July 2013

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ADMINISTRATIVE LAW JUDGE ORDERS

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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 3, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of DARRICK PIPER	: : : : :	
v.	:	Docket No. KENT 2013-751-D
KENAMERICAN RESOURCES, INC.	: :	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY: Young and Nakamura, Commissioners

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On June 6, 2013, Administrative Law Judge Kenneth R. Andrews issued an order temporarily reinstating Darrick Piper to employment with KenAmerican Resources, Inc., ("KenAmerican") pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). 35 FMSHRC __, slip op. at 15. The judge concluded that Piper's March 27, 2013 discrimination complaint, in which he alleged that KenAmerican refused to recall him from a layoff because he had previously filed a separate discrimination complaint, was not frivolously brought. KenAmerican has filed a petition for review of the judge's order with the Commission. For the reasons that follow, we grant review and affirm the judge's order requiring temporary reinstatement of Piper.

I.

Factual and Procedural Background

On December 31, 2012, ten miners at KenAmerican's Paradise Number 9 Mine were laid off due to deteriorating economic conditions. Slip op. at 6; Tr. 36, 52. The miners were all purportedly selected for layoff because of their excessive absenteeism. Slip op. at 6; Tr. 36, 53. Piper was one of these ten miners. Slip op. at 6. At the time of his discharge, he was a shuttle car operator at the mine. Gov't Ex. 6; Tr. 50.

On February 1, 2013, Piper filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging, in part, that he was discharged in retaliation for engaging in protected activity in violation of section 105(c)(2) of the Mine Act. Slip op. at 1. Piper alleged that prior to the layoff, in October 2012, he had reported to his mine foreman that he believed that his face boss "was using drugs." *Id*. at 6; Gov't Ex. 1; Gov't Ex. 2, Decl. Kirby Smith.

On March 19, 2013, the Secretary of Labor ("Secretary") filed an application for temporary reinstatement requesting an order requiring KenAmerican to reinstate Piper to his former position. Gov't Ex. 2. On April 5, 2013, however, the Secretary submitted an unopposed motion to dismiss the application after determining "that the facts disclosed during [his] investigation of the case on the merits do not support a violation of [s]ection 105(c)." Slip op. at 1-2; Gov't Ex. 3. Accordingly, the judge dismissed the proceeding. Slip op. at 2; Docket No. KENT 2013-571-D, Unpublished Order dated Apr. 8, 2013.

On March 27, 2013, while the March 19 application for temporary reinstatement was still pending, Piper filed a second discrimination complaint with MSHA. Gov't Ex. 5. In this complaint Piper alleged, in effect, that he had not been included within KenAmerican's recent recall of laid-off employees because he had filed the February 1 discrimination complaint. *Id*.

On May 14, 2013, the Secretary filed a second application for temporary reinstatement. S. Appl. at 1. In this application, the Secretary alleges that Ron Winebarger, the mine's manager of human resources, refused to speak with Piper about the layoff recall, but contacted and recalled other employees who had been laid off on December 31. S. Appl. at 3; Decl. Curtis R. Hardison.

KenAmerican requested a hearing on the May 14 application, which is the subject of this proceeding. At the hearing, Piper testified about the sequence of events that occurred while he was on layoff. Slip op. at 6-7. On January 1, 2013, Piper encountered Winebarger while shopping at a local store. *Id*. at 6. Piper inquired of Winebarger about the possibility of returning to work. *Id*. at 7. Piper testified that Winebarger told him to check back in a couple of weeks. *Id*.; Tr. 34.

In February, Piper visited the mine and spoke with its general manager, Randy Wiles. Slip op. at 7. Piper asked Wiles about returning to work. Piper testified that Wiles responded: "I just don't know. But the way people are quitting around here right now, there's a good chance that you will get your job back." *Id.*; Tr. 35. On this day, Piper also spoke with Winebarger. Slip op. at 7. Winebarger testified that he told Piper that once the mine lifted its hiring freeze he was welcome to apply and that he would receive due consideration. *Id*. at 7; Tr. 54.

KenAmerican lifted its hiring freeze at the end of February. Slip op. at 7. Winebarger testified that Wiles instructed him to begin hiring by "[looking] at the guys who were laid off first . . . [G]ive them the opportunity to reapply and [] give them due consideration." *Id*.; Tr. 58. Winebarger met with the mine's general manager and together they considered each of the

ten miners who had been laid off on December 31. Slip op. at 7. They invited six of the laid-off employees in to speak with them. *Id*. Four of these men were offered the chance to return to work, and three accepted. *Id*. Piper, however, was not contacted by KenAmerican.[1] *Id.* Winebarger testified that Piper had a history of attendance problems that had recently become worse. Slip op. at. 8; Tr. 65.

On March 27, 2013, after Piper learned that KenAmerican had recalled other employees, he contacted Winebarger to inquire about returning to work. Slip op. at 8. Winebarger testified that he told Piper "I can't talk to you right now. You have a discrimination complaint against us, and I can't talk to you about this right now." Tr. 55. Winebarger testified that he had been previously advised not to speak to a party that is a litigant against KenAmerican without the presence of counsel. Slip op. at 8; Tr. 55. Piper testified that he came to believe that the company had "blackballed" him. Slip op. at 9; Tr. 41-42. As a result, he filed the second discrimination complaint with MSHA. Slip op. at 9; Gov't Ex. 5.

On June 6, 2013, the judge issued a decision in which he concluded that the March 27 discrimination complaint was not frivolously brought. Slip op. at 15. In addition, the judge stated that at all times relevant to his decision, Piper was a "miner" for purposes of section 105(c)(2) of the Mine Act and therefore was eligible for temporary reinstatement. *Id*. Accordingly, the judge ordered KenAmerican to provided immediate temporary reinstatement for Piper to his former position. *Id*.

On review, KenAmerican asserts that the judge erred in concluding that Piper was a "miner" at the time he filed the March 27 discrimination complaint. Pet. at 4. The operator contends that Piper instead should have been considered an "applicant" for purposes of section 105(c)(2) and consistent with Commission case law and the Mine Act not eligible for temporary reinstatement pursuant to section 105(c)(2). *Id*. at 4-6.

II.

Disposition

The dispositive issue in this appeal is whether the judge erred in concluding that Piper was a "miner" for purposes of temporary reinstatement in connection with his discrimination complaint filed on March 27, 2013. As explained below, we affirm the judge's decision and conclude that treating Piper as being eligible for temporary reinstatement under the circumstances of this case is fully consistent with the language of the Act and Congressional intent.

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[1] None of the employees who were contacted by KenAmerican had previously filed a discrimination complaint with MSHA. Slip op. at 7; Tr. 64. Furthermore, these employees, unlike Piper, did not have fire brigade or MET training, or experience in operating a roof bolter, scoop, or continuous miner. Slip op. at 7.

Section 105(c)(2) provides in relevant part:

> *Any miner or applicant for employment or representative of miners* who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . . [I]f the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement *of the miner* pending final order on the complaint. . . . [Emphases added.]

Thus, the language of section 105(c)(2) provides that "any miner or applicant for employment or representative of miners" may file a discrimination complaint with the Secretary, but appears to limit temporary reinstatement to "miners." The term "miner" is defined in section 3(g) of the Act, 30 U.S.C. § 802(g), as "any individual working in a coal or other mine."

Indeed, the Commission has made it clear that "applicants for employment" are not eligible for temporary reinstatement under section 105(c)(2).[2] *Sec'y of Labor on behalf of Young v. Lone Mountain Processing, Inc.*, 20 FMSHRC 927 (Sept. 1998). In that case, the Secretary argued that the term "miner" as used in the temporary reinstatement provision of section 105(c)(2) was actually a "shorthand reference" that was meant to include "applicants for employment" and "miners' representatives." The Commission rejected that argument and held that under the language of section 105(c)(2) only "miners" may be granted temporary reinstatement. *Id*. at 930.

However, under the circumstances of this case, Piper was not a mere "applicant" for a position with KenAmerican. He had actively worked in KenAmerican's mine and was entitled to the protection of the temporary reinstatement provisions in section 105(c)(2). We need not explore in this case the full contours of the distinction between a "miner" and an "applicant for employment" under section 105(c)(2); rather, we conclude that under the facts of this case Piper must be regarded as a "miner" for temporary reinstatement purposes.

It is significant that the genesis of Piper's March complaint was the December 2012 layoff. Before that layoff, Piper was clearly a "miner," and his February complaint alleged that his layoff was impermissibly based on his prior safety complaints. Furthermore, Piper's March complaint alleged that KenAmerican's human resources director, Ron Winebarger, would not speak to him about an employment recall because Piper had filed the February complaint with MSHA – a protected activity. In short, Piper's March complaint clearly related back to, and was

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[2] There is, of course, a more fundamental reason why applicants for employment are not eligible for temporary *reinstatement*. As a purely logical and semantic matter, one cannot be "reinstated" to a position he has never held. Thus, plain language and common sense support our decision in *Lone Mountain* and its limit on the scope of temporary reinstatement.

connected with, the events that took place when he was actively working in the mine. It would elevate form over substance to treat Piper as a mere job applicant who had no prior work history with the operator and had not already filed a discrimination complaint.

Treating Piper as a "miner" in this case is fully consistent with Congressional intent in drafting section 105(c)(2). Congress intended that temporary reinstatement provide "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." S. Rep. No. 181, 95th Cong., 1st Sess. 37, *reprinted in* Subcommittee of Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 625. A miner who has allegedly been laid off for an impermissible reason must trust that he or she will not suffer adverse consequences later – including not being recalled – simply because he or she filed a discrimination complaint with MSHA. Indeed, in this very case, Piper believed that he had been blackballed due to his protected activity, and denying reinstatement to former employees under these circumstances may exert a chilling effect on miners' exercise of their rights under the Act.[3]

The decisions that KenAmerican seeks to rely upon are readily distinguishable. As discussed above, in *Lone Mountain*, the Commission held that a job applicant, as opposed to a miner, is not entitled to temporary reinstatement. 20 FMSHRC at 930. However, unlike the situation in *Lone Mountain*, Piper is not a mere job applicant who had no prior relationship with the operator. As discussed above, he worked at KenAmerican's mine until the allegedly discriminatory layoff occurred and is seeking temporary reinstatement to the position that he once held.

Nor is *Secretary of Labor on behalf of Williams v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987), relevant here. The court's decision did not even involve the issue of who could be eligible for temporary reinstatement under section 105(c)(2). Rather, the question in that case was whether individuals who had been laid off from a mine should be treated as "miners" for purposes of the statutory right to receive paid training that section 115 of the Act, 30 U.S.C. § 825, grants to "miners."[4]

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[3] Our approach is also consistent with case law under Title VII, where the Supreme Court has ruled that, for purposes of filing discrimination complaints, the term 'employee' "necessarily includes a former employee." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997).

[4] The court held that an individual is not a "miner" for paid training purposes unless that individual is "employed" in a mine. 822 F.2d at 1149. The court had no occasion to address the Act's reinstatement provisions or the type of situation involved here, where the operator is allegedly discriminating against an individual because of that individual's prior complaint that the layoff itself was discriminatory. The court's decision in *Emery Mining Corp. v. Secretary of Labor*, 783 F.2d 155, 159 (10th Cir. 1986), is distinguishable for the same reasons.

III.

Conclusion

For the foregoing reasons, we conclude that Mr. Piper was a "miner" at all relevant times in this case for purposes of the temporary reinstatement provisions of section 105(c)(2) of the Mine Act. Accordingly, we affirm the order of the judge granting him temporary reinstatement. At this stage of the proceedings, we intimate no view on the ultimate merits of the case.

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

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

Chairman Jordan, concurring:

I agree with my colleagues' affirmance of the judge's decision in which he determined that Darrick Piper was a "miner" for purposes of temporary reinstatement. However, I write separately because I reach this conclusion based on a different analysis than the one adopted by the majority.

The Mine Act provides that if the Secretary finds that a discrimination complaint was not frivolously brought, then the Commission, upon application of the Secretary, shall order the immediate reinstatement of the miner, pending final order on the complaint. 30 U.S.C. § 815(c)(2). Section 3 of the Mine Act defines miner as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). This definition cannot be applied literally in determining whether an individual is eligible for temporary reinstatement, as persons seeking that relief are usually not working in a mine. Indeed, that is why they are seeking temporary reinstatement. The meaning of the term "miner" as used in section 105(c)(2) is, therefore, ambiguous.

If a statute is clear and unambiguous, then effect must be given to its language. *See Chevron, U.S.A, Inc., v. Natural Res. Def. Council, Inc.*, *467 U.S. 837, 842-43 (1984)*; *accord., Local Union No. 1261, UMWA v. FMSHRC,* 917 F.2d 42, 44 (D.C. Cir. 1990). If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron,* 467 U.S. at 843-44; *Thunder Basin Coal Co.,* 18 FMSHRC 582, 584 n.2 (Apr. 1996); *Keystone Coal Mining Corp.,* 16 FMSHRC 6, 13 (Jan. 1994). Deference is accorded to "an agency's interpretation of the statute [that] it is changed with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D. C. Cir. 1994) (citing *Chevron,* 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance, as long, as that interpretation is one of the permissible interpretations that the agency could have selected. *See Cumberland Coal Res., LP v. FMSHRC,* __ F.3d __ No. 11-1464, 2013 WL 2450523, at 5 (D.C. Cir. June 7, 2013); *Joy Technologies, Inc. v. Sec'y of Labor,* 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) (citing *Chevron,* 467 U.S. at 843); *Thunder Basin Coal Co. v. FMSHRC,* 56 F.3d 1275, 1277 (10th Cir. 1995).

The Secretary has interpreted the term "miner" in section 105(c)(2)'s temporary reinstatement provision to include a laid-off employee who makes a non-frivolous claim that a filing of a prior section 105(c) discrimination claim played a part in the employer's decision not to recall him or her. The Secretary therefore considers Piper (the complainant in this case), a miner for purposes of section 105(c)(2) despite the fact that Piper's protected activity, (the February 1st discrimination complaint alleging a discriminatory layoff) took place after he was laid off (and therefore no longer working in a mine), and despite the fact that the alleged discriminatory action of failing to recall Piper was not directed to a "miner" as that term is literally defined by section 3(g).

The Secretary's interpretation of "miner" is reasonable because it furthers the purpose of the statute. The fact that a laid-off individual files a complaint with the Secretary or engages in other protected activity should not influence the decision whether or not to recall that individual back to work. Granted, a laid-off employee who believes his or her protected activity has played a role in the recall process can pursue a claim under section 105(c), but if that individual has no opportunity to obtain temporary reinstatement in the interim, his or her willingness to engage in protected activity could be curtailed. Indeed, as my colleagues have noted, slip op. at 5, it would likely deter a laid-off employee from filing a complaint, even if, as was the case with Piper, the individual believed the lay off itself was conducted in a discriminatory fashion.

The Secretary's interpretation is also consonant with the Supreme Court's interpretation of the term "employee" in the context of general discrimination law under Title VII. In *Robinson v. Shell Oil Co*., the Supreme Court held that the term "employee" in Title VII includes a former employee section 704(a). 519 U.S. 337, 345-46 (1997) (citing 42 U.S.C. § 2000e-2(a)). The case raised the issue of whether an individual could bring suit against his former employer for post-employment actions allegedly taken in retaliation for his filing a charge with the Equal Employment Opportunity Commission ("EEOC"). *Id.* at 339. The Court reasoned that the term "employees" could have a plain meaning in the context of one section of Title VII, but this did not mean it has the same meaning in all other sections and other contexts. *Id.* at 343. It decided that the term standing alone is necessarily ambiguous and that each section must be analyzed to see whether the context provides the term a further meaning. *Id.* at 343-44. The Court agreed with the EEOC that the "exclusion of former employees from the protection of [section] 704(a) would undermine the effectiveness of Title VII by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining to the EEOC." *Id.* at 346.

I agree with my colleagues that the cases relied on by KenAmerican are readily distinguishable. In *Secretary of Labor on behalf of Williams v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987), the majority correctly indicates that the issue was whether individuals who had been laid off from a mine should be treated as "miners" for purposes of the statutory right to receive paid training that section 115 of the Mine Act grants to "miners." In that case the D.C. Circuit stated:

> Congress enacted section 115(a) [the training provision] in order to create a safe and healthy work environment, but individuals while on layoff simply are not exposed to that environment. Requiring that such individuals receive safety training would *therefore serve no statutory purpose*, even if they have statutory or contractual rights that preclude their being considered "strangers," for some other purpose, to the mining industry or to the particular operator that laid them off.

822 F.2d at 1148 (emphasis added).[1] In the context of section 105(c)(2), however, there is a different statutory purpose at stake: the right of miners to make safety complaints without fearing retaliation. Here, the statutory purpose of section 105(c)(2) is served by the Secretary's approach.

In *Secretary of Labor on behalf of Young v. Lone Mountain Processing, Inc.,* 20 FMSHRC 927 (Sept. 1998), also relied on by the operator, the individual seeking temporary reinstatement had no previous employment relationship with the operator. *Id.* at 927-28, 930. This is not Piper's situation, as he had worked at KenAmerican for years and had been laid off for a few months before the alleged adverse action occurred.

Accordingly, I conclude that the Secretary's interpretation that Piper is a "miner" eligible for temporary reinstatement under section 105(c)(2) of the Mine Act, is reasonable and I would affirm the judge.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

[1] The D.C. Circuit framed its *Chevron* inquiry as: "we must therefore determine whether the Secretary 'reasonably' interprets section 105(c)(1) to require 'training neutral' recall of applicants who are 'contractually entitled to employment.'" *Peabody Coal,* 822 F.2d at 1145-46 This, of course, is not the relevant inquiry here, and thus a finding that the Secretary's interpretation of the Mine Act is reasonable is not inconsistent with the court's decision. Moreover, Judge (now Justice) Ruth Bader Ginsburg, in her concurrence, emphasized that "[o]ne need not exclude 'laid-off miners' . . . from the [section] 3(g) definition of 'miner' for all purposes in order to resolve this case, and I do not believe the panel intended or has made so sweeping a disposition." *Id.* at 1151 (Ginsburg, J. concurring).

Distribution:

Melanie J. Kilpatrick, Esq.
Rajkovich, Williams, Kilpatrick & True, PLLC
3151 Beaumont Centre Circle, Suite 375
Lexington, KY 40513
kilpatrick@wktlaw.com

Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296
feingold.jerald@dol.gov

Administrative Law Judge Kenneth R. Andrews
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
875 Green Tree Road,
7 Parkway Center, Suite 290,
Pittsburgh, PA 15220

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 11, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2007-447-M
	:	A.C. No. 09-00023-125618 E027
S & S DREDGING COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"), S & S Dredging Company ("the Dredging Company") contested a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") for an alleged failure to correct a defect in equipment. 33 FMSHRC 1324 (May 2011) (ALJ). Specifically, the Dredging Company contested the Secretary's allegation that the violation was significant and substantial ("S&S") and the result of its unwarrantable failure to comply with the mandatory safety standard.[1] *Id.* at 1325-27. After a hearing, Administrative Law Judge Avram Weisberger vacated both the S&S and unwarrantable failure designations. *Id.* at 1327. He vacated the S&S designation because he reasoned that the injuries that were reasonably likely to occur due to the violation would not be of a reasonably serious nature. *Id*. at 1326.

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

The Secretary filed a petition for review, which the Commission granted. He contends that the judge erred in overturning the S&S designation by failing to address material evidence in the record and misapplying the Commission's test for determining whether a violation is S&S.[2] We agree. For the reasons that follow, the judge's decision is reversed in relevant part, the S&S designation is affirmed, and the citation is remanded for the assessment of an appropriate civil penalty.

I.

Factual and Procedural Background

The Dredging Company is an independent contractor that dredges sand from a river at the Lithonia mine quarry in DeKalb County, Georgia. 33 FMSHRC at 1324; Tr. 54-55. On May 3, 2007, MSHA inspector Robert Knight visited the quarry and inspected the operator's wheel loader. Joint Stips. at V.3-V.4; Gov't Ex. A.

Knight observed that the steps on the loader were in a defective condition. Gov't Ex. A. Specifically, the bottom step hung loosely from chains and was unstable. Joint Stip. at V.5; Gov't Ex. B; Tr. 24, 28-29. While the second step on the ladder was stable, it was three feet high, bent, and caved inward. Joint Stips. at V.6-V.7; Gov't Ex. B. Patty Schildt, the company's owner, admitted that the steps had been in this defective condition for approximately two years. Tr. 53, 56-57. The parties later stipulated that "due to the condition of the broken bottom step," the second step "was the first usable step." Joint Stip. at V.6.

The mandatory standard set forth in 30 C.F.R. § 56.14100(b) requires that mine operators correct defects on equipment that affect safety.[3] Inspector Knight determined that the Dredging Company had violated this standard, and accordingly he issued Order No. 7794620 to the operator pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). Gov't Ex. A. The Secretary subsequently modified Order No. 7794620 to a section 104(d)(1) citation. 33 FMSHRC at 1324 n.1.

The Dredging Company contested the citation and the Secretary's proposed civil penalty. The operator stipulated that it had violated the standard at issue, but contested the S&S designation as well as the allegation that the violation was the result of an unwarrantable failure to comply with the safety standard. Joint Stip. at IV.1.

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[2] The Secretary did not petition for review of the judge's conclusion regarding the operator's alleged unwarrantable failure.

[3] Section 56.14100(b) states that "[d]efects 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."

On May 23, 2011, the judge issued a decision in which he determined that the violation was not significant and substantial. 33 FMSHRC at 1326. Specifically, the judge concluded that the Secretary failed to establish the fourth element of the test set forth in *Mathies Coal Co.*, 6 FMSHRC 1, 4 (Jan. 1984), i.e., "a reasonable likelihood that the injuries in question will be of a reasonably serious nature." The judge concluded that such injuries, which he identified as "sprains, possibly a broken ankle" were not of a reasonably serious nature because there was no evidence that either injury would require "hospitalization," "surgery," or "a long period of recuperation."[4] 33 FMSHRC at 1326. He also noted that "the height at which these steps are located does not appear to be very significant in terms of a contributing factor to a serious injury. The lower step was only one foot off the ground." *Id.* The judge then vacated the S&S designation. *Id.*

II.

Disposition

A. The judge erred by limiting S&S violations to those that are reasonably likely to result in injuries that require hospitalization, surgery, or require a long period of recuperation.

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, the Commission further explained:

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

6 FMSHRC at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The judge erred in requiring the Secretary to demonstrate that an injury would result in hospitalization, surgery, or a long period of recuperation in order to satisfy the requirement in

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[4] Besides identifying ankle injuries, Inspector Knight also stated that a miner would be at risk of a "back injury or pulled muscle." Tr. 29.

element four of the *Mathies* test that the potential injury be "of a reasonably serious nature." The judge's decision conflicts with the Commission's established case law. We have consistently recognized that muscle strains, sprained ligaments, and fractured bones are injuries of a reasonably serious nature for the purposes of the fourth element of the *Mathies* test. *See, e.g., Maple Creek Mining, Inc.,* 27 FMSHRC 555, 562-63 (Aug. 2005) (affirming a judge's conclusion that serious injuries such as a leg or back injury would arise from the failure to maintain an escapeway in a safe condition); *Buffalo Crushed Stone Inc.,* 19 FMSHRC 231, 238 n.9 (Feb. 1997) (concluding that slipping on a walkway would result in reasonably serious injuries such as a finger or a wrist fracture); *Southern Ohio Coal Co.,* 13 FMSHRC 912, 918 (June 1991) (affirming a judge's conclusion that a trip and fall would result in reasonably serious injuries such as "sprains, strains, or fractures"). In sum, the judge applied an incorrect legal standard in analyzing whether the violation was S&S.

Furthermore, the judge's conclusion regarding the third *Mathies* element is also logically inconsistent with his analysis of the fourth element. When analyzing the third element, the judge found it reasonably likely that a slip and fall from the steps would result in a sprained or broken ankle. 33 FMSHRC at 1326. When analyzing the fourth element, however, the judge stated that because the injury in question was not likely to require a long period of recovery, it was not reasonably serious. *Id.* These two statements are not reconcilable: a broken ankle obviously would require an extended period of recovery.

B. The judge erred by assuming that the loader's bottom step was in a usable condition.

In addition to applying an unduly stringent test when analyzing the fourth element of *Mathies*, the judge also made a significant factual error. The parties stipulated that "[t]he second step on the Loader . . . which was the first usable step due to the condition of the broken bottom step, was three feet from the ground." Joint Stip. at V.6. Inspector Knight testified that as a result of being connected by chains, the lower step would flip around if a miner tried to use it. Tr. 28-29. Schildt admitted that the steps had been in this defective condition for about two years. Tr. 56-57. Despite this stipulation and testimony, the judge stated that "[t]he lower step was only one foot off the ground" and that the height of the step "does not appear to be very significant in terms of a contributing factor to a serious injury." 33 FMSHRC at 1326.

The judge erred in assuming that a miner could safely use the bottom step. The record evidence unequivocally establishes that the bottom step was not usable and that the first usable step was three feet above the ground. Thus, to the extent that the judge relied on the height of the bottom step as a factor in determining the likelihood of a serious injury, his reliance is not supported by the record.

III.

Conclusion

We hold that the Secretary is not required to demonstrate that an injury would result in hospitalization, surgery, or a long recovery period in order to establish that a violation is significant and substantial. We further conclude that a sprained or broken ankle, a consequence the judge specifically identified as reasonably likely, is an injury of a reasonably serious nature. Accordingly, the decision of the judge is reversed with regard to whether Citation No. 7794620 should be designated as significant and substantial, and the citation is affirmed as a significant and substantial violation. This proceeding is remanded to an administrative law judge so that an appropriate penalty can be assessed.[5]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

[5] Judge Weisberger retired from the Commission while this matter was pending review.

Distribution

Terry Schildt
S & S Dredging
405 Pope Trail
Covington, GA 30014

Robin Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Administrative Law Judge Avram Weisberger (retired)
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

July 16, 2013

PRAIRIE STATE GENERATING COMPANY, LLC	:	
	:	Docket Nos. LAKE 2009-711-R
v.	:	LAKE 2009-712-R
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

Before: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY: Jordan, Chairman, and Nakamura, Commissioner

These contest proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). The Mine Act requires each operator of a coal mine to adopt a roof control plan "suitable to the roof conditions and mining system" of the mine. 30 U.S.C. § 862(a). Similarly, it requires every coal mine operator to adopt a ventilation system and methane and dust control plan "suitable to the conditions and the mining system of the coal mine." 30 U.S.C. § 863(o). Before they can be adopted, the Secretary of Labor (the "Secretary") must approve the plans. *Id*.; 30 U.S.C. § 862(a).

This case involves a dispute between the Secretary of Labor's Mine Safety and Health Administration ("MSHA") and the operator of a new underground coal mine regarding plan provisions that MSHA's District Manager refused to approve. 32 FMSHRC 602, 604 (May 2010) (ALJ). The primary dispute concerns the use of extended cuts, the width of entries and the length of diagonals. *Id*. MSHA's refusal to approve the operator's plan provisions was based in large part on the fact that this was a new mine with no prior history. *Id*. at 605.

Prairie State Generating Company, LLC ("Prairie State") is seeking review of two technical citations[1] issued by the Secretary after Prairie State expressed its intent to operate its

[1] When the operator and the Secretary are unable to resolve a dispute concerning a plan's provisions, the Secretary may issue a citation alleging a violation for operating without an approved plan, which is sometimes referred to as a "technical citation," so that the matter may be (continued...)

mine with unapproved ventilation and roof control plans in violation of 30 C.F.R. § 75.370(d) and 30 C.F.R. § 75.220(a)(1), respectively. In her May 21, 2010 Decision, Administrative Law Judge Margaret Miller upheld the citations. 32 FMSHRC at 612. For the reasons that follow, we affirm in part and vacate and remand in part the Judge's findings.

I.

Factual and Procedural Background

Prairie State operates the Lively Grove Mine, which in 2009 was a new underground coal mine in Washington County, Illinois. It is located within MSHA Coal Mine Safety and Health District 8 ("District 8").

Upon taking over as Manager of District 8 in the fall of 2007, Robert Phillips was informed that the district had the highest number of unintentional roof falls and the largest number of respirable dust overexposures of any district. 32 FMSHRC at 605. He was instructed to upgrade the roof control and ventilation plans in the district in order to reduce those numbers. Tr. 217, 229; 32 FMSHRC at 605.

In or around July 2008, Prairie State and MSHA began the approval process for Lively Grove's inaugural ventilation and roof control plans. Stip. 4. The parties entered into negotiations and discussed various plan provisions. 32 FMSHRC at 602. Prairie State twice submitted its proposed ventilation and roof control plans to District 8 Manager Phillips for approval and Phillips twice rejected them.[2] 32 FMSHRC at 602; Tr. 46; Exs. M-1, M-2; Stip. 12. On September 14, 2009, MSHA sent deficiency letters to Prairie State addressing the provisions at issue in each plan. 32 FMSHRC at 602; Exs. M-3, M-4. Between July 9, 2008, and September 17, 2009, the parties engaged in over 30 discussions attempting to reach an agreement and approval of the ventilation and roof control plans. Stip. 11.

Prairie State began mining coal at the Lively Grove Mine on September 10, 2009. P.S. Br. at 1. On September 17, MSHA inspector and ventilation specialist Keith Roberts issued technical Citation No. 6680548 to Prairie State for a violation of 30 C.F.R. § 75.370(d) for operating its mine with an unapproved ventilation plan, and MSHA roof control specialist Mark Odum issued technical Citation No. 6680549 for a violation of 30 C.F.R. § 75.220(c) for

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[1](...continued)
litigated before, and resolved by, the Commission.

[2] Prairie State also submitted alternative proposed plans, dated August 28, 2009, that did not contain the disputed provisions and under which it would operate after issuance of the technical citations. Ex. PS-27. MSHA approved the plans the same day. Ex. PS-29; Stip. 13.

operating with an unapproved roof control plan. 32 FMSHRC at 602-05.[3] Both citations were signed by Inspector Roberts. *Id*. Prairie State contested the citations and the matter proceeded to hearing before Judge Miller.

Prior to the hearing the parties resolved a number of issues leaving the following issues in dispute (Tr. 8-16):

1. Prairie State proposed the use of 40-foot extended cuts, as opposed to MSHA's proposal to use the industry standard of 20-foot cuts. 32 FMSHRC at 605-06.

2. Prairie State proposed the use of 20-foot wide entries as opposed to MSHA's proposal of 18-foot wide entries. *Id*. at 606.

3. Prairie State proposed the use of 68-foot length diagonals at intersections as opposed to MSHA's proposed 64-foot length diagonals. *Id*.

4. Prairie State proposed 9,000 and 12,000 cfm ventilation quantities with its fishtail ventilation system, but MSHA insisted on 25,000 cfm. *Id*. at 606-07.

5. Prairie State preferred not to address red zone issues in its roof control plan,[4] but MSHA insisted on their inclusion in the plan. *Id*. at 607.

6. Prairie State included no limitations on the number of turns in a crosscut and believed it to be a ventilation issue, whereas MSHA proposed to limit the number of turns in a crosscut and believed it to be a factor in roof control. *Id*.

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[3] Section 75.370(d) states in pertinent part that "[n]o proposed ventilation plan shall be implemented before it is approved by the district manager." Section 75.370(a)(1) states in pertinent part that "[t]he operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." 30 C.F.R. § 75.370(a)(1); *see also* 30 U.S.C. § 863(o).

Similarly, Section 75.220(c) states that "[n]o proposed roof control plan or revision to a roof control plan shall be implemented before it is approved." Section 75.220(a)(1) also provides that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine." 30 C.F.R. § 75.220(a)(1).

[4] "Red zone" issues involve procedures regarding the avoidance of a zone around a continuous miner, intended to address the hazards of moving equipment. P.S. Br. at 31-32.

7. Prairie State proposed a curtain setback five feet greater than the depth of the approved cut, but MSHA proposed a curtain setback at the same depth as the approved cut and the use of see-through curtains to improve visibility. *Id*.

8. Prairie State's roof control plan did not include the installation of mesh in-cycle on certain areas of the roof to protect from falling debris, while MSHA insisted on its inclusion. *Id*. at 607-08.

9. Prairie State's proposal included no limitations on the number of times a roofbolter can operate downwind of a continuous miner on shift, while MSHA sought a limit of two times. Pet. at 29; S. Br. at 24.

The Judge affirmed the citations, finding that the District Manger's determinations were not arbitrary and capricious. She also refused to admit Prairie State's evidence concerning approved ventilation and roof control plans at other mines in District 8, studies conducted at other District 8 mines, and studies on the use of extended cuts. 32 FMSHRC at 611-12.

II.

Disposition

A. Whether the Judge applied the correct legal standard in reviewing the District Manager's determinations regarding the proposed plans.

The Judge applied an "arbitrary, capricious or abuse of discretion" standard in reviewing the District Manager's rejection of Prairie State's ventilation and roof control plans.[5] 32 FMSHRC at 603, 610-11. She found that the District Manager's determinations regarding the proposed provisions in the ventilation plan and roof control plan were not arbitrary and capricious because he "balanced the conflicting ideas and articulated a rational connection between the facts shown and the choices he made." *Id*. at 608, 611-12. Thus, the Judge found that MSHA's revisions to Prairie State's ventilation and roof control plans for the Lively Grove Mine were suitable pursuant to sections 75.370(a)(1) and 75.220(a)(1). *Id*. at 609-10.

Prairie State argues that the Judge erred in holding that the appropriate standard of review of a District Manager's decision to reject certain provisions of roof control and ventilation plans was the "arbitrary and capricious" standard. It claims that the Judge applied the incorrect burden of proof by only requiring that the Secretary show that the MSHA plans were suitable for the Lively Grove Mine. Instead, Prairie State submits that the Judge should have also required that the Secretary prove that the plan provisions proposed by the operator were unsuitable for Lively Grove.

[5] The "arbitrary, capricious or abuse of discretion" standard is derived from the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Consistent with our decisions in *Mach Mining, LLC*, 34 FMSHRC 1784 (Aug. 2012), appeal docketed, No. 12-3598 (7th Cir. Nov. 14, 2012), and *Twentymile Coal Co.*, 30 FMSHRC 736 (Aug. 2008), we conclude that the Judge did not err in her articulation of the legal standard and her application of the burden of proof. She correctly held that the question before her was whether the Secretary proved that the District Manager did not abuse his discretion.[6] She also correctly stated that the Secretary's burden of proof required that he show that the District Manager examined the relevant data and articulated a satisfactory or reasonable explanation for his determinations. *See* 32 FMSHRC at 610-11.

In *UMWA v. Dole*, 870 F.2d 662, 669 n. 10 (D.C. Cir. 1989), the Court recognized that "while the mine operator had a role to play in developing plan contents, MSHA always retained final responsibility for deciding what had to be included in the plan." The Commission has also stated that "absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *C.W. Mining Co.*, 18

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[6] Prairie State's insistence that the Secretary must prove before the Judge that the operator's proposed plan provisions were unsuitable for the mine confuses the issue of who is charged with making suitability determinations. Pursuant to the language of the Mine Act and MSHA's implementing regulations, it is the district manager's role to determine whether proposed plan provisions are suitable or unsuitable for a particular mine, 30 U.S.C. § 862(a); 30 U.S.C § 863(a); 30 C.F.R. § 75.220(c); 30 C.F.R. § 75.370(a)(1), which the district manager in this case did. By rejecting Prairie State's proposals for 40-foot cuts, 20-foot cuts, 20-foot widths, 64-foot diagonals, etc., District Manager Phillips essentially found that the plan proposed by the operator was unsuitable. Ex. M-3 and M-4. This finding is inherent in Phillips' determination of what requirements were suitable for the mine at the outset of its operations.

The fact that the District Manager made suitability determinations for the mine does not mean that the Secretary must also prove suitability by a preponderance of the evidence before the Judge. Rather, the judge reviews the district manager's decision under an arbitrary and capricious standard to determine if he or she has made a full appraisal of the relevant and available facts, and is reasonable in drawing conclusions. *See Peabody Coal v. FMSHRC*, 111 F.3d 963, (D.C. Cir. 1997) (Table) (applying an arbitrary and capricious standard in affirming Commission decision sustaining the District Manager's suitability determinations regarding a ventilation plan). This is an appropriately deferential standard, as judges (as well as Commissioners) are not always best-equipped to decide technical issues regarding ventilation and roof control. They are instead charged with deciding whether the district manager has made a fair and informed suitability determination. Although our dissenting colleague disagrees with this assertion, slip op. at 20, n. 9, he acknowledges that these plan disputes involved "serious questions about relative safety risks and benefits" of the operator's and Secretary's approaches, and specifically "whether the safety risks inherent in more frequent equipment moves are outweighed by the hazards to roof stability that deeper cuts might present." Slip op. at 21. This is precisely the type of inquiry best left to MSHA's technical expertise in the first instance.

FMSHRC 1740, 1746 (Oct. 1996). We have explained that an arbitrary and capricious standard "appropriately respects the Secretary's judgment while allowing review for abuse of discretion, errors of law, and review of the record under the substantial evidence test" *Emerald Coal Res., LP*, 29 FMSHRC 956, 966 (Dec. 2007) (citations omitted); *see also Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (concluding that MSHA's withdrawal of approval of a water impoundment plan was not "arbitrary and capricious").

Accordingly, we conclude that the Judge applied the correct standard of review.

B. Whether the Judge's findings regarding the District Manager's refusal to approve the use of extended 40-foot cuts, 20-foot wide entries and 68-foot length diagonals at intersections are supported by substantial evidence.

As stated above, the primary dispute in this case concerns the use of extended cuts, the width of entries and the length of diagonals.[7] Section 75.330(b)(2) has the practical effect of restricting the standard cut to 10 feet, unless MSHA approves the use of extended cuts.[8] 30 C.F.R. § 75.330(b)(2); *see also* Oral Arg. Tr. 38. However, with the advances in the technology of continuous mining machines, it has become MSHA's practice to accept 20-foot cuts as standard. 32 FMSHRC at 604; Tr. 54-55.

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[7] It has come to the Commission's attention that MSHA has since approved Prairie State's request for a 40-foot cut depth and a 45-foot curtain set-back in these cases. *See* June 26, 2012 MSHA Approval Letter. A case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome. *North Am. Driller*s, 34 FMSHRC 352, 358 (Feb. 2012), *citing Climax Molybdenum Co. v. Sec'y of Labor*, 703 F.2d 447, 451-52 (10th Cir. 1983). Because the District Manager testified that it is his practice to deny, at least initially, requests for extended cuts in new mines, new MMUs, and new sections, we believe that the parties retain an interest in the outcome of this case, and therefore, we do not deem these issues moot.

[8] 30 C.F.R. § 75.330(b)(1) & (2) state (emphasis added):

> Ventilation control devices shall be used to provide ventilation to dilute, render harmless, and to carry away flammable, explosive, noxious, and harmful gases, dusts, smoke, and fumes . . . (2) These devices shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced unless an alternative distance is specified and approved in the ventilation plan. Alternative distances specified shall be capable of maintaining concentrations of respirable dust, methane, and other harmful gases, in accordance with the levels specified in the applicable sections of this chapter.
> .

Prairie State proposed that perimeter cuts be mined to a depth of 40 feet but the District Manager limited the maximum depth to 20 feet. 32 FMSHRC at 605-06; Tr. 69-71. Prairie State also proposed crosscut entries that are 20-foot wide, along with 68-foot length diagonals at the intersections. Phillips rejected both in favor of 18-foot wide entries and 64-foot diagonals. 32 FMSHRC at 606. Prairie State maintains that Phillips rejected the safer Prairie State plan for the less safe MSHA plan, and that the majority of mines in District 8 and elsewhere that use continuous miners have approval for 40-foot cuts.

As explained below, we conclude that substantial evidence[9] supports the Judge's finding that Phillips was not arbitrary and capricious and did not abuse his discretion in denying approval of these provisions in the proposed plans.

1. 40-foot cuts

In the deficiency letter dated September 14, 2009, District Manager Phillips stated that the Illinois No. 6 coal seam is gassy. Ex. M-3 at 1. He referenced a nearby mine operating in the same coal seam as Lively Grove that was liberating between 600,000 to more than 750,000 cubic feet of methane per day, and noted that during January 2009, the mine had experienced an accumulation of methane up to 3.0% even though the roof bolting machine was supporting a cut that was approximately 15 feet in depth. *Id*.

In addition, Inspector Roberts stated that although 40-foot cuts can be done safely and in compliance with ventilation, methane, and respirable dust standards, generally the less distance between the face and the end of the ventilation and dust control devices the better the methane and dust control will be. Tr. 53-54. Moreover, Roberts opined that the most dust is created when the continuous mining machine starts the cut and that in a 40-foot cut using a single pass continuous miner with a wet bed scrubber, there are four cuts, while in a 20-foot cut, there are only two cuts. Tr. 56, 58-59. He maintained that the more roof that is exposed, via a 40-foot cut, the longer it will sit unsupported. Tr. 54. Essentially, Roberts testified that 20-foot cuts provide for better methane, dust, and roof control. Tr. 53-54; 32 FMSHRC at 604. MSHA roof control expert Mark Odum's testimony supports Roberts' testimony regarding extended cuts from a roof control perspective. *See* Tr. 161-63.

Prairie State provided considerable testimony in support of its proposed plans. Expert witness Gary Hartsog testified that a majority of the mines using continuous miners have approval for extended 40-foot cuts, and that continuous miners with scrubbers are designed to operate in extended cuts. Tr. 416-418, 433-34; P.S. Br. at 14-15. With regard to ventilation, Hartsog and Victor Daiber, the engineering manager at the Lively Grove Mine, both testified that

[9] In assessing whether a finding is supported by substantial evidence, the record as a whole must be considered including evidence in the record that "fairly detracts" from the finding. *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989), *citing Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

a series of studies from the National Institute of Occupational Safety and Health ("NIOSH") during 2009 showed that there is minimal, if any, difference between a 20-foot cut and a 40-foot cut. Tr. 315; 430-31; 32 FMSHRC at 609. Daiber opined that the ventilation in an extended cut was as good, if not better than in the first 20 feet. Tr. 306, 313, 315, 344; P.S. Br. at 16.

Although Prairie State's witnesses provided testimony supporting its contention that 40-foot cuts would be safe, this testimony on balance did not significantly detract from the Secretary's evidence that 20-foot cuts are safer, particularly in a mine with no prior history. The Judge specifically found that the Secretary's witnesses were more credible:

> The evidence presented by the Secretary clearly demonstrates that the MSHA proposal is suitable as it relates to the Lively Grove Mine . . . . I credit both Roberts' and Odum's testimony far more than the generalization made by Hartsog, PSGC's expert.

32 FMSHRC at 609.[10] The Judge also specifically stated that the Prairie State experts "agreed that the roof conditions may be affected by extended cuts as the conditions are an unknown until mining actually begins." *Id*. She further stated that "Daiber [another Prairie State expert] essentially agreed that mining the area is the best way to determine the conditions at the mine and, therefore, taking smaller cuts in the beginning and evaluating them is a more prudent way to proceed. (Tr. 341, 346)." *Id*.

We conclude that the Judge's finding – that the District Manager's determination on extended cuts was not arbitrary and capricious – is supported by substantial evidence.

2. <u>Width of entries and length of diagonals</u>

With regard to the width of entries, Odum, a supervisory mining engineer of the roof control group for MSHA, testified that MSHA wanted Prairie State to start out with the more conservative 18-foot wide entries until an evaluation of the mine could be made. 32 FMSHRC at 604-05; Tr. 142-43, 153. He explained that although MSHA believed 18 feet was a width that could be safely mined at Lively Grove, MSHA could only evaluate the conditions encountered and the effectiveness of the 18-foot entries after mining began. Tr. 153. Odum testified that 18 feet was chosen based on the information provided by Prairie State about the expected conditions at Lively Grove, and because MSHA has seen success in District 8 with 18-foot entries. Tr. 151. He stated that the wider the entry, the more roof is exposed, and the more roof that is exposed, the more difficult it is to support that roof. Tr. 152. He opined that 18-foot wide entries are safer than 20-foot entries, because the narrower the entry the better the roof support will be. *Id*.

[10] A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

Regarding the length of diagonals, Odum testified that based on the conditions expected at the mine by Prairie State, MSHA believed that a narrower, in this case 64-foot, diagonal at the intersections was needed to effectively support Lively Grove's roof. Tr. 154-55. Odum stated that the 4-way intersections, statistically and practically, are most prone to roof control problems like roof falls, and that roughly 75 to 80 percent of all roof falls have occurred or will occur in 4-way intersections. Tr. 154, 156; Ex. M-16; 32 FMSHRC at 606. He maintained that the best way to address this was to keep the span of the intersection as small as possible and then after a sufficient amount of mining distance, MSHA would entertain larger intersections for Lively Grove. Tr. 154, 156; 32 FMSHRC at 606.

District Manager Phillips, relying in part on a power point presentation by Casey Sears, an MSHA roof control authority, determined that, because this was a new mine and the roof conditions were unknown, 64-foot diagonals were best under the circumstances. Tr. 216; M-19; 32 FMSHRC at 606. Phillips told Prairie State that if it could prove that the mine could control respirable dust and roof falls for two sampling cycles, then they could discuss the mine increasing to wider widths and larger diagonals. Tr. 222.

Because Lively Grove is a new mine devoid of any mining history, the Judge concluded that it was reasonable for MSHA to take the cautious performance-based approach advocated by District Manager Phillips. *See* 32 FMSHRC at 609. This approach is amply supported by substantial evidence. Phillips made it very clear that he only wanted proof that the Lively Grove Mine is capable of handling the industry standard cuts, before progressing to more extended depths. Once the mine has shown its durability, he stated that he was open to granting Prairie State the use of extended cuts, and greater widths of entries and lengths of diagonals. Tr. 222. We note that at the hearing Prairie State witnesses Daiber and Hartsog conceded that the effect of extended cuts on the roof would not be known for sure until mining actually began. 32 FMSHRC at 609; Tr. 345-46, 445-46.

Accordingly, we conclude that substantial evidence supports the Judge's decision that the District Manager did not act arbitrarily or capriciously or abuse his discretion by imposing requirements regarding the length of cuts, width of entries, and length of diagonals.

C. Remaining disputed plan provisions

Prairie State further argues that as to ventilation quantities, red zone issues, number of turns in crosscut, curtain setback, mesh in-cycle, and the roofbolter in relation to the continuous miner, the Judge's findings regarding the District Manager's determinations are also not supported by substantial evidence, and that the Judge's decision fails to meet the requirements of Commission Procedural Rule 69(a).[11] The Secretary agrees that, as it pertains to these issues, the

[11] Rule 69(a) requires that a Commission judge's decision "include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law (continued...)

Judge's decision fails to explain the bases of her findings and conclusions that the District Manager's proposed plan provisions were rational. We conclude that the Judge's findings should be vacated and remanded.

As discussed above, the Judge merely listed the issues in dispute and generally described the parties' positions on each of the foregoing issues, with the exception of the dispute surrounding the roofbolter, which she did not mention at all. 32 FMSHRC at 605-08. She made no findings of fact nor did she provide any explanation regarding which portions of the record she relied on in reaching her decision regarding Phillips' determinations on these issues.

Accordingly, we vacate the Judge's decision affirming the District Manager's determinations regarding the six remaining provisions and remand these issues to the Judge for an analysis consistent with Rule 69(a).

D. Whether the District Manager's application of an MSHA Procedure Instruction Letter to Prairie State's ventilation and roof control plans was arbitrary, capricious or an abuse of discretion.

Procedure Instruction Letter ("PIL") No. I08-V-03 provides guidance to district managers in evaluating requests for approval of extended cuts. Ex. M-14.[12] Relying on *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 407 (D.C. Cir. 1976); *Carbon County Coal Co.*, 6 FMSHRC 1123 (May 1984); and *Carbon County Coal Co.*, 7 FMSHRC 1367 (Sept. 1985), the operator argues that MSHA is imposing the PIL as an across-the-board rule. It contends that this is inconsistent with the fundamental premise of mine-specific plan development and subjects the operators to rules which have not been promulgated pursuant to notice and comment rulemaking under section 101(a) of the Mine Act, 30 U.S.C. § 811(a).

The PIL states that its purpose is to "provide[] direction in evaluating requests for approval of extended cuts. . . . These procedures deal with the evaluation of plans and include supplemental information to assist inspectors and specialists in plan evaluation." Ex. M-14 at 1; *see also* Ex. M-13.

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[11](...continued)
or discretion presented by the record." 29 C.F.R. § 2700.69(a).

[12] As part of the evaluation, it instructs district managers to review the history of the mine. In fact, Item C of the PIL provides a checklist which states that the "following factors should be considered when reviewing the mine history: (1) coal seam characteristics; (2) roof falls; (3) remote-control machinery accidents; (4) ignitions; (5) face methane liberation; and (6) ventilation, noise and respirable dust compliance." Ex. M-14 at 2. It further states that "[e]valuation of these factors on a standard cut should be made before considering approval of an extended cut." *Id.*

The Judge found that "[m]uch like a 'universal provision,' the PIL is based on MSHA experience and knowledge. It is a nationwide policy that a district manager has available for his consideration, and its purpose is to assist the district manager in reviewing plans." 32 FMSHRC at 611. She reasoned that the PIL's guidance assists district managers in determining how to best address requests for extended cuts. At a new mine like Lively Grove, it allows the parties to evaluate the plan at each step. *Id*. Inspector Roberts testified that Phillips would generally evaluate a mine's capability by using a 10-foot increment stair-step evaluation, in which he would approve a 20-foot cut, then upon the mine successfully operating with 20-foot cuts, progress to 30-foot cuts, then 40-foot cuts. Tr. 108-09.[13]

After taking into consideration the significant number of incidents at nearby mines involving methane liberation and roof falls, the Judge concluded that Phillips' attempt to avoid these problems at the outset by starting Lively Grove with standard 20-foot cuts and then allowing up to 40-foot cuts, based on performance, was appropriate. 32 FMSHRC at 604, 611. As she noted, Phillips "did not rule out the extended cuts, he simply wanted more information, based upon experience at *this* mine, in order to make a determination." *Id*. at 611 (emphasis in original).

We conclude that the Judge correctly determined that the District Manager did not abuse his discretion in his use of the PIL. As we explained above, we find substantial evidence in the record to support the Judge's finding that Phillips' decision to follow the guidance of the PIL was based on the specific conditions at the mine. 32 FMSHRC at 604, 611.

Accordingly, we conclude that the Judge correctly found that the District Manager did not apply the PIL as a binding norm, and that his use of the PIL was not arbitrary and capricious.

E. Whether the Judge erred in excluding certain evidence and expert testimony

During the hearing, Prairie State attempted to introduce evidence consisting of approved ventilation and roof control plans from other District 8 mines using extended cuts, a study on the use of 40-foot extended cuts in District 8, and NIOSH studies on 40-foot extended cuts. 32 FMSHRC at 612. None of the evidence had been introduced to the District Manager during the course of the negotiations, and the Judge did not admit the evidence into the record. *Id*. at 611-12.

Prairie State argues that the District Manager has an obligation to examine the relevant data, even if not specifically raised by the operator. Pet. at 13. Prairie State maintains that it is fundamentally unfair and makes MSHA the "arbiter of competitive advantage" to allow one

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[13] The across-the-board requirement that *has* been subjected to notice and comment rulemaking is the 10-foot requirement contained in 30 C.F.R. § 75.330(b)(2). *See supra* note 8. In point of fact, therefore, the PIL actually provides the guidance for allowing operators to *depart* from this mandatory standard in order to mine more coal in larger cuts.

operator the advantage of a particular plan provision and deny the benefits of the same provision to another operator. *Id*. at 13-14.

The Judge determined that the other mine plans were not relevant to her decision regarding the circumstances and suitability of the plans at Lively Grove. 32 FMSHRC at 612. She declined to find that Phillips abused his discretion because he did not find and review all relevant information, particularly when that information was not brought to his attention by the operator. *Id*. at 611-12. She further noted that neither Hartsog, testifying on ventilation, or Prairie State witness Murali Gadde, testifying on roof control, was involved in the plan development or presentation to the District Manager, and that the information or studies assembled by them was done so solely in preparation for hearing, after the plans had been deemed deficient. *Id*.

Pursuant to Commission Procedural Rule 63(a), a judge may exclude any evidence that is irrelevant, unduly repetitious, or cumulative. 29 C.F.R. § 2700.63(a). The Commission reviews a judge's evidentiary rulings under an "abuse of discretion" standard. *Shamokin Filler Co.*, 34 FMSHRC 1897, 1907 (Aug. 2012); *Mach Mining, LLC*, 34 FMSHRC at 1807; *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000) (citations omitted).

The Commission recently addressed this issue. In *Mach Mining*, we found that the Judge did not abuse her discretion in excluding evidence that had not been presented to MSHA prior to final determination on the proposed plan. 34 FMSHRC at 1807. Here, since the Judge was charged with examining whether Phillips abused his discretion in making his determinations, she correctly focused her analysis on "how he made his decision, what he had before him at the time, and what information he used." 32 FMSHRC at 612. The Judge found, and we agree, that it was not an abuse for Phillips to rely on the information he had in front of him, and because the disputed evidence was not introduced to him during his evaluation period or taken "back to [him] for re-consideration," it was not relevant to Phillips' determination, which was made prior to the hearing. *See id.* If Prairie State wanted to ensure that Phillips considered the proffered evidence before making final determinations on the plan provisions, it was the operator's responsibility to present the studies to Phillips on the company's behalf and explain how and why it was relying on them.[14]

Accordingly, we conclude that the Judge did not abuse her discretion in excluding specific evidence that had not been presented to MSHA for consideration prior to the District Manager's final determination.

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[14] Moreover, although she refused to admit the evidence she deemed irrelevant, she did, in fact, consider Hartsog's testimony that the potential for injury with 20-foot cuts was greater than with extended cuts. 32 FMSHRC at 610; Tr. 438-40. However, she also noted Hartsog's failure to address the safety of roof conditions in an extended cut. 32 FMSHRC at 610. The Judge simply credited the testimony of MSHA witnesses Roberts and Odum over what she described as the generalizations made by Hartsog. *Id*. at 609.

III.

Conclusion

For the reasons discussed above, we affirm the Judge's application of the "arbitrary, capricious, or abuse of discretion" standard of review to her examination of the District Manager's denial of approval of the proposed plans. We affirm the Judge's finding that the District Manager did not act arbitrarily and capriciously or abuse his discretion in his determinations that the length of cuts, width of entries, and length of diagonals proposed by MSHA were suitable to the Lively Grove Mine. We vacate the Judge's findings regarding ventilation quantities, red zone issues, number of turns in crosscut, curtain setback, mesh in-cycle, and the roofbolter in relation to the continuous miner, and remand for further analysis consistent with this decision. Finally, we conclude that the Judge did not err in her exclusion of certain evidence and testimony.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

Commissioner Young, dissenting:

I respectfully disagree with the majority's application of the "arbitrary and capricious" standard to the District Manager's review of the operator's plans in this case, and would therefore vacate and remand the judge's decision so that she may apply the proper legal standard to the plans at issue. The majority's opinion is unsupported by any competent legal authority, and in fact, is directly contradicted by binding precedent and statutory provisions.

Roof control plans are governed by 30 C.F.R § 75.220(a)(1), which states that "[e]ach mine operator shall develop and follow a roof control plan approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine." Similarly, 30 C.F.R. § 75.370(d) provides that "[n]o proposed ventilation plan shall be implemented before it is approved by the district manager." The meaning of the language governing ventilation and roof control plans and the burdens and standards governing their resolution has been recognized as a settled matter for decades of Commission jurisprudence.

This is unsurprising, given the intent of the statute and the clarity of the regulatory language following that intent. In both cases, the language is straightforward in its assignment of responsibilities: It is the operator's duty to propose, or to develop, and follow the plan; the District Manager's to approve or (implicitly) to disapprove of it. *See Peabody Coal Co.*, 15 FMSHRC 381, 387-88 (Mar. 1993) ("*Peabody I*") (recognizing common process for approval of various mine plans) (*citing Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985) (ventilation plan)); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987) (methane and dust control plans)); *see also Target Indus. Inc.*, 23 FMSHRC 945, 972 n.1 (Sept. 2001) (Verheggen and Riley, dissenting) (noting that "[t]he process of developing a roof control plan is analogous to the ventilation plan process").

Disputed plans, for which the parties are unable to agree on plan provisions despite good-faith negotiations, are subject to review by the Commission, which must resolve conflicts through our hearing process. Operators who disagree with MSHA's refusal to approve a plan may notify MSHA of their intent to implement a non-approved plan, implement the non-approved plan momentarily, and receive from MSHA a "technical" citation alleging a violation of section 75.370(d). *See, e.g.*, *Carbon County Coal*, 7 FMSHRC at 1371.

The Commission, through our decisions as interpreted and applied by our judges, has long held that the Secretary bears the burden of establishing that the operator's plan (in the particulars of its disputed provision(s)) is *un*suitable, and that the Secretary's is suitable to the mine in question. *See, e.g.*, *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996) ("*Peabody II*"); *Peabody I*, 15 FMSHRC at 387-88; *C.W. Mining Co.*, 18 FMSHRC 1740, 1748-53 (Oct. 1996); *Jim Walter Res., Inc.*, 31 FMSHRC 932, 933 (July 2009) (ALJ); *Peabody*, 16 FMSHRC 2072, 2073 n.2 (Oct. 1994) (ALJ); *Old Ben Coal Co.*, 16 FMSHRC 2172, 2175-76 (Oct. 1994) (ALJ).

In the case below, the ALJ short-circuited the process by avoiding the threshold question of unsuitability.[1] By moving directly to the evaluation of the *suitability* of the Secretary's plan under the least-rigorous standard in the law, the judge effectively replaces the burden of proof with a deferential "review" of the rationality of the District Manager's negotiating position.

The majority's endorsement of the ALJ's sleight-of-hand thus simplifies the problem of reviewing plan decisions by assuming away the issue. Instead of requiring the Secretary to carry the burden of proof on any substantive matter, the majority today agrees to allow the Secretary to prevail simply by demonstrating that his agents' decision-making – i.e., the *process* through which the plan was evaluated and replaced – met the minimum standard for reasonableness under the law.

Thus, instead of determining that the Secretary has properly disapproved of an operator's plan (because it is not suitable) and substituted his own (because it is), the majority focuses on the process and evades the Commission's responsibility to judge the outcome. The analysis of the Secretary's decision is thereby limited to a crabbed reading of the facts under an inapposite, appellate standard of review, and is divorced from our duty to pass on the underlying facts and circumstances.

This is fundamentally erroneous. First, the majority has determined to negate an established legal principle, supported by nearly 30 years of jurisprudence, arising from the essential structure of the Act and the clear language of the regulatory standard. Second, the majority has marginalized the Commission's own statutory role as an independent arbiter of disputes under the Act and regulations.

I. The Majority's Decision is Inconsistent with the Mine Act, Language of the Governing Standards and Sound, Established Precedent

The Mine Act provides that "the operators of [] mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in [] mines." 30 U.S.C. § 801(e). This is a fundamental recognition of a responsibility, not merely to follow the directives of the Secretary or the Congress, but to ensure that unsafe and unhealthful conditions and practices are prevented and avoided in every facet of operation.

The choice made by Congress is especially relevant to the development of mine plans, including specifically the roof control and ventilation plans at issue in this case. The standards

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[1] The Commission's long-settled view on this issue has only recently been disturbed. *See Mach Mining, LLC*, 34 FMSHRC 1784, 1790-93 (Aug. 2012), a case a majority of the Commission decided (erroneously, in my view) and currently under review by the U.S. Court of Appeals for the Seventh Circuit. *Mach Mining, LLC v. FMSHRC*, No. 12-3598 (7th Cir. filed Nov. 14, 2012). The same ALJ decided both *Mach* and the case at bar.

implement sections 302(a) (requiring adoption of approved roof control plans) and 303(o) (requiring adoption of approved ventilation plans) of the Mine Act.[2] The Secretary drafted and promulgated the standards at issue in this case through notice and comment rulemaking. He therefore chose the manner in which plans would be proposed and approved, consistent with the Act's command that operators "adopt" approved plans for roof control and ventilation.

The language in the standards imposes on operators the duty to "develop and follow" or "propose[]" and "implement[]" plans for roof control and ventilation, respectively. This obligation has been recognized, almost from the beginning of coal mine safety jurisprudence, as a "peculiar species of promulgation which *the operator himself adopts*" the governing standard. *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (1976) (emphasis added).[3] Thus, the Commission

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[2] Section 302(a) provides in pertinent part:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system . . . . A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted . . . .

30 U.S.C. § 862(a).

Section 303(o) provides:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator . . . .

30 U.S.C. § 863(o).

[3] Indeed, the Court's recognition of the operator's role in developing the governing standard is essential to the holding in *Zeigler*, the seminal case on plan approvals. Because such plans "appear to be developed by informal negotiations between the operator and the Secretary's representative, without any pretense of compliance with § 101," *Zeigler*, 398 F.2d at 403, the court felt compelled to read beyond the plain language of the Mine Act's precursor, the Federal Coal Mine Health and Safety Act of 1969 (the "Coal Act"). The Circuit Court held that adhering to the statute's literal meaning would not render meaningless the statutory requirement for ventilation plans, as the Interior Department contended, but would improperly prevent the operation of the Act from carrying "as much meaning as the framers of the statute intended." *Id.* at 408. The Court thus held that ventilation plans, though not literally "mandatory standards"

(continued...)

has long held that the Secretary bears the burden of establishing both the unsuitability of the operator's provision and the suitability of the District Manager's alternative. *See Peabody II*, 18 FMSHRC at 690 ("We conclude that the Secretary carried *his* burden of proving the unsuitability of the former plan and the suitability of the new provision . . .") (emphasis added).[4]

Reading the words of the statute and regulations assigning responsibility in the plan approval process, in their common usage, one must naturally conclude (as the Commission and its judges have previously decided) that the Secretary must demonstrate the unsuitability of the operator's plan. The Secretary chose to require operators to prepare plans, subject only to approval by the District Manager. The power to approve implies the power to disapprove.

Logically, a plan may be rejected only if it is unsuitable, because the Secretary must establish a basis for disapproval. *See Zeigler*, 536 F.2d at 406 (statute clearly requires operator, not Secretary to adopt plan; Secretary lacks "*anything close to unrestrained power to impose terms*") (emphasis added). Were we to permit the Secretary to substitute a plan merely because it is suitable, we would confer that very power, and negate the operator's responsibility to develop and implement plans. This would fundamentally transform the process, in a manner at odds with the language in the governing standards. Thus, it follows that the Secretary (who bears the burden of proof) must demonstrate that the operator's plan is unsuitable.

Until recently, the clear direction provided by the relevant standards and their statutory underpinnings was a settled matter. Indeed, the consistency of early authority supporting the common-sense reading of the plain language had established the Secretary's burden as a bedrock principle of black-letter law. *See id.* at 406-07 (even if Secretary is adamant on inclusion of conditions, operator retains the right to refuse to adopt the plan with the required conditions).

(...continued)
under the defined terms of the Act must be enforceable as such for the Act to be fully effective. The *Zeigler* Court's construction was expressly approved by Congress in enacting the Mine Act. S. Rep. No. 95-181, 95th Cong., 1st Sess. 25 (1977), *cited in UMWA v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989).

[4] After the Commission's decision in *Peabody I*, Peabody had sought reconsideration to clarify whether the Secretary was required to establish the unsuitability of the operator's plan. *Peabody Coal Co.*, 15 FMSHRC 628 (Apr. 1993); *Peabody II*, 18 FMSHRC at 688. The Commission denied the motion for reconsideration and ordered the judge to consider the issue on remand. Judge Melick, on remand, held that the Secretary bears the burden of proof on these issues. *Peabody Coal Co.*, 15 FMSHRC 1703, 1705-06 (Aug. 1993) (ALJ). The Secretary seems to find it significant that we never *imposed* the burden of proving the unsuitability; that it was simply something he voluntarily *assumed*. *See* S. Br. at 27; *Peabody II*, 18 FMSHRC at 688. It is telling that the Secretary and the majority choose to discuss a peripheral matter in *Peabody*, rather than the central holding in the case, which has been understood by every Commission ALJ prior to *Mach*, as placing the burden of proof on suitability and unsuitability on the Secretary. *See, e.g.*, *Peabody*, 16 FMSHRC at 2073 n.2.

The solidity of the law on this point is best illustrated by the fact that the majority itself cites *C.W. Mining*, 18 FMSHRC 1740 (Oct. 1996). However, that case hardly supports the majority's position. On the contrary, *C.W. Mining* further cemented, as binding precedent, use of the substantial evidence standard to determine whether the Secretary had met his burden of proving that his plan provisions were suitable, and the operator's unsuitable, in a case arising from changes in the mine's roof conditions and a history of roof fall accidents. *Id.* at 1748-54. The majority, however, ignores this central and controlling holding in *C.W. Mining*. Slip op. at 5. Instead, in a case where the very issue we consider today was decided in direct prejudice to the majority's position, my colleagues have transubstantiated the burden of proof from an entirely different question in *C.W. Mining*: whether the Secretary negotiated in good faith. This is a distinct issue and, as we held in *C.W. Mining*, is subject to a different burden of proof.[5] *Id.* at 1746-54.

While the Secretary does cite two other cases applying the arbitrary and capricious standard, neither is controlling, or even persuasive, for each applied the standard in distinct and unusual circumstances. *Emerald Coal Res., LP*, 29 FMSHRC 956 (Dec. 2007) considered for the first time the approval of emergency response plans under the Mine Improvement and New Emergency Response Act amendments ("MINER Act") to the Mine Act. The MINER Act required approvals to be carried out by the Secretary (not district managers), on an accelerated timetable and specified the provisions that were required to be included in *all* plans. Thus, plan approval or disapproval centered on a tightly-focused set of criteria developed by *Congress*, subject to approval by "*the Secretary*," not a district manager.

At the time, there were no implementing regulations. *See Emerald Coal*, 29 FMSHRC at 957-58 (noting that 30 U.S.C. § 876(b)(2)(A) of the MINER Act required that operators develop ERPs and submit them for approval by the Secretary within 60 days after the date of the statute's enactment on June 15, 2006).[6] Arguably, the ERP requirements are not even delegated lawmaking in any meaningful sense, for the direction given to the Secretary is to ensure that all plans met Congressionally-mandated standards.

Those circumstances are hardly analogous to a process through which *operators* are required to develop plans specifically tailored to each mine and to adopt them through approval

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[5] As in *Peabody*, the Secretary did not object to bearing the burden of proof on both the unsuitability of the operator's plan and the suitability of the Secretary's.

[6] *See* 71 Fed. Reg. 12252 (2006) (MSHA issued Emergency Temporary Standard on MINER Act, but did not address emergency response plans ("ERP")); MSHA PPL No. P06-V-8 (July 21, 2006), PPL No. P06-V-9 (Aug. 4, 2006), PPL No. P06-V-10 (Oct. 24, 2006) (all providing guidance for implementing ERPs); 71 Fed. Reg. 71430 (2006) (MSHA final rule implementing requirements of MINER Act addressed in ETS and reconciling ETS with MINER Act).

by the District Manager, subject to dispute resolution through litigation before the Commission. *See* 30 U.S.C. § 876(b)(2)(E)(i)-(vi); *see also Twentymile Coal Co.*, 30 FMSHRC 736, 747 (Aug. 2008) (noting that "the MINER Act provides for the inclusion in ERPs of six 'areas of concern that have universal applicability and are therefore susceptible of more generalized regulation'"); *Mach*, 34 FMSHRC at 1812 (Duffy and Young, dissenting in part) (recognizing the inherent difference in the implementation and approval process of ERPs because such plans did not require the Secretary to make determinations whether various provisions are suitable to the mine and were less dynamic than other mine plans).

Monterey Coal Co., 5 FMSHRC 1010 (June 1983), is also distinguishable. In that case, MSHA discovered that it had mistakenly approved of an impoundment plan by applying the wrong set of published criteria. The Commission found this to be a "good faith mistake" and not to be "arbitrary and capricious." *Id*. at 1016-1020. However, the case did not involve roof control or ventilation plans or pre-approval negotiation of any plan. Furthermore, the agency gave the operator the opportunity to submit additional data before revoking the approval and issuing the citation. Finally, as in *C.W. Mining*, *supra*, the arbitrary and capricious standard in *Monterey Coal* was applied to a question of good faith on the Secretary's part, not the substance of the plan or the operator's right to develop a plan, under the Act and the Secretary's regulations.

The unique statutory provision in *Emerald* or the odd fact pattern in *Monterey Coal* places those cases outside the purview of the controlling and persuasive authority for roof and ventilation plan approvals. The majority can point to no shift in the law justifying its unsettling of the law.

This is not to belittle concern for prudence and caution, especially in reviewing plans for new mines or new sections employing radically different mining techniques or in exceptional conditions. However, as experience for most of the Act's history has demonstrated, the affirmation of a prudent and cautious approach to mine plans may be easily accommodated within the pre-*Mach* framework.[7]

Within that legal construct, a District Manager who finds a provision to be inconsistent with the safe operation of a mine should be prepared to provide an evidentiary basis for disapproving of a plan or any of its provisions, arising from experience with mines of similar geology, similar plans, or other analogous circumstances. This is hardly an unreasonable burden

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[7] Our judges are fully capable of determining how much weight and credibility to assign to evidence in these circumstances, and the Commission's leading cases, *Peabody II and C.W. Mining*, affirmed determinations that the Secretary met the burden of proving unsuitability of the operator's plan and the suitability of the District Manager's alternative. I offer no opinion on whether the plan provisions insisted upon by the Secretary in this case would be sustained through application of the proper standard of review, but would remand the issue to the judge for decision.

for experienced agency officials – in fact, it has been standard operating procedure, as cited cases show, since the enactment of the Coal Act.

Beyond the Commission's disregard of our own precedent, the majority also disdains the express terms of the Mine Act, which clearly states that the Commission shall provide an opportunity for a hearing (in general accordance with the provisions of the Administrative Procedure Act ("APA")) on contests of citations, orders penalties, or other issues under the Act. 30 U.S.C. § 815(d).[8] The standard of proof for the Secretary under this provision has also been established as the burden of proving his case by a preponderance of the evidence. *Dir., Office of Worker's Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 277-78 (1994); *Steadman v. SEC*, 450 U.S. 91, 102 (1981). This is a clear legislative directive, and must be obeyed.

II. The Majority Abdicates an Important Commission Responsibility as Arbiter of Irreconcilable Plan Disputes

It's understandable that the Secretary should wish to lighten his burdens in the proceedings before us. What's beyond reason is the Commission's willingness to passively assent to – or worse, to encourage – the agency's efforts to marginalize the review function assigned to us by Congress. Yet, that is precisely the effect of the majority's decision. [9]

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[8] Substantive, factual burdens are resolved in accordance with section 554 of the APA. In turn, section 556 of the APA governs the conduct of the hearing and the burden of proof in proceedings carried out pursuant to section 554. It provides, in pertinent part: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). Furthermore, the APA requires "consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence." *Id.*

[9] The majority excuses its application of the arbitrary and capricious standard as "appropriately deferential [because] judges (as well as Commissioners) are not always best equipped to decide technical issues regarding ventilation and roof control." Slip op. at 5, n.6. This astonishing confession of impotence might well be extended to any other technical and engineering issue brought before the Commission for review. The law does not restrict our duty to "deciding whether the district manager has made a fair and informed suitability determination." *Id.* On the contrary, the Mine Act itself has directed us to decide cases in accordance with the APA and its burdens of proof. 30 U.S.C. § 815(d). Furthermore, the Mine Act requires the appointment of Commissioners who "by reason of training, education or experience are qualified to carry out the functions of the Commission under this Act." 30 U.S.C. § 823(a). We, in turn, are directed to hire qualified administrative law judges. *Id.*, § 823(b)(2). Nothing in my experience on the Commission validates the majority's express lack of confidence in the ability of the Commission to fulfill its statutory duties.

Congress chose to establish an independent review Commission as the exclusive means for adjudicating contested issues arising under the Mine Act. *See* 30 U.S.C. §§ 823(a), (c). Federal courts have recognized the Commission's function as a means of providing due process. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994). In particular, the Commission's authority over ventilation plan disputes has been recently acknowledged. *See Elk Run Coal Co., Inc. v. U.S. Dep't of Labor*, 804 F.Supp.2d 8, 14, 32 (D.D.C. 2011) (evaluation of ventilation systems, controls, and effectiveness "well within the Commission's expertise" and squarely within the Act's administrative review scheme).

The Commission therefore bears responsibility for deciding these issues, including, especially, the resolution of factual disputes. The Commission's findings of fact *must* be upheld on judicial review if they are supported by substantial evidence. *See* 30 U.S.C. § 816(a)(1) ("[The findings of the Commission] with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive"). This requires, of course, the development of an evidentiary record. The judge's error, compounded by the Commission's endorsement of it in *Mach* and in the case at bar, lies in a refusal to make any meaningful factual determinations.[10]

This is especially egregious here, where the operator raised serious questions about relative safety risks and benefits of its approach and the Secretary's. The judge demurred on the comparison of these alternatives. There is no determination in her decision, for example, that resolves whether the safety risks inherent in more frequent equipment moves are outweighed by the hazards to roof stability that deeper cuts might present.

It is therefore not possible for the Commission to conduct meaningful review of the judge's findings of fact – because there is no exposition of the salient facts in tension. *See U.S. Steel Mining Corp.*, 6 FMSHRC 1908, 1916 (Aug. 1984) (remanding case to judge because his conclusion on the issue of unwarrantable failure was insufficiently explained) (citing *The Anaconda Co.*, 3 FMSHRC 299, 299-302 (Feb. 1981)). Instead, the judge forecloses this central issue by finding that the Secretary's decision is not "arbitrary and capricious."

Because employment of this standard is contrary to our governing statutory and common law, the majority must justify its decision to disregard or overturn that law, which is grounded on our organic role as the entity charged by statute with resolving the type of factual and legal questions posed by this case. The futility of the majority's forage for authority in contravention of our assigned duty is self-evident. Just as the misapplication of *C.W. Mining* leads us, inadvertently, to the correct standard applied in that case, so does the majority's use of a bit of

[10] On remand, I would require the judge to reconsider the expert testimony and other evidence proffered by the operator, and excluded by the ALJ as irrelevant, to determine whether it is relevant under the proper standard of review, and in light of the appropriate burdens of proof.

dicta[11] from *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), direct us, eventually, to a contrary, legally-correct holding.

The Court's observation, in *Dole*, that "while the mine operator had a role to play in developing plan contents, MSHA always retained final responsibility for deciding what had to be included in the plan," slip op. at 5 (quoting *UMWA v. Dole*, 870 F.2d at 669 n.10), is accurate as far as it goes. The District Manager can, and routinely does, insist that his plan provisions be included in the event of an impasse. However, this is not the end of the process. The operator may refuse to revise its plan, choosing to operate briefly, under the unapproved plan. In that case, the operator notifies the agency of its intent to proceed, accepting the citation for a "technical" violation and abating it by adopting the Secretary's provisions. *See Carbon County*, 7 FMSHRC at 1371 (operator not required to acquiesce to District Manager's position but may refuse to implement, triggering litigation before Commission).

Because this is the law as we had always viewed it, the Commission has itself recognized the limits of the very language the majority cites from *UMWA v. Dole*, in a holding establishing that this language cannot mean what the majority insists it must: "While we note, as did the court in *UMWA v. Dole* [citing language employed by the majority here], that the plan approval process involves an element of judgment on the part of the Secretary, *when that judgment is challenged, the Secretary must sustain his burden with regard to suitability*." *Peabody II*, 18 FMSHRC at 692 (emphasis added; footnote omitted). The majority's reliance on *UMWA v. Dole* therefore requires both the denial of the plan dispute process we've followed, virtually *ab initio*, as well as an express refutation of our contrary interpretation of the language in *Dole* in a controlling precedent.[12]

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[11] *Dole* did not decide the standard of review applicable to plan disputes.

[12] It would also require us to implicitly overrule the fundamentals established in *Zeigler*.

Thus, there is no case, save *Mach*, that supports the majority's decision.[13] The directly relevant cases cited by the majority, involving consideration of ventilation and/or roof control plans, lead to or contain authority clearly affirming the Secretary's substantive burden on the question of suitability.[14] As noted *supra*, the cases applying a different standard are not on point.

Conclusion

The standard of review is a vital concern here, not because of the outcome in this or any other case, but because standards are the expression of policy choices, governed by fundamental principles which protect the public interest in its broadest sense. If the Secretary wishes to exert greater control, the Secretary may at any time propose a regulatory regime that confers greater specific authority to his agents in deciding plan issues. Until then, the Secretary is bound, as we are, by the terms in the Act and his regulations as they are written, not as he wishes they might have been. Accordingly, I dissent.

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

[13] The majority implies that the D.C. Circuit Court of Appeals has approved of the use of the arbitrary and capricious standard of review in plan dispute cases. *See* slip op. at 5 n.6, *citing Peabody Coal v. FMSHRC*, 111 F.3d 963 (D.C. Cir. 1997) (table). Beyond the evident weightlessness of a 16-year-old unreported case, resolved in three paragraphs in a table, *Peabody* doesn't support the majority's position in the case before us today. While the majority is correct in noting that the *Circuit Court* applied the arbitrary and capricious standard in affirming the *Commission's* decision on review, the Court did so under section 706(2)(A) of the APA. This provision *requires* the *reviewing court* to determine whether or not agency actions are arbitrary and capricious. In other words, the Court was stating in a matter-of-fact way the standard of review Congress directed it to employ. Neither the Commission nor its judges is within the scope of this section of the statute, and *Peabody*, which in substance affirmed a decision on an issue that had been resolved in *UMWA v. Dole*, is irrelevant.

[14] The aberration, of course, is *Mach*, which is similarly unfounded and plagued by the same legal errors as the case at bar.

Distribution

Arthur M. Wolfson, Esq.
Jackson Kelly, PLLC
Three Gateway Center
401 Liberty Avenue, Suite 1340
Pittsburgh, PA 15222

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center
401 Liberty Avenue, Suite 1340
Pittsburgh, PA 15222

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Administrative Law Judge Margaret Miller
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-5268

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 25, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2009-261-R
	:	Docket No. SE 2009-487
	:	A.C. 01-00851-180940-01
OAK GROVE RESOURCES, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY: Jordan, Chairman, and Nakamura, Commissioner

In these matters arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" of "Act"), Administrative Law Judge William B. Moran vacated a citation that was issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Oak Grove Resources, LLC ("Oak Grove"). 33 FMSHRC 846, 854 (Mar. 2011) (ALJ). The citation alleged that Oak Grove violated a notice of safeguard ("safeguard") which had been issued to the mine pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b).[1] OG Ex. 1.

[1] Section 314(b) grants the Secretary the authority to issue "safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials . . . ." 30 U.S.C. § 874(b).

I.

Factual and Procedural Background

Oak Grove operates an underground coal mine in Jefferson County, Alabama. Gov. Ex. 4 at 2. On May 22, 2008, a fatal accident occurred at the mine as miners were transporting the 24-ton body of a shearing machine[2] along the main haulage road. 33 FMSHRC at 847.

The miners were attempting to move the shearer to the mine's working face using four locomotive motors. *Id.* Two of the motors were used to pull and two motors were used to push the shearer. *Id.* Specifically, Motor No. 8 was the lead pulling car. *Id.* Motor No. 3 followed and was connected to Motor No. 8 by a rigid coupling device. *Id.* Behind Motor No. 3 was the shearer carrier which held the shearer body. *Id.* The shearer body itself was connected to Motor No. 3 by a flexible wire rope. *Id.* Motor No. 4 followed and was connected to the carrier by a solid drawbar. *Id.* Finally, the rear of Motor No. 4 was connected to Motor No. 9 by a rigid coupling device. *Id.* The wire rope that connected Motor No. 3 and the shearer body was the only flexible connection. *Id.*

The shearer carrier periodically derailed from the track as it moved inby the mine. Gov. Ex. 4 at 6. A derailment occurred as the carrier traveled up an incline in the mine floor. 33 FMSHRC at 847; Gov. Ex. 4 at 6. This derailment caused Lee Graham, the operator of Motor No. 3, to exit his vehicle and walk over to the carrier. 33 FMSHRC at 847. While Graham was standing on the tracks examining the situation, Motor Nos. 8 and 3 either slid or rolled downhill and pinned him against the carrier. *Id.* at 847-48; Tr. 57. He was fatally injured. 33 FMSHRC at 847.

MSHA Inspector David Allen investigated the accident. *Id.* at 848. On January 8, 2009, he issued Citation No. 7696616 to Oak Grove. *Id.*; OG Ex. 1. The citation states:

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

OG Ex. 1. The citation charged Oak Grove with violating a previously issued safeguard identified as Safeguard No. 2604892. That document required in pertinent part that "cars on main

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[2] A "shearing machine" is "[a]n electrically driven machine used to cut coal during longwall mining." *Dictionary of Mining, Mineral, and Related Terms* (2d ed. 1997). Oak Grove moved the body of the shearing machine with a "shearer carrier," which is a haulage car that is specifically designed for this task. 33 FMSHRC at 847; Tr. 46.

haulage roads not be pushed except where necessary to push cars from side tracks located near the working section to the producing entries and rooms."[3] OG Ex. 2.

Oak Grove contested both the citation and the validity of the underlying safeguard. 33 FMSHRC at 847, 850 n.4. On March 28, 2011, the judge issued a decision in which he concluded that the safeguard was invalid, as it failed to identify the "hazard" at which it was directed. *Id.* at 852. The citation was thereupon vacated. *Id*. at 854.

II.

Disposition

A. The Requirements for a Valid Safeguard.

In addition to the mandatory health or safety standards contained in the Mine Act or promulgated pursuant to notice and comment rulemaking under section 101(a), the Act permits the Secretary to issue "safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials . . . ." 30 U.S.C. § 874(b). The safeguard notices are issued on a mine-by-mine basis. Once issued, the safeguard operates as a mandatory standard for that mine. If the operator does not comply with the requirements contained in the safeguard, the inspector issues a citation. 30 U.S.C. § 814.

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[3] Safeguard No. 2604892 states:

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

OG Ex. 2. This safeguard was issued to Oak Grove on March 3, 1986. *Id*. On August 31, 1987, MSHA issued a "Waiver" to Oak Grove which stated that the operator was "permitted to push heavy mining equipment on track haulage roads" if six specific procedures were met. OG Ex. 3. On December 3, 2001, MSHA sent Oak Grove a letter which stated that the "Waiver" was void. OG Ex. 4.

The Secretary has published general criteria to guide inspectors in determining when a particular safeguard may be required at a mine. 30 C.F.R. § 75.1403-1. Any one of these general criteria may form the basis of a safeguard notice issued at an individual mine. In addition, an inspector may also issue safeguards that are not included in these published criteria. 30 C.F.R. § 75.1403-1(a).

Recognizing that safeguards are implemented "without resorting to otherwise required rulemaking procedures," the Commission has determined that "a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard." *Southern Ohio Coal Co*., 7 FMSHRC 509, 512 (Apr. 1985) ("*SOCCO I*"). Although the safety of miners requires that "the hazard of concern to the inspector is fully understood by the operator, thereby enabling the operator to secure prompt and complete abatement," we have recognized that "safeguards are written by inspectors in the field, not by a team of lawyers" and have cautioned that the requirement of specificity is "not a license for the raising or acceptance of purely semantic arguments." *Id*. at 512, n.2.

B. The Validity of Safeguard No. 2604892.

Approximately 22 years prior to the fatal accident that led to this proceeding, an MSHA inspector issued Safeguard No. 2604892, which required "that cars on main haulage roads not be pushed except where necessary to push cars from side tracks located near the working section to the producing entries and rooms."[4] OG Ex. 2. This prohibition simply repeated the language of 30 C.F.R. § 75.1403-10(b), which as indicated *supra* lists criteria that may prompt the issuance of a safeguard. The safeguard was issued after the inspector observed a "battery powered locomotive [that] was being used to push two loaded supply cars . . . down the graded haulage supply mine track entry." OG Ex. 2.

We have recognized that the safeguard criteria contained in section 75.1403-1 et seq., are "designed to minimize 'commonly recognized' transportation hazards." *Southern Ohio Coal Co*.,

[4] Notwithstanding the dissent's contention, slip op. at 9, continuing to impute knowledge of this requirement to the operator does not amount to governance by "administrative folklore." Safeguards are not casual guidance, but permanent (unless waived by MSHA) legally enforceable requirements with no inherent expiration date. Thus, just as miners must be trained in applicable mandatory safety standards, miners must also be aware of, and trained in, how to comply with the requirements of all applicable safeguards.

14 FMSHRC 1, 6 (Jan. 1992) ("*SOCCO II*").[5] Thus it has long been commonly recognized that pushing cars on the main haulage roads of an underground mine is a hazardous practice. *See* 30 C.F.R. § 75.1403-10(b); *see also* 30 C.F.R. § 75.1403-7(c) (providing that "[m]antrips should not be pushed").[6]

Our dissenting colleague claims, without support, that safeguards were intended as only a "stopgap measure," slip op. at 9, and he questions the validity of any safeguard based on these general criteria. In his view, a generally disfavored practice cannot be the subject of a safeguard issued to a particular mine; it can only be addressed by the issuance of a mandatory standard prohibiting the conduct. This view, which reads the entire safeguard provision in section 314(b) out of the Act, was rejected in *SOCCO II*. In that case the Commission considered "[w]hether a notice to provide safeguards issued under section 75.1403 is invalid if it addresses conditions that exist in a significant number of mines." 14 FMSHRC at 8.

Answering the question in the negative, the Commission determined that:

> The rulemaking provisions of sections 101 and 301 of the Mine Act do not circumscribe the authority to issue safeguards granted to the Secretary in section 314(b). . . . [I]n general, it is within the Secretary's sound exercise of discretion to issue mandatory standards or to issue safeguards for commonly encountered transportation hazards. . . . We discern nothing in the Mine Act or its legislative history expressly requiring that the hazard be unique to the mine at issue and nothing prohibiting the use of similar safeguards to address similar unsafe conditions that may exist at a number of mines.

Id. at 9-10.

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[5] The Commission was quoting from the regulations promulgated on March 28, 1970. 35 Fed. Reg. 5221, 5250 (1970). At that time the provisions were designated as "safeguards." Later that year the Secretary re-published them as "criteria" for safeguards. 35 Fed. Reg. 17890, 17923 (1970). The identical "no pushing" language was in both. We indicated in *SOCCO II* that, after the revision, "in all pertinent respects, the implementing regulations at 30 C.F.R. § 75.1403 remain the same." 14 FMSHRC at 7.

[6] Indeed, 35 years ago, a safeguard based on section 75.1403-10(b) was affirmed by the Commission's predecessor, the Department of the Interior's Interior Board of Mine Operations and Appeals. *Kaiser Steel Corp*., 3 IBMA 70 (1974) (affirming, *inter alia,* the judge's conclusion that "the notice [of safeguard] was properly issued").

The judge below determined that the safeguard was invalid because it failed to identify the "hazard" at which it was directed. Specifically, since the safeguard failed to indicate that pushing a supply car could result in such problems as compromised visibility, the lack of positive control, and the creation of a "pinch-point," the judge concluded that it failed to comply with the requirements of *SOCCO I* and was therefore fatally defective. 33 FMSHRC at 851-53. Even if, arguably, *SOCCO I* and its progeny could be read as requiring such an outcome, we subsequently rejected that interpretation in *The American Coal Co.*, 34 FMSHRC 1963 (Aug. 2012).[7]

In *American Coal*, we expressly rejected the argument that a safeguard must not only describe a "hazard," but also describe the potential risks or harms associated with that hazardous condition. *Id.* at 1969-1971. Although the Secretary may on occasion choose to include a description of the potential risks or harms associated with the hazardous condition described in a safeguard, such inclusion is not necessary under Commission case law. *Id.* at 1971. Given that many potential risks can flow from the cited hazardous condition, we concluded that it would be unreasonable to require the inspector to identify each and every one. *Id.* at 1969-70. We indicated that a valid safeguard provides an operator with notice of the conditions considered hazardous[8] and the conduct required to comply with the safeguard; it need not foreshadow the events that may occur if the safeguard is not implemented.[9]

We conclude that Safeguard No. 2604892 is a valid safeguard. It identifies a hazardous condition, i.e., a locomotive pushing two loaded supply cars, and a remedy, i.e., cars on main haulage roads are not to be pushed. OG. Ex. 2.

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[7] The Commission issued *American Coal,* on August 30, 2012, after the captioned matters had been briefed by the parties. In *American Coal*, the Commission directly addressed the definition of the term "hazard" in section 314(b) of the Mine Act. At our request, Oak Grove and the Secretary then filed supplemental briefs. In its supplemental filing, Oak Grove noted that it did not agree with our holding in *American Coal*. *See* OG Supp. Br. at 2 n.2.

[8] The dissent asserts that "pushing cars is not a 'condition;' it is a practice." Slip op. at 8. This semantic distinction and narrow reading of the term "condition" is inconsistent with our decision in *American Coal*, in which we upheld the validity of 12 of the 13 safeguards at issue, including, one where we identified "the nature of the hazard" as "a miner being hoisted in a man cage with the gate secured in an open position." 34 FMSHRC at 1976. Clearly, then, dangerous actions, even if they may be characterized as "practices," may constitute "hazardous conditions" under our *American Coal* analysis.

[9] *See also SOCCO II*, 14 FMSHRC 1; *Southern Ohio Coal Co*., 14 FMSHRC 748 (May 1992) ("*SOCCO III*"); *Green River Coal Co*., 14 FMSHRC 43 (Jan. 1992).

III.

Conclusion

In sum, we conclude that Safeguard No. 2604892 is valid, and we reverse the decision of the judge. These proceedings are remanded to the judge so that he may determine whether the Secretary proved that Oak Grove violated Safeguard No. 2604892 as alleged in Citation No. 7696616, and conduct such other proceedings as may be appropriate.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

Commissioner Young, dissenting:

I dissent from my colleagues because I believe the judge correctly applied the law to the safeguard at issue, and properly found it lacking. The majority, in validating the safeguard at issue, disregards the nature of safeguards as well as the legal requirements we've established for their affirmance.

The majority makes much of an alleged longstanding recognition that "pushing cars on the main haulage roads of an underground mine is a hazardous practice." Slip op. at 5, *citing* 30 C.F.R. §§ 75.1403-7(c), 75.1403-10(b). That cannot logically be true. Were it so, the practice would be banned by a mandatory safety standard. It is not. Rather, there is a mere expression of disapproval in a regulation, which serves as a guideline criteria for safeguards, dating from the inception of MSHA's regulatory program.[1]

Following the majority's line of reasoning, we would be required to conclude that MSHA has identified a hazardous practice for more than 40 years yet has failed to promulgate a mandatory standard prohibiting it. If the practice is, indeed, hazardous *per se*, as the majority suggests, MSHA should protect all miners by banning the pushing of cars on main haulage roads under properly-promulgated mandatory standards, and failure to do so amounts to dereliction.

Beyond that, there are a number of exceptions to the "prohibition" against pushing. None of the exceptions is accounted for in section 75.1403-10(b) in a way that clearly implicates a specific "hazard" as we defined it in *American Coal*, 34 FMSHRC 1963. There, we endorsed the ALJ's definition of "hazard" as a "condition[]/object[] that could affect the safe transportation of men and materials." *Id*. at 1971. Pushing cars is not a "condition;" it is a practice. The hazardous condition is not self-evident, and it must be.

Aside from being a requirement of the law, articulation of the hazard itself is important. Safeguard cases are different from those alleging a violation of an express mandatory standard. Rather than centering on whether the operator's acts or omissions occurred or were in violation of the standard, cases such as the one before us today challenge the validity of the standard itself. In recognizing this, we have not permitted safeguards merely to proscribe a practice. Rather, we have required the nature of the hazard itself to be described with particularity. *SOCCO I*, 7 FMSHRC at 512.

From a legal standpoint, doing so ensures that the operator is aware of MSHA's discreet concern for safety. *See id.* ("We further believe that the safety of miners is best advanced by an interpretive approach that ensures that the hazard of concern to the inspector is fully understood by the operator, thereby enabling the operator to secure prompt and complete abatement.") We have, after all, held that valid safeguards are enforceable as mandatory safety standards, *id.*, and the choice to use a safeguard in lieu of regulations voids certain due process protections embedded in that process.

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[1] As a *guideline*, section 75.1403-10(b) affords discretion in whether the practices it describes may be used as the basis for a safeguard. *See* slip op. at 4 (§75.1403-10(b) lists "criteria that *may* prompt the issuance of a safeguard") (emphasis added).

In the present case, the majority attempts to cure this by alleging that the operator had notice arising from the issuance of the safeguard some 22 years prior to the accident which prompted the investigation and citation in this case. That is the better part of a career in the mines, and it would be astonishing if anyone yet working for the operator or MSHA was present in this mine on both the date of the accident and the date of the safeguard's initial issuance. Imputing knowledge of the original safeguard and its meaning in this manner is, practically, governance by administrative folklore.[2]

That raises the most critical problem with the failure to define the hazard in this case: the lapse precludes thinking about safety and hazards in an active way. Some practices are patently unsafe, and no further explanation is necessary. *See, e.g., Oak Grove Res.,* 33 FMSHRC at 853 n.7 (citing obvious fall hazard from operating elevator with door open). Here, the safeguard simply prohibits cars from being pushed on main haulage roads. However, there is no obvious danger from pushing equipment.[3] The danger is variable and circumstantial, as the judge (and MSHA's witness below) recognized. *See id.* at 850-51 (noting several possible hazards).

Thus, while it is possible to conceive of hazards *arising* from the practice at issue, the judge properly observed that the inspector testifying on behalf of the Secretary was required to "read into" the safeguard the underlying hazards, which could include inability to maintain control while pushing equipment downgrade, or a lack of visibility where a load obstructs the operator's view. *Id.* The safeguard at issue did not identify these or any other hazards, however. *Id.* Failure to do so is fatal to the Secretary's case.

Finally, it is noteworthy that safeguards were intended as a stopgap measure to ensure transportation hazards could be addressed efficiently on a mine-by-mine basis in the infancy of the regulatory program. Section 314 of the Mine Act, which authorizes the use of safeguards, is among the provisions designated *interim* mandatory safety standards, pending the approval of *improved* mandatory safety standards. *See* 30 U.S.C. §§ 874, 861(a) (emphasis added). Section

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[2] The majority ironically reinforces this criticism by essentially stating that the safeguard must be valid because it was put in place long ago and miners should have been trained to avoid the prohibited practice. Slip op. at 4, n.4. However, the standard as written in the distant past was defective for the same reason it fails muster under *SOCCO I* and *American Coal* today: it does not describe with particularity the nature of the hazard. "The legitimacy of the notice to provide a safeguard and its application to conditions in the mine cannot be determined unless and until the provisions of the notice are violated." *Wolf Run Mining Co.,* 32 FMSHRC 1228, 1240-41 (Oct. 2010) (Duffy, Commissioner, dissenting; citations omitted). There is no evidence indicating that the safeguard was ever violated or challenged in this mine. Therefore, absence of an adequate description of the hazard renders the notice void *ab initio*, a defect only brought to light by the case at bar, and its maturity is irrelevant.

[3] I do not concede that pushing materials on main haulage roads is a hazardous practice, but the majority's opinion depends on the assumption that it is one. Slip op. at 4-6.

101 of the Mine Act commands the Secretary to develop those improved standards.[4] 30 U.S.C. § 811. The majority ignores this completely by seeking to bootstrap its decision on a provision in the federal regulations which disfavors the practice at issue *in all mines* without banning it in *any* mine. A true concern for safety would require the Secretary to promulgate a mandatory standard protecting all miners from the hazard.[5]

We have held that safeguards must be specific and must be construed narrowly due to their unusual status as inspector-generated mandatory standards. The judge correctly understood the appropriate governing standard and logically applied it in this case. I therefore would affirm his decision.

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

[4] The express will of Congress on this point supports the view that if pushing cars were a hazardous practice *per se*, the Secretary would have been required by the terms of the Act to adopt an "improved" standard banning the practice. *See* 30 U.S.C. § 811(a). As though this were not enough, we have expressly criticized the failure to adopt mandatory safety standards governing transportation hazards, a "leading cause of fatal accidents in underground coal mines." *SOCCO II*, 14 FMSHRC at 16 (quoting MSHA's Semi-Annual Regulatory Agenda, 56 Fed. Reg. 53584 (Oct. 21, 1991)). The passage of 20 years only lends gravity to our admonition in *SOCCO II*: "Because the use of individual safeguards, issued on a mine-by-mine basis, may not adequately protect all affected miners from haulage related hazards, we strongly suggest that the safety of underground coal miners would be better advanced by the promulgation of mandatory safety standards aimed at eliminating transportation hazards." 14 FMSHRC at 16 (emphasis in original).

[5] The majority relies on the affirmance by the Interior Board of Mine Operations Appeals of a safeguard notice derived from essentially the same guideline regarding pushing of loads. *See* slip op. at 5, n.6, *citing Kaiser Steel Corp.,* 3 IBMA 70 (1974). The logical force behind the approval of such interim, mine-specific directives, pending their use in developing mandatory rules, is greatly diminished by the failure to adopt the requisite standard banning the practice in the ensuing four decades.

Distribution:

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1340
401 Liberty Avenue
Pittsburgh, PA 15222

Edward Waldman, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Administrative Law Judge William Moran
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-302-M
v.	:	A.C. No. 04-05775-281632
J. HANLEY CONSTRUCTION, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On December 19, 2012, the Commission received from J. Hanley Construction, Inc. ("Hanley") a motion seeking to reopen a penalty assessment that, according to records of the Department of Labor's Mine Safety and Health Administration ("MSHA"), 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).

MSHA's records indicate that the proposed assessment was mailed to the operator's address of record and was returned undelivered on April 13, 2012. Hanley asserts that it never received the assessment, and that its crushing plant was leased to a rancher for private use. MSHA received a check dated May 10, 2012, and applied the payment to this case. The Secretary does not oppose the request to reopen, but urges the operator to ensure that its address of record is accurate and that future assessments can be received at that address.

Having reviewed Hanley's request and the Secretary's response, we conclude that the penalty assessment in this matter has not become a final order of the Commission because it was returned undelivered. We therefore remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Jerry Hanley, President
Hanley Construction, Inc.
2461 M West Road
Worden, MT 59088
hanleycorp@aol.com

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 17, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2013-206-M
v.	:	A.C. No. 16-01504-305097
HALLIBURTON ENERGY SERVICES, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On January 3, 2013, the Commission received from Halliburton Energy Services, Inc. ("Halliburton") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on November 5, 2012, and became a final order of the Commission on December 5, 2012. Halliburton asserts that its safety manager instructed the Halliburton law department to contest the assessment on November 5, 2012. However, due to an administrative oversight within the law department, the assessment was not timely contested. Halliburton's plant manager discovered the delinquency on MSHA's website on December 14, 2012, and promptly notified counsel. The Secretary does not oppose the request to reopen. The Secretary urges the operator and its counsel to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Peter Gould, Esq.
Patton Boggs LLP
1801 California Street, Suite 4900
Denver, CO 80202

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 17, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2013-228-M
v.	:	A.C. No. 23-01889-303216
BARBER & SONS AGGREGATE	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On January 17, 2013, the Commission received from Barber & Sons Aggregate ("Barber") 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). The Secretary does not oppose the request to reopen.

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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

David B.B. Helfrey, Esq.
120 S. Central Ave., Suite 1500
St. Louis, MO 63105

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 17, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-361
v.	:	A.C. No. 05-03505-301651
BLUE MOUNTAIN ENERGY, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On January 7, 2013, the Commission received from Blue Mountain Energy, Inc. ("Blue Mountain") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 4, 2012, and became a final order of the Commission on November 5, 2012. Blue Mountain asserts that it mailed a timely notice of contest on October 11, 2012. The Secretary notes that MSHA has no record of receiving the contest form. Blue Mountain discovered the discrepancy after receiving a delinquency notice, dated December 19, 2012. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the civil penalty compliance office in Arlington, VA.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Christopher G. Peterson, Esq.
Jackson Kelly, PLLC
1099 18th Street, Suite 2150
Denver, Colorado 80202
cgpeterson@jacksonkelly.com

Shad Peters
Manager of Safety
Blue Mountain Energy
3607 County Road 65
Rangely, CO 81648
speters@deserado.com

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 17, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2013-64-M
v.	:	A.C. No. 19-01224-301606
PYNE SAND AND STONE CO., INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On January 10, 2013, the Commission received from Pyne Sand and Stone Co., Inc. ("Pyne") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 1, 2012, and became a final order of the Commission on October 31, 2012. A delinquency letter was mailed on December 17, 2012. Pyne asserts that it was attempting to discuss the citations with MSHA and did not understand the contest procedure. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

James Pyne,
Pyne Sand & Stone Co., Inc.
1 Lackey Rd.
Douglas, MA 01516
jpyne@pynesand.com

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2013-414
v.	:	A.C. No. 15-19252-301754
HUBBLE MINING COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On January 23, 2013, the Commission received from Hubble Mining Company, LLC ("Hubble") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

Hubble asserts that it failed to contest the assessment due to a clerical error in the accounting department and discovered the error after receiving a delinquency notice dated December 26, 2012. Hubble further states that it implemented new procedures to prevent such errors from occurring in the future. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Gerald W. McMasters,
Hubble Mining Co., LLC
630 Washington Ave.
Paintsville, KY 41240
mcmastersg@bellsouth.net

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-371-M
v.	:	A.C. No. 02-00024-279683
FREEPORT-MCMORAN MORENCI, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On January 11, 2013, the Commission received from Freeport-McMoRan Morenci, Inc. ("Freeport") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on February 8, 2012, and became a final order of the Commission on March 9, 2012. Freeport asserts that it mailed a timely notice of contest on February 20, to St. Louis, Missouri. Freeport states that it discovered the error after being contacted by a collection agency. The Secretary does not oppose the request to reopen but notes that a delinquency letter was mailed on April 24, and the case was referred to the Department of Treasury for collection on August 16. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the civil penalty compliance office in Arlington, VA.

We note that Freeport previously filed a motion to reopen on February 7, 2012, asserting that controls have been established to ensure that failures to timely contest will not happen in the future. 34 FMSHRC___, slip op. at 2, No. WEST 2012-463-M (Dec. 20, 2012). We remind the operator that contest forms must be mailed to MSHA's Civil Penalty Compliance Office, 1100 Wilson Blvd., Arlington, VA 22209, as instructed on the proposed assessment form.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Kristin R. B. White, Esq.
Jackson Kelly PLLC
1099 18th Street, Suite 2150
Denver, CO 80202

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-402-M
v.	:	A.C. No. 10-01913-304344 U532
UNITED MINE SERVICES	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On January 28, 2013, the Commission received from United Mine Services ("UMS") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 30, 2012, and became a final order of the Commission on November 29, 2012. UMS asserts that it mailed a timely notice of contest on November 1, 2012. The Secretary notes that MSHA has no record of receiving the contest form. UMS discovered the discrepancy after receiving a delinquency notice, dated January 14, 2013. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Cole A. Wist, Esq.
Holland & Hart, LLP
6380 South Fiddlers Green Circle, Suite 500
Greenwood Village, CO 80111
cawist@hollandhart.com

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2013-92
v.	:	A.C. No. 18-00709-307275 ZP4
SAVAGE SERVICES CORPORATION	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On January 31, 2013, the Commission received from Savage Services Corporation ("Savage") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on November 29, 2012, and became a final order of the Commission on December 31, 2012. Savage asserts that its new safety director attempted to contact MSHA representatives in order to better understand the contest procedures. Upon receiving instructions to contest the assessment, Savage filed a late notice of contest on January 17, 2013. Savage states that it has implemented new procedures to prevent such delays in the future. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution

Daniel W. Wolff, Esq.
Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004-2595

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 22, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2013-183-M
v.	:	A.C. No. 31-02074-290358 C5A
DRILLING & BLASTING SYSTEMS, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On January 16, 2013, the Commission received from Drilling & Blasting Systems, Inc. ("DBS") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 1, 2012, and became a final order of the Commission on July 2, 2012. MSHA mailed a delinquency notice on August 16, 2012, and referred this case to the Department of Treasury for collection on December 6, 2012. DBS asserted that its safety manager was unfamiliar with the contest process. DBS further stated that due to staff downsizing and excessive workload outside the office, the safety manager was not aware of the received mail on his desk before finding the delinquency notice in August.

The Secretary opposed the request to reopen, noting that DBS has contested many penalties since 2006 and should have had someone responsible for the safety manager's duties while he was traveling. Moreover, the Secretary stated that DBS failed to explain why it took five months to request reopening after it received the delinquency notice.

On March 4, 2013, the Commission sent DBS a letter asking it to explain the delay in filing the motion to reopen and what office procedures were implemented to prevent future defaults. In response, DBS states that the safety manager has been in contact with counsel through January 2013 to draft this motion to reopen. DBS asserts that the delay was caused by the safety manager's workload outside the office, communication availability, and holiday schedules. DBS maintains that its safety manager now understands the contest process, and that it implemented new policies to ensure that proposed assessments are timely opened and contested.

The Commission has made it clear that where a failure results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008). We urge the operator and counsel to take all steps necessary to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Tina Stanczewski, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 22, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2013-109
v.	:	A.C. No. 46-01544-285119-02
SPARTAN MINING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On October 25, 2012, the Commission received from Spartan Mining Company ("Spartan") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

Spartan asserted that it received the proposed assessment on April 11, 2012 and mistakenly paid for Citation Nos. 8120978, 8148652, and 8151811. Spartan had earlier filed notices of contest for each of these citations.

The Secretary opposed the request to reopen, noting that this is the operator's second motion to reopen asserting the same mistake for its failure to contest the penalties (WEVA 2013-41). The Secretary stated that the operator timely contested seven other citations included in this proposed assessment, docketed as WEVA 2012-1026, and timely paid for the remaining 20 proposed penalties. The penalties for the seven other contested citations were approved for settlement on July 11, 2012, and were paid by check dated August 9, 2012. The Secretary maintained that Spartan and its counsel should have been aware of the inadvertently paid citations during negotiations in July, yet they did not request reopening until three months after the settlement decision.

On December 21, 2012, the Commission sent Spartan a letter asking it to identify when it discovered that the penalties were not timely contested and to explain the three-month delay in requesting reopening. In response, Spartan asserted that it was not aware of the inadvertently paid citations until October 2012, when its counsel determined that the citations were not contested.

The Commission has made it clear that where a failure results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008). We urge the operator to take all steps necessary to ensure that future penalty contests are properly marked and timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Carol Ann Marunich, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 26, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of REUBEN SHEMWELL	:	
v.	:	Docket No. KENT 2013-362-D
ARMSTRONG COAL COMPANY, INC. & ARMSTRONG FABRICATORS, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter rises under the Federal Mine Safety and Health Act of 1977 (the Act" or "Mine Act"), 30 U.S.C. § 801 et seq. (2006). On July 19, 2013, Armstrong Coal Company, Inc. and Armstrong Fabricators, Inc. ("Armstrong") filed with the Commission a document entitled "Armstrong Coal Co., Inc. & Armstrong Fabricators, Inc.'s Joint Petition for Discretionary Review." The Commission has also received a document entitled "Respondents Armstrong Coal Co., Inc. & Armstrong Fabricators, Inc.'s Joint Application for Stay Pending Appeal.

Both of Armstrong's pleadings seek relief from the "Decision on Liability and Cease and Desist Order" issued by Administrative Law Judge ("ALJ") Jerold Feldman on June 19, 2013. In his Decision, Judge Feldman granted the discrimination complaint filed by the Secretary of Labor ("the Secretary") on January 8, 2013 on behalf of Reuben Shemwell ("Shemwell") under section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). The ALJ determined that a civil lawsuit which Armstrong had filed against Shemwell in Kentucky, seeking compensatory and punitive damages, violates section 105(c)(1) of the Mine Act because it interferes with Shemwell's right to file a discrimination complaint under the Act. Decision at 19.[1]

[1] Shemwell had filed a discrimination complaint under the Mine Act against Armstrong on January 23, 2012 following Armstrong's termination of his employment as a welder. The Secretary subsequently applied for temporary reinstatement under section 105(c)(2), which was granted by the Commission upon a determination that Shemwell's discrimination complaint was

(continued...)

In the Cease and Desist Order, Judge Feldman ordered Armstrong to "cease and desist from prosecuting its civil suit brought against Shemwell in the Commonwealth of Kentucky's Muhlenberg County Circuit Court by filing an appropriate motion to dismiss." Decision at 22. The ALJ then stated:

> This Decision on Liability is an interim decision. It does not become final until a Decision on Civil Penalty and Supplemental Decision on Relief is issued. Accordingly, **IT IS FURTHER ORDERED** that the parties should confer **before July 30, 2013,** in an attempt to reach an agreement on the specific relief to be awarded. . . . If the parties cannot agree on the relief to be awarded, the parties **ARE FURTHER ORDERED** to file, **on or before August 23, 2013,** Proposals for Relief specifying the appropriate relief to be awarded.

Decision at 23 (emphasis in original).

With regard to Armstrong's Petition for Discretionary Review, filed "pursuant to Commission Procedural Rule 70,"[2] Armstrong PDR at 1, we have determined that the ALJ's Decision and Cease and Desist Order is not a final decision ending the judge's jurisdiction over this matter. Section 113(d) of the Mine Act, 30 U.S.C. § 823(d), only allows for review of final decisions. Ordinarily, a judge's decision finding a violation under the Mine Act is not final until the judge issues a penalty against the operator under section 105(d) of the Mine Act, 30 U.S.C. § 815(d). In his Decision in this case, quoted above, Judge Feldman explicitly stated that the decision does not become final until the judge issues a Decision on Civil Penalty and Supplemental Decision on Relief. Thus, the Commission lacks jurisdiction to entertain Armstrong's Petition for Discretionary Review and must reject it.

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[1](..continued)
not frivolously brought. 34 FMSHRC 1580, 1582 (July 2012), *aff'g* 34 FMSHRC 1464 (June 2012) (ALJ). Following the Secretary's subsequent decision not to pursue Shemwell's discrimination case, on August 22, 2012 Armstrong filed a civil tort action in the Circuit Court of Muhlenberg County, Kentucky, alleging that Shemwell's discrimination complaint before the Commission constitutes a "Wrongful Use of [Commission] Civil Proceedings." On August 27, 2012, Shemwell filed a private section 105(c)(3) action before the Commission based on the termination of his employment by Armstrong. Docket No. KENT 2012-1497. The section 105(c)(3) action is not a subject of the present proceeding.

[2]Commission Procedural Rule 70, entitled "Petitions for discretionary review," implements section 113(d) of the Mine Act, 30 U.S.C. § 823(d), and sets forth the provisions under which a party can seek relief before the Commission from a final order of an administrative law judge. 29 C.F.R. § 2700.70.

We recognize that under Commission Procedural Rule 76, 29 C.F.R. § 2700.76, the Commission may review a judge's ruling prior to the judge's final decision in the case. However, the procedure for interlocutory review under Rule 76(a)(1) includes certain mandatory provisions including the requirement that the party seeking interlocutory review first present the request to the judge and request his certification that the "interlocutory ruling involves a controlling issue of law" and that "immediate review will materially advance the final disposition." 29 C.F.R. § 2700.76(a)(1).

In this case, Armstrong could have sought interlocutory review under Rule 76, but did not do so. Armstrong's Petition for Discretionary Review was filed exclusively pursuant to Commission Rule 70, and did not mention the particular requirements applicable to interlocutory review under Rule 76. Indeed, nowhere in its 23-page petition did Armstrong recognize that Judge Feldman's Decision was not final, or even that the judge had very specifically emphasized that his Decision was not final. In the absence of any request for interlocutory relief by Armstrong, we need not address whether such relief would be appropriate.

Armstrong's Application for Stay Pending Appeal seeks "a stay of the Cease and Desist Order entered in this matter on June 19, 2013 in its entirety pending a ruling upon Respondents' Petition for Discretionary Review and any subsequent appellate proceedings." Application at 1, 9. The Commission has determined that it does not have jurisdiction to consider Armstrong's Petition for Discretionary Review. Thus, it also lacks jurisdiction to consider granting a stay in connection with a non-existent appeal.[3] Armstrong may seek a stay of the judge's Cease and Desist Order by motion addressed to the judge.

[3] On July 23, 2013, the Secretary filed with the Commission a Response to Respondents' Application for Stay and Unopposed Motion to Temporarily Stay Enforcement Pending Settlement Negotiations. The Secretary's motion requested that the Commission issue "an order temporarily staying the decision of the Administrative Law judge until August 23, 2013, to provide the parties an opportunity to settle the case." Secretary's Response at 1. The Secretary's motion should have been presented to the judge in the first instance, and thus we do not consider it.

For the reasons set forth above, Armstrong's Petition for Discretionary Review is denied.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Mary Beth Zamer, Esq.
Office of the Solicitor
U.S. Department of Labor
618 Church Street, Suite 230
Nashville, TN 37219-2456

Matt S. Shepherd, Esq.
Office of the Solicitor
U.S. Department of Labor
618 Church Street, Suite 230
Nashville, TN 37219-2456

Adam K. Spease, Esq.
Miller Wells
710 W. Main Street, 4th Floor
Louisville, KY 40202

Mason L. Miller, Esq.
300 E. Main Street, Suite 360
Lexington, KY 40507

Daniel Z. Zaluski, Esq.
Armstrong Coal Company
407 Brown Road
Madisonville, KY 42431

Tony Oppegard, Esq.
P.O. Box 22446
Lexington, KY 40522

Wes Addington, Esq.
Appalachian Citizens Law Center
317 Main Street
Whitesburg, KY 41858

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 29, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of REUBEN SHEMWELL,	:	
v.	:	Docket No. KENT 2013-362-D
ARMSTRONG COAL COMPANY, INC. & ARMSTRONG FABRICATORS, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006). On July 29, 2013, Armstrong Coal Company, Inc. and Armstrong Fabricators, Inc. ("Armstrong") filed with the Commission a document entitled "Armstrong Coal Co., Inc. & Armstrong Fabricators, Inc.'s Joint Petition for Interlocutory Review." On the same day, Armstrong also filed a document entitled "Respondents Armstrong Coal Co., Inc. & Armstrong Fabricators, Inc.'s Joint Emergency Application for Temporary Stay Pending Review."

Both of Armstrong's pleadings seek relief from the "Order Denying Stay" issued by Administrative Law Judge ("ALJ") Jerold Feldman on July 26, 2013. In his Order, Judge Feldman denied a stay of the Cease and Desist Order he had previously issued on June 19, 2013.[1]

[1] On June 19, 2013, Judge Feldman had issued a "Decision on Liability and Cease and Desist Order", in which he ruled that Armstrong had violated section 105(c)(1) of the Mine Act , 30 U.S.C. § 815(c)(1), by filing a civil tort action in the Circuit Court of Muhlenberg County, Kentucky, against Reuben Shemwell ("Shemwell") for compensatory and punitive damages alleging that Shemwell's discrimination complaint before the Commission constituted a "Wrongful Use of [Commission] Civil Proceedings." In the June 19 Decision, Judge Feldman ordered Armstrong to "cease and desist from prosecuting its civil suit brought against Shemwell (continued...)

Following issuance of the Order Denying Stay, Armstrong had filed with the ALJ an "Emergency Motion to Certify for Interlocutory Review" pursuant to Commission Procedural Rule 76(a)(1)(i), 29 C.F.R. § 2700.76(a)(1)(i). Judge Feldman issued an "Order Denying Request for Certification for Interlocutory Review" on July 26, 2013.

Armstrong represents that the parties have verbally agreed upon terms of a settlement of this case, and seeks "a temporary stay of the Cease and Desist Order until August 15, 2013, during which time the Parties could finalize and submit a written Joint Settlement Motion for consideration." Joint Petition For Interlocutory Review at 2. Armstrong further represents that during the period of stay, it will take no action to further its Kentucky civil tort action against Shemwell. *Id.* The Secretary has notified the Commission that he does not oppose Armstrong's Joint Petition for Interlocutory Review, and does not oppose Armstrong's Application for Stay Pending Review as long as the stay extends only until August 15, 2013.

Upon consideration of the foregoing, the Commission hereby orders that the ALJ's Cease and Desist Order be stayed until the Commission rules upon the Joint Petition for Interlocutory Review, but not beyond August 15, 2013. During the period of stay, Armstrong shall take no action to further its Kentucky civil tort action against Shemwell.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

[1](...continued)
in the Commonwealth of Kentucky's Muhlenberg County Circuit Court by filing an appropriate motion to dismiss" within 40 days. Decision at 22.

Distribution:

Mary Beth Zamer, Esq.
Matt S. Shepherd, Esq.
Office of the Solicitor
U.S. Department of Labor
618 Church Street, Suite 230
Nashville, TN 37219-2456

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Adam K. Spease, Esq.
Miller Wells
710 W. Main Street, 4th Floor
Louisville, KY 40202

Mason L. Miller, Esq.
300 E. Main Street, Suite 360
Lexington, KY 40507

Daniel Z. Zaluski, Esq.
Armstrong Coal Company
407 Brown Road
Madisonville, KY 42431

Tony Oppegard, Esq.
P.O. Box 22446
Lexington, KY 40522

Wes Addington, Esq.
Appalachian Citizens Law Center
317 Main Street
Whitesburg, KY 41858

Administrative Law Judge Jerold Feldman
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2013-537
v.	:	A.C. No. 15-18335-310776
DODGE HILL MINING COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On March 4, 2013, the Commission received from Dodge Hill Mining Company, LLC ("Dodge") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

MSHA's records indicate that the proposed assessment was delivered on January 15, 2013, and became a final order of the Commission on February 14, 2013. Dodge asserts that its safety manager sent the completed contest form to the corporate office of Patriot Coal Corporation ("Patriot") on January 21. Patriot's administrative assistant was delayed in filing the contest until February 18. The Secretary does not oppose the request to reopen, and notes that MSHA received a payment for the uncontested penalties, by check dated March 1, 2013. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed, and cautions that he may oppose future motions to reopen penalty assessments that are not contested in a timely manner.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Jeffrey K. Phillips, Esq.
Steptoe & Johnson, PLLC
2525 Harrodsburg Rd., Suite 300
Lexington, KY 40504
Jeff.Phillips@Steptoe-Johnson.com

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2013-310-M
v.	:	A.C. No. 21-02607-310305
ROBERSON LIME & ROCK, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On February 14, 2013, the Commission received from Roberson Lime and Rock, Inc. ("Roberson") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

MSHA's records indicate that the proposed assessment was delivered on January 9, 2013, and became a final order of the Commission on February 8, 2013. Roberson asserts that it mailed a timely notice of contest to Arlington, VA, on January 22, but it was returned undelivered. Roberson has enclosed a Postal Service tracking receipt confirming that the package was returned to Minnesota. The Secretary does not oppose the request to reopen, and notes that the MSHA payment office in St. Louis, MO, received a check for the uncontested penalties, dated January 22, 2013.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Josh Roberson
Roberson Lime & Rock, Inc.
34686 Co Road 72
Zumbro Falls, MN 55991
jroberson.rock@gmail.com

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-538-M
v.	:	A.C. No. 04-02542-309510 YUD
BODELL CONSTRUCTION COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On February 26, 2013, the Commission received from Bodell Construction Company ("Bodell") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

MSHA's records indicate that the proposed assessment was delivered on December 26, 2012, and became a final order of the Commission on January 25, 2013. Bodell asserts that its counsel erroneously construed the proposed assessment as a "pleading" served by mail and that Bodell's time to respond had been extended by five calendar days, and filed the contest on January 30. Bodell discovered the error after receiving a delinquency notice, dated February 6, 2013. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

D. Ryan Robinson, Esq.
Bostwick & Price, P.C.
Walter Ctr., 16 Fl.
175 South Main St.
Salt Lake City, UT 84111
ryan@bostwickprice.com

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2013-564
v.	:	A.C. No. 46-09086-310927
BRODY MINING, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On February 25, 2013, the Commission received from Brody Mining, LLC ("Brody") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

MSHA's records indicate that the proposed assessment was delivered on January 15, 2013, and became a final order of the Commission on February 14, 2013. Brody asserts that due to a clerical error it contested the proposed assessment on February 18. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Michael T. Cimino, Esq.
Jackson Kelly, PLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2013-603
v.	:	A.C. No. 46-08878-311162
AFFINITY COAL COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On March 4, 2013, the Commission received from Affinity Coal Company, LLC ("Affinity") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

MSHA's records indicate that the proposed assessment was delivered on January 17, 2013, and became a final order of the Commission on February 19, 2013. Affinity asserts that due to a mining accident on February 7, its safety director did not forward the notice of contest to counsel until February 26. The Secretary does not oppose the request to reopen, and notes that MSHA received a payment for the uncontested penalties, by check dated March 6, 2013.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Jonathan R. Ellis, Esq.
Steptoe & Johnson, PLLC
707 Virginia Street, East, 8TH Fl.
P.O. Box 1588
Charleston, WV 25326-1588
Jonathan.ellis@steptoe-johnson.com

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. CENT 2013-256-M
v.	:	A.C. No. 13-01617-279454
	:	
LINWOOD MINING AND MINERALS CORPORATION	: :	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On February 1, 2013, the Commission received from Linwood Mining and Minerals Corporation ("Linwood") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

MSHA's records indicate that the proposed assessment was delivered on February 7, 2012, and became a final order of the Commission on March 8, 2012. Linwood asserts that it mailed a notice of contest with payment for the uncontested citations on March 9, 2012. The Secretary does not oppose the request to reopen, and notes that the MSHA payment office in St. Louis, MO, received a check dated March 9, 2012. However, the Secretary notes that even if the contest form had been sent to the correct address it would not have been processed as a timely contest because it was mailed one day after the expiration of the 30 day contest period. The Secretary states that a delinquency letter was mailed on April 23, and the case was referred to the Department of Treasury for collection on August 9, 2012. Linwood enclosed its response to the collection notice, dated August 21, 2012. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to MSHA's Civil Penalty Compliance Office in Arlington, VA, as instructed on the proposed assessment form.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Dallas R. Allen
Linwood Mining & Minerals Corp.
401 East Front Street
Devenport, IA 52804-9500

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2013-218-M
v.	:	A.C. No. 31-01884-308237
DECK SAND COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On February 6, 2013, the Commission received from Deck Sand Company, Inc. ("Deck Sand") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

MSHA's records indicate that the proposed assessment was delivered on December 11, 2012, and became a final order of the Commission on January 10, 2013. Deck Sand asserts that it mistakenly believed that all citations stemming from the same inspection dates would be assessed together. Deck Sand discovered its error upon receiving two additional proposed assessments on or about January 11, 2013. Deck Sand further states that it has taken steps to ensure that all future contests are timely filed. The Secretary does not oppose the request to reopen.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Nicholas W. Scala, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-439-M
v.	:	A.C. No. 35-03681-303849
TIDEWATER CONTRACTORS, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On February 5, 2013, the Commission received from Tidewater Contractors, Inc. ("Tidewater") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

MSHA's records indicate that the proposed assessment was delivered on October 22, 2012, and became a final order of the Commission on November 21, 2012. Tidewater asserts that it mailed a timely notice of contest to St. Louis, MO, instead of Arlington, VA. After receiving a delinquency notice dated January 7, 2013, Tidewater mistakenly mailed its response to St. Louis, MO. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to MSHA's Civil Penalty Compliance Office in Arlington, VA, as instructed on the proposed assessment form.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Robert W. Elayer
Tidewater Contractors, Inc.
16156 Highway, 101 South
P.O. Box 1956
Brookings, OR 97415

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2013-515
v.	:	A.C. No. 46-09082-288737
SIGNATURE MINING SERVICES, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On February 7, 2013, the Commission received from Signature Mining Services, LLC ("Signature") 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

MSHA's records indicate that the proposed assessment was delivered on May 16, 2012, and became a final order of the Commission on June 15, 2012. Signature asserts that its owner was out of the country from May 4 to June 3 and from June 11 to July 16, 2012. MSHA mailed a delinquency notice on July 31, which was returned undelivered. The case was referred to the Department of Treasury for collection on November 15, 2012. Signature's owner states that he received a call from a collection company on January 16, 2013, and implemented new procedures to ensure timely communication in the future. The Secretary does not oppose the request to reopen, but cautions he may oppose future motions requested for this same reason.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Erik L. Silkwood, Esq.
Hardy Pence, PLLC
500 Lee Street, Suite 701
East, P.O. Box 2548
Charleston, WV 25329

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2013-518
v.	:	A.C. No. 46-08249-302803
STOLLINGS TRUCKING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, 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. (2006) ("Mine Act"). On February 8, 2013, the Commission received from Stollings Trucking Company, Inc. ("Stollings") 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). The Secretary of Labor does not oppose the request to reopen.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Distribution:

Craig W. Hundley
Mine Litigation Representative
Flaherty Sensabaugh, PLLC
200 Capitol St.
Charleston, WV 25301

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, D.C. 20004-1710

July 16, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. KENT 2012-1310-M A.C. No. 15-00045-292005
v.	:	
HANSON AGGREGATES MIDWEST, LLC, Respondent	: : :	Mine: Upton Quarry

DECISION

Appearances: Ryan L. Pardue, U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary of Labor;
Charles M. Sellards, Lawrenceburg, Kentucky, on behalf of Hanson Aggregates Midwest, LLC.

Before: Judge Zielinski

This case is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petition alleges that Hanson Aggregates Midwest, LLC ("Hanson"), is liable for four violations of the Secretary's Safety and Health Standards for Surface Metal and Nonmetal Mines, and proposes the imposition of penalties in the amount of $2,480.00. A hearing was held in Louisville, Kentucky. Respondent withdrew its contest of Citation No. 8640966, leaving three alleged violations at issue. Tr. 8-9. The parties elected to make closing arguments in lieu of filing post-hearing briefs. For the reasons that follow, I find that Hanson committed the violations and impose civil penalties in the amount of $925.00 for the litigated violations.

Findings of Fact - Conclusions of Law

Citation No. 8640965

Citation No. 8640965 was issued by Donald Gabbard[1] at 9:40 a.m. on May 8, 2012, pursuant to section 104(a) of the Mine Act. It alleges a violation of 30 C.F.R. § 56.13011 which

[1] Gabbard has been an inspector with MSHA for about 4.5 years. Tr. 16. Prior to joining MSHA, he worked at an underground limestone mine for 28 years in a variety of positions.

Tr. 17. Gabbard also received an associate degree in mining and a bachelor's degree. *Id.*

requires that "[a]ir receiver tanks . . . shall be equipped with indicating pressure gauges which accurately measure the pressure within the air receiver tanks." The violation was described in the "Condition and Practice" section of the citation as follows:[2]

> The portable air receiver tank in the back of company pickup #30994 did not have a functioning indicating pressure gauge. This exposed persons using this equipment to the hazard of working with unknown pressures. The tank may be used about once every two months. Injury can occur from over-pressurizing vessels or hoses.

Ex. G-1.

Gabbard determined that the violation was unlikely to cause a permanently disabling injury, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $392.00 was assessed for the violation.

The Violation

On May 8, 2012, Gabbard inspected Respondent's Upton Quarry, a surface limestone mine. Tr. 18. He traveled with Eugene "Sam" Coats,[3] the supervisor of the mine, in Coats' truck. Tr. 19. When they reached the top of the highwall, Gabbard exited the truck. Tr. 19, 20-21. As he walked around the truck, he noticed a faulty gauge on an air tank, located in the back. Tr. 19. Commonly called an air baum, the tank was used to provide supplemental compressed air to perform tasks such as filling tires or "blowing out a radiator." Tr. 18. The tank was filled using an air hose attached to a compressor. Tr. 28. A pop-off valve on the tank, if working properly, would open and release air if the pressure reached a certain level of pounds per square inch (psi). Tr. 38, 40.

Gabbard determined that the air gauge on the tank was broken because its lens was missing and the face piece behind the needle, marked with graduations and used to read the air pressure, was sitting abnormally. Tr. 19, 24-25; Ex. G-3. As a result, the needle, located on the face piece, "was all the way past the highest pressure point lodged down close towards zero . . . ." Tr. 19. Gabbard did not test the other components of the tank, such as the pop-off valve, but Coats stated that the valve was working a few weeks before. Tr. 21, 52-53; Ex. G-18 at 3.

Respondent argued that the gauge on the air tank was in fact working properly, and introduced a photograph that depicted the face piece correctly situated and the needle at the 40 psi mark. Tr. 14, 34, 35, 161; Ex. R-1. However, the photograph was taken by Coats after

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[2] Grammar and spelling errors have been corrected in quotations from documents prepared in the field.

[3] Coats was the plant supervisor at Hanson and had overall responsibility for the mine at the time that the citation was issued. Tr. 47. He has worked for Hanson for 27 years and has been in the mining industry close to 40 years. Tr. 48.

taking the tank off of the property and it did not depict the condition of the gauge at the time that the citation was issued. Tr. 48; Ex. R-1, G-3. Gabbard asserted that because the lens cover was missing, a miner would be able to manipulate the face of the gauge and the needle, making it non-functional and unreliable. Tr. 36-37, 38. In addition, Gabbard stated that Coats admitted the gauge was not working in the close-out conference. Tr. 32, Ex. G-18 at 3.

The standard clearly states that air tanks must be equipped with gauges that accurately measure the pressure within the tanks. The gauge's lens was missing and the face piece was disoriented and open to manipulation which prevented it from accurately measuring the pressure in the tank. I find that Respondent violated section 56.13011.

Gravity and Negligence

Gabbard marked the likelihood of injury as unlikely because he believed the tank was used infrequently, "about once every two months." Tr. 26; Ex. G-1. Coats told Gabbard that he would lend it to others for personal use and that he was not aware the air tank was on his truck. Tr. 20. In addition, Gabbard did not know the air pressure in the tank. Tr. 38. One person, who would have been filling the tank with air, was found to be affected. Tr. 23. Based on this information, I find that Gabbard properly determined the likelihood of injury and number of persons affected.

Gabbard conducted research into accidents involving pressurized vessels and found that lack of maintenance led to injuries from flying metal debris, though, it is unknown how many of the accidents occurred from over-pressurizing the vessel. Tr. 21, 22, 41-42. Gabbard asserted that if the tank over-pressurized, it could have ruptured and spread shrapnel. Tr. 22. He determined that the injury expected to occur was permanently disabling because the shrapnel could have caused alterations to a miner's tissue, muscle, or skin, resulting in a scar. Tr. 23; Ex. G-1. Gabbard stated, "[MSHA] dictate[s] if you have, like I say, burns and it alters your tissue, your muscle or your skin and it leaves a scar, that it is permanently disabling. A scar counts as permanently disabling." Tr. 23.

A direction by MSHA to find a scar from a cut or burn permanently disabling would be inconsistent with the Secretary's regulations, which define a permanently disabling injury as "[a]ny injury or illness which would be likely to result in the total or partial loss of the use of any member or function of the body." 30 C.F.R. § 100.3, Table XII-Gravity: Severity. It is highly improbable that a scar on a miner's skin, caused by shrapnel, would result in total or partial loss of a member or function of his body. However, shrapnel could sever a finger or nerve, or strike a miner's eye, causing a permanently disabling injury. I find that the violation was unlikely to result in a permanently disabling injury.

Gabbard determined the level of negligence to be moderate because, while Coats was not aware that the air tank was on his truck or how long it may have been there, it was his truck and he should have known about the tank and its condition. Tr. 20, 27, 28. I find that Coats should have known that the tank was in the back of his truck and that the gauge was not accurately measuring pressure. Therefore, a determination of moderate negligence was appropriate.

Citation No. 8640967

Citation No. 8640967 was issued by Gabbard at 11:41 a.m. on May 8, 2012, pursuant to section 104(a) of the Mine Act. It alleges a violation of 30 C.F.R. § 56.4101 which requires that "[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists." The violation was described in the "Condition and Practice" section of the citation as follows:

> A readily visible warning sign prohibiting smoking or open flames was not posted at the oil retrieval system. Approximately 50 gallons of oil was stored in a tank behind the fuel storage building where filters are drained to collect the used oil. In the event this oil became ignited, it would expose workers in the area to the hazard of oil fires. This area is used only for infrequent maintenance work. Burn injury can occur when encountering oil fires.

Ex. G-9.

Gabbard determined that the violation was unlikely to cause a permanently disabling injury, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $392.00 was assessed for the violation.

The Violation

Hanson has a "fuel lube" building on-site where different types of oil and lubricants, including diesel, motor oil, and hydraulic oil are stored. Tr. 55, 65. In the back of the building, there was an oil storage tank, used for the disposal of oil, a canister, and a catch drum used when performing preventative maintenance. Tr. 57, 64, 65. Gabbard observed that the catch drum was open and contained approximately 8 gallons of used motor oil. Tr. 57; Ex. G-7. A pile of leaves measuring about 10-12 inches tall was located at the base of the building and surrounded the canister, creating what Gabbard believed to be a fire hazard. Tr. 56, 57, 66; Ex. G-7. Gabbard stated that there was "no readily visible sign at all indicating a fire hazard, no smoking or open flames." Tr. 55; Ex. R-3.

The building was marked with three obvious fire hazard signs: one on the front of the building and one on either side. Tr. 57, 62-63, 78; Ex. R-2A-C. Gabbard posited that most access to the building would be from the front, where the sign measured approximately 8.5-10 inches x 11-12 inches. Tr. 57, 60; Ex. R-3. There were also signs inside the building. Tr. 100. Gabbard did not remember seeing any sign located on the back of the building or any evidence that there had once been a sign present. Tr. 58. The back of the building was approachable from either side. Tr. 59. While a miner would pass a sign on his way from the front of the building to the rear, a sign would not be in view once he reached the back. Tr. 61, 74, 80-81, 84, 86, 97, 100; Ex. R-2B. In addition, Gabbard stated that at the closeout conference, Coats "agreed with the citation, the condition did exist." Tr. 72.

The pile of dry leaves around the open catch drum of oil did pose a fire hazard in the back of the building as Gabbard concluded. While a miner would have passed one or more signs

on his way to the back of the building, there was no "readily visible" sign where the fire hazard existed. I find that Respondent violated section 56.4101.

Gravity and Negligence

Gabbard designated the likelihood of injury as unlikely because there were other signs posted in and around the building, and there were no ignition sources present in the area. Tr. 64, 70. In addition, the one miner affected experienced minimal exposure because preventative maintenance was not conducted every day. Tr. 70. I find that Gabbard correctly determined an injury was unlikely to occur and one person was affected.

Gabbard marked the injury expected to occur as permanently disabling because a fire could have caused burns, resulting in flesh and tissue alterations, i.e., scars. Tr. 68. However, Gabbard stated that it was very unlikely that the motor oil would explode if a fire started. Tr. 87. The oil tank lid was closed, there were fire extinguishers on-site, and miners were trained on the hazards of oil and fuel and to "[m]ostly retreat from fires" unless they were very small. Tr. 74, 96, 97, 99; Ex. G-12.

As stated above, it is highly improbable that a scar would result in total or partial loss of a member or function of a miner's body. Given that an explosion was highly unlikely, fire extinguishers were nearby, and miners were trained to retreat from fires, I find that, at most, a miner would have suffered minor burns resulting in lost workdays or restricted duty.

Gabbard assessed the level of negligence as moderate because the back of the building was somewhat secluded and not frequently accessed by employees. Tr. 70-71. While pre-shift and on-shift examinations were required for the building, Gabbard did not look at those records. Tr. 66. However, based on the testimony given, the open oil container and leaves at the rear of the building posed a fire hazard and there was no sign at that location. Respondent should have known about the violative condition. Therefore, I find that the level of negligence was properly marked as moderate.

Citation No. 8640968

Citation No. 8640968 was issued by Gabbard at 9:00 a.m. on May 9, 2012, pursuant to section 104(a) of the Mine Act. It alleges a violation of 30 C.F.R. § 56.14100(c) which requires that "[w]hen defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose . . . to prohibit further use until the defects are corrected." The violation was described in the "Condition and Practice" section of the citation as follows:

> The ladder steps accessing the operator's station of the #98107 haul truck were broken at the contact anchor points in two places. This defective condition exposed persons using the ladder steps to hazards of falling in event the ladder broke free of the truck. The truck had been used today and the operator had just exited the truck via this route. Falls can result in injury when faulty ladders are

used. The truck was removed from service and repairs were immediately conducted.

Ex. G-13.

Gabbard determined that the violation was reasonably likely to cause lost workdays or restricted duty, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $1,304.00 was assessed for the violation.

The Violation

During Gabbard's inspection of Hanson's #98107 A25 Volvo Haul Truck, he climbed a set of steps used to access the cab. Tr. 107, 108, 132. When he reached a height of about 3 feet, he felt the steps unnaturally sag several inches. Tr. 107, 108, 110, 153. Gabbard immediately withdrew from the steps and examined them. Tr. 153.

The steps consisted of one floating, i.e., freely swinging, step on the bottom and three rigid steps above.[4] Tr. 105. The rigid steps were one unit, welded to a rectangular metal frame. Tr. 133; Ex. G-15, R-6. The frame was bolted to the fender of the truck. Tr. 109, 110, 136, 152; Ex. G-15. There was also a bolt through the side of the top step, that connected the step assembly to the upper frame of the truck. Tr. 122, 133, 134; Ex. G-15B. Gabbard was unsure if all of the bolts provided structural support. Tr. 122. The weld in the upper right corner of the framework where the top step was attached was fractured. Tr. 137-38; Ex. G-15A. There was also a fractured weld where the second step from the top had been connected to a piece of angle iron that was attached to the truck's lower frame.[5] Tr. 106, 140-41; Ex. G-15. Based on his observations, Gabbard concluded that the steps had previously been loose and had been repaired with low-quality welds. Tr. 106, 113; Ex. G-15A.

The steps were the only means of access to the cab of the truck and the truck was in use at the time of the inspection. Tr. 108, 109, 142. While Gabbard agreed that the framework being attached to the fender could have accounted "for some true give[,]" there was excessive movement of the steps because of the fractures in the welds. Tr. 135, 147, 152. He maintained that the framework could have broken loose because it was not mounted to the truck in a way that would safely support his or the operator's weight, creating a hazardous condition for the

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[4] Gabbard could not remember how many steps were present. Tr. 108. Respondent introduced a depiction allegedly from a parts' catalogue for a 25A Volvo Haul Truck, showing three rigid steps and one floating step. Tr. 132; Ex. R-6.

[5] The angle iron bracket had been welded to the lower truck frame. The joint between the lower and upper truck frames, directly above the welded angle iron, indicates that there was natural movement between those components. That movement most likely resulted in the fracture of the weld, and may have caused the fracture of the low-quality weld on the upper part of the step assembly.

operator climbing the steps. Tr. 107, 117, 129, 147, 149. Gabbard stated that he discussed the citation during the close-out conference and Coats agreed with it. Tr. 117.

Respondent argued in its prehearing report that the broken weld between the second step and the angle iron attached to the truck's lower frame was not a defect. Coats asserted that the angle iron attachment was not per the manufacturers standards, citing to the depiction from the parts catalogue discussed above as well as a photograph of an allegedly identical haul truck Respondent had on-site that did not have an angle iron bracket. Tr. 124-25, 132-33, 135; Ex. R-5, 6. He stated that the bracket would have been added because "[t]he steps were a little loose. It would have been a lot better if you added a bracket onto it . . . to keep it from breaking off." Tr. 135. Gabbard did not look at the specifications for the haul truck and could not confirm that Respondent's picture of the "identical" truck was in fact the same model. Tr. 127, 128.

Based on the above testimony by Coats, I find that the angle iron bracket was previously connected to the second rigid step for the safety purpose of preventing excessive movement of the steps, or to keep them from breaking off the truck. It is the operator's responsibility to maintain the truck in a safe manner while it is in use. Tr. 142-43. The angle iron bracket's detachment from the step and the fracture in the weld of the main step framework constituted a defect, excessive movement and instability of the steps, creating a hazardous condition for the operator. I find that Respondent violated section 56.14100(c).

Significant and Substantial

The Commission reviewed and reaffirmed the familiar *Mathies*[6] framework for determining whether a violation is S&S in *Cumberland Coal Res.*, 33 FMSHRC 2357, 2363-65 (Oct. 2011):

> The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:
>
> > In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contribu ted to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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[6] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984).

. . . .
. . . .

The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id*. at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id*. The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The fact of the violation has been established. It contributed to a discrete hazard, a detached angle iron bracket and fractures on the truck steps that allowed for excessive movement, potentially resulting in a miner falling. Whether the violation was S&S turns on whether the hazard was reasonably likely to result in an injury causing event and whether it was reasonably likely that an injury would be of a reasonably serious nature.

Gabbard determined that an injury was reasonably likely because of the operator's repetitive exposure to the hazard. Tr. 117, 121. The haul truck was used on a daily basis and the operator would exit and enter the cab, walking up and down the steps, multiple times a day. Tr. 104-05, 108-09, 117. Gabbard concluded that the injury would have been serious and could have reasonably been expected to result in lost workdays or restricted duty from a broken or sprained ankle, torn ligament, or injury to the back caused by falling off the steps. Tr. 117; Ex. G-13. He also took into consideration the weight of operator, i.e., the person who would have been affected, when assessing the type of injuries. Tr. 117, 118, 119.

Given the high exposure of the operator to the hazardous steps and the amount of movement, I find that Gabbard correctly determined that injury was reasonably likely to occur. The injuries that Gabbard described were reasonable considering the height of the fall and the size of the operator. Any of those injuries could have caused the operator to

be out of work for several days and would have been reasonably serious in nature. Therefore, I find that the violative condition was significant and substantial.

Negligence

Gabbard marked the level of negligence as moderate. Ex. G-13. He stated that the truck operator noticed the steps sagging but did not report it for maintenance. Tr. 115. Gabbard did not verify the operator's statement by checking the pre-shift examination books, but the vehicle did require a pre-shift and on-shift examination. Tr. 116. He also based his decision on the fact that the broken weld on the angle iron bracket was polished from the vibration of the truck, indicating that the condition had existed "multiple shifts." *Id.* Further, Gabbard believed that the weld fractures were obvious when the area was examined closely. Tr. 111.

While it is uncertain whether the truck operator reported the condition, pre-shift and on-shift examinations of the truck were required and the condition had likely existed for multiple shifts. I find that Respondent should have been aware of the violative condition and that a finding of moderate negligence is appropriate.

The Appropriate Civil Penalties

As the Commission recently reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763 (Aug. 2012):

> Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:
>
> > the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 30 U.S.C. § 820(i).
>
> Under this clear statutory language, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties . . . we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."). While there is no presumption of validity given to the Secretary's proposed assessments, we have repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g., Sellersburg Stone*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May

2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform its review function. *See, e.g., Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

Good Faith - Operator Size - Ability to Continue in Business

The parties did not stipulate that Hanson demonstrated good faith in abating the violations, but based on the facts above, I find that it did. It was stipulated that paying the proposed penalties would not affect Hanson's ability to remain in business. Stipulations. The parties did not stipulate to the size of Hanson as an operator. However, the form reflecting calculations of penalty assessments, filed with the petition, indicates that Hanson is a small operator, and I so find. Overall, these factors are slightly mitigating.

History of Violations

Hanson's history of violations is reflected in a report generated from MSHA's database, the "R-17." Ex. G-19. The report lists violations issued at the Upton Quarry mine and reflects that 13 violations became final between February 8, 2011 and May 7, 2012. I accept the figures reflected in the report as accurate. However, the overall violation history set forth in the exhibit is deficient in that it provides no qualitative assessment, i.e., whether the number of violations is high, moderate or low. *See Cantera Green,* 22 FMSHRC at 623-24.

Some qualitative violations' history information can be found on the forms reflecting calculations of the proposed assessments. The Secretary's Part 100 regulations for regular penalty assessments take into account two aspects of an operator's violation history, the "total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period." 30 C.F.R. § 100.3(c). Only violations that have become final are used in the calculations. For total violation history, points used in the penalty calculation are assigned on the basis of the number of violations per inspection day, ranging from 0 points for 0 to 0.3 violations per day to 25 points for in excess of 2.1 violations per day. The assessment forms for the three litigated violations reflect an assessment of 25 points for overall violation history and 0 points for repeat violations. However, the penalty point calculation for overall violation history, in this case, is skewed. First, because the mine is small, the number of inspection days is low,[7] allowing even a small number of violations to total in excess of 2.1 violations per day. Second, the regulations provide that "[p]enalty points are not assigned for mines with fewer than 10 violations in the specified history period." 30 C.F.R. § 100.3(c)(1). In this case, three section 104(a) citations caused the number of penalty points assigned for violation history to drastically increase from 0 to 25 points. Accordingly, I reject the implication that Hanson has a high violations history and find that Hanson's overall history

[7] The number of inspection days is calculated by dividing the number of inspection hours during the 15-month period by 5, and rounding up.

of violations, as relevant to these violations, was moderate, and should be considered a neutral factor in the penalty assessment process.

Citation No. 8640965 is affirmed. A civil penalty in the amount of $392.00 was proposed for this violation. Considering the factors itemized in section 110(i) of the Act, I impose a penalty of $200.00 for this violation.

Citation No. 8640967 is affirmed as a violation. However, the injury that would have been reasonably expected to occur was lost workdays or restricted duty. A civil penalty in the amount of $392.00 was proposed for this violation. Considering the factors itemized in section 110(i) of the Act, I impose a penalty of $125.00 for this violation.

Citation No. 8640968 is affirmed as a violation. A civil penalty in the amount of $1,304.00 was proposed for this violation. Considering the factors itemized in section 110(i) of the Act, I impose a penalty of $600.00 for this violation.

The penalties imposed above, totaling $925.00, are lower than the $2,088.00 in penalties assessed for the violations for which Hanson was found liable. The reductions are the result of findings of lesser gravity and a determination that the penalty point numbers for overall violation history were excessive.

SETTLEMENT

The Respondent withdrew its contest of Citation No. 8640966. Accordingly, it will be ordered to pay the assessed penalty of $392.00 for the violation.

ORDER

Based on the foregoing, it is **ORDERED** that Citation Nos. 8640965 and 8640968 are **AFFIRMED**, and that Citation No. 8640967 is **AFFIRMED, as amended.**

It is **FURTHER ORDERED** that the operator pay total penalties of $1,317.00 within 45 days of this decision.[8]

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

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

Distribution (Certified Mail):

Ryan L. Pardue, Esq., U.S. Department of Labor, Office of the Solicitor, 1999 Broadway, Suite 800, Denver, CO 80202

Charles M. Sellards, Area Safety Manager, Hanson Aggregates Midwest, LLC, 1645 Tyrone Road, Lawrenceburg, KY 40342

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
WASHINGTON, DC 20004
TELEPHONE: 202-434-9958/FAX:202-434-9949

July 17, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),[1] Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 2010-1511 A.C. No. 15-19408-227973-01
v.	:	Docket No. KENT 2011-499 A.C. No. 15-19408-241858
TENNCO ENERGY, INC., Respondent	:	Mine: Hance Mine No. 1

DECISION

Appearances: Matthew S. Shepherd, Esq., Schean G. Belton, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;

Marco M. Rajkovich, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for Respondent.

Before: Judge Tureck

These cases are before me on two *Petitions for Assessment of Civil Penalty* filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Tennco Energy, Inc. ("Respondent"), pursuant to §105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 ("Act"). The first, filed on October 19, 2010, was docketed as KENT 2010-1511. It alleges one violation of the Mine Act and proposes assessing a penalty of $2,000. The second, filed on February 25, 2011, was docketed as KENT 2011-499. It alleges two violations of the Mine Act and proposes assessing $52,500 for each alleged violation for a total of $105,000 in penalties. Respondent contends that the citation and orders should be vacated.

[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

The following are the issues to be resolved in this case: (1) whether Respondent violated 30 C.F.R. §§ 75.202(a), 75.360(f), and 75.364(b); (2) whether the violations were significant and substantial; and (3) whether the violations were attributable to Tennco's high negligence and unwarrantable failure to comply with the standards.

The two cases were consolidated for hearing and decision.[2] A formal hearing was held in Somerset, Kentucky on March 15-16, 2012, and a subsequent hearing was held on April 4, 2012, in Hazard, Kentucky.[3] At hearing, Government Exhibits 1 through 18, Government Exhibit "Map," and Respondent's Exhibits A(1), A(2), A(3), CC, DD, EE, FF, LL, N, O, OO, Q, R, RR, S, T, UU, VV, and Y were admitted into evidence. Both parties then filed post-hearing briefs, the last of which was received on July 30, 2012.

I. Stipulations

The parties stipulate as follows:

1. At all times relevant to this proceeding, Tennco Energy, Inc. was the operator of the Hance Mine No. 1, Mine ID No. 15-19408.

2. The Hance Mine No. 1 is a "mine" as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

3. At all times relevant to this proceeding, products of the Hance No. 1 entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

4. Employees at the Hance Mine No. 1 produced approximately 224,000 tons of coal in 2010.

5. A copy of the citations/orders at issue in this proceeding was served on Tennco Energy, Inc. by an authorized representative of the Secretary.

6. Tennco Energy, Inc. timely contested the citations/orders.

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[2] The parties had settled two other cases prior to the hearing which had been consolidated with these cases, Docket Nos. KENT 2011-668 and KENT 2010-1512.

[3] And Citation to the exhibits of this proceeding will be abbreviated as follows: GX– Government Exhibit; RX – Respondent Exhibit. The transcripts from March 15-16, 2012 will be designated as TR1 and TR2 respectively. The transcript from April 4, 2012 will be designated as TR3.

7. Tennco Energy, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision regarding this case.

II. Findings of Fact and Conclusions of Law

Hance Mine No. 1 ("Mine") is a single section, underground drift coal mine located in Middlesboro, Kentucky and operated by Tennco Energy, Inc. TR1 9, 32. The average height of the Mine is seven feet. TR1 35. At the Mine, Respondent uses the room and pillar mining method. TR1 36-37. The Mine was designed with a primary and secondary escapeway. TR1 45. The secondary escapeway, also known as the No. 2 entry, serves as the main travelway to the No. 1 section of the Mine. TR1 43-44, TR2 407, TR2 588, Sec'y Br. 2-3. It is approximately 2,800 feet in length. TR1 40. At the time the citation and orders were issued, 32 people worked at the Mine, which had only been in existence for approximately ten months. TR1 38, TR2 485.

On June 22, 2010, Luther Shelton, a roof bolt machine operator at the Mine, sat down on a cardboard box next to a rib in the No. 1 section where he had been working that morning and began to eat his lunch. TR1 10, 62-63. Randy Miracle, Shelton's roof bolting partner, noticed a chunk of loose coal begin to fall above Shelton's head. TR1 351. Miracle warned Shelton about the loose piece of coal but, as Shelton got up, it fell on him and fractured two bones in his lower back. TR1 351-52. Shelton was transported out of the Mine and was flown by helicopter to a hospital at the University of Tennessee. TR1 10.

Alex Sorke, Tennco Energy's safety consultant, called MSHA and the State of Kentucky to report the accident at around 12:30 p.m. TR2 616. MSHA issued a §103(j) order telephonically at 12:39 p.m., which required that all employees withdraw from the Mine and stop all underground activity. TR1 58, 465. MSHA mine safety and health specialist James Lundy arrived at the Mine at about 1:35 p.m. to investigate the accident and, upon his arrival, the §103(j) order was modified to a §103(k) order.[4] TR1 58-59. Lundy had been employed with MSHA since 2006 and his duties as a mine safety and health specialist included conducting environmental surveys, participating in inspections, and going underground into the coal mines about three or four days a week. TR1 19, 28. Lundy was also trained in accident investigations. TR1 29. At the time of the hearing, he had close to 28 years of mining experience. TR1 26. After speaking to the miners who were standing outside about the accident, Lundy entered the Mine at approximately 2:25 p.m. TR1 63. Lonnie Curnutt, MSHA's acting field office supervisor; Alex Sorke, Tennco Energy's safety consultant; Mike Runyon, the Mine superintendent; and two individuals from Kentucky's Office of Mine Safety and Licensing, accompanied Lundy underground via two mantrips. TR1 64-65.

[4] A §103(k) order is similar to a §103(j) order in that it still requires that the mine remain evacuated, but it allows the mine operator to begin formulating an action plan on how to recover the mine and get back to work. TR1 59.

Lundy and the group headed to the No. 1 section of the Mine to gather information on what had caused Shelton's accident. TR1 65. Lundy testified that while traveling on the mantrips through the No. 2 entry, or secondary escapeway, he saw ribs that were sloughing and fractured, including approximately 50 loose ribs.[5] TR1 65-66. Lundy also saw ribs which had slabs of loose rock and loose coal tilting out towards the roadway. *Id.* There was a general discussion about recent changes in the mine ribs over the past few weeks, and Sorke mentioned that the ribs had taken on some moisture. TR1 69. As the party traveled towards the No. 1 section of the Mine through the No. 2 entry, Lundy testified that he noticed vertical cracks on ribs and saw bits and chunks of coal, some as much as three or four feet long, hanging horizontally from the stable rib material in approximately 40 to 50 places. TR1 70.

According to Lundy, once the group arrived at the No. 1 section, he saw an area where a roof fall had occurred that had been "dangered off" against travel. TR1 77. Lundy also observed a loose rib immediately inby the corner clip where the accident had taken place.[6] TR1 78. Specifically, Lundy noticed a fractured rib that was jutting out into the entry and a pillar that appeared as if it was taking a lot of weight with its fireclay mud oozing out.[7] *Id*. The fractured rib had a crack that measured at least half an inch out from the rib. TR1 81. Further, there was fresh rock dust that had fallen from the area, which showed that the crack in the rib was fairly recent. TR1 82. The fractured rib was 10 feet away from the accident scene. TR1 83.

After investigating the No. 1 section, Lundy walked back up the secondary escapeway about 300 or 400 feet past the feeder, made some observations, and then turned around. TR1 95, 290. While there, Lundy stated that he observed about four or five roof and rib problems, including some sloughage and pillars that had taken weight. TR1 97. Lundy stated that he took photographs of the accident scene, various parts of the secondary escapeway, and the examination records. TR1 101, 102, 197. Lundy then spoke to Runyon and told him that he saw a lot of sloughage on ribs and areas where cracks were present, and asked Runyon why the conditions had not been noted in the examination records. TR1 222-23. Runyon answered that he had seen the conditions but did not think that they were bad enough to put in the book. TR1 223. Lundy told Runyon that he disagreed with his assessment of the conditions and that he would be issuing citations for the conditions that he found in the Mine. *Id*. In order to abate the citations, Tennco Energy was required to modify the Mine's roof control plan and supplement it with a rib control plan. TR1 225.

The following day, on June 23, 2010, Lundy issued a citation and two orders to Tennco Energy for the conditions he had observed. TR1 230. The citation and orders were served on

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[5] Sloughing, also called fluffing, is when pieces of coal rib fracture and loosen from the actual coal pillar and either drop off the pillar or rotate outward. TR1 221-22.

[6] A corner clip is where a 90 degree corner of a pillar is cut back to make more room for machinery to go around the corner. TR1 76-77.

[7] Fireclay is a clay-type material that is lighter in color than general mud. TR1 79.

Sorke when he arrived at the MSHA District 7 office to get the Mine's's roof control plan changed to include rib control measures. TR1 225, 230. A revised roof control plan was issued on June 24, 2010 and added the use of cord lashing to control the ribs.[8] TR1 228. Tennco Energy commenced the cord lashing process on June 24, 2010 and completed cord lashing on June 30, 2010, lashing close to 70 percent of its pillars. TR1 229-30.

Citation No. 8335474

Lundy issued a §104(d)(1) citation, No. 8335474, alleging a significant and substantial violation of 30 C.F.R. §75.364(b)[9] that was "highly likely" to result in an injury or illness that could reasonably be expected to be "permanently disabling," and was caused by Respondent's "high" negligence and "unwarrantable failure" to comply with the standard. Section 75.364(b) requires:

> At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator:
> (1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.
> (2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled.
> (3) In each longwall or shortwall travelway in its entirety, so that the entire travelway is traveled.
> (4) At each seal along return and bleeder air courses and at each seal along intake air courses not examined under §75.360(b)(5).
> (5) In each escapeway so that the entire escapeway is traveled.
> (6) On each working section not examined under §75.360(b)(3) during the previous 7 days.
> (7) At each water pump not examined during a preshift examination conducted during the previous 7 days.

The "Condition or Practice" is described in the citation as follows:

> The weekly examination for hazardous conditions book for this mine does not include any reference to the ribs that are sloughing throughout the mine. The examiner admits the ribs are sloughing and spalling but that he does not think they are that bad. The

[8] Cord lashing is a process where two or three nylon straps are wrapped completely around a pillar in order to control sloughage from the pillar's ribs. TR1 227. The mine also supplements this process through the use of boards. TR1 228.

[9] All of the regulations cited in this *Decision* are contained in Title 30 of the Code of Federal regulations.

> condition is widespread even in the primary and secondary escapeways. The condition is obvious to a casual observer. Diligent examinations and accurate assessment of conditions are necessary to the safety of the miners. The mine is currently under a 103(k) order. When the order allows, a weekly examination must be made of the mine with accurate statement of conditions and actions taken. This action on the part of the examiner constitutes more than ordinary neglect, and is an unwarrantable failure to comply with a mandatory safety standard.

GX 1.

The Secretary proposes a penalty of $2,000 for this alleged violation of 30 C.F.R. §75.364(b) since no hazardous conditions were noted in the weekly reports after the examinations were performed on June 14 and June 21, 2010. Sec'y Br. 5. The hazardous conditions that the Secretary alleges existed in the Mine were widespread sloughing of ribs and the existence of 40-50 loose ribs in the primary and secondary escapeways. GX 1, Sec'y Br. 6, Sec'y Reply Br. 5. The Secretary contends that photographs in evidence as GX 9-O, 9-Q, 9-R, 9-T, 9-V, 9-W, and 9-X show the extent of the conditions that should have been included in the weekly examination reports. Sec'y Br. 6, Sec'y Reply Br. 5. The Secretary further contends that §75.364(b) was violated because these conditions would have been present during the weekly examinations that took place on June 14 and June 21, 2010, and should have been noted in the examination records. *Id*.

Respondent contends that this citation should be vacated. Specifically, Respondent argues that weekly examinations were performed by Runyon, the Mine superintendent, on June 1st, June 7th, June 14th, and June 21st, respectively. Resp't Br. 16, 18. The route Runyon took to perform these weekly examinations was to travel up the return entry all the way to the working section, cross into the intake, proceed to the secondary escapeway, and then exit the mine via the primary escapeway. TR2 448-51. He traveled through the areas where Lundy observed the allegedly hazardous conditions. *Id*. The Respondent argues that on all of these examinations, Runyon observed sloughing, but saw no hazards, and that Runyon was in the mine in between weekly examinations but saw no changes in the ribs at those times. Resp't Br. 16, 18. The Respondent further contends that on the day of the accident, June 22nd, Runyon had been in the No. 1 section, the section where the accident occurred, and he saw sloughage but he did not see any hazards. Resp't Br. 19.

During the weeks prior to the accident, MSHA Inspector John Sizemore, MSHA Engineer Mark Hiser, and MSHA personnel Kyle Nelson and Jamie Crawford had been in the Mine to perform inspections and tests. TR2 425, 432, 588, 596, 601, 603, 610-12, 614. Sizemore had been in the Mine on seven different days prior to June 22nd and traveled the very same roadways that Lundy would later travel. *Id*.; TR1 296. On May 21st, Sizemore was at the Mine for a general inspection and to conduct a respiratory dust survey. He was accompanied by Runyon. TR2 425. They traveled through the secondary escapeway all the way to the section via a golf cart and saw sloughage. TR2 425-26. Sizemore made no mention of the ribs and there were no

citations or orders issued for the ribs or the sloughage observed. TR2 428-29. On May 25th, Sizemore returned to the Mine and traveled once again along the secondary escapeway with Sorke. TR2 588-89. They viewed the ribs and saw sloughage, but Sizemore made no mention of hazards, made no comments regarding the roof or the ribs conditions, and did not issue any citations or orders related to rib control that day. TR2 591-92, 594.

On June 1st, Sizemore and Sorke traversed up the No. 1 beltline. TR2 596. On this particular inspection, however, Sizemore issued a citation because of a piece of dislodged rib. TR2 597. Sorke testified that the dislodged rib had been there for three months and was simply leaning against a wall. *Id.* Sizemore made no comments about any other ribs. *Id.*; TR2 600. On June 3rd, June 7th, June 8th, and June 15th, Sizemore returned to the Mine for various reasons and traveled in and out of the primary and secondary escapeways and through selected crosscuts. TR2 436, 446, 602, 606, 615. On these visits, he was accompanied by either Sorke or Runyon. Runyon testified that Sizemore saw the sloughage but voiced no concerns about ribs, and issued no citations or orders related to ribs. TR2 435-36, 445-46. In addition, Hiser was in the Mine on June 10th along with Nelson and Crawford. They entered through the return entry and traveled to the No. 1 working section. TR2 610-12. He was accompanied by Sorke, who testified that all three had the opportunity to look at the ribs in the No. 1 section and went through all seven passageways of the section, but no citations or orders were issued. TR2 611, 613-14.

Further, it should be noted that Lundy testified that the Mine had an excellent reputation and, as far as he knew, had no previous accidents involving the roof or ribs. TR1 293-94.

A copy of Respondent's weekly examination records for the Mine was admitted into evidence. The records for the examinations that took place on June 1, June 7, June 14, and June 21, 2010, under a column labeled "hazards noted", state "none at time of exam" for each date. RX CC. Thus, if sloughing or other conditions that actually were hazardous existed on these dates, Respondent would have violated §75.364(b) as alleged by the Secretary by failing to list the sloughage and loose ribs in the weekly reports.

The Secretary bases his case regarding Citation No. 8335474 on the testimony of Inspector Lundy supplemented by his inspection notes and the photographs he took during his June 22nd inspection of the Mine following the accident. The photographs the Secretary is relying on to support Lundy's testimony of the violations are of poor quality. They are photocopies of photographs, and in addition are not well lit. Nevertheless, they are clear enough to show some sloughing and cracks in the ribs somewhere in the secondary escapeway on June 22, 2010. But Lundy did not follow MSHA's internal guidelines by labeling the date, time, location, and a brief description of the photos (*see* RX OO), and had great difficulty in trying to identify where each photo was taken. For one thing, he was terribly confused about where he traveled in the Mine. His notes of the inspection state that he traveled up the secondary escapeway (RX UU at 9), which is accurate. But despite this entry in his notes, he testified consistently that the photographs he took other than at the accident site were taken in the primary escapeway. *See infra*. Then, under cross-examination, he stated that he had made a mistake, and he actually traveled in the secondary escapeway. TR1 288, 290. But he was sure he traveled in only one of the escapeways.

TR1 290. So his entire testimony regarding the locations where his photos were taken is incorrect. Lundy's inspection notes provide no details regarding the specific locations of the loose ribs that he allegedly saw.[10] TR1 288-89, TR3 77-78; RX UU, VV.

Further, since Lundy traveled only the secondary escapeway, all of Lundy's photos were of the No. 1 section where the accident took place and of the secondary escapeway. TR1 289, TR3 19, TR3 79. There are no photos in evidence of the conditions in the primary escapeway. Moreover, his admission that he only traveled in one of the escapeways, which would have been the secondary escapeway, is in conflict with the citation, which states that "[t]he condition is widespread even in the *primary* and secondary escapeways." Emphasis added. In stating that the condition was widespread in both escapeways, he relied upon what he was told by his supervisor, Lonnie Curnutt, regarding the conditions in the primary escapeway. TR1 322. The Secretary did not call Curnutt as a witness. Thus, there is no reliable evidence that there was any sloughing, loose ribs, cracks in ribs or any hazardous conditions in the primary escapeway.

Further, Lundy was deposed a week before the hearing, and was specifically questioned regarding the locations of the photos taken to show sloughing and loose ribs. During that short interval between his deposition and the hearing, he changed his mind regarding the sites where most of the photos were taken, but for the most part neither his deposition testimony nor his testimony at the hearing is correct.

Specifically, Lundy testified at the hearing that GX 9-O showed the condition at the No. 4 crosscut, but a week earlier during his deposition he had not been able to remember the location. TR1 152-54. Sorke testified, however, that GX 9-O could not have been taken within the first four crosscuts in the Mine because the ribs in those crosscuts were not banded after the inspection. TR2 642. He opined that Lundy would surely have had the Respondent band the area if he thought it needed remedial action prior to terminating the citations. TR2 642-43.

Lundy testified that GX 9-O showed rib failures that had extended out into the Mine floor and on to the roadway. TR1 156-57. However, he also testified that he did not see a hazard unless a person was close to the rib. TR1 342. Runyon testified that there were no hazards shown in GX 9-O. TR2 518. Specifically, he testified that GX 9-O showed sloughage but he did not see any hazards since the sloughage was on the ground. *Id*.

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[10] Sorke, who had worked at MSHA for almost 30 years in various capacities including as an accident investigator, testified that based on his experience, if an inspector finds a violation while going up an entry, then the location of the violation must be noted. TR2 586. Specific locations can be noted through the use of spad numbers, which are permanent markers that are placed on the roof. *Id.* The violation should reference either the spad number or another reference point. *Id*. The inspector's notes should also be very specific regarding the violations found. TR2 588.

Lundy testified that GX 9-Q was a photo of the No. 5 pillar in the primary escapeway. TR1 159. But he testified that he did not go into the primary escapeway. Sorke testified that the photo was of the offset and rib at the accident site. TR2 639. He is familiar with the site because he helped Lundy take measurements there. TR2 640. Lundy testified that the photo showed a thin fracture on the rib, a vertical crack that went from the mine floor almost to the roof on the rib, and coal material that had fallen from the rib on to the mine floor. TR1 163. However, he later testified on cross-examination that there were no hazards inherent to the rib shown in GX 9-Q. TR1 342. For the Respondent, Sorke testified that GX 9-Q showed flaking of the ribs and a spot on a rib where examiners may have pulled down a piece of coal. TR2 641-42. Runyon testified that there were no hazardous conditions shown in GX 9-Q. TR2 518.

Lundy testified that the photo in GX 9-R was taken in the No. 2 crosscut outby the primary escapeway; but admitted that he had been wrong regarding the location during his deposition a week earlier. TR1 166, 170. He testified that the hazard shown in GX 9-R was a fracture in the rib. TR1 166. Sorke could not identify from the photo where it was taken but testified that he saw no hazards. TR2 638. Runyon also testified that there were no hazards shown in GX 9-R. TR2 519.

Regarding GX 9-T, Lundy testified that the photo was taken by the No. 2 pillar of the primary escapeway; but he testified at his deposition that the photo was taken in the outby corner of the first pillar underground. TR1 172, 174. In either case, since he testified he did not go into the primary escapeway, his testimony cannot be correct. Sorke disagreed with Lundy's testimony regarding both of these sites, placing the location between the 18th and 19th crosscuts and the left corner of the 19th pillar. TR2 637. Lundy testified that the hazardous condition shown in GX 9-T was a pillar with an overhanging brow and a sloughed off rib underneath it. TR1 172. He also observed a crack in the top portion of the overhanging brow. TR1 172-73, TR1 336. Sorke explained that since the overhanging brow was not in the roadway, there was no hazard. TR2 519. Further, Sorke explained that the presence of a crack is not a hazard. It would only be a hazard if the crack was in the corner of the pillar and the pillar was hanging. TR2 523. He opined that a straight line crack, by itself, would not be a hazard. *Id*.

Regarding GX 9-V, Lundy testified that the photo was taken between the No. 2 and No. 3 crosscuts of the primary escapeway. TR1 176. Again, since he testified that he did not travel in the primary escapeway, this identification is incorrect. Sorke contradicted Lundy's testimony, stating that the photo was taken between crosscuts 17 and 18. TR2 634-35. Similar to Sorke, Runyon also testified that the exhibit was located between break 17 and 18 on the left-hand side of the roadway going up the secondary escapeway on the return neutral. TR2 521. The hazard that Lundy identified in the photo was the sloughing of the ribs. TR2 177. Neither Sorke nor Runyon saw any hazards. TR2 636, 519.

Government exhibit 9-X is a close-up of the photo in GX 9-W. Lundy testified that the photos were taken between the No. 2 and No. 3 crosscuts at the second full pillar underground of the primary escapeway. TR1 181, 185. He took the photos to show the "bread loafing type effect" of the rib material as it started to break and slough into the entry and to show that the

condition was obvious. *Id*. As has been noted several times above, the photos could not have been taken at the location specified by Lundy because he did not travel the primary escapeway on June 22, 2010. Although Runyon could not identify the exact location where the photos were taken, he did not see any hazards in either photo. TR2 521-22. Sorke also could not identify the specific location where the GX 9-X photo was taken but testified that it was not located in No. 2 and No. 3 crosscuts of the primary escapeway because the ribs in that area were not banded and had no sloughage. TR2 633. Sorke, however, identified the location of the photo in GX 9-W, stating that it was taken at the end of the No. 18 pillar and at the corner of the 19th pillar. TR2 636. He then realized that GX 9-W and 9-X were photos of the same area. TR2 637.

To add insult to injury, Lundy took additional photos, but lost the camera. TR1 270.

The only evidence the Secretary is left with to prove a violation of §75.364(b) is Lundy's testimony that there was sloughing, loose ribs and cracks in ribs somewhere in the secondary escapeway which should have been noted in the weekly examination reports of June 14 and 21. Lundy alleges that the conditions were obvious to the casual observer and were evident in the two weeks prior to Shelton's accident. TR1, GX 1. However, Sizemore and Hiser, the MSHA inspectors, were in the mine in the two to three weeks prior to Shelton's accident and neither discussed widespread hazardous ribs with Sorke or Runyon. In fact, Sizemore was in the mine seven times in the weeks proceeding the accident, between May 21st, and June 15th, and only cited the mine one time, for a single loose rib on June 1st. TR2 597. Sizemore also accompanied the third shift mine foreman on a preshift examination on June 3rd and, after the preshift examination, no one reported to Sorke any problems about ribs or sloughing. TR2 602. Sizemore made no mention of loose ribs or hazardous conditions to either Runyon or Sorke during the other six times he was in the mine. In fact, until the accident, no MSHA inspectors had mentioned sloughage issues to Runyon. TR2 417.

In light of all the defects in Lundy's testimony, as well as the failure of other MSHA inspectors to find similar hazardous conditions during the period Lundy alleges these conditions should have been reported in the weekly reports, the Secretary has not met his burden of proof regardless of Respondent's contrary evidence. Therefore, Citation No. 8335474 must be vacated.

But even if it is held that the Secretary's evidence, despite its considerable flaws, is sufficient to meet the Secretary's initial burden of proving a violation of §75.364(b), Respondent's contrary evidence outweighs the Secretary's.

There is a fundamental difference between the parties with regard to whether sloughage and the loose ribs are hazardous and whether loose ribs actually existed in the mine in the weeks leading up to the accident. Section 75.364(b) only requires an inspection for "hazardous conditions". Respondent admits that sloughage exists in the Mine, but argues that sloughage is not a hazard. Similarly, Respondent, without conceding that there were loose ribs in the Mine, argues that loose ribs are not inherently hazardous and are removed as soon as they are discovered.

Government Exhibit 9-O, 9-Q and 9-T do show sloughing of some rib material onto the Mine floor. GX 9-M, 9-N, 9-Q, 9-R and 9-T appear to show cracks in ribs. However, it is unclear just by looking at the photos if the conditions shown in the exhibits are hazardous. Thus, a deeper analysis of the testimony is necessary. Although Lundy characterized the conditions that he observed as hazardous, and testified that the conditions had existed for at least two weeks prior to Shelton's accident, he later testified that he saw no imminent dangers or hazards that would have necessitated stopping his investigation and requiring an immediate clean-up. TR1 257, 308-09.

Lundy testified that he observed about 50 loose ribs as he traveled to the No. 1 section. TR1 66. But as was pointed out above, Lundy's opinion is suspect. Lundy testified that he saw a fractured rib with a crack 10 feet from the scene of the accident. TR1 83. He testified to seeing this loose rib pulled down with a slate bar two or three days after the accident. TR1 383-84. Sorke testified that there was, in fact, a loose rib that was pulled down three or four days after the accident but disagreed with Lundy, stating that the loose rib that was pulled down was not evident on the day of the accident investigation. TR2 633. He also opined that he could not believe Lundy failed to take a picture of this loose rib if it had been apparent at the time of the accident. *Id*. So although a loose rib was taken down a few days after the accident, the only proof that it was there on June 22nd is Lundy's testimony which is contradicted by Sorke. Regardless, there is no reliable evidence that there were widespread loose ribs, as alleged in the citation.

Neither Sorke nor Runyon believed that the ribs in the Mine were hazardous. Runyon explained that what he looked for when examining ribs was to ensure that they were stable and not sloughed out into the roadway. TR2 414. If the ribs were sloughed out into the roadway, then the sloughage was cleaned up with a scoop or a low track. *Id*. Runyon further explained that unless the ribs were sloughing out into the roadway, they were left alone because digging out the ribs would only increase the amount of sloughage. TR2 415, 421. Further, if any part of a rib had broken loose but had not sloughed out, it would need to be pulled out with a bar and removed from the area. TR2 416. Miners were cautioned to stay away from ribs, and Runyon testified that it is hazardous to sit under sloughage. TR2 417, 506. Sloughage that is hanging and ready to come down is hazardous but the sloughage that is already on the ground is not hazardous. TR2 525. Further, changes in the underground mine temperature from the winter to the summer months result in condensation that will dampen the ribs. TR2 418. The middleman in the ribs absorbs the condensation and starts flaking out and, in turn, causes the ribs to start sloughing.[11] TR2 419-20. Runyon testified that nothing can be done to prevent the sloughage and that the only remedies were to clean up the sloughage if it got into the roadways and to provide additional support to the ribs. TR2 420-21.

Runyon was in the mine frequently in the weeks before the accident and testified that the ribs had not changed when he conducted his weekly examination on June 1, 2010. TR2 451. On that day, he saw sloughage in the No. 2 entry that had been there in the past but he did not see any

[11] The middleman is the clay, rock, or the mud in the middle of a seam of coal. TR2 419.

hazardous conditions from the rib sloughage. TR2 451-52. On June 7, Runyon went up the No. 2 entry, which was the same route as on June 1, 2010, and he saw minimal sloughage but no hazards. TR2 453. Runyon also went up the entries everyday between June 1st and June 7th when he was not conducting his weekly examinations and he did not see any changes in the ribs. TR2 454.

On June 8th, Runyon traveled with Sizemore on his inspection. Runyon observed no changes in the ribs from the weekly examination that he had conducted the day before on June 7th. TR2 455. On June 14, 2010, Runyon once again traveled up the No. 2 entry to perform his weekly examination and saw sloughage but no hazards. TR2 455. On the weekly examination that took place on June 21, 2010, Runyon traveled the same route and saw sloughage, but once again saw no hazards. TR2 456. On all of his weekly examinations, Runyon traveled up both the primary and secondary escapeways in their entirety. TR2 450-51,455. Runyon accompanied Hiser on his inspection on June 10, 2010, which included an imminent danger run. TR2 460. An imminent danger run requires going across the face of the mine and making sure that it is cleaned up and rock dusted, checking the test holes, checking that bolts are anchored in the right spads, and looking at the ribs. *Id*. Runyon testified that he saw sloughage but no hazards. TR2 457. From June 10th through June 21st, Runyon saw very little changes in the ribs. TR2 461. Finally, on June 22nd, the day of the accident, Runyon was in the No. 1 section within the hour before the accident. TR2 463. He had seen sloughage but had not seen any hazards. *Id*. Runyon testified that he did not believe the sloughage he observed was hazardous and did not place these observations in the weekly examination book because sloughage, by itself, was not considered a dangerous condition. TR2 478-79.

Sorke also did not see any hazardous conditions in the mine related to loose ribs. He testified that sloughage is a normal occurrence in all coal mines. TR2 574. Similar to Runyon, Sorke discussed the seasonal changes in coal mines that cause ribs to get damp or wet. TR2 579. He testified that the ribs in the Mine were damp to the touch due to seasonal changes and the ribs' middlemen had absorbed the moisture. TR2 580-81. Based on his 44 years of mining experience, Sorke testified that sloughing was always taken care of by scaling the ribs. TR2 581. In addition, MSHA's theory at the time he was employed with MSHA, from 1978 until his retirement in 2008, was that sloughage should be left alone unless it is in the roadway where people will travel. TR2 557, 567, 582. If it was in the roadway, then it should be cleaned up. TR2 582. He explained that the reason why the sloughage should be left alone unless it is in the roadway is because it will hold the rib and help to prevent further sloughage once the weight of the mountain sits down on the rib. TR2 583.

Shelton, the roof bolter who was injured, testified that, in the past, there had not been any problems with ribs in the Mine that would result in an accident. TR1 347. There were some rib problems in the roadway but the inspectors told them simply to clean them up. *Id*. He also testified that rib sloughing is when a rib loosens up and the method he knew to resolve it was to remove the loose rib with a slate bar. TR1 348. He had been told in the past not to get against the ribs and it was common knowledge. TR1 350. On the day of the accident, Shelton looked at the rib above him before he sat down and did not see any problems. TR1 351. He thought the rib

"looked good" and he would not have been in the area if he had seen any problems with the rib. *Id*.

There is a dispute between Lundy, on the one hand, and Runyon and Sorke on the other, regarding whether the coal that injured Shelton fell from the top of a rib or was cap coal. But exactly where the coal fell from is not important. What is important is that I credit Shelton and Sorke's testimony that they saw nothing hazardous regarding the ribs in the section. Shelton's testimony that prior to sitting down to eat he checked the rib and it looked good (TR2 350-51), is particularly persuasive. From one of the photos of the accident scene, GX 9-G, Sorke concluded based on three chunks of coal that had been left at the scene and the angle that the coal fell, that it was a piece of cap coal that was bonded to the roof that fell and hit Shelton. TR2 624-26, GX 9-G. Lundy testified that cap coal is the coal that is touching the mine roof and is also a part of the ribs. TR1 94. Runyon testified that since cap coal is bonded to the roof, there is no way to put a bolt in it; and if cap coal has a crack in it or it is loose, the best remedy is to pull it down. TR2 505. Sorke testified that cap coal that is bonded to the roof of a mine is not a detectable hazard. TR2 631.

As explained above, the evidence shows that Runyon conducted the weekly examinations in good faith. The evidence does not lead to the conclusion that a detectable rib hazard was the cause of the accident which injured Shelton. Runyon observed the No. 1 section within an hour prior to the accident and saw no changes in the ribs or obvious hazards. Shelton had looked at the rib above him immediately before he sat down and thought it "looked good." As explained above, Sorke and Runyon both testified that sloughage is common in underground coal mines and is not normally considered a hazard. In fact, sloughage is a hazard only if it can fall upon and injure a miner. Lundy confirmed this when he testified that sloughage is not a violation and would only be considered a hazard if it could cause injury. TR3 100-01.

Both Runyon and Sorke explained that sloughage will continue to occur if a mine attempts to continually remove it. Further, Lundy is the only one that saw hazardous rib conditions despite the fact that there were several MSHA personnel in the mine in the weeks leading up to the accident. During those inspections, there were no discussions about widespread loose ribs and the need to change the roof control plan. In fact, only one citation was issued by Sizemore, for a single loose rib. No one else saw the 40 to 50 loose ribs that Lundy claimed existed and that was the basis for Citation No. 8335474. In addition to not being able to identify where these allegedly loose ribs were, Lundy misstated the specific locations where the photos were taken. He also undermined some of his findings regarding hazards shown in the photos by testifying that there were no hazards inherent to the rib shown in GX 9-Q. TR1 342. From an analysis of the photos and the testimony, the evidence shows that the conditions which were sloughage, fractured ribs, and cracks in the ribs were not spilling into the roadways and did not lead to Shelton's injuries.

Instead, his injuries were caused by a fluke accident initiated by his ill-advised decision to sit near the ribs while eating lunch.[12]

Based on the above discussion, the evidence does not support a finding that there were widespread hazardous rib conditions throughout the mine. Therefore, a violation of § 75.364(b) has not been proven, and Citation No. 8335474 must be vacated.

Order No. 8335475

Order No. 8335475 alleges an S&S violation of 30 C.F.R. §75.202(a) that occurred, that will be permanently disabling, and that was caused by Respondent's "high" negligence and "unwarrantable failure" to comply with the standard. Section 75.202(a) requires that "the roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

The "Condition or Practice" is stated as follows:

> The operator has failed to control the ribs on the active 001-0 working section of this mine. Loose ribs have been found in various locations on and outby the active section. The ribs have not been supported or taken down to prevent miners from injury. Loose ribs are obvious along the roadways and on the active section. Failure to implement corrective measures has resulted in an accident involving a serious injury to a miner. Failing to recognize the hazard and implement necessary changes constitutes more than ordinary neglect and is an unwarrantable failure to comply with a mandatory safety standard. Foremen and management personnel shall be trained in hazard recognition and the revised roof control plan prior to returning to the underground areas of the mine.GX 6.

The Secretary proposes a penalty of $52,500 for this alleged violation of 30 C.F.R. §75.202(a). The Commission has held that §75.202(a) is a broadly worded standard and therefore "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have provided in order to meet the protection intended by the standard." *Canon Coal Co*., 9 FMSHRC 667, 668 (Apr. 1987).

As discussed above, Lundy's claims of widespread loose ribs in the mine at the time of Shelton's accident is not supported by the evidence. Since the evidence did not show widespread loose ribs, I cannot find that there was a failure by Respondent to implement corrective measures. Further, Runyon testified that Respondent provided rib support in the Mine by setting timbers and cribs and controlled loose ribs by pulling down the loose material and cleaning up sloughage. TR2 414-16, TR2 473, 479. Respondent did not use cord lashing to control loose ribs because,

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[12] It should be noted that the Secretary's brief paid scant attention to proof of the violations at issue in this case and none whatsoever to the inconsistencies in Lundy's testimony.

prior to the accident, Runyon and Sorke had never heard of it, and in any event it was not required by the Mine's roof control plan. TR2 473-74, 479.

Sorke also testified that during his close to 30 year career at MSHA and 44 years of total mining experience, using timbers and cribs and scaling sloughage was an acceptable method to control ribs. TR2 581-82, 674. In fact, Lundy himself testified that he saw timbers, straps, and differing roof bolt sizes throughout the mine during his investigation. TR1 294-95. Lundy also testified that scaling ribs can be an acceptable means to control ribs if all of the material is removed and there is no longer a hazard. TR3 103. The photos that he took to show the rib conditions showed the straps, different sized bolts, and other evidence of supplemental roof support that existed in the secondary escapeway. GX 9-A, 9-C, 9-E, 9-M, 9-N, 9-O, 9-Q, 9-R, 9-V, 9-W. Lundy testified that the use of timbers has not been recognized as rib support by MSHA since 2009 because they are ineffective. TR1 373-74, 383. However, apparently no one from MSHA had ever discussed this with Respondent, and Respondent had not been required to change its roof control plan at the Mine. Both Runyon and Sorke testified that the corrective method that Lundy required, the use of cord lashing or banding, would not have prevented the chunk of coal from falling and striking Shelton. TR2 477, 669. In fact, as Sorke testified, rib control measures do not prevent sloughage from occurring. TR3 74. Lundy testified that Shelton could still have been injured even if cord lashing had been implemented at the time of his accident. TR1 380. Neither Sizemore and Hiser, who were both in the mine the two weeks preceding the accident, mentioned the need for additional rib control methods or the need to revise the mine's roof control plan. TR2 429-30, 436, 459, 594, 600, 602, 606, 613-14.

Thus, the evidence shows that the Mine was complying with the provisions in its approved roof control plan prior to and, at the time of the accident, and was using generally accepted industry methods to control its ribs. Therefore, Order No. 8335475 must be vacated.

Order No. 8335476

> Order No. 8335476 alleges an S&S violation of 30 C.F.R. § 75.360(f) that occurred, will be permanently disabling, and that was caused by Respondent's"high" negligence and "unwarrantable failure" to comply with the standard. Section 75.360(f) requires:
> At each working place examined, the person doing the preshift examination shall certify by initials, date, and the time, that the examination was made. In areas required to be examined outby a working section, the certified person shall certify by initials, date, and the time at enough locations to show that the entire area has been examined.

The "Condition or Practice" is stated as follows:

> The operator has failed to record the hazardous conditions (loose ribs) encountered during the preshift examinations of the mine. No loose ribs have been noted in the book reviewed for the previous three weeks. The corrective measures are also missing from the book provided for that purpose. The books have been countersigned and include at least 3 examiners who are agents of the operator. Loose ribs are noted through both the primary and secondary escapeways. The roof control plan has been found to be inadequate for the mining conditions and a miner has received serious injuries due to an accident. Proper

examination of the mine would have shown the roof control plan was ineffective due to the presence of loose ribs throughout the mine. Failure to provide a record of findings during a mine examination constitutes more than ordinary neglect and is an unwarrantable failure to comply with a mandatory safety standard.

GX 7.

The Secretary proposes a penalty of $52,500 for this alleged violation of 30 C.F.R. §75.364(b). Similar to Citation No. 8335474, the Secretary alleges that loose ribs were present but no hazardous conditions were noted in the records, in this instance the records of pre-shift examinations. Although the order mentions a three week period in which no loose ribs were noted in these records, the Secretary's evidence and argument are limited to pre-shift examinations conducted on June 18, June 19, June 20, June 21, and June 22, 2010. Sec'y Br. 14; GX 10, 11, 11-A, 11-B, 12, 12-A, 12-B, 13. The Secretary argues that since no hazardous conditions were recorded, inadequate pre-shift examinations were conducted, in violation of section 75.364(b). *Id*.

Respondent contends that this citation should be vacated because there is no proof of loose ribs in either the primary or secondary escapeways. Resp't Br. 35-36. Further, Respondent points out that the pre-shift reports for June 18-22 do note hazardous conditions in the Mine which had to be remedied, although none involved the roof or ribs.

Lundy testified that GX 10, 11, 11-A, 11-B, 12, 12-A, 12-B, and 13, the preshift and onshift examination records from June 18 through June 22, 2010, did not list any hazardous rib or roof conditions. TR1 197-206. However, as discussed above, the evidence does not establish that there were widespread hazardous rib conditions throughout the mine in the weeks preceding the accident and on the day of the accident. The defects in the evidence proffered by the Secretary to support Citation 8335474 are just as applicable to this order. Therefore, Order No. 8335476 must be vacated.

III. Order

It is ***ORDERED*** that Citation No. 8335474, Order No. 8335475, and Order No. 8335476 are vacated, and Docket Nos. KENT 2010-1511 and KENT 2011-499 are dismissed.

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

Distribution:

Matthew S. Shepherd, Esq., Schean G. Belton, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456.

Marco M. Rajkovich, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9987 / FAX: 202-434-9949

July 19, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. KENT 2011-400 A.C. No. 15-16054-239158-GTY
v.	:	
BRESEE TRUCKING, Respondent	: :	Mine: No. 1 Plant

DECISION

Appearances: J. Malia Lawson, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;
Michael D. Clements, Kingsport, Tennessee, for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of her Mine Safety and Health Administration ("MSHA"), against Bresee Trucking, ("Bresee") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815.[1] The Secretary seeks a civil penalty in the amount of $11,306.00 for one alleged violation of her mandatory safety standards.

A hearing was held in Kingsport, Tennessee. The following issues are before me: (1) whether Bresee violated 30 C.F.R. § 77.404(a); (2) whether the violation was significant and substantial; and (3) whether Bresee was moderately negligent in violating the standard. The parties' Post-hearing Briefs are of record.

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

[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

I. Stipulations

The parties stipulated as follows:

1. At all times relevant to the proceeding in Civil Penalty Docket KENT 2011-400, Respondent was an independent contractor providing services to Old Virginia Services, LLC, in Harlan County, Kentucky, Mine ID Number 15-16054. Respondent's Contractor ID is GTY.

2. This preparation plant is a mine, as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(3)(h).

3. At all times relevant to the proceeding in Civil Penalty Docket KENT 2011-400, products of this mine entered commerce, or the operations or products thereof affected commerce within the meaning and scope of Section IV of the Mine Act, 30 U.S.C. § 803.

4. Respondent worked approximately 200,197 hours in the year 2009.

5. A copy of the citation at issue in this proceeding was served on Respondent by an authorized representative of the Secretary.

6. Respondent timely contested the citation.

7. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the presiding Administrative Law Judge has the authority to hear this case and issue a decision regarding this case.

8. The proposed penalty will not affect Respondent's ability to remain in business.

9. The proposed penalty is appropriate to the size of the business of the operator.

10. The operator's history of previous violations is shown in the document entitled R-17.

11. The operator abated the violation it was cited for herein in a timely manner and in good faith.

12. At the mine, mine identification number 15-16054, on September 29, 2010, the left rear brake chamber of the Mack maroon tandem coal truck, number 24, Kentucky tag number 232705, had an audible air leak.

Sec'y Br. at 1-2.

II. Factual Background

On September 29, 2010, Bresee provided trucking services to Old Virginia Services, LLC, operator of the No. 1 Plant ("Plant") in Harlan County, Kentucky, transporting approximately 150 loads of coal from the Yellow Rose and Clover Lick mines to the Plant for processing. Tr. 12, 164-65. On that day, MSHA Inspectors Jerry Hensley, Argus Broch, Joe Lawson, George Jackson and Charlie Ramsey conducted a regular inspection of coal trucks entering the Plant. Tr. 28.

After the inspectors arrived at the Plant, Hensley pulled over the No. 24 Mack truck for inspection. Tr. 33; Ex. P-1. He discussed the condition of the truck with the driver, Troy Weaver, and blocked the tires to prevent them from moving once the parking brake was released. Tr. 32-33. Hensley and Ramsey then instructed Weaver to engage the brake by depressing the brake pedal while they walked around the outside of the truck. Tr. 34. As they circled the truck, the inspectors heard a hissing noise which Hensley identified as an air leak. Hensley walked back to the operator's cab, looked inside, and saw that when Weaver engaged the brake, the brake pressure gauge indicated that the braking system lost 20 pounds of air pressure in 27 seconds. Tr. 35. When the inspectors looked under the truck at the slack adjusters on each side of the front axle they saw that when Weaver depressed the brake pedal, the slack adjuster for the left front brake moved further than two inches away from the brake chamber. Tr. 38, 40.[2] They then looked at the slack adjuster for the right rear brake on the rear axle and saw that it also moved further than two inches away from the brake chamber when the pedal was depressed. Tr. 46. Hensley proceeded to measure the distance between the brake chambers and the slack adjusters without depressing the brake pedal and then, after depressing the pedal, the same distance on both the left front and right rear brakes. Tr. 178-80; Ex. P-12. When the pedal was depressed, Hensley found that the slack adjuster for the left front brake moved three inches away from its brake chamber, and the slack adjuster for the right rear brake moved two and one-quarter inches away from its brake chamber. Tr. 56-58. Hensley then informed Weaver of the air leak and defective slack adjusters, asked him to take the truck out of service until it could be repaired, and issued a citation to Bresee for not maintaining the truck in safe operating condition. Tr. 61; Ex. P-1.

III. Findings of Fact and Conclusions of Law

Inspector Hensley issued 104(a) Citation No. 8350007 alleging a "significant and substantial" violation of section 77.404(a) that was "reasonably likely" to result in an injury that

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[2] A slack adjuster connects the pushrod extending from the brake chamber to the camshaft. When the brake pedal is depressed, air from the brake chamber moves the pushrod towards the slack adjuster, which, in turn, moves the camshaft, exerting pressure on the s-cam. The s-cam pushes the brake shoes apart, contacting the brake drum and stopping the wheels from moving. Tr. 39, 41-44; Ex. P-3 at 13, P-12.

could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Bresee's "moderate" negligence.[3] The "Condition or Practice" is described as follows:

> The Mack maroon tandem coal truck, Kentucky tag #232705, Co. #24 is not maintained in safe operating condition. When checked, the left rear brake chamber has an audible air leak, the slack adjuster for the right rear brake on the back tandem measures 2.25 inches when the brake pedal is depressed and the slack adjuster for the left front brake on the front tandem measures 3 inches when the brake pedal is depressed. This truck hauls heavy loads on steep grades. The operator removed the truck from service until the cited conditions could be repaired.

Ex. P-1. The citation was terminated after the left front tandem slack adjuster was properly adjusted, the right rear brake on the back axle was changed, and the air leak was repaired.

1. Fact of Violation

In order to establish a violation of one of her 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)).

Hensley opined that truck brakes may not work properly without the full amount of air pressure available, and that during normal use, the leak could expand and rupture the chamber which would render the left rear brake completely inoperative and incapable of stopping the truck. Tr. 35-37. He surmised that the air leak was coming from the service brake chamber rather than the parking brake chamber, since the parking brakes were not activated during the inspection and the gauge in the cab indicated that air was being lost from the service brake system. Tr. 182.[4] According to the North American Standard Vehicle Out-of-Service Criteria ("Criteria") used by MSHA, for the No. 24 truck with a Type 30 clamp brake chamber, the brake adjustment limit is two inches. Ex. P-13 at 15; Tr. 40-41. Hensley testified that if the slack adjuster moves further than two inches away from the brake chamber, the brake is defective under the Criteria and may not work properly. Tr. 44-45; Ex. P-3 at 15. He added that if the brake on one side of the axle is beyond the adjustment limit and the brake on the other side is within the limit, the brakes will apply unevenly on that axle, which could cause the driver to lose control of the truck. Tr. 62-63.

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[3] 30 C.F.R. § 77.404(a) provides that, "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

[4] Each brake canister contains two chambers, one for the service brake and the other for the parking brake. Tr. 110-11.

Additionally, the out-of-adjustment slack adjusters indicated that the brake shoes were being worn, which could lead to wear on the brake drum or the s-cam falling under the brake shoes, rendering the brake totally inoperative. Tr. 63-66. Despite these defects, Hensley testified, Weaver told him that the truck had no defects, and none was recorded in his Driver's Vehicle Inspection Report. Tr. 103-04; Ex. R-3. Given that the truck is driven on steep and winding roads, he opined that it would be unsafe to operate it with two defective brakes and an air leak, especially since the Criteria provide that when two of its six brakes are defective the truck should be taken out of service. Tr. 58-59, 67, 166; Ex. P-3 at 12. Hensley also testified that the conditions had been present for at least a day, and that Bresee should have observed and corrected them in a pre-operational exam. Tr. 70.

Dennis Hedrick served as the supervisor of Bresee's Kentucky division, and had conducted maintenance on coal trucks for 27 years at the time of the inspection. Tr. 106-08. Contrary to Hensley's testimony, Hedrick stated that when he looked at the truck after Hensley's inspection, he found that air was leaking out of the parking brake chamber rather than the service brake chamber and, therefore, the brake's stopping power was unaffected. Tr. 110-12, 115. Hedrick recalled that the truck weighed 42,000 pounds, hauled 30 to 42 tons of materials, and operated on windy roads in the dark of night. Tr. 164, 166-67. He testified that Bresee had upgraded the truck by installing a supplemental brake system, a driveline brake, which enhanced the truck's braking power when it descended a hill, and that the supplemental brake was unaffected by the air leak. Tr. 138-43; Ex. R-5. However, he admitted that he would not operate the truck given the brake defects that Hensley found, nor would he want anyone else to do so with the standard brake system disabled, even if the supplemental brake were operational. Tr. 116, 139. Hedrick also testified that the truck would have been inspected for air leaks and brake defects once a week, and that the brakes would have been adjusted twice weekly by a mechanic. Tr. 159-61.

I find Hensley's testimony credible, that the air leak in the service brake chamber and the extended slack adjusters prevented the brakes from engaging properly, which could cause the truck to skid off-road or crash. Given the treacherous conditions in which the truck carries heavy loads, a loss of braking capacity seriously compromised its safe operation, irrespective of the supplemental brake system, which Hedrick admitted was insufficient assurance that the truck would stop safely. Based on the air leak and the slack adjusters out of adjustment, I conclude that the Secretary has proven that Bresee violated section 77.404(a).

Given that the evidence indicates that these conditions had existed for at least a day, Bresee should have detected and corrected the brake defects, especially since the brake pressure gauge registered a dramatic loss of pressure when the brakes were engaged, and the air leak was audible to persons in close proximity to the truck. However, while installation of the supplemental brake system does not relieve Bresee of its obligation to maintain the primary system in safe operating condition, it does reflect concern for the safe operation of the truck and the safety of its driver. Therefore, I find that Bresee was moderately negligent in violating the standard.

2. Significant and Substantial

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is "significant and substantial" ("S&S") under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981): 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). In *U.S. Steel Mining Company*, the Commission provided further guidance on the third element:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." (citation omitted). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial.

U.S. Steel Mining Co., 7 FMSHRC 1125, 1129 (Aug. 1985) (emphasis added).

The fact of violation has been established, and the violation contributed to the truck driver's inability to stop his vehicle safely. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

Hensley testified that if the truck were to travel over a berm, impact a high wire or collide with a vehicle, the driver would likely suffer catastrophic crushing injuries to his arms, legs and chest. Tr. 68-69. On the contrary, Hedrick argued that the supplemental brake allowed the driver to stop the truck even if the primary braking system failed. Tr. 139. The Commission has held that, in order to satisfy the third element of the *Mathies* test, the Secretary must prove that the hazard contributed to by the violation will be reasonably likely to cause injury. The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). I find that a truck weighing 42,000 pounds and carrying 30 to 42 tons of material, colliding with another vehicle or sizeable object or leaving the road and falling down an embankment, is reasonably likely to result in the driver sustaining a

wide range of serious injuries such as lacerations, broken bones and head trauma, as well as crush injuries and even death. Therefore, I conclude that the violation was S&S.

IV. Penalty

While the Secretary has proposed a civil penalty of $11,306.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 20 U.S.C. § 820(j). *See Sellersburg Co.,* 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 763 F. 2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Bresee is a medium-size operator, with a significant history of previous violations that is an aggravating factor in assessing an appropriate penalty. Stip. 4; Ex. P-11. As stipulated, the proposed civil penalty will not affect Bresee's ability to continue in business, and Bresee timely abated the violation in good faith. Stip. 8, 11. The remaining criteria involve consideration of the gravity of the violation and Bresee's negligence in committing it. These factors have been discussed fully. Therefore, considering my findings as to the six penalty criteria, the penalty is set forth below.

It has been established that this serious violation of section 77.404(a) was reasonably likely to result in an injury that could reasonably be expected to result in lost workdays or restricted duty, that it was timely abated, and that Bresee was moderately negligent. Therefore, I find that a penalty of $11,306.00, as proposed by the Secretary, is appropriate.

ORDER

ACCORDINGLY, Citation No. 8350007 is **AFFIRMED**, as issued, and it is **ORDERED** that Bresee Trucking **PAY** a civil penalty of $11,306.00 within 30 days of the date of this Decision.

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

Distribution:

J. Malia Lawson, Esq., U.S. Dept. of Labor, Office of the Solicitor, 211 7th Avenue North, Suite 420, Nashville, TN 37219

Michael D. Clements, 408 A Manor Drive, Kingsport, TN 37660

/ss

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001-2021
Telephone: (202) 434-9980 / Fax: (202) 434-9949

July 22, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS: Docket No. KENT 2009-240 A.C. No. 15-04331-166529-02 Q7G Mine: Prep Plant Docket No. KENT 2009-562 A.C. No. 15-19102-172530 Q7G Mine: Prep Plant Docket No. KENT 2009-1281 A.C. No. 15-17077-188288 Mine: RB #5 Docket No. KENT 2009-1284 A.C. No. 15-18771-188304 Mine: RB #12 Docket No. KENT 2009-1286 A.C. No. 15-19102-191269 Mine: P-1 Docket No. KENT 2009-1388 A.C. No. 15-19102-191269 Mine: P-1 Docket No. KENT 2009-1549 A.C. No. 15-18145- 195699 Mine: CM & E No. 3 Docket No. KENT 2009-1601 A.C. No. 15-18771-197255
v.		
MANALAPAN MINING COMPANY ET AL., Respondent.		

: Mine: RB #12
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: Docket No. KENT 2010-9
: A.C. No. 15-19102-197266-01
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: Mine: P-1
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: Docket No. KENT 2010-10
: A.C. No. 15-19102-197266-02
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: Docket No. KENT 2010- 148
: A.C. No. 15-17077- 200396
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: Docket No. KENT 2010-152
: A.C. No. 15-19102- 200414-02
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: Docket No. KENT 2010-918
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: A.C. No. 15-17077-219606
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: Docket No. KENT 2010-1211
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: Docket No. KENT 2010-1213
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: Docket No. KENT 2010-1214
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: A.C. No. 15-18771-225937
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: A.C. No. 1518771-226595 Q7G
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: Docket No. KENT 2010-1514
: A.C. No. 15-17077-229388
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: Docket No. KENT 2010-1515
: A.C. No. 15-18771-229396-01
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: Docket No. KENT 2010-1516
: A.C. No. 15-18771-229396-02
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: Docket No. KENT 2010-1517
: A.C. No. 15-19102-229401-01
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: Docket No. KENT 2010-1518
: A.C. No. 15-19102-229401-02
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: Docket No. KENT 2010-1648
: A.C. No. 15-17077-232523
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: A.C. No. 15-18771-232531
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: Docket No. KENT 2010-1651
: A.C. No. 15-19102-232534
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: Docket No. KENT 2011-143
: A.C. No. 15-17077-235588
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: A.C. No. 15-19514-235613-01
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: Docket No. KENT 2011-145
: A.C. No. 15-19514-235613-02
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: A.C. No. 15-17077- 238728
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: A.C. No. 15-18771-241670
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: Mine: RB #12

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: Docket No. KENT 2011-448
: A.C. No. 15-19514-241685
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: Mine: D-1 Mine
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: Docket No. KENT 2011-559
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: A.C. No. 15-17077-244188-02
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: A.C. No. 15-19102-244202
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: A.C. No. 15-19514-244212
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: Mine: D-1 Mine
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: A.C. No. 15-18771-247071-01
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: Docket No. KENT 2011-682
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: Docket No. KENT 2011-684
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: Mine: D-1
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: A.C. No. 15-19498-249244
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: Docket No. KENT 2011-817
: A.C. No. 15-19514-249636
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: Mine: D-1
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: Docket No. KENT 2011-823
: A.C. No. 15-18771-249620
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: Mine: RB #12
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: Docket No. KENT 2011-824
: A.C. No. 15-19102-249626
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: A.C. No. 15-04331-252258
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: Mine: Prep Plant

: Docket No. KENT 2011-948
: A.C. No. 15-17077-252265
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: Docket No. KENT 2011-949
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: Docket No. KENT 2011-950
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: Mine: RB #12
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: Docket No. KENT 2011-951
: A.C. No. 15-19102-252275
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: Docket No. KENT 2011-952
: A.C. No. 15-19514-252288
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: Docket No. KENT 2011-991
: A.C. No. 15-04331-250045 Q7G
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: Docket No. KENT 2011-992
: A.C. No. 15-19102-250080 Q7G
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: Mine: P-1
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: Docket No. KENT 2011-1053
: A.C. No. 15-04331-252712 Q7G
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: Docket No. KENT 2011-1128
: A.C. No. 15-18771-255530-01
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: Mine: RB #12

: Docket No. KENT 2011-1129
: A.C. No. 15-18771-255530-02
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: Docket No. KENT 2011-1130
: A.C. No. 15-19514-255548
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: A.C. No. 15-04331-255517
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: A.C. No. 15-19102-255536
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: Docket No. KENT 2011-1151
: A.C. No. 15-04331-256021 Q7G
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: A.C. No. 15-18771-258422
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: A.C. No. 15-19514-258436
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: Docket No. KENT 2011-1236
: A.C. No. 15-04331-258408
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: A.C. No. 15-19102-258428
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: A.C. No. 15-17077-261016
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: Docket No. KENT 2011-1334
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: A.C. No. 15-18771-261023-02
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: Docket No. KENT 2011-1337
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: A.C. No. 15-19514-261034
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: A.C. No. 15-19498-260559
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: Docket No. KENT 2011-1375
: A.C. No. 15-19102-261444 Q7G
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: A.C. No. 15-04331-264087
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: Docket No. KENT 2011-1495
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: Docket No. KENT 2011-1496
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: Docket No. KENT 2011-1498
: A.C. No. 15-19102-264112-02
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: Mine: P-1

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: A.C. No. 15-19514-267106-01
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: Mine: D-1 Mine
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: Docket No. KENT 2012-24
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: Mine: D-1 Mine
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: A.C. No. 15-04331-269815
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: Docket No. KENT 2012-141
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: Docket No. KENT 2012-142
: A.C. No. 15-19514-269835
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: A.C. No. 15-04331-272673
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: Docket No. KENT 2012-321

: A.C. No. 15-18771-272686
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: Docket No. KENT 2012-1394

: A.C. No. 15-18725-295419
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: Docket No. KENT 2012-1499
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: Docket No. KENT 2012-1501
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: Mine: RB #12
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: Docket No. KENT 2013-17
: A.C. No. 15-19514-300891-01
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: Docket No. KENT 2013-18
: A.C. No. 15-19514-300891-02
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: Mine: D-1
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: Docket No. KENT 2013-352
: A.C. No. 15-19102-309285
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: Mine: P-1

DECISION

Before: Judge David F. Barbour

Appearances: Amanda Slater, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado
Schean Belton, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
John Williams, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky
Benjamin Bennett, 10156 US Hwy 25E, Pineville, Kentucky 40977
Jim Brummett, Jim Brummett, Manalapan Mining Company, Inc., 8174 E. Hwy 72, Pathfork, Kentucky 40863

The above-captioned cases are before me upon petitions for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. This matter,

consolidated under lead Docket No. KENT 2009-1097, consists of 137 cases containing 982 citations and orders involving Manalapan Mining Company Inc. ("Manalapan"), B&S Trucking Company and Cloverfork Mining & Excavating, collectively referred to as Manalapan et al. The companies share common ownership and Manalapan is the Respondent for the majority of the cases.

On May 01, 2012, the parties jointly moved that all of the Respondents' cases pending before the Commission be consolidated to facilitate settlement negotiations and evaluation of the Respondents' claim that payment of the penalties proposed by the Secretary would affect its ability to continue in business. The cases were consolidated and set for hearing on October 16, 2012 in Lexington, Kentucky.

In a status update to the court, the Secretary[1] reported that the parties were unable to reach an agreement regarding the effect of the proposed penalties on the Respondents' ability to continue in business, and that, as a result, settlement negotiations were unable to progress. The parties jointly requested that the court rule on whether the proposed penalties would affect the Respondents' ability to continue in business and hold a hearing on the other civil penalty criteria and the fact of violation at a later date. Accordingly, the court scheduled a bifurcated hearing. Hearing I, which solely addressed the Respondents' ability to continue in business, was scheduled to take place telephonically on December 13, 2012. Any cases not settled during subsequent settlement discussions were scheduled to be heard during Hearing II, in January 2013.

During a subsequent conference call with the court, Respondents' counsel reported that his clients were no longer alleging that the proposed penalties would affect their ability to continue in business. The Respondents' counsel restated this point on the record during the telephonic hearing on December 13, 2012. The parties also requested additional time to discuss settlement. They stated that the focus of their prior discussions had been the Respondents' ability to continue in business and that, as a result, they had little opportunity to engage in substantive settlement discussions. The cases were rescheduled to be heard March 05 - 15, 2013, and April 09 - 19, 2013, in Lexington, Kentucky. On February 11, 2013, the parties reported that they had made significant progress in their global settlement negotiations and requested additional time to conduct in person settlement discussions. On February 15, 2013, the court issued an order, which granted the parties additional time to negotiate and rescheduled the hearing for any outstanding dockets for April 09 - 12, 2013, April 15 - 19, 2013, June 04 - 06, 2013 and June 25 - 28, 2013. FIn the order, the court also granted the motion filed by Respondents' counsel to withdraw as counsel of record, with his clients' consent, due to their inability to pay additional attorneys' fees. The Respondents proceeded *pro se* and Benjamin Bennett, President of Manalapan Mining Company, represented the Respondents in the global settlement negotiations that took place March 04-05, 2013, March 07-08, 2013 and March 11-13,

[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

2013, in Pineville, Kentucky.[2] Steven Spitzer, attorney-advisor to Judge Jacqueline R. Bulluck, was available via phone to assist the parties as a settlement attorney. On March 13, 2013, the parties reported that settlement negotiations had been successful and that only 62 citations and orders remained. They requested that the hearing scheduled for April 09 - 12, 2013 be cancelled and that the parties be permitted to use April 15-19, 2013, originally reserved for a hearing, to conduct additional global settlement negotiations. The court granted the request. A subsequent conference call to discuss the outcome of settlement negotiations was scheduled and the remaining cases were set for hearing June 04 - 06, 2013.

During a status call on May 14, 2013, the parties reported that all but nine violations contained in three dockets, KENT 2009-1097, KENT 2010-1363 and KENT 2012-727, had been settled out of the original group of 143 dockets. A related docket, KENT 2012-1133, was consolidated with the three remaining dockets. The four cases were heard beginning June 04, 2013. The parties were directed to file briefs with the court by September 03, 2013.

The Secretary has filed motions to approve the global settlement to which the Respondents have agreed. Total proposed penalty assessment amount was $1,994,395.00. The total proposed settlement amount is $1,197,365.00.

I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The settlement terms are set forth below:

Citation/Order No.	Modification to Citation	Proposed Penalty	Amended Penalty
KENT 2009-1281			
8335781	No Change	$ 100.00	$ 100.00
8335782	No Change	$ 100.00	$ 100.00
8335783	Penalty Reduction	$ 1,026.00	$ 800.00
8335784	Penalty Reduction	$ 362.00	$ 200.00
8335785	Modify to Unlikely, Non-S&S	$ 1,530.00	$ 1,400.00
8335786	Modify to Unlikely, Non-S&S	$ 634.00	$ 500.00
8335787	Penalty Reduction	$ 108.00	$ 100.00
8335788	Penalty Reduction	$ 499.00	$ 300.00
8335789	No Change	$ 100.00	$ 100.00
8335790	Modify to Unlikely, Non-S&S	$ 1,795.00	$ 1,600.00

[2] Docket Nos. KENT 2010-1651, KENT 2012-972 and KENT 2012-973, originally consolidated under lead Docket No. KENT 2009-1097, settled before the global settlement conference. The court dismissed these cases in prior Decisions Approving Settlement.

In addition to the cases originally consolidated under lead Docket No. KENT 2009-1097, the parties also discussed Docket Nos. KENT 2012-1394, KENT 2012-1499, KENT 2012-1501, KENT 2013-17, KENT 2013-18 and KENT 2013-352 during the settlement conference. These dockets are part of the global settlement submitted to the court and, accordingly, are included in the caption.

8335791	Penalty Reduction	$ 745.00	$ 600.00
8335792	Penalty Reduction	$ 108.00	$ 100.00
8335793	No Change	$ 100.00	$ 100.00
8335794	No Change	$ 100.00	$ 100.00
8335798	Modify to Unlikely, Non-S&S	$ 425.00	$ 300.00
8335799	No Change	$ 100.00	$ 100.00
8335800	Penalty Reduction	$ 425.00	$ 300.00
8335801	No Change	$ 100.00	$ 100.00
8225802	Modify to Unlikely, Non-S&S	$ 425.00	$ 300.00
8225803	Penalty Reduction	$ 425.00	$ 300.00
8335804	No Change	$ 100.00	$ 100.00
8335812	Penalty Reduction	$ 425.00	$ 300.00
8335813	Penalty Reduction	$ 425.00	$ 300.00
8335814	Penalty Reduction	$ 425.00	$ 300.00
8335815	Modify to Unlikely, Non-S&S	$ 425.00	$ 300.00
8335819	Penalty Reduction	$ 425.00	$ 300.00
	Sub-Total	**$11,432.00**	**$ 9,100.00**
KENT 2009-1284			
8334580	Modify to Low Negligence	$ 807.00	$ 400.00
8334581	Vacate	$ 2,473.00	$ 0.00
8334582	No Change	$ 190.00	$ 190.00
8334583	Penalty Reduction	$ 745.00	$ 376.00
8338394	No Change	$ 224.00	$ 224.00
8338395	Penalty Reduction	$ 1,203.00	$ 800.00
8334584	No Change	$ 150.00	$ 150.00
8338396	No Change	$ 150.00	$ 150.00
8334585	No Change	$ 150.00	$ 150.00
8334586	No Change	$ 150.00	$ 150.00
8334590	Modify to Unlikely, Non-S&S	$ 745.00	$ 350.00
8334591	No Change	$ 745.00	$ 745.00
8334592	No Change	$ 150.00	$ 150.00
8334593	No Change	$ 150.00	$ 150.00
8334594	Penalty Reduction	$ 873.00	$ 348.00
8403423	No Change	$ 334.00	$ 334.00
8403425	No Change	$ 873.00	$ 873.00
8403426	No Change	$ 425.00	$ 425.00
8403427	No Change	$ 176.00	$ 176.00
8403428	No Change	$ 334.00	$ 334.00
8403429	No Change	$ 425.00	$ 425.00
8334595	No Change	$ 176.00	$ 176.00
8403424	Penalty Reduction	$ 190.00	$ 162.00
8334596	No Change	$ 150.00	$ 150.00
8334597	No Change	$ 150.00	$ 150.00
8334598	No Change	$ 150.00	$ 150.00

8334599	Modify to Unlikely, Non-S&S	$ 745.00	$ 350.00
8403430	No Change	$ 362.00	$ 362.00
8403431	No Change	$ 150.00	$ 150.00
8403432	No Change	$ 100.00	$ 100.00
8403433	No Change	$ 100.00	$ 100.00
8334600	No Change	$ 150.00	$ 150.00
8334605	No Change	$ 150.00	$ 150.00
8334606	No Change	$ 150.00	$ 150.00
8403434	No Change	$ 100.00	$ 100.00
8403436	No Change	$ 100.00	$ 100.00
	Sub-Total	**$14,395.00**	**$ 9,400.00**
KENT 2010-9			
8356316	Modify to 104(a) High, Unlikely, Non-S&S	$3,689.00	$3,000.00
KENT 2010-10			
8356289	Penalty Reduction	$ 138.00	$ 100.00
8356290	No Change	$ 100.00	$ 100.00
8356291	Modify to Unlikely, Non-S&S	$ 362.00	$ 300.00
8356292	Modify to Unlikely, Non-S&S	$ 362.00	$ 300.00
8356293	No Change	$ 100.00	$ 100.00
8356294	Penalty Reduction	$ 334.00	$ 300.00
8356295	No Change	$ 100.00	$ 100.00
8356296	No Change	$ 100.00	$ 100.00
8356297	No Change	$ 100.00	$ 100.00
8356298	No Change	$ 100.00	$ 100.00
8356299	No Change	$ 100.00	$ 100.00
8356816	No Change	$ 100.00	$ 100.00
8356300	Penalty Reduction	$ 334.00	$ 300.00
8356301	No Change	$ 100.00	$ 100.00
8356302	Penalty Reduction	$ 138.00	$ 100.00
8356303	Penalty Reduction	$ 334.00	$ 300.00
8356304	Penalty Reduction	$ 334.00	$ 300.00
8356305	No Change	$ 100.00	$ 100.00
8356306	Penalty Reduction	$ 499.00	$ 400.00
8356307	Vacate	$ 100.00	$ 0.00
8356308	Penalty Reduction	$ 362.00	$ 350.00
8356309	Penalty Reduction	$ 362.00	$ 350.00
8356310	Penalty Reduction	$ 425.00	$ 400.00
8356311	Vacate	$ 100.00	$ 0.00
8356312	Vacate	$ 100.00	$ 0.00
8356313	Vacate	$ 334.00	$ 0.00
8356314	No Change	$ 100.00	$ 100.00
8356315	Vacate	$2,901.00	$ 0.00

8356317	Penalty Reduction	$ 263.00	$ 200.00
8356318	No Change	$ 100.00	$ 100.00
	Sub-Total	**$8,982.00**	**$4,900.00**
KENT 2010-148			
8357222	Penalty Reduction	$ 499.00	$ 400.00
8357223	Penalty Reduction	$ 285.00	$ 200.00
8357224	Modify to Unlikely, Non-S&S	$1,026.00	$ 900.00
8357225	No Change	$ 100.00	$ 100.00
8357229	Penalty Reduction	$ 108.00	$ 100.00
8357230	Penalty Reduction	$ 176.00	$ 100.00
8357231	No Change	$ 100.00	$ 100.00
8357238	Penalty Reduction	$ 499.00	$ 400.00
8357241	Modify to Unlikely, Non-S&S	$ 499.00	$ 400.00
8357242	Penalty Reduction	$ 108.00	$ 100.00
8357243	Penalty Reduction	$ 108.00	$ 100.00
8357244	Penalty Reduction	$ 108.00	$ 100.00
8357245	Penalty Reduction	$ 108.00	$ 100.00
	Sub-Total	**$ 3,724.00**	**$3,100.00**
KENT 2010-152			
8356319	Modify to 104(a), Unlikely, Non-S&S, Moderate Negligence	$2,000.00	$1,500.00
8356321	Modify to 104(a), Unlikely, Non-S&S, Moderate Negligence	$2,000.00	$1,500.00
	Sub-Total	**$ 4,000.00**	**$3,000.00**
KENT 2010-918			
8356556	No Change	$ 100.00	$ 100.00
8356557	No Change	$ 100.00	$ 100.00
8356558	No Change	$ 100.00	$ 100.00
8356560	No Change	$ 100.00	$ 100.00
8356561	Modify to Unlikely, Non-S&S	$ 308.00	$ 100.00
8356562	No Change	$ 308.00	$ 308.00
8356563	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 1,116.00**	**$ 908.00**
KENT 2010-1108			
8342692	Penalty Reduction	$ 460.00	$ 240.00
8342693	Penalty Reduction	$ 334.00	$ 240.00
8342694	Penalty Reduction	$ 334.00	$ 240.00
8342695	Modify to Unlikely, Non-S&S	$ 308.00	$ 240.00
8342697	Modify to Moderate Negligence	$ 499.00	$ 240.00
	Sub-Total	**$ 1,935.00**	**$1,200.00**

KENT 2010-1214			
8356595	Penalty Reduction	$ 308.00	$ 100.00
8356596	Modify to Unlikely, Non-S&S	$ 308.00	$ 100.00
8356597	Modify to Unlikely, Non-S&S	$ 308.00	$ 100.00
8356598	No Change	$ 807.00	$ 807.00
8356599	Modify to Low Negligence	$ 308.00	$ 138.00
8342421	No Change	$ 243.00	$ 243.00
8342423	Modify to 1 Person Affected	$ 807.00	$ 460.00
8319991	Modify to Lost Workdays or Restricted Duty	$ 499.00	$ 334.00
8342424	Modify to Low Negligence	$ 308.00	$ 100.00
8342425	Modify to 1 Person Affected	$ 807.00	$ 460.00
8342426	No Change	$ 308.00	$ 308.00
8342430	Modify to Moderate Negligence	$ 362.00	$ 108.00
8342431	Modify to 1 Person Affected	$ 540.00	$ 308.00
	Sub-Total	**$5,913.00**	**$3,566.00**
KENT 2010-1362			
8357998	Modify to Unlikely, Non-S&S	$ 499.00	$ 100.00
8365013	No Change	$1,203.00	$1,203.00
8365014	No Change	$ 540.00	$ 540.00
8365015	Modify to Unlikely, Non-S&S	$1,140.00	$ 207.00
8365016	Modify to Unlikely, Non-S&S	$ 403.00	$ 100.00
8365017	No Change	$1,203.00	$1,203.00
	Sub-Total	**$4,988.00**	**$3,353.00**
KENT 2010-1365			
8341957	Modify to Unlikely, Non-S&S	$ 362.00	$ 100.00
8341958	Modify to Unlikely, Non-S&S	$ 460.00	$ 113.00
8341964	Penalty Reduction	$ 687.00	$ 500.00
8341965	Penalty Reduction	$ 687.00	$ 500.00
8341966	Penalty Reduction	$ 687.00	$ 500.00
8357587	No Change	$ 362.00	$ 362.00
8403782	No Change	$ 540.00	$ 540.00
8403783	No Change	$ 585.00	$ 585.00
8403800	No Change	$ 100.00	$ 100.00
	Sub-Total	**$4,470.00**	**$3,300.00**
KENT 2010-1516			
8405209	No Change	$ 745.00	$ 745.00
8364417	Vacate	$2,106.00	$ 0.00
8403809	No Change	$1,203.00	$1,203.00
	Sub-Total	**$ 4,054.00**	**$1,948.00**

KENT 2010-1518			
8364049	Modify to Unlikely, Non-S&S	$ 807.00	$ 162.00
8364050	Modify to Lost Workdays or Restricted Duty	$ 745.00	$ 460.00
8364051	Modify to 3 Persons Affected	$ 1,203.00	$ 873.00
8364052	No Change	$ 873.00	$ 873.00
8364053	No Change	$ 745.00	$ 745.00
8364054	Modify to Unlikely, Non-S&S	$ 1,944.00	$ 605.00
8342442	No Change	$ 308.00	$ 308.00
8342444	No Change	$ 1,026.00	$1,026.00
8342445	No Change	$ 1,203.00	$1,203.00
8342448	No Change	$ 308.00	$ 308.00
8342449	No Change	$ 334.00	$ 334.00
8364416	Modify to Unlikely, Non-S&S	$ 1,795.00	$ 362.00
8342450	Modify to Unlikely, Non-S&S	$ 460.00	$ 100.00
8342451	Modify to Unlikely, Non-S&S	$ 460.00	$ 100.00
9866050	No Change	$ 499.00	$ 499.00
8364436	No Change	$ 308.00	$ 308.00
8365400	No Change	$ 243.00	$ 243.00
	Sub-Total	**$13,261.00**	**$8,509.00**
KENT 2010-1648			
8357160	No Change	$ 308.00	$ 308.00
8357161	Modify to Unlikely, Non-S&S	$ 585.00	$ 258.00
8357164	No Change	$ 334.00	$ 334.00
	Sub-Total	**$1,227.00**	**$ 900.00**
KENT 2010-1650			
8338489	Penalty Reduction	$ 190.00	$ 100.00
8338490	Penalty Reduction	$2,106.00	$1,600.00
8338491	Penalty Reduction	$ 392.00	$ 200.00
	Sub-Total	**$2,688.00**	**$1,900.00**
KENT 2011-143			
8402886	Modify to Unlikely, Non-S&S	$ 308.00	$ 100.00
8402887	No Change	$ 263.00	$ 263.00
	Sub-Total	**$ 571.00**	**$ 363.00**
KENT 2011-144			
8364090	Modify to Unlikely, Non-S&S	$ 362.00	$ 100.00
KENT 2011-145			
8364094	Modify to Unlikely, Non-S&S	$ 362.00	$ 267.00
8364096	Modify to 1 Affected, Lost Workdays or Restricted Duty	$ 540.00	$ 267.00
8364098	Modify to Unlikely, Non-S&S	$ 362.00	$ 267.00
8364099	Modify to Lost Workdays or Restricted Duty	$ 362.00	$ 267.00

8364100	Modify to Unlikely, Non-S&S	$ 362.00	$ 267.00
8364101	Modify to 1 Affected, Lost Workdays or Restricted Duty	$ 540.00	$ 265.00
	Sub-Total	**$2,528.00**	**$1,600.00**
KENT 2011-156			
8364462	Penalty Reduction	$ 392.00	$ 308.00
8364463	No Change	$ 100.00	$ 100.00
8364465	No Change	$ 392.00	$ 392.00
8364466	Modify to Unlikely, Non-S&S	$ 392.00	$ 100.00
	Sub-Total	**$1,276.00**	$ **900.00**
KENT 2011-446			
8405261	Penalty Reduction	$1,203.00	$ 687.00
7502302	No Change	$ 100.00	$ 100.00
7502303	No Change	$ 100.00	$ 100.00
	Sub-Total	**$1,403.00**	$ **887.00**
KENT 2011-447			
8362842	Penalty Reduction	$ 190.00	$ 100.00
8362850	Modify to Low Negligence	$ 555.00	$ 400.00
8362854	Penalty Reduction	$ 540.00	$ 400.00
8362856	Penalty Reduction	$ 499.00	$ 300.00
8362859	Modify to Unlikely, Non-S&S	$ 499.00	$ 300.00
8362860	Modify to Unlikely, Non S&S	$1,026.00	$ 500.00
8362862	Modify to Unlikely, Non-S&S	$ 540.00	$ 400.00
8362863	Penalty Reduction	$ 499.00	$ 400.00
8362865	Modify to Low Negligence	$ 176.00	$ 100.00
8362866	Penalty Reduction	$ 873.00	$ 700.00
8362869	Penalty Reduction	$ 745.00	$ 700.00
8362870	Penalty Reduction	$ 873.00	$ 700.00
	Sub-Total	**$7,015.00**	$**5,000.00**
KENT 2011-448			
8364834	Modify to Low Negligence	$ 243.00	$ 200.00
9866095	Modify to 2 Affected and Lost Work Days or Restricted Duty	$ 634.00	$ 400.00
8342535	Penalty Reduction	$ 243.00	$ 200.00
	Sub-Total	**$1,120.00**	$ **800.00**
KENT 2011-563			
8362875	No Change	$ 100.00	$ 100.00
8404247	No Change	$ 100.00	$ 100.00
8404248	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 300.00**	**$ 300.00**
KENT 2011-564			
8342539	Modify to Unlikely, Non-S&S	$ 263.00	$ 100.00
8342540	No Change	$ 100.00	$ 100.00

9866114	No Change	$ 100.00	$ 100.00
8342545	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 563.00**	**$ 400.00**
KENT 2011-952			
8365264	Modify to Unlikely, Non-S&S	$ 362.00	$ 100.00
8365267	Modify to Unlikely, Non-S&S	$ 585.00	$ 117.00
9866162	No Change	$ 108.00	$ 108.00
	Sub-Total	**$ 1,055.00**	**$ 325.00**
KENT 2011-1128			
8365303	Penalty Reduction	$ 263.00	$ 100.00
KENT 2009-240			
8333875	Penalty Reduction	$ 1,140.00	$ 798.00
8333876	Penalty Reduction	$ 1,140.00	$ 798.00
8333878	Penalty Reduction	$ 1,140.00	$ 798.00
8333880	Penalty Reduction	$ 1,026.00	$ 718.00
8333882	Penalty Reduction	$ 1,026.00	$ 718.00
8333883	Penalty Reduction	$ 1,026.00	$ 718.00
8333901	Penalty Reduction	$ 1,026.00	$ 718.00
8333904	Penalty Reduction	$ 1,140.00	$ 798.00
8333905	Penalty Reduction	$ 1,569.00	$ 1,098.00
8333907	Penalty Reduction	$ 1,569.00	$ 1,098.00
8333908	Penalty Reduction	$ 1,140.00	$ 798.00
8333910	Penalty Reduction	$ 1,140.00	$ 798.00
8333911	Penalty Reduction	$ 1,944.00	$ 1,361.00
8333912	Penalty Reduction	$ 1,026.00	$ 718.00
8325401	Penalty Reduction	$ 1,026.00	$ 718.00
8325402	Penalty Reduction	$ 1,026.00	$ 718.00
	Sub-Total	**$ 19,104.00**	**$ 13,371.00**
KENT 2009-562			
8319150	Penalty Reduction	$ 1,412.00	$ 988.00
8319151	Penalty Reduction	$ 1,944.00	$ 1,361.00
	Sub-Total	**$ 3,356.00**	**$ 2,349.00**
KENT 2010-1024			
8357534	Penalty Reduction	$ 687.00	$ 481.00
8357535	Penalty Reduction	$ 1,026.00	$ 718.00
8357536	Penalty Reduction	$ 1,026.00	$ 718.00
8357538	Penalty Reduction	$ 1,026.00	$ 718.00
	Sub-Total	**$ 3,765.00**	**$ 2,635.00**
KENT 2010-1436			
8341959	Penalty Reduction	$ 1,026.00	$ 718.00
8341960	Penalty Reduction	$ 2,536.00	$ 1,775.00
8341962	Penalty Reduction	$ 1,026.00	$ 718.00
8341963	Penalty Reduction	$ 2,282.00	$ 1,597.00
	Sub-Total	**$ 6,870.00**	**$ 4,808.00**

KENT 2011-991			
8353025	Penalty Reduction	$ 946.00	$ 662.00
KENT 2011-992			
8363307	Penalty Reduction	$ 634.00	$ 444.00
8363308	Penalty Reduction	$ 1,026.00	$ 718.00
	Sub-Total	**$ 1,660.00**	**$ 1,162.00**
KENT 2011-1053			
8353261	Penalty Reduction	$ 2,678.00	$ 1,875.00
KENT 2011-1151			
8353289	Penalty Reduction	$ 873.00	$ 611.00
KENT 2011-1375			
8363450	Penalty Reduction	$ 4,329.00	$ 3,030.00
8363451	Penalty Reduction	$ 4,329.00	$ 3,030.00
	Sub-Total	**$ 8,658.00**	**$ 6,060.00**
KENT 2009-1549			
7502506	Penalty Reduction	$ 2,901.00	$ 1,941.00
7502507	No Change	$ 100.00	$ 100.00
7502508	No Change	$ 100.00	$ 100.00
7502509	Penalty Reduction	$ 2,901.00	$ 1,971.00
7502510	No Change	$ 100.00	$ 100.00
8337268	No Change	$ 100.00	$ 100.00
8337269	Penalty Reduction	$ 392.00	$ 244.00
8337270	No Change	$ 100.00	$ 100.00
8337271	No Change	$ 100.00	$ 100.00
8337272	No Change	$ 100.00	$ 100.00
8337273	Penalty Reduction	$ 392.00	$ 244.00
	Sub-Total	**$ 7,286.00**	**$ 5,100.00**
KENT 2010-767			
8337873	Penalty Reduction	$ 308.00	$ 126.00
8337875	No Change	$ 100.00	$ 100.00
8337876	No Change	$ 100.00	$ 100.00
8337877	No Change	$ 100.00	$ 100.00
8337878	Penalty Reduction	$ 585.00	$ 410.00
8337879	Penalty Reduction	$ 308.00	$ 216.00
8337880	Penalty Reduction	$ 308.00	$ 216.00
8337883	Penalty Reduction	$ 285.00	$ 200.00
8337884	Penalty Reduction	$ 285.00	$ 200.00
	Sub-Total	**$ 2,379.00**	**$ 1,668.00**
KENT 2011-795			
8350457	Penalty Reduction	$ 285.00	$ 200.00
8350465	Penalty Reduction	$ 263.00	$ 124.00
8350468	No Change	$ 100.00	$ 100.00
8350469	No Change	$ 100.00	$ 100.00

7502578	Penalty Reduction	$ 392.00	$ 274.00
7502579	Penalty Reduction	$ 425.00	$ 298.00
7502581	Penalty Reduction	$ 392.00	$ 274.00
	Sub-Total	**$ 1,957.00**	**$ 1,370.00**
KENT 2011-1343			
8349289	Penalty Reduction	$ 176.00	$ 112.00
8349291	Penalty Reduction	$ 392.00	$ 274.00
	Sub-Total	**$ 568.00**	**$ 386.00**
KENT 2012-639			
9867537	Penalty Reduction	$ 127.00	$ 100.00
KENT 2009-1601			
8334659	Penalty Reduction	$ 634.00	$ 441.00
8354360	Penalty Reduction	$ 946.00	$ 710.00
8334664	Penalty Reduction	$ 634.00	$ 451.00
8354364	Penalty Reduction	$ 946.00	$ 710.00
8354365	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 1,000.00
8334669	Penalty Reduction	$ 634.00	$ 476.00
8334670	Penalty Reduction	$ 634.00	$ 476.00
8334671	Penalty Reduction	$ 634.00	$ 476.00
8334672	Penalty Reduction	$ 127.00	$ 100.00
8403484	Penalty Reduction	$ 127.00	$ 100.00
8403483	Penalty Reduction	$ 127.00	$ 100.00
8334667	Penalty Reduction	$ 127.00	$ 100.00
8403485	No Change	$ 100.00	$ 100.00
8334666	Penalty Reduction	$ 127.00	$ 100.00
8334665	Penalty Reduction	$ 127.00	$ 100.00
8334663	Penalty Reduction	$ 634.00	$ 476.00
8334661	Penalty Reduction	$ 138.00	$ 104.00
8334662	Penalty Reduction	$ 127.00	$ 100.00
8334660	Penalty Reduction	$ 308.00	$ 231.00
8319909	Penalty Reduction	$ 190.00	$ 143.00
	Sub-Total	**$ 8,347.00**	**$ 6,494.00**
KENT 2010-1211			
8341934	Penalty Reduction	$38,500.00	$27,000.00
KENT 2010-1212			
8341937	Penalty Reduction	$ 946.00	$ 710.00
8357969	Penalty Reduction	$ 460.00	$ 345.00
8341941	Penalty Reduction	$ 362.00	$ 272.00
8357970	Penalty Reduction	$ 460.00	$ 345.00
8357971	Penalty Reduction	$ 460.00	$ 345.00
8402839	Penalty Reduction	$ 946.00	$ 710.00
8357972	Penalty Reduction	$ 460.00	$ 345.00
8402840	Penalty Reduction	$ 460.00	$ 345.00
8402841	Penalty Reduction	$ 460.00	$ 345.00
8402842	Penalty Reduction	$ 460.00	$ 345.00

8402853	Penalty Reduction	$ 807.00	$ 605.00
8341946	Modify to Non-S&S, Unlikely, and 1 Affected	**$** 1,795.00	$ 900.00
8402843	Penalty Reduction	$ 946.00	$ 710.00
8402846	Penalty Reduction	$ 460.00	$ 345.00
8357974	Penalty Reduction	$ 460.00	$ 345.00
8341948	Modify to Non-S&S, Unlikely, and 1 Affected	**$** 1,530.00	$ 800.00
8341953	Penalty Reduction	$ 362.00	$ 272.00
	Sub-Total	**$11,834.00**	**$ 8,084.00**
KENT 2010-1364			
8341930	Modify to 104(a) High Negligence	$27,900.00	$15,000.00
8341944	No Change	$13,600.00	$13,600.00
	Sub-Total	**$41,500.00**	**$28,600.00**
KENT 2010-1514			
8365019	Penalty Reduction	$ 1,203.00	$ 1,000.00
8365020	Penalty Reduction	$ 1,203.00	$ 1,000.00
8365039	Penalty Reduction	$ 362.00	$ 272.00
8365042	Penalty Reduction	$ 362.00	$ 272.00
8365026	Penalty Reduction	$ 745.00	$ 559.00
8365027	Penalty Reduction	$ 362.00	$ 272.00
8365028	Penalty Reduction	$ 362.00	$ 272.00
8320902	Penalty Reduction	$ 308.00	$ 231.00
8364415	Penalty Reduction	$ 807.00	$ 605.00
8357156	Penalty Reduction	$ 585.00	$ 439.00
	Sub-Total	**$ 6,299.00**	**$ 4,922.00**
KENT 2010-1649			
8341945	Modify to 104(a) Moderate Negligence, and 3 Affected	$15,900.00	$12,700.00
KENT 2011-154			
8341942	Penalty Reduction	$38,500.00	$34,250.00
8357973	Penalty Reduction	$38,500.00	$34,250.00
8357976	Vacate	$30,200.00	$ 0.00
	Sub-Total	**$107,200.00**	**$68,500.00**
KENT 2011-347			
8362587	Penalty Reduction	$ 499.00	$ 374.00
8362588	Penalty Reduction	$ 499.00	$ 374.00
8362589	Penalty Reduction	$ 499.00	$ 374.00
8362590	Penalty Reduction	$ 499.00	$ 374.00
8363001	Modify to Non-S&S, Unlikely	$ 1,795.00	$ 1,000.00
8363002	Penalty Reduction	$ 499.00	$ 374.00
8363003	Modify to Non-S&S, Unlikely	$ 1,795.00	$ 1,000.00
8362654	Penalty Reduction	$ 473.00	$ 355.00
8362655	Penalty Reduction	$ 473.00	$ 355.00

8362656	Penalty Reduction	$ 473.00	$ 355.00
8362657	Penalty Reduction	$ 540.00	$ 405.00
8362658	Penalty Reduction	$ 634.00	$ 476.00
8362659	Penalty Reduction	$ 634.00	$ 476.00
8362660	Penalty Reduction	$ 634.00	$ 476.00
8362661	Penalty Reduction	$ 634.00	$ 476.00
8362671	Penalty Reduction	$ 317.00	$ 238.00
	Sub-Total	**$10,897.00**	**$ 7,482.00**
KENT 2011-348			
8365032	Modify to Lost Workdays	$ 2,000.00	$ 1,203.00
KENT 2011-350			
8362832	Penalty Reduction	$ 634.00	$ 476.00
8362834	Penalty Reduction	$ 499.00	$ 374.00
8362838	Penalty Reduction	$ 634.00	$ 476.00
8362840	Penalty Reduction	$ 634.00	$ 476.00
	Sub-Total	**$ 2,401.00**	**$ 1,802.00**
KENT 2011-559			
8356960	Penalty Reduction	$ 1,800.00	$ 1,500.00
8365029	Penalty Reduction	$ 8,209.00	$ 7,000.00
8365030	Penalty Reduction	$ 9,122.00	$ 7,700.00
8365031	Modify to Non-S&S, Unlikely	$ 7,774.00	$ 5,000.00
	Sub-Total	**$26,905.00**	**$21,200.00**
KENT 2011-560			
8364862	Penalty Reduction	$ 190.00	$ 124.00
8364863	Penalty Reduction	$ 108.00	$ 100.00
8364864	Penalty Reduction	$ 540.00	$ 405.00
8364865	Penalty Reduction	$ 540.00	$ 405.00
8364866	Penalty Reduction	$ 540.00	$ 405.00
	Sub-Total	**$ 1,918.00**	**$ 1,439.00**
KENT 2011-562			
8364163	Modify to 2 Affected	$ 2,678.00	$ 1,500.00
8364164	Modify to 2 Affected	$ 2,678.00	$ 1,500.00
8364165	No Change	$ 2,678.00	$ 2,678.00
8364166	Modify to Non-S&S, Unlikely	$ 2,678.00	$ 600.00
8364167	Modify to Non-S&S, Unlikely	$ 2,678.00	$ 600.00
8364168	No Change	$ 8,893.00	$ 8,893.00
8364169	Modify to Non-S&S, Unlikely	$ 1,530.00	$ 600.00
8364170	Modify to Non-S&S, Unlikely	$ 8,893.00	$ 600.00
8364171	Modify to Non-S&S, Unlikely	$ 5,961.00	$ 600.00
8364172	No Change	$ 8,893.00	$ 8,893.00
8364173	Modify to Non-S&S, Unlikely	$ 1,412.00	$ 736.00
8364174	Modify to Non-S&S, Unlikely	$ 2,106.00	$ 800.00
8364175	No Change	$ 100.00	$ 100.00
8364176	Penalty Reduction	$ 687.00	$ 440.00

8364177	No Change	$ 100.00	$ 100.00
8364178	No Change	$ 100.00	$ 100.00
	Sub-Total	**$52,065.00**	**$28,740.00**
KENT 2011-680			
8335623	No Change	$ 100.00	$ 100.00
8335625	No Change	$ 100.00	$ 100.00
8335626	Modify to Moderate Negligence	$ 4,689.00	$ 2,450.00
	Sub-Total	**$ 4,889.00**	**$ 2,650.00**
KENT 2011-682			
8364179	Modify to Reasonably Likely, 2 Affected, and Low Negligence	$13,268.00	$12,000.00
8335622	Penalty Reduction	$ 807.00	$ 605.00
8402951	No Change	$ 100.00	$ 100.00
8402952	No Change	$ 100.00	$ 100.00
8402953	No Change	$ 100.00	$ 100.00
8402954	Penalty Reduction	$ 687.00	$ 415.00
8402955	No Change	$ 100.00	$ 100.00
8364881	Penalty Reduction	$ 807.00	$ 605.00
8364882	Penalty Reduction	$ 807.00	$ 605.00
8364883	Penalty Reduction	$ 807.00	$ 605.00
8364884	Penalty Reduction	$ 362.00	$ 272.00
8364187	Penalty Reduction	$ 807.00	$ 605.00
8364188	Penalty Reduction	$ 2,678.00	$ 2,500.00
8364189	Modify to Non-S&S, Unlikely	$ 1,795.00	$ 1,500.00
8364190	Modify to 1 Affected	$ 1,657.00	$ 1,500.00
8364191	Modify to Non-S&S, Unlikely	$ 1,795.00	$ 1,500.00
8364192	Modify to Non-S&S, Unlikely	$ 3,689.00	$ 3,000.00
8364193	Penalty Reduction	$ 540.00	$ 405.00
8364195	Modify to Non-S&S, Unlikely	$ 2,678.00	$ 1,500.00
8364197	Modify to Non-S&S, Unlikely	$ 1,203.00	$ 1,000.00
8353004	Penalty Reduction	$ 263.00	$ 197.00
8346970	Penalty Reduction	$ 243.00	$ 182.00
8347841	Penalty Reduction	$ 745.00	$ 559.00
8406120	Penalty Reduction	$ 150.00	$ 113.00
8346971	Penalty Reduction	$ 946.00	$ 710.00
8364198	Penalty Reduction	$ 1,304.00	$ 1,000.00
8364199	Penalty Reduction	$ 2,106.00	$ 2,000.00
8353000	Penalty Reduction	$ 3,689.00	$ 3,000.00
8406123	Penalty Reduction	$ 745.00	$ 559.00
8353001	Penalty Reduction	$ 499.00	$ 374.00
8347843	Penalty Reduction	$ 263.00	$ 197.00
8406124	Penalty Reduction	$ 150.00	$ 113.00
8347844	Penalty Reduction	$ 1,657.00	$ 1,500.00

8347846	Penalty Reduction	$ 2,473.00	$ 2,000.00
8346972	Penalty Reduction	$ 1,111.00	$ 1,000.00
8406125	Penalty Reduction	$ 745.00	$ 559.00
8406126	Penalty Reduction	$ 745.00	$ 559.00
8353002	Penalty Reduction	$ 150.00	$ 113.00
8353003	Penalty Reduction	$ 150.00	$ 113.00
8406127	Penalty Reduction	$ 224.00	$ 168.00
8346973	Modify to Non-S&S, Unlikely	$ 1,657.00	$ 1,000.00
8406128	Penalty Reduction	$ 150.00	$ 113.00
8347847	Penalty Reduction	$ 745.00	$ 559.00
	Sub-Total	**$55,697.00**	**$45,705.00**
KENT 2011-683			
8362886	Penalty Reduction	$ 745.00	$ 559.00
8362887	Penalty Reduction	$ 117.00	$ 100.00
8362888	Penalty Reduction	$ 117.00	$ 100.00
8362890	No Change	$ 100.00	$ 100.00
8362891	Penalty Reduction	$ 117.00	$ 100.00
8362892	Penalty Reduction	$ 117.00	$ 100.00
8362893	Penalty Reduction	$ 150.00	$ 113.00
8403193	Penalty Reduction	$ 687.00	$ 515.00
8350237	Penalty Reduction	$ 334.00	$ 251.00
8363236	Penalty Reduction	$ 138.00	$ 104.00
8403194	Modify to Non-S&S, Unlikely	$ 1,530.00	$ 800.00
8403195	No Change	$ 1,203.00	$ 1,203.00
8396008	Penalty Reduction	$ 138.00	$ 104.00
8363237	Penalty Reduction	$ 138.00	$ 104.00
8396009	Penalty Reduction	$ 138.00	$ 104.00
8362894	Penalty Reduction	$ 687.00	$ 515.00
8396010	Penalty Reduction	$ 460.00	$ 345.00
8363238	Penalty Reduction	$ 138.00	$ 104.00
8403196	Penalty Reduction	$ 1,203.00	$ 900.00
8353221	Penalty Reduction	$ 687.00	$ 515.00
8363239	Penalty Reduction	$ 150.00	$ 113.00
8353222	Modify to Non-S&S, Unlikely, and 1 Affected	$ 3,996.00	$ 2,000.00
8363240	Penalty Reduction	$ 745.00	$ 559.00
8363241	Penalty Reduction	$ 745.00	$ 559.00
8350238	Penalty Reduction	$ 263.00	$ 197.00
8396011	Penalty Reduction	$ 243.00	$ 182.00
8363242	Penalty Reduction	$ 334.00	$ 251.00
8362898	Penalty Reduction	$ 176.00	$ 132.00
8362899	No Change	$ 100.00	$ 100.00
8363301	Penalty Reduction	$ 585.00	$ 341.00
	Sub-Total	**$16,281.00**	**$11,170.00**

KENT 2011-684			
8342378	Penalty Reduction	$ 138.00	$ 104.00
8342379	Penalty Reduction	$ 207.00	$ 155.00
8342548	Penalty Reduction	$ 425.00	$ 203.00
8342550	No Change	$ 100.00	$ 100.00
8342549	Penalty Reduction	$ 243.00	$ 182.00
8342551	No Change	$ 100.00	$ 100.00
8342552	No Change	$ 100.00	$ 100.00
8342553	Penalty Reduction	$ 243.00	$ 182.00
8342554	Penalty Reduction	$ 112.00	$ 100.00
8342555	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 1,768.00**	**$ 1,326.00**
KENT 2011-817			
8365251	Penalty Reduction	$ 540.00	$ 405.00
8406405	Penalty Reduction	$ 243.00	$ 182.00
8353230	Penalty Reduction	$ 190.00	$ 143.00
8406407	Penalty Reduction	$ 190.00	$ 143.00
8406408	Penalty Reduction	$ 190.00	$ 143.00
8353231	Penalty Reduction	$ 190.00	$ 143.00
8365252	Penalty Reduction	$ 190.00	$ 143.00
	Sub-Total	**$ 1,733.00**	**$ 1,302.00**
KENT 2011-823			
8353007	Modify to Non-S&S, Unlikely	$ 3,143.00	$ 1,700.00
8353008	Modify to 1 Affected	$ 3,143.00	$ 2,645.00
8353009	Modify to Non-S&S, Unlikely	$ 3,143.00	$ 1,700.00
8353010	Penalty Reduction	$ 946.00	$ 710.00
8353011	Penalty Reduction	$ 946.00	$ 710.00
8353012	Modify to Non-S&S, Unlikely	$ 3,143.00	$ 1,700.00
8353013	No Change	$ 1,203.00	$ 1,203.00
8353016	No Change	$ 1,052.00	$ 1,052.00
	Sub-Total	**$16,719.00**	**$11,420.00**
KENT 2011-824			
8363302	Penalty Reduction	$ 687.00	$ 515.00
8363304	Penalty Reduction	$ 138.00	$ 104.00
8363306	Penalty Reduction	$ 745.00	$ 559.00
8405815	Penalty Reduction	$ 687.00	$ 515.00
	Sub-Total	**$ 2,257.00**	**$ 1,693.00**
KENT 2011-947			
8364682	No Change	$ 1,235.00	$ 1,235.00
8364683	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 1,026.00
8353251	No Change	$ 1,026.00	$ 1,026.00
8353252	Penalty Reduction	$ 207.00	$ 155.00

8353253	Modify to Reasonably Likely, Lost Workdays, 1 Affected	$ 9,634.00	$ 3,639.00
8353254	No Change	$ 1,026.00	$ 1,026.00
8353255	Penalty Reduction	$ 207.00	$ 155.00
8353257	No Change	$ 1,026.00	$ 1,026.00
8353258	Modify to Non-S&S, Unlikely	$ 3,996.00	$ 2,000.00
8353259	No Change	$ 1,026.00	$ 1,026.00
8353260	No Change	$ 3,996.00	$ 3,996.00
	Sub-Total	**$24,405.00**	**$16,310.00**
KENT 2011-948			
8364541	No Change	$ 1,111.00	$ 1,111.00
8364544	Vacate	$ 1,111.00	$ 0.00
	Sub-Total	**$ 2,222.00**	**$ 1,111.00**
KENT 2011-949			
8342494	Modify to 1 Affected	$ 3,200.00	$ 1,600.00
KENT 2011-950			
8353033	Penalty Reduction	$ 946.00	$ 705.00
8353034	Penalty Reduction	$ 634.00	$ 476.00
8353035	Penalty Reduction	$ 634.00	$ 476.00
8353036	Penalty Reduction	$ 634.00	$ 476.00
8365265	Vacate	$ 1,111.00	$ 0.00
8365266	No Change	$ 1,795.00	$ 1,795.00
8353042	Penalty Reduction	$ 127.00	$ 100.00
	Sub-Total	**$ 5,881.00**	**$ 4,028.00**
KENT 2011-951			
8353235	Penalty Reduction	$ 138.00	$ 104.00
8363330	Penalty Reduction	$ 392.00	$ 294.00
8364542	Vacate	$ 1,203.00	$ 0.00
8364543	Penalty Reduction	$ 2,678.00	$ 1,795.00
	Sub-Total	**$ 4,411.00**	**$ 2,193.00**
KENT 2011-1129			
8404158	Penalty Reduction	$ 127.00	$ 100.00
8365301	Penalty Reduction	$ 807.00	$ 600.00
8365302	Penalty Reduction	$ 634.00	$ 441.00
8365304	Penalty Reduction	$ 127.00	$ 100.00
8365305	No Change	$ 100.00	$ 100.00
8365306	Penalty Reduction	$ 127.00	$ 100.00
8365307	Penalty Reduction	$ 634.00	$ 471.00
8365308	Penalty Reduction	$ 127.00	$ 100.00
8365309	Penalty Reduction	$ 634.00	$ 476.00
8365310	Penalty Reduction	$ 634.00	$ 476.00
8353080	Penalty Reduction	$ 263.00	$ 197.00
	Sub-Total	**$ 4,214.00**	**$ 3,161.00**

KENT 2011-1130			
8364923	Penalty Reduction	$ 207.00	$ 130.00
8405330	No Change	$ 100.00	$ 100.00
8405332	Penalty Reduction	$ 540.00	$ 405.00
8405333	Penalty Reduction	$ 334.00	$ 251.00
8405334	Penalty Reduction	$ 362.00	$ 272.00
8405336	Penalty Reduction	$ 308.00	$ 231.00
	Sub-Total	**$ 1,851.00**	**$ 1,389.00**
KENT 2011-1133			
8363409	Penalty Reduction	$ 745.00	$ 509.00
8363410	Penalty Reduction	$ 224.00	$ 168.00
8363411	Penalty Reduction	$ 224.00	$ 168.00
8363412	Penalty Reduction	$ 224.00	$ 168.00
8363413	Penalty Reduction	$ 687.00	$ 515.00
8363414	Penalty Reduction	$ 243.00	$ 182.00
8363416	Penalty Reduction	$ 687.00	$ 515.00
8363417	Penalty Reduction	$ 687.00	$ 515.00
8363418	Modify to Non-S&S, Unlikely	$ 1,412.00	$ 800.00
8363419	Penalty Reduction	$ 2,678.00	$ 2,000.00
8363420	No Change	$ 100.00	$ 100.00
8363421	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 8,011.00**	**$ 5,740.00**
KENT 2011-1234			
8365361	Penalty Reduction	$ 127.00	$ 100.00
8365362	Penalty Reduction	$ 162.00	$ 112.00
8365364	Penalty Reduction	$ 243.00	$ 182.00
8353861	Penalty Reduction	$ 138.00	$ 104.00
8406252	Modify to Non-S&S, Unlikely	$ 1,304.00	$ 500.00
8353862	Penalty Reduction	$ 138.00	$ 104.00
8353863	Penalty Reduction	$ 634.00	$ 476.00
8406253	Penalty Reduction	$ 634.00	$ 476.00
8365365	Modify to Non-S&S, Unlikely	$ 1,111.00	$ 700.00
8406254	Modify to Non-S&S, Unlikely	$ 1,111.00	$ 700.00
8406255	Penalty Reduction	$ 634.00	$ 476.00
8353864	Penalty Reduction	$ 634.00	$ 476.00
8406256	Penalty Reduction	$ 190.00	$ 143.00
8406257	Penalty Reduction	$ 634.00	$ 476.00
8406258	No Change	$ 1,111.00	$ 1,111.00
8365367	Penalty Reduction	$ 127.00	$ 100.00
	Sub-Total	**$ 8,932.00**	**$ 6,236.00**
KENT 2011-1235			
8335669	Penalty Reduction	$ 207.00	$ 155.00
KENT 2011-1236			
8352988	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 300.00

8352991	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 300.00
8352992	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 300.00
8352993	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 300.00
8352994	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 300.00
8352995	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 300.00
8352996	No Change	$ 1,026.00	$ 1,026.00
8352997	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 300.00
8352998	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 300.00
8352999	Penalty Reduction	$ 207.00	$ 155.00
8363701	No Change	$ 1,026.00	$ 1,026.00
8363702	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 300.00
8363703	No Change	$ 1,026.00	$ 1,026.00
8363704	Modify to Non-S&S, Unlikely	$ 1,140.00	$ 300.00
8363705	No Change	$ 1,026.00	$ 1,026.00
8363706	No Change	$ 1,026.00	$ 1,026.00
8363708	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 300.00
8363711	No Change	$ 1,026.00	$ 1,026.00
8363712	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 300.00
	Sub-Total	**$18,789.00**	**$ 9,911.00**
KENT 2011-1332			
8363714	Penalty Reduction	$ 807.00	$ 605.00
8363715	Penalty Reduction	$ 807.00	$ 605.00
8363716	Penalty Reduction	$ 807.00	$ 605.00
8363717	Penalty Reduction	$ 807.00	$ 605.00
8363718	Penalty Reduction	$ 1,412.00	$ 1,200.00
8363719	Penalty Reduction	$ 807.00	$ 605.00
8363720	Penalty Reduction	$ 807.00	$ 605.00
8406815	Penalty Reduction	$ 162.00	$ 122.00
8363723	Penalty Reduction	$ 807.00	$ 605.00
8406816	Penalty Reduction	$ 162.00	$ 122.00
8363724	Penalty Reduction	$ 807.00	$ 605.00
8363725	Penalty Reduction	$ 807.00	$ 605.00
8406817	Penalty Reduction	$ 807.00	$ 510.00
8406818	Penalty Reduction	$ 162.00	$ 122.00
8406819	Penalty Reduction	$ 162.00	$ 122.00
	Sub-Total	**$10,130.00**	**$ 7,643.00**
KENT 2011-1333			
7496996	No Change	$ 100.00	$ 100.00
7496997	No Change	$ 100.00	$ 100.00
7496998	No Change	$ 100.00	$ 100.00
8364993	Penalty Reduction	$ 207.00	$ 155.00
8364995	No Change	$ 100.00	$ 100.00
8364998	Penalty Reduction	$ 425.00	$ 219.00
8368001	Penalty Reduction	$ 425.00	$ 319.00
8368002	Penalty Reduction	$ 460.00	$ 345.00

8368003	Penalty Reduction	$ 460.00	$ 345.00
8368005	Penalty Reduction	$ 460.00	$ 315.00
	Sub-Total	**$ 2,837.00**	**$ 2,098.00**
KENT 2011-1335			
8365369	Penalty Reduction	$ 127.00	$ 100.00
8335671	Penalty Reduction	$ 946.00	$ 705.00
	Sub-Total	**$ 1,073.00**	**$ 805.00**
KENT 2011-1336			
8362833	Modify to Non S&S, Unlikely	$ 1,700.00	$ 800.00
KENT 2011-1342			
8335670	Penalty Reduction	$ 207.00	$ 155.00
KENT 2011-1493			
8406830	Penalty Reduction	$ 127.00	$ 100.00
8406831	Penalty Reduction	$ 127.00	$ 100.00
8406832	Penalty Reduction	$ 127.00	$ 100.00
8406833	Penalty Reduction	$ 127.00	$ 100.00
8406838	No Change	$ 100.00	$ 100.00
8406839	No Change	$ 100.00	$ 100.00
8406840	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 808.00**	**$ 700.00**
KENT 2011-1494			
8368013	Penalty Reduction	$ 127.00	$ 100.00
8368014	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 227.00**	**$ 200.00**
KENT 2011-1496			
8365393	Modify to Non S&S, Unlikely	$ 1,412.00	$ 900.00
8365395	Penalty Reduction	$ 946.00	$ 710.00
8365396	Penalty Reduction	$ 585.00	$ 439.00
8365397	Penalty Reduction	$ 150.00	$ 113.00
	Sub-Total	**$ 3,093.00**	**$ 2,162.00**
KENT 2012-21			
8347845	Penalty Reduction	$ 1,944.00	$ 1,500.00
8365398	Penalty Reduction	$ 745.00	$ 559.00
8365399	Penalty Reduction	$ 150.00	$ 113.00
8368200	Penalty Reduction	$ 745.00	$ 559.00
8368201	Penalty Reduction	$ 162.00	$ 122.00
8368202	Penalty Reduction	$ 745.00	$ 559.00
8368203	Penalty Reduction	$ 807.00	$ 605.00
8368205	Modify to Non S&S, Unlikely	$ 1,412.00	$ 800.00
8363957	Penalty Reduction	$ 150.00	$ 113.00
8363958	Penalty Reduction	$ 499.00	$ 374.00
8363959	No Change	$ 2,473.00	$ 2,473.00
8368048	Penalty Reduction	$ 150.00	$ 113.00

8363960	Penalty Reduction	$ 150.00	$ 113.00
8363961	Modify to 1 Person Affected	$ 2,473.00	$ 2,200.00
8368215	Modify to Non S&S, Unlikely, 1 Person Affected	$ 4,329.00	$ 1,500.00
8368214	Modify to Non S&S, Unlikely, 1 Person Affected	$ 4,329.00	$ 1,500.00
8363962	Penalty Reduction	$ 150.00	$ 113.00
8368049	Penalty Reduction	$ 1,111.00	$ 800.00
8368050	Modify to Non S&S, Unlikely	$ 1,657.00	$ 1,200.00
8368053	Penalty Reduction	$ 150.00	$ 113.00
8368221	Penalty Reduction	$ 807.00	$ 605.00
8368222	Penalty Reduction	$ 807.00	$ 605.00
	Sub-Total	**$25,945.00**	**$ 16,639.00**
KENT 2012-24			
8405380	No Change	$ 100.00	$ 100.00
8405385	No Change	$ 100.00	$ 100.00
8405386	No Change	$ 100.00	$ 100.00
8365675	Penalty Reduction	$ 334.00	$ 151.00
8365674	Penalty Reduction	$ 207.00	$ 155.00
8365676	Penalty Reduction	$ 334.00	$ 251.00
8365677	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 1,275.00**	**$ 957.00**
KENT 2012-137			
8353573	Penalty Reduction	$ 873.00	$ 555.00
KENT 2012-138			
8368105	Penalty Reduction	$ 207.00	$ 105.00
8368106	No Change	$ 100.00	$ 100.00
8368107	No Change	$ 100.00	$ 100.00
8368108	No Change	$ 100.00	$ 100.00
8368109	No Change	$ 100.00	$ 100.00
8368110	No Change	$ 100.00	$ 100.00
8368111	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 807.00**	**$ 705.00**
KENT 2012-139			
8368212	Modify to Non-S&S, Unlikely, and Moderate Negligence	$ 3,689.00	$ 1,500.00
8404157	No Change	$ 3,143.00	$ 3,143.00
	Sub-Total	**$ 6,832.00**	**$ 4,643.00**
KENT 2012-140			
8364438	Penalty Reduction	$ 1,000.00	$ 600.00
8362855	Modify to Non-S&S, Unlikely	$ 1,800.00	$ 1,600.00
8362885	Modify to Non-S&S, Unlikely	$ 2,400.00	$ 1,600.00
	Sub-Total	**$ 5,200.00**	**$ 3,800.00**

KENT 2012-141			
8363415	Modify to 2 Affected	$ 2,901.00	$ 1,700.00
8406495	Penalty Reduction	$ 117.00	$ 100.00
8406272	Modify to Non-S&S, Unlikely	$ 1,944.00	$ 1,250.00
8406273	Penalty Reduction	$ 651.00	$ 476.00
	Sub-Total	**$ 5,613.00**	**$ 3,526.00**
KENT 2012-142			
8405331	Penalty Reduction	$ 540.00	$ 405.00
8405335	Penalty Reduction	$ 460.00	$ 345.00
	Sub-Total	**$ 1,000.00**	**$ 750.00**
KENT 2012-320			
8352990	Modify to Non-S&S, Unlikely	$ 4,329.00	$ 1,000.00
KENT 2012-321			
8368636	Penalty Reduction	$ 946.00	$ 710.00
8365368	Modify to Reasonably Likely and Moderate Negligence	$ 23,229.00	$15,000.00
8365363	Penalty Reduction	$ 634.00	$ 476.00
8365366	Penalty Reduction	$ 634.00	$ 476.00
8405748	Modify to 1 Affected	$ 4,689.00	$ 4,000.00
8405749	No Change	$ 1,657.00	$ 1,657.00
	Sub-Total	**$31,789.00**	**$22,319.00**
KENT 2012-322			
8363431	Modify to Moderate Negligence	$ 5,080.00	$ 3,250.00
8406477	Modify to 1 Affected, and Moderate Negligence	$11,306.00	$ 8,000.00
8406478	Penalty Reduction	$ 1,944.00	$ 1,575.00
8363678	No Change	$ 100.00	$ 100.00
	Sub-Total	**$18,430.00**	**$12,925.00**
KENT 2012-323			
8368622	Penalty Reduction	$ 207.00	$ 139.00
8368625	Penalty Reduction	$ 112.00	$ 100.00
8368637	Penalty Reduction	$ 207.00	$ 130.00
	Sub-Total	**$ 526.00**	**$ 369.00**
KENT 2012-413			
8364985	No Change	$ 100.00	$ 100.00
8363880	Penalty Reduction	$ 207.00	$ 130.00
8363881	Penalty Reduction	$ 207.00	$ 155.00
	Sub-Total	**$ 514.00**	**$ 385.00**
KENT 2012-415			
8362889	Penalty Reduction	$ 1,400.00	$ 900.00
8363300	Penalty Reduction	$ 2,700.00	$ 1,500.00

8363430	Penalty Reduction	$ 2,500.00	$ 1,800.00
	Sub-Total	**$ 6,600.00**	**$ 4,200.00**
KENT 2012-416			
8363454	Penalty Reduction	$ 873.00	$ 530.00
8363872	No Change	$ 100.00	$ 100.00
8363873	Penalty Reduction	$ 499.00	$ 374.00
8363874	No Change	$ 100.00	$ 100.00
8363875	No Change	$ 100.00	$ 100.00
8363876	No Change	$ 100.00	$ 100.00
8363877	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 1,872.00**	**$ 1,404.00**
KENT 2012-723			
8402059	No Change	$ 100.00	$ 100.00
KENT 2012-724			
8404175	Penalty Reduction	$ 176.00	$ 132.00
8404176	Penalty Reduction	$ 263.00	$ 172.00
	Sub-Total	**$ 439.00**	**$ 304.00**
KENT 2012-729			
8353163	No Change	$ 100.00	$ 100.00
KENT 2012-839			
8368685	Penalty Reduction	$ 243.00	$ 157.00
KENT 2012-840			
8363891	No Change	$ 100.00	$ 100.00
8363890	Penalty Reduction	$ 150.00	$ 113.00
	Sub-Total	**$ 250.00**	**$ 213.00**
KENT 2012-842			
8363887	Penalty Reduction	$ 263.00	$ 197.00
8363894	Penalty Reduction	$ 263.00	$ 172.00
8363895	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 626.00**	**$ 469.00**
KENT 2012-845			
8368677	No Change	$ 1,657.00	$ 1,400.00
KENT 2012-847			
8368247	Modify to Non-S&S, Unlikely	$ 5,503.00	$ 2,000.00
8368671	Penalty Reduction	$ 1,944.00	$ 1,500.00
8368674	Penalty Reduction	$ 499.00	$ 374.00
8368675	Penalty Reduction	$ 224.00	$ 168.00
8368678	Penalty Reduction	$ 8,209.00	$ 6,000.00
8368679	Penalty Reduction	$ 425.00	$ 319.00
8368680	Penalty Reduction	$ 425.00	$ 319.00
8368681	Penalty Reduction	$ 334.00	$ 251.00
	Sub-Total	**$17,563.00**	**$10,931.00**

KENT 2012-848			
8365678	Modify to 104(a), Moderate Negligence	$11,000.00	$ 5,500.00
8365679	Penalty Reduction	$17,800.00	$14,000.00
8365680	Penalty Reduction	$24,600.00	$19,000.00
	Sub-Total	**$53,400.00**	**$38,500.00**
KENT 2012-849			
8368331	Penalty Reduction	$ 150.00	$ 113.00
KENT 2012-974			
8378200	Penalty Reduction	$ 150.00	$ 113.00
8378201	Modify to Non-S&S, Unlikely	$ 1,111.00	$ 500.00
8378202	Vacate	$ 1,111.00	$ 0.00
8378203	Penalty Reduction	$ 585.00	$ 439.00
8378205	Penalty Reduction	$ 873.00	$ 655.00
8378206	Penalty Reduction	$ 243.00	$ 182.00
8378207	No Change	$ 100.00	$ 100.00
8378208	Penalty Reduction	$ 585.00	$ 439.00
8378210	No Change	$ 100.00	$ 100.00
8378211	No Change	$ 100.00	$ 100.00
8378212	Penalty Reduction	$ 745.00	$ 559.00
8378213	Penalty Reduction	$ 807.00	$ 605.00
8378214	Penalty Reduction	$ 150.00	$ 113.00
8402779	No Change	$ 100.00	$ 100.00
8402780	No Change	$ 100.00	$ 100.00
8402781	No Change	$ 100.00	$ 100.00
8402782	No Change	$ 100.00	$ 100.00
8402783	No Change	$ 100.00	$ 100.00
8402784	Penalty Reduction	$ 150.00	$ 113.00
8402785	No Change	$ 100.00	$ 100.00
8402786	No Change	$ 100.00	$ 100.00
8378216	Penalty Reduction	$ 745.00	$ 259.00
8378217	Penalty Reduction	$ 150.00	$ 113.00
8378218	No Change	$ 100.00	$ 100.00
8378219	Penalty Reduction	$ 150.00	$ 113.00
8378220	Penalty Reduction	$ 150.00	$ 113.00
8378222	Penalty Reduction	$ 150.00	$ 113.00
8378223	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 9,055.00**	**$ 5,629.00**
KENT 2011-1497			
8363456	Penalty Reduction	$ 2,282.00	$ 1,800.00
8363457	Penalty Reduction	$ 2,282.00	$ 1,800.00
	Sub-Total	**$ 4,564.00**	**$ 3,600.00**
KENT 2012-22			
8406482	Penalty Reduction	$ 585.00	$ 357.00

8406483	Penalty Reduction	$ 176.00	$ 132.00
8406489	Penalty Reduction	$ 585.00	$ 439.00
8363473	No Change	$ 100.00	$ 100.00
8353911	Modify to 2 Affected	$ 4,440.00	$ 2,250.00
8406468	Penalty Reduction	$ 651.00	$ 488.00
8406469	Penalty Reduction	$ 651.00	$ 488.00
8406470	Penalty Reduction	$ 131.00	$ 100.00
8406471	Penalty Reduction	$ 131.00	$ 100.00
8406472	Penalty Reduction	$ 651.00	$ 488.00
8406473	Penalty Reduction	$ 971.00	$ 728.00
8406474	Penalty Reduction	$ 131.00	$ 100.00
8406475	Penalty Reduction	$ 651.00	$ 488.00
8406476	Penalty Reduction	$ 131.00	$ 100.00
8406481	Penalty Reduction	$ 112.00	$ 100.00
8406480	No Change	$ 100.00	$ 100.00
8406479	Penalty Reduction	$ 131.00	$ 100.00
8406484	Penalty Reduction	$ 403.00	$ 302.00
8406485	Penalty Reduction	$ 167.00	$ 125.00
8406486	Penalty Reduction	$ 142.00	$ 107.00
8406487	Penalty Reduction	$ 651.00	$ 488.00
8406488	Penalty Reduction	$ 131.00	$ 100.00
8406490	Penalty Reduction	$ 705.00	$ 529.00
8406491	Penalty Reduction	$ 705.00	$ 529.00
8406493	Penalty Reduction	$ 142.00	$ 107.00
8406494	Penalty Reduction	$ 705.00	$ 529.00
8406497	Penalty Reduction	$ 651.00	$ 488.00
8406498	Penalty Reduction	$ 651.00	$ 488.00
8406500	Penalty Reduction	$ 705.00	$ 529.00
8406501	Penalty Reduction	$ 131.00	$ 100.00
8406502	Penalty Reduction	$ 131.00	$ 100.00
8406503	Vacate	$ 131.00	$ 0.00
	Sub-Total	**$16,479.00**	**$11,179.00**
KENT 2012-726			
8363652	Penalty Reduction	$ 1,412.00	$ 1,058.00
8368047	Penalty Reduction	$ 243.00	$ 132.00
8368451	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 500.00
8368660	No Change	$ 100.00	$ 100.00
8368661	No Change	$ 100.00	$ 100.00
8368452	Penalty Reduction	$ 1,026.00	$ 900.00
8368663	Penalty Reduction	$ 634.00	$ 476.00
9867539	Penalty Reduction	$ 190.00	$ 143.00
8368670	Penalty Reduction	$ 946.00	$ 710.00
9867549	Penalty Reduction	$ 392.00	$ 294.00
	Sub-Total	**$ 6,069.00**	**$ 4,413.00**

KENT 2012-728			
8363455	Penalty Reduction	$ 1,530.00	$ 1,100.00
8363458	Modify to Moderate Negligence	$ 1,530.00	$ 775.00
8353919	Modify to Reasonably Likely	$ 3,784.00	$ 2,000.00
8363882	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 6,944.00**	**$ 3,975.00**
KENT 2012-885			
8406499	Penalty Reduction	$ 4,200.00	$ 2,500.00
8406496	Modify to Non-S&S, Unlikely	$ 2,800.00	$ 1,500.00
	Sub-Total	**$ 7,000.00**	**$ 4,000.00**
KENT 2009-1286			
8320791	No Change	$ 100.00	$ 100.00
8320792	No Change	$ 100.00	$ 100.00
8320793	No Change	$ 100.00	$ 100.00
8320794	Penalty Reduction	$ 334.00	$ 251.00
8320795	Penalty Reduction	$ 334.00	$ 201.00
8320796	Penalty Reduction	$ 224.00	$ 143.00
8356200	Penalty Reduction	$ 138.00	$ 104.00
8356201	No Change	$ 100.00	$ 100.00
8356204	No Change	$ 100.00	$ 100.00
8356205	No Change	$ 100.00	$ 100.00
8356207	No Change	$ 100.00	$ 100.00
8356208	No Change	$ 100.00	$ 100.00
8356211	Penalty Reduction	$ 687.00	$ 390.00
8356213	Penalty Reduction	$ 285.00	$ 214.00
8356214	Penalty Reduction	$ 334.00	$ 201.00
8356215	No Change	$ 100.00	$ 100.00
8338397	No Change	$ 100.00	$ 100.00
8338398	Penalty Reduction	$ 334.00	$ 251.00
8338399	Penalty Reduction	$ 1,026.00	$ 770.00
8338400	Penalty Reduction	$ 634.00	$ 426.00
8356216	No Change	$ 100.00	$ 100.00
8356217	Penalty Reduction	$ 555.00	$ 416.00
8356218	No Change	$ 100.00	$ 100.00
8356219	Penalty Reduction	$ 334.00	$ 201.00
8356220	Penalty Reduction	$ 334.00	$ 201.00
8356221	Penalty Reduction	$ 334.00	$ 251.00
8356222	Penalty Reduction	$ 1,203.00	$ 902.00
8400602	No Change	$ 100.00	$ 100.00
8356224	Penalty Reduction	$ 224.00	$ 168.00
8356225	Penalty Reduction	$ 224.00	$ 168.00
8356226	Penalty Reduction	$ 585.00	$ 439.00
8356227	Penalty Reduction	$ 334.00	$ 251.00

8356228	No Change	$ 100.00	$ 100.00
8356229	No Change	$ 100.00	$ 100.00
8356230	Penalty Reduction	$ 540.00	$ 405.00
8356231	Penalty Reduction	$ 334.00	$ 251.00
9887160	Penalty Reduction	$ 499.00	$ 374.00
8356232	No Change	$ 100.00	$ 100.00
8356234	Penalty Reduction	$ 362.00	$ 272.00
8356235	Penalty Reduction	$ 334.00	$ 251.00
8356236	Penalty Reduction	$ 334.00	$ 251.00
8356237	Penalty Reduction	$ 334.00	$ 251.00
8356238	Penalty Reduction	$ 334.00	$ 251.00
8356239	No Change	$ 100.00	$ 100.00
8356240	Penalty Reduction	$ 334.00	$ 201.00
8356241	No Change	$ 100.00	$ 100.00
8356242	Penalty Reduction	$ 334.00	$ 201.00
8356243	No Change	$ 100.00	$ 100.00
8356244	Penalty Reduction	$ 334.00	$ 251.00
8356245	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 14,530.00**	**$ 10,907.00**
KENT 2009-1388			
9887162	Penalty Reduction	$ 392.00	$ 294.00
8403439	No Change	$ 100.00	$ 100.00
8403435	No Change	$ 362.00	$ 362.00
8356246	No Change	$ 100.00	$ 100.00
8403440	No Change	$ 334.00	$ 334.00
8403441	No Change	$ 334.00	$ 334.00
8403442	No Change	$ 100.00	$ 100.00
8356247	No Change	$ 100.00	$ 100.00
8356248	No Change	$ 362.00	$ 362.00
8303443	No Change	$ 100.00	$ 100.00
8356249	No Change	$ 362.00	$ 362.00
8356250	No Change	$ 334.00	$ 334.00
8356259	No Change	$ 100.00	$ 100.00
8335344	No Change	$ 100.00	$ 100.00
8335345	No Change	$ 362.00	$ 362.00
8335346	No Change	$ 100.00	$ 100.00
8403446	No Change	$ 100.00	$ 100.00
8335347	No Change	$ 100.00	$ 100.00
8403447	No Change	$ 100.00	$ 100.00
8335348	Penalty Reduction	$ 362.00	$ 272.00
8403448	No Change	$ 100.00	$ 100.00
8335351	Modify to Non-S&S, Unlikely	$ 1,795.00	$ 538.00
	Sub-Total	**$ 6,199.00**	**$ 4,754.00**

KENT 2010-1515			
8341943	Modify to 104(a), Reasonably Likely and 2 Affected	$ 47,200.00	$ 25,000.00
KENT 2010-1517			
8356594	Penalty Reduction	$ 2,300.00	$ 1,200.00
8364000	Modify to 104(a), Reasonably Likely	$ 53,800.00	$ 32,500.00
8364002	Modify to Non-S&S, Unlikely	$ 2,300.00	$ 1,500.00
	Sub-Total	**$ 58,400.00**	**$ 35,200.00**
KENT 2011-155			
8402897	Penalty Reduction	$ 150.00	$ 113.00
8405235	Penalty Reduction	$ 745.00	$ 559.00
8342492	Penalty Reduction	$ 162.00	$ 122.00
8342493	Penalty Reduction	$ 162.00	$ 122.00
8342495	Penalty Reduction	$ 499.00	$ 374.00
8342496	Penalty Reduction	$ 460.00	$ 345.00
8342497	Penalty Reduction	$ 807.00	$ 605.00
9866073	Penalty Reduction	$ 540.00	$ 405.00
8402891	Penalty Reduction	$ 460.00	$ 345.00
8402892	Penalty Reduction	$ 745.00	$ 559.00
8335494	Penalty Reduction	$ 745.00	$ 559.00
8335495	Penalty Reduction	$ 745.00	$ 559.00
8342501	Penalty Reduction	$ 807.00	$ 605.00
	Sub-Total	**$ 7,027.00**	**$ 5,272.00**
KENT 2011-349			
8405157	Penalty Reduction	$ 138.00	$ 104.00
8404215	Penalty Reduction	$ 362.00	$ 272.00
8405158	Penalty Reduction	$ 540.00	$ 405.00
8404218	No Change	$ 100.00	$ 100.00
8405159	Penalty Reduction	$ 362.00	$ 272.00
8405160	Penalty Reduction	$ 150.00	$ 113.00
8405161	Penalty Reduction	$ 873.00	$ 655.00
8402902	Penalty Reduction	$ 687.00	$ 515.00
8402905	Penalty Reduction	$ 540.00	$ 405.00
8342512	Penalty Reduction	$ 634.00	$ 476.00
8342515	Non-S&S, Unlikely	$ 2,106.00	$ 1,100.00
8357184	Penalty Reduction	$ 392.00	$ 294.00
8342522	Penalty Reduction	$ 127.00	$ 100.00
8342523	Penalty Reduction	$ 392.00	$ 294.00
8342524	Penalty Reduction	$ 745.00	$ 559.00
8342526	Penalty Reduction	$ 540.00	$ 405.00
8364117	Penalty Reduction	$ 540.00	$ 405.00
8364118	Penalty Reduction	$ 540.00	$ 405.00

8364119	No Change	$ 100.00	$ 100.00
8364120	Penalty Reduction	$ 946.00	$ 710.00
8364121	Penalty Reduction	$ 540.00	$ 338.00
9866085	Penalty Reduction	$ 117.00	$ 100.00
	Sub-Total	**$11,471.00**	**$ 8,127.00**
KENT 2011-561			
8403810	Modify to 104(a), 1 Affected	$ 9,122.00	$ 6,000.00
8403811	Modify to 104(a), Moderate Negligence	$ 4,810.00	$ 1,304.00
	Sub-Total	**$13,932.00**	**$ 7,304.00**
KENT 2011-681			
8403812	Penalty Reduction	$25,800.00	$ 12,900.00
8403813	Modify to 104(a), High Negligence Citation	$19,300.00	$ 13,000.00
	Sub-Total	**$45,100.00**	**$ 25,900.00**
KENT 2011-1132			
8364680	Modify to Reasonably Likely, Lost Workdays	$ 25,163.00	$ 17,000.00
8364681	Modify to Reasonably Likely. Lost Workdays	$ 25,163.00	$ 17,000.00
8353256	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 550.00
8353266	Penalty Reduction	$ 207.00	$ 155.00
8353267	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 800.00
8404009	Penalty Reduction	$ 207.00	$ 155.00
8353286	Modify to Non-S&S, Unlikely	$ 3,405.00	$ 800.00
8353287	No Change	$ 2,901.00	$ 2,901.00
8353288	Penalty Reduction	$ 425.00	$ 319.00
8353290	Penalty Reduction	$ 807.00	$ 605.00
8352977	Penalty Reduction	$ 207.00	$ 155.00
8352978	Modify to Non-S&S, Unlikely	$ 1,026.00	$ 897.00
8352979	No Change	$ 1,026.00	$ 1,026.00
8352980	No Change	$ 1,026.00	$ 1,026.00
	Sub-Total	**$ 63,615.00**	**$ 43,389.00**
KENT 2011-1237			
8363422	No Change	$ 100.00	$ 100.00
8363423	Penalty Reduction	$ 138.00	$ 104.00
8363427	Penalty Reduction	$ 117.00	$ 100.00
8363428	Modify to Non-S&S, Unlikely	$ 1,203.00	$ 900.00
8363429	Penalty Reduction	$ 585.00	$ 402.00

8363432	Penalty Reduction	$ 117.00	$ 100.00
8363433	Penalty Reduction	$ 585.00	$ 413.00
8363434	Penalty Reduction	$ 117.00	$ 100.00
8363435	Penalty Reduction	$ 745.00	$ 559.00
8363436	Penalty Reduction	$ 2,282.00	$ 1,282.00
8363437	Penalty Reduction	$ 131.00	$ 100.00
8363441	Penalty Reduction	$ 585.00	$ 439.00
8363442	Penalty Reduction	$ 585.00	$ 439.00
	Sub-Total	**$ 7,290.00**	**$ 5,038.00**
KENT 2011-1334			
8342516	Modify to No Lost Workdays	$ 8,600.00	$ 4,000.00
KENT 2011-1337			
8406459	Penalty Reduction	$ 117.00	$ 100.00
8363443	Penalty Reduction	$ 127.00	$ 100.00
8363444	Penalty Reduction	$ 117.00	$ 100.00
8363445	Penalty Reduction	$ 585.00	$ 374.00
8363446	Penalty Reduction	$ 2,282.00	$ 1,500.00
8363447	Penalty Reduction	$ 460.00	$ 345.00
8363448	Penalty Reduction	$ 117.00	$ 100.00
8363449	Penalty Reduction	$ 117.00	$ 100.00
8363452	Penalty Reduction	$ 460.00	$ 345.00
8363453	Penalty Reduction	$ 117.00	$ 100.00
		$ 4,499.00	**$ 3,164.00**
KENT 2011-1495			
8364181	Modify to 104(a), 2 Affected	$ 52,500.00	$ 20,000.00
8364194	Modify to Non-S&S, Unlikely and 1 Affected	$ 13,600.00	$ 6,800.00
	Sub-Total	**$ 66,100.00**	**$ 26,800.00**
KENT 2011-1498			
8363459	Penalty Reduction	$ 263.00	$ 197.00
8363460	Modify to Moderate Negligence	$ 1,700.00	$ 750.00
8353925	Modify to Non-S&S, Unlikely	$ 2,536.00	$ 750.00
	Sub-Total	**$ 4,499.00**	**$ 1,697.00**
KENT 2012-20			
8347842	Modify to Non-S&S, Unlikely	$ 4,000.00	$ 4,000.00
8406122	Modify to 1 Affected	$ 10,705.00	$ 8,000.00
	Sub-Total	**$ 14,705.00**	**$ 12,000.00**
KENT 2012-23			
8342546	Modify to Reasonably Likely, Lost Workdays	$ 38,500.00	$ 25,000.00
8342557	Modify to Non-S&S, Unlikely	$ 1,800.00	$ 1,300.00

	Sub-Total	**$ 40,300.00**	**$ 26,300.00**
KENT 2012-414			
8368064	Modify to Reasonably Likely	$ 70,000.00	$ 35,000.00
KENT 2012-725			
8368065	Modify to 104(a), Moderate Negligence and Reasonably Likely	$ 70,000.00	$ 39,000.00
8368211	No Change	$ 14,373.00	$ 7,200.00
8368213	Modify to 104(a), Moderate Negligence, and Reasonably Likely	$ 35,543.00	$ 17,771.00
8368218	Vacate	$ 13,609.00	$ 0.00
8368054	Modify to 104(a), Moderate Negligence, and Reasonably Likely	$ 30,288.00	$ 15,144.00
8368219	Modify to High Negligence and Reasonably Likely	$ 70,000.00	$ 35,000.00
8368220	Modify to 104(a), High Negligence, and Reasonably Likely	$ 60,000.00	$ 30,000.00
	Sub-Total	**$293,813.00**	**$144,115.00**
KENT 2012-841			
8406504	Modify to 104(a), Unlikely	$ 7,176.00	$ 5,000.00
8353920	Modify to 104(a), Lost Workdays	$ 56,929.00	$ 16,000.00
8353935	Modify to Lost Workdays	$ 2,000.00	$ 2,000.00
	Sub-Total	**$ 66,105.00**	**$ 23,000.00**
KENT 2012-846			
8368063	Modify to 104(a), Moderate Negligence, and Reasonably Likely	$ 70,000.00	$ 35,800.00
8368051	Modify to Reasonably Likely	$ 70,000.00	$ 35,000.00
8368217	Modify to Reasonably Likely	$ 70,000.00	$ 40,000.00
	Sub-Total	**$210,000.00**	**$110,800.00**
KENT 2012-1394			
8378048	Penalty Reduction	$ 575.00	$ 431.00
KENT 2012-1499			
8363896	Penalty Reduction	$ 293.00	$ 170.00
8408540	No Change	$ 100.00	$ 100.00
8408541	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 493.00**	**$ 370.00**

KENT 2012-1501			
8368676	Penalty Reduction	$ 1,657.00	$ 600.00
KENT 2013-17			
8378081	Penalty Reduction	$ 1,100.00	$ 500.00
KENT 2013-18			
8378204	Penalty Reduction	$ 585.00	$ 439.00
8378215	Penalty Reduction	$ 224.00	$ 172.00
8378124	No Change	$ 100.00	$ 100.00
8378125	Penalty Reduction	$ 745.00	$ 459.00
	Sub-Total	**$ 1,654.00**	**$ 1,170.00**
KENT 2013-352			
8369645	No Change	$ 100.00	$ 100.00
8369647	No Change	$ 100.00	$ 100.00
8369648	No Change	$ 100.00	$ 100.00
	Sub-Total	**$ 300.00**	**$ 300.00**
KENT 2010-1213			
8364001	Modify to Permanently Disabling & Moderate Negligence	$ 9,122.00	$ 6,122.00
GLOBAL SETTLEMENT TOTAL		**$1,994,395.00**	**$1,197,365.00**

WHEREFORE, the motions to approve settlement for the above-captioned cases are **GRANTED**. The modifications made to the citations and orders in each docket are set forth below.

KENT 2009-1281

It is **ORDERED** that Citation Nos. 8335785, 8335786, 8335790, 8335798, 8335802 and 8335815 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2009-1284

The Secretary has vacated Citation No. 8334581. It is **ORDERED** that Citation No. 8334580 be **MODIFIED** to reduce the level of negligence to "low." It is **ORDERED** that Citations Nos. 8334590 and 8334599 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2010-9

It is **ORDERED** that Citation No. 8356316 be **MODIFIED** to change the type of action to a section 104(a) citation, to reduce the level of negligence to "high," to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2010-10

The Secretary has vacated Citation Nos. 8356307, 8356311, 8356312, 8356313 and 8356315. It is **ORDERED** that Citation Nos. 8356291 and 8356292 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2010-148

It is **ORDERED** that Citation Nos. 8357224 and 8357241 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2010-152

It is **ORDERED** that Order Nos. 8356319 and 8356321 be **MODIFIED** to change the type of action to a section 104(a) citation, to reduce the level of negligence to "moderate," to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2010-918

It is **ORDERED** that Citation No. 8356561 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2010-1108

It is **ORDERED** that Citation No. 8342695 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding. It is **ORDERED** that Citation No. 8342697 be **MODIFIED** to reduce the level of negligence to "moderate."

KENT 2010-1214

It is **ORDERED** that Citation Nos. 8356596 and 8356597 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding. It is **ORDERED** that Citation Nos. 8356599 and 8342424 be **MODIFIED** to reduce the level of negligence to "low." It is **ORDERED** that Citation No. 8319991 be **MODIFIED** to reduce the injury that could reasonably be expected to occur to "lost workdays or restricted duty." It is **ORDERED** that Citation No. 8342430 be **MODIFIED** to reduce the level of negligence to "moderate." It is **ORDERED** that Citation Nos. 8342423, 8342425 and 8342431 be **MODIFIED** to reduce the numbers of persons affected to "one person."

KENT 2010-1362

It is **ORDERED** that Citation Nos. 8357998, 8365015 and 8365016 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2010-1365

It is **ORDERED** that Citation Nos. 8341957 and 8341958 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2010-1516

The Secretary has vacated Citation No. 8364417.

KENT 2010-1518

It is **ORDERED** that Citation Nos. 8364049, 8364054, 8364416, 8342450 and 8342451 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding. It is **ORDERED** that Citation No. 8364050 be **MODIFIED** to reduce the injury that could reasonably be expected to occur to "lost workdays or restricted duty." It is **ORDERED** that Citation No. 8364051 be **MODIFIED** to reduce the number of persons affected to "three persons."

KENT 2010-1648

It is **ORDERED** that Citation No. 8357161 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-143

It is **ORDERED** that Citation No. 8402886 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-144

It is **ORDERED** that Citation No. 8364090 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-145

It is **ORDERED** that Citation Nos. 8364094, 8364098 and 8364100 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding. It is **ORDERED** that Citation Nos. 8364096 and 8364101 be **MODIFIED**

to reduce the number of persons affected to "one person," and to reduce the injury that could reasonably be expected to occur to "lost workdays or restricted duty." It is **ORDERED** that Citation No. 8364099 be **MODIFIED** to reduce the injury that could reasonably be expected to occur to "lost workdays or restricted duty."

KENT 2011-156

It is **ORDERED** that Citation No. 8364466 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-447

It is **ORDERED** that Citation Nos. 8362850 and 8362865 be **MODIFIED** to reduce the level of negligence to "low." It is **ORDERED** that Citation Nos. 8362859, 8362860 and 8362862 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-448

It is **ORDERED** that Citation No. 8364834 be **MODIFIED** to reduce the level of negligence to "low." It is **ORDERED** that Citation No. 9866095 be **MODIFIED** to reduce the number of persons affected to "two persons," and to reduce the injury that could reasonably be expected to occur to "lost work days or restricted duty."

KENT 2011-564

It is **ORDERED** that Citation No. 8342539 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-952

It is **ORDERED** that Citation Nos. 8365264 and 8365267 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2009-1601

It is **ORDERED** that Citation No. 8354365 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2010-1212

It is **ORDERED** that Citation Nos. 8341946 and 8341948 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding, and to reduce the number of persons affected to "one person."

KENT 2010-1364

It is **ORDERED** that Order No. 8341930 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the level of negligence to "high."

KENT 2010-1649

It is **ORDERED** that Order No. 8341945 be **MODIFIED** to change the type of action to a section 104(a) citation, to reduce the level of negligence to "moderate," and to reduce the number of persons affected to "three persons."

KENT 2011-154

The Secretary has vacated Order No. 8357976.

KENT 2011-347

It is **ORDERED** that Citation Nos. 8363001 and 8363003 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-348

It is **ORDERED** that Citation No. 8365032 be **MODIFIED** to reduce the injury that could reasonably be expected to occur to "lost workdays or restricted duty."

KENT 2011-559

It is **ORDERED** that Order No. 8365031 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-562

It is **ORDERED** that Citation Nos. 8364166, 8364167, 8364169, 8364170, 8364171, 8364173 and 8364174 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding. It is **ORDERED** that Citation Nos. 8364163 and 8364164 be **MODIFIED** to reduce the number of persons affected to "two persons."

KENT 2011-680

It is **ORDERED** that Citation No. 8335626 be **MODIFIED** to reduce the level of negligence to "moderate."

KENT 2011-682

It is **ORDERED** that Citation Nos. 8364189, 8364191, 8364192, 8364195, 8364197 and 8346973 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding. It is **ORDERED** that Citation No. 8364179 be **MODIFIED** to reduce the likelihood of injury to "reasonably likely," to reduce the number of persons affected to "two persons," and to reduce the level of negligence to "low." It is **ORDERED** that Citation No. 8364190 be **MODIFIED** to reduce the number of persons affected to "one person."

KENT 2011-683

It is **ORDERED** that Citation No. 8403194 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding. It is **ORDERED** that Citation No. 8353222 be **MODIFIED** to reduce the likelihood of injury to "unlikely," to remove the inspector's significant and substantial finding, and to reduce the number of persons affected to "one person."

KENT 2011-823

It is **ORDERED** that Citation Nos. 8353007, 8353009 and 8353012 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding. It is **ORDERED** that Citation No. 8353008 be **MODIFIED** to reduce the number of persons affected to "one person."

KENT 2011-947

It is **ORDERED** that Citation Nos. 8364683 and 8353258 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding. It is **ORDERED** that Citation No. 8353253 be **MODIFIED** to reduce the likelihood of injury to "reasonably likely," to reduce the injury that could reasonably be expected to occur to "lost workdays," and to reduce the number of persons affected to "one person."

KENT 2011-948

The Secretary has vacated Citation No. 8364544.

KENT 2011-949

It is **ORDERED** that Citation No. 8342494 be **MODIFIED** to reduce the number of persons affected to "one person."

KENT 2011-950

The Secretary has vacated Citation No. 8365265.

KENT 2011-951

The Secretary has vacated Citation No. 8364542.

KENT 2011-1133

It is **ORDERED** that Citation No. 8363418 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-1234

It is **ORDERED** that Citation Nos. 8406252, 8365365 and 8406254 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-1236

It is **ORDERED** that Citation Nos. 8352988, 8352991, 8352992, 8352993, 8352994, 8352995, 8352997, 8352998, 8363702, 8363704, 8363708 and 8363712 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-1336

It is **ORDERED** that Citation No. 8362833 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-1496

It is **ORDERED** that Citation No. 8365393 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2012-21

It is **ORDERED** that Citation Nos. 8368205 and 8368050 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding. It is **ORDERED** that Citation Nos. 8368215 and 8368214 be **MODIFIED** to reduce the likelihood of injury to "unlikely," to remove the inspector's significant and substantial finding, and to reduce the number of persons affected to "one person." It is **ORDERED** that Citation No. 8363961 be **MODIFIED** to reduce the number of persons affected to "one person."

KENT 2012-139

It is **ORDERED** that Citation No. 8368212 be **MODIFIED** to reduce the likelihood of injury to "unlikely," to remove the inspector's significant and substantial finding, and to reduce the level of negligence to "moderate."

KENT 2012-140

It is **ORDERED** that Citation Nos. 8362855 and 8362885 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2012-141

It is **ORDERED** that Citation No. 8363415 be **MODIFIED** to reduce the number of persons affected to "two persons." It is **ORDERED** that Citation No. 8406272 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2012-320

It is **ORDERED** that Citation No. 8352990 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2012-321

It is **ORDERED** that Citation No. 8365368 be **MODIFIED** to reduce the likelihood of injury to "reasonably likely," and to reduce the level of negligence to "moderate." It is **ORDERED** that Citation No. 8405748 be **MODIFIED** to reduce the number of persons affected to "one person."

KENT 2012-322

It is **ORDERED** that Citation No. 8363431 be **MODIFIED** to reduce the level of negligence to "moderate." It is **ORDERED** that Citation No. 8406477 be **MODIFIED** to reduce the number of persons affected to "one person," and to reduce the level of negligence to "moderate."

KENT 2012-847

It is **ORDERED** that Citation No. 8368247 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2012-848

It is **ORDERED** that Citation No. 8365678 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the level of negligence to "moderate."

KENT 2012-974

The Secretary has vacated Citation No. 8378202. It is **ORDERED** that Citation No. 8378201 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2012-22

The Secretary has vacated Citation No. 8406503. It is **ORDERED** that Citation No. 8353911 be **MODIFIED** to reduce the number of persons affected to "two persons."

KENT 2012-726

It is **ORDERED** that Citation No. 8368451 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2012-728

It is **ORDERED** that Citation No. 8363458 be **MODIFIED** to reduce the level of negligence to "moderate." It is **ORDERED** that Citation No. 8353919 be **MODIFIED** to reduce the likelihood of injury to "reasonably likely."

KENT 2012-885

It is **ORDERED** that Citation No. 8406496 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2009-1388

It is **ORDERED** that Citation No. 8335351 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2010-1515

It is **ORDERED** that Order No. 8341943 be **MODIFIED** to change the type of action to a section 104(a) action, to reduce the likelihood of injury to "reasonably likely," and to reduce the number of persons affected to "two persons."

KENT 2010-1517

It is **ORDERED** that Citation No. 8364000 be **MODIFIED** to change the type of action to a section 104(a) action, and to reduce the likelihood of injury to "reasonably likely." It is **ORDERED** that Citation No. 8364002 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-349

It is **ORDERED** that Citation No. 8342515 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-561

It is **ORDERED** that Order No. 8403810 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the number of persons affected to "one person." It is **ORDERED** that Order No. 8403811 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the level of negligence to "moderate."

KENT 2011-681

It is **ORDERED** that Order No. 8403813 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the level of negligence to "high."

KENT 2011-1132

It is **ORDERED** that Citation Nos. 8364680 and 8364681 be **MODIFIED** to reduce the likelihood of injury to "reasonably likely," and to reduce the injury that could reasonably be expected to occur to "lost workdays." It is **ORDERED** that Citation Nos. 8353256, 8353267, 8353286 and 8352978 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-1237

It is **ORDERED** that Citation No. 8363428 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2011-1334

It is **ORDERED** that Order No. 8342516 be **MODIFIED** to reduce the injury that could reasonably be expected to occur to "no lost workdays."

KENT 2011-1495

It is **ORDERED** that Order No. 8364181 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the number of persons to "two persons." It is **ORDERED** that Citation No. 8364194 be **MODIFIED** to reduce the likelihood of injury to "unlikely," to remove the inspector's significant and substantial finding, and to reduce the number of persons to "one person."

KENT 2011-1498

It is **ORDERED** that Citation No. 8363460 be **MODIFIED** to reduce the level of negligence to "moderate." It is **ORDERED** that Citation No. 8353925 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding,

KENT 2012-20

It is **ORDERED** that Citation No. 8347842 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding. It is **ORDERED** that Citation No. 8406122 be **MODIFIED** to reduce the number of persons affected to "one person."

KENT 2012-23

It is **ORDERED** that Citation No. 8342546 be **MODIFIED** to reduce the likelihood of injury to "reasonably likely," and to reduce the injury that could reasonably be expected to occur to "lost work days." It is **ORDERED** that Citation No. 8342557 be **MODIFIED** to reduce the likelihood of injury to "unlikely," and to remove the inspector's significant and substantial finding.

KENT 2012-414

It is **ORDERED** that Citation No. 8368064 be **MODIFIED** to reduce the likelihood of injury to "reasonably likely."

KENT 2012-725

The Secretary has vacated Citation No. 8368218. It is **ORDERED** that Citation Nos. 8368065, 8368213 and 8368054 be **MODIFIED** to change the type of action to a section 104(a) citation, to reduce the level of negligence to "moderate," and to reduce the likelihood of injury to "reasonably likely." It is **ORDERED** that Citation No. 8368219 be **MODIFIED** to reduce the level of negligence to "high," and to reduce the likelihood of injury to "reasonably likely." It is **ORDERED** that Citation No. 8368220 be **MODIFIED** to change the type of action to a section 104(a) citation, to reduce the level of negligence to "high," and to reduce the likelihood of injury to "reasonably likely."

KENT 2012-841

It is **ORDERED** that Citation No. 8406504 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the likelihood of injury to "unlikely." It is **ORDERED** that Citation No. 8353920 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the injury that could reasonably be expected to occur to "lost workdays." It is **ORDERED** that Citation No. 8353935 be **MODIFIED** to reduce the injury that could reasonably be expected to occur to "lost workdays."

KENT 2012-846

It is **ORDERED** that Citation No. 8368063 be **MODIFIED** to change the type of action to a section 104(a) citation, to reduce the level of negligence to "moderate," and to reduce the likelihood of injury to "reasonably likely." It is **ORDERED** that Citation Nos. 8368051 and 8368217 be **MODIFIED** to reduce the likelihood of injury to "reasonably likely."

KENT 2010-1213

It is **ORDERED** that Order No. 8364001 be **MODIFIED** to reduce the injury or illness that could reasonably be expected to occur to "permanently disabling" and to reduce the level of negligence to "moderate."

PAYMENT

It is further **ORDERED** that the operator pay a total penalty of **$1,197,365.00** in ten installments. The first payment in the amount of $119,736.50 will be due on July 24, 2013. Nine subsequent payments of $119,736.50 shall be due on the following dates: August 24, 2013, September 24, 2013, October 24, 2013, November 24, 2013, December 24, 2013, January 24, 2014, February 24, 2014, March 24, 2014 and April 24, 2014.

The parties have agreed that failure to make any of the scheduled payments within ten days of the due date will result in the entire, unpaid balance becoming immediately due and payable, together with such court costs as may be incurred by the U.S. Department of Labor, or other agency acting on its behalf, in collecting the amount due. Upon receipt of full payment, the above-captioned cases are **DISMISSED**.

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution:

Amanda K. Slater, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5708

Schean G. Belton, Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219

John Williams, Esq., Rajkovich, Williams,Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

Benjamin Bennett, President, Manalapan Mining Co., Inc., 10156 U.S. Highway 25E, Pineville, KY 40988

Jim Brummett, Manalapan Mining Co., Inc., 8174 East Highway 72, Pathfork, KY 40863

/ca; /dm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
202-434-9900

July 22, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner,	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEVA 2012-1821 A.C. No. 46-07837-299315 ARK
v.	:	
LEWIS-GOETZ AND COMPANY INC., Respondent	: :	Mine: Dobbin Ridge Prep Plant

DECISION AND ORDER
ON CROSS MOTIONS FOR SUMMARY DECISION

Appearances: M. del Pilar Castillo, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for Petitioner;
John B. Bechtol, Esq., Metz Lewis Brodman Must O'Keefe LLC, Pittsburgh, PA, for Respondent.

Before: Judge Rae

This case is before me on the Secretary's Petition for Assessment of Civil Penalty against Lewis-Goetz and Company, Inc. ("Lewis-Goetz"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. § 815.[1] The parties agreed to submit the matter to me for resolution on motions for summary decision. They filed joint stipulations as well as briefs in support of their positions.

Statement of Stipulated Facts:

The Secretary seeks a civil penalty for a single violation of 30 C.F.R. § 77.1710(g) which states in relevant part that employees working in surface work areas of underground coal mines "shall be required to wear" safety belts and lines when there is a danger of falling. The citation

[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

was written in conjunction with an imminent danger order[2] by MSHA inspector Ensminger on December 18, 2011 at the Dobbin Ridge Prep Plant owned by Arch Coal through its Vindex Energy Corporation. This coal mine is located near Mt. Storm, West Virginia.

Lewis-Goetz is an independent contractor that offers conveyor belt fabrication and repair services to mines and is identified by MSHA contractor identification "ARK." Lewis-Goetz hourly employees Gene Franklin and Jesse Brown were performing belt splicing and vulcanizing services on the elevated No. 2 raw coal belt when Ensminger observed them. Brown was on the belt approximately 10 to 12 feet above the ground. He was not wearing a safety harness or tag line. The belt was wet from falling snow at the time and it was 20 degrees Fahrenheit. This condition caused Ensminger to reach the conclusion that Brown was in imminent danger of falling and caused him to issue the order and this citation. In speaking with Ensminger, Brown stated that he was aware of Lewis-Goetz' requirement to wear fall protection, he had been retrained on it just 13 days earlier and he had it in his tool bag located in the maintenance truck. His explanation for his failure to use it was that he was in a hurry to complete his work due to the weather and he decided not to use it. (*Jt. Stipulations of the Parties*.)

The parties have submitted joint exhibits which document Brown's training on the use of fall protection dated November 10, 2009 (OSHA training record) and MSHA annual refresher training on November 10, 2009, November 15, 2010 and November 5, 2011. (Gov. Ex. C.) Also submitted is Gov. Ex. D which is a copy of Lewis-Goetz' Company Safety Program Disciplinary Program indicating that a failure to wear required PPE is a safety violation subject to a graduated discipline including the possibility of termination for repeated violations. Respondent also states that Brown was in fact disciplined as a result of this violation. (*Resp't's Br. in Support of Notice of Contest.)*

Summary Decision Standards

> Commission Rule 67 sets forth the guidelines for granting summary decision:
> (b) A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows:
>
> (1) That there is no genuine issue as to any material fact; and

[2] Sec. 107(a) of the Act provides " If upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist."

(2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

The Commission "has long recognized that [ ] 'summary decision is an extraordinary procedure,' and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Hanson Aggregates New York, Inc*., 29 FMSHRC 4, 9 (Jan. 2007)(quoting *Energy West Mining Co*., 16 FMSHRC 1414, 1419 (July 1994)). In reviewing the record on summary judgment, the court must evaluate the evidence in "the light most favorable to…the party opposing the motion." *Hanson Aggregates* at 9 (quoting *Poller v. Columbia Broad. Sys*., 368 U.S. 464, 473 (1962)). Any inferences "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 motions." *Hanson Aggregates*, 29 FMSHRC at 9 (quoting *Unites States v. Diebold, Inc*., 369 U.S. 654, 655 (1962)).

The issues presented are whether MSHA had jurisdiction over Lewis-Goetz as an "operator" within the meaning of the Act and whether they violated the mandatory standard. There are no contested issues of material fact involved in reaching a conclusion as to these two issues.

Findings of Fact and Legal Analysis

Jurisdiction

The Secretary asserts jurisdiction over Lewis-Goetz as an operator based upon the fact that it provides "services or construction" at a mine as defined under the Act. 30 U.S.C. § 802(d). Lewis-Goetz' services are essential to the work of extracting coal and its presence at the mine is more than *di minimis.* Additionally, the Secretary points out that Lewis-Goetz registered with MSHA as a contractor and obtained an MSHA ID number. It did not assert a jurisdictional defense in its responsive pleadings herein and has paid prior civil penalties assessed against it without protest. (*Sec'y's Mot. for Summ. Decision*.)

The Respondent asserts that it is not an operator. Their services were very limited, they did not extract coal themselves, there is no evidence that their role at the plant went beyond this one incident and because the violation was written as affecting only one person, it is evident that they did not "come close to the level of operation, control or supervision required"… "to rise to the level of an 'operator.'" (*Resp't's Br.*)

The Commission has set forth a two-part test to determine whether a contractor is subject to MSHA's jurisdiction as an "operator." The first step is to determine the contractor's "proximity to the extraction process" or, in other words, to determine if its work is "sufficiently related to that process," and the second part is to determine the extent of its presence at the mine. *Otis Elevator Co.,* 11 FMSHRC 1896, 1900 (Oct. 1989); *Joy Technologies Inc.,* 17 FMSHRC 1303, 1307 (Aug. 1995), *aff'd* 99 F.3d 991 (10th Cir. 1996). In further defining the extent of presence required to make a finding that a contractor may be held accountable for violations, the Commission and the Third and Fourth Circuits have found only contact that is "so rare, infrequent and attenuated" as to be considered *de minimis,* would be excepted from the definition of an operator. *National Industrial Sand Ass'n,* 601 F.2d 689, 701 (3d Cir. 1979); *Old Dominion Power Co. v. Donovan,* 772 F.2d 92, 96 (4th Cir. 1985); *Otis Elevator* at 1900.

The Respondent's position that they are not an operator focuses on the fact that they do not control the plant or supervise employees of Arch Coal or perform the extraction of coal. However, they admittedly control, supervise and discipline their own employees working at the mine such as Brown and Franklin. Their second line of defense is that their services are incidental to the mining process and their presence is very limited. It would be extremely difficult at best to find that fabricating, maintaining and repairing conveyor belts is not an essential part of the mining process. Without the means of transporting the ore from the face to the outside plant and storage facilities, the extraction process of mining would be impossible. This bears no further discussion. They clearly acknowledge they are contractors providing essential services to the mining community on a continuing basis by the mere fact that they registered with MSHA and obtained a contractor's ID and have maintained that status since 2009. They have been filing their reports, such as hours worked with MSHA since 2009 (ranging from 11,147 in 2009 to 14,060 so far this year), as evidence that their presence at the mines is far beyond this one incident as Respondent asserts. They provided yearly MSHA refresher training to their employees at least from 2009 through 2011 as evidenced by joint exhibit Gov. C. They have indeed paid prior assessed penalties without contesting MSHA's jurisdiction over them as a contractor. (*MSHA Mine Data Retrieval System, www.MSHA.gov.*) And the mere fact that only one person was cited as affected by this violation is in no way indicative of their status as something other than an independent contractor within MSHA's jurisdiction. As Respondent is well aware, it is based solely upon the fact that only Brown was in danger of falling. Without further discussion, I find this argument is without merit.

Respondent did not violate the standard

Addressing Respondent's position first, the cited standard states that employees "shall be required to wear" fall protection. Under the plain meaning of this statute, they assert that they cannot be found in violation as long as they do impose such a requirement and take reasonable

measures to assure it is enforced. They cannot be held responsible for being guarantors against an employee's disobedience or negligence. (*Resp't's Br.,* citations omitted.)

The Secretary takes the position that the Act imposes strict liability on all operators who violate a mandatory standard notwithstanding employee misconduct. Several Circuit Court decisions are cited for this proposition; however, that is not the issue here. The issue is whether the standard has, in fact been violated. More precisely, it is whether the language "shall be required to wear" means the operator must only require the miners to wear the protective gear or whether it means miners "shall wear it" imposing liability against the operator if they do not regardless of cause or knowledge on the part of the operator. The difference is critical.

As the Respondent has correctly referenced in its brief, the Commission has spoken to this very issue and has stated that the language of this regulation "does not state that the operator must guarantee that belts and safety lines are actually worn, but rather says only that each employee shall be required to wear them." The Commission further held that "shall be required to wear" and "shall be worn" have two separate and distinct meanings and operators do not have the duty to guarantee that employees heed its directives. *Southwestern Illinois Coal Corp.,* 5 FMSHRC 1672, 1675 (1983). The duty imposed upon the operator is that they have a safety system in place requiring employees to use safety gear and that they diligently seek to enforce that requirement through such avenues as training, supervision, and disciplinary measures for failure to comply. *North American Coal Corp.,* 3 IBMA 93 (1974); *Southwestern Illinois Coal Corp.* at 1674-75.

The Secretary has stipulated that Respondent has a written policy that all miners must wear fall protection, they offer at least yearly refresher training on it and by company policy a violation of the requirement to wear fall protection is subject to graduated disciplinary measures including termination. Brown stated to Ensminger when he was pulled off the belt that he was well aware of the requirement to wear the equipment but he intentionally ignored the policy. The gear was readily available to him in his tool bag. (*Jt. Stipulations of the Parties)* The Secretary has provided documentation that Lewis-Goetz was cited for a violation of this same standard in June 2011. (Sec. Ex. B). No further information surrounding the events leading to this citation was provided. Accordingly, this document alone provides an insufficient basis from which to draw any conclusions contrary to the stipulated facts submitted by the parties.[3] Based upon the facts mutually agreed upon, I find that Lewis-Goetz did have an adequate policy in place requiring employees to wear fall protection and they took adequate measures to enforce that policy.

[3] If it were the Secretary's position that Lewis-Goetz does not make a diligent effort to enforce its policy regarding fall protection, a material issue of fact would be in contest making summary decision inappropriate in this case. I therefore draw no such conclusions as the parties have stipulated to the contrary.

In sum, I find that Lewis-Goetz has not violated the standard cited by the Secretary and I grant its motion for summary decision.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Secretary's motion for summary decision **IS DENIED** and Respondent's motion for summary decision **IS GRANTED**.

Citation No. 8036268 is **VACATED** and this matter is **DISMISSED**.

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

Distribution:

M. del Pilar Castillo, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630E., The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106-3306.

John B. Bechtol, Esq., Metz Lewis Brodman Must O'Keefe LLC, 535 Smithfield Street, Suite 800, Pittsburgh, PA 15222.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, D.C. 20004-1710

July 24, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
	:	DOCKET NO. KENT 2011-434
Petitioner,	:	
v.	:	
	:	A.C. NO. 15-19076-240278
NALLY & HAMILTON ENTERPRISES,	:	
	:	Mine Name: Chestnut Flats
Respondent	:	

DECISION

Appearances: Brian D. Mauk, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner
Martin J. Cunningham, Esq., Bingham Greenebaum Doll, LLP, Lexington, Kentucky, for the Respondent
S. Thomas Hamilton, Jr., Esq., Saltsman & Willett, PSC, Bardstown, Kentucky, for the Respondent

Before: Judge Moran

Introduction

This matter involves a citation issued for an alleged violation of 30 CFR § 77.1710(i) and its requirement that "employee[s] … shall be required to wear … [s]eat belts in a vehicle where there is a danger of overturning and where roll protection is provided." For the reasons which follow, the Court, finding that the mine's employees *were required* to wear seat belts, VACATES the citation and DISMISSES the proceeding.

Citation No. 8362516

At the outset, while the facts are herein related, it should be noted that there were no genuine disputes about the facts and that this case turns upon the Court's construction of the cited standard.

Findings of Fact

On May 5, 2010, MSHA Inspector Arthur Smith issued Citation No. 8362516, after conducting an accident investigation of a non-fatal injury in which a rock truck overturned at the Nally & Hamilton Chestnut Flats Mine on April 21, 2010. The driver of the truck was not wearing a seat belt at the time of the accident. Tr. 16.

MSHA Inspector Arthur Vincent Smith[1] conducted the accident investigation at the Chestnut Flats Mine following the April 21 incident.[2] Smith began the investigation at the mine on April 29, 2010; the investigation then continued on May 3 and 5, during which time he visited both the mine and the home of accident victim James Patterson. Tr. 19. When Inspector Smith arrived at the mine on April 29, he talked with the mine foreman, Michael Lewis, about the investigation he would be conducting for the April 21 accident. Tr. 23.

Prior to his investigation, mine officials sent Inspector Smith a written report that documented the April 21 accident. Tr. 29. Smith's understanding of the accident during his investigation was based on this report, for the truck had been moved from its overturned position prior to the investigation and no pictures were supplied. Tr. 29-30. Smith explained that the incident occurred at a dump site during the night shift on April 21 around 4:00 a.m., and as James Patterson was backing out to dump "he got over too far to the right, and he drove over the berm." Tr. 30-31. The truck backed over the berm and then initially rolled over on its right side, before ending upside down, having rotated 180 degrees. Tr. 31-32.

Upon his arrival at the accident site on April 29, Inspector Smith examined the triple 7D rock truck, which was involved in the accident on April 21. This is a large truck, capable of carrying 100 tons. Tr. 27, 31. The truck had been moved since the accident from its overturned position and re-situated in an upright position on level ground. Tr. 32-33. As he inspected the truck, Smith noticed that the truck cab had a rollover protective structure that had broken off during the roll-over accident. Tr. 26. The Inspector met with the welders who were repairing the cab protector on the damaged truck, and determined that the accident was not attributable to any truck defect. Tr. 34-35. He also checked the truck's seat belt, which he determined was operable. Tr. 36.

[1] Inspector Smith retired in September 2012, after 35 years of employment with MSHA. At the time of his retirement, he worked as surface specialist and accident investigator. He gained the position as a surface specialist due to his extensive experience with various types of surface mining. Tr. 10. He worked in his roles as a both a surface specialist and an accident investigator at MSHA for about 8 to 10 years prior to his retirement. Tr. 10-11. Prior to coming to MSHA in 1977, Inspector Smith worked as an equipment operator and worked in blasting, helping mechanics, and other facets of surface mining. Tr. 12. The parties stipulated to Inspector Smith's qualifications as a mine investigator. Tr. 14

[2] The parties agreed to stipulations in the Secretary's pre-hearing report from No. 3A through 3K. Tr. 15-16.

Accident victim James Patterson was not at the mine during Inspector Smith's April 29 investigation, as he was under doctor's orders at the time not to return to work. Tr. 45. Inspector Smith continued his investigation on May 3 when he visited James Patterson at his home. Mr. Patterson and his wife were at home during this May 3 meeting; no other MSHA or Nally & Hamilton representatives were present on that day. Tr. 44. Smith did not take a written statement from Mr. Patterson, nor did he record their conversation. Tr. 45.[3] The Inspector stated that he "asked [Patterson] about the accident, and we discussed . . .when it happened and why it happened, how it happened. And I asked him, I said, were you wearing a seatbelt. He said, well, I won't lie to you. He said, no, I was not."[4] Tr. 40.

After meeting with Mr. Patterson, Inspector Smith returned to the Chestnut Flats Mine on May 5 to continue his investigation. Tr. 53. There, he again spoke with mine foreman Michael Lewis and informed him that he was going to issue a citation because the victim was not wearing a seatbelt at the time of the accident. *Id*. Smith recollected that Mr. Lewis then told him that the company had a policy requiring miners to wear seatbelts at all times while on mobile equipment. *Id*. The Inspector did not remember whether Mr. Lewis showed him the company's written policy at that moment, nor could he recall the first time he saw the mine's policy. Tr. 56-57.

In issuing the Citation, Inspector Smith explained that he marked it as "moderate negligence" because "there was a mitigating circumstance, which was a company policy…It's not like the company knew [Mr. Patterson] wasn't wearing [the seatbelt]. They weren't aware of it at all, and yet they had a policy to require him to wear it." Tr. 66. Smith informed that the mine's policy requires that all mobile equipment operators, not just rock truck operators, wear a seatbelt. *Id.*

Regarding the practice of wearing seatbelts at the mine, Inspector Smith advised that he spoke with the night shift foreman, Mr. Asher, about this and that he informed that "if they were found operating mobile equipment without a seatbelt, that they had to spend eight hours in a classroom after that. The company gave them the class. They couldn't work. They had to attend a class concerning seatbelts." Tr. 70. Inspector Smith also stated that, during his previous inspections at the Chestnut Flats Mine, he had seen miners wear seatbelts while operating mobile machinery such as bulldozers, loaders, and rock trucks. Tr. 71, 81.

On cross-examination, Inspector Smith acknowledged that the cab of the rock truck was high enough that no one from Nally & Hamilton could see from the ground level whether an

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[3] Inspector Smith explained that accident investigators as a practice will usually only take written statements or tape record statements during fatal accident investigations. Tr. 45.

[4] Mr. Patterson concurred that the accident happened near the end of the night shift, around 4:00 a.m. on April 21. Tr. 41. Inspector Smith recalled that during the visit, Patterson showed him an injury he had sustained from the accident on his lower back, which Smith described as a "big round knot" sticking out of his back. Tr.45- 46. The Inspector further recalled that Mr. Patterson was hospitalized for the requisite three hours after this accident, and he had missed some work days. Tr. 48.

operator in a cab of the truck was, or was not, wearing a seatbelt. Tr. 83. Accordingly, the Inspector agreed that a person standing on the ground next to the truck would have no way of knowing whether the operator inside the cab was wearing a seatbelt. *Id.* Smith further agreed that Nally & Hamilton enforced its seatbelt requirement policy and that it was clear to the vehicle operators whom he spoke with during the investigation that seatbelt usage was required. Tr. 88-89. When asked who was negligent in this situation, Mr. Patterson or Nally & Hamilton, Smith responded that it was Mr. Patterson who was negligent. Tr. 90.

James Tracy Creech, who has worked as safety coordinator for all Nally & Hamilton Enterprises mines, including the Chestnut Flats Mines, also testified. Tr. 101-102. His duties as safety coordinator include traveling with MSHA inspectors and conducting annual retraining and mine emergency training for METs or first state training. Tr. 101.

Mr. Creech stated that the Respondent had a written policy in place requiring that anyone operating a piece of equipment with rollover protection must wear a seatbelt:

> It's company policy that any time you operate a piece of equipment with rollover protection, you must have a seatbelt on. Plus it's also a company policy that if you drive a company vehicle anywhere on the public roads, you must have a seatbelt on. Tr. 104.

Rule No. 8 of the company's policy and safety rules, in effect under that title at the time of Patterson's accident, is communicated to employees upon their hire and every year during their eight-hour annual retraining. Tr. 106, 107; Exh. R1. Mr. Creech explained:

> Every year, each employee has to have eight hours of annual retraining. During that annual retraining, they go over their company policy and safety rules. In the class that I do personally, I read each company policy and safety rule, and then down at the bottom it says, I have read or had read to me; and I'll read that, and I say by signing below you agree to abide by these company policy and safety rules. And if they sign it, then they agree to abide by the company policy and safety rules. Tr. 105.

Rule No. 8 reads: "Wear seat belts at all times where equipment is equipped with rollover protection system." Exh. R1. The Respondent presented evidence that James Patterson signed this company policy on November 10, 2004 and again at company retraining sessions in 2005, 2006, 2007, 2008, and 2009. Tr. 110, 116; Exh. R1, R2, R3, R4, R5, R6.

In the event this policy is violated, the employee is issued a written warning or is required to attend an eight-hour retraining. Tr. 105-06. Creech could only recall one instance, since starting at the mine in 1997, in which an employee was disciplined for violating the seatbelt usage policy. Tr. 106-108. This instance involved an employee who was required to attend an eight-hour safety retraining after failing to wear a seatbelt while driving on a public highway. Thus, the mine's policy was enforced even where an employee was off Nally & Hamilton's property. Tr. 106, 125.

At the annual retraining sessions, along with reading through the company policy with the employees, Mr. Creech would also show the employees videos that "show the advantages of

wearing a seatbelt versus the disadvantages of not wearing a seatbelt." Tr. 119, 122; Exh. R7 through R11. Mr. Patterson watched these videos prior to the April 21 accident. Tr. 122.

In addition to signing the company policy upon starting employment and attending annual retraining, Creech testified that the foremen also try to conduct a monthly safety talk with the employees during which "they talk about seatbelts, berms, highwalls, and things on the job specific that they need to talk about with their men." Tr. 106. The foremen would use these five to ten-minute meetings to "explain to them what all is going on, what they need to be looking for, things that have happened." Tr. 128. At these meetings the foremen will stress the importance of wearing seatbelts, keeping their berms up, and doing pre-shift examinations so the employees will know if something is wrong with the equipment. *Id*.

Mr. Creech also agreed that it is not possible for a foreman to see into the triple 7D rock truck unless one climbs up to the cab or the truck operator opens the truck's door so the foreman can see into the cab. Tr. 126. The cab area of triple 7D trucks is 108 inches, or about 9 feet, from the ground. *Id*. These trucks have lap seatbelts, so even if someone outside the cab could see the operator through the windshield, one could not see down to the area where the seatbelt would be fastened. *Id*.

When asked about the repercussions for multiple seatbelt violations, Mr. Creech testified that such an issue has not yet occurred, but it could very likely result in that employee's dismissal. Tr. 127. He noted that "we have over 250 people laid off who would love to come back to work. And I'm sure if they got the second [violation], we would be sending them home and having someone else come in to do their job." *Id.* Creech attributed the fact that the mine has only experienced one seatbelt usage violation to the company's emphasis on its policy, and that "the guys know that if they get caught without them, there will be consequences." Tr. 128. He also noted past accidents in which a triple 7D rock truck had overturned a complete 360 degrees, but the operator was wearing his seatbelt and "the only scratch he had was a little place on his cheek…where a rock came through the side glass when it was flipping over and hit him on the cheek." Tr. 129. Creech would often use such examples when explaining to employees the importance of wearing a seatbelt. *Id.*

The Parties' contentions

The Secretary contends that the Respondent has misconstrued the plain language of Section 77.1710 and violated the standard by failing to diligently enforce its seatbelt-wearing policy. Sec. Br. 5. It submits that the Respondent's argument, that it is in compliance because it requires employees to wear seatbelts, would essentially rewrite the standard to provide that "[e]ach operator shall require employees to wear protective clothing and devices" rather than the standard's actual wording that "[e]ach employee…shall be required to wear protective clothing and devices." The Secretary maintains that because the standard places the seatbelt requirement on "each employee," an operator's written policy, as it is only a piece of paper, does not provide protection to a miner. Rather, the seatbelt itself provides this protection. Sec. Br. 5-6.

The Court would comment that the Secretary's argument, focusing upon the words, "each employee," misses the full context of the standard which provides that employees *shall be*

required to wear protective equipment. Had it been the Secretary's objective, the standard could have simply stated that "employees shall wear" the identified protective equipment. However, as the Commission has noted in a similar context, such language was not employed here.

The Secretary also maintains that Respondent did not diligently enforce its seatbelt policy per the requirements of Section 77.1710, as set forth in *Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672 (Oct. 1983). Respondent has not quantified how much of its annual safety training is devoted to seat belt safety. Sec. Br. 6. Furthermore, Respondent's safety coordinator, Mr. Creech, admitted that the seat belt safety policy had only been enforced one time since 1997. *Id.* Mr. Creech also conceded that one cannot physically see whether a rock truck driver is wearing a seatbelt when standing on the ground or driving by in a truck, and Respondent presented no evidence that mine management performed visual inspections to ensure that employees were wearing their seatbelts. *Id.* In the Court's view, these arguments are either irrelevant or could be equally construed to reach a different conclusion than the Secretary suggests.

Referencing Commission and ALJ decisions that have upheld violations of various Section 77.1710 provisions, despite the existence of an operator policy requiring the use of the cited protective clothing and devices, the Secretary points to.*Austin Power, Inc.*, 9 FMSHRC 2015 (Dec. 1987); *Middle Kentucky Construction, Inc.*, 2 FMSHRC 1137 (May 1980) (ALJ Steffey); and *Reading Anthracite Co.*, 32 FMSHRC 399 (April 2010) (ALJ Bulluck). The latter held that Section 77.1710(i) requires the "use of a seatbelt," and that the operator was moderately negligent where an employee had been trained but did not wear a seatbelt and the operator did not diligently enforce its policy because drivers were not constantly reminded of the necessity of seat belts. The Court observes that these decisions are factually distinct from the present matter and that the decisions of fellow administrative law judges have no precedential effect.[5]

Respondent contends that the record does not support a basis for the citation nor does it support the severity urged by the Secretary. As with the Secretary, the Respondent also cites to *Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672 (Oct. 1983) in support of its position. Respondent asserts that it satisfied its duty of diligent enforcement under Section 77.1710 and, as no violation occurred, the citation should be vacated. Respondent highlights that the Commission has stated that an operator's obligation is not simply to have a policy, but also to require seatbelt usage in the policy, educate and train employees regarding the policy, and enforce the policy on the operator's employees, all of which the Respondent has done.

[5] The Secretary has also urged the Court to uphold Inspector Smith's S&S designation, for the injury producing event occurred as a result of Mr. Patterson not wearing his seat belt when his rock truck overturned. Sec. Br. 8.

It also contends that Inspector Smith's "moderate negligence" designation was proper, for although Respondent's safety policy requiring the use of seat belts is a mitigating factor, the limited enforcement of this policy contributes to Respondent's negligence. Sec. Br. 9. The Court would comment that the Secretary's assertion that the Respondent had "limited enforcement" is without record support and that in any event, by vacating the citation, those issues are now moot.

Arch Mineral Corp., 5 FMSHRC 468, 472-74 (March 1983). It adds that the mine's safety belt usage requirements are memorialized in its written company policy, which each miner must sign before beginning employment and that this policy is reiterated every year, during annual retraining and required safety videos. Nally & Hamilton also requires employees to complete pre- and post-shift reports which include affirming whether the seat belt is operable. Punishment for violation of the seatbelt policy is strict, and includes dismissal for repeat offenders.[6] Resp. Br. 7. The Court agrees both with the Respondent's characterization of its policy and the description of its application.

Discussion

The cited standard, Section 77.1710(i) provides: "Each employee working in a surface coal mine or in the surface work areas of an underground coal mine **shall be required** to wear protective clothing and devices as indicated below . . . (i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided." (emphasis added).

In *Southwestern Illinois Coal Corp*., 5 FMSHRC 1672 (Oct. 1983), ("*Southwestern*"), the Commission followed the Department of Interior Board of Mine Operations Appeals' reading in *North American Coal Corporation*, 3 IBMA 93 (1974), of a similarly-worded standard, which standard employed the same "**shall be required to wear**" phrase. In the *Southwestern* case "safety belts," as opposed to "seat belts," were in issue, with the standard providing, in pertinent part, "Each employee . . . shall be required to wear protective clothing and devices as indicated below . . . (g) Safety belts and lines where there is a danger of falling . . ." Section 77.1710(g). The Commission agreed that the meaning of the phrase "shall be required to wear" meant that operators must (1) establish a safety system requiring the wearing of the clothing or equipment and (2) enforce the system diligently.[7] *Id.* at 1674-75.

Referring to the Interior Board's decision in *North American Coal Corp.*, 3 IBMA 93, 107 (1974), ("*North American*"), the Commission reasoned:

> The intended effect of [the Interior Board's] construction was that if a failure to wear the protective clothing and equipment was 'entirely the result of the employee's disobedience

[6] Alternatively, even if the Citation is upheld by the Court, Respondent maintains that the evidence does not support an S&S finding because the first two elements of the *Mathies* test were unproven by the Secretary. *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). Also, it asserts that the negligence should be lowered to none, because even the MSHA Inspector admitted that Mr. Patterson, and not the company, acted negligently. Respondent notes that *Western Fuels-Utah Inc.*, 10 FMSHRC 256, 260-61 (March 1988), makes clear that Respondent cannot be held negligent when a rank-and-file employee like Mr. Patterson was the negligent party. Resp. Br. 8.

[7] In *North American Coal Corporation*, it was "face-shields or goggles" that were the particular subject of the "shall be required to wear" phrase. Thus, in at least two prior instances, one by the Commission and the other by its predecessor, the IBMA, it has been determined that the "shall be required to wear" phrase is distinct from a safety standard requiring that one "shall wear" listed protective devices.

> or negligence rather than a lack of requirement by the operator to wear them, then a violation has not occurred…[t]he regulation does not state that the operator must guarantee that belts and safety lines are actually worn, but rather says only that each employee shall be required to wear them. The plain meaning of "require" is to ask for, call for, or demand that something be done. . . . Accordingly, when an operator requires its employees to wear belts when needed, and enforces that requirement, it has discharged its obligation under the regulation. We respectfully disagree with our dissenting colleagues that "shall be required to wear" means "shall be worn." The two phrases are not the same, and we do not find persuasive a reading that converts a duty to require into a duty to guarantee. Certainly, the purpose of the standard is to protect miners, but the standard as written provides for that protection by directing that operators require the belts to be worn. *Id.* at 1675. (citations omitted).

The Court considers the Secretary's arguments to have an otherworldly construction, at odds with the plain wording of the standard and with Commission precedent. Thus, while the Secretary's contention[8] that it is not the mine's written policy, but the safety belts themselves which protect miners while operating mobile machinery, is true, the Secretary's conclusion from that observation -- that any employee's failure to wear a safety belt constitutes a violation -- ignores the standard's language.

As the Respondent has noted, the level of vigilant enforcement necessary to insulate an operator from liability, under the sweeping construction of this standard urged by the Secretary, contravenes the Commission's own pronouncements about Section 77.1710's meaning. It points to the Commission's observation in *Southwestern Illinois Coal Corp*., that the standard's language imposes upon the operator a *duty to require*, *not a duty to guarantee*. 9 FMSHRC at 1675. Both Inspector Smith and Safety Coordinator Creech specified the numerous safety measures that the mine routinely employed to enforce its seatbelt policy. Not only did Nally & Hamilton require its employees to sign off on agreeing to the mine's safety policies, including seatbelt usage, before beginning employment, but each miner also revisits this policy every year at the company's annual retraining. The truck's driver, James Patterson, was among the Nally & Hamilton employees who agreed to this safety policy before starting employment at the mine; he was further reminded of these rules every year at annual retraining. Tr. 115-116. The Court agrees that, to hold an operator liable for Mr. Patterson's noncompliance in the face of an established company policy, which policy Mr. Patterson regularly acknowledged, would exceed the scope of the provision. It is also noteworthy that both MSHA Inspector Smith and Nally & Hamilton's Safety Coordinator Creech agreed that it was not possible for a mine foreman or other supervisor, standing at ground level, to see whether a truck operator is wearing a seatbelt while sitting in the truck cab, which rises nearly 10 feet above ground level. Tr. 83, 126 It is no small matter to observe that, under these facts, no reasonable additional steps could have been taken to assure that its employee was wearing the seat belt for this vehicle, given the undisputed record that one could not tell from the ground if the lap belt was being worn.

As noted earlier, while the Secretary has asserted that Mr. Creech's recollection of only one instance in which an employee was disciplined for violating the seatbelt policy suggests

[8] Sec. Br. 5-6.

Respondent's failure to diligently enforce its policy, that same information could equally be construed to show that the Respondent's policy was effective. In support of this observation, it is noted that Inspector Smith had observed miners wearing safety belts during his past inspections at the mine, and Mr. Creech expressed that the possibility of termination incentivized miners to follow the safety rules, particularly in light of the company's recent layoffs. Tr. 81, 126. Mr. Creech also recalled an instance, similar to Mr. Patterson's accident, in which the miner's triple 7D truck completely overturned. Tr. 129. The miner in that instance, however, was wearing a seatbelt and suffered no injuries, and Creech would often use that example to illustrate the importance of seatbelt usage to the mine's mobile equipment operators. *Id.* Accordingly, not only did the mine's seat belt rule, in place at the time of Mr. Patterson's accident, mandate employee compliance with the safety belt policy while operating mobile equipment, but the testimony of both witnesses also established that the mine diligently enforced this policy.

In conclusion, it is undisputed that the rock truck was not defective at the time of the accident, that Nally & Hamilton did not know (and could not reasonably determine for this truck) that Patterson was not wearing his safety belt, and that the mine had, and enforced, a policy regarding the wearing of safety belts. The Commission in *Southeastern Illinois Coal* subscribed to the principal that "if a failure to wear the protective clothing and equipment was 'entirely the result of the employee's disobedience or negligence rather than a lack of requirement by the operator to wear them, then a violation has not occurred.'"[9] 9 FMSHRC at 1675, quoting *North American*. (emphasis in original).

For the reasons stated above, the Court finds that the Secretary did not establish a violation of 30 CFR § 77.1710(i), and accordingly, Citation No. 8362516 is VACATED[10] and this matter is hereby DISMISSED.

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

[9] While, the matter has been vacated, and therefore consideration of negligence is not reached, were it to be considered, given that it was solely Mr. Patterson's negligence in failing to wear his seat belt, the Court would not, on these facts, find the Respondent negligent.

[10] In the alternative, should the Commission depart from the apparent precedence and hold that the Secretary did establish a violation of Section 77.1710(i), the Court would find that, on this record, the S&S and moderate negligence designations were not established. Inspector Smith admitted that Mr. Patterson, not Nally & Hamilton, was negligent in the situation, and conceded that Nally & Hamilton had no way of knowing that truck driver Patterson was not wearing a seatbelt. The Court would therefore find there was no negligence and, given the significant mitigating factors present in this case, would reduce the civil penalty to $100 (one hundred dollars).

Distribution:

Brian D. Mauk, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, Tennessee 37219-2456; mauk.brian@dol.gov

Thomas Hamilton, Esq., Saltsman & Willett, PSC, 212 East Stephen Foster Ave., Bardstown, Kentucky, 40004; thomashamiltonjr@gmail.com

Martin J. Cunningham, Esq., Bingham Greenebaum Doll, LLP, 300 West Vine St., Suite 1100, Lexington, Kentucky, 40507; mcunningham@bgdlegal.com

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004
Telephone No.: (202) 434-9958 / Fax No.: (202) 434-9949
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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. LAKE 2009-35 A.C. No. 11-02752-164722
v.	:	
THE AMERICAN COAL COMPANY, Respondent	: :	Mine: Galatia Mine

DECISION AND ORDER

Appearances: Travis W. Gosselin, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner

Jason W. Hardin, Esq., and Mark E. Kittrell, Esq., Salt Lake City, Utah, for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a Petition for Assessment of Civil Penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). It involves two 104(d)(2) orders issued to Respondent for alleged violations of 30 C.F.R. 75.400 concerning float coal dust and loose coal accumulations. Both orders were assessed "flagrant" penalties under the "repeated failure" provision of section 110(b)(2) of the Act.

A hearing was held in Henderson, Kentucky. The parties introduced testimony and documentary evidence, and witnesses were sequestered.

During the drafting of this decision, the Commission granted interlocutory review in two cases concerning the "repeated failure" flagrant provision of section 110(b)(2). In *Conshor Mining*, *LLC*, the judge certified for interlocutory review his ruling that a violation that is not attributable to reckless conduct may not be deemed flagrant under 30 U.S.C. § 820(b)(2) based on the operator's history of prior similar violations. Unpublished Order at 2-3 (Jan. 19, 2012). In *Wolf Run Mining Co*., the judge certified for interlocutory review his ruling that the Secretary of Labor may not permissibly consider an operator's past violation history in determining whether a

violation resulted from a "repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard," so as to warrant the designation of a flagrant violation within the meaning of section 110(b)(2) of the Act, 30 U.S.C. § 820(b)(2). 34 FMSHRC 337, 345-46 (Jan. 2012) (ALJ). Given the similarity of these cases to the issues at bar, I deemed it prudent to stay this matter during the pendency of the interlocutory review proceedings. On March 20, 2013, the Commission issued its Wolf Run Decision. *See Wolf Run,* 35 FMSHRC at ___, slip op., No. WEVA 2008-1265 (Mar. 20, 2013).

By Order dated April 1, 2013, I lifted the stay of this matter and gave the parties an additional opportunity to brief what effect, if any, the Commission's *Wolf Run* decision should have on disposition of this matter. Both the Secretary and Respondent filed briefs in response to my Order lifting stay.

For the reasons set forth below, I modify Order No. 7490599 to reduce the level of negligence from "high" to "moderate." I further modify Order Nos. 7490584 and 7490599 to reduce the likelihood of injury or illness from "highly likely" to "reasonably likely." Further, I affirm the S&S and unwarrantable failure designations for both Orders and conclude that both violations are flagrant under a narrow interpretation of the "repeated failure" provision. *See Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 8, n. 14. Accordingly, I reduce the proposed penalty for Order No. 7490584 from $179,300 to $101,475 and Order No. 7490599 from $164,700 to $77,737, resulting in a total civil penalty assessment of $179,212 for the "repeated failure" flagrant violations found herein.

On the entire record, including my observation of the demeanor of the witnesses,[1] and after considering the post-hearing and post *Wolf Run* briefs, I make the following:

II. Findings of Fact

A. Stipulated Facts

The parties stipulated to the following facts.

1. Respondent is an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 803(d), at the coal mine at which the Orders at issue in these proceedings were issued.

2. Galatia Mine is operated by Respondent.

3. Galatia Mine is subject to the jurisdiction of the Mine Act.

[1] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses.

4. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.

5. The individual whose signature appears in Block 22 of the Orders at issue in these proceedings was acting in his official capacity and as an authorized representative of the Secretary of Labor when the Orders were issued.

6. A duly authorized representative of the Secretary served the subject Orders and terminations of the Orders upon an agent of the Respondent at the dates and place stated therein as required by the Mine Act, and the Orders and terminations may be admitted into evidence to establish their issuance.

7. The total proposed penalties for the Orders at issue in these proceedings will not affect Respondent's ability to continue in business.

8. The Orders contained in Exhibit A attached to the Petition for Assessment of Penalty for these dockets are authentic copies of the Orders at issue in these proceedings with all appropriate modifications and terminations, if any.

B. Factual Background

Respondent operates the Galatia Mine, a large underground coal mine in Saline County, Illinois. At the time that the Orders in this case were issued, there were three portals: the Main Portal, Galatia North Portal, and the Millennium Portal, which is now known as the New Future Portal. Tr. I at 160; *see also American Coal Co.*, 33 FMSHRC 2803 (Nov. 2011) (ALJ).[2]

The Galatia Mine utilized a complex system of conveyor belts to transport coal for many miles from mine face to portal. Accumulations of coal at two transfer points between belts gave rise to the instant Orders. On September 18, 2007,[3] inspectors issued Order No 7490584 for accumulations occurring approximately four miles outby the working section near the location where the Flannigan #1 belt transferred coal to the Northwest #3 belt. Tr. I at 102, 353-55; R. Ex. 5, pp. 3-4. On September 23, 2007, Order 7490599 was issued for accumulations which occurred near the transfer point between the Pony Belt, a small, temporary belt at the working section in the northwest area of the mine, and the Flannigan tailgate belt. Tr. I at 308, 353-55; R. Ex. 4, pp. 3-4.

[2] In 2010, the Galatia Mine was split into two separate mines. The old Mine ID No. 11-02752, assigned by MSHA, was retained by the Galatia Mine, which was renamed the "New Era Mine." *American Coal Co.*, 33 FMSHRC 2511, 2512, n. 2 (Oct. 2011) (ALJ). The mine that was split off, dubbed the Millennium Portal (now known as the New Future Mine), was issued a separate Mine ID No. 11-03232. *Id*.

[3] All subsequent dates occurred in 2007, unless otherwise indicated.

In 2007, the Galatia Mine employed almost 800 people and produced 7,009,160 tons of coal. Tr. I at 39. When the instant inspections occurred in September 2007, the mine liberated a little over three million cubic feet of methane a year and was subject to five-day spot inspections. Tr. I at 53-54. In the twelve months preceding September 23, Respondent was issued twenty-seven citations/orders for alleged violations of 30 C.F.R. 75.400 involving accumulations of coal, lump coal, coal dust, float coal dust, and coal fines on and around conveyor belts and belt structures in the Galatia Mine. P. Exs. 5-31. Nineteen of the aforementioned citations/orders were issued as S&S violations. P. Exs. 5, 8, 10-12, 14, 15-18, 20, 22, 25-31. In the twenty-four months preceding the subject orders, Respondent was cited for violations of 75.400 a total of 361 times. P. Ex. 1. Among those 361 citations and orders, seventy-seven were issued as S&S violations and eleven were issued as unwarrantable failure violations under Section 104(d) of the Mine Act. P. Ex. 1.[4]

C. The Inspections at Issue

1. Order No. 7490584

On September 18, mine foreman, John Alariai, accompanied Steven Miller,[5] MSHA's lead coal mine inspector for the Galatia Mine portals, during an E01 inspection when Miller issued Order No. 7490584. Tr. I at 57-58; *see* 30 U.S.C. § 103(f). The 104(d)(2) Order alleged a violation of 30 C.F.R. § 75.400 citing accumulations of loose coal and float coal dust near and outby the Northwest #3 belt tail area. The Order states:

> Float coal dust, a distinct black in color, and loose coal were allowed to accumulate under and around the energized tail roller of the Northwest Number 3 conveyor belt. The accumulations measured approximately 6 inches to 29 inches in depth. Accumulations of coal that had been removed from under this tail roller in the past had been stock pile[d] behind the tail roller guard and measured approximately 6 feet in

[4] As discussed in greater depth below, the Secretary relies on a violation history printout that does not completely represent the final determination of the citation and orders contained within. P. Ex. at 1. Some of the citations, and all of the unwarrantable failure orders, have been either contested and have not yet become final orders of the Commission or have been altered as the result of litigation or settlement. Respondent, however, provided the settlement for twenty citations in which the Secretary agreed to remove the S&S designation for nine citations, lower the gravity and/or negligence for twelve citations, and remove the unwarrantable failure designation for one citation. R. Ex. 39.

[5] Miller has thirty-one years of experience in the coal mine industry, including twenty years as an MSHA inspector with responsibilities at the Galatia Mine. Tr. I at 45, 47, 50-51. As lead inspector at the mine, he is responsible for tracking all citations and areas that need inspection, and he conducts meetings with managers and other inspectors to discuss and prevent recurrence of the same types of violations. Tr. I at 51-52.

> width, 2 feet in depth, and 8 feet in length. Loose coal and coal float dust also extended outby the tail roller approximately 150 feet as well as 40 feet inby the tail roller. This area was black and the turning tail roller was suspending float coal dust into the atmosphere. This condition has been on the books for the last four shifts.

P. Ex. 2.

Miller did not identify any wet or slurry areas in the accumulations. Tr. I at 82. Miller described the "float coal dust" as a brown material with the consistency of flour and described "loose coal" as ranging in size from 6-inch diameter lumps to pea-size gravel. Unlike loose coal, float coal dust is extremely fine, and can go through a 200 sieve screen. Tr. I at 201-02. Both substances are combustible, but there is an "added hazard" with float dust, which can propagate an explosion when suspended. Tr. I at 59-60, 202. Miller acknowledged that although frictional heat did occur with the loose coal and float dust grinding in the tail roller of the Northwest #3 belt, he found no other ignition source in the area, and no evidence of methane or abnormal gas readings. Tr. I at 94-95, 269. Furthermore, Miller did not detect methane near the cited areas, and the Secretary offered no evidence about methane liberation in the Galatia North Mine portal for the specific time period at issue. Tr. I at 159-160, 271-73.

The accumulations were in an area where the belt tail intersected and connected with the Flannigan #1 belt head. Tr. I at 215-16. Miller opined that the accumulations at the Northwest #3 belt tail were different from "normal spillage," as they were "a distinct black in color" and measured approximately 6 inches to 29 inches in depth. Tr. I at 61-62. Miller observed the accumulations under and around the turning tail roller, which created a point of contact between the combustible accumulations and the belt itself. Tr. I at 62. Miller opined that the amount of accumulations in the area of the belt's tail roller was "a lot more than what you should see . . . on a tail roller if it's being properly maintained." Tr. I at 63.

Miller explained that as coal is transferred from belt to belt, some float dust travels through the air, but the black color of the accumulations on the rock-dusted surface indicated that the condition had existed for quite some time. Tr. I at 71-72. Based on the condition and color of the accumulations, and the absence of evidence that the belt was torn or had gone down suddenly, Miller determined that the accumulations "had been there for many shifts." Tr. I at 72-73.

Miller relied on Respondent's examination books to conclude that the accumulations were present for at least four shifts. Tr. I at 74. Respondent's pre-shift reports are prepared by mine examiners in the three hours prior to the beginning of each shift and are countersigned by a mine manager, superintendent/assistant, and another pre-shift mine inspector. Each report contains notations alerting mine management of violations and hazardous conditions and remarking on developing hazards. At the end of each shift, the mine manager files another report listing the violations and other hazardous conditions that were observed during the shift or reported by the pre-shift examiner, and the actions taken to address said conditions.

Respondent produced the five set of reports addressing the Northwest #3 belt that were filed prior to the issuance of Order No. 7490584. R. Exs. 22, 23. Those shift reports provide as follows:

a. September 17

i. 8 a.m. to 4 p.m. shift (day shift)

The report alerts mine management of hazardous or violative conditions at sections 101-103, 93, and 86-87 of the Northwest #3 belt, which the report describes as "dirty." In the remarks section, the examiner notes, "accumulation[s] take up to [the] head roller. Floor gray. B.O. bottom roller 96 ½." In an undated on-shift report, the mine manager states that the reported sections have been cleaned. R.Ex. 22.

ii. 4 p.m. to 12 midnight shift (evening shift)

The pre-shift report cites the following violations and hazardous conditions: "Tail Area Black, Tail scraper dirty, #1 Head Area Black**,** 101-103 dirty, 161 dirty." R. Ex. 22. The hand-written remarks for this shift are difficult to read, however, they appear to say, "B.O. Bottom seg. @ 43, 109-119 getting dirty. Flakes piling outby Drive BO Bottom roller @ 96 ½ XC." R. Ex. 22. The on-shift report makes no mention of the reported conditions. Instead, it appears that the mine manager spent the shift addressing water and roadway issues at the G.N. Travelway. *Id.*

b. September 18

i. 12 midnight to 8 a.m. shift (midnight shift)

The pre-shift report states that the following condition was reported to mine management: "Tail & scraper dirty & black." R. Ex. 22. The examiner also includes in the remark section that: "108-119 getting dirty B.O. Bot. roller @ 96 ½ XC." The on-shift report identifies the same hazardous condition reported to mine management ("Tail & scraper dirty"), but there is no indication that management took any action to address the condition as the "Action Taken" column for this item is left blank. R. Ex. 22.

ii. 8 a.m. to 4 p.m. shift (day shift)

The pre-shift report states the following: "Tail and scraper dirty and black. Dirty under rollers at 93 x-cut." The conditions again were reported to mine management. R. Ex. 23. The remarks section states: "108-119 getting dirty, B.O. bottom roller at 96 ½ x-cut. Floor getting black [at] Tail – 150 x-cut." The on-shift report repeats the reported conditions, without noting that any action was taken to address the conditions. The time and date on the "shift" line for this report is left blank. R. Ex. 23.

iii. 4 p.m. to 12 midnight shift (evening shift)

The pre-shift report states the following: "Tail & scraper getting Black; Dirty under rollers @ 93XC; 145.5 - 148 XC Dirty; 0/Cast@124XC." It notes that the conditions were reported to mine management. R. Ex. 23. The remarks for the pre-shift state the following: "96 ½ Bottom Roller BO; 106-108 getting dirty, Acc; 109, 120xc Acc. getting dirty 150xc → Tail getting black." The on-shift report states the following: "tail & scraper dirty," and notes that the condition was "cleaned." R. Ex. 23. I find that the tail scraper was cleaned after Miller discovered the violation at 5:15 p.m., since the shift had just begun, the conditions were present at least throughout the prior shift, and the accumulations cited were extensive. P. Ex. 2.

c. The Stockpiled Accumulation

During the inspection, Miller also observed that accumulations of coal had been removed from under the tail roller of the Northwest #3 belt and stockpiled behind the tail roller guard. Tr. I at 63, 226-27. Miller opined that there was no reason that Respondent could not have shoveled the coal back onto the belt. Tr. I at 222. The stockpiled accumulations were black in color and had not been rock dusted. They measured approximately six feet in width, two feet in depth, and eight feet in length.

Although Miller acknowledged that the stockpiled accumulations did not create a tripping hazard, he asserted that they would have provided additional fuel in the event of an ignition in the area. P. Ex. 2; Tr. I at 66-67, 230. Miller also issued a separate citation, not at issue here, alleging that the tail roller was not adequately guarded because the guard had been left open to clean the roller, and a long-handled shovel was in the opening of the roller. Miller testified that the stockpile was located behind the shovel, which indicates that some efforts to abate the stockpile had occurred. Tr. I at 223-27. Miller also stated in his notes that it was unknown how long the stockpile had existed. Tr. I at 229-30; P. Ex. 4, p. 6.

Miller opined that Alariai was "not real happy" after observing the stockpiled accumulations behind the tail roller guard and float dust in the air. Tr. I at 63, 85. Miller also testified that he and Alariai both expressed dissatisfaction with the conditions at the belt. Miller explained:

> We held countless meetings with the mine operator. You know, as I said, you can see my notes. [I've] got scratched here, history in books. We've held countless meetings trying to eliminate these kinds of violations. I was sent there on these two inspections with a heightened awareness for 75.400 to try to get them under control by my supervisor. You know, we brought in people from our education and training to conduct classes to basically help re-instruct examiners on what they should be looking for, what should be reported in the books and so forth. So this was a condition that was being let

> go, and everyone was to the point that, hey, we've got to do something before we have a mine fire at this mine.

Tr. 86. Miller further testified that stockpiling accumulations in such a fashion is "an attempt to keep the mine in production and move on . . . ." Miller also opined that although "[t]his was an acceptable practice [at the mine] for a long time," MSHA did not consider the practice to be an acceptable method of addressing coal accumulations. Tr. I at 151.

By contrast, Respondent's site manager, Steve Willis, testified that it was not operator practice to stockpile accumulations behind tail rollers and that any stockpile of accumulations behind a tail roller was only temporary, until the accumulations could be transported to an area for safe shoveling onto the belt. Tr. I at 482, 485-87. Willis confirmed, however, that the stockpiled accumulations were the result of Respondent's clean-up efforts, despite the fact that its "Clean Up Program" stated that "[l]oose accumulations of coal along the belt lines will be shoveled onto the belt." Tr. I at 485; R. Ex. 15.

Miller also observed that the turning tail roller was suspending float coal dust into the air, and the condition was obvious. Tr. I at 239. Miller explained that float coal dust that has recently fallen from the belt is normally black, but that given time and friction, the coal dust takes on a brown or reddish brown color. Tr. I at 64-65, 84. Miller testified that he observed float coal dust with red-brown color, which indicated that the roller had been turning in coal, not for minutes, but for several shifts. Tr. I at 206-07. Miller further testified that absent a "train wreck" on the belt system, it is impossible for accumulations of this nature to develop over the course of one shift. Tr. I at 72-73.

Miller did not identify any defects with the belt system or rollers. Specifically, there were no misaligned belts, no belts rubbing on any structures, no broken or damaged rollers, no bad bearings, no hot or warm rollers or bearings, no metal-to-metal friction, and no smoke. Tr. I at 274-77. Furthermore, there were no electrical problems with the belt system in the Northwest #3 belt area and no problems with the water sprays. Tr. I at 108.

Significantly, Miller could not recall the exact nature of the damage to nearby stoppings. Tr. I at 94. When asked the nature of the damage to the stoppings, Miller replied, "I don't recall. I want to say there was coal in the stopping that hadn't been properly sealed." In Miller's view, this would have allowed smoke to contaminate the primary escapeway and injure between fourteen and thirty-two miners working inby. Tr. I at 93-94. Miller's contemporaneous notes, however, indicate that he cited the stoppings at X-cut #5 and #14 where there was evidence of crushing and leaking. R. Ex. 1, p. 7. Miller's notes further state that were an accident to occur, the damaged stoppings would contribute only to injuries that would result in lost workdays or restricted duty for two miners. *Id*. Miller testified that the hazard posed by the smoke would not be mitigated by the direction of the air flow. Tr. I at 93-94.

Site manager Willis testified that the miners were located approximately three and one-half to four miles inby the Northwest #3 tail area. Tr. I at 413-14; R. Ex. 4. Willis further testified that the air flow and air pressure in the primary escapeway was much greater than the airflow and pressure in the affected belt entry. Tr. I. at 416, 417, 426, R. Ex. 5. As a result,

Willis opined that any leakage between the two areas caused by a damaged stopping would have been from the higher pressure primary escapeway into the lower pressure belt entry. Tr. I at 417, 425-26; R. Ex. 5, p. 3 (showing primary escapeway with air pressure of 130,700 cubic feet per minute (CFM), while belt entry has air pressure of 18,200 CFM.

Miller conceded that the mine's fire detection and suppression measures were in compliance with MSHA regulations and that Respondent had provided adequate training to miners. Tr. at 263-264, 256, 288. Specifically, there were carbon monoxide (CO) monitors near the cited conditions that day, which were being monitored on the surface, and there were fire suppression systems on the Flannigan #1 belt head, drive and take-up areas, just inby the cited conditions. Tr. I at 263-264, 256. Miller also noted that lifelines were in place in the escapeways in compliance with MSHA regulations. Tr. I at 267.

Miller did not offer any testimony regarding what temperature (i.e., flashpoint) would be required to ignite the coal accumulations that were in contact with the tail roller. Willis, however, gave conflicting testimony as to whether the flashpoint temperature would have been exceeded under normal mining operations if the belt had continued to turn up loose coal and float dust.

> JUDGE: If there was a tail roller that was spinning [in] an accumulation of coal, would that be enough heat and friction to trigger a [heat] sensor? [6]
>
> A. No. I've never seen that happen. In all honesty, I haven't.
>
> JUDGE: What about a belt that was turning up coal dust or loose coal?
>
> A. No, it would have to generate enough heat to where you almost have a fire, Your Honor, in order ---.
>
> JUDGE: Well, how much heat would that generate?
>
> A. It's hard to say. If you have air moving over it, kind of like in this instance right here; if you have 18,000 cubic feet of air moving over it, it would have to maintain --- *it would have to be doing that a long time in order to melt a sensor, which it eventually would.* The heat sensor would definitely activate the sensors.

Tr. I at 438-39 (emphasis added).

[6] Foreman Raney testified that the heat sensors are triggered when the flashpoint temperature for coal is met. Tr. II at 56-57.

Order No. 7490584 alleges that the accumulations posed a serious and substantial risk to miners as the condition was highly likely to result in an injury that could reasonably be expected to be fatal and affect at least ten persons. The violative condition was alleged to have resulted from high negligence and was designated as an unwarrantable failure. Miller based the S&S designation on the tail roller grinding in the accumulations, which he believed constituted a frictional ignition source. Tr. I at 62, 119. Miller testified that there was a damaged stopping inby and the escapeways would have been compromised from smoke, and the miners would have had to travel through it. Tr. I at 90. Miller concluded that "any time you've got fuel and . . . an ignition source, our training is that it's more than . . . reasonably likely that a serious accident is going to occur and the condition is fatal." Tr. I at 98. Regarding the unwarrantable failure designation, Miller testified that the accumulations were obvious and extensive, existed for a lengthy period of time, and that Respondent knew about the accumulations and took insufficient efforts to abate them. Tr. I at 98, 119, 139-40.

Subsequent to the inspection and upon consultation with managers and supervisors at the MSHA regional office, Miller was provided with guidance as to how to designate Order No. 7490584 as a repeated flagrant pursuant to 30 U.S.C. § 820(b)(2). Tr. I at 320-34. Miller attributed the flagrant designation to Respondent's prior history of known, similar section 75.400 violations, including three 104(d) Orders under the same standard in the prior fifteen months, with severity of injury designated as more than permanently disabling.[7] Tr. I at 315-16, 323, 330; *see also* P. Ex. 1; P Exs. 5-31. MSHA further elected to waive the regular assessment formula contained in 30 C.F.R. 100.3 and instead issued a specially assessed penalty of $179,300 under erstwhile special assessment guidelines. *See* R. Ex. 3.

2. Order No. 7490599

On September 23, Miller issued 104(d)(2) Order No. 7490599, which alleged a violation of 30 C.F.R. 75.400 at the Flannigan Tailgate belt. P. Ex. 3. Respondent's safety escort, Joe Myers, accompanied Miller during the inspection. Tr. I at 105. The Order states:

> Float coal dust, a distinct black in color, and loose coal were allowed to accumulate under and around the energized tail roller of the Flannigan Tailgate conveyor belt. The accumulations measured approximately 6 inches to 14 inches in depth. Loose coal and coal float dust also extended outby the tail roller approximately 450 feet as well. The area was black and the turning tail roller was suspending float coal dust into the atmosphere. The bottom belt and bottom rollers were in contact with these accumulations.

P. Ex. 3.

[7] Miller could not identify, in the Secretary's exhibits, which three prior 104(d)(2) orders formed the basis for either of the flagrant designations at issue, nor could he identify the repeated flagrant criteria or guidance relied on by District 8 supervisors, who never saw the conditions themselves. R. Br. at 48, citing Tr. 323-24, 330-33, 336, and 341-42.

Miller testified that the accumulations were a "distinct black in color," or "jet black." Tr. I at 108-09; P. Ex. 4. Miller testified that absent a "train wreck," it would take more than two shifts for accumulations of this type and color to develop. Tr. I at 108, 314-15. On cross-examination, Myers conceded that the accumulations were "obvious," and that he noticed the float coal dust immediately upon entering the area. Tr. II at 143. After Miller issued the Order, Myers "immediately shut down the belt to correct the situation." Tr. II at 143.

One on-shift examiner was responsible for walking and examining the Flannigan Tailgate belt area, however, there is no record of the conditions Miller observed in the on-shift examination books. Tr. II at 87-89; R. Ex. 25. On cross, Miller conceded that the absence of any reference to the cited conditions in the examination books made the instant Order No. 7490599 different from the prior Order No. 7490584, discussed above. Tr. I at 312.

According to Raney, it took approximately one hour and a half for a team of four to six miners to shovel the accumulations onto the belt and to retrieve and apply rock dust to the cited area. Tr. II at 98-99, 108. The miners cleaned up the accumulations by shoveling the material back onto the belt, as was normal practice. Tr. II at 110.

Miller did not identify any defects in the tail roller. Specifically, there were no misaligned belts, no belts rubbing on any structures, no broken or damaged rollers, no bad bearings, no hot or warm rollers or bearings, no metal-to-metal friction, and no smoke. Tr. I at 274-77, 346-47. Miller acknowledged that Respondent utilized a number of fire detection and suppression systems and other safety measures. Tr. I at 356-57. Miller further testified that he did not identify any problems with these systems. Tr. I at 356-57.

In addition to the accumulation, Miller observed float coal dust suspended in the atmosphere. P. Ex. 3. Based on the red-brown color of the float dust, Miller concluded that the roller and belt had been grinding in coal for a significant period of time. P. Ex. 4, at p. 6; Tr. I at 116, 203. In his notes, Miller also noted the presence of "a lot of BLACK FLOAT DUST." *Id*. at p. 8. Based on Miller's thirty-one years of experience in the coal mine industry, and his experience shoveling along belts as a miner, Miller credibly testified that the grinding of coal -- in this case, against an energized tail roller -- will turn the material a lighter color. Tr. I at 203, 206-08.

Based on a contemporaneously created report, safety escort Myers testified that "[t]he bottom belt was wet and the area around the tailpiece was very wet, with water standing on both sides, roof and ribs well dusted." Tr. II at 133; *see also* R. Ex. 26. Foreman Raney testified that there were places under the belt that were "holding water." Tr. II at 110. Although Miller's notes indicated that a small amount of wet material was present, he had no drawing or diagram showing where the wet material was located and he could not specifically recall where the wet material was located, although he thought that it was at the transfer point between the Pony Belt and the Flannigan Tailgate belt. Tr. I at 112-13, 213.

I credit Miller's testimony that the float coal dust and loose coal that was accumulating under and around the tail roller was not wet. Tr. I at 113. His notes indicate that only a small

amount of wet material existed, while noting the presence of "a lot of BLACK FLOAT DUST." P. Ex. 4. As Miller explained, a large amount of float dust is an indicator of dry coal. Tr. I at 362. Moreover, Miller testified that the water sprays on the belt drive produce only a light mist and would not have created any water puddles at the tailpiece. Tr. I at 190. Accordingly, I conclude that the accumulations under and outby the tailpiece were mostly dry and combustible.

According to section foreman Raney, the midnight shift Production and Delay (P&D) report for September 23 shows three delays related to "Pony Belt ground fault" and a longer delay (120 minutes) described as: "Pony Belt would not run for more than 2-3 min[utes] & kick breaker." Tr. II at 64-65; R. Ex. 21. Raney testified that the P&D reports and other records indicated that the Pony Belt was experiencing electrical problems with the ground monitor, which were fixed during the day shift on September 23. Tr. II at 65. Raney testified that when belts repeatedly stop and start, they could cause spillage. Tr. II at 67-68. He further testified that the feeder often could keep running when the belt was down, and this could grind up coal in the feeder, thereby facilitating suspension when the belt was restarted and the coal was transferred between the Pony and Flannigan Tailgate Belts. Tr. II at 68-69. Furthermore, he testified that coal, which had recently been sprayed with water when transferred from the feeder to the belt, would dry out during downtime, making accumulations more likely when the belt was restarted. Tr. II at 70.

Raney also testified regarding the direction of the airflow in the area where the violation occurred. Tr. II at 45-46; R. Ex. 4, p. 5. Raney testified that the airflow would go to the Number Four entry to the set-up face, and then go to the left, come up, sweep the faces, and then go back out the Number One entry of the set-up room, and then over to the Number One and Two entries, which were both returns, and leave out the tailgate. Tr. II at 46; R. Ex. 4, and R. Ex. 6, p. 5 (see ventilation map containing arrows of the airflow path). At the time of the Order, there was a break between the Flannigan tailgate and headgate, which had not been mined. Tr. II at 26-27; R. Ex. 4, p. 4. I note that the miners were located approximately six cross-cuts inby the cited location. Tr. I at 114; Tr. II at 42; *see also* R. Ex. 4, p. 3. Thus, I find that the miners would have had to evacuate the mine through the Tailgate area, in the event of a fire.

Order No. 7490599 alleges that the accumulations posed a serious and substantial risk to miners as the condition was highly likely to result in an injury that could reasonably be expected to be fatal and affect at least six persons. The violative condition was alleged to have resulted from high negligence and was designated an unwarrantable failure. Miller designated the violation as S&S based on the fact that the bottom belt and bottom rollers were in contact with the accumulations and the energized tail roller was turning in the accumulations, thus providing two separate potential ignition sources. Tr. I at 107, 119. Regarding the unwarrantable failure designation, Miller testified that, "if you go back to history, countless means no change in the attitude of the operator. These are conditions that the most casual observer should have detected. These were a problem." Tr. I at 119. With regard to negligence, Miller referenced the Respondent's "history, meetings, [and] repeated violations." *Id*.

Subsequent to the inspection and upon consultation with managers and supervisors at the MSHA district office, Miller was provided with guidance regarding how to designate Order No. 7490599 as a repeated flagrant violation pursuant to 30 U.S.C. § 820(b)(2). Tr. I at 320-34.

Miller attributed the flagrant designation to Respondent's prior history of known, similar section 75.400 violations, including three 104(d) Orders under the same standard in the prior fifteen months, with severity of injury designated as more than permanently disabling. Tr. I at 315-16, 323, 330; *see also* P. Ex. 1; P Exs. 5-31. MSHA further elected to waive the regular assessment formula contained in 30 C.F.R. 100.3 and instead issued a specially assessed penalty of $164,700 under erstwhile special assessment guidelines. *See* R. Ex. 3.

3. Testimony of Allen McGilton

At the hearing, I permitted Allen McGilton, an employee of Respondent and a former MSHA coal mine inspector and field office supervisor with thirty-seven years of experience, to testify over the objection of the Secretary. Tr. II at 170-71, 182. During his tenure with MSHA, McGilton inspected thousands of miles of belts in over sixty coal mines. McGilton has extensive first-hand experience with mine fire and explosion emergencies. McGilton has trained and advised mining safety professionals both domestically and abroad. *Id*. at 177-82.

I also permitted the Secretary to move to strike McGilton's testimony in her post-hearing brief. *Id*. at 170-71. Indeed, the Secretary did move to strike McGilton's testimony in post-hearing brief, again arguing that his testimony is irrelevant because McGilton lacks any first-hand knowledge of the conditions existing at the Galatia North Mine portal, and that he had not been employed at the mine when the accumulations were cited. P. Br. at 47-49.

Having carefully reconsidered the matter, I reaffirm my ruling at the hearing and find McGilton's testimony admissible and relevant to the issues before me. I am required to make an assessment of the gravity of the violation, including whether it is S&S. That requires an assessment of whether the hazard of fire contributed to by the violation was reasonably likely to result in an injury, and whether it was reasonably likely that any such injury would be of a serious nature. Although McGilton did not have first-hand knowledge of the conditions existing at the Galatia North Mine portal, and had not been employed at the mine when the conditions occurred, his experience with other coal mines nationwide, as well as his training and experience with MSHA is at least relevant to provide general background testimony regarding belt entry fires. Accordingly, I will consider McGilton's testimony and give it the weight I deem appropriate.

McGilton testified that he had never seen or heard of a belt fire occurring from a roller that did not have a defect or condition such as a bad bearing, metal-to-metal friction, molten metal falling off the roller, a belt cutting into a stand, etc. Tr. II at 202-03. While McGilton knew of several reports and studies that addressed fire hazards in coal mines, he knew of none that concluded that friction between a tail roller and coal accumulations alone could lead to a fire, absent something wrong with the tail roller. Tr. II at 204.

III. Brief Summary of the Parties' Initial Arguments on Brief

A. The Secretary's Arguments

For both Order Nos. 7490584 and 7490599, the Secretary argues that Respondent violated section 75.400. P. Br. at 10-11, 24-26. Respondent allowed accumulations of loose coal and coal float dust to create points of friction with the energized tail rollers of the Northwest #3 and Flannigan Tailgate belts, and with the bottom belt at the Flannigan Tailgate. *Id*. Further, at the Northwest #3 belt, Miller observed accumulations of coal that had been removed from under, and stockpiled behind, the tail roller. P. Br. at 6. For Order No. 7490584, the Secretary relies on Miller's notes and testimony describing the presence of float dust at the tail roller to argue that the accumulations were not wet. P. Br. at 10-11. For Order No. 7490599, the Secretary relies on Miller's notes and testimony to argue that only a small and insignificant amount of wet material existed. P. Br. at 24-26.

The Secretary also argues that the violations were S&S. P. Br. at 11-18, 26-28. The Secretary contends that tail rollers grinding through coal accumulations constitute possible "ignition sources," which are highly likely to ignite the accumulations and start a mine fire, assuming continued normal mining operations. *Id*. at 13, 26-28. Furthermore, the fire would have caused serious or fatal injuries, ranging from smoke inhalation to carbon monoxide poisoning to burns. *Id*. The Secretary relies on the belt fire in *Aracoma*, where two miners were killed. P. Br. at 15. The Secretary argues that any attempt to distinguish *Aracoma* based on the mine operator's safety measures, including fire detection and suppression systems, flatly contradicts *Buck Creek Coal, Inc.,* 16 FMSHRC 540, 542 (Mar. 1994) (ALJ), *aff'd*, *Buck Creek Coal*, 52 F.3d 133, 135-36 (7th Cir. 1995). P. Br. at 15-18.

The Secretary contends that the violations were the result of Respondent's high negligence and unwarrantable failure to comply with section 75.400. *Id*. at 18-20, 21-24, 28-32. Based on Miller's testimony, the Secretary attributes these designations to the mine operator's history of violations under the standard, MSHA's efforts to remediate this history, and the particular characteristics of the conditions cited. Tr. I at 137-38. The Secretary emphasizes that Respondent had knowledge of the violations, that they were extensive, dangerous and obvious, and that Respondent took no reasonable efforts to abate the violations. P. Br. at 21-24, 28-32. For Order No. 7490584, the Secretary argues that the cited conditions were identified on the pre- and on-shift examination books for four shifts, and Respondent did not eliminate them. *Id*. at 21. For Order No. 7490599, the Secretary claims that the obvious and extensive conditions existed for several shifts and Respondent knew or should have known about them and made no effort to clean them up, despite recurring notice that greater efforts were needed to eliminate such highly dangerous conditions. *Id*. at 30-32.

The Secretary also contends that the violations were flagrant under a broad interpretation of section 110(b)(2). *Id*. at 32-42. The Secretary argues that the phrase "a known violation" properly encompasses Respondent's history of any similar, known violation. *Id*. The Secretary asserts that Respondent repeatedly encountered dangerous, known accumulations in the sections, crosscuts and entries of the area that it was mining, which were substantially similar to the

current, known violations. P. Br. at 34, 36-37. The Secretary further argues that the accumulations reasonably could have been expected to cause death or serious bodily injury through smoke inhalation, entrapment and/or death. *Id*. at 40-42. Therefore, the Secretary argues that the violations cited in Order Nos. 7490584 and 7490599 were correctly assessed as flagrant under Section 110(b)(2).

In addition, the Secretary argues that the criteria established for determining flagrant violations as set forth in the Procedural Instruction Letter (PIL) was not invalid rulemaking, and that her interpretation of section 110(b)(2) is entitled to deference under *Chevron v. Natural Res. Def. Council,* 467 U.S. 837 (1984). P. Br. at 34-36, 42-44. The Secretary also disputes Respondent's contention that the flagrant penalty assessments constitute excessive fines under the Eighth Amendment, and that inadequate notice of the flagrant violations was given under the Fifth Amendment Due Process Clause. P. Br. at 44-47. Finally, the Secretary denies that her interpretation of section 110(b)(2) is so vague as to encourage arbitrary enforcement. P. Br. at 46.

B. The Respondent's Arguments

As a threshold matter, Respondent argues that there are a number of factual misstatements regarding the evidence and testimony in the Secretary's Post-Trial Brief. R. Reply Br. at Ex. A. Respondent also argues that the alleged violations were not S&S, primarily because the Secretary failed to identify an ignition source. R. Br. at 4-7, 25-27. Respondent emphasizes that there were no identifiable defects in the tail roller or belt equipment, and therefore the likelihood of a mine fire was too speculative. *Id*. at 6-7, 25-28; R. Reply Br. at 1-3. Respondent contends that its safety measures, equipment, and training would have mitigated any serious injury in the event of a fire, and a fire would have only caused minor injuries due to smoke inhalation. *Id*. at 9-13, 28-34. Respondent also contends that only one or two miners, not six to ten, would have been injured in a fire. *Id*. at 15-17, 33-34.

In addition, Respondent argues that the Secretary's reliance on *Buck Creek* is misplaced when it comes to determining the degree and severity of a hazard. Respondent contends that discounting evidence of airflow, ventilation controls, stoppings, CO monitors, fire suppression systems, firefighting equipment, specially trained fire brigades, and recently conducted escapeway and fire drills for such determinations "belies reality and would render the regulatory guidelines for gravity meaningless." R. Reply Br. at 3-4.

Respondent further argues that the alleged violations did not result from high negligence or an unwarrantable failure. R. Br. at 17-24, 34-40. With respect to Order No. 7490599, Respondent argues that there was some wet material in the area, and the cited condition did not result from "high," but rather "moderate" negligence. R. Br. at 26, 34-40. For Order No. 7490584, Respondent argues that the Secretary failed to prove that the accumulations existed for four shifts because the pre- and on-shift reports only showed some of the conditions described in the Order, and the belt could have had mechanical defects causing spillage. *Id*. at 18. For Order No. 7490599, Respondent claims that during the previous two shifts, electrical problems with the Pony Belt caused sudden stops and starts and caused spillage. *Id*. at 36-37. Thus, Respondent argues that the accumulations existed for two shifts, at most. *Id*. Respondent also argues that it

did not have knowledge of this violation because the Flannigan Tailgate was not in a travelway that was typically used by miners. *Id*. at 40-41; R. Reply Br., Ex. A, at 4. Respondent also posits that neither violation was extensive. *Id*. at 21, 37. Further, Respondent claims that the Secretary failed to provide notice that the Northwest #3 or Flannigan Tailgate areas were trouble spots, and Respondent took efforts to abate the specific violations and accumulations generally. *Id*. at 21-22, 38. In addition, Respondent contends that the violations were not dangerous, relying on its arguments regarding S&S. *Id*. at 24, 40.

In Respondent's view, the Secretary relies on an overly broad interpretation of section 110(b)(2). *Id*. at 56-58. Respondent argues that the PIL was not promulgated pursuant to Section 101 of the Act. Therefore, the criteria therein cannot be utilized to support a "flagrant" designation. R. Br. at 53-54. More specifically, Respondent says that the Secretary cannot consider the Respondent's history of similar violations when determining what constitutes a "repeated failure to make reasonable efforts to eliminate a known violation." *Id*. at 56-58. Rather, Respondent claims that "a known violation" constitutes a singular violation, i.e., a "repeated failure to … eliminate a known violation," as opposed to any kind of separate or multiple violations. *Id*. at 56; R. Reply Br. at 6-7. Respondent also claims that it took reasonable efforts to eliminate the violative conditions, which were not "known." R. Br. at 58-60. In addition, Respondent argues that the accumulations were unlikely to cause death or serious bodily injury. *Id*. at 59-60.

Respondent also contends that the Secretary's interpretation of the flagrant provision should receive no *Chevron* deference because the interpretation has been a "moving target." R. Reply Br. at 5-6. Respondent further argues that absent rulemaking by MSHA, Commission judges should not make new law on the complex and technical matters regarding the definition of a flagrant violation. R. Br. at 55. Respondent contends that, under the Mine Act, MSHA was required to propose more precise rules regarding flagrant violations, but that it chose to avoid controversy, and perhaps extended rulemaking, by failing to do so. *Id.* Respondent argues that Commission judges should decline to enforce the flagrant designations until such time as MSHA decides to conduct more thorough and appropriate rulemaking. *Id.*

Finally, Respondent contends that the flagrant penalty assessments are excessive fines under the Eighth Amendment, and that the vague statutory language in section 110(b)(2) fails to provide adequate notice under the Due Process Clause and encourages arbitrary enforcement *Id*. at 42-52. Respondent further claims that arbitrary enforcement in fact occurred in this instance. *Id*. at 46-49; R. Reply Br. at 8.

Based on the foregoing arguments, Respondent proposes a reduced penalty of $11,307 for Order No. 7490584 and $3,406 for Order. No. 7490599. R. Br. at 25, 41.

IV. Application of Legal Principles

A. Violations of § 75.400

30 C.F.R. § 75.400 provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

Section 75.400 prohibits accumulations, not mere spillages. *See Old Ben Coal Co*. (*Old Ben II*), 2 FMSHRC 2806, 2808 (Oct. 1980). The Commission in *Old Ben* stated that some spillage of combustible materials may be inevitable in mining operations and bright line differentiates the two terms, and that whether a spillage constitutes an accumulation under [30 C.F.R § 75.400] is a question, at least in part, of size and amount. This, an accumulation exists if "a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light Co*., 12 FMSHRC 965, 968 (1990), *aff'd, Utah Power & Light Co. v. Sec'y of Labor*, 951 F.2d 292 (10th Cir. 1991); *see also Old Ben II*, *supra*, 2 FMSHRC at 2808 ("[T]hose masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe."); *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 558 (D.C. Cir. 2012).

The Commission has expressly rejected the argument that accumulations of combustible materials may be tolerated for a reasonable time. *See, e.g., Old Ben Coal Co*. (*Old Ben I*), 1 FMSHRC 1954, 1957–58 (Dec. 1979) (section 75.400 "was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated"). The Tenth Circuit in *Utah Power and Light* similarly stated that "while everyone knows that loose coal is generated by mining in a coal mine, the regulation plainly prohibits permitting it to accumulate; hence it must be cleaned up with reasonable promptness, with all convenient speed." *Utah Power & Light, supra*, 951 F.2d at 295, n. 11.

Respondent does not challenge the violations anywhere in its briefs. *See generally*, R. Br. and Reply Br. Furthermore, nowhere in the record does Respondent contest the violations. *See generally* Tr. I and II. I find that Respondent concedes the violations of section 75.400 for Order Nos. 7490584 and 7490599.[8]

[8] Even if Respondent did challenge the violations, I would find them. A reasonably prudent person familiar with the mining industry and the protective purpose of section 75.400 would have recognized the accumulations of float coal dust and loose coal at the Northwest #3 tail and Flannigan Tailgate areas.

B. Significant and Substantial and Gravity Determinations

1. Legal Principles

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

To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the Commission's subsequent *Mathies* test: (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. *See Mathies Coal Co*., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, supra,* 52 F.3d at 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An evaluation of the reasonable likelihood of injury is made assuming continued normal mining operations. *U.S. Steel Mining Co. (U.S. Steel III)*, 7 FMSHRC 1125, 1130 (Aug. 1985) (*quoting U.S. Steel Mining Co. (U.S. Steel I*), 6 FMSHRC 1573, 1574 (July 1984).

The Commission has held that, in examining the third element of the *Mathies* test for those violations that involve hazards of ignition or fire, the Secretary must prove that such a hazard is reasonably likely to occur, in addition to proving that the hazard is reasonably likely to result in an injury. *Ziegler Coal Co.,* 15 FMSHRC 949, 953 (June 1993). The Commission held in *Ziegler Coal* that a finding that a fire or explosion hazard is reasonably likely to occur is a necessary pre-condition to finding that an injury is reasonably likely to occur. *Id*., *citing U.S. Steel Mining*, 6 FMSHRC 1834, 1836 (Aug. 1984).

At the same time, the Commission has long held that "[t]he fact that injury [or a condition likely to cause injury] has been avoided in the past or in connection with a particular violation may be 'fortunate, but not determinative.'" *U.S. Steel IV*, *supra*, 18 FMSHRC at 867, *quoting Ozark-Mahoning Co*., 8 FMSHRC 190, 192 (Feb. 1986). *See also Elk Run Coal Co*., 27 FMSHRC 899, 906-07 (Dec. 2005)*; Blue Bayou Sand & Gravel, Inc*., 18 FMSHRC 853, 857 (June 1996).

The Commission has provided the following S&S guidance for accumulation violations:

> When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf*, *Inc*., 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent

> of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co*., 12 FMSHRC 965, 970-71 (May 1990).

Enlow Fork Mining Co., 5 FMSHRC 5, 9 (Jan. 1997).

2. Order No. 7490584

I find the violation in Order No. 7490584 to be S&S. The Secretary established the first two elements of the *Mathies* test. An accumulations violation occurred, which contributed to a discrete fire and smoke hazard. Regarding the third element of *Mathies*, the Secretary demonstrated that the cited accumulations were reasonably likely to cause a mine fire, which was reasonably likely to result in an injury. Although there were no current defects in the tail roller, I credit inspector Miller's testimony that the tail roller was grinding through coal and this was an ignition source. I find that a fire was reasonably likely to occur during normal continued mining operations. Tr. I at 62-63, 372. Concerning the fourth element of *Mathies*, I find that injuries resulting from the fire were reasonably likely to be serious in nature.

Although I find little support for the inspector's determination that a fire was highly likely to occur, Circuit Court and Commission case law support the proposition that a tail roller turning in coal accumulations is reasonably likely to be an ignition source for S&S purposes, despite the lack of any defects in the belt or rollers. The present case is analogous to *Buck Creek, supra.* In *Buck Creek*, the judge affirmed the S&S designation and reasoned that a tail roller that was completely covered and turning in combustible coal fines could easily become an ignition source that could cause a fire if the roller became heated, despite the apparent absence of evidence that the tail roller was hot or that any defects in the roller were present. 16 FMSHRC at 542.

The Commission denied review of the ALJ's decision and the case was appealed to the Seventh Circuit. The Seventh Circuit affirmed the judge's S&S determination despite Buck Creek's arguments that the inspector found no evidence of combustible gases, electrical problems, defects in safety equipment/apparatus used to prevent fires, *or that the roller was subject to heated conditions*. Reply Brief of Appellant at 1, *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133 (7th Cir. Mar. 28, 1995) (No. 94-2084), 1994 WL 16179739, at *2-3 (italics added). The Seventh Circuit affirmed the judge's credibility determinations concerning the opinion of an inspector with thirty-two years of mining experience, who specialized in mine ventilation issues. *Id*. at 135. In addition, the court observed that safety measures in place to address a fire "does not mean that fires do not pose a serious safety risk to miners." 52 F. 3d at 135-36.

Buck Creek is not the only case supporting the Secretary's position. Similarly, in *Amax Coal Co.*, 19 FMSHRC 846, 848-850 (May 1997), the Commission again affirmed the judge's finding that a reasonable likelihood of a fire was present when accumulations of dry loose coal

and float coal dust were allowed to accumulate at the junction of a head roller and mother belt.[9] On appeal, the Commission upheld the judge's S&S finding based on the potential ignition source created by frictional contact between fifteen feet of belt and the accumulation of packed dry coal and loose coal. 19 FMSHRC at 849-50. Further, the Commission rejected Amax's arguments that "a miner working in the area at the time the order was issued 'would have detected the smell of any combustion' and taken appropriate measures to alert the mine's communication center, and that the presence of fire detection systems, self-contained self rescuers, and firefighting equipment in the cited area minimized the risk of injuries from a fire." *Id*.

In addition, a number of Commission judges have concluded that an accumulation violation is S&S based solely on contact between accumulations and mechanized equipment, which lacks any defects. These colleagues have concluded that such contact, by itself, constitutes a potential ignition source sufficient to support an S&S finding. *See American Coal Co*., 33 FMSHRC 2803, 2809-10 (Nov. 2011) (ALJ) (finding an S&S violation where a feeder in accumulations of loose coal and coal float dust was deemed a potential ignition source, despite the fact that the feeder was not defective); *Bledsoe Coal Co*., 2012 WL 5178246 *26 (Oct. 2012) (ALJ) (concluding that the issue of defects is irrelevant to the S&S analysis).

Based on the confluence of factors present here, I find that the frictional grinding of the tail roller in the loose coal is a potential ignition source, which is reasonably likely to cause a mine fire.[10] Although inspector Miller did not provide testimony addressing the flashpoint of the coal dust and fines, I credit his testimony regarding the risk of frictional heating. Tr. I at 62. I further credit Willis' admission that, given enough time, friction from a belt running in coal could cause enough heating to trigger belt heat sensors.[11] Tr. I at 438-39. Under existing Circuit

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[9] Neither the judge nor the Commission mentioned the existence of any defect in the belt. It is reasonable to infer that they would have mentioned such a relevant factor in the S&S analysis had it existed.

[10] Applying existing Commission and Seventh Circuit precedent in *Buck Creek*, I decline to give probative value to Respondent's testimony that it utilizes a number of early fire detection and response systems on its belt line, including methane and carbon monoxide detectors, water sprays, stoppings, and ventilation control devices. As set forth above in *Buck Creek*, the Seventh Circuit affirmed the judge's determination that a coal accumulation violation on a conveyor belt was S&S, despite the presence of redundant fire detection and prevention measures. 52 F.3d at 136. Thereafter, applying *Buck Creek*, the Commission has determined that little weight should be given to safety measures such as fire detection and suppression systems when determining whether an accumulation violation is S&S. *See Amax Coal*, *supra*, 18 FMSHRC at 1359, n.8; *Amax Coal*, *supra*, 19 FMSHRC at 850; *Big Ridge,* 35 FMSHRC ___, No. LAKE 2009-377, 13 (June 2013); *Cumberland Coal*, 33 FMSHRC 2357, 2369-70 (Oct. 2011), *aff'd Cumberland Coal Res. v. FMSHRC*, No. 11-1464, 2013 WL 2450523 (D.C. Cir. 2013).

[11] Raney testified that the heat sensors are triggered at the flashpoint temperature. Tr. II at 56-57.

Court and Commission precedent, it is not necessary for the Secretary to show a mechanical defect in order to prevail on an S&S designation for an accumulations violation. *See Buck Creek*, *supra*, 16 FMSHRC at 542, *aff'd*, 52 F.3d at 135-36; *Amax Coal*, *supra*, 19 FMSHRC at 848-51; *Black Beauty*, *supra*, 33 FMSHRC at 1486-87, *aff'd*, 703 F.3d at 555 (D.C. Cir. 2012). Thus, under continued normal mining operations, despite McGilton's testimony to the contrary, I conclude that the frictional heat caused by the tail roller turning in coal accumulations was reasonably likely to cause a fire.[12]

I also find that the Secretary satisfied the fourth element of the *Mathies* test. I credit Miller's testimony that if normal mining operations continued and the accumulations were left unabated, it would have been reasonably likely that a fire would occur, thereby exposing miners to serious injuries from the smoke that could bypass the inadequate stoppings and enter the primary escapeway.

Although Miller determined that such injuries could be reasonably expected to be fatal, little factual evidence exists to bolster the inspector's determination. Miller testified that he was trained to cite all violations where there is fuel and an ignition source exists as "fatal," but he fails to relate the conditions of the present Order to the actual risk posed to miners located miles away from the ignition source at this particular mine. *See* Tr. I. at 98. Unlike accumulation violations in other cases, Miller never specifically testified that a fire would pose risks of burns, carbon monoxide poisoning, explosion, entrapment of escaping miners, or that miners at the face would be inundated by smoke and unable to locate the escapeways. Instead, Miller only alleged a smoke hazard whereby ten or more miners evacuating the mine in the primary excapeway would be exposed to an unknown amount of smoke that was able to bypass the inadequate stoppings. Tr. I at 92, 93. When asked why the order was written as "fatal," Miller testified:

> It's highly likely it could have occurred if we hadn't found the condition and corrected it. I believe that if we had not found the condition, it would have turned into a mine fire, so ---. And the fatal --- I think there's two ways you get a fatal. There was a stoppage of damage inby --- if you have a mine fire, you're going to have smoke. This is a long way back into the mine here. Guys would have had to travel through the smoke. The escapeways would have more than likely been compromised. You know, we had that disaster, as I mentioned, at Aracoma, that miners didn't get out on a lifeline. Smoke prevented them from getting out, and we had a fatal there. So I think that, you

[12] McGilton's testimony that he had never seen or heard about a belt fire resulting from a roller without defects does not preclude an S&S finding. Tr. II at 202-03. As the Commission stated in *Amax Coal, supra*, 19 FMSHRC at 849, the absence of an injury-producing event when a cited practice or condition has occurred is not dispositive of whether a violation is S&S. *See also Elk Run Coal*, *supra*, 27 FMSHRC at 906; *Blue Bayou Sand & Gravel*, *supra*, 18 FMSHRC at 857.

> know, there's a real good chance that we would have had fatal injuries if this event occurred.

Tr. I at 90.[13]

As the history of violations shows, MSHA has not determined that all accumulation hazards pose a fatal risk to miners. P. Ex 5-31.[14] When questioned as to the discrepancy between the violative condition at issue and past citations and orders that have identified the type of injury that could be reasonably expected from an accumulations violation that contributed to a mine fire as "lost workdays or restricted duty" and rarely as "permanently disabling," Miller testified that the violations at issue were generally "extreme," but he did not state how he reached this conclusion, nor did he provide any facts differentiating the prior cited conditions. Tr. I at 132-33. Was the size of the accumulation extreme or did the location of the accumulation pose a more dangerous threat than past violations? The undersigned is left only to guess and attempt to fill in the blanks in an incomplete narrative.

I further note that the Secretary has not offered sufficient evidence as to the amount of smoke that miners would have been exposed to in the primary or secondary escapeways to justify the contention that the hazard would reasonably likely result in fatal injuries. Miller testified that the stoppings would normally isolate the belt area from the escapeways, but the damaged stoppings that were cited during the same inspection would allow smoke to contaminate the primary excapeway. Tr. I. at 94. Although Miller could only guess at the hearing about the nature of the damage to the stoppings near the accumulations, his contemporaneous notes indicate that he cited the stoppings at crosscut #5 and #14, where there was evidence of crushing and leaking. R. Ex. 1, p. 7; *see also* Tr. I at 94 (when asked about the nature of the damage to the stoppings, Miller replied, "I don't recall. I want to say there was coal

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[13] While Miller did cite the tragic events at Aracoma as a basis for the "fatal" determination, the factual circumstances that lead to the deaths of two miners at Aracoma differed substantially from the conditions at the Galatia Mine. Accordingly, I decline to draw much inference by analogy to such tragic events. Further, the Commission has traditionally downplayed the importance of historical data in determining the S&S status of a violation. *Amax Coal, supra*, 19 FMSHRC at 849; *Elk Run Coal*, *supra*, 27 FMSHRC at 906; *Blue Bayou Sand & Gravel*, *supra*, 18 FMSHRC at 857. If, as the Commission has ruled, the absence of an injury-producing event is not dispositive of whether an S&S violation occurred, I see no reason why the existence of a single, tragic event with markedly different facts should be given much weight.

[14] Upon review of past citations, it is not immediately clear why the conditions alleged in Order No. 7490584 should be afforded a higher level of gravity. These citations were issued by multiple MSHA inspectors and some of the citations seem to contain allegations equally or more serious in nature. *See, e.g.,* P. Ex. 17 (accumulations measuring between six and twelve inches in depth at both the head and tail roller with float coal dust extending 2000 feet was alleged to cause a hazard that was reasonably likely to result in lost workdays or restricted duty). While the citation history is not dispositive of the gravity analysis, the unexplained inconsistency undermines Miller's credibility on this issue and calls into question Miller's testimony that he was trained to cite all such conditions as "fatal."

in the stopping that hadn't been properly sealed."). Miller's notes from this separate citation further state that were an accident to occur, the damaged stoppings would only contribute to injuries that would result in lost workdays or restricted duty of two miners. *Id*.

I am not, however, persuaded by Willis' testimony that in the event of a fire, any leakage of air would be confined from the higher pressure primary escapeway into the belt entry. *See Buck Creek*, *supra*, 52 F.3d at 136 (rejecting mine operator's argument "that the mine is ventilated in such a way that the smoke would have been pulled away from the area where workers were located."). In these circumstances, I credit Miller's testimony, based on his thirty-one years of experience, that the flow of air along the beltway would not prevent some leakage where the stoppings were damaged. Tr. 93-94.

Although the determination of an inspector should not be dismissed lightly, the Secretary has the burden of proof and must convey, at the very least, a plausible explanation for the inspector's gravity determinations. It is not enough for the inspector to present the circular argument that a hazard is fatal because he thought people might die. To afford such testimony weight would, in essence, shift the burden to the Respondent to disprove the Secretary's allegations. Accordingly, I find that the Secretary failed to prove that the facts of the violative condition could reasonably likely be expected to result in a fatal injury.

Finally, I credit Miller's representation that at least ten miners would be affected were a fire to start and smoke enter the primary escapeway. Tr. I at 91. Inspector Miller's uncontroverted testimony established that there were two super units where between fourteen and sixteen miners worked inby the cited condition. *Id*. at 92. I expressly reject Respondent's argument that the number of people affected should be limited to the number of people that might actually be injured in an accident. Such an analysis would be far too speculative and contrary to the purposes of the Mine Act that seeks to prevent all miners from exposure to unsafe working conditions. Therefore, the gravity of this Order must reflect the fact that more than ten miners would have been exposed to the smoke hazard in the primary excapeway.

In sum, I conclude that the Secretary demonstrated that the 75.400 violation is S&S. The Secretary has established a violation that contributes to a discrete safety hazard, satisfying the first and second prongs of the *Mathies* test. Furthermore, the frictional contact between the coal accumulations and the tail roller was reasonably likely to cause a mine fire, which would produce an injury under the third prong of *Mathies*. Finally, any injuries were reasonably likely to be serious in nature (i.e., lost workdays or restricted duty) under the fourth *Mathies* prong. *See, e.g*., *Buck Creek, supra*, 16 FMSHRC at 542-43 (ALJ) (finding that "smoke and gas inhalation" would cause a reasonably serious injury "requiring medical attention" for S&S purposes), *aff'd* 52 F.3d at 135-36 (7th Cir. 1995). Therefore, I affirm the S&S designation for Order No. 7490584.

3. Order No. 7490599

Basically for the same reasons set forth above with regard to Order No. 7490584, I find that the Secretary established that the violation was S&S. I have credited Miller's testimony that a fuel source and two frictional ignition sources were present in the Flannigan Tailgate area. As

noted above, the lack of defects does not negate the existence of these ignition sources. I also conclude that the accumulations under and outby the tailpiece were mostly dry and combustible. I credit Miller's testimony that only a small amount of wet accumulations were present and that the accumulations under and outby the tailpiece were mostly dry and combustible. I also credit Miller's testimony that the black color of the accumulations indicated that the operator did not rock dust the area for quite some time. Furthermore, it is well settled that even wet or damp accumulations can dry out and ignite. *See Utah Power & Light*, 12 FMSHRC 965, 969 (May 1990).

The analysis of the gravity of Order No. 7490599, however, differs from the gravity analysis for Order No. 7490584 in several ways. In the condition cited in Order No. 7490599, the accumulations were much closer inby, only a few crosscuts removed from the working section. Tr. I at 121. There appears to be no stoppings that would isolate escaping miners from the effects of a fire. *See* R. Ex. 4, p. 5. As the miners would be exposed to an unmitigated smoke hazard, I affirm Miller's determination that any injuries that were to occur from a fire could reasonably be expected to result in serious, possibly fatal injuries. In addition, based on Miller's uncontroverted testimony that only the miners working inby the Flannigan Tailgate would be exposed to the hazardous condition, I find that the number of miners affected is six. Tr. I at 121.

Accordingly, I conclude that a fire was reasonably likely to occur as a result of the frictional heat generated between the loose coal and the energized tail roller. I further find that a mine fire was reasonably likely to occur during continued normal mining operations and cause serious, possibly fatal injuries, which may include smoke inhalation, carbon monoxide poisoning, burns, and entrapment to the six miners working inby the Pony Belt. Thus, I affirm the S&S designation for Order No. 7490599.

C. Unwarrantable Failure

1. Legal Principles

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d). It refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, supra*, 52 F.3d at 136 (approving Commission's unwarrantable failure test).

The Commission has recognized that whether conduct is "aggravated" in the context of an unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Such factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious, whether the violation

posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 43 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). A judge has discretion to determine that some factors are irrelevant or are less important than other factors under the totality of circumstances. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

The Secretary bears the burden of proving all elements of an unwarrantable failure by a preponderance of the evidence. If an operator reasonably, but erroneously, believes in good faith that the cited conduct is the safest method of compliance with the applicable regulations, its actions will not constitute aggravated conduct that exceeds ordinary negligence. *Jim Walter Res*., *Inc*. *v*. *Sec'y of Labor*, 103 F.3d 1020, 1024 (D.C. Cir. 1997).

2. Legal Analysis

Having duly considered each unwarrantable failure factor below, I find that the Secretary established by a preponderance of the evidence that Respondent exhibited aggravated conduct through a "serious lack of reasonable care" by permitting the accumulations to persist. The evidence in the record shows that the accumulations in Order No. 7490584 existed for three shifts and that the accumulations in Order No. 7490599 existed for at least two shifts. Respondent had knowledge of the conditions cited in Order No. 7490584 and should have known of the conditions cited in Order No. 7490599. The conditions cited in both orders were extensive, obvious, and dangerous, and Respondent failed to make reasonable efforts to abate the violations prior to the issuance of the Orders. I discuss below, the applicability, *vel non*, of the relevant unwarrantable failure factors under Commission precedent.

a. The Extent of the Violative Conditions

The Commission has viewed the extent of a violative condition as an important element in the unwarrantable failure analysis. *IO Coal* Co., 31 FMSHRC 1346, 1351-52 (Dec. 2009). This factor considers the scope or magnitude of the violation. *See Eastern Associated Coal,* 32 FMSHRC 1189, 1195, *citing Peabody Coal Co*., 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988). As explained below, the extensiveness factor favors a finding of unwarrantable failure for both Orders.

i. Order No. 7490584

The narrative in Order 7490584 states that the accumulations measured approximately "6 inches to 29 inches in depth." P. Ex. 2. Furthermore, the accumulations of coal that had been removed from under the tail roller in the past had been stockpiled behind the tail roller guard and measured approximately "6 feet in width, 2 feet in depth, and 8 feet in length." *Id*. In addition, loose coal and float coal dust extended outby the tail roller approximately "150 feet as well as 40 feet inby the tail roller." *Id*. I credit Miller's testimony that the amount of accumulations that he observed was "a lot more than what you should see . . . on a tail roller if it's being properly maintained." Tr. I at 63. Furthermore, the accumulations in the present case mirror those found

to be extensive in *Buck Creek*, *supra*, 16 FMSHRC at 542, *aff'd Buck Creek*, 52 F.3d at 136 (accumulation of nine inches of coal under the feeder and in the dumping points was extensive). Accordingly, on balance, I find that the extensiveness factor weighs in favor of an unwarrantable failure finding.

ii. Order No. 7490599

For essentially the same reasons as the previous Order, I find that the accumulations described in Order No. 7490599 were extensive. The accumulations measured six to fourteen inches in depth. P. Ex. 2. Miller cited 450 feet of loose coal and float dust located in active and possibly inactive workings. Tr. I at 308-12 (Miller was unsure of the location of the feeder). Raney testified that it took approximately one and a half hours for a team of four to six miners to shovel the accumulations onto the belt and to retrieve and apply rock dust to the cited area. Tr. II at 98-99, 108, 110. As with Order No. 7490584, the accumulations mirror those found to be extensive in *Buck Creek*. Accordingly, I find that the extensiveness of the violation weighs in favor of an unwarrantable failure finding.

b. The Duration of the Accumulation Violations

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. *See, e.g., Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration of cited conditions). As explained below, I find that this factor supports an unwarrantable failure finding for both Orders.

i. Order No. 7490584

Miller credibly testified that the accumulations described in Order No. 7490584 were a "distinct black in color," or what he would describe as "jet black." Tr. I at 108-09; P. Ex. 4. Based on the color and condition of the accumulations and the amount of accumulations observed, Miller concluded that the condition had existed for several shifts. Tr. I at 314-15. He explained that as coal is transferred from belt to belt, some float dust gets in the air, but the black color of the accumulations on a rock-dusted surface indicates that the condition had existed for quite some time. Tr. I at 71-72.

I credit Miller's undisputed testimony that the black color of the accumulations was indicative of the fact that they existed for "quite some time." Tr. I at 64-65. In addition, the pre-shift and on-shift reports for September 17 and 18 indicate that the accumulations existed during the 4 p.m. to midnight shift on September 17, during the midnight to 8 a.m. and 8 a.m. to 4 p.m. shifts on September 18, and during the first hour and 15 minutes of the 4 p.m. shift on September 18. *See* R. Exs. 22-23. Thus, I conclude that the accumulations existed for over three shifts, and definitely long enough that they should have been cleaned up prior to Miller's arrival. In this regard, I note that the Commission has expressly rejected the argument that "accumulations of combustible materials may be tolerated for a 'reasonable time.'" *Black Beauty*, *supra*, 703 F.3d at 558-59, *quoting Old Ben Coal*, *supra*, 1 FMSHRC at 1957–58; *see also Utah Power*, *supra*, 12 FMSHRC at 968 (section 75.400 "was directed at preventing accumulations in the first

instance, not at cleaning up the materials within a reasonable period of time after they have accumulated.").

Respondent argues that the Secretary failed to establish that the accumulations cited in Order No. 7490584 were present during the shifts because the examination reports for the pre-shift and on-shift inspections on September 17 and 18 reflect only some of the conditions cited in the Order. R. Br. at 18-19; R. Exs. 22-23. Respondent argues that these shift reports fail to mention the alleged stockpile, the roller turning in accumulations, any suspended float coal dust, or any accumulations on the floor outby the tail. R. Br. at 18-19; R. Exs. 22-23.

I am not persuaded by Respondent's argument. Respondent overlooks the fact that the reports repeatedly indicate that the tail area and scraper were "dirty" and/or "black." R. Exs. 22-23. It is reasonable to infer from examiner notations that a tail area, scraper, and rollers are "dirty" and "black," that there are accumulations of loose coal or float coal dust in that area. In evaluating whether the terms "dirty" and "black" are vague or ambiguous, I view these terms in context and conclude that they are essentially a euphemism for coal accumulations. The purpose of recording mine conditions in the pre-shift and on-shift examination reports is to document any hazardous conditions that need to be addressed under the statute and regulations. It is reasonable to infer on this record that "dirty" and "black" refers to accumulations of loose coal and float coal dust, as opposed to non-combustible mud or dirt, or some other non-violative condition, as Respondent suggests. Accordingly, I find it more likely than not that the pre-shift and on-shift reports for September 17 and 18 refer to the same accumulations that Miller cited in Order No. 7490584, which I have found existed for over three shifts.[15]

Respondent also argues that mine examiner findings on other dates, which explicitly describe tail rollers grinding through coal accumulations, indicate that the mine examiners compiling the reports for September 17 and 18 would have included such a description had such conditions been present. R. Br. at 19; Tr. II. at 115; R. Ex. 24a. Specifically, Respondent relies on the fact that on September 6, a mine examiner noted that there was a "tail roller running in wet fines." R. Ex. 24a. Moreover, on September 7, a mine examiner noted that there was "slurry in the walkway at drive take-up[,] and that slurry fines need [to be] cleaned outby in the drive and the take-up." Tr. II at 130; R. Ex. 24a. Respondent emphasizes that the mine examiner who filled out the September 6 pre-shift report was the same examiner who filled out the pre-shift reports for September 17 and 18 and used the words "dirty" and "black," thereby negating the possibility that the discrepancies were attributable to different mine examiners having different

[15] Recently, the Commission addressed an analogous issue in *Manalapan Mining*, *Inc*., 2013 WL 754106 *6-7 (Feb. 2013). The issue was whether the judge erred in using the phrase "wet" and "muddy" in several pre-shift and on-shift reports to support the conclusion that accumulations existed for a lengthy period of time. *Id*. The Commission remanded the case because the judge inconsistently interpreted "wet" and "muddy" to refer to accumulations in one area of the mine, and not in another, and implicitly adopted the judge's interpretation of "wet" and "muddy" as evidence of impermissible accumulations. *Id*. at 6-7. Here, by analogy, I rely on similar terms, such as "dirty" and "black," in the pre-shift and on-shift reports to support my findings that Respondent had knowledge of, or certainly should have known about, the duration of the accumulations.

methods for reporting violations. R. Ex. 24a; R. Exs. 22-23. Accordingly, Respondent argues that if the tail roller was turning in accumulations, it would have been noted.

I am not persuaded by this evidence and argument. Initially, I note that the mine examiner findings relied on by Respondent refer to wet fines and slurry, not dry combustible accumulations. Furthermore, despite this evidence, I still find it more likely than not that the descriptions in the examination reports for September 17 and 18 describe the violations that Miller noted in Order No. 7490584. The pre-shift report for the 8 a.m. to 4 p.m. day shift on September 17 informs management that the Northwest #3 belt was dirty, there were accumulations from take-up to head roller, and the floor was gray, while the on-shift report describes the violative condition as dirty. The pre-shift report for the 4 p.m. to 12 midnight shift on September 17 states, inter alia, that the tail area was black and the tail scraper was dirty, while the on-shift report makes no mention of the conditions. Pre-shift reports for both the 8 a.m. to 4 p.m. shift and the 4 p.m. to 12 midnight shift for the Northwest #3 belt area on September 18 describe the rollers as being "dirty" underneath. R. Ex. 23. The on-shift reports for the 8 a.m. to 4 p.m. shift that day also describe the rollers as "dirty." In addition, when analyzing the examination reports in conjunction with Miller's notes and the narratives in his Order, I find it more likely than not that said reports refer to the same accumulations cited in the Order.

Furthermore, I am not convinced by Respondent's argument that the accumulations at the tail roller likely were of very recent origin because conditions at belt transfer points can create problems quickly. *See* Tr. I at 186. Respondent relies on Miller's admission that a variety of problems at transfer points could cause spillage and accumulations. Such problems include misaligned belts, defective or improperly installed water sprays, or broken/bent scrapers, which allow coal to be carried back and deposited at the tail roller. Tr. I at 145, 184-86; R. Br. at 20-21. Respondent's argument, however, is undercut by its additional argument and Miller's testimony that no defects in the tail roller or the conveyor belt system existed on the date of the violation. R. Br. at 6-7. Furthermore, Miller credibly testified on cross that he would have cited Respondent for these defects had he observed them. Tr. I at 274. Respondent cannot have it both ways. Accordingly, I reject Respondent's suggestion that the accumulations were very recent due to defects in the belt or rollers.

In sum, based on the combined weight of Miller's testimony concerning the color and amount of the accumulations, reasonable inferences drawn from the language of the pre-shift and on-shift examination reports, and the absence of any evidence that the belt had torn or gone down suddenly, I find that the accumulations in Order No. 7490584 existed for at least three shifts. Tr. at 72-73. Commission precedent supports an unwarrantable failure finding where the accumulations have lasted for less than one shift. *See Windsor Coal*, *supra*, 21 FMSHRC at 1002; *see also Buck Creek*, *supra*, 52 F.3d at 136 (finding unwarrantable failure where cited accumulation was present at least since the previous shift); *Old Ben Coal*, *supra*, 1 FMSHRC at 1959 (finding unwarrantable failure where accumulation existed for less than one shift). Accordingly, the duration of the violation here weighs in favor of finding an unwarrantable failure.

ii. Order No. 7490599

The Secretary has demonstrated that the accumulations described in Order No. 7490599 existed for about two shifts, a period of time long enough that action was necessary to eliminate them. I credit Miller's testimony regarding the color and amount of the accumulations. Specifically, Miller testified that the accumulations were a "distinct black in color," or what he would describe as "jet black." Tr. I at 108-09; R. Ex. 4. He testified that absent a "train wreck," it would take a significant period of time for accumulations of this type and color to develop. Tr. I at 108. Miller explained that as float dust deposits on the rock-dusted surfaces, it slowly changes the color of the surfaces from white, to gray, to black. Tr. I at 71-72.

Unlike the prior Order, where there appears to have been a well-documented build up in accumulations over the course of three shifts, Order No. 7490599 seems to present the proverbial "train wreck" scenario during the first shift on September 23. The Pony Belt had breaker issues for the preceding five shifts, but during the aforementioned shift, the problem got so bad that the Pony Belt would only run for two to three minutes before the breaker would be tripped. R. Ex. 21. Based on foreman Raney's testimony that repeated starting and stopping of the belt would cause spillage, I find that it is likely that loose coal and coal dust began building up about two shifts before the condition was cited. Tr. II at 67-70. As noted above, the Commission has held that accumulations of combustible material that have existed for less than two shifts are sufficient to support a finding of unwarrantable failure. *Windsor Coal*, *supra*, 21 FMSHRC at 1002; *see also Buck Creek*, *supra*, 52 F.3d at 136 (finding unwarrantable failure where cited accumulation must have been present at least since the previous shift); *Old Ben*, *supra*, 1 FMSHRC at 1959 (finding unwarrantable failure where accumulation had existed for less than one shift). Accordingly, I find that the duration of the violation for two shifts weighs in favor of finding an unwarrantable failure.

c. Whether Respondent Was Placed on Notice that Greater Efforts Were Necessary For Compliance with Section 75.400

Repeated, similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal*, *supra*, 19 FMSHRC at 851; *see also Consolidation Coal*, *supra*, 23 FMSHRC at 595. The purpose of evaluating the number of past violations of a particular standard is to determine the degree to which those violations have "engendered in the operator a heightened awareness of a serious . . . problem." *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007), *citing Mid-Continent Res., Inc*., 16 FMSHRC 1226, 1232 (June 1994). The Commission has also recognized that "past discussions with MSHA" about a problem "serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *Id.*, *citing Consolidation Coal*, 23 FMSHRC at 595.

i. Order No. 7490584

Respondent argues that it did not have the requisite notice that greater efforts at compliance were necessary because the Galatia Mine is a large mine where numerous 75.400 violations can be expected. R. Br. at 21-22. Respondent asserts that belts routinely spill coal during normal operations, that conditions change quickly, and that it is a constant struggle to identify and clean up accumulations. *Id*. Respondent further asserts that MSHA did not provide it with any specific, prior notice that the Northwest #3 tail roller area was a trouble spot for accumulations. Therefore, it pleads ignorance that it needed to provide heightened attention to that area of the mine. *Id*.

I reject Respondent's arguments. Respondent has an affirmative obligation to inspect and eliminate hazards in all areas of its mine. In addition, the record establishes that Respondent was warned repeatedly through meetings, training sessions, and prior citations/orders, about belt accumulation problems that were similar to those documented in Order No. 7490584. Tr. I at 86-90, 123. Despite MSHA's repeated warnings, Respondent continued to violate Section 75.400. Furthermore, Commission and D.C. Circuit precedent establish that past violations in a different area of a mine may provide an operator with sufficient awareness of an accumulations problem for unwarrantable failure purposes. *See San Juan Coal*, *supra*, 29 FMSHRC at 131; *Black Beauty Coal*, *supra*, 703 F.3d at 561. Accordingly, I find that Respondent was placed on notice repeatedly that greater efforts were necessary for compliance with section 75.400. This factor strongly supports an unwarrantable failure finding.

ii. Order No. 7490599

For the same reasons, I find that Respondent was placed on notice that greater efforts were necessary for compliance with Section 75.400 with regard to Order No. 7490599. Accordingly, this factor also favors a finding of unwarrantable failure for Order No. 7490599.

d. Whether the Violation Posed a High Degree of Danger

The high degree of danger posed by a violation supports an unwarrantable failure finding. *See BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Quinland Coals*, *supra*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were "highly dangerous"). For purposes of evaluating whether violative conditions pose a high degree of danger, it is often necessary to consider the same facts already considered as part of the gravity evaluation in an S&S analysis. *See San Juan Coal, supra*, 29 FMSHRC at 125, 132-33 (remand for failure to apply S&S findings to danger factor in unwarrantable failure analysis).

i. Order No. 7490584

As discussed in detail above in my S&S analysis, the accumulations described in Order No. 7490584 posed a risk of serious injury from smoke inhalation to more than ten miners. The Secretary established that, were a fire to ignite, miners evacuating through the primary excapeway would be exposed to a smoke hazard, which would be reasonably likely to result in

lost workdays or restricted duty. Furthermore, consistent with my S&S analysis, I have recognized that the Commission finds little probative value in Respondent's testimony that it utilizes a number of fire suppression and early detection and response systems on its belt line. *See Buck Creek*, *supra*, 52 F.3d at 136; *Amax Coal*, *supra*, 19 FMSHRC at 850. Accordingly, I conclude that the degree of danger posed by the violation tips in favor of a finding of unwarrantable failure.

ii. Order No. 7490599

I find that the accumulations cited in Order No. 7490599 posed a high degree of danger. The size and location of the accumulations, in addition to the fact that the area was not isolated from active workings, contributed to the likely risk of a serious and possibly fatal injury to miners working inby. Accordingly, I conclude that the violative condition posed a high degree of danger to miners and thus weighs in favor of an unwarrantable failure finding.

e. Respondent's Knowledge of the Existence of the Violation and Whether the Violation was Obvious

Respondent's knowledge of a violation and the obviousness of a violation are relevant factors for an unwarrantable failure analysis. The Commission has held that knowledge is established by showing "the failure of an operator to abate a violation [that] he knew or *should have known* existed." *Emery Mining Corp*., 9 FMSHRC 1997, 2002-03 (Dec. 1987); *see also*, Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1602 (1975) ("Coal Act Legis. Hist."). As explained below, I find that these factors support an unwarrantable failure finding for both Orders.

i. Order No. 7490584

Miller credibly testified that "[t]he first thing we noticed [when we came into the area] was the float dust suspended in the area when you walked into the area. It was obvious, the extensive amount of accumulations." Tr. I at 239. Respondent concedes the obviousness of the violation. R. Br. at 24.

Regarding Respondent's knowledge of the violation, the pre-shift and on-shift examination records show that the tail area was black and/or dirty for at least three shifts. Reasonable inferences drawn from the language of the pre-shift and on-shift reports establish that Respondent knew that the accumulations existed. Management reviews and countersigns the books, and thus aware of the need to eliminate the accumulations when addressing the black and dirty tail area repeatedly noted by its examining agents. Tr. I at 75-76. Accordingly, I find that Respondent knew or should have known that the accumulations were obvious and that these factors support an unwarrantable failure finding.

ii. Order No. 7490599

I find that the accumulations cited in Order No. 7490599 were also obvious. As with the previous Order, Respondent concedes this point. In fact, Myers testified that the accumulations were "obvious." Tr. II at 143. "Float dust was suspended in the air as soon as we went around the corner." R. Ex. 26. I find that even a casual observation would have revealed that there was an energized tail roller grinding through coal at the Flannigan Tailgate.

Furthermore, the Secretary has shown that Respondent knew or should have known of the accumulation problem. Given the scope of the condition cited, it seems difficult to believe that reasonably attentive on-shift examiners would not have reported this condition. Furthermore, Respondent should have been aware of the potential for accumulations given the electrical problems the Pony Belt had been experiencing. Production delay reports show that the accumulations likely were created and grew worse during the previous two shifts because the Pony Belt had been experiencing problems, which caused it to stop and start repeatedly. R. Ex. 21.

Although Respondent should have been alerted to the possibility of accumulations by the Production delay reports, there is little evidence to establish that Respondent had actual knowledge of the condition. Pursuant to MSHA regulations, a miner should have walked the belt during either a pre-shift or on-shift examination. Tr. I at 300. Examiners, however, did not report the condition to mine management and Miller did not issue a citation related to examinations. While the fact that the condition was not reported to, or observed by, mine management mitigates Respondent's negligence, if Respondent had conducted thorough examinations, the condition should have been documented. Accordingly, I find that these factors tilt in favor of an unwarrantable failure determination.

f. Respondent's Efforts in Abating the Violation

An operator's efforts to abate a violation are relevant to an unwarrantable failure determination. Thus, where an operator has been placed on notice of a problem, the level of priority that the operator places on abatement of the problem is relevant. *IO Coal*, *supra*, 31 FMSHRC at 1356, *citing Enlow Fork Mining*, *supra*, 19 FMSHRC at 17. The focus is on abatement efforts made prior to issuance of the citation or order. *Id.*

i. Order No. 7490584

Respondent argues that it made efforts to abate belt entry 75.400 violations generally and did not ignore its prior violations. R. Br. at 38-39; Tr. I at 450. Willis testified that Respondent held meetings with MSHA and training sessions with mine examiners to prevent section 75.400 violations from recurring. Tr. I at 450. Miller testified, however, that Respondent could have and should have assigned more rock dusters and assigned more miners to shovel at belt transfer points. Tr. I at 145-46, 374-76. Despite the inspector's recommendations, I am wary to second guess Respondent's allocation of its workforce and recognize that there may be more than one way to make genuine efforts to abate recurring violations. The Commission has recognized that special safety meetings may be relevant to whether an operator is attempting to address an

ongoing problem. *See IO Coal*, *supra*, 31 FMSHRC at 1356. The record establishes that Respondent had a group from MHSA come down from Beckley to train examiners (Tr. I at 123, 449); that Respondent held special safety talks and manager meetings (Tr. I at 448); that changes were made in workforce allocation to increase belt examinations (Tr. at 448-49); that examiners were fired or disciplined for failure to cite hazardous conditions (Tr. I at 455); and that Respondent created PowerPoint training guidelines on July 7, 2007 (Tr. I at 456; R. Ex. 16).

Nevertheless, even though Respondent did attempt to make efforts to eliminate belt entry 75.400 violations generally, this evidence is not dispositive of the specific unwarrantable failure or repeated failure allegations at issue. Where an operator has actual knowledge of a violative condition, the Commission has considered the operator's abatement efforts of the specific violation in question. *See Consolidation Coal*, *supra*, 22 FMSHRC at 330-33; *Windsor Coal*, *supra*, 21 FMSHRC at 1005-1007. I conclude that Respondent failed to make adequate efforts to abate the known accumulation violation cited in Order 7490584, prior to its issuance. I am not persuaded by Respondent's argument that it took specific efforts to abate the violative condition because it was shoveling up the accumulations at the tail roller when it created the stockpile of loose coal behind said roller. As noted above, the stockpile of loose coal was part of inspector Miller's reason for issuing the Order in the first place. It was also contrary to the mine's MSHA-approved cleanup plan. R. Ex. 15. Shoveling some of the loose coal into a stockpile did little to eliminate any accumulation or mitigate any hazard contributed to by the violation. The stockpile also presented a propagation expedient in the event of a fire. Tr. I at 232. In any event, extensive accumulations of loose coal and float coal dust were allowed to accumulate under and around the tail roller. In short, Respondent's inadequate abatement efforts also support an unwarrantable failure finding.

ii. Order No. 7490599

While there can be little doubt that Respondent's history of violations serves to put the operator on notice that greater efforts were needed to address the condition, I find that Respondent's voluntary participation in safety meetings and training sessions shows that reasonable efforts were made to address known accumulations. As the Commission has suggested, special safety meetings can indicate that an operator is taking steps to address a recurring problem. Unlike in Order No. 7490584, mine management did not have actual knowledge of the accumulations at the Flannigan Pony belt. Accordingly, Respondent's abatement efforts weigh against an unwarrantable failure determination for Order No. 7490599.

g. Conclusion Regarding Unwarrantable Failure Factors

In sum, after considering the relevant Commission factors, I conclude that the violations in Order Nos. 7490584 and 7490599 were the result of Respondent's unwarrantable failure to comply with section 75.400. Respondent's actions with regard to the conditions in Order No. 7490584 displayed an aggravated inattention to a known recurring problem. The record establishes that the accumulations cited in Order No. 7490584 existed for at least three shifts, and the accumulations cited in Order No. 7490599 existed for about two shifts. For both violations, the accumulations were extensive and relatively obvious. The unmitigated fire hazard made Order No. 7490599 particularly dangerous. Further, the Respondent knew or should have

known of the violations, and Respondent failed to take specific, concrete measures to eliminate the known accumulations in Order No. 7490584.

D. Negligence

1. Legal Principles

In assessing penalties for violations of mandatory standards, Section 110(i) of the Mine Act requires that the Commission consider, inter alia, whether the operator was negligent. 30 U.S.C. § 820(i). Thus, each mandatory standard carries with it an accompanying duty of care to avoid violations of the standard. An operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.

By regulation "negligence" is defined as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required . . . to take steps necessary to correct or prevent hazardous conditions or practices." *Id*. "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." *Id*. High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id*. Moderate negligence is when "[t]he operator knew of should have known of the violative condition or practice, but there are mitigating circumstances." *Id*. Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id*. No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id*.

2. Legal Analysis

After close examination of the record, I affirm the Secretary's finding of high negligence for Order No. 7490584, but find that negligence should be reduced from "high" to "moderate" for Order No. 7490599. Pursuant to 30 C.F.R. § 100.3(d), a violation is said to be the result of "high negligence" if *no* mitigating factors exist. Thus, if no mitigating factors exist, the violation is attributable to high negligence. Otherwise, the inspector must find moderate, low, or no negligence. *Excel Mining, supra,* 497 F. App'x at 79.

Respondent's utilization of fire detection, fire brigades, suppression systems, and its maintenance of escapeways does not mitigate its negligence. Operators are required to comply with all relevant safety and health standards and regulations and are not entitled to leniency because they have satisfied legal requirements. I find, however, the fact that the condition in Order No. 7490599 had not been reported to mine management by its examiners to be a mitigating factor. Accordingly, I modify the negligence for Order No. 7490599 from "high" to "moderate."

E. Flagrant

1. Background Concerning Application of the Statutory Flagrant Provision of Section 110(b)(2)

a. Rulemaking and Guidance

On August 17, 2006, following the Aracoma and Sago Mine disasters, Congress enacted the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), thus amending the Mine Act to "further the goals set out in the [Act] and to enhance worker safety." To accomplish this purpose, Congress added a flagrant designation in section 110(b)(2), which sets forth language defining the term "flagrant" and provides for the assessment of enhanced civil penalties. It provides the following:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000 [$242,000]. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2).

Pursuant to Section 8(b) of the MINER Act, the Secretary proposed a rule, subject to notice and comment, regarding the Criteria and Procedures for Proposed Assessment of Civil Penalties, including those that implemented the flagrant provision. *See* Pub. L. No. 109-236, § 8, 120 Stat. 493 (2006). On October 26, 2006, following the prescribed notice and comment period, MSHA released a Procedure Instruction Letter (PIL) No. 106-111-04, titled "Procedures for Evaluating Flagrant Violations."[16] In the PIL, MSHA detailed its interpretation of the statutory and regulatory language for a flagrant violation under the "repeated failure" provision of section 110(b)(2).

The PIL provides the following criteria:

1. Citation or order is evaluated as significant and substantial;

2. Injury or illness is evaluated as at least permanently disabling;

3. Type of action is evaluated as an unwarrantable failure; and

[16] These procedures became effective on October 26, 2006, expired on May 31, 2008, and were later re-issued as PIL No. I08-1II-02, which expired on March 31, 2010.

4. At least two prior "unwarrantable failure" violations of the same safety or health standard have been cited within the past 15 months.

On March 22, 2007, MSHA published a final rule implementing the flagrant penalty provision, effective April 23, 2007. 72 Fed. Reg. 13592. Section 100.5(e) merely parrots section 110(b)(2) of the MINER Act and provides no further guidance about how the rule will be applied: It provides:

> Violations that are deemed to be flagrant under section 110(b)(2) of the Mine Act may be assessed a civil penalty of not more than $220,000 [$242,000]. For purposes of this section, a flagrant violation means "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

In the supplementary information accompanying and discussing a section-by-section analysis of the final rule, MSHA rebuffed commenters' concerns that the language of the proposed rule was too vague and that section 110(b)(2) was limited to a violation that an operator has failed to correct under section 110(b)(1). 71 FR 13622-23 (Mar. 22 2007). MSHA further remarked:

> Several commenters stated that the proposed language with respect to flagrant violations was too vague. They suggested that flagrant violations be limited to repeated violations of the same standard that were issued under Section 104(d) of the Mine Act, characterized as involving reckless disregard. They further suggested that flagrant violations be limited to violations that have been finally adjudicated. MSHA considered these suggestions in developing this final rule and has determined that it would be most beneficial to miner's safety and health to retain the proposed language. In addition, the proposed language mirrors the MINER Act. Violations that are deemed to be flagrant would be subject to a penalty of up to $220,000 under the special assessment provision of this final rule.
>
> For a number of reasons, MSHA believes that a flagrant violation under section 110(b)(2) is not limited to a violation that an operator has failed to correct under section 110(b)(1). First, section 110(b)(1) specifically applies to failure to correct a "violation for which a citation has been issued." In contrast, section 110(b)(2) applies to failure to eliminate a "known violation," and does not specify that a "known violation" must be a violation which has been cited.

> Second, the Senate Report accompanying the MINER Act discusses flagrant violations without any reference to section 110(b) and without any indication that a flagrant violation must be a violation which has been cited. S. Rep. No. 109-365 (Dec. 6, 2006).
>
> Third, section 110(b)(2) applies to failure to eliminate violations "under this section" (emphasis added) that are deemed to be flagrant. Section 110(b)(2) cannot be read as applying only to violations under section 110(b) because section 110(b) is a subsection, not a section. Instead, Section 110(b)(2) must be read as applying to violations under the section in which it appears—i.e., section 110—including section 110(a).
>
> Fourth, section 110(b)(2) is, by virtue of its designation as a sub-subsection separate and distinct from section 110(b)(1), a provision distinct and independent from section 110(b)(1). That designation suggests that section 110(b)(2) is not limited to violations encompassed by section 110(b)(1).
>
> Finally, it would be illogical to limit flagrant violations to violations which have been cited. Plainly, failure to eliminate a violation which is known to the operator but which has not been cited by MSHA—perhaps because MSHA has not conducted an inspection since the violation arose—can be just as dangerous, and just as deserving of an enhanced penalty, as a violation which is known to the operator and which has been cited.
>
> Accordingly, the proposal has been modified. Final § 100.5(e) includes a reference to section 110(b)(2) of the Mine Act.

71 FR 13622-23 (Mar. 22 2007).

b. The Commission's *Wolf Run* Decision

The Commission's only decision to date to address the flagrant provision in section 110(b)(2) is *Wolf Run Mining Co*., 35 FMSHRC ___ (Mar. 2013). That case involved a repeated flagrant allegation as opposed to a reckless flagrant allegation. In the context of cross motions for summary decision, the judge concluded that the Secretary's interpretation of a "repeated failure" to include a respondent's past history of violations, did not comport with the plain language of the Act. *Wolf Run Mining Co*., 34 FMSHRC 337, 345 (Jan. 2012) (ALJ). By subsequent order, the judge in *Wolf Run* certified his ruling for interlocutory review. The Commission granted review on the issue of whether the judge correctly construed the "repeated

failure" language of section 110(b)(2). Pet. for Discretionary Rev., *Wolf Run Mining Co*., Docket No. WEVA 2008-1265 (Mar. 2012).

On interlocutory review, the Commission held that that the "plain language of section 110(b)(2) does not support the [j]udge's ruling that past violative conduct may not be considered in determining whether a cited condition represents a repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard . . . ." *Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 6. The Commission observed:

> Turning first to the statutory language itself, it is difficult to conceive how one determines whether certain conduct represents 'repeated' behavior of any sort without considering whether there have been prior instances of similar behavior. One might reasonably argue about the number of prior violations that should be necessary, or how similar those prior violations should be before conduct is appropriately considered a 'repeated failure' under 110(b)(2), but an interpretation that precludes consideration of any prior violations runs counter to the natural meaning of the language.

Id., (footnote omitted).[17]

The Commission further reasoned that "[i]t would be inconsistent with the Act's graduated enforcement scheme to allow consideration of an operator's past violative conduct for an unwarrantable failure determination but to prohibit consideration of an operator's past violative conduct in the assessment of a potentially higher flagrant 'repeated failure' penalty." *Id*. at 7. The Commission found that another factor undermining the "crabbed construction" that a "repeated failure" be circumscribed to instances in which an operator repeatedly failed to eliminate the cited condition at issue, is the fact that such interpretation would render the provision "mere surplusage" and "effectively indistinguishable from the failure to abate provisions of section 104(b) of the Mine Act." Such a confined interpretation would also be duplicative and sometimes inconsistent with section 110(b)(1), which sets forth a daily maximum penalty of $7,500 for failure to correct a cited violation, with no upper cap like the $242,000 cap on a flagrant violation penalty. The Commission found it difficult to believe that Congress determined that additional enforcement tools were needed in the wake of the Sago disaster, only to provide a sanction already addressed by an existing provision. *Id*.

[17] In a personal footnote, Commissioner Nakamura did not agree that the textual language "repeated failure to make reasonable efforts to eliminate a known violation" was susceptible to only one interpretation, since two Commission judges, one in *Conshor Mining* and one *Wolf Run,* concluded that the term "repeated failure" refers to "current repeated conduct evidenced by a failure to eliminate the hazard posed by the discrete violation alleged to be flagrant, rather than by a past history of violations. But examining the "repeated failure" language in light of its purpose and context, rather than in isolation, Commissioner Nakamura concluded that the "repeated failure" language is susceptible to only interpretation. *Id*. at n.9, *citing Kasten v. Saint-Gobain Performance Plastics Corp*., 131 S.Ct. 1325, 1330-31 (2011).

Finally, the Commission observed that confining the "repeated failure" language to the "repeated failure to eliminate" the *cited* condition "might result in the elimination of any meaningful distinction between a 'reckless' and a 'repeated' flagrant violation, as a repeated failure to make reasonable efforts to eliminate a single known and dangerous violation will often be considered reckless." *Id*. at 7-8. While acknowledging that a scenario in which an "inspector comes upon a violative condition which has been repeatedly noted in the operator's examination books . . . might well be considered flagrant under either the 'reckless failure' or 'repeated failure' criteria of section 110(b)(2)," the Commission "declined to limit the application of the repeated failure prong to what [it] would hope and expect to be rare occurrences." *Id*. at 8, n. 14.

For these reasons, the Commission concluded that the Secretary may permissibly consider an operator's past violation history in determining that a violation should be assessed as a "repeated failure" flagrant violation within the meaning of section 110(b)(2). The Commission remanded *Wolf Run* to the judge for a determination of whether the violation alleged in the Order was properly assessed as flagrant. In doing so, the Commission intimated no view on the reasonableness of the interpretation advanced by the Secretary's appellate counsel. *Id*. at 8.[18]

On remand, the judge directed the Secretary to submit a statement explaining the Secretary's interpretation of section 110(b)(2) and whether that interpretation required notice and comment rulemaking. The judge stated:

> Presumably the existence of violations cited previous to the subject violation of section 75.400 will form at least part of the basis for the Secretary's explanation. If so, the Secretary shall identify those prior violations by their citation/order numbers, their date, the standards violated and the section of the Mine Act under which the citations/orders were issued. In addition, the Secretary shall explain the role each such violation played in the Secretary's determination that the violation of section 75.400 found in Order No. 6605922 was flagrant.

Wolf Run Mining Co., Docket No. WEVA 2008-1265 (Mar. 2013) (ALJ Order on Remand).

In response to the judge's Order on remand, the Secretary argued that a "repeated failure" is established where the operator either: (1) failed more than once to make reasonable efforts to eliminate the violation alleged to be flagrant; or (2) failed to make reasonable efforts to eliminate at least one previous violation prior to failing to make reasonable efforts to eliminate the violation alleged to be flagrant. *See* Secretary's Response to Order on Remand, 3, No. WEVA

[18] Under that interpretation, where section 110(b)(2)'s other criteria are satisfied, a "'repeated failure' is established where the operator either (i) failed more than once to make reasonable efforts to eliminate the violation alleged to be flagrant; or (ii) failed to make reasonable efforts to eliminate at least one previous violation prior to failing to make reasonable efforts to eliminate the violation alleged to be flagrant." *Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 8, n. 15 citing n.5.

2008-1265 (Mar. 2013) (ALJ). This reading is the same one that the Secretary's appellate counsel presented to the Commission on interlocutory review in *Wolf Run*. Thus, this appears to be the Secretary's current interpretation of the repeated failure provision of Section 110(b)(2).

In this case, however, the Secretary never advanced that interpretation. Rather, it relied on the PIL that was in effect at the time the Orders were issued. It is against this backdrop that the undersigned addresses the instant repeated flagrant allegations.

c. *Wolf Run* Revisited

I find that both violations in Order Nos. 7490584 and 7490599 are flagrant under a narrow interpretation of the "repeated failure" provision where a repeated failure may be established without resort to past violation history (*see Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 8, n. 14). Of course, past violation history may help establish that the litigated violation is flagrant, but here the Secretary did not provide sufficient evidence of the particulars of that past violation history, including the specifics of the unwarrantable failure orders relied upon, or prior admissions or stipulations of high negligence, to successfully establish prior known violations and use such past violation history in prosecution of the repeated failure flagrant allegations. Nevertheless, since I find that Respondent was given adequate notice of the narrow interpretation of the "repeated failure" provision where a repeated failure may be established without resort to past violation history (*see Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 8, n. 14), I need not address whether Respondent was denied fair notice under a broader interpretation that relies on past violation history left unexplained in *Wolf Run* and inconsistently enforced by the Secretary.[19]

[19] The Secretary has failed to proffer sufficient evidence concerning the nature of the past violations of section 75.400 to support the repeated flagrant designation for either violation. The Secretary must show a history of violations that were known to the operator and that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury. As in *Bowie Resources*, the Secretary has submitted a printout in support of the repeated flagrant finding listing all the alleged violations of section 75.400 that were cited between October 11, 2005 and September 23, 2007. *See Bowie Resources, LLC*., 33 FMSHRC 1685, 1699 (July, 2011) (ALJ). The printout only provides the most basic of facts for each alleged violation (i.e., the citation number, the standard alleged to have been violated, the S&S and unwarrantable designations, the proposed penalty, payment status, etc.), but does not list the alleged negligence of the operator nor the violation narrative setting forth the practices or conditions for which the citation was issued. P. Ex. 1.

The Secretary did, however, provide copies of twenty-seven citations previously issued to Respondent alleging violations of section 75.400, which the Secretary claims are substantially similar. P. Ex. 5-31; P. Br. at 33-34. Only one of the "substantially similar" violations received into evidence was alleged to be an unwarrantable failure, and six of those twenty-seven citations were alleged to have been the result of "high" negligence. These citations are unreliable indicators of past violative flagrant conduct as they only represent the allegations made by the Secretary, and not the final order of the Commission. *See* R. Ex. 39 (Order Approving Partial

(continued…)

As explained above, *Wolf Run* narrowly held that past violative conduct may be considered in determining whether a cited condition represents a "repeated failure" flagrant violation, but it does not resolve which prior violations are relevant. Nor does *Wolf Run* pass on the reasonableness of the interpretation advanced by the Secretary's appellate counsel, which disavowed the Secretary's previous reliance on the "substantial similarity" of the previous violations to the violation alleged to be flagrant. *Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 8.

As noted, the Secretary's Statement in Response to the ALJ's Order on Remand in *Wolf Run* adopts appellate counsel's interpretation. As noted, under that interpretation, where section 110(b)(2)'s other criteria are satisfied, a "repeated failure" is established where the operator either (i) failed more than once to make reasonable efforts to eliminate the violation alleged to be flagrant (i.e., the narrow interpretation that I apply to this case) or (ii) failed to make reasonable efforts to eliminate at least one previous violation prior to failing to make reasonable efforts to eliminate the violation alleged to be flagrant (i.e., a broader interpretation that I decline to address prior to further guidance from the Commission or MSHA rulemaking)." *Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 8, n. 15 citing n.5. Thus, restated in full, consistent with Commission language in n. 5 (i.e., "where section 110(b)(2)'s other criteria are satisfied") and consistent with the Secretary's brief and oral argument in *Wolf Run,* the Secretary's current litigating position, although not advanced here, is that a "repeated failure" flagrant violation is established where the operator either (i) failed more than once to make reasonable efforts to eliminate a known violation alleged to be flagrant that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury (*narrow interpretation*); or (ii) failed to make reasonable efforts to eliminate at least one previous known violation that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury, prior to failing to make reasonable efforts to eliminate the known violation alleged to be flagrant (*broad interpretation*).

In my view, such a reading accounts for both a permissibly narrow interpretation of the "repeated failure" provision where a repeated failure may be established with or without resort to past violation history (*see Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 8, n. 14), and a permissibly broad interpretation where a repeated failure may be established by reliance on the cited violation and at least one prior known violation that killed, seriously injured, or reasonably

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[19](…continued)

Settlement in which the aforementioned unwarrantable designation was removed). While the Commission has ruled that "non-admission" clauses are impermissible insofar as they prevent consideration of alleged violations in proceedings under the Mine Act, the parties may negotiate paper changes to the citations that would alter the inspector's initial evaluation and thus affect their importance in the repeated flagrant analysis. *See Amax Lead Co. of Mo*., 4 FMSHRC 975, 978 (June 1, 1982). I decline to strip Respondent of its due process afforded under the Act by blindly accepting the Secretary's invitation to consider unproven allegations as history of repeated flagrant violations when those allegations have either not yet become final orders of the Commission, or were subject to unspecified modifications as part of an approved settlement.

could have been expected to kill or serious injure. In both the first and second prong, if the Secretary relies on past violation history, the Secretary must *prove t*hat any prior violation relied upon was known, such as through a high negligence stipulation or proof of the knowledge factor in an unwarrantable failure analysis, and that the known violation met the requisite gravity level to be flagrant.

This reading also accounts for minor ambiguity in otherwise fairly plain statutory language. The phrase "repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury" may be subject to more than one reasonable interpretation. The pronoun "that" may be interpreted broadly to refer to a certain type or kind of prior violation, namely a violation that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury. Under this interpretation, and consistent with *Wolf Run*, a "repeated failure" flagrant violation may be established when an operator fails on more than one occasion to make reasonable efforts to eliminate that *type or kind* of violation, i.e., a violation that killed, seriously injured, or reasonably could have been expected to kill or serious injure. Left unresolved, however, is whether the *same* mandatory standard must be violated, or whether *any* mandatory standard will suffice where the known violation killed, seriously injured, or reasonably could have been expected to kill or serious injure.

On the other hand, the phrase "repeated failure to make reasonable efforts to eliminate a known violation . . . that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury" may also be interpreted narrowly, apart from any consideration of an operator's prior history of violations, such as where a mine operator ignores the same violation on more than one occasion, giving meaning both to the terms "repeated failure" and the singular phrase "a known violation." *See Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 8, n. 14. Of course, in such circumstance, as explained above, the operator's past violation history may be considered in determining whether the singular violation is flagrant. As the Commission suggested in *Wolf Run*, either interpretation is permissible, but an interpretation that flatly rejects consideration of any prior violation history is not, particularly in light of the purpose and context of the statutory language.

2. Respondent's Due Process, Fair Notice, and Arbitrary Enforcement Arguments

a. Respondent's Arguments

Respondent requests that the two flagrant designations be removed because the statute and regulation are void for vagueness and overly broad, both on their face and as applied. The Respondent argues that the statute and regulation fail to provide fair notice of what conditions or practices should be considered flagrant, and encourage arbitrary enforcement, which Respondent says actually occurred here. *See generally* R. Br. at 42-50.

Respondent emphasizes that basic principles of due process require sufficient notice and dictate that "an enactment is void for vagueness if its prohibitions are not clearly defined . . . .

[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *FMC Corp*., 8 FMSHRC 631, 640 (Apr. 1986) (ALJ) (citing *Grayned v. City of Rockford*, 408 U.S. 102 (1972) (emphasis added); *see also Kolender v. Lawson,* 461 U.S. 352, 357 (1983). Respondent notes that the statute does not provide any definitions for several key terms and phrases, such as "reckless," "repeated failure," "to make reasonable efforts to eliminate," "a known violation," "substantially and proximately caused," "reasonably could have been expected to cause" and "serious bodily injury." R. Br. at 42-43. Respondent further details how MSHA's proposed rule and final regulation merely restate the statutory language, and how MSHA deliberately chose to avoid formal notice and comment rulemaking regarding its interpretation of the flagrant provision, as set forth in the PIL, by omitting its interpretation from the proposed rules and waiting to release the PIL three days after the comment period had closed. Thus, Respondent argues that Congress and MSHA left operators with no guidance on what the various terms and phrases in the flagrant statute and regulation mean, leaving them to guess about what actions, conditions, or practices could result in a flagrant designation. R. Br. at 44.

The Secretary argues that the Commission's decision in *Wolf Run* has provided such guidance. P. Rep. Br. to Order Lifting Stay, at 4. As stated above, the Commission found "the language of section 110(b)(2) [to be] plain" as it relates to whether an operator's past history of violations may be considered in determining whether a violation resulted from a repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard. *Wolf Run*, 35 FMSHRC ___, slip op. at 6, n. 7. As a result, the Secretary argues that I should reject Respondent's argument that Section 110(b)(2) failed to provide notice regarding the requirements of Section 110(b)(2). P. Rep. Br. to Order Lifting Stay at 4.

In addition, Respondent argues that the Secretary's "repeated failure" flagrant interpretations are invalid and unenforceable, and should receive no deference under a *Chevron II* analysis because there are indicia of inadequate consideration that support a finding that MSHA's interpretation does not reflect its fair and considered judgment. *Id*. at 2-6 (citations omitted). Respondent reiterates that MSHA's rulemaking merely parroted the statute and did not provide any criteria for "repeated failure" flagrant violations. Respondent further emphasizes that the Secretary disavowed the PIL in this case and in *Wolf Run* as a "nonbinding" "general policy statement." Consequently, the Respondent notes that the Secretary has no formal rule or policy interpretation regarding the "repeated failure" criteria here, and must rely on altered and vague testimony and ever-evolving litigation positions. *Id*. at 2-3.

Respondent emphasizes that Miller did not rely upon the PIL, did not believe the conditions warranted a flagrant designation when he observed them, and only designated them flagrant when later told to do so by District 8 superiors. *Id*. at 3. Furthermore, the Respondent emphasizes that the Secretary's current litigating position regarding the "repeated failure" criteria differs substantially from the PIL, the criteria announced in *Wolf Run*, and the criteria espoused by Miller at trial, thus amounting to no more than a "convenient litigating position" that makes deference inappropriate. *Id.* at 4, citing *Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2166 (2012).

Respondent also highlights a host of questions that arise from the Secretary's reliance (without rulemaking) on past violation history, including why twenty-seven alleged "substantially similar" section 75.400 violations – all section 104(a) citations with lost workdays designations and twenty-one with moderate negligence designations - triggered application of the flagrant provision. *Id*. at 4-5. Respondent notes that examination of the twenty-seven citations by month shows that belt entry violations of Section 75.400 declined dramatically in the months leading up to September 2007 when the instant Orders were issued. *Id*. at 5.

Furthermore, Respondent argues that the Secretary's new flagrant arguments are inconsistent with prior detailed rulemaking for section 100.3(c), entitled *History of Previous Violations*, which was promulgated at the same time as the flagrant rule in section 100.5 (e). Respondent notes that the Preamble to the Final Rule, as it relates to the repeat violation provision in section 100.3(c), establishes that such provision is aimed at repeat citations for the same safety and health hazards at the same operation within a specified period of time in an effort to prevent reoccurrence and thereby provide systematic improvement to miner safety and health. *Id*. at 5, citing 72 Fed. Reg. at 13,608. Respondent argues that the Secretary's new litigation position regarding "repeated failure" flagrant violations appears to say the same thing, thus rendering the repeat violations regulation in section 100.3(c) superfluous.

In short, Respondent argues that the undersigned should give no legal effect to the PIL, no deference to the Secretary's "repeated failure" litigation position, find inadequate guidance to determine the appropriate criteria for a "repeated failure" flagrant violation without additional rulemaking, and remove the flagrant designations. *Id*. at 6, n. 3, citing *Drummond Co.*, 14 FMSHRC 661, 683-87, 692 (May 1992) (finding that the application of penalty criteria in non-binding policy letters affects operator's rights, and invalidating new standards imposing higher penalties for excessive history because they were substantive and there had been no opportunity for public comment).

Respondent's Response Brief to Order Lifting Stay also expands on earlier arguments that the flagrant statute and its associated regulation are unconstitutionally vague and overly broad on their face and as applied. Respondent cites the Supreme Court's recent decision in *FCC v. Fox Television Stations, Inc*., 132 S.Ct. 2307, 2317 (2012) to bolster its argument that the Due Process Clause of the Fifth Amendment requires that the flagrant provision and identical MSHA's regulation be deemed void for vagueness because they do not give fair notice of the conduct forbidden or required. R. Br. to Order Lifting Stay at 6. Respondent notes that the *Fox* Court emphasized that "the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, the regulated party should know what is required of them so they may act accordingly; second, decision and guidance are necessary so that those enforcing the law not act in an arbitrary and discriminatory way." 132 S.Ct. at 2317, citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

With regard to the first concern of what is required under "repeated failure" criteria to avoid a flagrant designation, Respondent relies on *Wolf Run's* acknowledgment that "[o]ne might reasonably argue about the number of prior violations that should be necessary or how similar those prior violation should be before conduct is appropriately considered a "repeated failure" under 110(b)(2). R. Br. to Order Lifting Stay at 6, citing *Wolf Run*, 2013 WL 1249150, at *3.

Respondent argues that this statement coupled with the silence of the statute and existing regulation on such criteria support a finding that Respondent was provided with inadequate notice of the "repeated failure" criteria, and when and how it would be applied, so it could avoid a flagrant designation. *Id*. at 7.

With regard to the second *Fox* concern, Respondent claims that *Wolf Run* strengthens its argument that the "repeated failure" prong of the flagrant provision and regulation encourages and allows arbitrary enforcement. Respondent notes that the issuing inspector in *Wolf Run*, unlike Miller here, "followed the criteria in the PIL" when he recommended that the 75.400 accumulation violation be designated flagrant in November 2007. *Id*. at 7, citing 2013 WL 1249150, at *2. Thus, Respondent argues that during the same time frame, MSHA was interpreting and enforcing the flagrant provision and regulation in at least two different manners in two different districts. Thus, Respondent argues that the unconstitutionally vague criteria encouraged, and actually allowed, arbitrary enforcement based on evolving and ever-changing criteria. *Id*. at 8 and n. 5.

Finally, Respondent's Response Brief to Order Lifting Stay argues that the stipulated facts in *Wolf Run,* the other reported ALJ decisions regarding flagrant violations, and the expired PIL, all support an interpretation of "serious bodily injury" to mean a violation that reasonably could be expected to cause a permanently disabling or fatal injury, but not a lost workdays injury. *Id.* at 8, citing *Wolf Run*, 34 FMSHRC at 34 (ALJ) (referring to stipulation of "permanently disabling injuries"); *Stillhouse Mining*, 34 FMSHRC 778, 815, 821, 826, 835 (Mar. 2011) (ALJ) (finding "fatal" and "permanently disabling injuries"); PIL, R. Ex. 27 ("Injury or illness. . . at least Permanently Disabling"). Respondent concludes that this is "perhaps the simplest most compelling reason why the flagrant designations should be removed from Orders 7490584 and 7490599. *Id*.

b. Respondent's Arguments, While Superficially Appealing, Lack Merit Under the Narrow Holding in This Case

Addressing the Respondent's arguments, the Supreme Court has long held that the Commission has the authority to address constitutional challenges to the Act. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994); *see also Kenny Richardson*, 3 FMSHRC 8, 18-21 (Jan. 1981), *aff'd*, 689 F.2d 632 (6th Cir. 1982) (Commission has authority to decide constitutional issues). The undersigned must assume that Congress legislated in light of constitutional limitations. *See Emerald Coal Res., Inc.*, 29 FMSHRC 956, 971 (Dec. 2007), citing *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). The Supreme Court has concluded that there is a "strong presumptive validity that attaches to an act of Congress" and statutes are not automatically invalidated as vague simply because it is difficult to determine whether certain offenses fall within the statutory language. *Id*., *citing United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). Consequently Respondent carries a heavy burden to show that the flagrant provision in the MINER Act is unconstitutionally vague. *Id*., *citing Langston v. Johnson*, 478 F.2d 915, 919 (D.C. Cir. 1973).

Initially, I find that MSHA gave Respondent actual notice of its interpretation of what is required under the flagrant provisions of the statute when MSHA articulated such interpretation in the PIL on October 26, 2006, well before the Secretary undertook the current enforcement

action in 2009. I find that due process is satisfied when an agency gives actual notice of its interpretation prior to enforcement, irrespective of the validity of that interpretation. *See, e.g., Consolidation Coal Co*., 18 FMSHRC 1903, 1907 (Nov. 1996) (holding that actual notice was provided by MSHA prior to issuance of citation); *see also General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (reasoning that agency's pre-enforcement warning to bring about compliance with its interpretation will provide adequate notice). The PIL functioned as an expression of the agency's official position regarding the interpretation of "flagrant" before it filed the instant case. Therefore, the PIL provided actual notice to Respondent of MSHA's enforcement position, irrespective of the validity of that position.[20]

In addition, I find that plain statutory language provided actual notice to Respondent under a narrow interpretation of the "repeated failure" provision, i.e., that a repeated failure *may be* established without resort to past violation history (*see Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 8, n. 14). In fact, Respondent concedes as much when it argues that MSHA's interpretation of "repeated failure" in the PIL is wrong because the phrase "a known violation" indicates that the statute is focused upon a repeated failure to eliminate a singular, known violation. R. Br. at 45.

Although the Commission in *Wolf Run* held that past violative conduct may be considered in determining whether a cited condition represents a "repeated failure" flagrant violation, footnote 14 of *Wolf Ru*n also makes clear that the narrow interpretation that I apply in this matter is also a permissible interpretation under the statute. Accordingly, I conclude that Respondent was given fair notice of proscribed conduct in the circumstances of this case, and there was no arbitrary enforcement of the "repeated failure" flagrant provision. Since Respondent was given adequate notice of this narrow interpretation under the plain language of the statute, I need not address whether Respondent was denied fair notice under a broader interpretation that relies on some nebulous, and yet to be defined, past violation history that is consistent with the express statutory language and underlying Congressional intent.

3. No More Than *Skidmore* Deference Is Due Here

I decline to give the Secretary's interpretation full *Chevron* or *Seminal Rock* deference in the circumstances of this case. As a threshold matter, it is remarkable that seven years after Congress established a flagrant violation under section 110(b)(2), MSHA has failed to undertake substantive notice-and-comment rulemaking on the substantive meaning of the flagrant provision. Rather, the Secretary's regulation merely parrots the language of the statute. Making matters worse, the Secretary has advanced constantly evolving interpretations of section 110(b)(2) before the Commission and its judges. *See Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 3-4, n. 5.

[20] As explained below, the PIL and the Secretary's varying and evolving interpretations of the "repeated failure" provision thereafter, deserve no more than *Skidmore* deference to the extent they have the power to persuade.

In the present case, like in *Wolf Run,* the Secretary's interpretation has changed several times. The Secretary initially relied on MSHA's PIL criteria at the hearing to establish a "repeated failure" flagrant violation. Under these criteria, the citation or order must be designated as S&S and an unwarrantable failure, with severity of injury designated as at least permanently disabling, and there must be at least two prior unwarrantable failure violations of the same safety or health standard cited within the past fifteen months. That enforcement guideline appears to be cut from whole cloth and superimposes requirements not present in the language of the statute, without the benefit of notice-and-comment rulemaking. The PIL, while adequate for notice purposes and as a screening device for MSHA, is too broad a brush to be used for definitive deference in the repeated flagrant analysis. While it may be established through adequate proof or stipulation that past unwarrantable violations were "known" violations for the purposes of determining flagrant, knowledge is but one part of the unwarrantable failure balancing test and is not a prerequisite for such a finding. As noted, a known violation may be established by a prior admission or stipulation regarding negligence. Further, the PIL criteria does not seem to capture whether the operator made reasonable efforts to eliminate a prior known violation.

Perhaps recognizing such problems, the Secretary, as in *Wolf Run*, broadens the proposed interpretation of a "repeated failure" flagrant violation on post-hearing brief to include previous non-S&S and non-unwarrantable failure violations, and seemingly narrows the interpretation to require that the previous violations be "substantially similar." P. Br. at 36-37 (citing OSHRC precedent as instructive); *cf.*, *Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 3-4, n. 5. I am not persuaded by this non sequitur. Dropping the S&S and/or unwarrantable failure prerequisites in any past violation history relied upon to establish a "repeated failure" flagrant appears to be inconsistent with the statutory language that a known violation substantially and proximately caused, or reasonably could be expected to cause, death or serious bodily injury. In such circumstances, even assuming any "substantial similarity" requirement to be appropriately grafted onto the statutory language, any previous violation(s) relied on to establish a "repeated failure" flagrant cannot possibly be "substantially similar" to the alleged repeated flagrant being litigated, which must have the requisite knowledge and gravity requirements.

Much like in *Wolf Run*, the Secretary further argues on brief that the violations in Order Nos. 7490584 and 7490599 should be found "repeated failure" flagrant violations because of eleven previous unwarrantable failure orders as well as the history of 361 citations/orders for section 75.400 violations in the previous 24-month period. P. Br. at 34; P. Br. to Order Lifting Stay at 3. *Cf.*, *Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 3-4, n. 5.[21] As noted, however, only one actual unwarrantable failure order is in the record and the judge's Order Approving Settlement establishes that the unwarrantable failure designation was removed. R. Ex. 39. In addition, the Secretary argues that Respondent received twenty-seven citations/orders for 75.400 violations that were "substantially similar" to the alleged "repeated failure" flagrant violations at issue because they involved accumulations of coal, float coal dust, coal fines, and other combustible materials that had been allowed to develop on or around conveyor belts and belt

[21] The previous 24-month period departs from the former PIL criteria of at least two prior unwarrantable failures of the same standard within the past fifteen months.

structures. *See* P. Br. at 37; P. Br. to Order Lifting Stay at 3. *Cf. Wolf Run, supra,* 35 FMSHRC at ___, slip op. at 3-4, n. 5. Of these twenty-seven citations/orders, the Secretary notes that nineteen were issued for S&S violations, including five that were issued as unwarrantable failures in the two months before September 18, 2007. Accordingly, the Secretary argues that Respondent's history of violations is replete with examples of "prior instances of similar behavior" demonstrating that Respondent has repeatedly failed to eliminate accumulations of combustible materials in and around belts and belt structures in the mine" and this is strong evidence in support of the "repeated failure" flagrant designations. P. Br. to Order Lifting Stay at 3.

Even assuming that the Secretary establishes such history, that does not mean that the Secretary necessarily has established all the requisite elements of a "repeated failure" flagrant violation, particularly if certain aspects of a prior settled or open unwarrantable failure violation such as "a known violation that substantially and proximately caused, or reasonably could be expected to cause, death or serious bodily injury" have not been proved or admitted for purposes of the Act, and are merely assumed by the Secretary. While the Commission has left open which prior violations are relevant to the assessment of a "repeated failure" violation, including the number of prior violations that should be necessary, and how similar those prior violations should be, reliance on such violation history raises a host of proof problems which cannot be met "by simply introducing a computer printout showing that there have been multiple violations of a cited safety standard at the mine. Such statistics do not establish that the mine operator has repeatedly failed to make reasonable efforts to eliminate a known violation." *Bowie Res., supra,* 33 FMSHRC at 1699.[22] Rather, the Secretary must establish all the statutory elements for each "repeated failure" relied upon to establish a flagrant violation. This may prove difficult, despite admission clause language, when prior citations are settled without proving up all requisite elements.

Given MSHA's and/or the Secretary's constantly evolving interpretations of a "repeated failure" flagrant violation as set forth in this case, I must first consider *Chevron's* applicability to such interpretations. Initially, I note that "[a]gency inconsistency is not a basis for declining to analyze an agency's interpretation under the *Chevron* framework." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). Rather, unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under Administrative Procedure Act (APA), 5 U.S.C.A. § 706(2)(A). Accordingly, if an agency adequately explains its reasons for reversal of policy, the change is not invalid because the whole point of *Chevron* is to leave discretion provided by the ambiguities of a statute with the implementing agency. *Id*.

Accordingly, I look to *Chevron's* two-step analysis to determine whether the PIL, 30 C.F.R. section 100.5(e), and/or the Secretary's appellate arguments before the Commission in

[22] The judge in *Bowie Resources*, declined to rule on whether an increasing history of S&S and unwarrantable failure violations of a single standard would be sufficient to establish the "repeated failure" element. Instead, he determined that the Secretary had not established that the violation in the case reasonably could have been expected to cause death or serious injury, the fourth prong of the *Stillhouse* analysis. Because he determined that injury was unlikely, the judge vacated the Secretary's flagrant determination. *Id.* at 1700.

Wolf Run are permissible constructions of the statute in this case. *Chevron*, 467 U.S. at 842-43. The first step in the *Chevron* analysis is "whether Congress has directly spoken to the precise question at issue is," because if it has, that is the end of the inquiry. I agree with Respondent's argument that the flagrant statute is silent as to the "repeated failure" criteria. I also agree that while *Wolf Run* found that the plain language of the "repeated failure" flagrant provision allowed consideration of prior violation history, the statute is silent and ambiguous as to how that should be done. R. Br. to Order Lifting Stay at 1-2. Accordingly, I turn to *Chevron* step 2.

Under *Chevron* step 2, silence or ambiguity in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion, and filling these gaps involves difficult policy choices that agencies are better equipped to make than courts. 467 U.S. at 865–866. If a statute is silent or ambiguous, and if the implementing agency's construction is reasonable and not arbitrary, capricious, or manifestly contrary to the statute, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation. *Id*., at 843–844, n. 11.

Nevertheless, as Respondent points out on brief, *Chevron* deference only applies when: (1) "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law" and (2) "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp*., 533 U.S. 218, 226–27 (2001). Otherwise, the interpretation is "entitled to respect" only to the extent it has the "power to persuade." *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006), quoting *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

Whether an agency's reasonable statutory interpretation satisfies *Mead's* second requirement depends on the form and context of that interpretation, which may provide reason to suspect that the agency's interpretation is not reflective of the agency's fair and considered judgment on the matter in question. *Christopher v. SmithKline Beecham Corp*., 132 S.Ct. 2156, 2166 (2012); *see also Auer v. Robbins*, 519 U.S. 452, 462 (1997). Accordingly, deference is inappropriate where there are indicia of inadequate consideration, including conflicts between the agency's current and previous interpretations, signs that the agency's interpretation amounts to no more than a convenient litigating position, or an appearance that the interpretation is no more than a post hoc rationalization advanced by an agency seeking to defend past agency action against attack. *Christopher, supra,* at 132 S.Ct. at 2166.

Considerable indicia of inadequate consideration are present in this case. As emphasized, the Secretary's current litigating position regarding the "repeated failure" criteria differs substantially from the PIL relied on in this case, from the criteria pronounced in *Wolf Run*, and from the criteria relied on by inspector Miller at trial. As *Wolf Run* recognized, the Secretary has been anything but consistent regarding an interpretation of the "repeated failure" criteria. The Secretary's most recent position as advanced by appellate counsel in *Wolf Run* amounts to little more than a "convenient litigating position," making deference inappropriate. *Christopher*, *supra*, 132 S.Ct. at 2166.

In these circumstances, I conclude that the Secretary's varying interpretations of the "repeated failure" flagrant provision in this case merit no deference under *Chevron*.

I note that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446, n. 30 (1987). Shifting interpretations signal that the agency is not using its expertise and cannot make up its mind on an issue. *See, e.g*., *Rosales-Garcia v. Holland*, 322 F.3d 386, 403, n.22 (6th Cir. 2003), *cert. denied sub nom*. *Snyder v. Rosales-Garcia*, 539 U.S. 941 (2003). The Secretary's inconsistent interpretations of section 110(b)(2), as well as its failure to undertake notice-and-comment rulemaking, signal that the agency is not using its expertise and cannot make up its mind on how to interpret a "repeated failure" flagrant violation. Accordingly, I refuse to grant the Secretary's interpretation of section 110(b)(2) *Chevron* deference in this case.

I also find that that *Chevron* deference does not apply to the Secretary's interpretation of the statute based on the PIL. An agency's statutory interpretation only qualifies for *Chevron* deference if the interpretation is promulgated during the exercise of statutory authority to prescribe norms which carry the force of law, *i.e*., adjudication, notice-and-comment rulemaking, or some comparable law-making method. *United States v. Mead Corp*., 533 U.S. 218 (2001). In *Mead*, *supra,* customs ruling letters were legally binding only on the parties who requested them, not the public. The Court held that Congress did not intend to delegate to the agency the authority to act with force of law, and the agency did not act with, force of law. *Mead*, *supra*, 533 U.S. at 233.

Here Congress delegated authority to act with force of law, but MSHA did not do so. Furthermore, the PIL interpreting the Act does not carry force of law because it does not establish any binding norms on anyone. In *Chao v. Occupational Safety & Health Review Comm'n*, 540 F.3d 519 (6th Cir. 2008), the Sixth Circuit held that *Chevron* deference "is not required where the interpretation is offered via an informal medium -- such as an opinion letter, agency manual, policy statement, or enforcement guideline -- that lacks the force of law." *Id*. at 527, *citing Christensen v. Harris Cnty*., 529 U.S. 576, 587 (2000); s*ee also North Fork Coal Corp*. *v*. *FMSHRC*, 691 F.3d 735, 740-41 (6th Cir. 2012). Accordingly, I find that the enforcement guidance in the MSHA PIL has failed to carry out any congressionally delegated authority to act with force of law.

I also decline to grant *Seminole Rock* deference to the Secretary's interpretation of the regulatory language in section 100.5(e). *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The regulation merely parrots the statutory language of section 110(b)(2). An agency deserves no deference for an interpretation of its own regulation when the regulation merely parrots the language of the statute, without implementing it. *Gonzales, supra,* 546 U.S. at 257 (2006). In such cases, the agency is not using its expertise to interpret the law. It is merely copying or paraphrasing the statutory language. *Id*. at 258. Furthermore, the Secretary cannot argue that the PIL should receive *Seminole Rock* deference. The PIL is not an interpretation of section 100.5(e) because the PIL was released prior to the promulgation of 100.5(e).

Accordingly, I conclude that the Secretary's various interpretations are entitled to no more than *Skidmore* deference to the extent they have the "power to persuade" based on thoroughness of consideration, validity of reasoning, consistency with earlier and later pronouncements, and all other relevant factors." *Skidmore, supra,* 323 U.S. at 140. In this case,

I am not persuaded by the Secretary's shifting and inconsistent reasoning, including the addition of requirements not present in the statutory language.

4. The Elements of a "Repeated Failure" Flagrant Violation

Pursuant to the express statutory language, to establish a repeated flagrant violation, the Secretary must prove the following elements: (1) a repeated failure (2) to make reasonable efforts to eliminate; (3) a known violation of a mandatory health or safety standard; (4) that substantially and proximately caused or reasonably could have been expected to cause; (5) death or serious injury. *See Wolf Run*, March 22, 2013 Order on Remand in Docket No. WEVA 2008-1265, citing *Wolf Run*, *supra*, 34 FMSHRC at 345; *Stillhouse Mining*, *supra*, 33 FMSHRC at 778.

a. A Repeated Failure

"Repeated" means something that is said or done on more than one occasion. *See Oxford Dictionary of Current English* 764 (3d ed. 2001); *see also Webster's New World College Dictionary* 1215 (4th ed. 2007) ("repeated" is defined as something that is "said, done, or presented again"); *Random House Webster's College Dictionary* 1102 (2nd ed. 1997) ("done or said again and again"); *Webster's New World College Dictionary*, Third College Edition 1138 (3rd ed. 1988) ("said made, done, or happening again"); *The American Heritage Dictionary*, Second College Edition 1048 (2nd ed. 1982) ("said, done, or occurring again and again").

"Failure" means a "lack of success" or "the omission of expected or required action." *The New Oxford American Dictionary*, *supra,* at 604. In the legal context, failure means "1. Deficiency; lack; want. 2. An omission of an expected action, occurrence, or performance." *Black's Law Dictionary*, *supra*, at 631.

"Repeated" modifies "failure" and therefore a "repeated failure" means an omission of an expected action on more than one occasion.

b. To Make Reasonable Efforts to Eliminate

The next statutory phrase concerns the expected action that an operator must make. The action expected to be undertaken is "to make reasonable efforts to eliminate . . . ."

"To make" means to undertake.

"Reasonable" describes efforts and is understood by laypersons and lawyers as "having sound judgment; fair and sensible" or "as much is appropriate or fair [under the circumstances]; moderate." *Black's Law Dictionary*, *supra*, at 1293; *The New Oxford American Dictionary*, *supra,* at 1411.[23]

[23] Relevant tort law evaluates the reasonableness of an actor's conduct according to the standard of care followed by a reasonably prudent person. *Stillhouse*, *supra*, 33 FMSHRC at 804; Restatement (Third) of Torts, § 3, comment a. For civil penalty purposes, the Commission (continued...)

"Effort[s]" means a "vigorous or determined attempt[s]." *The New Oxford American Dictionary*, *supra,* at 540.

"Eliminate" means to "completely remove or get rid of (something)." *Id*. at 548; *Stillhouse*, 33 FMSHRC 778, 804 (Mar. 2011).

c. A Known Violation of a Mandatory Health or Safety Standard

The next statutory phrase describes what conditions an operator must make reasonable efforts to eliminate. The answer is that an operator must make reasonable efforts to eliminate a known violation of a mandatory health or safety standard. The plain meaning of "known" accords with the commonly understood meaning of "knowingly" under the Mine Act. *See Stillhouse, supra*, 33 FMSHRC at 806-07; *Freeman United Coal Mining Co.*, 108 F.3d 358, 363-64 (D.C. Cir. 1997); *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012). To "know" means to "be aware of through observation, inquiry, or information." *The New Oxford American Dictionary*, *supra,* at 937.

In the legal context, "knowledge" may be understood as "actual" or "constructive." Black's Law Dictionary, *supra*, at 888. Actual knowledge may be "express," which is "[d]irect and clear knowledge," or it may be "implied," which is "[k]nowledge of such information as would lead a reasonable person to inquire further." *Id*; *Stillhouse, supra*, 33 FMSHRC at 806.

The Commission has interpreted "knowingly" under section 110(c) of the Mine Act in such a manner. The test for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Cougar Coal Co*., 25 FMSHRC 513, 517 (Sept. 2003) (citing *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd* on other grounds, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983)). Under this test, "[a] knowing violation occurs when an individual 'in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.'" *Cougar Coal*, *supra*, 25 FMSHRC at 517 (quoting *Kenny Richardson*, *supra*, 3 FMSHRC at 16).

The meaning of "known" also embraces constructive knowledge of a violation, which is "[k]nowledge that one using reasonable care or diligence should have." *Black's Law Dictionary*, *supra*, at 888. Constructive knowledge derives solely from the duty to have acquired that knowledge. *See, e.g., Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 364 (D.C. Cir. 1997); *Jim Walter Res., Inc*., 19 FMSHRC 1761, 1767–69 (Nov. 1997).

The text of the statute does not require "a known violation" to have already been cited by MSHA in order to establish a "repeated failure" flagrant violation. *Wolf Run, supra,* 35

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[23](...continued)
has used the reasonably prudent person standard to determine whether, in light of the facts and circumstances surrounding a mine operator's conduct, a reasonably prudent person would have recognized a legal duty to take certain actions to comply with a mandatory health and safety standard. *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 656 (Aug. 2008) (quoting *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982)); *Stillhouse*, *supra*, 33 FMSHRC at 804.

FMSHRC at ___, slip op. at 7; *Stillhouse*, *supra*, 33 FMSHRC at 804; *Bowie Resources*, *supra,* 33 FMSHRC at 1697. The language and structure of section 110 make clear that an operator's failure to correct an already-cited condition is not a prerequisite to the establishment of a flagrant violation. *See Stillhouse*, *supra*, 33 FMSHRC at 805; *supra, 33 FMSHRC at* 1697. The only adjective modifying "violation" is "known," not cited. *Cf.*, section 104(b), 30 U.S.C. § 814(b), providing for a failure to abate citation where "a violation described in a citation issued pursuant to subsection (a)" is a prerequisite.

In my view, the meaning of the phrase "of a mandatory health or safety standard" is straightforward. A mandatory health or safety standard is *any* substantive regulatory standard promulgated pursuant to Title I of the Mine Act. The Act does not say the *same* standard. As noted above, however, the Secretary has advanced interpretations that the *same* mandatory standard must be violated, engendering arguable ambiguity and conflating a "repeated failure" involving the same standard with a "repeated failure" involving *any* mandatory standard where the known violation killed, seriously injured, or reasonably could have been expected to kill or serious injure. I note that in proposing a penalty the Secretary already looks to the Respondent's history of previous violations based on both the total number of violations and the number of repeat violations of the *same* citable provision of a standard in the preceding 15-month period. *See* 30 C.F.R § 100.3(c). In the advent of the deadly Sago and Aracoma tragedies, it would appear to the undersigned that in the flagrant provision, Congress intended the broader application inherent in any mandatory standard, not the same one.

I need not resolve this issue here. The parties do not dispute that 30 C.F.R. 75.400 is a mandatory safety standard as that term is used in Section 110(b)(2). *See, e.g., McElroy Coal Co*., 30 FMSHRC 237, 238 (Mar. 2008) (ALJ) (identifying 30 C.F.R. 75.400 as a "mandatory safety standard").

d. That Substantially and Proximately Caused, or Reasonably Could Have Been Expected to Cause Death or Serious Bodily Injury

The next statutory phrase addresses what kind of known violation of a mandatory health or safety standard an operator has repeatedly failed to make reasonable efforts to eliminate. The answer is the kind or type of violation "that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." Thus, section 110(b)(2) of the Mine Act requires the Secretary to prove that the violation substantially and proximately caused death, or reasonably could have been expected to cause, death or serious bodily injury. As explained above, a "repeated failure" flagrant violation turns on whether an operator, on more than one occasion, failed to make reasonable efforts to eliminate a known violation of a mandatory health and safety standard. . . ." Accordingly, when one adds the statutory phrase "that substantially and proximately caused, or reasonably could have been expected to cause death or serious bodily injury," the type of known violation is further defined to encompass one that killed, seriously injured or reasonably could be expected to kill or seriously injure.

For purposes of analyzing "substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury," it is helpful to analogize, in part, to

the *Mathies* test for significant and "*substantial*." Consistent with the plain language of the statute, where death or serious injury actually occurs as a result of a known violation of a mandatory standard, substantial and proximate cause must be established.

To "cause" is "[t]o bring about or effect." *Black's Law Dictionary*, *supra*, at 235; *see The New Oxford American Dictionary*, *supra*, at 272 (defining cause as to "make (something) happen").

A substantial cause means something that is "considerable in importance, value, degree, amount or extent." *The American Heritage Dictionary* 1727 (4th ed. 2009).

Proximate cause means "1. A cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor. 2. A cause that directly produces an event and without which the event would not have occurred." *Black's Law Dictionary*, Eighth Edition, 2004, at 234; s*ee also* Restatement (Third) of Torts § 29 (2010) ("An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."); *United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir. 2011) *quoting* William L. Prosser, The Law of Torts § 41, at 236 (4th ed. 1971) (defining proximate cause as the "reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.").

If the Secretary is unable to show that a repeated failure to make reasonable efforts to eliminate a known violation substantially and proximately caused death or serious injury, the Secretary may show, in the alternative, that an operator repeatedly failed to make reasonable efforts to eliminate a known violation that reasonably could have been expected to cause . . . death or serious bodily injury." 30 U.S.C. § 820(b)(2) (emphasis added). As noted, based on the plain meaning of the statute's terms, an operator's conduct "reasonably could have been expected to cause death or serious bodily injury" when, based on all of the facts and circumstances surrounding the operator's repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard, the operator's conduct reasonably was likely to bring about death or serious bodily injury. *Stillhouse*, *supra*, 33 FMSHRC at 807-08.[24]

[24] The statutory language arguably is ambiguous regarding whether the Secretary must prove that the violation reasonably could have been expected to "substantially and proximately" cause death or serious bodily injury, if it chooses to make this alternative showing of a potential injury. Although the language is clear that the Secretary must prove that the violation "substantially and proximately caused" death or serious bodily injury in the scenario of an actual injury, it is unclear whether this language carries over to the language that applies in the "potential injury" scenario. In the instant case, however, the issue is immaterial because, as set forth below, the known accumulation violations contributed to a discrete safety hazard, i.e., a mine fire, which, if left unabated during the course of continued mining operations, reasonably could have been expected to cause serious injuries, regardless of how one interprets the statutory language of section 110(b)(2). In other words, under the definition of proximate cause set forth above, there is a reasonable connection between the repeated failure to eliminate known

(continued...)

A final issue is what constitutes "death or serious bodily injury." "Serious" is defined as "grave in quality or manner." *The American Heritage Dictionary 1590 (4th ed. 2009)*. "Bodily" means "of relating to the body" or "physical." *Id*. at 205. "Injury" is defined as "damage or harm done to a person or thing." *Id.* at 902. Thus, in the context of the present 75.400 violation, where no death or serious injury actually occurred, the Secretary must establish that Respondent's repeated failure to make reasonable efforts to eliminate a known violation could reasonably be expected to result in death or serious bodily injury.

5. Application of the Repeated Failure Provision of Section 110(b)(2)

a. Positions of the Parties

In arguing that the elements for "repeated failure" flagrant violations are met, the Secretary relies on many of the same facts underlying its unwarrantable failure determinations. The Secretary argues that the Respondent knew about the accumulations that led to the issuance of Order Nos. 7490584 and 7490599 and therefore they were known violations. P. Br. at 39.

Specifically, with regard to Order No. 749058, the Secretary contends that the conditions cited were identified in the pre-shift and on-shift examination books for four shifts prior to the Miller's inspection. R. Exs. 22-23. The Secretary further emphasizes that Respondent's only attempt to address or clean up the accumulations at the Northwest #3 conveyor belt was to stockpile the existing accumulations behind the tail roller guard, contrary to Respondent's own "Clean-Up Program," which explicitly states, "[l]oose accumulations of coal along the belt lines will be shoveled onto the belt." R. Ex. 15; *see also* Tr. I at 486. The Secretary claims that these accumulations were known to the Respondent for several shifts and Respondent took only minimal steps to clean them up, and no apparent steps to eliminate the further development of accumulations in this area of the mine. Thus, in essence, the Secretary argues that Respondent repeatedly failed to make reasonable efforts to eliminate a known violation that could reasonably be expected to cause death or serious bodily injury. P. Br. at 39.

With regard to Order 7490599, the Secretary also argues that Respondent either knew or should have known about the accumulations cited. The Secretary notes that the area cited by Miller was three or four crosscuts away from the active section. Also, the Secretary contends that the crew working that section had been on shift for approximately two and one-half hours at the time that Miller issued the Order, and they would have been required to pass the Flannigan Tailgate on their way to the working section. Miller testified that Myers was upset that the section foreman had not discovered and addressed the conditions cited in the Order. *Id*. at 105, 114-15. Thus, the Secretary argues that Myers's contemporaneous declaration to Miller that he was upset that the foreman had not found the condition demonstrates that Respondent knew or should have known about the accumulations cited in the Order. P. Br. at 66.

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[24](...continued)
accumulations and the reasonably likely risk that such failures would likely result in the risk of serious injury as a result of a mine fire. Accordingly, I need not definitively resolve any such statutory ambiguity.

Respondent argues that the Secretary has not proven that Respondent engaged in a "repeated failure to make reasonable efforts to [eliminate] a known violation" with regards to the conditions set forth in Order Nos. 7490584 and 7490599. Initially, with regard to Order No. 7490584, Respondent contends that there is no evidence that the Northwest #3 belt tail roller was turning in accumulations and suspending float coal dust in a way that was seen or "known" by an examiner or "known" by Respondent or its management personnel. R. Br. 58-60. Respondent claims that the conditions could have come into being between the last examination and the time of issuance of the Order, due to defects in the tail roller and belt system. *Id*. Furthermore, Respondent claims that clean-up work was in progress at the cited tail roller. Respondent notes that there was a shovel sitting under the tail roller with a black, fresh pile of loose coal located a few feet behind (inby) the shovel and tail roller. Additionally, the 150 feet of loose coal and float coal dust outby the tail roller had been placed in the pre-shift exam records immediately preceding issuance of the Order in the Remarks column. Accordingly, Respondent claims that the examiner did not consider such condition to be hazardous. Respondent also claims that it had practices and procedures in place to identify hazardous conditions and clean them up, and that these practices were being followed. *Id*. Respondent concludes that in light of these facts, the undersigned should find that Respondent did not engage in a repeated failure to make reasonable efforts to eliminate a known violation with regard to the conditions cited in Order No. 7490584.

With regard to Order No. 7490599, Respondent claims that there is no evidence that the cited conditions at the Flannigan Tailgate belt tail were "known" by management. R. Br. at 59. Respondent argues that all or a large part of the accumulations could have come into existence on the prior shift, during a time when the Pony Belt was having electrical problems and troubleshooting was occurring. Respondent argues that there is no evidence of any failure, let alone a repeated failure, to correct the alleged conditions. Accordingly, Respondent argues that it did not engage in a repeated failure to make reasonable efforts to correct a known violation with regard to the conditions set forth in Order No. 7490599. *Id.*

Finally, Respondent argues that the violations could not reasonably have been expected to cause death or serious bodily injury. Rather, with respect to both Orders, Respondent claims that the reasonably expected injury was smoke inhalation that might have led to lost workdays. *Id*. at 60.

6. Legal Analysis - A Narrow Interpretation

Under a narrow interpretation of section 110(b)(2) as described in *Wolf Run* at n. 14, the Secretary established that Respondent's accumulations violations constitute a "repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that . . . could be reasonably expected to cause death of serious bodily injury." As noted, in the absence of further guidance from the Commission, long overdue rulemaking from MSHA, or a consistent interpretation or litigating position by the Secretary that has not been advanced by appellate counsel in another case, I decline to address a broader interpretation here or the significance of past violation history.

a. Repeated Failure to Make Reasonable Efforts to Eliminate a Known Violation of a Mandatory Safety Standard

i. Order No. 7490584

Respondent's violation as cited in Order No. 7490584 constitutes a "repeated failure" flagrant violation. Respondent, on more than one occasion, i.e., repeatedly for three shifts, failed to make reasonable efforts to eliminate a known accumulation violation that was recorded in its examination books, and that known violation was of mandatory safety standard 75.400.

As noted above, I have found that the accumulations at the tail roller existed for at least three shifts, according to the pre-shift and on-shift reports. R. Ex. 23. Respondent had a reasonable opportunity before and during each shift to eliminate the accumulations, but it failed to do so. Thus, for three shifts, Respondent repeatedly failed to eliminate the accumulations.

During Miller's inspection, the accumulations under and around the energized tail roller of the Northwest Number 3 conveyor belt measured approximately six to twenty-nine inches. No reasonable effort had been made to eliminate them. Rather, Respondent had stockpiled extensive accumulations from this area behind the tail roller guard. Respondent's creation of the stockpile of loose coal behind the tail roller does not constitute a reasonable effort to eliminate the violation. Rather, the stockpiled accumulations provided additional fuel in the reasonably likely event of an ignition in the area during normal, continued mining operations in which the energized tail roller was grinding in the accumulations and suspending float coal dust into the atmosphere. *See* Tr. I at 230; P. Ex. 2. No reasonable effort had been made to eliminate these accumulations either. In short, Respondent allowed substantial quantities of loose coal and float dust to accumulate and grind in the tail roller, while stockpiled and other accumulations were allowed to persist nearby.

The violation that Respondent repeatedly failed to make reasonable efforts to eliminate was a *known* violation of mandatory safety standard 75.400. The accumulations were documented on the pre-and on-shift books for three shifts. Mine managers review and countersign the books, and therefore were aware of the violative condition euphemized in the books. Tr. I at 75-76. Although Respondent claims that the pre-shift and on-shift examination records only show that the tail area was "dirty" and "black," I have found herein that the words "dirty" and "black" are reasonably read in proper context to refer to an accumulation violation. Accordingly, I have found that Respondent knew and certainly should have known that the violation existed for three shifts.

ii. Order No. 7490584

For essentially the same reasons, Respondent's violation in Order No. 7490584 also constitutes a "repeated failure" flagrant violation. Respondent, on more than one occasion, i.e., repeatedly for at least two shifts, failed to make reasonable efforts to eliminate an accumulation violation that it should have known about.

The accumulations described in Order No. 7490599 measured more than a foot deep at the tail roller and loose coal and float dust extended for a considerable distance. P. Ex. 3. They were "distinct black in color," or "jet black." Tr. I at 108-09; P. Ex. 4. Based on his experience, Miller concluded it would take a "train wreck," for accumulations of this type and color to develop. Tr. I at 108. Further, based on the color and condition of the accumulations and the amount of accumulations observed, Miller concluded that the condition had existed for several shifts. Tr. I at 314-15. I have credited this testimony and found that the accumulations existed for at least two shifts.

Respondent had a reasonable opportunity before and during each shift to eliminate the accumulations, but it failed to do so. Thus, for two shifts, Respondent repeatedly failed to eliminate the violation.

The violation that Respondent repeatedly failed to make reasonable efforts to eliminate for two shifts was a violation of mandatory safety standard 75.400, which Respondent should have known about. Respondent concedes that the accumulations were likely created and worsened during the previous two shifts when the Pony Belt had been experiencing problems, which caused it to stop and start repeatedly, resulting in the accumulations. As the problems with the Pony Belt were well documented in P&D reports, Respondent was alerted to the fact that potential accumulations at this location would need additional attention. In fact, foreman Raney testified that the repeated starting and stopping of the belt was known to cause such problems. Tr. II at 67-68. Accordingly, I conclude that Respondent knew or should have known that the violation existed for at least two shifts.

b. That Reasonably Could Have Been Expected to Cause Death or Serious Bodily Injury

i. Order No. 7490584

Respondent's accumulation violation was a known violation that reasonably could have been expected to cause death or serious bodily injury. As explained in the S&S analysis above, the known accumulation violation contributed to a discrete safety hazard, i.e., a mine fire, which, if left unabated during the course of continued mining operations, reasonably could have been expected to cause severe and serious injuries due to smoke inhalation. Accordingly, I affirm the "repeated failure" flagrant designation for Order No. 7490584.

ii. Order No. 7490599

Respondent's accumulation violation was a known violation that reasonably could have been expected to cause death or serious bodily injury. As explained in the S&S analysis above, the known accumulation violation contributed to a discrete safety hazard posed by the smoke, that reasonably could have been expected to cause serious or fatal injuries in the form of smoke inhalation, carbon monoxide poisoning, burns, entrapment or death, if left unabated during continued mining operations. Accordingly, I affirm the "repeated failure" flagrant designation for Order No. 7490599.

VI. Civil Penalty Principles

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

> The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:
>
> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600, citing 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id*. at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising this discretion, the Commission has reiterated that a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

A. Explanation for "Repeated Failure" Flagrant Penalties Assessed

As Order Nos. 7490584 and 7490599 were issued under § 104(d)(1), § 110(a)(3)(A) of the Act requires that the minimum penalty shall be at least $2,000. Furthermore, section 110(b)(2) of the Act requires that the amount assessed for flagrant violations shall be no more than $242,000. Here, the Secretary's Petition has proposed assessment of penalties of $179,300 for Order No. 7490584 and $164,700 for Order No. 7490599, thus satisfying the statutory

minimum penalties for unwarrantable failures, and not exceeding the statutory maximum penalties flagrant violations.

Respondent's history of previous violations is based on both the total number of violations and the number of repeat violations of the same provision of a standard in the preceding fifteen month period. 30 C.F.R § 100.3(c). The record evidence establishes that in the fifteen months preceding Order Nos. 7490584 and 7490599, Respondent was cited for violations involving section 75.400 about 160 times.

Regarding Order No. 7490584, I have found that Respondent was highly negligent by repeatedly failing to make reasonable efforts to eliminate the known accumulations violation that was reasonably likely to cause serious injuries resulting in lost workdays or restricted duty from smoke inhalation. Respondent's repeated inaction over the course of three shifts, particularly in light of Respondent's accumulation violation history, demonstrates a serious and continuing lack of care to manage a serious accumulation problem and make reasonable efforts to eliminate the known violation.

Regarding Order No. 7490599, I have found that Respondent was moderately negligent by repeatedly failing to make reasonable efforts to eliminate the accumulations violation that it knew or should have known about and that was reasonably likely to cause serious or fatal injuries. The fact that the condition was not reported to management on pre-shift and on-shift reports constitutes a mitigating factor in terms of Respondent's negligence. Nevertheless, Respondent should have known about the violation through monitoring of Production and Delay reports and knowledge of repeated Pony Belt breakdowns. Respondent's repeated inaction over the course of more than two shifts, particularly in light of Respondent's accumulation violation history, demonstrates a serious and continuing lack of care to manage a serious accumulation problem and make reasonable efforts to eliminate the violation that it knew or should have known about.

Respondent demonstrated good-faith by achieving rapid compliance after issuance of both Orders. P. Ex. 2; P. Ex. 3. Further, Respondent stipulates that payment of the proposed civil penalties would not affect its ability to remain in business. Given the large size of Respondent's business and the penalty criteria discussed above, I assess civil penalties of $101,475 for Order No. 7490584 and $77,737 for Order No. 7490599, thereby resulting a total civil penalty of $179,212 for the "repeated failure" flagrant violations found herein. This penalty assessment is based the statutory criteria of section 110(i) and the deterrent purposes of the Act. *Cf*. *Sellersburg*, *supra*, 5 FMSHRC at 294-95.

B. Rejection of Excessive Fines Argument under the Eighth Amendment

Respondent contends that the "repeated failure" flagrant penalties in this case constitute excessive fines that violate the Eighth Amendment of the Constitution. Specifically, Respondent argues that the combined flagrant penalty assessment is grossly disproportionate to the two violations. I disagree.

The instant case is distinguishable from cases in which the Supreme Court found penalties to be disproportionate. In *United States v. Bajakajian*, 524 U.S. 321, (1998), for example, the Court considered several factors in deciding that it was grossly disproportionate for the government to take away $357,144 from *an* individual who failed to report this money to customs while leaving the country. *Id.* at 337-40. The factors considered included the culpability of the actor and the harm caused by the violation. *Id.; see also Cooper Industries*, *Inc*., *v*. *Leatherman Tool Group*, *Inc*., 532 U.S. 424 (2001). The Court reasoned that the culpability of the actor was low, despite failing to report the currency, because the money was not used to further illegal activity, such as tax-evasion, which was the statute's primary focus. *Bajakajian*, *supra*, 524 U.S. at 337-40. Furthermore, the actor's failure to report the currency did not cause any substantial harm. In this regard, had the crime gone undetected, the government would only have lost information that $357,144 had left the country. No fraud was committed, nor was any tangible damage inflicted on anyone. *Id.*

Caselaw in the corporate context is more analogous. In *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909), the Court refused to hold that $1,623,500 (not adjusted for inflation) an excessive fine against a corporation for violating state anti-trust laws. The Court declined to interfere unless the fine was so grossly excessive as to amount to deprivation of property without due process of law. In upholding the fine, the Court noted that the business was extensive and profitable during the period of violation, and that the corporation had over $40,000,000 of assets and has declared dividends amounting to several hundred percent. *Id*. at 111-12. Thus, the fine was not excessive.

As in *Waters-Pierce Oil Co*., Respondent is a large company with numerous assets. Furthermore, unlike in *Bajakajian*, Respondent's culpability is high because its repeated failure to eliminate known violations that were flagrant unwarrantable failures posed serious injury and high danger to miners. Accumulation violations, if left unabated near an ignition source during normal continuous mining operations, are likely to contribute to explosion or fire hazards, which are reasonably likely to result in death or serious bodily injury to miners. To deter repeated failure to make reasonable efforts to eliminate such known violations, Congress enacted the MINER Act amendments to impose substantial flagrant penalties on bad actors. Respondent's violation history, despite the Secretary's failure to pinpoint its specifics, demonstrates that it is a bad actor with respect to repeated and recurring accumulation violations. A very large number of S&S and unwarrantable failure citations for section 75.400 violations did not deter Respondent's repeated failures to eliminate such violations. Elevation to flagrant penalties under the narrow interpretation set forth herein is warranted and appropriate on this record.

Accordingly, I conclude that a total $179,212 flagrant penalty is constitutional under the Eighth Amendment and consistent with the deterrent purpose of the Act.

VII. ORDER

For the reasons set forth above, Order Nos. 7490584 and 7490599 are **AFFIRMED** as significant and substantial, unwarrantable failure, and repeated flagrant violations under 30 C.F.R. § 75.400. Further, Order No. 7490599 is **MODIFIED** to reduce the level of negligence from "high" to "moderate." Order No. 7490584 is **MODIFIED** to reduce the injury or illness that could reasonably be expected to occur from "fatal" to "lost workdays or restricted duty."

Further, Order Nos. 7490584 and 7490599 are **MODIFIED** to reduce the likelihood of injury or illness from "highly likely" to "reasonably likely." Within forty days of the date of this decision, Respondent, American Coal Company is **ORDERED TO PAY** a total civil penalty of $179,212 for the "repeated failure" flagrant violations found herein.

Accordingly, I reduce the proposed penalty for Order No. 7490584 from $179,300 to $101,475 and Order No. 7490599 from $164,700 to $77,737, resulting in a total civil penalty assessment of $179,212 for the "repeated failure" flagrant violations found herein.

/s/ Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

Distribution: (Certified Mail)

Travis W. Gosselin, U.S. Department of Labor, Office of the Solicitor, 230 S. Dearborn Street, Room 844, Chicago, IL 60604

Jason W. Hardin, Mark E. Kittrell, Fabian & Clendenin, 215 S. State St., Ste. 1200, Salt Lake City, UT 84111-2323

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, N.W., Suite 520 N
Washington, D.C. 20004-1710
Telephone No.: (202) 434-9917 Fax No.: (202) 434-9949

July 31, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	: : : :	CIVIL PENALTY PROCEEDING Docket No. KENT 2010-505 A.C. No. 15-19266-208402-01
v.	:	
HUBBLE MINING COMPANY, LLC, Respondent.	: :	Mine: Hubble No. 7

DECISION

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

Mickey Webster, Esq., Wyatt, Tarrant & Combs, LLP, 250 W. Main Street, Suite 1600, Lexington, Ky 40507-3211

Before: Judge L. Zane Gill

This case arises from a petition for assessment of civil penalty filed by the Secretary of Labor under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012), (the "Act".) It charges Hubble Mining Co., LLC ("Hubble") with a single violation of a mandatory standard and seeks a civil penalty for that violation.[1] The issue before me is whether Hubble violated the standard as alleged and, if a violation is found, the appropriate civil penalty for the violation. The case was heard on March 6, 2012, in Pikeville, Kentucky.

The Citation

The 104(d) Citation, Citation No. 7442179, was issued to Hubble on November 25, 2009, by MSHA Inspector and Health Specialist Nathan Mounts ("Mounts.") (Ex. S-3) It alleges a 104(d) violation under the Mine Act, 30 U.S.C. § 814(d) (1), of 30 C.F.R. § 75.220(a) (l):

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing

[1] Two citations were written in this case. The first, Citation No.7442178, was issued as a Section 103(k) order intended to secure the site of the highwall failure at issue here pending further action. The second, Citation No. 7442179, was issued as a Section 104(d) (1) citation and forms the basis for the contest in this case.

> geologic conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

The relevant part of the October 20, 2009 Roof Control Plan states:

> **Highwall Precautions:**
>
> A substantially constructed canopy shall be provided at all intended drift or slope openings before penetrating the coal seam. Canopies shall also be installed at any other drift or slope openings prior to being used by workers to enter or exit the mine. The canopy shall be substantially constructed and extend from the highwall for a distance which will provide for adequate protection from falling highwall material.

(Ex. S-5a).

The Citation alleges the following condition or practice:

> The operator has failed to comply with the approved roof control plan. Upon the initial development of the #2, #3, and #4 portals, the operator failed to installed [sic] substantially constructed canopies prior to penetrating/mining coal seam resulting in the Joy continuous miner being covered up by sandstone rock due to high wall failure. The certified mine foreman was operating the continuous miner at this time. The mine operator has engage [sic] in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. S-3). According to the inspector, injury or illness was "highly likely" and could reasonably be expected to be "fatal;" the alleged violation was "significant and substantial;" one (1) person would be affected; and the operator's negligence was "high." (Ex. S-3). The proposed fine is $3,689.00.(Ex. S-1).

Findings of Fact[2] - Conclusions of Law[3]

Stipulations

The parties entered the following written stipulations:

1. Hubble Mining Company, LLC is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.
2. Hubble Mining Company, LLC has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.
3. Hubble Mining Company, LLC operates the Hubble #7 Mine, I.D. No. 15-19266.
4. The Hubble #7 Mine produced 4,981 tons of coal in 2009, and had 199 hours worked in 2009.
5. A reasonable penalty will not affect Hubble Mining Company, LLC's ability to remain in business.
6. Respondent, Hubble Mining Company, LLC, abated the violation it was cited for herein in a timely manner and in good faith.

The Highwall Collapse

On November 25, 2009, Hubble began the initial work of cutting the portals, or shaft openings, into the coal seam for what would eventually become Hubble Mine No. 7.[4] (Tr. 282)

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

[3] Citations to the hearing transcript are noted "Tr.," followed by the page number(s). Citations to the Secretary's exhibits are noted "S-," and to the Respondent's exhibits are noted "R-," followed by the exhibit numbers.

[4] The pleadings in this case variously refer to the Mine at issue as Hubble Mine Face Up No. 2 and Hubble Mine No. 7. The events in this case relate to initial development of what

(continued...)

The proposed underground mine was to have four portals. (Tr. 41) Prior to Hubble's work, a separate company, not involved in this dispute, had done preparatory excavation to expose the coal seam and overlying rock. (Tr. 248-249) This created a 40-foot vertical highwall and a horizontal bench roughly 80 to 100 feet in depth. (Tr. 33)

Only a few miners were working at the No. 7 mine on November 25, 2009, when the highwall collapsed. (Tr. 72) Harold Akers ("Akers"), one of Hubble's owners, was intermittently at the location throughout the morning. (Tr. 249-250) Akers was moving between the No. 7 mine and another Hubble mine located less than a mile away. (Tr. 249-250)

The intended portals were numbered from left to right, 1 through 4, facing the highwall. (Tr. 41; 49) The portals were intended to be cut on a roughly 60 degree angle, instead of straight into the highwall. (Tr. 53) When cutting an entry at a 60 degree angle, the continuous miner operator must take extra care to watch the continuous miner closely to ensure the entry is straight. (Tr. 72)

After a routine pre-shift examination, which included a review of the roof control plan with the miners, Mine Foreman Owen Carter ("Carter") started cutting the new portals at the No. 7 mine. (Tr. 282) Carter used a remote controlled mining machine in the same fashion employed by Hubble throughout its history and by Akers for the previous 25 years. (Tr. 243; 251) Hubble had stationed four steel canopies at the No. 7 site. (Tr. 172) These canopies were substantially constructed of four-inch steel beams with metal plating on top to prevent rocks from falling into the protected area under the canopy. (Tr. 35-36) Before placing a canopy near the coal seam and its unsupported exposed rock highwall, Carter used a remote controlled continuous mining machine to make the first shallow cuts into the coal seam. (Tr. 243-244; 264)

Carter operated the remote controlled mining machine with a wireless remote box. (Tr. 298-299) While making the first portal cut, he stood some fifty to sixty feet from the highwall and off to one side. (Tr. 286) Carter testified that he did this in order to have a full view of the highwall in case the rock overlying the seam became unstable. (Tr. 280-281) Akers explained that the first cut is more dangerous than subsequent cuts due to the unknown nature of the rock strata behind the exposed rock. (Tr. 47; 248-249) He also explained that by not installing a canopy prior to the first cut, he was able to stand well away from the highwall, which allowed him to monitor the entire face of rock for instability. (Tr. 280-281; 248-49) Carter testified that if he had placed a canopy near the highwall prior to the first cut, he would not have been able to have the same view. (Tr. 292) Moreover, he would have likely had to operate the mining

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[4](...continued)
eventually became Hubble Mine No. 7. The highwall failure resulted in Hubble abandoning the location, and having additional highwall work done by a separate company. Hubble resumed operations after this work was done, and the Mine is currently referred to as Hubble Mine No. 7. For simplicity and clarity, this decision will refer to the mine as the "No. 7 mine" or simply "No. 7."

machine while under or very near the canopy in order to be able to view the cutter head in the coal seam. (Tr. 292) He testified that from near or under the canopy he would not have had a full view of the highwall and might have been killed by the highwall collapse (Tr. 292-293), an opinion shared by Inspector Nathan Mounts. (Tr. 138-139)

Carter cut the first portal (No. 4) at the No. 7 mine without incident. (Tr. 282-83) He remotely backed the mining machine out of the coal seam and used its cutting head to pick up and place the steel canopy in the portal. (Tr. 280; 282-283) This allowed him to stay away from the highwall at all times before permanent roof support was installed. (Tr. 286) A roof bolting machine was then moved into the shallow cut, the machine's temporary hydraulic roof support system was used to support the roof, tests holes were drilled into the roof, and permanent roof support in the form of roof bolts were drilled and installed. (Tr. 246-248) After roof bolting was finished, a scoop was brought in to clean coal and rock from the entry and do any final positioning of the canopy. (Tr. 113-117; 244-245; 264)

Carter testified that the second portal (No. 3) was cut using the same method, also without incident. (Tr. 283; 293; 297-298) He then started cutting the third portal (No. 2) standing some 50-60 feet behind the miner and to the right and observing the highwall for any movement. (Tr. 166-167; 285-286; Ex. S-6) Carter testified that he began seeing rock flaking and signs of instability. (Tr. 286-87) He attempted to remotely back the mining machine out of the portal, but a 35'x20'x15' section of the highwall collapsed with an estimated 300,000 lbs of rock "sitting down" on top of and covering much of the mining machine. (Tr. 63; 206; 286-287; 299-300; Ex. S-6, #8) This was a fundamental highwall failure, something that a canopy would not have protected against. (Tr. 65-66; 132-133) No one was injured. The mine was abandoned until the site could be reworked and prepared for mining again. (Tr. 132-133)

Hubble notified MSHA of the collapse. (Tr. 28-29; 161) Inspector Mounts and Supervisory Inspector Silas Adkins traveled to the mine site at the same time but in separate vehicles. (Tr. 59; 161-162) When they arrived, portals 4 and 3 had been cut, and each had a canopy in position in the portal. (Tr. 45-46; 112-113; 172) Intended portal 1 had not yet been cut. (Tr. 49-50) Akers, Carter, and a roof bolting machine operator had discussions with Mounts and Adkins during the course of the inspection. (Tr. 72-73; 145) Mounts testified that Akers spoke primarily with Adkins, but that Mounts was also involved in some discussions with Akers. (Tr. 144-146) All of the individuals interviewed by Mounts and Adkins unguardedly and openly described the process that Hubble had used in cutting the portals, consistent with the description above. Mounts issued a 103(k) order and "dangered off" the area within 20 feet of the highwall. (Tr. 80-81)

Carter testified that, if the canopy were in place first, the miner operator would need to be under the canopy on the first cut in order to adequately see where the miner was cutting and what was happening on the highwall above him (Tr. 280-281), particularly where the first cut is taken from an angle relative to the face. (Tr. 288-289; 292) Carter testified that working under or near a canopy could create a false sense of safety (Tr. 292), which might have resulted in his death in this case. (Tr. 138-139; 292-293) Hubble's witnesses testified that making the first cut without

actually installing the canopy was much safer. (Tr. 256-257) MSHA's witnesses countered that one of the benefits of having a canopy in place in the portal before any cutting is done is to provide a noise alert to anyone working in the area with his back to the cutting. (Tr. 182-183)

In deciding to issue the citation in this case, Mounts interpreted the word "provided," as used in Hubble's roof control plan, to mean the same thing as "installed." (Tr. 103-104; 107-108) According to his interpretation, a canopy must be installed before the initial cut is taken. However, he also allowed that a canopy must be installed before miners can enter or leave through the new portal, which is the same as Hubble's interpretation. (Tr. 78-79) Adkins also interpreted "provided" to mean the same thing as "installed." (Tr. 145-146; 172-173; 220-221)

Discussion

The Commission discussed the interpretation of plan provisions in *Martin Cnty. Coal*, stating that

> It is well established that plan provisions are enforceable as mandatory standards. *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). As such, the law governing the interpretation of regulatory standards is applicable to plan provisions. *Energy West*, 17 FMSHRC at 1317-1318.
>
> The "language of a regulation … is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (*citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that the Secretary's interpretation is accorded deference. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (*quoting Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)).

28 FMSHRC 247, 254-255 (May 2006).

A guiding and basic canon of statutory and regulatory interpretation is that courts should "give effect, if possible, to every clause and word of a [regulatory provision], avoiding if it may be, any construction which implies that [the drafter] was ignorant of the meaning of the language it employed."[5] If the meaning of a regulatory provision is plain, the provision should be interpreted so as to give effect to that plain meaning. *Exportal Ltd. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990); *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984). When "a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results." *Martin Cnty. Coal*, 28 FMSHRC at 255.

"In determining the meaning of regulations, the Commission … utilizes 'traditional tools of … construction,' including an examination of the text and the intent of the drafters." *Amax Coal Co.*, 19 FMSHRC 470, 474 (Mar. 1997) (*quoting Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44-45 (D.C. Cir. 1990)). In a plain meaning analysis, the Commission also looks to "the language and design of the Secretary's regulations as a whole." *New Warwick Mining Co.*, 18 FMSHRC 1365, 1368 (Aug. 1996). Reading the provision at issue in the context of the overall plan is consistent with the Commission's construction of mine plans in accordance with well-settled rules of construction. *Mettiki Coal Corp.*, 13 FMSHRC 3, 7 (Jan. 1991) ("a written document must be read as a whole, and … particular provisions should not be read in isolation").

In determining whether a provision's meaning is plain, courts apply all of the traditional tools of interpretation, including both the language of the particular provision at issue and the language, structure, and purpose of the statutory scheme as a whole. *Tacoma, Wash. v. FERC*, 331 F.3d 106, 114 (D.C. Cir. 2003); *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1288 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 970 (2001). According to Commission case law, where a plan provision is ambiguous, the Secretary is required to "dispel the ambiguity" by presenting evidence of the provision's history and purpose and evidence that the provision has been consistently enforced. *Jim Walter Res., Inc.*, 28 FMSHRC 579, 589 (Aug. 2006) (citation omitted).

The relevant portion of the October 20, 2009 Roof Control Plan states:

> **Highwall Precautions:**
>
> A substantially constructed canopy shall be provided at all intended drift or slope openings before penetrating the coal seam. Canopies shall also be installed at any other drift or slope openings prior to being used by workers to enter or exit the mine. The canopy shall be substantially constructed and extend from the highwall for a distance which will provide for adequate protection from falling highwall material.

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[5] *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

(Ex. S-5a 6) (emphasis added). The Secretary alleges that Hubble violated the first sentence of the quoted paragraph because the words "provided" and "installed" both mean the same thing, and Hubble had not installed a canopy when the highwall failed, although it had placed a canopy at the site of portal No. 2. The Secretary's interpretation is identical to the interpretation of the roof control plan offered by Inspector Mounts in his testimony at the hearing. Mounts essentially based his decision to cite Hubble for violating its roof control plan on an interpretation that makes "provided" and "installed" coterminous:

Q321 So what does provided mean?

A It means it's got to be installed prior to penetrating the coal.

Q322 But those two words are different. Do you see the difference there? One
says provided, and what is your interpretation of provided, when you're almost going to cut, you're going to take your initial cut....

A It's got to be....

Q323 ...and this says that you have to provide one. What does that require the
operator to do?

A He's got to have a canopy installed.

Q324 Okay. So, to you, provided means actually putting it in place?

A Yes.

Q325 Okay. And what basis do you have to form that opinion that provided
means to put it into place?

A Men and equipment is going to be working in that area.

(Tr. 104)[6]

Hubble argues that the roof control plan does not require that a canopy be installed prior to making the initial cut, but merely be "provided" at the site, ready to be installed before any

[6] Adkins' interpretation of the two terms is essentially identical. (Tr. 158-159; 194-195)

miners enter the opening. Hubble also argues that its method of making the initial cut in a new mine is safer than the method the Secretary seeks to enforce.[7]

The terms "provided" and "installed" should not be interpreted in isolation from the remaining elements of the roof control plan and the related mandatory standard, 30 C.F.R. § 75.220(a) (1). "It is a tenet of statutory interpretation that [words should be interpreted] 'in their aggregate [to] take their purport from the setting in which they are used."' *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 155 (2d Cir. 1999) (*quoting King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (second alteration in original)). "In the absence of an express definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word to be construed." *Berwind Natural Res. Corp.*, 21 FMSHRC 1284, 1306-1307 (Dec. 1999) (citations omitted).

When discussing statutory interpretation, the Commission has recognized that:

> [w]hen the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning." *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989); *see also Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (Sept. 1996) (citations omitted). It is a cardinal principle of statutory and regulatory interpretation that words that are not technical in nature 'are to be given their usual, natural, plain, ordinary, and commonly understood meaning.' *Western Fuels*, 11 FMSHRC at 283 (*citing Old Colony R.R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1932)). It is only when the plain meaning is doubtful that the issue of deference to the Secretary's interpretation arises. *See Pfizer Inc. v. Heckler*, 735 F.2d at 1509 (deference considered "*only* when the plain meaning of the rule itself is doubtful or ambiguous") (emphasis in original).

Akzo Nobel Salt, Inc., 21 FMSHRC 846, 852 (Aug. 1999).

The first objective in construing the language of this roof control plan is to give the words used their common meanings before attempting to force them into one mold or another to fit the arguments of the parties. The second objective is to attain internal consistency. Any interpretation that introduces an element of inconsistency in meaning is less compelling than one that enhances contextual consistency. The next step is to decide whether the regulatory meaning

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[7] Under these facts, there is no question it is safer. This issue, however, is not central to the resolution of the dispute, which simply requires a straightforward interpretation of the roof control plan.

is sufficiently clear and apparent – a prerequisite to the subsequent determination of whether the Secretary's interpretation deserves any special deference.

I find that the meanings of the contested words are plain both on their face and in the broader context of the entire roof control plan provision and the underlying mandatory standard, 30 C.F.R. § 75.220(a) (1). Common usage of the two words supports Hubble's interpretation. The terms are sufficiently clear and must, therefore, be enforced according to the common meaning of the language used.

The common usages of the words "provided" and "installed," as used in the contested portion of the roof control plan, connote distinct concepts and processes. This supports Hubble's interpretation and implementation of the plan. It is apparent that a multi-step process is contemplated by the language in the roof control plan, which speaks of two distinct actions relating to placement of protective canopies. The two actions relate to different circumstances giving rise to the need to put canopies in place. First, before the coal seam is penetrated, a canopy must be provided at the site of an intended portal. Second, once the seam has been entered or some other new mine opening has been created, but before miners may enter or leave through that opening, a canopy must be installed.

The first circumstance arises when a new drift or slope opening is being cut into a coal seam, creating a new mine portal – the situation found in this case. In such an instance, the roof control plan requires a canopy to be positioned or "provided" at the cut location, but not necessarily installed there,[8] until miners begin traveling through the portal. Travel through the

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[8] Although the plan provision does not require actual installation of a canopy during the process of making the initial portal cut, it is to be understood broadly enough to allow canopy installation during the initial cut, presumably at the discretion of the mine operator to respond to the circumstances extant at that place and time. The mandatory standard which makes the roof control plan a matter of MSHA enforcement addresses this circumstance:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, *that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.*

30 C.F.R. § 75.220(a) (l) (emphasis added).

Thus, it is relevant to consider Hubble's traditional method of using a remote controlled miner to make the initial portal cut as part of the "mining system to be used at the mine." The standard specifically authorizes the use of "additional measures" – presumably beyond those spelled out in the roof control plan – "to protect persons if unusual hazards are encountered." The use of a remote controlled miner that allows the operator to stand a long way back from the

(continued...)

portal by miners is the necessary condition for the second circumstance, which is signaled by use of the words "also" and "any other" and relates generally to any drift or slope opening. It conceivably also covers a new opening in an entirely new mine or a new opening in an existing mine that has yet to be used as a passageway for miners to travel.[9] A canopy must be "installed" before any mine opening, whether new or newly intended for use by miners, can be traveled by miners.

This interpretation is logically integrated, gives effect to the common meanings of the words used, comprehends and harmonizes all parts of the roof control provision and its underlying mandatory standard, is consistent with the use of the two distinct terms "provided" and "installed," requires no reference to any extraneous or *ad hoc* material to be understood, reconciles the use of the modifiers "also" and "any other," is consistent with the testimony of the witnesses at the hearing, and makes good operational sense under the facts of this case.

This interpretation is based on the common meaning of the terms "provided" and "installed." Words that are not terms of art and not statutorily defined are customarily given their ordinary meanings, often derived from the dictionary. Although I am no fan of resorting to dictionary definitions to assist in interpreting contested language, I do so in this case to underscore the clarity in meaning of the words "provided" and "installed." As Judge Learned Hand observed, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or

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[8](...continued)
highwall while making the initial cut can be seen as such an "additional measure." Hubble's method and interpretation are arguably sanctioned by the language of the mandatory standard. The regulation allows for some flexibility, particularly when it tends to protect miners facing unusual hazards.

This language can also be interpreted to allow for not installing the canopy before the initial cut is made. Opting not to install it prior to the initial cut can be considered an additional protective measure, a point supported by the evidence in the record. (Tr. 138-139; 280-281; 288-289; 292) This gives the terms "provided" and "installed" some context and tends to support the argument that the roof control plan's language was chosen deliberately, was based on safety considerations, and supports a regulatory intent to allow the operator some discretion as to when to actually install a canopy.

[9] I include the possibility of a new portal being cut in an existing mine in light of the testimony of Supervisory Inspector Adkins. He speculated that the canopy regulation could apply to a situation where a new opening is cut into an existing mine. It is not clear under what circumstances that would involve a new cut into a highwall, which judging by the title of this section of the roof control plan defines the scope of this canopy requirement. (Tr. 158-159; 195)

object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[10]

Nonetheless, Black's Law Dictionary defines "provide" as follows: "To make, procure, or furnish for future use." *Black's Law Dictionary* 1224 (6th ed. 1990) ("*Black's*"). The Oxford English Dictionary defines the verb "provide" (when used with an object) as follows: "make available for use; supply." Oxford Univ. Press, definition of *provide*, *Oxford Dictionaries*, http://oxforddictionaries.com/definition/english/provide (accessed June 14, 2012). The same source also notes the following derivation of provide: "late Middle English (also in the sense 'prepare to do, get ready'): from Latin *providere* 'foresee, attend to', from pro- 'before' + *videre* 'to see'." *Id.* Black's Law Dictionary defines "install," as follows: "[t]o set up or fix in position for use or service." *Black's*, *supra,* at 798 (6th ed. 1990). The Oxford English Dictionary defines the verb "install" (when used with an object) as follows: "place or fix (equipment or machinery) in position ready for use." Oxford Univ. Press, definition of *install*, *Oxford Dictionaries*, http://oxforddictionaries.com/definition/english/install (last visited June 14, 2012).

Hubble's interpretation is internally consistent. It does not require that one of the key terms be forced to carry the same meaning as the other in order to support the proffered argument. It is clear on the basis of the common meanings of the terms that "provided" does not mean the same thing as "installed." Hubble's interpretation does no harm to either of the definitions or to the internal consistency of the plan provision. The roof control plan's language offers more compelling support for the two-step process described by Hubble's witnesses[11] than it does for the Secretary's theory. (Tr. 220-221)

The Secretary argues that the words used in two successive sentences, and which are plainly different, be considered to mean the same thing. If the first sentence containing the word "provided" really meant "installed" then the second sentence would not have used the word "installed," and the word "provided" in the first sentence would be superfluous. Such a reading would violate well-established rules of construction requiring that written provisions within the same document be read and interpreted consistently with each other and that effect must be given to each part of a document to avoid making any word meaningless or superfluous. *See Mettiki Coal Corp.,* 13 FMSHRC at 7 (1991).

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[10] *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945). Justice Stevens has also expressed a preference for established interpretation over dictionary definitions. "In a contest between the dictionary and the doctrine of *stare decisis,* the latter clearly wins." *Hibbs v. Winn*, 542 U.S. 88, 113 (2004) (Stevens, J., concurring).

[11] Hubble's witnesses describe a process in which miners first place a canopy at the cite of the new portal. The canopy is installed after the initial cut, roof bolting, and clean-up but before any miners actually use the portal for ingress and egress.

It is one thing when the disputed language, on its face, is subject to different interpretations. That is the essence of the type of ambiguity addressed by the cases cited above. In this instance, however, we are dealing an ambiguity raised strategically by the Secretary to support issuance of a citation. The ambiguity only arises if the common meanings of "provided" and "installed" are blurred and blended so as to make them identical. The roof control plan language can only be made ambiguous if one ignores the use of the two distinct words, "provided" and "installed," or distorts the meanings of those two words to make them mean the same thing. In interpreting regulatory language, the court should not reach for hypothetical lexical possibilities before construing the apparent and accepted meaning of the words used. Nearly any language can be made ambiguous if the common and accepted meanings are distorted to create the ambiguity. I reject Secretary's attempt to do it here.

Hubble "provided" a canopy at each of the new portals, as required by the plain language of the roof control plan. The roof control plan does not require installation of a canopy in this situation. The Secretary has failed to prove a violation of the roof control plan. For these reasons, I vacate the citation.

Deference to the Secretary's Litigation Position

The Secretary argues that her interpretation of the roof control plan provisions at issue here should be given deference. I have concluded that the meaning of these provisions is sufficiently clear to be enforced as written. There is no ambiguity here that would raise the issue of deference. *See Bluestone Coal Corp.,* 19 FMSHRC 1025, 1028 (June 1997). Nonetheless, in the interest of thoroughness, I will address the deference issue raised by the parties. Assuming arguendo that the language of the roof control plan lacked sufficient clarity to foreclose all debate as to its meaning, I conclude further that the Secretary's interpretation of the roof control plan language is unreasonable and deserves no deference.

If a regulatory provision[12] is ambiguous or silent on a particular issue, the court is "required to determine whether an agency's interpretation of a statute is a reasonable one." *Phillips v. A&S Construction Co.*, 31 FMSHRC 975, 979 (Sep. 2009); *Chevron, U.S.A Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-844 (1984). In other words, an agency is only entitled to deference when "[its] interpretation of the [regulation] it is charged with administering . . . is reasonable." *Phillips,* 31 FMSHRC at 979 (citation omitted); *see also Chevron,* 467 U.S. at 844. Put another way, "[w]here the [provision at issue] is silent or

[12] Since this case deals with a mine plan, under Commission authority the contested plan language is considered the regulatory standard, and there is no "statutory" language to construe in a traditional *Chevron* sense. *Martin Cnty. Coal,* 28 FMSHRC at 254. The regulation cited in the citation merely requires Hubble to follow the roof control plan. Nonetheless, case law regarding appropriate deference to an agency interpretation does not require a different analysis or outcome whether we cite to *Chevron* or *Seminole. Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

ambiguous, the agency's interpretation is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected." *Phillips,* 31 FMSHRC at 979; *see also Joy Techs., Inc. v. Sec'y of Labor,* 99 F.3d 991, 995 (10th Cir. 1996).

No reasonable interpretation of the actual provision language is offered by the Secretary. Even though an agency may be entitled to some degree of deference under both *Chevron* and *Seminole*, "an agency's statutory interpretative authority is not unfettered." *Hobet Mining Co.*, 2004 WL 3256505, at *8 (FMSHRC Nov. 29, 2004). The U.S. Supreme Court noted that the amount of deference to which an agency is entitled depends on, among other things, the agency's consistency and the persuasiveness of its position. *See U.S. v. Mead Corp.,* 533 U.S. 218, 228 (2001). Consequently, the Court recognized that judicial responses to requests for deference range "from great respect at one end, see, e.g., *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.,* 467 U.S. 380, 389-390, 104 S.Ct. 2472, 81 L.Ed.2d 301 (1984) ("'substantial deference'" to administrative construction), to near indifference at the other, *see, e.g., Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 212-213, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) (interpretation advanced for the first time in a litigation brief)." *Id.* at 228. *See also Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944) (stating that "[t]he weight [accorded to an administrative] judgment in a particular case will depend upon 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 power to control").

In *Bowen,* the Court recognized that "[it has] declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." 488 U.S. 204, 212 (1988) (emphasis added) (*quoting Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)) (internal quotation marks omitted). Further, the Commission recognizes that an agency's interpretation that is announced for the first time during the course of administrative litigation is only entitled to deference if it "reflect[s] the agency's fair and considered judgment on the matter in question." *Doe Run Co.,* 22 FMSHRC 1243, 1253 (Oct. 2000) (*quoting Akzo Nobel,* 212 F.3d at 1304).

To determine the degree of deference, the court should consider whether the Secretary's litigation position reflects MSHA's "considered judgment" or is merely a *post hoc* rationalization. *Akzo Nobel Salt, Inc. v. FMSHRC,* 212 F.3d 1301, 1304 (D.C. Cir. 2000) In *Tilden Mining Co.*, Judge Weisberger set out an analytical framework that I find useful in making this determination. 24 FMSHRC 53, 60-61 (Jan. 2002) (ALJ). Three factors are relevant: (1) Is the proffered interpretation consistent with long standing agency practice? *Tilden*, 24 FMSHRC at 61 (*citing Ass'n of Bituminous Contractors v. Apfel*, 156 F.3d 1246, 1252 (D.C. Cir. 1998)). (2) Is there a history of consistent agency enforcement on this point? *Tilden*, 24 FMSHRC at 61 (noting that the conditions giving rise to the citation had been in existence for several years and had not been cited in past inspections). (3) If there is a change in enforcement direction, has the Secretary articulated any rationale for the change? *Tilden*, 24 FMSHRC at 61 (*citing Thomas Jefferson University v. Shalala*, 512 U.S. 504, 515-518 (1994)). Where these

conditions are not present, the interpretation is properly characterized as a litigation position that reflects a *post hoc* rationalization deserving no deference. *Tilden*, 24 FMSHRC at 60-61.

In *Tilden*, the Commission held that neither the Secretary's litigation position nor the interpretation of the inspector who issued the citation were entitled to deference because both failed to reflect MSHA's "considered judgment." 24 FMSHRC at 61. In support of this holding, the Commission noted that the interpretations did not articulate a long standing agency practice because the alleged violative conditions had existed for several years without being cited in past inspections. Thus, the Commission concluded that "[s]uch a change appears to be as a result of the thought processes of one individual, i.e., the issuing inspector, and that the Secretary's litigation position is a "*post hoc* rationalization." *Tilden*, 24 FMSHRC at 61.

The circumstances present here are similar to those in *Tilden*. The Secretary's witnesses freely admitted that MSHA has not articulated a position consistent with Mounts' and Adkins' "interpretation" of the roof control plan. Both admitted having no knowledge of earlier citations written to enforce this roof control plan language in the manner attempted here. There is no written record of any interpretation consistent with the litigation position taken in this case. There is no history of agency practice, interpretation, or enforcement – longstanding or otherwise – relating to this issue. The "interpretations" offered in this case are simply *post hoc* rationalizations stemming from Mounts' and Adkins' cursory review of the roof control plan after being notified of the highwall failure.

Deference to a permissible agency interpretation is appropriate, despite its first appearance in the context of litigation, as long as it is apparent that it reflects a "fair and considered judgment on the matter in question." *Akzo Nobel*, 212 F.3d at 1304 (*quoting Auer*, 519 U.S. 452, 462 (1997)) and cases cited therein. As is apparent from the Findings of Fact above, there is nothing in the record showing that MSHA has ever before interpreted the disputed language or anything similar to it so as to erase the apparent difference in the words "provided" and "installed" or to detract from the conclusion that a two-step process is contemplated. Furthermore, the Secretary has presented no factual evidence that her position in this case is the result of a principled development and application of an enforcement strategy. *See generally Doe Run Co.*, 22 FMSHRC at 1253 (noting that the "fair and considered judgment" of MSHA was reflected in reexamination of litigation position in meetings involving MSHA's administrators and members of the Solicitor's Office, which resulted in an agency interpretation acceded to by the administrators who had developed the original interpretation).

From an analysis of the hearing testimony and due consideration of the Secretary's post-hearing briefing it is clear to the Court that the Secretary's attempt to meld "provided" and "installed" into a single concept was prompted by the needs of this case alone. No interpretation of the language of the roof control plan can support the Secretary's litigation position without contorting the plan language in violation of accepted rules of interpretation.

MSHA's decision to cite the operator appears to have been made at the scene of the highwall collapse. The choice was not made based on a clear violation, but rather based on the

inspector's belief that some action had to be taken in light of the sobering dimensions of the rock fall and the potential for disaster inherent in the situation, which thankfully remained only hypothetical as to any miners. The result is a circular argument based on the regulatory provision that seemed to best fit the situation at hand – specifically, the highwall section of the roof control plan. Mounts initiated the circularity by misquoting the canopy section of the roof control plan:

> The operator has failed to comply with approved roof control plan. Upon the initial development of the #2, #3, and #4 portals, the operator failed to **installed** [sic] substantially constructed canopies prior to penetrating/mining coal seam resulting in the Joy continuous miner being covered up by sandstone rock due to high wall failure.

(Ex. S-3)(emphasis added)

Mounts' enforcement action relied on his blurring of the distinction between the separate terms "provided" and "installed." Nothing in the roof control plan contributes to this mistake. Its language and logic is clear to anyone with a passing knowledge of the permissible remote control mining method used by Hubble and consistent with the regulatory standard underlying the process of proposing and approving a roof control plan. The difficulty of supporting this interpretation is apparent in Mounts' testimony about his enforcement thought process, above. Adkins' testimony shows that he adopted Mounts' logic without change. At hearing, the Secretary introduced nothing into the record to show that either Mounts' or Adkins' logic was the result of any further or prior consideration by MSHA that would give context to the interpretation that blends the terms "provided" and "installed." The Secretary adopted Mounts' initial interpretation as his litigation position, thus completing the circle and returning it to its point of origin.

In contrast, Akers and Carter testified that Hubble – and they individually– had openly and consistently used the same method for opening new portals on many occasions and over many years without any indication from MSHA that there was anything wrong with their practice. The contested plan language originated with Hubble and was approved by MSHA's regional office. (Tr.184-185) There is no evidence that Hubble's choice of roof control plan language had in any way ever been challenged or criticized by MSHA. It is fair to assume that had MSHA sensed any vagueness or contradiction in Hubble's proposed plan language, it would have raised such concerns before approving the roof control plan rather than waiting until an incident such as this highwall collapse to raise them for the first time. MSHA's failure to raise any concern about its interpretation in the past contravenes its current claim that the language means something other than what is apparent from the words chosen by Hubble and approved by MSHA. This also argues against MSHA's litigation position that its interpretation deserves deference.

Absurd Results

An interpretation of the roof control plan that undercuts the purpose stated in the regulation is not permissible, is not reasonable, and would lead to absurd results. The language of the underlying mandatory standard illustrates this:

> 30 C.F.R. § 75.220
> Roof control plan.
>
> (a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

[Emphasis added.]

The "[p]revailing geological conditions, and the mining system to be used at the mine," are deliberately recognized as the backdrop for specific provisions in any roof control plan. The mine operator must draft a roof control plan, with knowledge of the prevailing geological conditions and the mining system it intends to use at the mine, and present it to the MSHA regional office for review and approval. (Tr. 184-185) Since the operator is tasked with knowledge of its mine's geological peculiarities and is directed to propose a roof control plan suitable to the mining method to be used at its facility, it follows that a reasonable degree of operator discretion is contemplated by the standard. The operator is uniquely situated to posses the knowledge of the site and its intended mining methods.

Hubble presented testimony to show that it had used the remote controlled miner to make initial portal cuts many times over a long period of time. There is no evidence in the record that MSHA had ever expressed any concerns about the safety of using a remote controlled miner to do this work. There is nothing to indicate that Hubble's choice of mining method was at odds with the intent of the mandatory standard.

The second sentence in 30 C.F.R. 75.220(a) (1) further obligates the operator to employ "[a]dditional measures" to protect miners "if unusual hazards are encountered." Again, the standard vests discretion in the operator to take additional measures when necessary to provide for the safety of miners. Additional measures are measures beyond those specified in the actual language of the roof control plan but consistent with it and the overall safety mandate of the Mine Act. The record establishes that making the initial portal cut into a highwall is a procedure fraught with special danger. (Tr. 256) The use of a remote-controlled mining machine to make the initial portal cuts increased the measure of safety afforded to the men working in the area by allowing them to do this dangerous work from a greater distance. (Tr. 118-119) By employing this mining method, Hubble was exercising discretion allowed, indeed mandated, by 30 C.F.R. § 75.220(a) (1). Following the exact language of the roof control plan approved by MSHA by

having a protective canopy at hand ("provided") at the portal site facilitated the safest use of remote controlled miner as it made the first, most dangerous, cut. This is arguably more in alignment with the general requirements of 30 C.F.R. § 75.220(a) (1) than actually having a canopy installed before making the cut, which according to Mounts' testimony would have impeded the safest use of the miner. (Tr. 138-39)

The operator discretion shown by Hubble here, i.e., opting to use the remote controlled miner and not installing a canopy prior to making the initial portal cut, is not inconsistent with a fair reading of the language of the roof control plan and the underlying standard. Hubble's interpretation harmonizes the overall intent of 30 C.F.R. § 75.220(a) (1) and the actual words used in the roof control plan. It also harmonizes the deliberate choice of the two distinct words, as discussed above.

In contrast, the record provides an example of the creative lengths to which MSHA went to make sense of its litigation position in this case. Mounts testified that all initial cuts have to use two canopies, a provision that is found nowhere in the roof control plan. In essence, Mounts would have Hubble construct an oversized canopy that they would push up to the highwall before making the initial cut. (Tr. 56-57) They would then make the first cut from inside the oversized canopy so as to make the opening large enough to fit a second and smaller permanent canopy inside. (Tr. 56-57). Once the cut was made, the oversized canopy would be moved away and the second canopy placed into the opening. (Tr. 56-57) Mounts concedes that it would be impossible to make the initial cut using the permanent canopy because it has to be fit into an opening larger than itself, and it is impossible to cut a larger opening from inside the smaller canopy. (Tr. 57) An interpretation that requires the wholesale importation of a completely new and separate process that is absent from the contested language is clearly nothing more than an attempt to support an *ad hoc* litigation theory that deserves no deference.

The Secretary argues that Hubble had to install a canopy before making an initial portal cut into the highwall, a process that could complicate Hubble's remote cutting method and increase the potential for injury to miners. In support of this argument, Adkins testified about three possible benefits arising from an installed canopy: (1) an installed canopy could divert falling rock into the void created by the mining machine as it cuts into the highwall under the canopy, thus directing it away from the miner operating the mining machine; (2) rock falling on the sheet metal roof of the canopy could serve as an audible warning to the miner operator in the event he was not facing the highwall at the moment, giving him extra seconds to run to safety; and (3) the canopy could provide shelter for miners working on mining equipment in the event of a breakdown. (Tr. 55; 170-172;182-183) In contrast, Hubble's method of not installing a canopy until after it has made the initial highwall cut by remote control allows the miner operator to stand far enough back from the highwall to be out of the reach of even a serious collapse, such as this one.

On balance, the Secretary's argument and its supporting testimony advocates a method that serves the interests of miner safety much less effectively, and could lead to the absurd result of undercutting the stated purpose of the Act to foster the safety of miners. The overall objective

of the Mine Act, and presumably all of its related standards, 30 U.S.C. § 801(g) (1) is to foster the health and safety of miners. An interpretation of a roof control plan that would penalize a mining method that is clearly safer for miners and support a method that would increase the likelihood of serious injury to miners would lead to absurd results, is not reasonable, and does not deserve deference. In short, the Secretary's litigation position does not deserve deference under the prevailing precedent.

MSHA's proffered "interpretation" of the roof control plan ignores the actual language used, is not the "considered judgment" of MSHA, and is entitled to no deference.

ORDER

Citation No. 7442179 is vacated.

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

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

Mickey Webster, Esq., Wyatt, Tarrant & Combs, LLP, 250 W. Main Street, Suite 1600, Lexington, Ky 40507-3211

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710
Telephone: (202) 434-9950
Fax: (202) 434-9954

July 2, 2013

PINNACLE MINING COMPANY, INC.	:	CONTEST PROCEEDINGS
Contestant,	:	
v.	:	Docket No. WEVA 2013-633-R
	:	Order No. 7203957; 02/06/2013
	:	
	:	Docket No. WEVA 2013-634-R
SECRETARY OF LABOR,	:	Order No. 7203958; 02/06/2013
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, MSHA,	:	Pinnacle Mine
Respondent	:	Mine ID 46-01816
	:	

ORDER GRANTING SECRETARY'S MOTION TO COMPEL

This case is before me on a Notice of Contest filed under Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (2000) ("the Act") and is stayed pending the assessment of proposed penalties. On May 21, 2013, the Secretary of Labor filed a Motion to Compel the Contestant to provide complete, verified answers and responses to the Secretary's First Set of Interrogatories and First Requests for Production and to make certain persons available for deposition. In the alternative, the Secretary requested that I dismiss the contest proceedings with prejudice for failure to cooperate in discovery, pursuant to 29 C.F.R. § 2700.59.

The Contestant submitted its Response in Opposition to the Secretary's Motion on May 31, 2013. Contestant states that it is not refusing to engage in discovery, that it provided responses to the Secretary's Requests for Admissions, and has also provided the Secretary with its position statement to engage in informal settlement negotiations. Contestant stated that it has engaged in discovery but was seeking assurances that no 110(c) investigations would arise from the orders. Contestant further submits that the Secretary's motion is a pretext to challenge an operator's right to file pre-penalty notices of contest. Contestant cites the Commission's decision in *Marfork Coal Company, Inc.,* 29 FMSHRC 626 (August 2007) and an ALJ order applying *Marfork,* for the proposition that section 105(d) provides operators with a right to contest a citation or order and that initiating discovery and informal negotiations are valid reasons for bringing a 105(d) contest proceeding. Consequently, Contestant also submits that the Secretary should be compelled to engage in informal settlement negotiations.

The Secretary requested a conference call on these issues, which was held on June 18, 2013. This Order memorializes my oral orders issued during the conference call.

As a preliminary matter, pursuant to 29 CFR. § 2700.56(d), I note that parties may initiate discovery after an answer to a notice of contest is filed, even if the case is stayed pending the assessment of proposed penalties. In addition, *Marfolk* clarified that section 105 permits operators to file citations and orders before the related penalties are proposed, even without the need for immediate review.

During the conference call, the solicitor reiterated that there are no open or pending 110(c) investigations but he could not stipulate that there would not be one in the future, if facts came to light that would create the necessity for a future investigation. I concurred with the solicitor's position and verbally ordered Contestant to provide the requested responses four weeks from the date of the conference call, in order to allow Contestant time to locate and consult with outside counsel for the miners.

Accordingly, the Secretary's Motion to Compel is GRANTED. Contestant is ordered to provide discovery responses four weeks from the date of the conference call that was held on June 18, 2013. As the Secretary has agreed to engage in settlement discussions following receipt of the discovery responses, I decline to address Contestant's argument on this issue.

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

Distribution:

Lorna M. Waddell, Esq. Dinsmore & Sholl, LLP, 215 Don Knotts Boulevard, Suite 310, Morgantown, WV 26501.

Matthew N. Babington, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Boulevard, 22nd Floor, Arlington, VA 22209-2247

/kla

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER
875 GREEN TREE ROAD, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412)920-7240
FAX:(412)928-8689

July 18, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. PENN 2011-243-M A.C. No. 36-09172-247170
v.	:	Docket No. PENN 2012-149-M A.C. No. 36-09172-278527
DUFFY, INC., Respondent	:	Mine: Port Allegheny Mine
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. PENN 2013-86-M A.C. No. 36-09172-296177A
v.	:	
DENNIS S. BELL, employed by DUFFY, INC., Respondent.	:	Mine: Port Allegheny Mine

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Before: Judge Steele

I. Procedural Background

Between July 1, 2010 and July 13, 2010 the Secretary of Labor ("Secretary") issued seven 104(d)(1) citations/orders to Duffy, Inc. ("Duffy" or "Respondent"). The citations were terminated between July 13, 2010 and August 3, 2010. On October 28, 2010 the Secretary informed Respondent that MSHA had opened a Section 110(c) investigation into the actions of Michael Duffy, the mine owner, and Dennis Bell, the mine foreman with respect to those violations. On March 3, 2011, seven months after the final violations at issue were terminated , the proposed penalties were assessed for the citations and orders. On or about March 9, 2011 Respondent contested those assessments. Sixteen days later, the Secretary filed a timely Petition for Assessment of Civil Penalty.

On July 5, 2011 PENN 2011-243-M was assigned to Judge John Kent Lewis. Between July 22 and July 25, 2011 the parties discussed the desirability of a stay and ultimately agreed to request one pending the completion of the 110(c) investigation.[1] The Secretary requested the stay and Judge Lewis granted it on August 5, 2011. The Secretary provided periodic updates to Judge Lewis' law clerk on October 3, 2011, November 2, 2011, and, allegedly, in May 2012. On June 14, 2012 Mr. Duffy passed away. On July 27 the Section 110(c) penalties were assessed and on August 20, 2012 and August 17, 2012 they were received Mr. Duffy (presumably his estate) and Mr. Bell respectively. Those 110(c) penalties became final orders on September 20, 2012. On October 20, 2012 the stay in PENN 2011-243-M was lifted. Respondent filed an unopposed motion to re-open those 110(c) proceedings on November 26, 2012.

On November 19, 2012, Respondent filed a "*Motion to Dismiss For Undue Delay in Enforcement*." The Secretary filed a Response on December 19, 2012 to which the Respondent countered on January 2, 2013. On January 4, 2013 the Secretary filed a letter in response to the Respondent's Reply. On January 31, 2013, the Commission re-opened the 110(c) proceedings and the case against Mr. Bell was assigned to me as PENN 2013-86-M. On June 3, 2013 I hosted a conference call to discuss these proceedings. On June 4 and 5 2013, each party sent an additional letter.

II. Question at Issue

Were the delays in these proceedings sufficient to justify dismissal of the dockets? For reasons that will be explained more fully below, I find that dismissal is not appropriate.

III. Reasoning

a. PENN 2011- 243-M: Duffy, Inc.

Respondent's motion raises a novel issue, which it concedes has no case law on point. (*Respondent's Reply in Support of Motion to Dismiss* at 3). Specifically, Respondent argues that the delay between the issuance of the final citation at issue here on July 13, 2013 and the lifting of the stay on October 20, 2013 violated its right to a timely adjudication under 29 C.F.R. §2700.1(c), thereby warranting dismissal. In light of the aforementioned lack of case law, Respondent suggests that I consider whether there was adequate cause for the delay and whether Respondent suffered actual prejudice to determine whether a delay requires dismissal. In short, Respondent suggests I utilize the standard supplied by the Commission in *Salt Lake County Road Department*, 3 FMSHRC 1714 (July 1981) which was re-affirmed and explained recently in *Long Branch Energy*, 34 FMSHRC 1984 (Aug. 2012).

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[1] In an e-mail dated July 25, 2011 Respondent's attorney, Eric M. Dullea wrote, "Following up on our e-mail exchange last week, we agree that a Motion to Stay this matter would be appropriate pending the completion of the 110(c) investigation."

I do not believe that *Salt Lake* and its progeny apply to the entire two-plus year life-span of this case nor do I think they are particularly instructive on how to handle this situation.[2] *Salt Lake* held that under Commission Rule 28 the 45-day deadline for the Secretary to file a petition following a contest by an operator is not jurisdictional.[3] *Salt Lake* at 1716; *see also Long Branch* at 1987. Therefore, the failure to file the petition within 45-days does not automatically lead to dismissal but instead to an analysis of whether there was adequate cause for the delay and actual prejudice to the operator. *Id*. at 1717. Only if these conditions are met is dismissal appropriate. *Id*.

The statutory basis of this rule and the Commission's analysis show that the *Salt Lake* test is not appropriate here. That 45-day deadline in Rule 28 implements Section 105(d) of the Act, which requires the petition to be filed "immediately" following an operator's contest. *Medicine Bow Coal Co.*, 4 FMSHRC 882, 885 (May 1982). There is no corresponding requirement in the Act that requires a hearing be held "immediately" following the issuance of citations. Further, Rule 1(c) does not contain an actual deadline; it contains only broad, aspirational language regarding a speedy hearing. As such, applying the same rule as *Salt Lake* would be absurd. The *Salt Lake* test is only appropriate because there is an imperative for the Secretary to act *immediately* in the statute and 45-day deadline in the Commission's rules. Here, Respondent is requesting the *Salt Lake* test be taken out of context and applied to a vague guarantee of "speedy" adjudication. I do not believe that to be warranted. *Salt Lake* and its progeny only apply to Rule 28 and other situations where the Secretary must act "immediately."

The only time period during which the application of a the *Salt Lake* standard would be appropriate would be between the contest of the proposed penalties by Respondent and the filing of the petition by the Secretary. In this particular case, Respondent contested the proposed penalties on March 9, 2011 and sixteen days later (with 29 days to spare) the Secretary filed his petition. As a result, the Secretary complied with even the most stringent reading of Rule 28. Therefore, *Salt Lake* and its progeny do not apply

That is not to imply that there is no situation in other areas of the case where a delay by the Secretary could result in dismissal. However, I do not believe that any delay in this case would warrant such a severe remedy. Considering each event in the procedural timeline in this case reveals that any delays in the proceedings were reasonable and/or consented to by Respondent.

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[2] It should be noted that it is from the issuance of the stay forward that Respondent claims to have suffered prejudice, not the entire two-year period. (*Respondent's Motion to Dismiss For Undue Delay in Enforcement* at p. 8). This, despite the fact that in other portions of its brief, Respondent discusses timeliness over the entire two and a half year period between the issuance of the citations and the lifting of the stay. (*Id*.) In light of this confusion, I will consider this case both as whole and also from the issuance of the stay.

[3] At the time of the decision in Salt Lake it was Rule 27, but the rules are identical.

The final citation/order was issued on July 13, 2010 and Respondent terminated the final citation/order on August 3, 2010. Seven months later, on March 3, 2011 the Secretary issued the proposed assessments. Under Section 105(a) of the Act, the Secretary is afforded a reasonable time to notify the cited operator of assessed civil penalties following the termination of the investigation. The Commission has held that a delay of less than eleven months between the termination of the inspection and the issuance of a proposed civil penalty is *per se* reasonable. *See Sedgeman*, 28 FMSHRC 322 (June 2006). In this case, the proposed penalty was issued seven months after the inspection and therefore there was no unreasonable delay.

As stated previously, following Respondent's contest of that proposed penalty, the Secretary complied with Commission Rule 28 in issuing the petition16 days later.

Between the issuance of the petition on or about March 25, 2011 and July 5, 2011, the Secretary took no action in this case. However, that delay is reasonable in light of the fact that no Judge was assigned to the case at that time. The Secretary could not push towards a hearing or request a stay because there was no person to preside over a hearing or grant a stay. On July 5, 2011 Judge Lewis was assigned and, roughly three weeks later, the Secretary requested a stay in this matter pending the related 110(c) investigation.

It is uncontested that the Secretary's *Motion to Stay Civil Proceeding* was unopposed by Respondent during discussions between the parties in July 2011. (*Respondent's Motion to Dismiss For Undue Delay in Enforcement* at p. 3). Most of Respondent's complaint regarding delay in this case concern this time between the granting of the stay on August 5, 2011 and the lifting of the stay on October 20, 2012. However, at no time following the issuance of that stay did Respondent ever request that Judge Lewis or I lift the stay. Respondent cannot willingly consent to a stay, willingly refrain from requesting an end to that stay, and then complain about the length of that stay. This proposition does not even require citation to legal authority, it is self-evident. Respondent has abdicated any right to complain about this delay through its consent to the stay

Respondent presents several arguments as to why it should not be bound by its consent to the stay. None of those arguments are particularly compelling, but I will address each in turn. First, Respondent argues that the stay lasted for 15 months. (*Id*. at 8). Respondent does not explain how this eliminates its consent. Respondent did not place any time limits on its consent to the stay and never repudiated its consent at any time.

On a related note, in discussing the length of time the stay existed, Respondent notes that the Secretary provided only two status updates regarding the 110(c) investigation. The emphasis Respondent places on this point perfectly illustrates the Respondent's apparent beliefs that it was on the sideline waiting for the Secretary to act and also that the Judge did not have a role in this proceeding. Judge Lewis' *Order Granting Stay* did not indicate that the Secretary was required to provide a status report; it stated that "the parties" were required to provide a status report. In full, the Order stated, "The parties are **ORDERED** to provide a status update of this proceeding, and the related special investigation, within 60 days of the date of this Order." Those status

updates were not even intended to provide information to Respondent, they were for the benefit of the Judge. If Respondent had complied with the Order and checked in at 60 day intervals, it could have used the opportunity to request that the matter move more quickly.

This is similar to Respondent's constant refrain that the Secretary did not act quickly enough. However, the Secretary's role is not preeminent. The Judge has the power to grant and lift stays, the Secretary does not. If Respondent wanted the stay lifted, it should have gone to the source: the Judge. Unfortunately, neither Judge Lewis nor I can tell when a party wants a task completed if we are not asked to do it.

Respondent's next argument is that the investigation into the case commenced a year before the stay was requested, indicating that the stay would be for a short duration. (*Id*.). As already noted, there were no unreasonable delays in the run-up to the issuance of the stay. Further, nothing in the Secretary's stay request or in the *Order Granting Stay* indicates that the 110(c) investigation was nearly completed or that the stay was to be for a short duration. I cannot conceive of any "reasonable implication" Respondent was able to glean that this would necessarily be a short stay. In a related argument, Respondent stated that it could not foresee that the investigation would take 13 additional months. (*Respondent's Reply in Support of Motion to Dismiss* at 5). However, Respondent presented no legal authority for this proposition that a consent to a stay has a pre-determined expiration date or that the stay must be considered in light of an operator's unspoken expectations.

Respondent further argues that when the stay was requested, discovery had not commenced. (*Respondent's Motion to Dismiss For Undue Delay in Enforcement* at 8). I do not understand this particular argument. Nothing in the stay prevented the parties from continuing forward with discovery or settlement of PENN 2011- 243-M while the case was stayed. The stay only prevented Judge Lewis and I from setting the case for hearing. If the parties wanted to continue to work together after the stay, nothing would prevent them from doing so. If, with or without that discovery, Respondent acquired information that indicated that the stay was no longer in their best interest, it could have requested the stay be lifted.

Next, Respondent argues that cases related to 110(c) investigations are routinely granted, whether opposed or unopposed. (*Id*.). Respondent provides no source for this grand assertion. When confronted with a request for a stay that is opposed, I will consider the matter carefully before issuing a decision. There are cases in which Judges have refused to issue a stay, or severely limited the scope of the stay. However, even if this argument were true, Respondent's inaction precludes it from complaining about it now. Much like an objection during a hearing, Respondent must raise an issue in order to preserve their opposition in the future. Respondent had an opportunity to object to the stay and, in fact, had a continuing opportunity to request that the stay be lifted. It chose not to exercise those opportunities and therefore cannot complain now.

Respondent also argues that it does not have an obligation to prod the case forward and keep the Secretary moving. *(Respondent's Reply in Support of Motion to Dismiss* at 5). This is

absolutely true. However, failure to take an action, even one that is not required, can foreclose certain opportunities. Sadly, this is the nature of life; sometimes taking advantage of one opportunity (whether it's enjoying a stay in which civil penalties are not levied or going for a Sunday drive) can foreclose other opportunities (be it complaining about the pace of a case or watching a football game). We all manage to get along alright despite the deprivation. Respondent was not required to request the Secretary move faster or demand that I lift the stay. However, if Respondent does not do so during the stay, it cannot complain about that delay when it is lifted.[4]

Finally, Respondent argues that a decision that it waived its right to request the stay be lifted is unfair because its failure to act quickly was caused by Mr. Duffy's death. (*Id*. at 6). It argues that the Secretary has a double standard whereby he is allowed to take two years to conduct an investigation, but Respondent has but a short time following the death of its owner "to implement a successor plan, resume its business activities and inform MSHA that its enforcement schedule is too slow lest it waive its rights." This particular argument perhaps says more than Respondent intended. It shows, once again, that Respondent was not being harmed by the stay, but was, in fact, enjoying its benefits.

This really reaches the flaw in Respondent's entire argument regarding delay in this matter. During the stay, Respondent reaped several benefits. It was not required to pay any civil penalties, it avoided having several (d) citations and orders on its record, and it had ample opportunity to explore legal strategies or discuss settlement. Respondent consented to the stay and did not ask that it be lifted. As a result, it is stuck with the mixed bag of losses and gains that resulted therefrom.

Therefore, at no time during the pendency of this proceeding has Respondent suffered from undue delay. Certainly not to the extent to justify something as severe as dismissal. Taking the entire two-plus years as a whole, I find that any delays resulted from the reasonable time taken by the Secretary to prosecute the case and that, to a large extent, the delays occurred with Respondent's explicit consent.

b. PENN 2013-86-M: Dennis S. Bell

While the parties' briefings in this matter primarily concern PENN 2011-243-M, Respondent appears to have made a related argument that the 110(c) proceeding against Mr.

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[4] In making this argument, Respondent states that there is a double standard here in that deadlines fall harder on operators than the Secretary. That is probably true. However, the reason for that double standard is obvious. Whereas Respondent's actions in a case are taken for the benefit of the Respondent, the Secretary is acting for the benefit of the miners and their safety. While the Commission is often unhappy with The Secretary's slow pace during 110(c) investigations (or in other areas), it chooses to grant the Secretary a certain leeway. This is not out of deference to, or bias in favor of, the Secretary. It is because the Commission recognizes, as it did in *Long Branch*, that the Act is to be construed in a way that protects the health, safety, and lives of miners. If that incidentally benefits the Secretary, the Commission is willing to accept some minor "unfairness" to operators.

Bell, PENN 2013-86-M, should also be dismissed.[5] Respondent's motion to dismiss this case rests on two theories. First, Respondent argues that Mr. Bell is not a "agent" of the operator and therefore, cannot be held accountable under Section 110(c). Second, Respondent argues that an unreasonable delay under Section 105(a) has caused prejudice to Mr. Bell. Neither of these arguments is compelling.

Respondent argues that Mr. Bell is not an agent of Respondent, and therefore not liable under Section 110(c) because:

> Although Mr. Bell holds the title of foreman, he is not a salaried employee - he is paid an hourly wage. Also, Mr. Bell is not part of Respondent's management. He does not have the authority to hire, fire or discipline other employees. Indeed, the Special Assessment Forms in this case indicate that Mr. Bell was making good faith efforts to comply with the applicable standards, but had to discuss all of the compliance matters with the late Mr. Duffy. From an operational standpoint, Mr. Bell was responsible for relaying Mr. Duffy's instruction to other employees at the Mine.

(Respondent's Reply in Support of Motion to Dismiss at 7). Respondent also cites to Commission precedent for the proposition that determining agent status involves a multi-factor test. *Id*. *citing Martin Marietta Aggregates*, 22 FMSHRC 633, 638 (May 2000).

However, in order to utilize a multi-factor test, a Judge must be equipped with facts. Facts may come in the form of stipulations in the pleadings and from evidence at a hearing. In this case, we have neither of those things. We have two parties who promise to offer diametrically opposed factual presentations regarding Mr. Bell's job responsibilities. It is entirely possible that after discovery, or perhaps after a hearing, that the facts will show that Mr. Bell is not an agent of Respondent. But we do not have facts now, we have assertions. Further, a *Motion to Dismiss* is not the proper venue for findings of fact. Therefore, I will wait for proper time and the presentation of evidence before making a determination as to Mr. Bell's agency status.

Respondent's second argument is similar to an argument it made with Respect to PENN 2011-243-M. Specifically that under Section 105(a) of the Act, the Secretary did not notify Respondent of the assessed civil penalties within a reasonable time following the termination of the investigation. Several ALJ decisions hold that the 105(a) "reasonable time" standard also applies to 110(c) situations. See e.g. *Reasor*, 34 FMSHRC 943 (April 2012) (ALJ); *Wayne Jones*, 20 FMSHRC 1267 (Nov. 1998)(ALJ); *James Lee Hancock*, 17 FMSHRC 1671 (Sept.

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[5] Initially, Respondent asked for the 110(c) proceeding against the Duffy estate to be dismissed as well. However, The Secretary has since dropped that case.

1995) (ALJ). With respect to how that requirement applies, I believe that Judge Turek's *Order in Denying Motions to Dismiss* in *Secretary of Labor v. Christopher Brinson, employed by Kentucky-Tennessee Clay Co. et al*, provides a succinct analysis of the relevant law. Specifically:

> In *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256 (D.C. Cir. 2005)...the court held that the requirement in §105(a) that notices of proposed assessments must be issued "within a reasonable time" does not start running when the underlying citation or order is issued. *Id*. at 261. The court stated that the period cannot start running "before the mine had an opportunity to respond to the order," since on of the factors to be considered in assessing a penalty against respondent is how the mine abated the citation. *Id*. at 262. Instead, the court held the period starts running when MSHA completes its investigation. The court gave deference to the Secretary's position in that litigation that the investigation ended when an accident investigation report was issued. *Id*. at 261.

SE 2012-340M, SE 2012-370-M, and SE 2012-348-M, 2013 WL 3152293, *5 (May 7, 2013)(ALJ Turek). In that case, Judge Turek began measuring the "Reasonable Time" from where the special investigation ended, rather than from the time the citation was issued. *Id*.

I believe that is appropriate in this case as well. Here, the special investigation was completed and the penalties assessed On July 27, 2012.[6] On August 17, 2012 Mr. Duffy received notice of the assessed penalties. As noted above, The Commission has held that a delay of less than eleven months is *per se* reasonable. *Sedgeman*, *supra*. The delay in this case was less than one month, as a result, I cannot find it unreasonable.

I briefly note that Respondent again suggested that I use the two-part analysis in *Salt Lake* to determine whether the delay in this case required dismissal. However, as the Respondent and Bell did not timely contest the 110(c) assessments, I do not believe the time ever began to run on the 45-day deadline. Respondent has since had the case re-opened and petition has been timely filed with me in this docket. For reasons explained more fully above, I decline to use the *Salt Lake* analysis over the entire period beginning with the issuance of the citations in PENN 2011-243-M or even from the start of the investigation in this docket on October 28, 2010.

---

[6] I note here that Respondent often seemed confused in its briefing with the separate nature of the 104(d) citations/orders in PENN 2011-243-M and the 110(c) case in PENN 2013-86-M. These are separate proceedings with different investigation periods and different assessment times. Respondent presents an argument in its parsing when the "inspection" and "investigation" in this case was completed. I will not get into the details. Suffice it to say that Respondent conflated the dates for these two separate dockets in that argument to discover an earlier date for the end of the investigation.

IV. Conclusion

In light of the fact that Respondent did not suffer from any unreasonable delay with respect to PENN 2011-243-M and PENN 2013-86-M, Respondent's *Motion to Dismiss* is hereby **DENIED**.

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

Distribution:

Bryan C. Shieh, Esq., U.S. Department of Labor, Office of the Solicitor, The Curtis Center, 170 S. Independence Mall West, Suite 630E, Philadelphia, PA 19106

Erik M. Dullea, Esq., Patton Boggs LLP, 1801 California Street, Suite 4900, Denver, CO 80202

/tjb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
WASHINGTON, DC 20004
TELEPHONE: 202-434-9953 / FAX: 202-434-9949
July 18, 2013

BOART LONGYEAR COMPANY,	:	CONTEST PROCEEDINGS:
Contestant,	:	
	:	Docket No. WEST 2012-248-RM
v.	:	Order No. 8605604; 10/25/2011
	:	
	:	Docket No. WEST 2012-249-RM
SECRETARY OF LABOR	:	Order No. 8605605; 10/25/2011
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2012-250-RM
Respondent.	:	Order No. 8605606; 10/25/2011
	:	
	:	Docket No. WEST 2012-251-RM
	:	Order No. 8605607; 10/25/2011
	:	
	:	Mine: Durkee Cement Plant
	:	Mine ID: 35-02970 Y12
	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2012-422-M
Petitioner,	:	A.C. No. 35-02970-275832 Y12
	:	
	:	Docket No. WEST 2012-891-M
v.	:	A.C. No. 35-02970-287135 Y12
	:	
	:	Mine: Durkee Cement Plant
BOART LONGYEAR COMPANY,	:	
Respondent.		

ORDER DENYING MOTION TO AMEND CITATION AND PETITION AND TO PLEAD IN THE ALTERNATIVE
ORDER EXTENDING TIME FOR DISCOVERY AND DENYING MOTION TO QUASH
ORDER SETTING DATES AND TIMES FOR RESPONSES

Before: Judge Barbour

In these consolidated contest and civil penalty proceedings, the Secretary, *inter alia*, petitions for the assessment of a civil penalty of $70,000 for an alleged violation of 30 C.F.R. § 56.15005 as set forth in Citation No. 8605605 (Docket No. WEST 2012-891). The citation, which is dated October 25, 2011, was issued pursuant to section 104(d)(1) of the Mine Act. 30 U.S.C. § 814(d)(1). It charges that a foreman was observed working on top of the bed of

a truck without wearing fall protection. Section 56.15005 in pertinent part states that, "Safety belts and lines shall be worn when persons work where there is danger of falling[.]" In answering the Secretary's petition the Respondent denies it violated the standard. Answer 2. It further asserts that the findings the inspector made when issuing the citation (findings related to the gravity of the alleged violation, the negligence of the company, the unwarrantable failure of the company and the S&S nature of the alleged violation) are "incorrect as a matter of law and fact." *Id.* In addition, the company argues that the proposed penalty is "not substantially justified." *Id.*

I.

MOTION TO AMEND CITATION AND PETITION IN THE ALTERNATIVE

The Secretary moves to amend the citation and the civil penalty petition to assert that the company also violated 30 C.F.R. § 56.11027, a standard requiring, "Scaffolds and working platforms [to] be of substantial construction and provided with handrails and maintained in good condition." The Secretary states that, "Respondent will not be prejudiced by the granting of this motion insofar as the facts and circumstances giving rise to either violation are related, and the evidence the Secretary will present in this matter will be, for the most part, 'equally relevant to both safety standards.' " Motion 2 (*citing Gilbert Development Corp.*, 32 FMSHRC 185, 199-200 (Feb. 2010) (ALJ Manning)). The Respondent counters with numerous objections to the motion, including among other things, that it will indeed be prejudiced and that in any event, the motion is untimely. Company's Response to Motion to Amend 2-4.

The court finds no need to resolve all of the Respondent's objections. It agrees with the Respondent that granting the motion will be prejudicial. This alone dooms the Secretary's request. While there is no doubt, as both parties recognize, that Commission judges have the authority to grant motions to plead in the alternative in appropriate circumstances (*Gilbert Development*, 32 FMSHRC at 200.), such circumstances do not here exist. As an initial matter, there is a problem with the Secretary's terminology. While the motion is titled to allow pleading in the alternative, it reads as though the Secretary is asking the court to find that the company violated both standards. "[T]he Secretary moves to amend Citation No. 8605605 and the Petition for Assessment of Penalty in Docket No. WEST 2012-891-M to allege, in the alternative, that the Respondent violated . . . [section] 56.11027 *in addition to* . . . [section] 56.15005." Motion 1 (*emphasis supplied*). Pleading in the alternative means one or the other, not both.

Although this semantical problem can be circumvented by reading the language of the motion as expressing the Secretary's intent to ask the court to find a violation of section 56.11027 **or** a violation of section 56.15005, reading it in this way and granting the motion would prejudice the company. Unlike the case before Judge Manning, the two safety standards here at issue are not virtually identical and, despite what the Secretary asserts, evidence presented regarding both would not necessarily be equally applicable. The citation at issue describes the condition the company allegedly violated.

> The foreman was observed working on top of the bed of truck #2268. The foreman was not wearing fall protective gear. The foreman was about 5 feet above ground level . . . The foreman was standing at the edge of the bed of the truck. The bed was covered in pipe, tools, a garbage can, dirt, loose pipe, and debris. Sharp blasted rock and debris were on the ground under the miner's work area. Should the miner fall it would likely expose him to serious or fatal injuries. An oral imminent danger order . . . was issued to the foreman working on the bed of the truck[.]
>
> Doug Tucker, [the] foreman[,] engaged in aggravated conduct constituting more than ordinary negligence in that he conducted an unsafe act violating a mandatory standard. Doug stated he had been trained in the use of fall protection but actively chose not to use it.

Citation No. 8605605.

The citation clearly pertains to the foreman's failure to use fall protection while working and in danger of falling, a charge the company has been preparing to defend. Section 56.11027, however, concerns the construction and maintenance of work platforms, including a requirement to provide such platforms with handrails. There is not one word in the citation referencing the construction, substantial or otherwise, of a work platform or the provisioning of a platform with handrails. While the truck bed conceivably could be viewed as a work platform and the alleged debris on the bed could be viewed as impairing the platform's good condition, there has been no notice to the company to prepare against such an interpretation. If the Secretary wishes to charge the company with a violation of Section 56.11027, he should do it in the "old fashioned" way by issuing a citation and proposing a civil penalty, so that the issues are raised in a subsequent case that provides sufficient notice to the Respondent. The court will not allow the Secretary to "back door" the charge through an ill advised amendment to the existing citation and pleadings. The Secretary's motion is **DENIED**.

II.

MOTION FOR EXTENSION OF TIME FOR COMPLETION OF DISCOVERY
MOTION TO QUASH
DATES AND TIMES FOR RESPONSES

The Secretary also moves for an extension of time to complete discovery. The motion was filed on July 9, 2013. The Secretary requests an effective extension to July 19. Motion for Extension of Time 3 n.1. Along with the motion the Secretary filed interrogatories, requests for admissions and requests for production of documents. Counsel for the Respondent advised counsel for the Secretary that she opposes the motion.

In a July 11, 2013, electronic message to the parties the court, mindful that the cases are scheduled to be tried beginning on July 30, 2013, expressed its exasperation with this last minute, "down to the wire" discovery dispute. However, the court stated that unless counsel for the Respondent raised something unanticipated when she filed her written objections to the motion, the court would "in all likelihood . . . grant [the motion] in part and order the company to respond to the Secretary's First Interrogatories and First Requests for Admissions by 5:00 p.m. EST, July 19, 2013." E-mail from David Barbour, Administrative Law Judge, to counsels (July 11, 2013, 5:40 PM EST) (in lead file). On July 16, 2013, counsel for the Respondent filed her written objections to allowing discovery and she moved to quash the Secretary's interrogatories, requests for admissions and requests for production of documents. The court has reviewed the Respondent's objections, many of which center on the Respondent's contention that the Secretary's request is untimely. In the court's view the objections do not represent "good cause" justifying a need to forego discovery. The court takes counsel for the Secretary at his word that his first discovery requests were sent to counsel for the Respondent on June 17, 2013. The court also takes counsel for the Secretary at his word that after he served the discovery requests on counsel for the Respondent, he heard nothing from counsel for the Respondent until he, counsel for the Secretary, contacted counsel for the Respondent on July 10 and she advised him on July 11 that the she would not respond because she viewed the discovery requests as untimely.

A purpose of discovery is to allow counsels access to all relevant information prior to trial to minimize surprise at trial and to allow counsels to advise their clients as to the strengths and weaknesses of their cases. In addition, full knowledge of one another's cases facilitates settlement. These are among the reasons why discovery is encouraged and judges are given leeway to regulate its implementation and practice. If, in a judge's opinion, engaging in discovery is likely to facilitate revelation of the truth of the matters at issue, the judge has the authority and the duty to facilitate it. Here, while counsel for the Secretary's discovery requests came late in the overall time line of the cases, they were not so late as to prevent counsel for the Respondent from coming forward with good faith responses. She did not do so. Rather, she waited approximately 23 days before advising counsel she viewed the requests as untimely.

The court believes that the interest of the parties in producing a complete record, the interests of the public and the Commission in ascertaining the truth of the matters at issue and

the Commission's overall interest in encouraging full disclosure in litigated cases must prevail. Therefore, the court **GRANTS** the Secretary's motion to extend the time to complete discovery and it **DENIES** the Respondent's motion to quash. The court views the Secretary's First Interrogatories and First Requests for Admissions as acceptable and necessary for full disclosure. It therefore **ORDERS** the company to respond to the interrogatories and requests for admissions by 5:00 p.m., EST, Monday, July 22.[1] Any documents identified in the responses shall be delivered to counsel for the Secretary by fax or by electronic transmission at that time. Finally, as stated in the July 11 e-mail, the court views paragraph 1 of the Secretary's Request for Production of Documents as too broad and it **RULES** the company need not respond to the request in paragraph 1. If, after receiving the Respondent's responses to the Secretary's interrogatories and requests for admissions, counsel for the Secretary identifies particular relevant documents he wishes produced, he will have until 5:00 p.m., EST, Wednesday, July 24 to request their production, and counsel for the Respondent will have until 5:00 p.m., Friday, July 26 to deliver the documents by fax or electronic transmission.[2]

The parties' prehearing reports were due on July 16, 2013, and both the Secretary's and Respondent's reports have been received. In view of the holdings regarding discovery, the Secretary may file an amended report by 5:00 p.m. July 26, 2013 and the Respondent may file one by that time and date as well.

/s/ David Barbour
David Barbour
Administrative Law Judge

[1] This is a later date than the provisional date indicated in the court's July 11, 2013, e-mail to the parties. E-mail from David Barbour, Administrative Law Judge, to counsels (July 11, 2013, 5:40 PM EST) (in lead file). However, the court believes the additional time may be necessary to allow the company to fully respond.

[2] These are later dates than the provisional dates indicated in the court's July 11, 2013, e-mail to the parties. E-mail from David Barbour, Administrative Law Judge, to counsels (July 11, 2013, 5:40 PM EST) (in lead file). However, the court believes the later dates may be necessary to allow the company and the Secretary to fully respond.

Distribution (1st Class U.S. Mail):

Bryan Kaufman, Esq., U.S. Department of Labor, Office of the Solicitor, 1999 Broadway, Suite 800, Denver, Colorado 80202

Dana Svendsen, Esq.; Liane D. Hunt, Paralegal, Jackson Kelly, PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

/sa

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, DC 20004

July 26, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of REUBEN SHEMWELL, Complainant,	:	DISCRIMINATION PROCEEDING Docket No. KENT 2013-362-D MADI CD 2013-01
v.	:	
ARMSTRONG COAL COMPANY, INC. & ARMSTRONG FABRICATORS, INC., Respondents	:	Parkway Mine Surface Facilities Mine ID 15-19356

ORDER DENYING STAY

I. Background

On August 22, 2012, Armstrong Coal Company and/or Armstrong Fabricators (collectively referred to as "Armstrong") filed a civil tort suit in the Commonwealth of Kentucky's Muhlenberg Circuit Court seeking compensatory and punitive damages from Reuben Shemwell. The civil action alleges that Shemwell's discrimination complaint brought before the Commission constitutes a "Wrongful Use of [Commission] Civil Proceedings" under Kentucky state tort law. Circuit Court Complaint at 7, No. 12-CI-00897 (Aug. 22, 2012).

On January 8, 2013, the Secretary of Labor ("the Secretary") filed a discrimination complaint on behalf of Shemwell pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act" or "Mine Act"). 30 U.S.C. § 815(c)(2). The Secretary asserted that Armstrong's civil suit in Kentucky violates section 105(c)(1) of the Act, which provides:

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

30 U.S.C. § 815(c)(1) (emphasis added).

In addition to asserting that the civil suit violates section 105(c)(1), the Secretary asserted the civil suit creates a significant chilling effect that cannot be tolerated, stating:

> The Mine Act comprehensively regulates the filing of complaints by miners, and tolerance of state tort actions by employers for "wrongful use" of such proceedings would have a "direct and substantial effect" on the willingness of miners to file complaints . . . .

Sec'y Post-Oral Arg. Br. at 16 (citation omitted).

An interim Decision on Liability granted the Secretary's discrimination complaint brought on behalf of Shemwell, and required Armstrong to cease and desist from prosecuting its Muhlenberg suit by filing an appropriate motion to dismiss the suit within 40 days of the interim decision, or by Monday, July 29, 2013. 35 FMSHRC __, slip op. (June 2013) (ALJ). The Cease and Desist Order was predicated on the evident chilling effect of Armstrong's civil suit that creates a significant disincentive for miners to exercise their statutory right to communicate safety-related complaints to mine operators. *Id.* at 13.

On July 25, 2013, Armstrong filed a motion "to temporarily stay, until and including August 15, 2013, the Cease and Desist Order entered in this matter on June 19, 2013[,] pending submission of a Joint Settlement Motion by the Parties hereto." Armstr. Mot. at 1. In support of its motion, Armstrong reports that the Secretary and Shemwell have verbally agreed upon settlement terms that would resolve this case, "including a term requiring that Respondents voluntarily dismiss the Muhlenberg Suit." *Id.* at 2. Armstrong represents that the Secretary does not oppose Armstrong's motion.

II. Disposition

As stated in the interim decision, the considerations for determining the propriety of granting Armstrong's motion to stay are well settled. 35 FMSHRC __, slip op. at 21. The relevant issues are: (1) whether there is a likelihood of Armstrong prevailing on appeal; (2) whether Armstrong will be irreparably harmed if the Cease and Desist Order is not delayed; (3) whether not delaying the Cease and Desist Order creates an adverse effect on others; and (4) whether not delaying the Cease and Desist Order is in the public interest. *See Kevin Baird v. PCS Phosphate Company, Inc.*, 33 FMSHRC 127, 128-29 (Feb. 2011) (citing *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

With respect to the likelihood of prevailing on appeal, the interim decision determined that Armstrong's civil suit is: contrary to federal law in that it was both preempted, and baseless and retaliatory; contrary to Kentucky state law which requires a final decision on the merits in the proceeding alleged to have been misused; contrary to the plain language of section 105(c)(1) of the Mine Act that prohibits interference with the exercise of a miner's statutory right; and, contrary to legislative intent that seeks to promote and encourage miner participation in safety-

related matters. 35 FMSHRC __, slip op. (June 2013) (ALJ). Suffice it to say that Armstrong's prospects of prevailing in this matter are not good.

With respect to whether Armstrong will be irreparably harmed if a stay is not granted, Armstrong relies on *Clark v. Cincinnati Ins. Co.*, Case No. 2005-CA-000356-MR, 2006 WL 1044461, at *5 (Ky. Ct. App. Nov 15, 2006) for the proposition that Kentucky law provides a one year statute of limitation for malicious prosecution actions. Thus Armstrong asserts it may be time barred from refiling its civil tort suit even if it were dismissed without prejudice. Armstr. Mot. at 2. Armstrong's reliance on *Clark* is disingenuous, as Kentucky tort law requires a Commission finding in favor of Armstrong as a prerequisite to a state tort action for misuse of civil proceedings. *D'Angelo v. Mussler*, 290 S.W.3d, 75, 79 (Ky. App. 2009). As stated in *Clark*, "an injury occurs when the injured party knew or should have known that he was harmed." *Clark*, 2006 WL 1044461, at *5. Thus, the statute of limitations has not yet begun to run in the absence of a Commission decision on the merits of Shemwell's complaint. Consequently, denial of Armstrong's stay request will not pose any irreparable harm to Armstrong.

Although Armstrong will not be irreparably harmed if a stay is not granted, miners similarly situated to Shemwell may indeed be harmed if a stay is granted. In this regard, it is surprising that the Secretary has voiced no opposition to Armstrong's motion, in view of the Secretary's stated apprehension about the chilling effect created in this matter. The chilling effect is particularly harmful to mining personnel employed by Armstrong who presumably are aware that they too, like Shemwell, can be exposed to compensatory and punitive liability if they bring unwelcome safety related complaints to Armstrong's attention. Moreover, the continued prosecution of the civil suit discourages, in general, the active miner participation that the Mine Act seeks to promote. Consequently, granting the stay, even if only until August 15, 2013, during which time Armstrong represents that it would take no additional action in furtherance of the state suit, still has a potential to adversely effect miners - "the most precious resource" protected by the Mine Act. 30 U.S.C. § 801(a); Armstr. Mot. at 2.

With respect to the question of the public interest, I am cognizant that Armstrong could argue that its request for stay should be granted because, for reasons best known to the Secretary, it is not opposed. However, Congress has delegated to the Commission the responsibility to "assure that the public interest is adequately protected" before any propositions advanced by the Secretary in furtherance of a settlement are granted by the Commission. S. Rep. No. 181, 95th Cong., 1st Sess. 45 (1977), *reprinted in* Legislative History of the Federal Mine Safety and Health Act of 1977, at 633 (1978); *see also* 30 U.S.C. § 820(k). Permitting the state civil suit to remain viable is contrary to the public interest because its effect is the harassment and intimidation of miners who may wish to exercise their statutory rights, activities this Commission is committed to encourage and protect.

As a final matter, Armstrong avers that the terms of the parties' settlement agreement, which have been verbally agreed upon, require Armstrong to "voluntarily dismiss" its Muhlenberg suit. Armstr. Mot. at 2. The parties miss the point. The circumstances dictating

Armstrong's dismissal of its civil action are no longer negotiable, given the Cease and Desist Order that is in effect in this proceeding. While Armstrong apparently prefers to *voluntarily* move to dismiss its suit shortly, the Cease and Desist Order *requires* Armstrong to file an appropriate motion to dismiss by the close of business on Monday, July 29, 2013. The Secretary may take whatever enforcement action he deems appropriate in the event Armstrong fails to abide by the Cease and Desist Order.

I note parenthetically that Armstrong may assert that the requirement that it move to imminently dismiss its civil suit in Kentucky is a significant hardship. In view of Armstrong's last-minute request for stay, such an argument is tantamount to the proverbial child defendant charged with murdering his parents who seeks the sympathy of the court because he is an orphan. Moreover, any hardship experienced by Armstrong pales in comparison to the hardship it has thrust upon Shemwell. I am unmoved.

I realize the expedient thing to do would be to grant the requested stay. However, I believe to do so would be shamefully wrong.

ORDER

In view of the above, **IT IS ORDERED** that Armstrong's motion to stay the implementation of the Cease and Desist Order **IS DENIED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution:

Mary Beth Zamer, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

Matt S. Shepherd, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

Adam K. Spease, Esq., Miller Wells, 710 W. Main Street, 4th Floor, Louisville, KY 40202

Mason L. Miller, Esq., 300 E. Main Street, Suite 360, Lexington, KY 40507

Daniel Z. Zaluski, Esq., 407 Brown Road, Madisonville, KY 42431

Tony Oppegard, Esq., P.O. Box 22446, Lexington, KY 40522

Wes Addington, Esq., Appalachian Citizens Law Center, 317 Main Street, Whitesburg, KY 41858

/tmw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, DC 20004

July 26, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of REUBEN SHEMWELL, Complainant,	:	DISCRIMINATION PROCEEDING Docket No. KENT 2013-362-D MADI CD 2013-01
v.	:	
ARMSTRONG COAL COMPANY, INC. & ARMSTRONG FABRICATORS, INC., Respondents	:	Parkway Mine Surface Facilities Mine ID 15-19356

ORDER DENYING REQUEST FOR CERTIFICATION FOR INTERLOCUTORY REVIEW

Before me is an emergency motion filed by Armstrong Coal Company, Inc. & Armstrong Fabricators, Inc. (collectively referred to as "Armstrong") on July 26, 2013, at 4:22 p.m., requesting certification for interlocutory review of an Order Denying Stay, issued on this date, July 26, 2013. The order denied staying a Cease and Desist Order that requires Armstrong to file an appropriate motion to dismiss its civil suit, filed in the Commonwealth of Kentucky's Muhlenberg Circuit Court against Reuben Shemwell, within 40 days of the interim decision, or by Monday, July 29, 2013.

Certification of a request for interlocutory review requires a showing that the request for interlocutory review involves a novel question of law, and that immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76 (a)(1)(i).

As noted in the Order Denying Stay sought to be reviewed, the case law concerning the criteria for granting a stay are well settled and do not present a novel question of law. Order Denying Stay, slip op. at 2. With respect to materially advancing this proceeding, Armstrong argues that resolution of the question of whether interim remedial measures should be stayed upon notification that settlement has been reached will materially advance the proceeding. Armstr. Mot. Requesting Certif. at 2. However, as noted in the Order Denying Stay, a Cease and Desist Order has been issued by the Judge. Consequently, the circumstances and timetable for filing an appropriate motion to withdraw the civil suit are not matters for negotiation between the parties, as the Cease and Desist Order goes beyond the scope of any settlement terms. Order Denying Stay, slip op. at 4. Consequently, the interlocutory review sought by Armstrong will not materially advance this proceeding.

Accordingly, **IT IS ORDERED** that the Emergency Motion Requesting Certification for Interlocutory Review **IS DENIED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution by electronic mail at 5:50 p.m.:

Mary Beth Zamer, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

Matt S. Shepherd, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

Adam K. Spease, Esq., Miller Wells, 710 W. Main Street, 4th Floor, Louisville, KY 40202

Mason L. Miller, Esq., 300 E. Main Street, Suite 360, Lexington, KY 40507

Daniel Z. Zaluski, Esq., 407 Brown Road, Madisonville, KY 42431

Tonny Oppegard, Esq., P.O. Box 22446, Lexington, KY 40522

Wes Addington, Esq., Appalachian Citizens Law Center, 317 Main Street, Whitesburg, KY 41858

/tmw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, DC 20004-1710
Telephone No.: 202-434-9933
Telecopier No.: 202-434-9949
July 30, 2013

FRED ESTRADA,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2013-311-DM
v.	:	SE-MD 2013-06
	:	
	:	
FREEPORT McMORAN TYRONE, INC.,	:	
and/or RUNYAN CONSTRUCTION,	:	Tyrone Mine
Respondent	:	Mine ID 29-00159

NOTICE OF HEARING; PREHEARING ORDER
and
ORDER REGARDING MOTION

Before: Judge Moran

I. NOTICE OF HEARING and PREHEARING ORDER

The hearing in this matter will commence on Tuesday October 1, 2013 and continue, as needed, on October 2nd. The hearing will be in, or as close as possible to, Silver City, New Mexico. A subsequent notice will identify the precise hearing address.

Prior to this case being assigned to the undersigned administrative law judge, an Order to Submit Information was issued on May 24, 2013 by Chief Administrative Law Judge Robert Lesnick. That Order directed the parties "to submit to [the] Commission, [a response as to] who is the correct respondent in these proceedings." The Order also directed "[t]hat party . . . to file its answer to the complaint within 30 days after receipt of the complaint." The same Order to Submit Information, which also included an Order to Answer, noted that the Complainant filed his discrimination complaint and that Runyan was identified as the party responsible for the violation. When the Mine Safety and Health Administration ("MSHA") was involved with its investigation of the case,[1] it listed both Freeport McMoran Tyrone, Inc. ("Freeport") and Runyan Construction ("Runyan") as Respondents. The record does not contain any answer, nor any response at all, from Runyan to the Order from the Chief Judge. Accordingly, Runyan Construction is ORDERED to respond to the Order to Submit Information by August 14, 2013.

[1] Subsequently, on February 1, 2013, MSHA informed that it declined to bring a Section 105(c) action on behalf of Mr. Estrada, advising him at that time that he could proceed with his own complaint for the alleged discrimination.

Runyan Construction must thereafter respond to this present Prehearing Order as well, and do so according to the compliance dates listed in this Order.

The parties are further **ORDERED** to acknowledge receipt of this notice by replying promptly to the address on this letterhead to the attention of Judge William Moran at that address. This response must include all respondents' addresses, emails, telephone numbers for the Court to be able to contact the parties, as needed. It is noted that, at present, Mr. Fred Estrada, Runyan Construction, and Freeport McMoran Tyrone, Inc. are the parties in this proceeding.

IMPORTANT: Failure to comply with any Order from the Court may result in an Order of Default and/or Dismissal being issued. Therefore, it is critical that all parties comply with all Orders and this includes Orders to participate in telephone conference calls at a given date and time.

In this regard, the Court notes that a conference call was scheduled after the Court was in direct telephone contact with Mr. Fred Estrada and Attorney Kristin White, the latter representing Respondent Freeport McMoran Tyrone, Inc. However, Mr. Fred Estrada did not join the call, which was scheduled for June 27, 2013. Subsequently, on July 5, 2013, Complainant Estrada sent a facsimile to the Court, advising that he tried to phone in to the conference number but was unsuccessful. At the time of the June 27th call, the Court was under the mistaken impression that Counsel for Freeport McMoran Tyrone Inc. was also representing Runyan Construction. Runyan Construction is either representing itself or has counsel. Whichever is the arrangement, Runyan is advised that it is a named Respondent in this proceeding and as with the other parties, Runyan Construction must also fully comply with all Orders issued by the Court, which includes this Order. Accordingly, as with the other parties in this proceeding, **Runyan is ORDERED** to acknowledge receipt of this notice by replying promptly to the address on this letterhead and to the attention of Judge William Moran at that address. This response must include all addresses, emails, telephone numbers for the Court to be able to contact the parties as needed. If Counsel has been retained, such counsel should file a notice of appearance.

It is very likely that another conference call or several such calls will be scheduled with the parties during August. In the event a party is unable to connect to the toll free number: 1-866- 867-4769, such party is directed to call 703 851 2785 and/or 202 577 6809 and advise of the connection problem. **NOTE:** When calling 1-866- 867-4769, the voice prompt will inform the caller to enter a "pass code" to join the call. That pass code is 144 772. Both steps must occur; one must call the number and then, when prompted, one must enter the pass code in order to connect to the call.

Fred Estrada is proceeding *pro se* in this matter and therefore representing himself. However the Court takes note that David Estrada, brother of the Complainant, Fred Estrada, has been assisting the Complainant as a non-attorney assistant. In light of that, the Complainant is **ORDERED** to provide the Court with all David Estrada's addresses, emails, telephone numbers

for the Court to be able to contact him**,** *unless Fred Estrada advises the Court that his brother, David Estrada, will have no further role in connection with this discrimination proceeding.* Fred Estrada is again advised that he has the right to retain an attorney to represent him in this matter but that the federal government does not provide or pay for such attorneys and therefore that all such legal representation costs must be paid for solely by the Complainant.

Prehearing Exchange. The Parties are **ORDERED** to exchange with one another all exhibits intended for introduction as part of the record in this proceeding and to list all individuals who will be called as witnesses at the hearing. Do not send a copy of the exhibits to the Court. For each witness listed, the parties are to include a brief summary of the subject(s) about which the witness is expected to testify. This prehearing exchange is to occur by August 30, 2013.

II. ORDER REGARDING MOTION

Counsel for Freeport McMoran Tyrone, Inc. filed a "Response to Order to Submit Information and Motion to Dismiss." In a formal sense, it did not file an Answer. Instead, its Motion to Dismiss took precedence over Answering the Complaint. The Motion avers that Freeport is not Mr. Estrada's employer,[2] and it adds that Mr. Estrada "disclaimed Freeport as a party to his alleged discrimination."[3] Freeport acknowledges that "Motions to Dismiss are rarely granted, especially as to a pro se Complainant." The Motion also acknowledges that "[i]n cases brought by pro se complainants, motions to dismiss for failure to state a claim should rarely be granted. *Instead, in such a case, a judge should ensure that he informs himself of all the available facts relevant to his decision, including the complainant's version of those facts*." Motion at 2. (italics added). The Court takes that concession by Freeport to heart and on that basis denies the motion at this time, subject to the content of Freeport's further submission, as explained below.

In the Argument section of its Motion, Freeport points to the statement of Mr. Estrada's brother, David Estrada, that Runyan Construction is the party responsible for the alleged violation. After repeating that Complainant has never been employed by Freeport, it adds that "Mr. Estrada has not made an allegation that he engaged in any protected activity of which Freeport was aware." Motion at 3. The Motion concludes that "Freeport has never taken any adverse action against Mr. Estrada . . . [and that] Mr. Estrada has failed to state a claim against Freeport for which relief may be granted."

The Court does not view the reasons advanced by Freeport for dismissal to be dispositive. It is not for Mr. Estrada to determine if Freeport is a proper party to this proceeding.

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[2] A declaration from Freeport's Health & Safety Manager states that Freeport has never employed Mr. Estrada. Exhibit B to Motion.

[3] Exhibit C to Motion (emphasis in Motion).

This observation is particularly true where a litigant is proceeding pro se and is not likely to have the fund of knowledge to make what is ultimately both a factual and legal determination and one for the Court to resolve.[4] In *Bryant v. Dingess Mine Service, Winchester Coals, Inc., Mullins Coal Company, Joe Dingess and Johnny Dingess,* 10 FMSHRC 1173, 1988 WL 409157 (Sept. 1988) ("*Bryant*"), the Commission, in the context of a discrimination complaint, addressed the issue of determining the proper respondents. As here, Mr. Bryant, was proceeding on his own behalf, MSHA having declined to file a complaint. The Commission noted that the issue of determining the parties who could be liable for a wrongful discharge "turns upon an examination of the true nature of the relationship existing between the parties . . . [and that] it is the conduct of the parties and not the terminology of the contract which determines the nature of the relationship."[5] *Id.* at *1178.

Therefore, at this point, the Court is without sufficient information regarding the relationship between Freeport McMoran and Runyan Construction including, *but not limited to*, issues such as the control and authority at the mine, the employer of Todd Hamilton, and the owner of the truck alleged to have safety issues,

Accordingly, for now at least, Freeport McMoran's Motion is DENIED.

/s/ William B. Moran
William B. Moran

[4] Even if, for the sake of argument, Mr. Estrada's view of the proper respondent were accepted, Runyan could move to add Freeport as a respondent to the proceeding.

[5] In *Bryant*, the Commission found that Dingess was an independent contractor in name only and that Mullins and Winchester acted more as operators of the mine and had actual control, with the independent contractor being akin to "an on-site supervisory agent" for them. *Id.* at *1180.

Distribution:

Fred Estrada, P.O. Box 404, Tyrone, New Mexico 88064

David Estrada, 3861 East New Berry Ave. SE, Mesa, AZ 85206

Michelle Witter, Esq., Jackson Kelly, PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

Runyan Construction Inc., P. O. Box 2827 Silver City, NM 88062

Runyan Construction Inc.,12 Truck By Pass Rd, Silver City, New Mexico 88061

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19TH STREET, SUITE 443
DENVER, CO 80202-2536
303-844-3577/FAX 303-844-5268

July 30, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION(MSHA)	:	Docket No. WEST 2010-365-M
Petitioner,	:	AC No. 04-05632-203553
	:	
v.	:	
	:	
NORTH COUNTY SAND & GRAVEL, INC.,	:	
Respondent.	:	Roadrunner 32

ORDER GRANTING THE SECRETARY'S MOTION TO AMEND PROPOSED PENALTY AND TO DENY RESPONDENT'S MOTION TO STRIKE

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty under Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (the "Mine Act"). This matter involves one citation issued to North County Sand & Gravel ("NCSG" or "Respondent") at its Roadrunner 32 Mine for an alleged violation of 30 C.F.R. § 56.15005. The Secretary proposed a penalty of $35,500.00 under her special assessment procedures. 30 C.F.R. § 100.5. A hearing was held on May 1, 2013. At the start of the hearing, NCSG filed a 43 page motion to strike the Secretary's specially assessed penalty proposal. Rather than file an opposition to NCSG's motion to strike, the Secretary filed a motion to amend the penalty proposal and to deny Respondent's motion to strike the special assessment because it is now moot. The Secretary's revised proposed penalty is $6,624.00 under her regular assessment formula. 30 C.F.R. § 100.3. Although NCSG does not oppose the penalty reduction, it argues that its motion to strike is not moot.

Pursuant to Commission Procedural Rules 10 and 55, I grant the Secretary of Labor's motion to amend the civil penalty proposal. 29 C.F.R. § 2700.10 & 55. As stated above, after reviewing the arguments and evidence presented in NCSG's motion to strike the special assessment, the Secretary determined that the conditions surrounding the alleged violation at issue did not warrant a special assessment. The Secretary therefore seeks to replace the special assessment with a new penalty proposal of $6,624.00.[1]

The Commission has acknowledged that the Commission's administrative law judges have the authority to grant the Secretary leave to amend citations and penalty proposals in the course of adjudication so long as the modification does not result in legal prejudice to the operator. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289-1290 (Aug. 1992). The Commission has

[1] NCSG contends that this proposal is inaccurate because it does not include a 10% reduction for good faith abatement. It argues that the regular assessment should be $5,961.00.

held that pleadings may be liberally modified absent a showing of legal prejudice to the party opposing the modification by analogy to Fed. R. Civ. P. 15(a). *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May. 1990). Therefore, leave for amendment "shall be freely given when justice so requires." *Wyoming* Fuel, 14 FMSHRC at 1290. I find that NCSG will not suffer any legal prejudice in amending the civil penalty because the Secretary seeks to reduce the proposed penalty to ensure compliance with MSHA's penalty regulations. The timing of the Secretary's proposal also does not preclude relief. *See Mammoth Coal Co.*, 33 FMSHRC 2348, 2349 (Sept. 2011) (ALJ) (*citing Consolidation Coal*, 2 FMSHRC 3, 5 (Jan. 1980)). The hearing in this case was held on May 1, 2013, but briefs have not been filed and a decision has not been issued.

Respondent argues that its motion to strike is not moot. First, it contends that the mootness doctrine does not apply in a case where the Commission exercises its policy jurisdiction delegated by Congress. 30 U.S.C. § 815(d). Second, Respondent argues that the motion to strike is not moot because the Secretary has not made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to reoccur. Lastly, it asserts that it intends to seek an award of attorney fees under the Equal Access to Justice Act (EAJA), which was the main issue in the motion to strike; thus, it prevents the motion to strike from being deemed moot.

I find that the procedural and substantive validity of the Secretary's initial special assessment no longer has any bearing upon the civil penalty proposed by the Secretary or to be assessed by the Commission. The Commission has noted that "it serves no purpose to force the Secretary to continue litigating the merits a citation that [he] has determined to be legally or otherwise unworthy of prosecution." *North American Drillers, LLC*, 34 FMSHRC 352, 359 (Feb. 2012).

While the "reasonableness" of the special assessment may be the ultimate issue, the motion to strike raises a myriad of subsidiary issues. The Secretary points out that there would be questions of (1) whether the Commission may strike the Secretary's penalty proposal without remanding for the Secretary to propose a new penalty; (2) whether the citation at issue was properly selected for special assessment and whether MSHA sufficiently informed NCSG of the reasons for that selection; (3) whether MSHA's special assessment procedures are procedurally valid; and (4) whether MSHA's special assessment procedures are substantively valid under the Mine Act. In effect NCSG is asking for a declaratory judgment upon all these issues.

The Commission has held that in order to obtain a declaratory judgment, the party seeking relief must show (1) "that there is an actual, not moot, case or controversy between the parties under the Mine Act;" (2) "that the threat of injury to the complainant is real, not speculative;" and (3) "that the issue as to which relief is sought is ripe for adjudication." *North American Drillers,* 34 FMSHRC at 360 (*citing Mid-Continent Resources,* 12 FMSHRC 949, 954 (May 1990)). NCSG did not make the necessary showing for declaratory relief. It has not identified the particular legal issues it wishes the court to decide, let alone demonstrate that those issues are fit for judicial decision without a special assessment at issue and a supporting record for the court to review.

It is important to understand that Commission judges assess penalties *de novo*. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). In determining the amount of the penalty, neither the judge nor the Commission is bound by a penalty recommended by the Secretary. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). The Secretary's penalty proposal can be used as a starting point in a judge's analysis of the penalty criteria in section 110(i), 30 U.S.C. § 820(i), of the Mine Act when assessing an appropriate civil penalty, but judges are not required to do so.

I find, based upon the Secretary's proposed amendment to his penalty proposal, that the motion to strike the civil penalty is moot for the purpose of this court assessing an appropriate civil penalty in this case, assuming I find that NCSG violated section 56.15005. My ruling is limited to this civil penalty docket and I make no finding as to the relevance or mootness of NCSG's motion to strike the Secretary's specially assessed penalty in an EAJA proceeding.

For the reason set forth above, the Secretary's motion is **GRANTED**.

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

Distribution:

Timothy J. Turner, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5708

C. Gregory Ruffennach, Esq., 1629 K Street, N.W. STE 300, Washington, D.C. 20036

RWM