. Tr.17. Additionally, the Respondent indicated that the various materials stockpiled at the quarry were used for different purposes. Tr. 21. Some of it was used for construction projects, some to construct buildings, and some of it was transported to his supply yard. Tr. 21. In *Duquette*, all of the material that went through a scalping screen was then subsequently deposited into the same dump truck for transport. 37 FMSHRC at 751. Here, however, the materials were separated into five different stockpiles in which only one of the materials, four minus stone, was loaded into the dump truck for use offsite. Tr. 20.

Screening material to be sized and then stockpiled for further use are functions normally performed by a mine operator. *See Watkins Engineers,* 24 FMHRC at 673-675 (finding the process of sizing and stockpiling of extracted material were sufficient for MSHA to establish jurisdiction over the operator); *see also Tamko Roofing Products*, 27 FMSHRC 486, 487 (May 2005) (ALJ) (screening limestone into different sizes constituted milling, which was accordingly subject to MSHA jurisdiction). As noted above, sizing alone is sufficient to establish MSHA jurisdiction. *Colorado Lava*, 25 FMSHRC at 407.

At hearing, the Respondent admitted that screening was performed at the quarry; however, he claimed he did it only for scalping purposes. Tr. 105. Yet, Merwine testified he witnessed an employee of the Respondent use a Caterpillar excavator to load extracted material from an embankment and then dump that material into a hopper. Tr. 27; *see also* GX-9B. The material then flowed through a screener, made up of different sized holes depending upon the material desired. Tr. 25. Any material placed on the plant hopper would then go to one of three separate conveyor lines. Tr. 27. One of these lines then fed material onto a stacked conveyor belt which fed the material into a second portable plant where products could be sized even further. Tr. 27-28. It was at this point Merwine observed the second plant produce products of two different sizes. Tr. 31. In sum, Merwine testified that he observed five different sized piles of products "that appeared to have come from the portable screening plants;" different materials screened through two different plants, and an excavator loading one of the uniquely sized piles into a dump truck. Tr. 20.

Given the evidence presented by the Secretary and the reasonable inferences flowing from that evidence, this Court concludes the Secretary has proven that it is more likely than not that sizing occurred at Mayfield Quarry. The Interagency Agreement, expressly states "sizing occurs if particles of mixed sizes are grouped into particles of the same size or into groups of particles ranging between maximum and minimum sizes." *MSHA-OSHA Interagency Agreement*, 44 Fed. Reg. 22,827 at 22,829. Here, Merwine testified to having observed materials going into the feed hoppers and separated into three different sizes and observed at least five different sized piles of material stockpiled at the quarry. Tr. 36; Tr. 20. These types of activities fall within the first part of the definition of sizing. *See* 44 Fed. Reg. 22,827 at 22,829. Although the Respondent contends the extracted materials were actually dirt and waste their makeup is irrelevant to the determination of whether sizing occurred. Accordingly, this Court finds the Secretary's conclusion that the Respondent conducted sizing at the Mayfield Quarry to be an appropriate interpretation of the Act.

C. Whether the Products of the Mayfield Quarry Affect Commerce

Article I, Section 8, Clause 3 of the Constitution provides Congress the authority to "regulate commerce . . . among several States." The Supreme Court has consistently upheld Federal regulations of seemingly local activities due to the belief that such activity could affect interstate commerce. Although many of these ostensibly local activities appear to be purely intrastate, if they are the type of activity which falls within a class of regulated activity, they will be deemed to have affected interstate commerce. *See Wickard v. Fillburn*, 317 U.S. 111 (1942) (growing wheat solely for consumption on the farm on which it is grown affects interstate commerce); *Fry v. United States*, 421 U.S. 542, 547 (1975) (stating even activity that is purely

intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similar situated, affects commerce among the States or with foreign nations).

Mining is one of those classes of regulated activities and therefore has been subject to the broadest reaches of Federal regulation under the Commerce Clause due to the extent its activities affect interstate commerce. *Marshall v. Kraynak*, 457 F. Supp. 907, (W.D. Pa, 1978), *aff'd*, 604 F.2d 231 (3d Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980). Notably, "the Act does not require that the effect on interstate commerce be substantial; any effect at all will subject [the operator] to the Act's coverage." *Marshall v. Bosack*, 463 F. Supp. 800, 801 (E.D. Pa. 1978).

Section 4 of the Mine Act states that: "[e]ach coal or other mine, the products of which enter commerce or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803. In enacting the mine safety statutes, Congress intended to exercise its authority to regulate interstate commerce to "the maximum extent feasible through legislation." *Secretary v. Shingara*, 418 F. Supp. 693 (M.D. Pa. 1976), quoting S. Rep. No. 1055, 89th Cong., 2d Sess. 1 (1966), *U.S. Code Congressional and Administrative News*, 89th Cong., 2d Sess. 2072.

Indeed, courts have consistently held that even mines with solely local sales will still affect interstate commerce and therefore fall within the ambit of Congress' Commerce power. *See e.g*., *U.S. v. Lake*, 985 F.2d 265, 269 (6th Cir. 1993) (finding that a coal mine operator who was solely purchasing mining supplies from a local dealer and whose sales were entirely local affected commerce because these activities in combination with other activities could affect interstate coal markets); *D.A.S. Sand & Gravel*, *Inc. v. Chao,* 386 F.3d 460 (2nd Cir. 2004), *cert denied*, 544 U.S. 1048 (2005) (affirming Commission holding that the Mine Act applies to sand and gravel company that sold their products entirely intrastate).

Likewise, Commission judges have held that any operator that engages in milling, even if for personal use, will be found to affect interstate commerce. *Cobblestone Ltd*., 10 FMSHRC 731, 733 (June 1988) (ALJ) (finding that the operation of a family owned gravel pit which was used solely for building a family residence affected commerce). To determine whether the Respondent's quarry operation affects commerce, this Court must "focus on whether such actors taken together would have the potential to affect the interstate market at issue." *State of Alaska*, 36 FMSHRC at 2645. Recently this Court had the chance to apply the analysis to an operator sizing sand and gravel through the use of a screening plant, the court declared unequivocally that "there is no question that such potential is present with respect to entities that mine or mill sand or gravel for their own use." *Id*.

Similar to the homeowner in *Cobblestone*, the Respondent indicated during the inspection of his property that the materials located onsite were used to construct buildings and utilized in various construction projects. Tr. 45-46. All of this work was conducted offsite. Tr. 46. Additionally, the Respondent admitted at his deposition that he used some of the material from the quarry at construction sites to backfill foundations of buildings he constructs. Tr. 46. Furthermore, Merwine testified that the Respondent conceded that some of the materials

screened at the quarry were sent to the Respondent's supply yard, where products can be purchased by the public.[10] Tr. 21.

The day after the inspection, Merwine visited Respondent's supply yard which is located approximately a half mile away, to continue his investigation. Tr. 36. Merwine testified that he observed bins with sand, and different sizes of stone for sale. Tr. 36-37; GX-19, GX-20. Three of the bins he observed contained the same type of stone materials that he observed being processed through Respondent's screening plants at the quarry the day before. Tr. 37, 85-86; see also GX-9N, 9O, and 9P. Notably, Merwine observed four minus stone in one of the bins. Tr. 37, 38. This was the same type of stone Merwine had observed being loaded into a dump truck at the quarry for shipment offsite. Tr. 37, 38; *see also* GX-9N, GX-9O, GX-9P.

Even though no direct evidence was presented to show that the stone material contained in the bins at the supply yard originated from the quarry, given that the Respondent consistently stated he sent screened material from the quarry to the supply yard, both during the inspection and his deposition, coupled with Merwine's photographs, testimony, and field notes, this Court finds it more likely than not the Respondent sold at least some of these products at his supply yard. Moreover, it is also reasonable to infer that some of the equipment Respondent was using such as the Caterpillar excavator or portable plants were manufactured outside the Respondent's home state of Pennsylvania. It has been held that use of equipment that has been moved in interstate commerce affects commerce. *See United States v. Dye Construction Co*., 510 F.2d 78, 82 (1975).

Even if the Respondent was not selling screened material from the quarry through his supply yard, he still affected commerce. The Respondent has conceded that he used the material from the quarry for construction projects. Tr.45-46. Specifically, Respondent admitted he used some of the screened material from the quarry to backfill foundations of buildings he constructs. Tr. 46. As the Secretary astutely points out in his Post Hearing Brief, if the Respondent was not able to obtain this material from the quarry, he would have to acquire it from the open market. SPHB 16. Indeed, the Court has long held that products affect commerce where they have an intrinsic value as a commodity which would have to be purchased elsewhere if not produced by the operator. *See*, *N.Y.S. Department of Transportation*, 2 FMSHRC 1749 (July 1980) (ALJ); *Island County Highway Department*, 2 FMSHRC 3227 (Nov. 1980) (ALJ); and *County of Ouray*, *Colorado*, 9 FMSHRC 1205 (July 1987) (ALJ).

Although it may be true that the Respondent never took material from the Mayfield Quarry to Jermyn Supply for sale to the general public, given the broad interpretation and coverage of the Act as intended by Congress, and as construed by the courts, it may be reasonably inferred that Respondent's activities as a whole had an impact on interstate commerce. *See Fry* 421 U.S. at 547.

Therefore, this Court concludes that the Mayfield Quarry's sand and gravel processing activities, including all of the equipment and machines used in the processing of the materials for various uses in the Respondent's construction businesses, constitute a mining operation covered

[10] Merwine documented the encounter with the Respondent in his field notes. GX-5.

by the Act, affect interstate commerce within the meaning of the Act, and that the Respondent is within the Act's reach.

D. Whether Under the *Elam* Test the Respondent is Subject to MSHA Jurisdiction

The Commission has emphasized when making a determination regarding jurisdiction this Courts inquiry must focus on the nature of the functions that occur at the site. S*ec'y of Labor (MSHA) v. Oliver M. Elam, Jr.,* 4 FMSHRC 5, 7 (1982). To determine whether a site falls within the ambit of MSHA jurisdiction, a reviewing court must engage in a two-prong analysis: (1) A party must engage in activities normally performed by a mine operator and (2) The party must perform these activities in order to make the extracted material suitable for a particular use or to meet market specifications. *Id*. at 8.

Here, the Respondent used portable plants to screen material into different sizes. Tr. 106. As discussed in detail *supra*, this process is referred to as "sizing," and falls within one of the categories of milling, as set forth in the Interagency Agreement. *See* 44 Fed. Reg. at 22,829-22,830 (Apr. 17, 1979). Moreover, the agreement recognizes milling as a mining operation. *Id*. Consequently, because the Respondent engaged in milling at the Mayfield Quarry, an activity that is normally performed by a mine operator, the Respondent satisfies the first prong of the *Elam* test.

In *Elam*, coal was not sized for any particular use; rather the coal was sized into one size to help facilitate the loading process at Respondent's dock. 4 FMSHRC at 5. Unlike *Elam*, the Respondent operated two portable screening plants to separate material into five separate stockpiles, with each stockpile containing material of a distinct size. Tr. 20; Tr. 106. Notably, these stockpiles appear to be stored onsite until they are needed for a particular use offsite. Tr. 20.

If the Respondent's true intent was to use the material for bulk fill on his properties then it would defy logic for the Respondent to have spent time and resources to screen the material into different groups of particles based on their size. Rather, the Respondent could have simply taken the material from the embankment and loaded it onto the dump truck to be used as bulk fill. This did not occur. Instead the material is used for its intrinsic properties, and appears to be used over a relatively wide area of locations where the Respondent conducts activities related to his construction businesses. Accordingly, the Respondent's sizing of extracted materials at Mayfield Quarry in order to make the extracted material suitable to meet market specifications satisfies the second prong of the *Elam* test. Thus, having satisfied both prongs of the *Elam* test, this Court finds the Mayfield Quarry well within the ambit of Mine Act jurisdiction.

E. Whether the Respondent's Operation is a Borrow Pit

The Respondent further asserts that MSHA jurisdiction was inappropriate because the Mayfield Quarry operation is a "borrow pit," and therefore not subject to inspection. RPHB 4-5. Respondent supports this contention by arguing that the material extracted was merely bulk fill and only used on land relatively near the borrow pit. RPHB 4.

The Interagency Agreement defines borrow pits as follows:

> "Borrow Pits" are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining. (For example, a borrow pit used to build a road or construct a surface facility on mine property is subject to MSHA jurisdiction). "Borrow pit" means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. **No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities** on land which is relatively near the borrow pit.

MSHA-OSHA Interagency Agreement, 44 Fed. Reg. at 22,828; (*emphasis added*); GX-21.

In 1996, MSHA adopted interpretive guidelines to provide further clarity on the agreement. The Interpretation and Guidelines stated:

> Thus, if earth is being extracted from a pit and is used as fill material in basically the same form as it is extracted, the operation is considered to be a "borrow pit." For example, if a landowner has a loader and uses bank run material to fill potholes in a road, low places in the yard, etc., and no milling or processing is involved, except for the use of a scalping screen, the operation is a borrow pit. **The scalping screen can be either portable or stationary and is used to remove large rocks, wood or trash.** In addition, whether the scalping is located where the material is dug, or whether the user of the material from the pit is the owner of the pit or a purchaser of the material from the pit, does not change the character of the operation, as long as it meets the other criteria**.**

I, MSHA, U.S. Dept. Of Labor, *Program Policy Manual,* Section 4, I.4-3 (1996). (*Emphasis added*).

The Commission and its Judges have traditionally applied a narrow interpretation of the term "borrow pit." *Jones Bros*., *Inc*., 39 FMSHRC 399, 401 (Feb. 2017) (ALJ), *citing Drillex, Inc.*, 16 FMSHRC 2391, 2396 (Dec. 1994); *Kerr Enterprises*, *Inc*., 26 FMSHRC 953, 957 (Dec. 2004) (ALJ); *N.Y. State Dep't of Transp*., 2 FMSHRC 1749, 1761 (July 1980) (ALJ). For example, state agencies that extracted and screened sand for traction control purposes on runways and roadways during the winter months were found to be mine operators and consequently did not qualify for the "borrow pit" jurisdictional exception. *See N.Y. State Dep't of Transp.*, 2 FMSHRC at 1761. In *New York Department of Transportation*, the Court held that when materials are processed through a shaker screen for the purpose of shaping them into a particular size for their "intrinsic qualities," the operator will not be found to be operating a *"borrow pit*" within the meaning of the MSHA-OSHA Interagency Agreement. *N.Y. State Dep't of Transp.,* 2 FMSHRC at 1758-59. Additionally, the court held the operator's usage of a portable screening plant to select 1-1/2″ gravel constituted "milling." *Id.* at 1761. This "milling"

removed the NY DOT from the MSHA-OSHA Interagency Agreement definition of "borrow pits." *Id.*

Here, Respondent employed two portable screening plants to size sand and gravel particles, which are then subsequently stockpiled throughout the property based on their unique characteristics and most importantly, their distinct sizes. As noted above, Respondent conceded during his deposition that the stockpiles of separate materials were further grouped into piles by size, "small, medium, and large." Tr 106. Furthermore, after the materials are processed through the screening plants, the stockpiles of gravel and sand are not "in basically the same form" as they were extracted. As such, the Respondent's use of screeners to "mill" or "size" the sand and gravel materials is no different than any other sand and gravel operation that is subject to MSHA jurisdiction.

Even the use of a minimal "scalping screen" has been found sufficient for MSHA to assert jurisdiction when the operator of the screen does not use the product for bulk fill on nearby sites. *Kerr Enterprises*, 26 FMSHRC at 957. In *Kerr Enterprises*, although the operators use of a scalping screen to remove wood debris from earthen material was in accordance with the definition allowed for in the Interagency Agreement the operator still did not qualify for a borrow pit exception because the material was used for purposes other than bulk fill. *Id*. at 957.

Once again, Respondent's reliance on *Duquette* is mistaken. *See Duquette,* 37 FMSHRC at 744. In *Duquette*, the operator was an excavation contractor who extracted material solely for the purpose of using it as bulk fill for commercial or residential construction projects. Id. at 749. Notably, the operator did not conduct any milling processes. *Id*. at 751. Rather, he only engaged in scalping "to remove debris to make the material suitable for bulk fill usage." Furthermore, the bulk material extracted was used as found and was not altered to make the material "uniquely suitable for a particular purpose that can satisfy market specifications." Thus, the excavation contractor in *Duquette* closely mirrored the example set forth in the MSHA Program Policy Manual. Accordingly, the court found the excavator contractor to satisfy the requirements of operating a borrow pit.

Unlike *Duquette*, the Respondent conducted milling activities on his property. Tr. 106. Although the Respondent's first portable screening plant did in fact remove large rocks, wood, and trash, this is not the end of the process. Rather, after the material goes through the first plant where large rocks, trash, and wood are scalped away, the screening process continued with a second portable plant where the material was then altered even further into three additional sizes of rock. Tr. 27-28. The material was then stockpiled based on size and other characteristics until needed for a specific use. Tr. 20.

The "milling" of materials at the Mayfield Quarry dictates that the area qualifies as a mine. Moreover, it must be noted that even if borrows pits do exist on the property they are still located on mine property and most importantly are related to mining. Therefore, the Mayfield Quarry was appropriately subject to MSHA inspection.

F. Whether a *De Minimis* Exception Exists to Activities Usually Subject to MSHA Jurisdiction

Lastly, this Court at hearing requested that both parties address whether there is a *de minimis* exception to the activities that would otherwise fall under the jurisdiction of the Mine Act. [11]

Here, Respondent alleges his quarry is open for no more than two weeks per year and a normal workday consists of only two hours. Tr. 104. Respondent testified that he receives no income from the operation and that he is mainly focused on his construction company. Tr. 103. Furthermore, the Respondent alleges that during certain periods of time the operation can be dormant for up to two years. Tr. 103.

Although the Respondent purports to conduct a very limited operation the evidence submitted contradicts this assertion. According to the Respondent's application for a DEP Large Non Coal Mine Operator's License issued by the Commonwealth of Pennsylvania on July 6, 2015, the Respondent reported that 7,542 tons of Non-Coal minerals were mined at his operation in 2014. *See* GX-14. Additionally, the Respondent testified that in just two hours he was able to screen 20 tons of extracted material per day. Tr. 104-105. Yet, as the Secretary emphasizes in his Post Hearing Brief, if the Respondent did indeed only screen 20 tons of extracted material per day in 2014, it would have taken Respondent over 377 days to process the 7,542 tons of material at the Mayfield Quarry. This cannot be considered *de minimis* activity.

The amount of time spent extracting materials, however, is irrelevant to the instant matter. As the Commission has made clear "sand and gravel mining operations, whether year round, or ***intermittent***, have long been subject to Mine Act regulation." *State of Alaska,* 36 FMSHRC at 2647 (*Emphasis added*). The attempts of operators to escape jurisdiction by arguing that only a small portion of their activities could reasonably be subject to Mine Act regulation is not a new phenomenon in the mining industry. *See Hosea O. Weaver & Sons*, 28 FMSHRC at 692 (finding that even though the gravel crushed onsite comprised only 4.5% of asphalt plant's total output this was not a *de minimis* activity) *see also Austin Powder Co*., 37 FMSHRC 1337, 1355-1356 (June 2015) (ALJ) (holding that an operator who used only up to 10% of its stored materials should not be considered *de minimis* activity because the items stored were used directly in the mining process). The courts have made clear that "the governing jurisprudence . . . [holds] that any activity which is functionally integrated with the mining activity necessitates the imposition of MSHA jurisdiction even where that activity is minor or removed from the mining site." *Bonanza Materials Inc*., 15 FMSHRC 1355, 1359 (July 1993) (ALJ).

Here, Respondent contends that all of the operations conducted at Mayfield Quarry were performed intermittently. As such, Respondent argues his sporadic milling activities should be

[11] Although Respondent's Counsel did not address this issue adequately in his brief the Secretary asserts in her brief that the Act does not contain such an exception for operators, only independent contractors. SHPB 20. I need not address that issue here. Rather, this Court holds the subject activities are not *de minimis* in the context of the Respondent's overall operation.

exempt from MSHA jurisdiction.[12] Although Respondent's quarry operation may indeed be secondary to his construction business, this Court finds Respondent's sizing activities to be functionally integrated with a mining activity, milling. Thus, whether the Respondent sporadically conducts sizing at Mayfield Quarry or not is irrelevant.

As Respondent concedes, the Mayfield Quarry operation has been active for at least 10 years. During that time period the Respondent was able to conduct mining operations without any oversight or accountability from the appropriate mining regulatory authority. This Court finds such lack of oversight to be of great concern and fear that the Respondent may have been able to evade numerous Mine Act violations.[13] Moreover, this Court is deeply troubled that former and current employees may have been put in harm's way due to hazardous working conditions prior to MSHA inspecting the site.

The legislative history of the Mine Act is clear regarding the link between "hazards involved with … mining" and "the need to provide for the health and safety of the nation's miners." S. Rep. No. 95-181, at 1 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 589 (1978). Indeed, as set forth in Section 2(a) of the Act, "the first priority and concern of all in the [mining] … industry must be the health and safety of its most precious resource - the miner." 30 U.S.C. § 801. Simply put, the Mine Act was enacted to protect miners, not mines. To permit the Respondent to evade the regulations of the Act due to a *de minimis* exception would fly in the face of Congress's intent that what is considered to be a mine be given the broadest possible interpretation.

G. Whether the Respondent was in the business of Preparing Minerals

Finally, the Respondent contends that because he "did not engage in screening the bulk fill to remove impurities or ensure size quality, did not dry or clean it, and did not engage in the process of loading the bulk fill in separate containers according to size to be sold to third parties," he does not engage in in the process of "preparing minerals." RPHB 5. Accordingly, Respondent contends he is not subject to MSHA jurisdiction. However, "milling" and

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[12] At hearing, Respondent's Counsel contended that *Duquette* stood for the proposition that any activities performed at a mining facility in operation less than 200 hours a year would be considered *de minimis*. Tr. 92-93. Again, Respondent is mistaken. Rather, in *Duquette* both parties merely stipulated that an MSHA inspector mentioned to the operator there was a provision suggesting operators in service less than 200 hours a year would be taken off the MSHA inspection list. *See Duquette* 37 FMSHRC at 745. This Court has found that no such provision exists in the Act or any relevant case law to support such a contention. Furthermore, this Court is not bound by any stipulations from an unrelated matter before a different ALJ.

[13] Respondent argues in his brief because the citations issued in the instant matter are not related to respiratory issues from dust circulation the Respondent has not violated any of the types of safety concerns that MSHA was established to remedy. RPHB 5. I find the Respondent's argument somewhat attenuated from reality. In the instant case the Respondent was cited for 17 violations, all of which dealt with potential safety hazards.

"preparation" are used interchangeably in the context of the Act. Both words detail what the process of treating mined minerals for market entails. For example, in *A Dictionary of Mining, Mineral and Related Terms* (U.S. Bureau of Mines, 1968) at 707, milling is defined as including "preparation for market." Thus, one can understand how both terms-milling and preparation—became part of the Act without either term being designated by Congress as an entirely separate process.

As described in detail *supra*, the Respondent engaged in milling which is part of the process of preparing minerals for the market. The Act's use of both terms indicates that both processes under the Act should be read broadly. Accordingly, MSHA jurisdiction was appropriate under the plain reading of the Mine Act and under the Secretary's interpretation.

ORDER

Based on the above, I find that MSHA had jurisdiction over the Mayfield Quarry and that a hearing on the merits will be set shortly.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 31, 2017

DANIEL B. LOWE and MATTHEW A. VARADY, Complainants v. JERRITT CANYON GOLD, LLC, ET AL., Respondent	INTERFERENCE PROCEEDING Docket No. WEST 2017-0331-DM MSHA No: WE-MD 14-04, WE-MD 14-03 Jerritt Canyon Mill Mine ID: 26-01621

CORRECTED DECISION GRANTING MOTIONS TO DISMISS[*]
ORDER OF DISMISSAL

Before: Judge Manning

This case[1] is before me upon a complaint of interference filed under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended. 30 U.S.C. § 801, *et seq.* (the "Mine Act"). Because this case is related to other cases filed by Complainants, a brief history of the previous litigation is necessary to put the present case in context.

I. BACKGROUND

Daniel B. Lowe and Matthew A. Varady were separately terminated from their employment by Veris Gold USA, LLC, in November 2013 ("Veris Gold"). The Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA") determined that Veris Gold had not violated section 105(c) of the Mine Act in either instance. As a consequence, Lowe and Varady brought separate discrimination cases before the Commission under section 105(c)(3) of the Mine Act which were assigned Docket Nos. WEST 2014-307-DM in the case of Varady and WEST 2014-614-DM in the case of Lowe. Commission Administrative Law Judge William B. Moran was assigned the cases and held separate hearings in the two cases in June 2015. On September 2, 2015, Judge Moran issued a decision finding that Veris Gold discriminated against Varady, 37 FMSHRC 2037, and on October 15, 2015, Judge Moran issued a decision finding that Veris Gold discriminated against Lowe, 37 FMSHRC 2337.

[*] The original decision and order in this case, issued on July 27, 2017, contained a clerical error in the second line on page 8, which has been corrected here. No other changes have been made in this decision and order.

[1] When this case was docketed by the Commission, the respondent was listed as Veris Gold USA, LLC. Veris Gold no longer exists and Complainants did not include Veris Gold in the complaint. Instead, the interference complaint was in the form of a letter and listed Jerritt Canyon Gold, LLC and several other entities, as discussed below.

A. Veris Gold Bankruptcy Filing

In the meantime, on June 9, 2014, Veris Gold filed a petition in bankruptcy in Canada and with the United States Bankruptcy Court for the District of Nevada ("Bankruptcy Court").[2] An automatic stay against continuing any judicial, administrative or other actions against the debtor was entered by the Bankruptcy Court. About a year later, on June 4, 2015, the Bankruptcy Court issued an order approving the sale of the substantial assets[3] of Veris Gold to Jerritt Canyon Gold, LLC, ("JCG") pursuant to section 363 of the Bankruptcy Code. 11 U.S.C. § 363. Under the terms of the purchase, as approved by the Bankruptcy Court, JCG could not be held liable for claims based on any successor or transferee liability, or any enforcement action or enforcement history, including employment and pension claims.

Soon after the Bankruptcy Court approved this asset sale, Lowe and Varady filed a motion asking that the sale be stayed. On June 19, 2015, the Bankruptcy Court denied this motion. Lowe and Varady did not appeal the Bankruptcy Court's order. The sale of the assets of Veris Gold to JCG closed on June 14, 2015. The sale of assets generated minimal proceeds. Administrative expenses were paid but none of the secured or general unsecured creditors received any proceeds. On September 2, 2015, after notice and hearing, the Bankruptcy Court entered an order granting the motion to close the bankruptcy case.

In his October 15, 2015 decision finding that Veris Gold discriminated against Lowe, Judge Moran asked the Commission for direction "about how to proceed in this matter of first impression" given the order of the Bankruptcy Court and that the purchaser of the assets was not a party in the discrimination case. 37 FMSHRC at 2348. On January 12, 2016, the Commission issued an order finding that it lacked jurisdiction to provide direction concerning the issues raised by the judge. 38 FMSHRC 25.

In March 2016, Judge Moran granted Varady's and Lowe's motion to amend their respective discrimination complaints to include JCG as a party but he did not determine whether JCG could be held liable as a successor to Veris Gold. 38 FMSHRC 513, 529 (Varady); 38 FMSHRC 565, 581 (Lowe). JCG filed petitions for interlocutory review in both cases with Judge Moran on this issue, which he denied. 38 FMSHRC 900 (Apr. 2016) (Varady); 38 FMSHRC 1559 (June 2016) (Lowe). JCG then filed a petition for interlocutory review with the Commission, which was denied with respect to both cases in July 2016.

B. Hearing and Orders Entered by Bankruptcy Court in August and September 2016

Judge Moran issued an order on July 27, 2016 discussing principles of successorship and granted Lowe's request to conduct discovery against JCG with respect to successorship issues.

[2] Veris Gold Corporation filed for bankruptcy in Canada. Veris Gold USA LLC was a subsidiary of Veris Gold Corporation, a Canadian entity with headquarters in Vancouver, British Columbia. I have not discussed the Canadian proceedings in this decision. In many instances the Bankruptcy Court's orders simply followed the lead of the Canadian bankruptcy court.

[3] The vast majority of Veris Gold's assets, including the Jerritt Canyon Mill, were sold to JCG.

38 FMSHRC 1888. On August 4, 2016, JCG filed motions with the Bankruptcy Court to reopen the subject bankruptcy case to enforce the previously approved sale order, to enjoin Complainants from pursuing claims against JCG, and for sanctions against Lowe and Varady. On August 11, 2016, the Bankruptcy Court held a hearing on the Motion to Reopen and Motion to Enforce at which Varady and Lowe were present. During the August 11, 2016, hearing on the motion, Bankruptcy Judge Gregg W. Zive reiterated that there was no successor liability when JCG purchased the assets of Veris Gold. The judge questioned the need for Complainants to conduct discovery on successorship issues in Judge Moran's cases because JCG is not a successor to Veris Gold due to the fact that the assets were sold under section 363 of the Bankruptcy Code. He advised Complainants that they could appeal his decision that JCG is not a successor to the Court of Appeals. The judge further told Complainants that, in any event, neither the secured nor unsecured creditors of Veris Gold received any payment from the estate. Finally, he enjoined Complainants from proceeding any further in their attempts to obtain relief from JCG as an alleged successor. He did not grant JCG's request for sanctions, but he "put Mr. Lowe and Mr. Varady on notice that if they violate [his] order, [he]will enforce it with monetary sanctions." (Bankruptcy Tr. 60, quoted at 38 FMSHRC 2109, 2715).

On September 2, 2016, the Bankruptcy Court entered a written order granting JCG's motions but denying that part of the motions asking for sanctions, without prejudice. The order stated that Complainants were prohibited from pursuing their claims against JCG, Whitebox, or any other persons or entities related to or associated with JCG or Whitebox in any other Court or proceeding, "including any administrative proceedings before the [Commission] ALJ or any other proceeding or tribunal." Bankruptcy Court Order dated September 2, 2016 at 26 (Copy of Court's Order was entered into the official record in the present case). The Bankruptcy Court order further stated that the "Sale Order enjoins Creditors Lowe and Varady from pursuing their claims against the Purchaser [JCG] or any persons or entities related to or associated with Purchaser for successor liability in any other court or proceeding. The Creditors actions seeking to assert successor liability on Purchaser and others, . . . are an impermissible collateral attack on the Sale Order, and are prohibited by the injunction contained therein." *Id*. at 25. Finally, in denying the motion for sanctions, the order stated that "Creditors Lowe and Varady are hereby placed on notice that if they violate the Court's Order, the Court may enforce the Order with monetary sanctions. The Bankruptcy Case will remain open to ensure that the Creditors comply with the Court's Orders." *Id*. at 26.

C. Subsequent Proceedings Before the Commission

On October 25, 2016, Judge Moran entered orders dismissing the discrimination cases brought by Lowe, 38 FMSHRC 2709, and Varady, 38 FMSHRC 2723, based on the holding of the Bankruptcy Court. Lowe and Varady appealed these dismissals to the Commission. By order dated December 16, 2016, the Commission noted that Respondents had not filed a motion to dismiss, determined that Judge Moran's dismissal orders were premature, and remanded the cases to the Commission's chief judge for reassignment to a different judge. 38 FMSHRC 2899. The cases were reassigned to Commission Judge David Simonton.

Before Judge Simonton, JCG moved to dismiss the cases because the sale order approved by the Bankruptcy Court permitted it to purchase the Jerritt Canyon Mill free and clear of liens,

claims, and interests, specifically including employment law claims, and because the sale order provided that JCG would not be liable as a successor to Veris Gold. Complainants argued that the Mine Act authorizes them to pursue their discrimination claims against JCG as a successor in interest to Veris Gold and they sought to add various other entities as additional successors.[4] At the order of Judge Simonton, Complainants, JCG, alleged affiliate Whitebox 2014-l Ltd., and the Solicitor filed briefs addressing his jurisdiction and his authority to enforce the Complainants' discrimination claims against JCG and the additional entities.

On March 20, 2017, Judge Simonton issued an order granting JCG's motion to dismiss denying Complainants' motion to add additional parties as successors to Veris Gold. 39 FMSHRC 781. He held that "allowing the Complainants to pursue successorship liability against JCG in violation of a free and clear sale would subvert the policies outlined in the Bankruptcy Code and affirmed in *Nathanson* [*v. National Labor Relations Board*, 344 U.S. 25 (1952)]." 39 FMSHRC at 787. He went on to state the there is "no support for the claim that the Commission can override or ignore the Bankruptcy Court's interpretation and enforcement of the Sale Order to allow successorship liability." *Id.* Judge Simonton's order includes a thorough analysis of issues surrounding the interplay between the orders of the Bankruptcy Court and the Commission's authority under the facts of this case. I hereby incorporate his findings and conclusions set forth in that order into this decision by reference.

Complainants filed a petition for discretionary review of Judge Simonton's order with the Commission. The Commission denied review on May 8, 2017. Complainants filed an appeal of Judge Simonton's order of dismissal, as made final by the Commission's denial of review, with the United States Court of Appeals for the 9th Circuit on or about July 12, 2017. (Lowe et al. v. FMSHRC, Case No. 17-72019).

II. INTERFERENCE COMPLAINT

On or before March 1, 2017, Lowe and Varady filed an interference complaint with the Department of Labor through MSHA's Western Metal/Nonmetal District Office. In response, Diane Watson, Supervisory Special Investigator for the Western Metal/Nonmetal District, stated that the complaint "does not meet the criteria under 105c of the Act for filing of a new discrimination complaint and none will be forthcoming from the Agency." (Email dated March 1 from Watson to Lowe). She further stated that the Complainants have "not been employed at the mine for at least two years; this matter has been in litigation since that time and MSHA has no authority to act under section 105c." *Id.* I conclude that the Secretary of Labor determined that the provisions of section 105(c) were not violated and, as a consequence, Lowe and Varady had the right to file a complaint with the Commission under section 105(c)(3) of the Mine Act.

[4] These additional entities included Whitebox Asset Management, Whitebox Advisors LLC, Eric Sprott, and Sprott Mining Inc. In this case and in the previous discrimination cases brought by Lowe and Varady, various business entities have been referred to as "Whitebox," "WBox," "WBox 2014-1" and "Whitebox Entities" (collectively "Whitebox" in this decision). According to the Bankruptcy Court, WBox 2014-1 Ltd., was the Debtor in Possession during Veris Gold's bankruptcy and registered the entity that ultimately became JCG.

On March 6, 2017, Lowe and Varady filed this interference complaint with the Commission. The complaint is in the form of a letter that names within the body of the letter the following entities that Complainants believe interfered with their Mine Act rights: JCG, Whitebox 2014-1 Ltd and any other associated entity or persons associated with Whitebox, attorneys Mark Kaster, Annette Jarvis, Cathy Reece,[5] Amy Tirre, and Brad Mantel. (Complaint at 2). JCG and WhiteBox filed answers to the complaint and this case was assigned to me by the Commission's chief judge on April 5, 2017.

The interference complaint states that Complainants "first experienced this conspiracy of interference on September 2, 2016 when Jerritt Canyon Gold USA, Whitebox 2014-1 Ltd., and Eric Sprott, dba Jerritt Canyon Gold USA . . . through its attorneys Mark Kaster, Annette Jarvis of the law firm Dorsey & Witney LLP, Cathy Reece of the law firm Fennemore Craig, PC and Amy N. Tirre of the law offices of Amy N. Tirre, participated in filing an action with the United States Bankruptcy Court whereupon they attempted to have monetary sanctions levied against Mr. Lowe and Mr. Varady for exercising their rights under the Mining Act of 1977." Complaint 1-2. Complainants maintain that their discrimination claims fall under the jurisdiction of the Commission and that the Bankruptcy Court has no jurisdiction over them as it pertains to their actions before the Commission.

Their second allegation is that on February 27, 2017, "the conspiracy continued when attorneys Kaster and Jarvis emailed a letter to Mr. Lowe and Mr. Varady, a letter we recognize as an act of interference," that was intimidating and threatening to them. *Id.* at 2. "The letter threatens Jerritt Canyon Gold USA LLC's intent to seek monetary sanctions through the Bankruptcy Court against Mr. Lowe and Mr. Varady for exercising their rights under the Mining Act." *Id.* The letters state that Complainants should take "immediate steps to dismiss our FMSHRC cases[.]" *Id.*

These letters attached to the interference complaint, written on the stationary of the law firm of Dorsey & Whitney, LLP, state that they serve as notice that JCG "preserves and intends to take actions under the rights allowed by the United States Bankruptcy Court of the District of Nevada[.]" The letters reference the Bankruptcy Court's order of September 2, 2016 and state that the order enjoins Lowe and Varady from pursuing claims against JCG and Whitebox. The letters further note that Lowe and Varady "willfully violated the Bankruptcy Court's explicit orders" when they filed a petition for discretionary review of Judge Moran's dismissal of their discrimination cases. The letters conclude by stating that "JCG provides this notice and requests that you take immediate steps to dismiss your FMSHRC case against JCG or any other persons or entities related or associated with JCG."

Complainants state they are seeking a "Cease and Desist Order" so that they may "continue to exercise [their] rights under the Act" and ask that a severe penalty be assessed against "Jerritt Canyon Gold LLC, Whitebox 2014-1 LTD and any other associated entity or person associated with 'Whitebox' as well as against attorneys Kaster, Jarvis, Reece and Tirre as well as Solicitor of Labor Brad Mantel as we believe that his actions in these matters are

[5] Complainants misspelled Ms. Reece's name throughout the complaint. I have used the correct spelling in this decision.

complicit and that he too has taken and/or supported the actions of Kaster, Jarvis, Reece and Tirre and in doing so has interfered with Mr. Lowe's and Mr. Varady's rights under the Act." *Id.*

Summary of the Parties' Arguments.

JCG argues that the interference complaint should be dismissed because it "fails to state a claim upon which relief can be granted." JCG Mot. 10. Specifically, JCG asserts that Complainants have never been employed by JCG and, while the Mine Act protects against interference affecting statutory rights of miners, representatives of miners, or applicants for employment at a mine, Complainants failed to plead facts to demonstrate that they are part of one of those protected classes. *Id*. at 13. Accordingly, Complainants do not qualify for relief under section 105(c) of the Act. *Id*. at 12.

JCG further argues that the underlying discrimination claims were against Veris Gold, not JCG, and the actions taken by JCG to defend itself and assert rights afforded under the Bankruptcy Court's orders cannot form the basis of Complainants' interference claims. *Id*. at 11. The Bankruptcy Court's final order enforcing JCG's right to be "free and clear" of claims of successor liability with respect to its purchase of certain Veris Gold assets establishes that JCG had a legitimate and substantial reason to defend itself against Complainants' successor liability claims. *Id*. at 15.

Finally, JCG argues that the complaint is procedurally defective because it was not filed within 60 days of the alleged interference and it undermines the "valid and binding final orders of the FMSHRC and the Bankruptcy Court" which were not appealed. *Id*. at 11 n. 7, 16.

Whitebox[6] raises essentially the same arguments made by JCG and also asserts that it was not a party to the discrimination proceeding and should not be a party to this proceeding since it "did not purchase and does not own the assets of Veris Gold USA, Inc. or . . . Jerritt Canyon Gold, does not operate the Jerritt Canyon mill or mine, is not an employer of miners and is not a successor to Veris Gold USA, Inc." Whitebox Mot. 1-2. Moreover, it avers that the underlying discrimination complaints which form the basis of the interference claim were dismissed by Judge Simonton against any alleged successor and the motion to include Whitebox as a party to those proceedings was denied by Judge Simonton. Because the Commission denied the petition for review in those matters, "there is nothing to be interfered with and this interference case is moot and should be dismissed." *Id*. at 2. Finally, Whitebox argues that, with respect to the alleged interference via letters sent to Complainants, neither Whitebox nor its counsel sent those letters and, instead, were only copied on the correspondence. *Id.* at 3.

Complainants argue that the letters they received dated February 27, 2017 "represented a threat to the Complainants in an attempt to stop the Complainants from exercising their rights under the Act." Response to Motions to Dismiss at 2. The attorneys listed in their interference complaint all acted in concert to prevent them from exercising these rights and "they should be held accountable for their actions as well as the actions of their respective clients. *Id.* Complainants believe that the "the law is very plain and clear on this matter and [they] request

[6] I have not joined Whitebox as a party to this case. It entered a special, limited appearance for the sole purpose of responding to the interference complaint.

that this Court find all [entities listed in the complaint] guilty of interfering with the statutory rights of the miners and assess a heavy penalty against them[.]" *Id.* at 3. Finally, Complainants maintain that WBox 2014-1 Ltd. has a controlling interest in JCG as evidenced by information at Mine Data Retrieval System at MSHA's website. Information shown for the Jerritt Canyon Mill indicates that JCG is the operator and "WBox 2014-1; Eric Sprott" is the "Current Controller." As a consequence "Whitebox does in fact have an active interest and role in operating" the mine.

III. ANALYSIS

A. Summary of Commission Case law Concerning Interference Complaints.

Section 105(c) of the Act states, in pertinent part, that "[n]o person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against *or otherwise interfere with* the exercise of the statutory rights of any miner . . . because of the exercise by such miner … on behalf of himself or others of any statutory right afforded by this [Act]."30 U.S.C. § 815(c)(1) (emphasis added). The language of the Mine Act and its legislative history make clear that section 105(c) protects miners against "not only the common forms of discrimination, such as discharge, suspension, demotion…, but also against the more subtle forms of interference, such as promises of benefits or threats of reprisals." S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)

The test for what constitutes interference under the Act is "not well-settled." *Michael Wilson et al. v. Armstrong Coal Co., Inc*., 39 FMSHRC __, (May 9, 2017) (ALJ). In *UMWA obo Franks and Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088 (Aug. 2014), the Commission found that a violation of section 105(c) had occurred, with two Commissioners holding that the mine operator had interfered with miner's rights under the Act. There, the minority adopted a two prong test advocated by the Secretary that interference would occur if:

(1). a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and

(2). the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Id. at 2108. Several other Commission judges have applied this test. *See Scott D. McGlothlin v. Dominion Coal Corp*., 37 FMSHRC 1256 (June 2015) (ALJ); *Sec'y of Labor obo Eric Greathouse et al. v. Ohio County Coal*, 37 FMSHRC 2892 (Dec. 2015) (ALJ). Although a majority of the Commission has not formally adopted the *Franks* test as the single test for interference, it has confirmed that it may be an appropriate test. *See Sec'y of Labor obo Thomas McGary et al. v. The Marshall County Coal Co., et al*., 38 FMSHRC 2006 (Aug. 26, 2016). *See also Michael Wilson v FMSHRC et al.*, 2017 WL 3091569 (DC Cir. 2017).

B. Conclusions of Law

The issues to be resolved in this case are purely of a legal nature. There are no disputes of fact that would affect the disposition of the case. I recognize that dismissal of a case brought under section 105(c)(3) of the Mine Act for failure to a state claim is not favored. *Ribble v. T&M Development*, 22 FMSHRC 593 (May 2000); *Perry v. Phelps Dodge Morenci, Inc.,* 18 FMSHRC 1918, 1920 (Nov. 1996). I hold, however, that under the rather unusual circumstances presented in this case, dismissal is warranted. Holding a hearing on the issues raised by Complainants would not change the result and would potentially subject Complainants to sanctions by the Bankruptcy Court. It should be noted that after the Commission denied Complainants' petition for discretionary review of Judge Simonton's order of dismissal, I issued an order, dated May 15, 2017, urging the parties to settle the case and suggesting a framework for doing so. Mark Kaster, counsel for JCG, reported that he attempted to contact Lowe and Varady to discuss settlement but neither Complainant responded. Email dated 6/6/2017.

Based upon the record described above and established law, I find that this case should be dismissed for the following reasons.

(1). The listed attorneys must be dismissed from this case because an attorney cannot be held liable to third parties for acts committed within an attorney-client relationship absent a showing that the attorney exceeded his scope of representation. *See Hansaworld USA, Inc. v. Carpenter*, 662 Fed.Appx. 259 (5th Cir. 2016); *Brinkman v. Bank of America, N.A*., 914 F. Supp. 2d 984 (D. Minn. 2012); *Iqbal v. Bank of America, N.A*., 559 Fed. Appx. 363, 364 (5th Cir. 2014). There has been no showing that any of the named counsel exceeded the scope of his or her representation in this case. In addition, attorney Brad Mantel of the Office of the Solicitor cannot be held to have interfered with Complainant's Mine Act rights. The Secretary declined to prosecute the underlying discrimination cases that Complainants brought against Veris Gold and declined to bring the present case on Complainants' behalf.

(2). Lowe and Varady were not members of the protected class at the time of the alleged interference. Section 105(c) of Mine Act provides that no person shall discriminate against or interfere with the statutory rights of three specific groups of people. To be protected by this provision the individual must be: (1) a miner, (2) a representative of miners, or (3) an applicant for employment at a mine. The complaint alleges that the Respondents interfered with Complainants' statutory rights in various ways during the period between September 2, 2016 and

February 27, 2017.[7] Complainants were not miners, representatives of miners or applicants for employment at the time that the alleged interference occurred. Indeed they never worked as miners for JCG and had not worked as miners for Veris Gold since November 2013. Although Judge Moran determined that Veris Gold discriminated against Varady and Lowe, as discussed above, Veris Gold is not a party to this proceeding and no longer existed at the time of the alleged interference. I find that neither Lowe nor Varady were members of the protected class at the time of the alleged interference.

(3). Assuming that Lowe and Varady are part of the protected class, I find that they failed to establish a case of interference. The first part of the interference test requires Complainants to show that respondents' actions, when viewed from the prospective of Complainants, tended to "interfere with the exercise of protected rights." I will assume that the letters sent to Lowe and Varady in March 2017 tended to interfere with their protected rights, when viewed from their prospective. Nevertheless, the Respondents justified their actions with "a legitimate and substantial reason whose importance outweighs" the alleged harm caused by their actions. JCG and its attorneys had a legal duty to abide by the rulings of the Bankruptcy Court. That court authorized the sale of assets of Veris Gold unencumbered by any of its legal and financial obligations. Complainants had two opportunities to appeal the rulings of the Bankruptcy Court on this issue, once when Judge Zive denied their request to stay the sale of Veris Gold's assets in June 2015 and again after Judge Zive's order of September 2, 2016 reaffirming the nature of the sale order. They did not file any appeals. JCG agreed to purchase assets of Veris Gold with the understanding that it was taking the property free and clear of all encumbrances, which were substantial, pursuant to section 363 of the Bankruptcy Code. Respondents, including their counsel, had the right and a legal obligation to defend the terms of the asset sale against collateral attack. This free and clear sale was ordered by the Bankruptcy Court. Although the letters threatened to take action, the letters also reminded Lowe and Varady that the Bankruptcy Court specifically enjoined them from continuing to pursue Mine Act remedies against JCG and the other entities. Complainants are, in reality, arguing against the provisions of the Bankruptcy Code that provide for this type of "free and clear of any interest" sale upon approval of the Bankruptcy Judge. 11 U.S.C. 363(f).

(4). Complainants' attempt to relate this interference complaint back to the discrimination cases they brought against Veris Gold cannot stand. Neither JCG nor Whitebox can be held

[7] As stated above, Respondents maintain that the interference complaint was filed more than 60 days after Respondents filed motions in Bankruptcy Court on August 4, 2016 to reopen the case which cumulated in the August 11 hearing and September 2, 2016 order. They assert that, because section 105(c)(2) of the Mine Act requires complaints to be filed within 60 days after the alleged violation occurs, these events cannot form the basis of the interference complaint. Commission case law is clear, however, that the filing period is not jurisdictional. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381 (Dec. 1999). Whether a complaint is untimely requires an evaluation of the particular facts involved. In this instance, I find that the two letters of February 27, 2017 relate back to the Bankruptcy Court's hearing and order in August-September 2016. The delay was not serious and it did not prevent Respondents from defending their actions. I conclude that I have jurisdiction over all the events raised in the complaint of interference.

liable for the previous discriminatory acts of Veris Gold because they are not successors to Veris Gold. The Bankruptcy Court authorized the asset sale free and clear of all liens, claims, and other interests. As stated above, Complainants did not seek to appeal the court's authorization of the "free and clear" sale. Judge Simonton correctly determined that the "interpretation and efficacy of the [Bankruptcy Court's] Sale Order is governed by the Bankruptcy Code and not the Mine Act." 39 FMSHRC at 787. In addition, Complainants' contention that Veris Gold filed for bankruptcy to avoid its obligations under the Mine Act is without merit. The record before the Bankruptcy Court shows that Veris Gold was facing insurmountable financial difficulties.[8] As a consequence, it is simply inconceivable that Veris Gold's bankruptcy filing and JCG's purchase of the assets "free and clear of any interest" were motivated in any part to avoid responsibility for Lowe's, Varady's or any other miner's discrimination claims under the Mine Act.

IV. ORDER

The motions to dismiss filed by Jerritt Canyon Gold, LLC and WBox 2014-1-Ltd. are **GRANTED** and this case is **DISMISSED** against all entities listed by Daniel B, Lowe and Matthew A. Varady in their complaint of interference including but not limited to Jerritt Canyon Gold, LLC, WBox 2014-1-Ltd, and the attorneys listed therein.

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

[8] As the Bankruptcy Court noted, none of the secured or unsecured creditors were paid. For example, Deutsche Bank was not paid any of its $90 million dollar claim for loans it had made and mechanic's lien claims in the amount of $40 million dollars were unpaid. Bankruptcy Court Order dated September 2, 2016 at 7, 24.

Distribution:

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RWM

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 5, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2015-101-M A.C. No. 24-02070-361812
v.	
JOHN RICHARDS CONSTRUCTION Respondent	Mine: Richards Pit

ORDER OF DEFAULT

Before: Judge Bulluck

This proceeding is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration against John Richards Construction ("JRC"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On October 30, 2015, I issued a Summary Decision affirming Citation Nos. 8762878 and 8762879. On December 2, 2015, the Commission granted JRC's Petition for Discretionary Review as to Citation No. 8762878 only. On May 11, 2017, the Commission vacated the order granting summary decision as to Citation No. 8762878, and remanded the matter to me for discovery and a full evidentiary hearing on the merits.

Between Tuesday, May 16 and Tuesday, May 23, this office emailed JRC's representative John Richards at JRC's address of record five times, and placed nine calls to its phone numbers of record, i.e., the mine office phone and Mr. Richards' cell phone. This office was only able to reach JRC employee Cindy Llewellyn at the mine office, who agreed to convey to Mr. Richards that this office was seeking his availability for a conference call in order to discuss several preliminary issues: whether the parties are interested in settling; whether JRC wishes a hearing in the matter; whether the parties wish to conduct discovery; and any other housekeeping matters associated with moving this case forward.

On Monday, May 22, Ms. Llewellyn forwarded to this office by email a handwritten note from Mr. Richards stating "I'm working out of range of cell service from early morning till late at nite. I will call when job is finished and I can get some sleep." In response, this office called Ms. Llewellyn and emailed Mr. Richards, advising that failure to respond to the outstanding request for Mr. Richards' availability by close of business Tuesday, May 23 would result in issuance of an order to show cause why this case should not be dismissed. Having received no response, on Friday, May 26, this office issued an Order to Show Cause, directing JRC to justify its failure to provide the requested information, or otherwise contact this office directly through its representative. JRC was also put on notice that failure to comply with the Order in three weeks, by Friday, June 16, would result in a default judgment in favor of the Secretary, and an order to pay the civil penalty.

On Monday, June 5, JRC filed a motion construed as a renewal of its September 29, 2015 motion for recusal, which I denied by Order dated Tuesday, June 6. On Tuesday, June 13, JRC emailed this office requesting a two-week extension on the Order to Show Cause deadline; I extended the deadline to Friday, June 30, by Order dated Wednesday, June 14.

On Monday, July 3, by USPS regular mail, this office received a Response to Show Cause Order from JRC, signed by Mr. Richards on June 28, which stated that "[t]he Court is well aware of all of the issues and of the affidavit of Mark Smith regarding the annual inspection of the fire extinguishers that had been done timely as required by MSHA (see record). For these reasons, this citation should be dismissed." Not only is JRC's Response untimely, but it raises more questions than it answers. It is unclear whether JRC even wishes a hearing, or whether it is asking the judge to vacate the citation and dismiss this case summarily. Furthermore, the Response fails to justify JRC's failure to provide the requested information or, finally, provide Mr. Richards' availability.

JRC has been given ample time, over six weeks, to provide this office with dates and times that its representative is available for a prehearing conference with the opposing party and the judge, consistent with the Commission's instructions on remand. Mr. Richards' selective, indirect contact with this office to date demonstrates that compliance has been possible but, nevertheless, unintended by Mr. Richards — an insurmountable impediment to processing this case.

ORDER

This case cannot proceed where Respondent refuses to fulfill its baseline duties and, therefore, it is **ORDERED** that **JUDGMENT BY DEFAULT** is hereby entered for the Secretary of Labor, and John Richards Construction is **ORDERED TO PAY IMMEDIATELY** a civil penalty of $100.00.[1] **ACCORDINGLY**, this case is **DISMISSED**.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

[1] 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. Please include Docket number and A.C. number.

Distribution:

Timothy Turner, Office of the Solicitor, U.S. Department of Labor, 1244 Speer Boulevard, Suite 515, Denver, CO 80204

John Richards, John Richards Construction, 2824 Highway 83 North, P.O. Box 316, Seeley Lake, MT 59868

/tcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 18, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. ORIGINAL SIXTEEN TO ONE MINE, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2017-119 A.C. No. 04-01299-423919 Docket No. WEST 2017-173-M A.C. No. 04-01299-425970 Sixteen To One Mine

ORDER GRANTING THE SECRETARY OF LABOR'S MOTION TO DENY RESPONDENT'S REQUEST FOR ISSUANCE OF SUBPOENAS

Before the Court is the Secretary of Labor's Motion to deny the Respondent, Original Sixteen to One Mine's request for the issuance of subpoenas ("Motion"). The Respondent has requested subpoenas for the appearance of three MSHA employees at the upcoming hearing in Truckee, California, commencing on August 9, 2017.

The hearing, for the two dockets listed in the caption, involves 11 citations and 2 orders. Two MSHA-authorized inspectors issued the citations; in September 2016 Inspector Julie Hooker issued the two 104(a) citations involved in WEST 2017-0119 and, in November 2016, Inspector Bryan Chaix issued the nine 104(a) citations and two 104(b) orders involved in WEST 2017-173. The Motion identifies the three individuals for whom subpoenas are sought: Wyatt Andrews, who is the Mine Safety and Health Administration's ("MSHA's") Western District Manager, John Pereza, who is an Assistant District Manager in MSHA's Western District, and Steven Hagedorn, who is an inspector in MSHA's Vacaville, CA field office. For the reasons which follow, **the Secretary's Motion is GRANTED.**

Respondent's Request for Subpoenas

In its July 4, 2017 email, Respondent informed of the grounds in support of the subpoenas it seeks for the three above-named individuals. Respondent asserts that

> AR [Authorized Representative] Hooker and AR Chaix are required (must) demonstrate through their words and actions that they are knowledgeable and professional regarding the specific site they inspect. They must rely on their training and experience 'to reach fact-based, impartial decisions in safety and health matters involving miners.' (Chapter TWO A -Procedures Handbook) They

> are required to utilize their time efficiently and effectively. Neither AR Hooker nor AR Chaix carried out these activities.

Respondent's July 4, 2017 email to the Court and the Secretary of Labor's Counsel, Attorney Pearson.

In the same email, the Respondent elaborated on the reasons supporting the subpoenas as follows,

> Wyatt Andrews and John Perez are key witnesses in the defense of alleged violations of citations issued by AR Hooker and AR Chaix. Both have knowledge regarding the qualifications of AR Hooker and AR Chaix. Wyatt Andrews and John Perez have intimate background, training and experiences with MSHA and its operation in the Western District. No others are qualified to address the questions Respondents will raise in this administration hearing except the Administrator. [Respondent also notes that] [t]he district and assistant district managers share responsibility with the Administer for Metal and Nonmetal Mine Safety and Health (Administrator) 'for enforcing and implementing provisions of the Mine Act' (Chapter ONE D - Procedures Handbook) [and that] Wyatt Andrews and John Perez hold the two district responsibilities. [Respondent then adds that] [i]f the SOL objects to issue Subpoenas [*sic*] for these federal employees, Respondent requests a subpoena for the Administrator.

Id.

As for the third individual for which a subpoena is sought, AR Steve Hagedorn,[1] Respondent states that inspector Hagedorn

> was the designated inspector of then trainee, Right of Entry (ROE) Hooker on her first underground inspection, which was at Sixteen to One mine. This placed him directly responsible over ROE Hooker. MSHA has an 'Instruction Guide Series, instructor training Course. Its intent is to 'teach how to teach.' An instructor/teacher should be well versed in the subjects they intend to teach by past training and experiences. 'If not, further study and/or experience <u>will</u> be required.' Respondent will prove that Hooker did not receive required instructions during the mandatory training period. Respondent will also prove that AR Chaix failed to conduct his activities during the inspection, as required with another ROE federal

[1] Respondent identifies the inspector as "Steve Haggerdorn." However, it appears that the correct spelling of the inspector's name is "Steven Hagedorn."

employee during his training. This establishes a pattern of behavior that only Messrs. Andrews, Perez or the Administrator [ ]can address.[2]

Id. (emphasis in original)

The Secretary's Motion to deny the Respondent's request for issuance of the subpoenas.

The Secretary contends that neither Wyatt Andrews nor John Pereza possess relevant information as neither was "directly involved in the issuance of the citations at issue in this case." Motion at 3. The Secretary states that neither individual was "present at the Mine at the time of either inspection and have no personal knowledge of the conditions described in the citations and orders at issue." *Id.* The Court notes that the Respondent does not claim otherwise.

Given that, the Secretary argues that "their testimony would not assist the finder of fact in determining the truth and is not relevant." As neither can offer any "relevant evidence they should not be compelled to testify." *Id.*

The Secretary also notes, correctly, that Respondent's request for the subpoenas is to allow it *to question Andrews and Pereza* about the qualifications of inspectors Chaix and Hooker. However, the Secretary responds that, as he intends to call both inspectors as witnesses in the upcoming hearing, Mr. Miller will be able to question both Chaix and Hooker directly about their qualifications.[3]

With those principles in mind, the Secretary argues that "Mr. Chaix's character is not an essential element of whether Respondent violated the cited standards. Whether Mr. Chaix was

[2] It is noted that, on June 29, 2017, Respondent initially advised the Court via email that subpoenas for John Perez "and/or Wyatt Andrews testimony is critical for judging these citations issued by AR Brian Chaix. There is no acceptable reason for one or both not to appear in your courtroom." June 29, 2017 email from Michael Miller to the Court and the Secretary of Labor's Counsel, Attorney Pearson.

[3] A side issue has apparently arisen, as the Secretary also informs of Mr. Miller's expressed intention "to question Mr. Andrews and Mr. Pereza about internal personnel matters relating to Mr. Chaix, and about Mr. Chaix's demeanor and interactions . . . [and that Mr. Miller has] opined that Mr. Chaix has unstated 'mental issues' that he wishes to explore." *Id.* at 3. As the Secretary observes, delving into such issues are intended to attack the inspector's character. Challenging that purpose, the Secretary notes that "Federal Rule of Evidence 404 prohibits the introduction of evidence of a person's character or previous actions to prove that a person acted in accordance with that character trait on a particular occasion." *Id.* at 3-4. Further, the Secretary points out that "'[c]haracter evidence does not constitute an 'essential element of a claim or charge unless it alters the rights and liabilities of the parties under the substantive law.'" *Id.* at 4, citing *Gibson v. Mayor & Council of Wilmington*, 355 F.3d 215, 232 (3d Cir. 2004) (citing *Schafer v. Time, Inc*., 142 F.3d 1361, 1371 (11th Cir.1998). The Court agrees with the Secretary's observations. Particular questions which may be posed along these lines will be addressed as they arise during the course of the hearing.

unpleasant is completely irrelevant to that question. . . . such questioning would be irrelevant to assisting the trier of fact in determining whether the citations should be upheld." *Id.*

Turning to the requested subpoena for Inspector Steven Hagedorn, the Secretary argues that Hagedorn does not possess relevant information, noting Hagedorn "was not present for the September 2016 inspection of the Mine and has no personal knowledge of the citations issued by Ms. Hooker at that inspection. In fact, Mr. Miller admits as much and states that his intent in calling Mr. Hagedorn to testify is to question him on his training of Ms. Hooker." *Id*. at 5.

While the Secretary acknowledges that Ms. Hooker accompanied Mr. Hagedorn as a trainee on his inspection of the Mine in November, 2015, the matters in dispute in the present docket have nothing to do with that November 2015 inspection and therefore have no relevance to this matter.

The Secretary points out that "Mr. Miller may question Ms. Hooker about her background and training at the hearing on this matter. Any testimony by Mr. Hagedorn would be unduly repetitious, needlessly cumulative, and would serve to waste time during the upcoming hearing," and the Hagedorn subpoena should be denied. *Id.*

Last, the Secretary contends that the Administrator for metal/nonmetal should not be compelled to testify because he is a high ranking government official.[4] *Id.* A second, but important, reason to preclude the Administrator's testimony is that he is "without personal knowledge of the facts of this case and [therefore] should be protected from compulsory testimony." Motion at 5, citing *Pocahontas Coal Co*., 36 FMSHRC 2326, 2327 (ALJ Miller, August 7, 2014).

[4] As the Secretary correctly observes, "Courts have routinely held that 'top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.' *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (citing *United States v. Morgan*, 313 U.S. 409 (1941)). The rule disallowing compulsory testimony of government officials applies not only to cabinet members and heads of executive agencies; it applies as well to lower level but relatively important decision makers within an agency. *Simplex* 766 F.2d at 586-7 (barring depositions of the Solicitor of Labor, the Secretary of Labor's Chief of Staff, an OSHA Regional Administrator, and an OSHA Area Director). The reasons for this rule are particularly apparent in the instant case. 'Considering the volume of litigation to which the government is a party, a failure to place reasonable limits upon private litigants' access to responsible government officials as sources of routine pre-trial discovery would result in a severe disruption of the government's primary function.' *Cmy. Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd*., 96 F.R.D. 619, 621 (D.D.C. 1983), citing *Capitol Vending Co. v. Baker*, 36 F.R.D. 45 (D.D.C. 1964)." Motion at 4-5. The Court agrees with the Secretary's observations; the Respondent's alternative request to subpoena the Administrator is DENIED.

Discussion

This is not a hard, nor close, matter to resolve. While, as the Respondent states, MSHA inspectors must "demonstrate through their words and actions that they are knowledgeable and professional regarding the specific site they inspect [and that] [t]hey must rely on their training and experience 'to reach fact-based, impartial decisions in safety and health matters involving miners,'" the Respondent will have a full opportunity to challenge both the inspectors' knowledge about the alleged violations and the adequacy of their underlying training and experience. Respondent's July 4, 2017 email.

In this regard, in order to assist in cross-examining those inspectors, the Respondent may elect to bring individuals to the hearing who have specialized knowledge about the subjects addressed in the various safety standards cited by the inspectors, in order to attempt to show deficiencies in the inspectors' grasp of those standards and/or alleged educational shortcomings in their knowledge of the subjects upon which those standards are based.

As an illustrative example, in the instance where the Respondent was cited for an alleged violation of 30 C.F.R. § 57.18025, and that standard's requirement, in part, that one is not to work alone "in any area where hazardous conditions exist that would endanger his safety," the Respondent may delve into the basis for the inspector's conclusions that the standard was violated. 30 C.F.R. § 57.18025. This could include questioning about the inspector's underground hard rock mining experience. As a second illustration, the same approach could be used for the citation asserting that the mine's check-in and check-out system did not provide an accurate record of the persons in the mine, per 30 C.F.R. §57.11058.

These examples are only intended to show how, potentially, one could cross-examine an inspector and neither party should construe them as suggesting that the alleged violations are suspect, nor do they infer that the Secretary may not prevail in those or the other contested citations. The facts adduced at the hearing and the legal determinations about the standards involved will determine the outcomes of the challenged citations.

For now, the more important point is that there is neither a need nor a justification for Respondent's requested subpoenas of MSHA's Andrews or Perez, much less for the appearance of the Metal and Nonmetal Administrator at the upcoming hearing. Thus, the Court does not agree at all with the Respondent's claim that "[n]o others are qualified to address the questions Respondents will raise in this administration hearing . . ." Respondent's July 4, 2017 email. The same observation applies with equal force to the subpoena sought for MSHA's Hagedorn.

SO ORDERED.

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

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July 19, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. EMERALD COAL RESOURCES, LP, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2015-266 A.C. No. 36-05466-385249 Emerald Mine No. 1

ORDER

On August 15, 2014, Brandon Crutchman ("Crutchman"), an inspector from the Mine Safety and Health Administration ("MSHA") conducted an inspection at Emerald Mine No 1, a coal mine operated by Emerald Coal Resources LP ("Emerald"). After completing his inspection, Crutchman issued Order No. 7028490 for an alleged violation of 30 C.F.R. § 75.363(a) and Order No. 7028491 for an alleged violation of 30 C.F.R. § 75.400.

Procedural History

Approximately ten months after the Orders were issued, MSHA proposed assessment No. 000385249, which included Order No. 7028490 and Order No. 7028491. Both Orders were designated as flagrant. A total proposed penalty of $234,200.00 was assessed on Emerald.

Emerald received the proposed assessment on July 6, 2015. Later that week, Emerald contested the proposed assessment by a letter sent to the Mine Safety and Health Administration Civil Penalty Compliance Office. A date stamp indicates that the office of assessments received the contest on July 14, 2015.

Pursuant to Section 2700.28(a), "[w]ithin 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty." Thus, the Secretary was required to file with the Commission a petition for assessment of penalty on or before August 28, 2015.

On August 3, 2015, Alpha Natural Resources, Inc. ("Alpha"), filed for Chapter 11 Bankruptcy; this included affiliate Emerald. Thereafter, Emerald issued Worker Adjustment and Retraining Notification Act ("WARN"), notices to all of its 278 employees stating that it intended to permanently idle Emerald No.1 Mine and reduce its workforce by November 24, 2015. On October 28, 2015, Emerald submitted a plan to seal the mine. Throughout the months of November and December 2015, Emerald reduced its workforce to approximately 15 active

hourly and salaried employees between their underground and surface preparation plant operations. The final mine sealing plan was approved on December 22, 2015.

On January 15, 2016, the Secretary filed a Motion to Permit Late Filing, simultaneously with a Petition for Assessment of Civil Penalty in this matter. Four days later, on January 19 2016, Emerald received the Secretary's Motion to Permit Late Filing and Petition for Assessment of Civil Penalty. This occurred 17 months after the issuance of the Orders and 5 months after the deadline by which the Secretary was required to file the Petition for Assessment of Civil Penalty.[1] The Secretary claimed the filing was delayed because of a clerical error caused by a change in the District's administrative personnel.

Emerald then filed a Response to the Secretary's Petition for Late Filing on January 28, 2016, requesting that the Secretary's Petition for Assessment of Civil Penalty be dismissed due to the Secretary's untimely filing.

On May 26, 2017, this case was assigned to the Administrative Law Judge. On June 27, 2017, the undersigned sent the Respondent a request for additional information regarding the Bankruptcy proceedings of Alpha, as well as the nature of the asset sale. On July 5, 2017, Respondent provided this additional information, as well as sections of the Bankruptcy Court order.

Contentions of the Parties

The Respondent argues that the Secretary failed to show adequate cause for her delay in filing a Petition for Assessment of Civil Penalty. The Respondent further argues that because the Secretary has provided no adequate cause, Respondent is not required to show prejudice to the presentation of its defenses. Therefore, the Respondent requests that the Secretary's Motion to Permit Late Filing be rejected and the Petition dismissed.

In addition, the Respondent asserts that even if this Court determines adequate cause for the Secretary's delay exists, the Petition should still be dismissed because the Respondent suffered "real" and "substantial" prejudice. The Respondent alleges that as a result of filing for Chapter 11 Bankruptcy in 2015, the company has significantly reduced its workforce. Additionally, Respondent claims that several of the witnesses that were involved in the inspection on August 15, 2014 are no longer employed by the Respondent. Notably, Respondent alleges that the mine manager, manager of operations, the belt maintenance supervisor, several of the hourly belt personnel responsible for maintaining the belts, and its union escort are no longer employed by Respondent or any of its affiliates. Therefore, Respondent alleges, in effect, an inability to gather the information necessary to present its best defense against the Orders issued by MSHA.

[1] Due to an error, the Secretary mistakenly filed his Initial Motion to Permit Late Filing as Unopposed. To fix this error the Secretary filed an Amended Motion correctly identifying the motion as opposed on January 20, 2016.

The Respondent further states that equipment has been altered since the inspection occurred. Additionally, Respondent believes that documents related to the subject condition may now be missing. Thus, the Respondent argues they have been significantly prejudiced by the Secretary's untimely delay.

The Secretary argues he has shown adequate cause to support the admission of an untimely petition because the delayed filing in this matter was the result of an innocent and rare inadvertent error by an inexperienced employee who is no longer employed by MSHA. Moreover, the Secretary claims there is no evidence to suggest that the Secretary acted with caprice, willful delay, intentional misconduct, or bad faith. In fact, the Secretary states as soon as the error was discovered it filed the Motion and Petition. Therefore, the Secretary believes adequate cause explains the delay in this case.

In addition, the Secretary argues that the Respondent has failed to show prejudice arising from the Secretary's delay because the Respondent has made no showing that it will suffer immediate prejudice in filing its Answer to the Petition. The Secretary further argues that the Respondent has presented no evidence as to how it has specifically been prejudiced by the Secretary's delay.

Lastly, the Secretary argues even if this Court credits the Respondent's claim of prejudice, dismissal of the Petition is not automatic because the public interest in enforcing the Mine Act is paramount to strict procedural regularity. Therefore, the Secretary requests her petition be accepted out-of-time.

Legal Principles

Section 105(a) of the Mine Act provides: "If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator…of the civil penalty proposed to be assessed…" 30 U.S.C. § 815(a).

If a timely notice of contest is filed, section 105(d) provides: "The Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing…." 30 U.S.C. § 815(d).

Commission Procedural Rule 28 provides: "Within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty." 29 C.F.R. § 2700.28(a).

The legislative history of the Mine Act reveals the express intent of Congress that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 95-181, 95th Cong., 1st Sess. at 34 (1977), *reprinted in* Senate Subcommittee on Labor, Comm. on Human Resources., 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 622 (1978).

In *Twentymile Coal Company*, 411 F. 3d 256 (2005), the D.C. Circuit Court held that an 11-month delay between an investigation report and the issuance of a proposed penalty assessment was not unreasonable. Two Supreme Court cases were cited, *Brock v. Pierce County,* 476 U.S. 253 (1986) and *Barnhart v. Peabody Coal Co.,* 537 U.S. 149 (2003). In *Brock*, the Supreme Court warned that it "would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." *Id.* at 260, and concluded that the statutory time provision in that case "was clearly intended to spur the Secretary to action, not to limit the scope of his authority. Congress intended that the Secretary should have maximum authority to protect the integrity of the program." *Id*. at 265. In *Barnhart,* the Supreme Court noted that not "since *Brock* have we ever construed a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later." *Id*. at 158.

In 1981 the Commission considered a proposed penalty filed approximately 2 months after the date it was due. *Salt Lake County Road Department*, 3 FMSHRC 1714 (July 1981). Referring to the legislative history, it was determined that the overriding concern was with enforcement, and the Commission's Rule did not create a "statute" of limitations or procedural "strait jackets." *Id.* at 1715, 1716. The Commission held that upon seeking permission to file late, the request must be predicated upon adequate cause. However, the Commission also held that an operator may object to a late penalty proposal on the grounds of prejudice. *Id.* at 1716.

The Commission has clarified that "adequate cause" will not be found to exist unless a non-frivolous explanation for the delay is provided. The Secretary's excuse may not be facially implausible, and the delay must not result from "mere caprice" or through willful delay, intentional misconduct, or bad faith. Should the Secretary meet the burden of showing adequate cause, the Commission further explained:

> [A]n operator must show at least some actual prejudice arising from the delay in order to secure a dismissal of a penalty proceeding due to a late-filed petition. Mere allegations of potential prejudice or inherent prejudice should be rejected. Of course, occasions may arise where a judge will find that the Secretary has demonstrated adequate cause and that the operator has brought forth evidence of actual prejudice. The judge in such instances must weigh the interest of fairness to the operator against the public interest in upholding the enforcement purpose inherent in section 105(d).

Long Branch Energy, 34 FMSHRC 1984, 1991 (Aug. 2012).

Therefore, the burden shifts to the operator to establish actual prejudice. The prejudice must be "real" or "substantial", and demonstrated by a specific showing by the operator. *Id.,* at 1993. There must be more than "inherent prejudice" or mere "danger of prejudice". *Webster County Coal, LLC,* 34 FMSHRC 1946, 1951 (Aug. 2012), citing *Long Branch*.

The Commission has held that where the Secretary and operator have both satisfied their burdens, a judge "must weigh the interests of fairness to the operator against the public interest

in upholding the enforcement purpose inherent in Section 105(d). *Long Branch*, 34 FMSHRC at 1991.

The Secretary's Declaration

In pertinent part, the Declaration of Rebecca L. Kollar ("Kollar") on February 3, 2016 is as follows:

1. I am currently employed by the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA"), as Secretary to the Assistant District Manager at the MSHA Coal District 2 ("Coal District 2"). I joined MSHA on October 15, 2006, when I was hired as a Coal Mine Safety and Health Assistant ("CMS&H Assistant").
2. On December 14, 2014, I was promoted to my current position. On or about March 23, 2015, April Neiderhiser was hired to replace me as a CMS&H Assistant. Ms. Neiderhiser as a CMS&H Assistant.
3. The Coal District 2 CMS&H Assistant, is responsible for keeping track of and carrying out all of the administrative tasks executed by the Conference & Litigation Representatives ("CLR's") of Coal District 2. These tasks include processing new civil penalty petitions and mailing cases to the Philadelphia Office of the Regional Solicitor ("Solicitor's Office").
4. I am familiar with MSHA's civil penalty assessment process and the procedures of civil penalty proceedings before the Commission.
5. Coal District 2 typically receives an automated e-mail from MSHA's internal citation and case tracking software that a matter has been docketed at the Federal Mine Safety and Health Review Commission ("FMSHRC"). This e-mail alerts the CMS&H Assistant that a contest has been filed and whether a CLR or the Solicitor's Office will handle the matter. In either case, the CMS&H Assistant enters the docket number on an Excel spreadsheet.
6. As a CMS& H Assistant I was responsible for creating a system to manage and track various cases that came into the office. I developed an Excel Spreadsheet to organize and maintain information about cases including petition deadlines. This spreadsheet automatically calculates the petition's due date. If as case is to be transferred to the Solicitor's Office, then the matter is entered in the spreadsheet. The procedure is for the case to be removed from the spreadsheet once a return receipt is e-mailed from United Parcel Services ("UPS") indicating that the package transmitting the case has been delivered.
7. I trained Ms. Neiderheiser how to populate the Excel spreadsheet, keep track of cases, file petitions, and mail cases to the Solicitor's Office.
8. On or about January 13, 2016, our office was contacted by the Solicitor's Office inquiring about the status of Docket PENN 2015-266. The Solicitor's Office stated it never received the case. As a result I reviewed our records in an effort to locate the case and found that we received an automated e-mail on July 20, 2015

regarding Docket No. PENN 2015-266. From this e-mail I learned that the Docket was designated to the Solicitor's Office.

9. I also reviewed the Excel spreadsheet and determined that Docket No. PENN 2015-266 was not included on this list. I searched through our e-mailed receipts and could not find an e-mail receipt from UPS showing that the case had been mailed to the Solicitor's Office. As a result of my review, I found no evidence that the case was even sent to the Solicitor's Office or that a civil penalty petition was filed by Coal District 2.
10. Ms. Neiderheiser was the CMS&H Assistant at the time Coal District 2 received the notice of docketing for PENN 2015-266 and therefore responsible for ensuring that the case was mailed to the Solicitor's Office. Since Ms. Neiderheiser's last date of employment with MSHA was July 23, 2015, I could not get her input as to what may have happened with Docket No. PENN 2015-266.
11. Because the file for PENN 2015-266 could not be located, our office created a new case file for the docket. The new case file was mailed to the Philadelphia Solicitor's Office for litigation.

GX-1 (Secretary's Reply to Respondent's Response In Opposition).

The Respondent's Declarations

In pertinent part, the Declaration of Dan Lhota on January 28, 2016 is as follows:

1. I am employed in the human resources department of Maxxim Shared Services, LLC, which is affiliated with Emerald Coal Resources, LP and Alpha Natural Resources, Inc.
2. On September 25, 2015, Emerald issued Worker Adjustment and Retraining Notification Act ("WARN"), notices to its 278 employees stating that it intended to permanently idle Emerald No. 1 Mine and reduce the workforce at the mine by approximately November 24, 2015.
3. On November 25, 2015, Emerald reduced its workforce to approximately seventeen active hourly and thirteen salaried employees between the underground and surface preparation plant operations.
4. On December 8, 2015, Emerald further reduced its workforce to six active hourly employees and nine salaried employees.
5. Currently, there are eight salaried and six hourly employees assigned to work at Emerald Mine No. 1 and the Emerald Mine No. 1 preparation plant.
6. Emerald does not plan to increase its staff in the future.

RX-F.

In pertinent part, the Declaration of Ryan Kerr on January 28, 2016 is as follows:

1. I am employed by Maxxim Shared Services, LLC, which is affiliated with Emerald Coal Resources, LP and Alpha Natural Resources, Inc.
2. I am currently assigned to work at Emerald Mine No. 1 in the safety department.
3. I am one of fourteen persons currently assigned to work at Emerald Mine No. 1. Emerald does not place to increase its staff in the future.
4. I am responsible for dealing with compliance issues at Emerald Mine. I receive proposed assessments from MSHA and forward the completed contest forms to the corporate office of Alpha Natural Resources for processing. I also receive petitions for assessment, which I forward to the corporate office of Alpha Natural Resources for processing.
5. In July 2015, I completed the contest form associated with Assessment No. 000385249, which contained Order Nos. 7028490 and 7028491 that were assessed as flagrant. I forwarded the completed contest form to Alpha Natural Resources for processing.
6. In November and December 2015, Emerald reduced its workforce and no longer retains relations with several of the witnesses involved in the inspection on August 15, 2014.
7. Emerald or its affiliates no longer employ many of the persons employed by Emerald during the August 15, 2014 inspection.
8. The mine foreman and manager of operations are no longer employed by Emerald or its affiliates. The belt maintenance supervisor along with several hourly belt personnel responsible for maintaining the belts at Emerald in August 2014 are no longer employed by Emerald or its affiliates. Additionally, the UMWA escort who accompanied Inspector Crutchman is no longer employed by Emerald or its affiliates.
9. Currently, Emerald is working toward sealing the mine and plans to seal the mine in the near future.
10. The belt that was cited in Order No. 7028491 has been altered since August 2014.
11. I believe it will be difficult to locate documents relevant to the issuance of Order Nos. 7028490 and 7028491, particularly given the passage of time since the Orders were issued and the limited staff currently at Emerald.

RX-H (Respondent's Response to Secretary's Motion to Permit Late Filing).

Other information

On June 6, 2017, Counsel for Respondent by email provided a copy of a letter dated March 4, 2016 showing that the Emerald Mine was sealed on February 29, 2016. Also received

was information from MSHA's Mine Data Retrieval System showing that the mine was in "nonproducing" status since October 6, 2015 and that effective July 29, 2016 the controller was Contura Energy, Inc ("Contura"). In addition, the Emerald Mine No. 1 was considered a "facility" and in the last 12 months had received no S&S citations or orders in 56.25 inspection hours.

Analysis

Adequate Cause

The Commission has held that in instances where the Secretary does not file a timely petition for assessment, it must predicate the request for late filing upon a showing of adequate cause. *Salt Lake County Road Dept*., 7 FMSHRC 1714, 1716 (July 1981). "Such a requirement will guard against cases of abuse and also comports with the analogous leeway extended to private litigants before the Commission." *Id.* In the instant case, the Secretary has presented evidence that its late filing was due to an unusual oversight related to a change in Coal District 2's administrative personnel. Kollar's Declaration describes how administrative and human error led to a situation where MSHA neglected to process the Contest properly and issue a citation in a timely manner. GX-1. The MSHA administrator who would have received the notice and been responsible for ensuring that the case was mailed to the Solicitor's office left MSHA's employ almost two years ago, and MSHA is unable to reach her for information. The error was only discovered in mid-January 2016 when the Solicitor's Office contacted the District inquiring about the status of Docket No. PENN 2015-0266. Following this discovered discrepancy, the Solicitor's Office filed the Motion to Permit Late Filing in the instant case.

Despite an agency's best efforts, there is bound to be some minimal amount of administrative, technological, or human error that leads to delay or loss of files. The Commission has found adequate cause based on clerical errors similar to the one detailed in the instant case. *Medicine Bow*, 4 FMSHRC 882 (May 1982) (finding adequate cause where inadequate staff led to delay); *Webster Cnty Coal*, 34 FMSHRC 1946 (Aug. 2012) (clerical error and computer issues led to delay). In the instant case, the Secretary has described a situation where such mistakes occur. The Secretary's delay was not due to any dilatory intent, bad faith, or "mere caprice" on the part of the agency, but rather clerical error at the District Office. *Long Branch Energy*, 34 FMSHRC 1984, 1991 (Aug. 30, 2012). Once the delay was discovered, MSHA acted with haste in filing the petition, and moving the Court to allow such late filing. I find that under the circumstances described by MSHA, the agency had adequate cause for the delay.

Actual Prejudice

Despite a finding that the Secretary had adequate cause for the delay, the Respondent may still object to the late filing of the petition based upon prejudice. *Salt Lake*, 3 FMSHRC at 1716; *See also Long Branch Energy*, 34 FMSHRC at 1992; *Rhone-Poulenc of Wyoming*, 15 FMSHRC 2089, 2093 (Oct. 1989), aff'd 57 F.3d 982 (10th Cir. 1993). However, mere "allegations of potential prejudice or inherent prejudice" are to be rejected. *Long Branch*, 34 FMSHRC at 1991. The prejudice borne by the operator must be "real" or "substantial." *Id.* In the

instant case, the Respondent has provided detailed information regarding events that have actually happened and has made a showing of such real and substantial prejudice.

During the Secretary's untimely five-month delay Emerald was part of a Chapter 11 bankruptcy and issued WARN notices to 278 employees indicating that it would permanently idle the mine. RX-F. In November and December 2015, Emerald reduced its workforce to approximately 15 employees. In January 2016, Emerald and its affiliates no longer employed and did not maintain relations with certain witnesses involved in the August 15, 2014 inspection. RX-F, RX-H. These witnesses included the mine foreman, the manager of operations, the belt maintenance supervisor, the UMWA escort who accompanied the MSHA Inspector, and several hourly belt maintenance personnel. Further, the belt relevant to the orders had been altered, and documents relevant to the orders would be difficult to locate. RX-H. In the same manner that this Court has accepted the Secretary's position that, due to Neiderheiser leaving MSHA's employ in July 2015, it has been unable to get her input into what occurred with the missing docket, this Court accepts the Respondent's argument that the necessary witnesses and documents will be difficult or impossible to find and have available for further proceedings in this matter.

The following month, on February 29, 2016, the Emerald No. 1 Mine was sealed, thereby preventing travel to the cited area.

On July 12, 2016, the sale of Emerald Coal Resources to the new entity, Contura, was approved by the Bankruptcy Court. Effective July 29, 2016, Contura was the controller listed on the MSHA website. Contura purchased the assets "free and clear of any and all mortgages, options, pledges, liens, charges, security interests, encumbrances, restrictions, leases, licenses, easements, liability or claims of any nature whatsoever, direct or indirect…" *In Re: Alpha Natural Resources, Inc., et al*., Case No. 15-33896 (KRH), Bankr. E.D. VA. (July 12, 2016) at (B)(5). Contura did not assume the liabilities of Emerald, and is not owned or in any way related to Alpha. See also, Respondent's Response to Request for Information, p. 2.

Considering the specific circumstances that transpired during the long delay in this case, the Respondent has shown more than a mere potential for or danger of prejudice. The burden that would be imposed on the Respondent in proceeding further with this action would be quite substantial because much of the evidence necessary for defense is either missing, unavailable or in a significantly altered condition. This would certainly have a significant effect on the presentation of the defense. By January 2016, very few employees remained, the belt in question had been altered, and the location of relevant documents was not known. Thereafter the mine was sealed and the company was sold. Thus, needed witnesses have long ago been laid off and their whereabouts would be unknown. Even if some could be found, they would suffer greatly from the passage of time and faded memories. Evidence has undoubtedly been lost; there is no indication that Emerald as a business entity still exists or that needed evidence could be found. Therefore, I find that Respondent has met its burden of showing real and substantial prejudice.

Balancing of Interests

Since the Secretary and the Respondent have both satisfied their burdens, the undersigned "must weigh the interests of fairness to the operator against the public interest in upholding the

enforcement purpose inherent in Section 105(d). *Long Branch*, 34 FMSHRC at 1991. In the instant case, there is minimal, if any, public interest in permitting the late filing.

One of the most common rationales for the imposition of civil penalties is the deterrent effect of the penalties. *See National Independent Coal Operators' Assn. v. Kleppe*, 423 US 388, 401 (1976). In the instant case, there would be absolutely no deterrent effect of permitting a late filing when the penalties were proposed 17 months after the inspection, after the company was part of a bankruptcy, after the vast majority if not all of the personnel have been laid off, after the mine has been sealed, and after the Emerald asset was sold to an entity that did not assume any of the former company's liabilities. Pursuant to the Order of the Bankruptcy Court the successor entity, Contura, cannot be charged with a monetary debt. The deterrent effect of any penalty that might be determined is lost.

The Secretary has not identified any entity following the bankruptcy and absent any potential monetary liability that could be subject to this enforcement action. It is not enough for the Secretary to assert only that the public interest in enforcing the Mine Act is paramount to strict procedural regularity. The question presented is just what specific purpose is served by the further expenditure of resources by all parties when the effect of an enforcement action, even if the Secretary were entirely successful, has not been explained. The bankruptcy action has removed any monetary liability, and there is no showing that Contura is a successor in interest and liable for its predecessor's violations of the Mine Act. The Commission's successorship test[2] would not appear to be able to be satisfied since the mine is sealed and not producing, there is no continuity of business operations established, the same jobs no longer exist, the workforce and supervisory personnel have been laid off and there is no indication that the successor had notice of this enforcement action.

[2] The nine-part test is 1) [W]hether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product. See, *Munsey v. Smitty Baker Coal Co*., 2 FMSHRC 3463, 3465-66 (Dec. 1980).

Due to the very substantial burden that would be imposed on Respondent by continuing this enforcement action, I find the interest of fairness to Respondent greatly outweighs any remaining potential public interest in permitting the late filing of the petition.

Accordingly, the Secretary's Motion to Permit Late Filing is **DENIED**, and the Petition for Assessment of Civil Penalty is **DISMISSED**.

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

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July 20, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. LARRY ANDERSON, formerly employed by AK COAL RESOUCES INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. PENN 2017-109 A.C. No. 36-10041-431766A Mine: North Fork Mine

ORDER GRANTING IN PART AND DENYING IN PART THE SECRETARY'S MOTION FOR PROTECTIVE ORDER
ORDER GRANTING IN PART AND DENYING IN PART THE SECRETARY'S MOTION FOR PROTECTIVE ORDER LIMITING DEPOSITION

Before: Judge Andrews

On June 5, 2014, citations were issued at AK Coal Resources. A 110(c) investigation into Respondent, Larry Anderson, began shortly after the citations were issued, and the investigation concluded on January 31, 2017. Respondent was notified of the civil penalties proposed against him on February 21, 2017. On April 12, 2017, Respondent filed his answer and served the Secretary with discovery requests. Interrogatory requests and documentation production occurred on May 8, 2017, and May 31, 2017. On June 7, 2017, Respondent served the Secretary with a Notice of Deposition, proposing a deposition date for an unnamed MSHA official on July 14, 2017. On June 12, 2017, Respondent served an Amended Notice of Deposition for Cajetan Stepanic proposing a deposition date on July 27, 2017.

On June 22, 2017, the Secretary filed a Motion for Protective Order requesting the undersigned preclude the respondent from taking the deposition of an unnamed MSHA official as described in Respondent's Notice of Deposition. The Secretary contends that the information sought by Respondent in the deposition is irrelevant and protected by the government officials privilege, deliberative process privilege, investigative process privilege, attorney-client privilege and attorney work product privilege. On June 30, 2017, Respondent filed a Response in Opposition to the Secretary's Motion for Protective Order & Motion to Compel Deposition. Respondent contends that the information sought in the deposition is relevant, is not protected by the privileges asserted, and is necessary for a fair determination in this case.

On July 11, 2017, the Secretary filed a Motion for Protective Order Limiting Deposition of Supervising Special Investigator J. Cajetan Stepanic by precluding the Respondent from asking questions regarding the special-investigation process and communications between Supervisor Stepanic and MSHA's Technical Compliance and Investigations Office ("TCIO"). The Secretary contends that some of the documents and information sought may be irrelevant and protected by the deliberative process privilege, the investigative process privilege, the attorney-client privilege, and the attorney work product privilege. Respondent filed a Response in Opposition to the Secretary's Motion for Protective Order Limiting Deposition & Motion to Compel Deposition on July 14, 2017. Respondent contends that the deposition is relevant, the documents requested are not privileged, and the information sought is necessary for a fair determination in this case.

The Respondent's request for a deposition with an MSHA official covered"(1) The review process with TCIO for Section 110(c) investigations; (2) The staffing and workload of TCIO in the period June 6, 2014-December 2016; and (3) The process of review of the investigation concerning the Respondent within TCIO during the period June 6, 2014 to December 11, 2016."

I. Discovery

Under Commission Rule 56, "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." 29 C.F.R. § 2700.56(b). The Commission and the Federal Courts have broadly construed the discovery rule to include relevant material, and have narrowly construed the claim of privilege. *Hickman v. Taylor*, 329 U.S. 495 (1947); *Secretary of Labor on behalf of Logan v. Bright Coal Co., Inc.,* 6 FMSHRC 2520 (1984). The party asserting a privilege has the burden to demonstrate that relevant material is not subject to discovery. *In re: Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982).

The Secretary contends that a deposition is not appropriate for the unnamed MSHA official because the information sought by Respondent is not relevant and is covered by several privileges: (1) the qualified immunity for government official's privilege, (2) the deliberative processes privilege, (3) the investigative process privilege, (4) the attorney-client privilege, and (5) the attorney work product privilege.

The Secretary also argues that limited deposition is appropriate for Supervisor Stepanic because at least some of the information sought is privileged and irrelevant. For Supervisor Stepanic's deposition, the Secretary argues all of the privileges above except the qualified immunity for government official's privilege.

II. Relevance

The Secretary argues that the information sought by Respondent in the depositions at issue is not relevant, and thus, Respondent should not be allowed to depose the MSHA official and should be limited in his deposition of Supervisor Stepanic. The Secretary cites the general 5 year statute of limitations for civil penalty proceedings, 28 U.S.C. § 2462, stating that the present 110(c) case falls within the statute of limitations and so any questions about the timeliness or

work load of MSHA and TCIO specifically is irrelevant to claims and defenses in this action. The Secretary further points to section 105(a) of the Mine Act, which provides that "[i]f, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a *reasonable time* after the termination of such inspection or investigation, notify the operator…of the civil penalty proposed…" 30 U.S.C. § 815(a). The Secretary argues that the investigation period by TCIO and the Office of Assessments was reasonable in this case, and so a deposition on these issues would be irrelevant.

Respondent is argues that the timeline for the investigative process was unreasonable under section 105(a) of the Act and could lead to dismissal. Respondent specifically cites to the MSHA Handbook's proposed timelines, to argue the unreasonableness of the investigative timeframe. This Court agrees with Respondent that a deposition concerning the issues of time and workload may be relevant, or may at least lead to relevant information for a defense. Thus, a deposition shall not be barred due to irrelevance for the unnamed MSHA official or Supervisor Stepanic.

III. Qualified Immunity for Government Officials Privilege

The Secretary asserted a Qualified Immunity for Government Officials Privilege in its first Motion for Protective Order barring a deposition of the MSHA official.

This privilege prevents parties from deposing high-ranking government officials, unless rare circumstances exist. *Community for Creative Non-Violence v. Lujan*, 908 F.2d 992, 998 (D.C. 1990). The Commission has upheld that high level officials are protected from compulsory testimony so that their jobs are not constantly interfered with by the discovery process. *Newmont Gold Company*, 18 FMSHRC 1304, 1307 (July 1996) *citing Church of Scientology of Boston v. I.R.S.*, 138 F.R.D. 9, 12 (D. Mass. 1990). I do not find that the unnamed MSHA official is the type of high level government official that requires this protection. The Secretary has not met its burden in demonstrating that a high-ranking government official would be required to be deposed by Respondent's Fed. R. Civ. P. 30(b)(6) Notice of Deposition. This Court does not have sufficient evidence that several individuals from MSHA, who do not maintain this qualified immunity could satisfactorily provide the necessary information allowed by this Court and requested by Respondent.

IV. Deliberative Process Privilege

The Commission has upheld a deliberative process privilege which "attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy." *In re: Contests of Respirable Dust Sample Alteration Citations*("*Dust Cases*"), 14 FMSHRC 987, 992 (June 1992) quoting *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 772 (D.C.Cir.1978). Pre-decisional communications that are deliberative, which means that they "must actually be related to the process by which policies are formulated" are protected. *Id.* (quoting 591 F.2d at 774).

"The privilege protects thoughts, ideas, reasoning, and analyses which lead to a decision of the agency." *Hidden Splendor Resources, Inc*., 33 FMSHRC 2345, 2347 (Sept. 2011) citing *Kan. State Network, Inc. v. F.C.C.*, 720 F.2d 185, 191 (D.C. Cir. 1983). The Supreme Court has

held the privilege protects "'the decision making process of government agencies,' and focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *N.L.R.B. v. Sears, Roebuck & Co*., 421 U.S. 132, 150 (1975) (internal citations omitted) citing *Stiftung v. V. E. B. Carl Zeiss*, 40 F.R.D. 318, 324 (May 1966).

The Commission held that "purely factual information that does not expose an agency's decision making process does not come within the ambit of the privilege." *Dust Cases*, 14 FMSHRC at 993. If factual information is combined with protected information, the party opposing disclosure must demonstrate, "that the material is so inextricably intertwined with the deliberative material that its disclosure would compromise the confidentiality of the deliberative information that is entitled to protection." *Consolidation Coal*, 19 FMSHRC 1239, 1246-47 (1997) citing *Providence Journal Co. v. United States Dep't of the Army*, 981 F.2d 552, 562 (1st Cir. 1992).

The Notice of Deposition for the unnamed individual states that the covered topics at deposition would be the review process with TCIO for Section 110(c) investigations, the staffing and workload of TCIO June 6, 2014-December, 2016, and the review process of the investigation concerning the named Respondent within TCIO June 6, 2014-December 11, 2016.

This Court agrees with the Secretary that any advisory opinions, recommendations by TCIO and MSHA fall under this privilege and the MSHA official cannot be deposed concerning this information. Thus, the requested information concerning TCIO's 110(c) review process and the review process for the named Respondent are part of the deliberative process, as they involved communications, analyses and recommendations concerning a 110(c) citation. However, Respondent may request information regarding any underlying facts, dates, and the staffing and workload of TCIO.

The Notice of Deposition for Supervisor Stepanic requests that he be "prepared to produce any notes or documents… related to the investigation conducted concerning…the process of investigation, and any communications between Mr. Stepanic and TCIO concerning the status and timing of review by TCIO."

This Court finds that any communications regarding the review process, recommendations and analyses are privileged, and Supervisor Stepanic is not required to answer questions or produce documents related to these requests. However, any information regarding underlying facts, as well as the status and timing of review by TCIO is not privileged.

Overcoming the Privilege

The deliberative process privilege is qualified and is subject to the balancing test set forth in *Bright Coal Company*, 6 FMSHRC 2520 (Nov. 1984), governing the informant's privilege. *Dust Cases*, 14 FMSHRC at 994. This case states that when "disclosure is essential to the fair determination of a case, the privilege must yield." *Bright Coal Co.*, 6 FMSHRC at 2523 citing *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). This test analyzes if "if the Secretary is in sole control of the material sought, and whether the party seeking disclosure has other

avenues available to it to obtain the material." *Dust Cases*, 14 FMSHRC at 988. The party seeking disclosure has the burden of proving that the information requested is essential to a fair determination of the case. *Bright Coal Co.*, 6 FMSHRC at 2526.

This Court does not find that the Respondent has demonstrated an essential need for fair determination of this case that outweighs the privilege supporting MSHA's ability to analyze each case, make recommendations and communications concerning the case before a final decision is made. Additionally, Respondent has not shown that deliberations and recommendations made during the investigation are necessary to a fair determination in this case. Thus, the information and documents requested in both depositions, of the MSHA official and Supervisor Stepanic that fall under the deliberative process privilege has not been overcome by the needs of Respondent.

V. Investigative Process Privilege

The Commission has held that an "official information" privilege or investigative process privilege may be used to prevent the unwarranted disclosure of documents from law enforcement investigatory files, as well as testimony about that information. *Thunder Basin Coal Co*., 15 FMSHRC 2228, 2237-38 (Nov. 1993); *Dust Cases*, 14 FMSHRC at 1008-09. This privilege is qualified and is subject to a "balancing of the government's interest in non-disclosure and the operator's need for information prior to hearing." *Thunder Basin Coal Co*, 15 FMSHRC at 2238

Any testimony and documents requested regarding TCIO's investigative process is also protected by the Investigative Process Privilege. Hence, any questions or document requests of the MSHA official or Supervisor Stepanic regarding the investigatory process are protected and Respondent has not demonstrated that it has a need for this information in defending the 110(c) investigation or pursuing a defense of an unreasonable timeline for prosecution. Again, any information regarding underlying facts and investigation dates may be discoverable and are not covered by this privilege.

VI. Attorney-Client Privilege

The attorney-client privilege is a client's privilege meant to encourage communication between attorneys and clients. *BHP Copper Inc.*, 38 FMSHRC 1579, 1583 (June 2016)(ALJ). citing *Upjohn v. United States*, 449 U.S. 383, 389 (1981). The attorney-client privilege requires that the party claiming the privilege is:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a

crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

BHP Copper Inc., 38 FMSHRC at 1583 citing *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998).

The Supreme Court has also held that the attorney-client privilege protects communications made during an internal investigation made to ensure compliance with a law. *Upjohn v. United States*, 449 U.S. at 392.

The Secretary argues that the Office of the Solicitor is involved in advising MSHA and TCIO during the investigation review process. Further, the Secretary contends that the topics Respondent intends to cover in the depositions at issue necessarily include the Solicitor's involvement.

This Court finds that the investigations made by MSHA may be covered by the attorney-client privilege, as they involve an investigation by MSHA, the party, issuing a citation that is to be prosecuted by the Secretary of Labor. However, this Court disagrees that all facts and dates are part of the Attorney-Client Privilege and cannot be discoverable. The Commission has repeatedly held that any underlying facts concerning a case are discoverable; therefore, the MSHA official and Supervisor Stepanic may be deposed on facts and dates related to the 110(c) case at issue. Nevertheless, any confidential communications made in preparation for litigation are not discoverable, and the witness may not be deposed on any attorney-client communications.

VII. Work Product Privilege

The Commission has held that the attorney work product privilege is a qualified immunity against discovery. *Asarco, Inc.*, 12 FMSHRC 2548, 2557-2558 (Dec. 1990). A party may withhold discoverable materials if they are documents and tangible things that are prepared in anticipation of litigation or for hearing by or for another party or that party's representative. *Asarco, Inc.*, 12 FMSHRC at 2558 (Dec. 1990).

The Secretary argues that Respondent's request that the MSHA official or Supervisor Stepanic be prepared to produce any notes or documents she intends to rely on at the deposition is barred by the work product privilege. This Court agrees that many documents relied on by the deposed will involve documents prepared by the Secretary of Labor in preparation for hearing. Any documents prepared in anticipation of litigation are protected by this privilege and the witnesses may not be compelled to produce such documents.

Nonetheless, this Court disagrees that all documents relevant to questioning is privileged. Documents concerning underlying facts and the relevant timelines may be produced and are not privileged.

VIII. Conclusion

Thus, this court **GRANTS** in part and **DENIES** in part the Secretary's Motion for Protective Order for the unnamed MSHA Official, limiting the deposition to facts, dates, and times concerning the 110(c) citation.

This Court also **GRANTS** in part and **DENIES** in part the Secretary's Motion for Protective Order Limiting Deposition of Supervisor Stepanic. Respondent may depose the witness solely on facts, dates, and times relevant to the 110(c) citation.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 20, 2017

CROWN RESOURCES CORPORATION, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDINGS Docket No. WEST 2017-0202-RM Citation No. 8612335; 01/19/2017 Docket No. WEST 2017-0325-RM Citation No. 8882030; 03/23/2017 Mine: Buckhorn Mine Mine ID: 45-03615
ACI NORTHWEST, INC. Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	Docket No. WEST 2017-0211-RM Citation No. 8612334; 01/19/2017 Docket No. WEST 2017-0212-RM Citation No. 8612336; 01/19/2017 Mine: Buckhorn Mine Mine ID: 45-03615 W198

BEFORE: Judge Gill

ORDER DENYING MOTIONS FOR SUMMARY DECISION

These cases involve four Notices of Contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). An authorized representative of the Secretary, on behalf of the Mine Safety and Health Administration ("MSHA"), issued Citation Nos. 8612334 and 8612336 to ACI Northwest, Inc. ("ACI Northwest") and Citation No. 8612335 to Crown Resources Corporation ("Crown Resources") following a December 21, 2016, accident resulting in the death of a miner on a mine haul road. MSHA subsequently issued Citation No. 8882030 to Crown Resources after inspecting the road on which the accident occurred. On April 7, 2017, Crown Resources and ACI Northwest (collectively referred to as "Contestants") filed a motion to consolidate, which was granted.[1]

[1] Crown Resources contracts with ACI Northwest to haul gold ore extracted from the mine.

The Contestants have filed a joint motion for summary decision, while the Secretary has filed a motion for partial summary decision. The issue before me, as framed by these motions, is whether MSHA has jurisdiction over Forest Service Road 3550-125 (the "Road at Issue").[2] The answer depends on whether this road is within the definition of "mine" under the Federal Mine Safety and Health Act of 1977 (Mine Act), Pub. L. No. 95–164, § 102(b)(3), 91 Stat. 1290 (codified at 30 U.S.C. § 802(h)(1)).

The Commission has long analogized summary decision to summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 56. *See, e.g., Kenamerican Res., Inc.*, 38 FMSHRC 1943, 1946 (Aug. 2016); *Energy W. Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). Summary judgment should not be granted "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994) (quotation omitted). For summary judgment to be appropriate, the evidence must do more than *allow* the court to find in the movant's favor, it must "*require* that the court do so." *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (emphasis in original). If, when viewing the evidence and drawing all permissible inferences in favor of the non-movant, the record could support either party, then resolution at the summary judgment stage is inappropriate. *Id.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-55 (1986).

Disposition by summary decision is appropriate provided: (1) the entire record establishes that there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law. 29 C.F.R. §2700.67(b). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). If the moving party fails to meet its burden, then summary decision must be denied, regardless of the sufficiency of the opposition. Even the absence of an opposition does not entitle the movant to summary decision when the motion is inadequately supported. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-61 (1970) (summary judgment must be denied where the evidence in support of the motion does not establish the absence of any genuine issue, even if no opposing evidence is presented). *See also In re Rogstad*, 126 F.3d 1224, 1227-28 (9th Cir. 1997); *Campbell*, 21 F.3d at 55-56.

Statement of the Case

"Coal or other mine" is defined in Section 3(h)(1) of the Act as:

> (A) *an area of land from which minerals are extracted*… (B) ***private*** ways and roads ***appurtenant to*** such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, *facilities*, equipment, machines, tools, or other property… used in, or to be used in, *or resulting from, the work of extracting such minerals*… or used in, or to be used in, the

[2] Lack of MSHA jurisdiction over the road would moot the above Citations.

> milling of such minerals, or *the work of preparing coal or other minerals*, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1) (emphasis added).

The United States Court of Appeals for the District of Columbia affirmed the Secretary's interpretation of the ambiguous statutory terms "*private roads*," —which the Secretary interpreted to mean "those restricted to a particular group or class of persons (not to a particular person)"— and "*appurtenant to*," which the Secretary interpreted to mean that "the road belong and provide a right of way to some more important thing (not dedicated exclusively to use by some more important thing)." *Sec'y of Labor v. Nat'l Cement Co., Inc.*, 573 F.3d 788, 791 (D.C. Cir. 2009). The parties both agree that these definitions have established precedent. (Contestants Br. 22; Sec'y Br. 25)

Motion for Summary Decision Submitted by Crown Resources/ACI Northwest

The Contestants assert that Forest Service Road 3550-125 (the "Road at Issue") is not private because of its ongoing and frequent use by the public. Contestants also argue that the Road at Issue is not appurtenant to the Buckhorn Mine because sections of the road that fall on private and federal lands did not have a transferable easement. Finally, even if the Road at Issue was under MSHA jurisdiction, Contestants claim they did not receive fair notice because MSHA had not previously inspected the road.

"Private"

Contestants argue that the Road at Issue is not private because several of their employees declared under oath that they believed this was the case, and that they had seen members of the public using the road. (Contestants Br. 28-31) Contestants also claim that the lessors of their easement —the Washington State Department of Natural Resources ("Washington DNR" or "DNR") and the United States Forest Service ("USFS" or "Forest Service")— did not attempt to enforce agreed-upon restrictions on public access. *Id.* These opinions do not meet the evidentiary burden that would compel me to conclude as a matter of law that the Road at Issue is not private. Instead, the Contestants' underlying claim that there are no genuine issues of material fact is overtly contradicted by their own exhibits. The most salient example of this is the Contestants' internal training documents at the time of the accident, in which management not only informed employees that the Road at Issue was closed to the public, but also explicitly instructed workers to report trespassers to their supervisors. (Ex. C–21 (for the 2008 version, see Ex. S–I.)) It is incongruous for Contestants to now argue, after years of training their own employees to monitor and police the Road at Issue for trespassers, that the road could not possibly be considered private under the Mine Act.

The testimonies by Crown Resources employees are contradicted by numerous other exhibits provided by the Contestants and Secretary, which solidly creates triable and material issues of fact. Crown Resources underwent lengthy negotiations with the USFS and Washington DNR before receiving approval for the Buckhorn Access Project, which authorized Crown to

construct an access road to the mine on government-owned land. At every step of the approval process, the USFS and DNR specified that the Road at Issue would be private:

> 1) The Buckhorn Access Project's Final Environmental Impact Statement ("FEIS") repeatedly declared that the Road at Issue would be "closed to public use for safety" during mining operations. (Ex. C–13, Bates Nos. CRC 176-181, CRC 192, CRC 399-405; *see also* Record of Decision, Ex. S–C, Bates Nos. CRC 818, CRC 853)
>
> 2) Public comments on the FEIS, and the Forest Service's responses to these comments, indicated a mutual understanding that the Road at Issue would be closed to public use. (Ex. C–13, Appendix F, Bates Nos. CRC 780, CRC 783, CRC 789)
>
> 3) Crown Resources likewise agreed in its Commercial Easement with the Washington DNR that the Road at Issue would be closed to public use on DNR land. (Ex. S–D, p. 2 "Other entities seeking to use the access roads . . . must obtain an easement from DNR.")
>
> 4) Crown Resources' Final Amended Plan of Operations ("FAPOO") stated that the Road at Issue "will be closed to public access during project operations." (Ex. S–E, Bates No. CRC 48)
>
> 5) Order 673 prohibited the public from using the Road at Issue without first obtaining express permission from the Forest Service. (Ex. S–E)
>
> 6) The Road Use Permit Crown obtained from the Forest Service likewise prohibited all motorized vehicles unaffiliated with the mine from using the Road at Issue. (Ex. S–G, Bates No. CRC 1180 "Forest Road 3550-125 . . . will be closed to all motorized vehicles not associated with the mine. . . .")
>
> 7) Finally, and most tellingly, when Crown Resources signed the Forest Service's Road Use Permit, it promised to furnish and install "FOR MINE USE ONLY" signs to alert the public at intersections connected to the Road at Issue. (Ex. S–G, Clause 4, Bates No. CRC 1189-90)

The Contestants assert that the lessors of their easement never acted to enforce these closure requirements, opining that if the Forest Service had truly cared about Crown's refusal to help restrict public access to the road as promised, they would have "insist[ed] on such closures." (Contestants Br. 28) No legal precedent is cited to support the Contestant's argument that Crown's alleged breach of its contracts with the USFS and DNR thwarts all MSHA jurisdiction over the Road at Issue as a matter of law. Even if precedent supported the Contestants, they have

not provided indisputable factual evidence that Forest Service personnel "[were] aware of the public's unrestricted use of the Road at Issue," or were even aware that Crown had failed to follow the terms of their agreement. *Id.* The Road Use Permit instructed Crown that "[i]f problems occur requiring enforcement, the Forest Service shall be promptly notified," but the Contestants have furnished no evidence that they ever gave prompt notice to the Forest Service as promised when their employees observed members of the public on the Road at Issue. (Ex. S–G, Bates No. CRC 1189) Therefore, the Secretary's reasonable inference, countering the Contestants' own narrative of events, necessarily awaits rebuttal at a hearing: that when Crown promised to give the Forest Service prompt notice of trespassers, the Forest Service assumed Crown would follow this term of their agreement. I have no way to conclude as a matter of law that the Forest Service's purported indifference to trespassers was not instead the result of their expectation that good faith notice from Crown would trigger their intervention. It appears that every signed legal document between Crown and the Forest Service and Washington DNR considered the Road at Issue to be private, and Contestants have not provided sufficient factual or legal support for me to override this evidence.

"Appurtenant to"

The Contestants assert that *Secretary of Labor v. National Cement Company, Inc.*, 573 F.3d 788 ("*National Cement II*"),[3] held that a transferable easement is a necessary condition for a road to be deemed "appurtenant to" a mine under the Mine Act. (Contestants Br. 35-36) However, the Secretary correctly noted that this is an incorrect articulation of *National Cement II*. The D.C. Circuit never stated or implied that having a transferable easement was absolutely necessary for a road to be appurtenant. They instead endorsed the Secretary's broad interpretative authority over the Mine Act's jurisdictional scope.[4] As such, a more sensible reading and understanding of *National Cement II* is that the presence of a transferable easement was found to be a sufficient condition in that case, but is not dispositive in future cases. The Court instead focused attention on whether the Secretary's interpretation of "appurtenant to" was in reasonable alignment with "a key objective of the Mine Act." *Id.* at 796. Finding a reasonable alignment depended on the highly deferential standard of review promulgated in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *National Cement II*, 573 F.3d at 792-93.

Although the Road at Issue clearly "provides a right of way to some more important thing," whether it does not "belong" to the mine is an issue of material fact that Contestants must demonstrate at a hearing. *National Cement II*, 573 F.3d at 791. The Contestants acknowledge that MSHA is not asserting jurisdiction over the entire 48-mile haul route, or even the entire 8.7-mile length of FSR 3550, but only the 3.4 miles leading up to the mine. (Contestants Br. 24) To

[3] I refer to this case as "*National Cement II*" to distinguish it from *Secretary of Labor v. National Cement Company, Inc.*, 494 F.3d 1066 (D.C. Cir. 2007).

[4] "On remand the Secretary adopted the broad reading of this provision to bring the access road within MSHA's jurisdiction. We held before that such a reading was not inconsistent with the language of subsection (B) and we will not revisit that decision." *National Cement II*, 573 F.3d at 793.

repeat, the Contestants' own exhibits show that this section of FSR 3550 was constructed and reconstructed by Crown Resources for the purpose of transporting miners and mined ore to and from a mine, and had been repeatedly designated as closed to the public by the Forest Service, Washington DNR, and the Contestants themselves.

The Contestants note that the Buckhorn Mine has an irregular boundary that overlaps with, but does not perfectly match, the benefited parcel described in the DNR's Commercial Easement ("Exhibit B"). (Ex. C–28; Ex. C–29) The benefited parcel includes land overseen by the US Forest Service and US Bureau of Land Management. (Ex. C–15) The Contestants argue that this lack of exactitude between the benefited parcel and Buckhorn Mine meant that the Washington DNR intended their easement to "[encompass] an area greater than the Buckhorn Mine and land owned by Crown Resources." (Contestant Reply Br. 4-5) While this assertion about the DNR's motives necessarily requires actual factual support from the Contestants at a hearing, the controlling interpretation of Section 3(h)(1)(B) indicates that Exhibit B's lack of complete alignment with the Buckhorn Access Project is unlikely to matter. The Road at Issue can be "...(not dedicated exclusively to use by some more important thing)" and remain appurtenant to a mine. *National Cement II*, 573 F.3d at 791.

Fair Notice

The Contestants complain that they received insufficient notice of potential Mine Act liability because MSHA declined to assert jurisdiction over the Road at Issue during the numerous inspections that preceded this case. (Contestants Br. 23) However, this lack of notice is wholly irrelevant to the jurisdictional dispute before me, as MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator. *See Mainline Rock & Ballast, Inc. v. Sec'y of Labor*, 693 F.3d 1181, 1187 (10th Cir. 2012) (citing *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1416-17 (10th Cir. 1984)). The Mine Act is a strict liability statute. As long as a regulation is sufficiently specific that a reasonably prudent person, familiar with the conditions the regulation is meant to address and the objective the regulation is meant to achieve, would have fair warning of what the regulation requires, then the due process requirements for notice are satisfied. *Mainline Rock & Ballast, Inc.*, 693 F.3d at 1187 (citing *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1083-84 (10th Cir. 1998)). A mine operator that instructs its miners that the section of road connecting its mine to the outside world is closed to the public has reasonably fair warning that MSHA could one day assert jurisdiction over that road. (Ex. C–21)

I am also not persuaded by Contestants' argument that MSHA expressly waived jurisdiction during a June 2013 inspection when Inspector Urnovitz, an authorized Representative of the Secretary, chose not to assert jurisdiction over the Road at Issue after conversing with Crown Resources Superintendent John Gianukakis. (Contestants Br. 14) As plausibly noted by the Secretary, Inspector Urnovitz may have been misled by Superintendent Gianukakis's representations that the Road at Issue could not be subject to MSHA jurisdiction because it had been made available by the Forest Service for public use. (Ex. C–25, p. 2; Sec'y Reply Br. 4)

For the reasons discussed above, the Contestants' Joint Motion for Summary Decision is denied.

Motion for Partial Summary Decision Submitted by the Secretary

The Secretary's motion asserts the following: (1) the Road at Issue is private; (2) the Road at Issue is appurtenant to the Buckhorn Mine; and, therefore, (3) the Road at Issue falls under MSHA's jurisdiction. As stated previously, summary decision should not be granted "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *Campbell*, 21 F.3d at 55 (quotation omitted).

A hearing is needed to resolve conflicting evidence about whether restrictions on public use of the Road at Issue expired at the time of the citations. Forest Service Order 673 set September 30, 2016, as the expiration date of the Road at Issue's closure to the public. (Ex. C–16) If Crown's permit granting exclusive use of the contested road had expired on that date without an extension, the road may have become legally public at the time of the disputed citations. This material fact would bar MSHA jurisdiction under the Secretary's interpretation of Section 3(h)(1) of the Mine Act. *National Cement II*, 573 F.3d at 791. The Secretary provided testimony from District Ranger Matthew Reidy that the agency had initially set the expiration date *for one year later*, on September 30, 2017, and that the Order is still in effect "until the completion of the Buckhorn Access Project." (Ex. S–F, p. 2) Other Forest Service documents, from the FEIS onward, also indicate an intent to restrict public access to the Road at Issue beyond the date when the citations at issue occurred. (*See, e.g.*, Ex. S–C, Bates No. CRC 818, "Forest Road 3550-125 past the junction with Forest Road 3550-130 will be closed to public use *for the life of the project*." (emphasis added); Ex. S–G, Bates No. CRC 1183, "This permit shall terminate on December 31, 2017. . . .") A trial is necessary before I conclude that Order 673 accidentally contains (or does not contain) a significant typo (as opposed to Mr. Reidy accidentally misremembering the Order's expiration date) or is counteracted by the other legal agreements between the Contestants and USFS.

For the reasons discussed above, the Secretary's Motion for Partial Summary Decision is denied.

ORDER

For the reasons discussed above, the Contestants' joint motion for Summary Decision is **DENIED** and the Secretary's Motion for Partial Summary Decision is also **DENIED**.

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

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