

March 2015

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## **COMMISSION DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 4, 2015

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

v.

EXCEL MINING, LLC

Docket No. KENT 2009-1368

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, 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. (2012) (“Mine Act” or “Act”), Excel Mining, LLC (“Excel”) seeks review of a citation and an order issued to it by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). At issue are two violations of MSHA’s permissibility standard, 30 C.F.R. § 75.507-1(a),<sup>1</sup> for de-watering pumps in a return air course in Excel’s Van Lear Mine. Excel disputes the special findings made by the Secretary – in particular, the significant and substantial (“S&S”) and unwarrantable failure designations – and the basis for the penalty assessments with respect to the penalty criterion involving size of the controlling entity.

The Administrative Law Judge found that the violations were S&S and the result of Excel’s unwarrantable failure to comply. 33 FMSHRC 3221, 3225-27 (Dec. 2011) (ALJ); Jt. Ex. 9, Stips. 14, 21. He also found that Excel was highly negligent and assessed the penalties proposed by the Secretary. 33 FMSHRC at 3227-28.

For the reasons that follow, we affirm the Judge’s decision.

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<sup>1</sup> 30 C.F.R. § 75.507-1(a), provides that “[a]ll electric equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible except as provided in paragraphs (b) and (c) of this section.” The Judge found no contention that paragraphs (b) or (c) are applicable here. 33 FMSHRC at 3223.

## I.

### Facts and Proceedings Below

#### A. Factual Background

Excel's Van Lear Mine is an underground coal mine located in Martin County, Kentucky. The mine liberates 295,000 cubic feet of methane in a 24-hour period from one split of air and was subject to a 15-day spot inspection for methane at the time of the violations at issue in this case. Tr. 42-43.

On May 5, 2011, MSHA Inspector Dale Howell visited the Van Lear Mine to perform an electrical inspection. He was unable to inspect two de-watering pumps<sup>2</sup> – the P-40 and P-70 pumps located in the return air course approximately 60 feet from the VL-2 seals – because they were submerged in three feet of water. The VL-2 seals are breathable, permitting methane to in-gas and out-gas, which means that during times of high barometric pressure, methane is pushed back behind the seals, whereas during times of low barometric pressure, methane is liberated from the seals. Behind the VL-2 seals are an initial set of seals put in place at an earlier time. Before the installation of the VL-2 seals, an explosive mixture of methane was detected behind the seals. With the VL-2 seals in place, there is no way to determine the current condition of the initial seals. The pumps were located in an entry where four entries were compressed into one, causing the air from five returns from active sections to move past the pumps. At the time of Inspector Howell's visit on May 5, he noted that due to the accumulation of water, only two feet of passable airway travel were provided.

Jake Bowen, Excel's Assistant Chief Electrician, indicated to Inspector Howell that the water built up because the power had been off. Howell was concerned that, without the pumps, water would continue to build up, block air flow, and impede travel in the return air course. Inspector Howell indicated to Bowen that he would return to examine the pumps once the water was removed.

On May 11, Howell returned to the mine and found a foot of water surrounding the pumps. Howell examined the pumps for permissibility by using a feeler gauge and pulling on the cable entering the box to see if it moved. Any movement in the cable indicates that the cable is not properly packed. When a stuffing box is not properly packed, it is not permissible because in an explosion, flames could escape the container by traveling past the unsecured cable.

The permissibility requirements are designed to ensure that ignitions occurring within enclosures on mining equipment which contain electrical circuits will not escape into the mine

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<sup>2</sup> A de-watering pump consists of the pump itself, which sits on the mine floor, usually in water, and a starter box, which is located 20-30 feet away in a dry location, usually suspended from the roof. The two are connected by an inner machine cable. Where the cable enters the starter box, it is insulated and secured by packing glands, which are filled with fiberglass-type rope.



atmosphere. Specifically, the requirements are intended to prevent the ignition of an explosive air-methane mixture surrounding mine equipment. An ignition inside the enclosure will generate hot gases. When the equipment is permissible, these gases will escape through a flame-arresting path built into the enclosure and will cool as they pass through. Consequently, the gas escaping into the surrounding atmosphere will not ignite any external explosive air. *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1130-31 (May 2014).

MSHA regulations define permissible equipment as “all electrically operated equipment taken into or used in by the last open crosscut of an entry . . . [that is] designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and . . . to prevent, to the greatest extent possible, other accidents in the use of such equipment.” 30 C.F.R. § 75.2.

During his examination of the pumps, Inspector Howell found that the packing glands were missing from both pump starter boxes and that there was a problem with the handle on one of the boxes. When Inspector Howell pulled on the cables to the starter boxes, they moved back and forth. When he looked into the boxes, he did not see any stuffing. The cable to one of the boxes had been “whittled down with a knife so that it would fit into the pump,” and the stuffing boxes did not have proper lead ties to keep the packing glands from loosening. 33 FMSHRC at 3224; Tr. 27, 31-32.

Inspector Howell also found a note on top of the cover of the starter box with a non-functioning breaker handle. If functioning properly, the breaker handle would have enabled the breaker on the starter box to be reset without removing the cover of the box. Inspector Howell understood the note to be a warning to miners not to do anything that would trip the breaker, so as to avoid the need to take the cover off the box to reset it.

Inspector Howell spoke with Bowen, who indicated that he had worked at the mine for about a month and that during that time, the pumps had not been replaced and that no work or repair had been done on the pumps. Inspector Howell confirmed this with Excel’s Chief Electrician Rick James and by checking Excel’s examination record books, which did not indicate that the pumps had been changed in the weeks preceding Howell’s inspection.

Inspector Howell issued a citation for the P-40 pump and an order for the P-70 pump pursuant to section 104(d) of the Mine Act, 30 U.S.C. § 814(d), for failure to maintain the pumps in permissible condition. Howell designated the violations as S&S<sup>3</sup> and a result of Excel’s high negligence and unwarrantable failure.<sup>4</sup> MSHA proposed penalties of \$23,200 for the citation and \$25,800 for the order.

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<sup>3</sup> The S&S 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.”

<sup>4</sup> The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30

(continued...)

## **B. The Judge's Decision**

The Judge noted that Excel conceded the fact of the violations. The Judge concluded that the violations were S&S. Specifically, the Judge credited the testimony of Inspector Howell and MSHA's ventilation expert and supervisor, Craig Plumey. They testified that a spark from inside the pump starter box could escape into the mine atmosphere where it was likely that methane could be present in explosive levels due to the elevated levels of methane, out-gassing of the nearby sealed off area, and the convergence of five returns from active sections into the one entry where the pumps were located. Tr. 25, 30, 41-45, 89, 93-96, 102-04. The Judge found persuasive the weight of the evidence regarding the "existence of serious existing ignition sources in a mine liberating significant amounts of methane" and concluded that the Secretary had proven a reasonable likelihood that the hazard of an explosion contributed to by the permissibility violations would result in serious injury to ten miners, and would result in disruption of ventilation affecting fifty to sixty miners. 33 FMSHRC at 3225-26.

The Judge likewise concluded that the violations were the result of Excel's unwarrantable failure. He credited testimony that the conditions existed for about a month, which he found aggravating as to duration; that Excel had knowledge of them, given the requirement of weekly examinations and the presence of the note acknowledging the malfunctioning breaker handle; and that the conditions were extensive and obvious given that no packing was provided at all. Tr. 28-29, 31-34, 50-54. The Judge rejected Excel's argument that the electrical examiners' negligent conduct could not be imputed to it. 33 FMSHRC at 3226-27.

Having considered the six penalty criteria under section 110(i), the Judge assessed the same penalties the Secretary had proposed for both violations.

## **II.**

### **Disposition**

#### **A. S&S**

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 Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

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<sup>4</sup> (...continued)

U.S.C. § 814(d)(1), which 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."

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

*Id.* at 3-4 (footnote omitted).

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). When examining whether an explosion or ignition is reasonably likely to occur, it is appropriate to consider whether a “confluence of factors” exists to create such a likelihood. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988); *see Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 184 (Feb. 1991). Some of the factors to be considered include the extent of accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *See Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf*, 10 FMSHRC at 501-03.

Excel challenges the Judge’s S&S finding on three grounds: (1) that the Judge erred in failing to apply the “confluence of factors” standard; (2) that the Judge misapplied the consideration of “continued normal mining operations”; and (3) that the Judge erred in relying on “could” statements to support a finding of reasonable likelihood of the hazard contributed to by the violation resulting in an injury. Each of these arguments is related to step three of the *Mathies* test.

We conclude that the Judge properly applied the Commission’s *Mathies* analysis to the circumstances of this case and that substantial evidence supports the Judge’s findings that the violations were S&S.

Although the Judge did not specifically identify his findings under each step of *Mathies*, he made explicit findings tantamount to an analysis of each step. The Judge clearly found a violation under step one, as he noted that the parties conceded the fact of a violation. 33 FMSHRC at 3221, 3223. Regarding the fourth step of *Mathies*, a reasonable likelihood that the injury in question would be of a reasonably serious nature, the Judge credited the testimony of Inspector Howell that he “would expect to see fatal injuries from a resulting methane explosion and injuries from burns and smoke inhalation from a mine fire.” 33 FMSHRC at 3225; Tr. 48-49. Substantial evidence supports the Judge’s finding. Inspector Howell testified that ten people would be affected by a methane explosion, and up to fifty or sixty people would be affected in the event of a disruption in the mine’s ventilation system. 33 FMSHRC at 3225; Tr. 48-49.

While the Judge did not explicitly identify the hazard under step two of *Mathies*, he clearly understood that the hazard was the danger of a spark being released from the starter box into the mine atmosphere, thereby providing an ignition source for methane. 33 FMSHRC at 3223 (citing to Howell’s testimony that “when a stuffing box is not properly packed, it is not permissible because, in the event of an explosion, the flames can escape the container by traveling past the unsecured cable”).

The Judge focused his S&S analysis on the third step of *Mathies* – whether there is a reasonable likelihood that the hazard contributed to will result in an injury. 33 FMSHRC at 3224-26. Excel argues that the Judge misapplied applicable Commission precedent. Excel contends that the Judge erred by relying on “could” statements, arguing that the Commission has held that “statements that [a methane ignition] *could* occur, standing alone, do not support a finding that there was a reasonable likelihood of an ignition.” See *Zeigler Coal Co.*, 15 FMSHRC 949, 954 (June 1993) (emphasis added) (citing *Eastern Assoc. Coal Corp.*, 13 FMSHRC at 184-85; *Union Oil Co. of CA*, 11 FMSHRC 289, 298-99 (Mar. 1989)).

We conclude that the Judge properly applied Commission precedent in his S&S analysis.<sup>5</sup> The Judge explicitly credited testimony of Inspector Howell and ventilation expert Plumey regarding the hazardous conditions created by the violation. Having found that there were multiple sources of methane and specific evidence as to the potential for explosive accumulations, he concluded that there was a reasonable likelihood that an ignition or explosion would occur given the ignition sources of the non-permissible pumps. 33 FMSHRC at 3225-26.

The circumstances in this case, therefore, are similar to the issues addressed by the Commission in *Knox Creek Coal Corp.*, 36 FMSHRC 1128 (May 2014). In *Knox Creek*, the Commission concluded that the confluence of circumstances presented by the violative conditions sufficiently established that there was a reasonable likelihood of an ignition resulting from the non-permissible continuous mining equipment. The Secretary had presented expert testimony regarding the scope and nature of the hazardous conditions posed by the non-permissible equipment in the mine which liberated excessive methane. *Id.* at 1132-37.

The Judge’s decision also is consistent with longstanding Commission precedent. In *U.S. Steel Mining Co.*, 6 FMSHRC 1866 (Aug. 1984), the Commission upheld an S&S finding for a permissibility violation involving headlights, even though at the time of the violation there

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<sup>5</sup> Cases relied upon by Excel are clearly distinguishable from the present case. In *Zeigler*, the Judge had merely summarized the testimony without analyzing the confluence of factors necessary to establish a reasonable likelihood of an ignition. *Id.* at 954. Because the Judge failed to make necessary findings and reconcile conflicting testimony, the Commission vacated the Judge’s S&S determination and remanded for further analysis. *Id.* at 954-55. The Commission noted that speculative testimony, “standing alone,” does not support a finding of a reasonable likelihood of an ignition. See *id.* at 953-54. The Commission also recognized that the S&S terminology in section 104(d)(1) of the Mine Act refers to a violation which “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . .” (emphasis added), and that the “Secretary is not required to prove that the hazard contributed to will actually result in an injury causing event.” *Id.* at 953 nn. 5-6 (citing *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 673, 678 (Apr. 1987)). In *Eastern Associated* and *Union Oil*, the Commission found that the evidence was speculative and failed to support a finding of the reasonable likelihood of the hazard resulting in an injury. Here, the Judge did make findings as to the reasonable likelihood of the violative conditions contributing to an ignition, crediting Inspector Howell’s testimony.

appeared to be adequate ventilation in the mine, and mining was not taking place at the precise moment the citation was issued. *Id.* at 1869.

Similarly, in *U.S. Steel Mining Co.*, 8 FMSHRC 1284 (Sept. 1986), the Commission affirmed the Judge's S&S findings regarding a permissibility violation involving electric face equipment. The inspector had observed a bolt missing on the cover plate of the control compartment of a shuttle car. The control plate was designed to keep an ignition confined and the missing bolt could permit methane to enter the control compartment, causing an ignition. *Id.* at 1289-90. The mine liberated more than one million cubic feet of methane in a 24-hour period, and there had been a methane ignition in the year preceding the hearing. The Commission concluded that this was sufficient to uphold the S&S designation. *Id.*

The record in this case demonstrates an even greater potential for the hazard of methane ignition to occur. The Secretary's witnesses offered extensive testimony of potential methane sources. It is undisputed that this mine liberated high levels of methane. Tr. 42. The location of these pumps was in close proximity to a sealed off area known to release explosive amounts of methane. Tr. 42-43, 89. The pumps were also located in an entry where four entries converged into one, causing the air from five returns from active sections to move past the pumps. Tr. 103-04. Inspector Howell testified that methane could also escape from cracks in mine strata, such as in areas where there has been a roof fall, and that the mine had experienced a roof fall only one break in by the seals. Tr. 44.

Inspector Howell and Plumey, MSHA's ventilation expert, also testified as to their concerns about the reduced space for air to travel through the entry where the pumps were located due to the accumulation of water. 33 FMSHRC at 3225; Tr. 29-30, 49-50, 93-94. The egregiousness of the violations is heightened by the fact that the boxes contained no packing material at all. Without any packing material, the boxes could not properly contain any internal combustion. Tr. 25. Also significant is the fact that one of the cables into the box had been whittled down to fit into the opening. Tr. 32. Hence, substantial evidence supports a finding that there was a reasonable likelihood that the hazard of a spark being released from the starter box would result in a methane explosion causing serious injury.

The Judge's consideration of these factors demonstrates that he correctly considered the "confluence of factors" that could result in an ignition. As mentioned earlier, the confluence of factors analysis requires consideration of the particular circumstances in the mine, including the possible ignition sources, the presence of methane, and the type of equipment in the area. *See Utah Power & Light Co.*, 12 FMSHRC at 970-71; *Texasgulf*, 10 FMSHRC at 501-03. As discussed previously, the Judge acknowledged the multiple sources of methane in the entry where the pumps were located and that the non-permissible pumps posed an ignition hazard. 33 FMSHRC at 3225-26.

Excel's argument regarding continued normal mining operations is also unpersuasive. Excel appears to be arguing that, in considering continued normal mining operations, the Judge failed to take into account contrary evidence it presented that the ventilation was adequate and that it was unlikely that an explosive level of methane would be present in the mine. Excel's complaint that the Judge did not consider its witnesses' countervailing testimony is unavailing, as the Judge explicitly stated that he did consider this testimony. However, he found it unconvincing and credited the Secretary's witnesses. 33 FMSHRC at 3226.

Commission Procedural Rule 69(a) requires that a Commission Judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). A Judge is required to analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994). The Judge has adequately done so here.

Substantial evidence supports the Judge's conclusion that under continued normal mining operations there was a reasonable likelihood that the hazard would contribute to serious injuries to miners. As discussed above, the non-permissible pumps created potential ignition sources during continued normal mining operations. Water accumulation in the entry where the pumps were located obstructed air flow and potentially compromised ventilation in the mine. Water was an ongoing problem in this area of the mine. The entry where the pumps were located was the merging point of five active entries. If airflow diminished, the likelihood of explosive levels of methane accumulating would increase. Also, the location of the pumps was close to a sealed area known to liberate explosive levels of methane. Previously, a roof fall had occurred at the mine only one break in by the seals, from which methane could liberate. 33 FMSHRC at 3225. Thus, even if one were to accept the testimony of Excel's witnesses that the mine had sufficient velocity and volume of air at the time of the violations, the Judge credited the overwhelming testimony of Inspector Howell and MSHA ventilation expert Plumey demonstrating the potential for Excel's ventilation to be compromised and thus not adequately move and dilute methane. We conclude that the Judge's credibility determinations are reasonable and find no basis to overturn them.<sup>6</sup>

## **B. Unwarrantable Failure**

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, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

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<sup>6</sup> 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).

Whether the conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator’s knowledge of the existence of the violation, (6) the operator’s efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009).

Excel contends that the Judge failed to consider all the unwarrantable failure factors. However, the Judge did make findings on unwarrantable failure factors, including duration, extensiveness, obviousness, knowledge, danger, and lack of abatement. He found each of these factors to be aggravating. The Judge found that the conditions were obvious and extensive because the boxes lacked any packing at all. Regarding the danger of the violations, he found that the violations involved high gravity. He found that Excel’s failure to correct the condition was particularly egregious given the presence of a note on the P-70 pump which indicated that the breaker handle was not functioning, putting the operator on notice of the need for repair and maintenance. The Judge also relied on the fact that a simple examination would have informed the examiner that the pumps were not compliant. 33 FMSHRC at 3227. Substantial evidence supports the Judge’s findings as to these factors.

Likewise, substantial evidence supports the Judge’s finding as to duration and knowledge. Excel disputes the evidence that the conditions lasted for more than a month but can cite no record evidence in support of that position. Inspector Howell testified that Excel’s Assistant Chief Electrician James Bowen told him that the pumps had not been changed out and the mine’s record books corroborated this. Tr. 50-51. There was no indication that the pumps had been changed out or repaired between March 28 and May 11, 2009. Chief Electrician Rick James testified that the pumps must have been changed out between the last examination and Howell’s inspection, but provided no proof. Tr. 122-25. The Judge credited Inspector Howell’s testimony. In concluding that the conditions lasted for more than a month, the Judge drew an inference, which is reasonable and supported by the record. 33 FMSHRC at 3226. Such circumstantial evidence can suffice to satisfy the substantial evidence test to support a Judge’s finding. *See Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984) (holding that “the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence”).

Regarding the issue of knowledge, the Judge relied on the note on the starter box as putting Excel on notice that there was a problem with the pump. Excel contends that there is no evidence as to when the note was present or whether its agent wrote or saw the note. Regardless of whether Excel’s examiner saw the note during the last inspection of the pumps, the examiner should have been aware of the violation, given its obviousness. Also, the evidence with regard to duration established that the violations existed for more than a month, putting Excel on notice. Hence, the Judge’s finding that Excel knew or should have known of the violations is supported by substantial evidence.

The Judge did not address whether Excel was on notice that greater compliance efforts were necessary. As Excel points out, there is no evidence in the record that it had been previously cited for this condition or otherwise placed on notice. However, given the Judge's other findings that the conditions were dangerous, long standing, extensive, obvious, and that the operator knew or should have known of them, any potential mitigation related to notice of greater compliance could not overcome the overwhelming evidence here of other aggravating circumstances. See *Manalapan*, 35 FMSHRC at 294 ("The factor of dangerousness may be so severe that, by itself, it warrants a finding of unwarrantable failure."); *Jim Walter Res., Inc.*, 19 FMSHRC 480, 486-89 (Mar. 1997) (finding that evidence of obviousness and extensiveness of violations sufficient to support finding of unwarrantable failure).

Excel's argument regarding the imputation of negligence for unwarrantable failure purposes is misplaced. Here, the key points are the failure of Excel to provide the packing material initially in order to make the pumps permissible, the failure of Excel's examiners to note this deficiency, and the failure of Excel to correct it. The negligence of Excel's examiners is imputable to Excel for unwarrantable failure purposes. See *Mettiki Coal Corp.*, 13 FMSHRC 760, 772 (May 1991) (certified electrician acts as an agent when performing electrical inspections); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 197 (Feb. 1991) (miner who failed to make examinations found to be agent of operator for purposes of unwarrantable failure). Thus, the Judge did not err by imputing high negligence to Excel under the circumstances of this case.

Given the Judge's findings of aggravating circumstances, substantial evidence supports the Judge's conclusion that the violations amounted to Excel's unwarrantable failure to comply with the cited standard. Thus, we affirm the Judge's findings of unwarrantable failure and high negligence.

### **C. Penalties**

Excel's argument as to the consideration of "controller points" in calculating the appropriate penalties also lacks merit. Excel claims that MSHA erred in calculating the applicable points for a controlling entity under its regulations in 30 C.F.R. Part 100 and that the Secretary provided no evidence to support his assessment on this factor.<sup>7</sup>

As the Commission has recently emphasized, the Secretary's Part 100 penalty regulations are not binding on the Commission. *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) ("The Secretary's Part 100 regulations apply only to the Secretary's penalty proposals, while the Commission exercises independent authority to assess penalties pursuant to section 110(i) of the Mine Act.") (citations omitted); see also *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), *aff'g*, *Sellersburg Stone Co.*, 5 FMSHRC 287 (Mar. 1983)

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<sup>7</sup> The Secretary did present an exhibit attached to his Petition for Assessment of Penalty, which provided the production details related to Excel and its controlling entity, Alliance Resource Partners LP, for purposes of assigning points to calculate the proposed assessment under Part 100. Thus, contrary to Excel's assertion, there is evidence in the record to support the Secretary's proposed assessments.



("[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.").

The Judge considered all six factors under section 110(i) of the Mine Act, as required. The Judge found that Excel is a large operator with a significant history of violations. 33 FMSHRC at 3227. In fact, Excel conceded that it was a large operator. *See* Jt. Ex. 9, Stip. 6. The Judge also found that Excel abated the violations in good faith and that there was no evidence that the penalties would adversely affect Excel's ability to remain in business. The Judge referred to his previous analysis of the violations, where he concluded that they involved high gravity and high negligence, resulting from Excel's unwarrantable failure to comply. 33 FMSHRC at 3227. Thus, the Judge correctly applied section 110(i) and independently assessed penalties for the violations.

Excel does not dispute the Judge's decision with regard to his application of section 110(i) or his findings on the penalty criteria. Substantial evidence supports the Judge's findings. Accordingly, we see no grounds for disturbing the Judge's penalty assessments. Because the Judge was not bound by the Secretary's Part 100 regulations in assessing penalties, he was not required to explicitly address Excel's argument regarding the "controller points."

Accordingly, we affirm the Judge's penalty assessments.

### III.

#### Conclusion

For the foregoing reasons, we affirm the Judge's decision concluding that the violations were S&S and resulted from Excel's unwarrantable failure to comply. We also affirm the penalty amounts.

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

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

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 4, 2015

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

v.

SIGNAL PEAK ENERGY, LLC

Docket No. WEST 2010-1130

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

**DECISION**

BY: Nakamura, Acting Chairman; Cohen, Commissioner

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), and involves two citations issued to Signal Peak Energy by the Secretary of Labor in the wake of a roof fall (or “cave”) and a resulting injury.

Citation No. 8463717 alleges that Signal Peak failed to immediately notify the Department of Labor’s Mine Safety and Health Administration (“MSHA”) of an accident, in violation of section 50.10 of the Secretary’s reporting requirements. The Secretary alleges that the injury was reportable under section 50.10(b), or alternatively, that the roof fall was reportable under section 50.10(d).<sup>1</sup> Citation No. 8463718 alleges that Signal Peak failed to preserve the

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<sup>1</sup> Section 50.10 states in relevant part that an “operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred” involving:

. . .

(b) An injury of an individual at the mine which has a reasonable potential to cause death;

. . . or

(d) Any other accident.

30 C.F.R. § 50.10. For the purposes of subsection (d), the definition of “accident” includes “an unplanned roof or rib fall in active workings that impairs ventilation.” 30 C.F.R. § 50.2(h)(8).

accident site in violation of section 50.12.<sup>2</sup> The Secretary designated Citation No. 8463717 as significant and substantial (“S&S”),<sup>3</sup> and attributed both cited conditions to reckless disregard.<sup>4</sup>

The Administrative Law Judge upheld both citations in their entirety and assessed penalties that were substantially higher than those proposed by the Secretary. 34 FMSHRC 1346 (June 2012) (ALJ). The Commission granted Signal Peak’s petition for review with regard to all elements. For the reasons below, we affirm the Judge’s findings with regard to Citation No. 8463717 with the exceptions of the finding of a violation of 30 C.F.R. § 50.10(d) and the assessed penalty. We affirm the Judge’s findings with regard to Citation No. 8463718 in their entirety.

## I.

### **Factual and Procedural Background**

#### **A. Factual Background**

On December 23, 2009, a roof fall or “cave” occurred in the longwall gob at Signal Peak’s Bull Mountain Mine No. 1 in Roundup, Montana. This was the initial roof cave on the first longwall panel at the mine. Caves in the gob are an expected part of longwall mining, and the initial roof cave on a panel is often larger than subsequent falls. Tr. 93-94. The cave caused a blast of air which damaged approximately 78 stoppings, and propelled miner Mike Stewart 50-80 feet. 34 FMSHRC at 1352; Tr. 62, 123. When Stewart was found by other miners shortly after the blast, he was in severe pain, had difficulty breathing and moving, had a significant lump on his back, and stated that he was not okay. He was loaded onto a backboard and slowly transported to the surface. 34 FMSHRC at 1356, 1358; Tr. 158, 162, 165, 429-32.

Shift foreman and EMT Ben Harcourt<sup>5</sup> performed an evaluation as Stewart was transported to the surface. He determined that Stewart had a cut on his head, noticeably broken ribs, pain in his chest and back, trouble breathing, and signs of shock. He stated that he found no obvious signs of concussion, internal bleeding, or a punctured lung, and found that Stewart had good respiration and circulation. Tr. 367-76. However, Harcourt was not able to take Stewart’s pulse, blood pressure or oxygen level, and admitted that without these three critical components he did not have an accurate assessment of Stewart’s vital signs. Tr. 391-92. He nevertheless

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<sup>2</sup> Section 50.12 states in relevant part: “no operator may alter an accident site . . . until completion of all investigations pertaining to the accident.” 30 C.F.R. § 50.12.

<sup>3</sup> The “significant and substantial” language is found in section 104(d)(1) of the Act, which refers to “a violation of any mandatory health or safety standard . . . of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1).

<sup>4</sup> The Secretary’s regulations for proposing penalties state that “reckless disregard” is “conduct which exhibits the absence of the slightest degree of care.” 30 C.F.R. § 100.3, Table X.

<sup>5</sup> Harcourt had become certified as a basic level EMT only eight months earlier, and this was the first serious traumatic injury he had attended to. Tr. 356-57, 385-86.

concluded that the injuries were not life-threatening. Tr. 380-82. Although Harcourt's authority included the ability to call MSHA in the event of a reportable injury, he decided not to do so. Tr. 389, 393.

Once Stewart was transferred to an ambulance, EMT Kerry Halverson performed another evaluation and observed largely the same injuries; however, he concluded that there was a reasonable potential for death, because Stewart's back pain and the distance he was thrown raised the possibility of spinal damage and internal injury. 34 FMSHRC at 1357; Tr. 247-50.

Signal Peak's Safety Director, Thomas Rice, was called at home and informed of the accident while Stewart was being transported out of the mine. Rice began driving to the mine, was called again and informed that Stewart was almost to the surface, and pulled over to wait for the ambulance, which he then followed to Roundup Memorial Hospital. Once at the hospital, Rice spoke with Harcourt, the ambulance personnel, and the attending physician. Rice testified that they all stated the injuries were not life-threatening, so he decided the injury was not reportable at that time. 34 FMSHRC at 1362-64; Tr. 452-58. Stewart was then transferred by life-flight to another hospital, in Billings, Montana, where it was ultimately determined that he had a burst thoracic vertebra, and other injuries including fractures of the left scapula, ribs, and sternum. 34 FMSHRC at 1349.

MSHA learned of the incident from a newspaper reporter who called five days later, on December 28, 2009, to inquire about an accident which had occurred at Signal Peak's mine. *Id.* MSHA Temporary Field Office Supervisor David Hamilton spoke with Rice on the phone that afternoon. The Judge credited Hamilton's testimony that Rice was not forthcoming with information regarding the roof fall or Stewart's injuries. *Id.* at 1354; Tr. 212-13.

The next morning, MSHA Inspector Wayne Johnson visited the hospitals to view Stewart's medical records and speak with medical personnel. The Judge credited Johnson's recollection of his conversation with Stewart's attending physician, in which the physician told Johnson that he considered Stewart's injuries to be life-threatening due to the risk of internal injury caused by the miner "being blasted 50 to 80 feet down an entry." 34 FMSHRC at 1349-50; Tr. 49-50.

Johnson traveled to the mine that afternoon. After speaking with Harcourt and other mine personnel regarding Stewart's initial condition and the extent of the blast, Johnson concluded that Signal Peak failed to timely report an immediately reportable accident. He then issued Citation No. 8463717. Specifically, Johnson concluded that Stewart's injuries were reportable because they were obviously life-threatening, and that the roof fall was reportable because it impaired ventilation throughout the mine. 34 FMSHRC at 1351-53, 1377; Tr. 66-67, 77-78, 88; Gov. Ex. 1. Johnson also discovered that Signal Peak had mined past the accident site before MSHA had an opportunity to investigate, and issued Citation No. 8463718, alleging that Signal Peak had failed to preserve the accident site. 34 FMSHRC at 1351-52; Tr. 90-91; Gov. Ex. 2.<sup>6</sup>

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<sup>6</sup> Johnson also issued an uncontested section 103(k) withdrawal order. 34 FMSHRC at 1351 n.11. Section 103(k) states in part that "[i]n the event of any accident . . . an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine." 30 U.S.C. § 813(k).

Ultimately, MSHA Roof Specialist Pete Del Duca determined that the mine had a massive 200 foot thick sandstone roof, which, because it was not well-jointed, had trouble breaking up and caving in. By the time the initial cave occurred, mining had progressed 220 feet along a 1250 foot face, 10 to 12 feet high. 34 FMSHRC at 1378; Tr. 282-283, 296. When the initial cave finally occurred, it caused “a very big blast because all that air [had] to be displaced.” Tr. 279. Prior to the MSHA investigation, Signal Peak had done nothing to prevent a similar blast from the initial cave in the next longwall panel to be mined. 34 FMSHRC at 1378-79; Tr. 300-04. Because of MSHA’s intervention, the mine’s roof control plan was modified to encourage earlier and smaller falls on future longwall panels. 34 FMSHRC at 1378; Tr. 298-99, 301, 309-13, 525.

## **B. The Judge’s Decision**

With respect to Citation No. 8463717, the Judge found that Signal Peak failed to notify MSHA within 15 minutes once it knew of “injuries . . . which have a reasonable potential to cause death” in violation of section 50.10(b). He found that any reasonable person should have known almost immediately that such a reasonable potential for death existed upon finding Stewart, based on the distance he was thrown, his difficulty moving, and his obvious back injury. 34 FMSHRC at 1368-69.

Alternatively, the Judge also found that Signal Peak failed to timely notify MSHA once it knew of “an unplanned roof [ ] fall in active workings that impairs ventilation,” in violation of section 50.2(h)(8), as incorporated through section 50.10(d). He found that the roof fall clearly impaired ventilation by damaging 78 stoppings, was unplanned because it exceeded expectations, and was in active workings despite occurring in the gob because it affected ventilation in active workings. *Id.* at 1376-77, 1380-82.

The Judge affirmed the S&S designation for Citation No. 8463717. He found that the failure to report delayed MSHA involvement, thereby exposing miners to uncorrected conditions; that such exposure was likely to occur, noting that the necessary changes to the roof control plan would not have happened without MSHA intervention; and that a similar fall would likely result in similarly serious injuries as those sustained by Stewart. *Id.* at 1371-74.

In finding the violation attributable to reckless disregard, the Judge noted aggravating factors: Rice’s unwillingness to provide details to Hamilton over the phone, and Signal Peak’s general failure to take corrective action after the roof fall. The Judge rejected Signal Peak’s contention that its determination not to report Stewart’s injury was reasonable. *Id.* at 1374-75.

Having found that the roof fall and/or injury constituted a reportable accident, and finding it undisputed that Signal Peak had mined past the site where the event occurred, the Judge found that Signal Peak failed to preserve an accident site in violation of section 50.12. Accordingly, he affirmed Citation No. 8463718. *Id.* at 1375. The Judge also upheld the reckless disregard designation, noting that Signal Peak took no steps to notify MSHA before resuming mining in the area. *Id.* at 1376.

Based primarily on his determination that both violations constituted egregious failures and that the operator placed miners in danger by impairing MSHA's ability to investigate, the Judge increased the penalty for Citation No. 8463717 from \$49,500 to \$74,250, and increased the penalty for Citation No. 8463718 from \$1,900 to \$9,500. *Id.* at 1346 n.1, 1382-83.

## II.

### Disposition

#### A. Citation No. 8463717

##### 1. Violation

###### a. *Section 50.10(b)*

Section 50.10(b) requires an operator to “immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving . . . an injury . . . which has a reasonable potential to cause death.” 30 C.F.R. § 50.10(b). We affirm the Judge’s finding that any reasonable person should have known immediately upon finding Stewart that his injuries had a reasonable potential to cause death.<sup>7</sup> 34 FMSHRC at 1368. The failure to notify MSHA of the injuries during the following five days clearly violated section 50.10(b).

As a preliminary matter, we note that the Judge defined a “reasonable potential” as a “not far-fetched” possibility, *id.*, while Signal Peak contends it is synonymous with “life-threatening.” SP Br. at 11-12. As discussed below, we conclude that Stewart’s injuries clearly fall within the realm of a “reasonable potential to cause death,” without the need to further define the term reasonable potential to cause death.<sup>8</sup>

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<sup>7</sup> The Judge also delineated subsequent times at which it was clear that Stewart’s injuries constituted a reportable accident. 34 FMSHRC at 1369. Although we agree that Signal Peak should have understood the need to report the accident to MSHA at each of these later moments, we need not discuss them in detail. The reporting period clearly commenced when Harcourt reached Stewart after the blast which threw him 50 to 80 feet.

<sup>8</sup> Commissioner Cohen disagrees with his colleagues that the Commission should not take this opportunity to define the phrase “reasonable potential to cause death” contained in 30 C.F.R. § 50.10(b). The Judge rejected Signal Peak’s argument that a miner must sustain an injury that qualifies as “life-threatening” to trigger the reporting requirements of section 50.10(b). 34 FMSHRC at 1369. The Judge concluded that Signal Peak’s position was contradicted by the plain language of the standard which requires only “a reasonable *potential* to cause death.”

The term “potential” is commonly understood to mean “something [that is] ‘capable of being,’ or something which presents a ‘possibility,’ albeit not yet in existence.” *Id.* at 1368.

(continued...)

Substantial evidence amply supports the Judge's finding that Stewart's condition evinced a reasonable potential to cause death.<sup>9</sup> Stewart had been thrown a great distance,<sup>10</sup> and had a significant back protrusion. 34 FMSHRC at 1368-69. In addition, in finding that these signs indicated a reasonable potential for death, the Judge relied on Stewart's own testimony that he told nearby miners he was not okay, was in great pain, and had trouble moving. *Id.* at 1357-58.<sup>11</sup> He also credited EMT Halverson's testimony that the blast and impact could easily have caused internal injury and raised concerns that Stewart had suffered spinal damage. *Id.* at 1357. The Judge also based his findings on miner Brandon Mobley's testimony that, in view of Stewart's pain, back injury, difficulty moving and trouble breathing, Mobley believed Stewart was "really hurt." *Id.* at 1356; Tr. 156-63.

Notably, the preamble to the final rule for section 50.10 includes major upper body blunt force trauma in a list of types of injuries which pose a reasonable potential for death. 71 Fed. Reg. 71,430, 71,434 (Dec. 8, 2006). In addition, Stewart's obvious back injury, pain, difficulty moving, and difficulty breathing increased the possibility that his injuries could be fatal. Stewart's initial condition presented a sufficient possibility of internal injury and spinal damage

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<sup>8</sup> (...continued)

Commissioner Cohen agrees with the distinction identified by the Judge -- a "reasonable potential to cause death" is not synonymous with "life threatening." The Judge correctly discerned that the reporting requirement in section 50.10(b) contemplates a subjective immediate evaluation governed by the concern for the "possible," not an objective clinical examination as suggested by Signal Peak. *See* SP Br. at 12-14. The Judge's analysis is consistent with the Commission's decision in *Cougar Coal Co.*, 25 FMSHRC 513, 521 (Sept. 2003), in which we stated that "the decision to call MSHA cannot be made upon the basis of clinical or hypertechnical opinions as to a miner's chance of survival. The decision to call MSHA must be made in a matter of minutes after a serious accident." *See also* 71 Fed. Reg. 71,430, 71,434 (Dec. 8, 2006).

Commissioner Cohen suggests that the Commission adopt the following definition of "reasonable potential to cause death": The reporting requirement of section 50.10(b) is triggered when a miner is injured in a manner that would cause a reasonably prudent mine operator to consider the possibility that the injured miner's life may be in jeopardy. Obviously, because the extent of an injury is not always immediately apparent, the totality of the circumstances, including how the injury occurred, should be considered by the mine operator.

<sup>9</sup> When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>10</sup> The Judge credited Inspector Johnson's testimony that both mine and hospital personnel informed him that the blast had thrown Stewart 50-80 feet. 34 FMSHRC at 1352. Even the 40 foot estimate provided by Rice is a significant distance. Tr. 459.

<sup>11</sup> According to Inspector Johnson, Harcourt told him that Stewart "was in excruciating pain, ten plus on a pain scale, pretty critical." Tr. 70.

that a reasonable person should have recognized that an injury with a reasonable potential to cause death had occurred.

Signal Peak argues that the Judge erred in giving more weight to external indicators of injury than to Harcourt's evaluation of the actual injuries, which Signal Peak claims established that Stewart's life was not in danger. However, the evaluation did not establish that Stewart's injuries posed no reasonable potential for death. While Harcourt did find that Stewart had some stable vital signs and no obvious signs of concussion or internal injury, Tr. 370-74, the evaluation was neither conclusive nor exhaustive. Harcourt testified that he did not take all of Stewart's vital signs and therefore could not get an accurate assessment, and that he "absolutely" did not know what was wrong with Stewart. Tr. 391-92, 396. Clearly, Stewart was severely injured and the fortunate fact that he did not die from the injuries does not detract from a finding that the readily observable nature of his injuries presented a reasonable potential to cause death.

Section 50.10 requires operators to notify MSHA "immediately . . . at once without delay and within 15 minutes." 30 C.F.R. § 50.10. Prompt reporting is clearly essential to the standard, and requires a prompt determination as to whether an accident has occurred. *See Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989) (finding that section 50.10 "accords operators a reasonable opportunity for investigation," but that the investigation "must be carried out . . . in good faith without delay and in light of the regulation's command of prompt, vigorous action"); *see also* 71 Fed. Reg. 12,252, 12,260 (Mar. 9, 2006) (noting that "[t]aking too much time to determine whether . . . an accident occurred" is a common reason for violations of section 50.10).

Given the need for a prompt determination inherent in section 50.10, the Commission has found that readily available information such as the nature of the accident is highly relevant in determining whether an injury is reportable, while permitting operators to wait for a medical or clinical opinion would "frustrate the immediate reporting of near fatal accidents." *Cougar Coal Co.*, 25 FMSHRC 513, 520-21 (Sept. 2003) (holding that an electric shock, 18-foot fall, and head injury had a "per se" reasonable potential for death); *see also Mainline Rock & Ballast, Inc.*, 693 F.3d 1181, 1188-89 (10th Cir. 2012) (holding that an operator should have been alerted to the potential for death by the fact that the miner was pulled through a roller). Here, the Judge properly considered the nature of the accident, i.e., being propelled a great distance, as well as readily observable indicators of trauma such as Stewart's severely injured back, difficulty moving, and great pain.

Although the testimony and the parties' arguments primarily focused on Safety Manager Rice's actions, Harcourt testified that he had the authority to notify MSHA in the event of an accident resulting in a reasonable potential to cause death, Tr. 389, and he failed to do so. His failure to call, or to have a call made, was sufficient to constitute a violation. In this respect, an operator may not designate one specific person, such as a safety manager, to place the immediate call to MSHA. Once a person with sufficient authority to call learns of an event injuring a miner, the clock begins to run on the period for evaluation of whether the injury presents a reasonable potential to cause death and a determination of whether a call is required.



We emphasize that an operator, in determining whether it is required to notify MSHA under 30 C.F.R. § 50.10, must resolve any reasonable doubt in favor of notification. As stated in the preamble to the final rule addressing 30 C.F.R. § 50.10 in 2006:

In emergencies, where delay in responding can mean the difference between life and death, immediate notification leads to the mobilization of an effective mine emergency response. Immediate notification activates MSHA emergency response efforts, which can be critical in saving lives, stabilizing the situation, and preserving the accident scene. Immediate notification also promotes Agency assistance of the mine's first responder efforts. In other situations, it allows for a range of appropriate Agency responses depending on the circumstances. It alerts MSHA to trends or warning signals that can trigger a special inspection, an investigation, or targeted enforcement. This communication also encourages operators and miners to work with MSHA to develop procedures that prevent incidents from resulting in more hazardous situations, ultimately leading to disasters.

71 Fed. Reg. at 71,431. Although notification of MSHA may result in delays in production, Congress declared in section 2(a) of the Mine Act that “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner.” 30 U.S.C. § 801(a).

In addition, as the Commission stated in *Cougar Coal*, “[i]n the field, the decision to call MSHA cannot be made upon the basis of clinical or hypertechnical opinions as to a miner's chance of survival. The decision to call MSHA must be made in a matter of minutes.” 25 FMSHRC at 521. Yet, before speaking with Harcourt and deciding not to report the injury, Rice spent 30 minutes in his car waiting for the ambulance. During that time, he called the mine to find out whether the ambulance had left, but did not gather any substantive information from on-site personnel regarding the roof fall or Stewart's injuries. Tr. 453, 501. Rice's testimony indicates that he waited for a medical opinion because he was hoping for a level of certainty with respect to Stewart's prognosis. Tr. 472-74, 479. By waiting for a medical opinion at the hospital rather than spending that time gathering readily available information, information which in this case would have been sufficient to trigger the notification requirement, Rice failed to conduct a sufficiently prompt investigation. *See, e.g., Consolidation Coal*, 11 FMSHRC at 1936-38 (finding that a supervisor's 45-minute investigation was not sufficiently prompt, because he could have ascertained the necessary facts to determine that an accident occurred during the initial call informing him of the incident).

Given the mechanism of Stewart's injuries – being propelled 50-80 feet – and the apparent severity of his injuries, whether the incident was immediately reportable was not a close call. The Judge properly found on the basis of substantial evidence that a reasonable person would have concluded that Stewart's injuries posed a reasonable potential for death based on the available information.

b. Section 50.10(d)

Section 50.10(d) states generally that “any other accident” is also immediately reportable. 30 C.F.R. § 50.10(d). For the purposes of the Part 50 reporting requirements, the definition of “accident” includes “an unplanned roof or rib fall *in active workings* that impairs ventilation or impedes passage.” 30 C.F.R. § 50.2(h)(8) (emphasis added). It is undisputed that the roof fall at issue occurred in the longwall gob, which is not an active working.<sup>12</sup> 34 FMSHRC at 1377 n.54. The Judge nevertheless accepted the Secretary’s alternate theory of liability, finding that the roof fall was an accident as defined in section 50.2(h)(8) because it affected ventilation in active workings. *Id.* at 1381-82. We find that the regulatory language plainly requires that the fall occur in active workings; therefore the roof fall here was not an accident as defined in section 50.2(h)(8), and the failure to report it was not a violation of section 50.10(d).

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. *Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (Jan. 1998) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted)). The language of section 50.2(h)(8) is clear. The regulation addresses roof falls *in active workings*; use of the word “in” precludes a finding of an accident where the fall occurred outside of active workings.

We note that the Secretary’s litigating position in this matter, i.e., that roof falls in the gob are immediately reportable if they impair ventilation in nearby active workings, is not reflected in MSHA’s Program Policy Letter regarding the “Reporting of Unplanned Roof Falls in Accordance with 30 C.F.R. § 50.10.” PPL No. P12-V-03 (May 11, 2012). The Letter repeatedly uses the phrase “in active workings” when enumerating the types of falls that must be reported, and states that “[a]n active working does not include worked out areas or areas adjacent to active workings.” *Id.* This exclusion of nearby areas suggests that MSHA has traditionally interpreted the “in active workings” requirement for unplanned roof falls more narrowly.<sup>13</sup>

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<sup>12</sup> “Active workings” are defined as “any place in a coal mine where miners are normally required to work or travel.” 30 U.S.C. § 878(g)(4).

<sup>13</sup> While the Secretary’s Program Policy Letters cannot prescribe binding rules of law, *see The American Coal Co.*, 34 FMSHRC 1963, 1970-71 (Aug. 2012), they can be instructive. The Secretary’s Program Policy Manual can clarify or explain a regulation’s language and therefore provide instruction to mine operators. *See Tilden Mining Co.*, 36 FMSHRC 1965, 1969-70 (Aug. 2014). MSHA considers Program Policy Letters “an integral part of the Program Policy Manual.” MSHA, *Program Policy Manual*, [www.msha.gov/REGS/COMPLIAN/PPM/PMMAINTC.HTM](http://www.msha.gov/REGS/COMPLIAN/PPM/PMMAINTC.HTM) (last visited Feb. 25, 2015).

Only a fall which occurs in active workings may be an “accident” as defined in section 50.2(h)(8), and the fall here occurred outside of active workings in the longwall gob.<sup>14</sup> Signal Peak’s failure to report the roof fall did not constitute a failure to report an accident in violation of section 50.10(d).<sup>15</sup> However, because Stewart’s injuries constituted an “accident” pursuant to section 50.10(b), the Judge’s finding of a violation is affirmed.

## 2. S&S

As a threshold matter, only violations of mandatory standards may be designated as S&S. *See supra* n.3. We find that the Judge properly rejected Signal Peak’s claim that section 50.10 is not a mandatory standard. 34 FMSHRC at 1348. Section 50.10 was initially issued as a regulation. *Cyprus Emerald Res. Corp.*, 195 F.3d 42, 44 (D.C. Cir. 1999). However, in 2006, a revised section 50.10 was published as an Emergency Temporary Standard (“ETS”), then adopted as a permanent standard in a Final Rule, in accordance with section 101 of the Act.<sup>16</sup> 71 Fed. Reg. 12,252 (Mar. 9, 2006); 71 Fed. Reg. 71,430 (Dec. 8, 2006); *see Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 651 n.4 (Aug. 2008).

Signal Peak claims that the final rule merely revised a regulation and showed no intent to create a mandatory standard. These arguments were addressed in *Pine Ridge Coal Co.*, 33 FMSHRC 987 (Apr. 2011) (ALJ). The Judge in that case held that section 50.10 was properly promulgated according to procedures outlined in section 101, and that publishing the ETS and Notice of Formal Rule Making in the Federal Register provided notice to operators of the Secretary’s intent to enforce section 50.10 as a mandatory standard. *Id.* 1003-10. We agree.

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<sup>14</sup> Although the roof fall caused an air blast which damaged stoppings in active workings, and thus impaired ventilation, Del Duca testified that the stoppings were not hit with anything from the roof fall other than the air blast. Tr. 331; 34 FMSHRC at 1381 n.57. We do not address the question of whether a roof fall outside of active workings which expels physical debris or other material into active workings could be considered an “accident” within the meaning of 30 C.F.R. § 50.2(h)(8).

<sup>15</sup> We can understand that from a policy standpoint, it might be useful to consider an unplanned roof fall in the gob which impairs ventilation or impedes passage in active areas as a reportable accident under 30 C.F.R. § 50.10(d). If Mike Stewart had not been injured in this accident, under our holding today the roof fall would not have been an occurrence which needed to be reported to MSHA. If that had been the case, the resulting changes to Signal Peak’s roof control plan, which encouraged earlier and smaller caves on future longwall panels, 34 FMSHRC at 1378-79, would not have been made. However, we are constrained by the language of the regulation to rule as we have.

<sup>16</sup> Section 101(b) states that the Secretary shall provide an Emergency Temporary Standard if he determines that miners are exposed to a grave danger. The provision outlines the process for transforming the temporary standard into a mandatory standard through notice-and-comment rulemaking, as described in section 101(a). 30 U.S.C. § 811(b).

Having determined that Citation No. 8463717 *may* be designated as S&S, we also conclude that the Judge properly affirmed the S&S designation. 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 Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission set forth the following four-part test to evaluate whether a violation is properly designated as S&S:

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

*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). 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).

Signal Peak contends that the failure to timely report the accident to MSHA did not contribute to a hazard, because MSHA's involvement was not necessary to remedy Stewart's injuries. This interpretation unduly narrows the purpose of section 50.10. While immediate rescue efforts are a significant concern, section 50.10 is also intended to facilitate MSHA's ability to investigate and remedy the cause of the accident. The preamble to the final rule states:

Not only can [timely reporting] be vital to the saving of lives, but it can be instrumental to having expert Agency personnel at the scene with authority to assure that the accident site remains undisturbed and preserved for investigation into causes.

. . . roof falls . . . for example, may necessitate critical, pro-active corrective actions and the need for emergency response assistance.

71 Fed. Reg. at 71,435. This is properly reflected in the Judge's determination that Signal Peak's failure to immediately report the accident created a hazard by interfering with MSHA's ability to investigate the cause of the accident, thereby exposing miners to the danger resulting from roof conditions resulting in an unexpectedly massive initial roof fall.<sup>17</sup> 34 FMSHRC at 1371-73.

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<sup>17</sup> Although the accident at issue is Stewart's injury rather than the roof fall, an investigation into the cause of the accident necessarily would, and ultimately did, lead MSHA to discover the roof conditions that caused the unexpectedly massive initial fall and to suggest means (hydrofracking) to prevent such an event on future panels. Tr. 310.

Signal Peak also contends that the hazard was unlikely to result in a serious injury in the context of continuing mining operations. Specifically, Signal Peak states that a similarly dangerous roof fall was unlikely to recur, noting that subsequent falls on the cited panel would have been smaller than the initial fall which injured Stewart, and that MSHA permitted mining to resume on the cited panel without requiring modifications to the roof control plan. However, these factors at most establish that a similar fall was unlikely on the *cited* longwall panel.<sup>18</sup>

We conclude that substantial evidence supports the Judge's finding that the hazard contributed to the reasonable likelihood of a similarly dangerous cave when Signal Peak began its *subsequent* longwall panel. 34 FMSHRC at 1373. Signal Peak's chief engineer agreed with the inspector that MSHA's recommended changes to the roof control plan were necessary and effective in preventing a similarly large blast on the next longwall panel. Tr. 298-99, 523-25. These changes did not originate with Signal Peak. Following the roof fall and ensuing blast of air on December 23, the operator simply fixed the ventilation damage and resumed mining. 34 FMSHRC at 1371. In light of Signal Peak's failure to initiate contact with MSHA or preserve the accident site, the investigation and modification of the roof control plan prior to beginning the next panel would not have occurred without MSHA's intervention.

Signal Peak does not dispute that any injury that occurred from a blast resulting from a roof fall in the gob of the size that occurred on December 23, 2009, would be of a reasonably serious nature. Accordingly, we affirm the Judge's finding that the violation was significant and substantial.

### **3. Reckless Disregard**

The Judge based his determination of reckless disregard on findings regarding several elements of Signal Peak's conduct, all of which are supported by the record. First, the Judge found evidence, based on Rice's evasiveness during his phone conversation with MSHA Supervisor Hamilton, that Signal Peak knew it had a duty to report immediately but failed to do so. 34 FMSHRC at 1374. He relied on Hamilton's testimony, which he deemed "highly credible," that he had to pry every bit of information from Rice. *Id.* at 1354; Tr. 212-15. A Judge's credibility determination is entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992).

Second, the Judge found that Signal Peak failed to take any steps to ensure that the roof fall was investigated, thereby placing miners at future risk. 34 FMSHRC at 1374. It is uncontested that Signal Peak did not initiate contact with MSHA after the accident, and Signal Peak presented no evidence of an independent investigation. As discussed above, without an

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<sup>18</sup> MSHA's inspector and roof specialist conceded that the initial fall on a longwall panel is generally the largest. Tr. 93-94, 282-83. However, the record does not indicate whether subsequent falls would still have been large enough to cause serious injury. It is also true that MSHA allowed mining to resume on the cited panel without requiring modifications to the roof control plan. Tr. 302-03. But this happened only after additional safety precautions were put in place at MSHA's instigation. Tr. 304-06.

investigation, necessary changes to the roof control plan would not have been made, and miners would have been at risk on subsequent panels. We conclude that substantial evidence supports the Judge's finding of reckless disregard.

The Judge considered and rejected Signal Peak's argument that its determination that the injuries were not immediately reportable was reasonable. Instead, he found that Signal Peak missed several discrete points at which it was clear from Stewart's condition that Signal Peak had an obligation to report immediately. In short, the duty to report was obvious at multiple points in time. 34 FMSHRC at 1374. As discussed above, *see supra* p. 6, substantial evidence supports the Judge's determination that the operator should have known that Stewart's injuries were immediately reportable, i.e., that it was unreasonable to conclude that the injuries were not immediately reportable.

To summarize the Judge's findings, all of which are supported by substantial evidence: (a) a roof fall in the longwall gob occurred with such force that it damaged 78 stoppings; (b) the blast picked up miner Mike Stewart and threw him 50 to 80 feet; (c) Stewart suffered severe and obvious injuries, had trouble moving and trouble breathing, and was in "excruciating" pain; (d) it took one-and-a-half hours to bring Stewart out of the mine, during which time it was impossible to fully take his vital signs; (e) Stewart was taken by ambulance to a hospital and then by life flight to another hospital; (f) the doctor at the first hospital believed "absolutely" that Stewart's injuries were life-threatening; (g) Signal Peak never contacted MSHA about the accident; (h) rather, as the Judge noted, 34 FMSHRC at 1359, Signal Peak's concern was to resume production, which it did three days later, after fixing the ventilation damage; (i) in resuming mining, Signal Peak changed conditions at the accident scene, thereby impeding any investigation by MSHA; (j) Signal Peak did nothing to investigate causes of the enormous roof fall and resulting blast or to prevent recurrences in future longwall panels; (k) MSHA found out about the accident from a newspaper reporter, five days after it occurred; (l) when contacted by MSHA, Signal Peak's Safety Director was "anything but forthcoming" in answering questions; and (m) Signal Peak filed the Form 7000-1 accident report one-and-a-half hours after the Safety Director first spoke with MSHA. This pattern of behavior fully supports the Judge's conclusion that Signal Peak acted with reckless disregard in failing to report Stewart's injury to MSHA.

## **B. Citation No. 8463718**

Section 50.12 prohibits operators from altering an "accident site" before investigations are completed. 30 C.F.R. § 50.12. Signal Peak does not deny that it resumed mining at the site of Stewart's injury before MSHA was able to investigate, but contends that it did not fail to preserve an accident site in violation of section 50.12 "[f]or the same reasons" that it did not fail to report an accident in violation section 50.10, i.e., the injury was not an accident. SP Br. at 27. Having already found that the Judge properly identified Stewart's injury as a reportable accident, *see supra* pp. 6-8, we affirm the Judge's finding that Signal Peak failed to preserve the accident site in violation of section 50.12.<sup>19</sup>

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<sup>19</sup> Signal Peak does not explicitly challenge the Judge's finding of reckless disregard for Citation No. 8463718. However, if Signal Peak intended to also challenge the reckless disregard (continued...)

### C. Penalties

In assessing penalties, the Judge raised the amount for Citation No. 8463717 from \$49,500 as proposed by the Secretary to \$74,250, and similarly raised the penalty for Citation No. 8463718 from \$1,900 to \$9,500. 34 FMSHRC at 1346 n.1.

First, Signal Peak contends, and the Secretary agrees, that the Judge erred by imposing a penalty for Citation No. 8463717 in excess of the \$70,000 maximum for general non-flagrant violations of mandatory standards provided by section 110(a)(1) of the Act.<sup>20</sup> We find that the Judge did improperly exceed the relevant statutory maximum. However, as provided in section 110(a)(2) of the Act, the relevant maximum assessable penalty for failing to immediately report an injury with a reasonable potential to cause death is \$60,000.

Section 110(a)(2) states that an operator “who fails to provide timely notification to the Secretary as required under section 103(j) of this [Act] (relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less than \$5,000 and not more than \$60,000.”<sup>21</sup> 30 U.S.C. § 820(a)(2). Section 103(j) requires an operator to notify the Secretary “within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred.” 30 U.S.C. § 813(j). This is the same conduct required by sections

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<sup>19</sup> (...continued)

finding “for the same reasons” as for Citation No. 8463717, i.e., that it reasonably believed the injuries were not immediately reportable, that argument is again rejected. *See supra* p. 12.

<sup>20</sup> Section 110(a)(1) of the Act states that the “operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this [Act], shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$50,000 for each such violation.” 30 U.S.C. § 820(a)(1). In 2008, the maximum was adjusted to \$70,000 through rulemaking to account for inflation, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410, 104 Stat. 890 (28 U.S.C. § 2461 note)), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, Title III, Apr. 26, 1996, 110 Stat. 1321) and the Federal Reports Elimination Act of 1998 (Pub. L. No. 105-362, Title XIII, Nov. 10, 1998, 112 Stat 3280). *See* 30 C.F.R. § 100.3(a); 73 Fed. Reg. 7206, 7207-08 (Feb. 7, 2008).

<sup>21</sup> In 2012, the \$60,000 maximum was raised to \$65,000 to account for inflation. *See supra* n.20; 30 C.F.R. § 100.4(c); 77 Fed. Reg. 76,406, 76,406-07 (Dec. 28, 2012). However, adjustments for inflation “shall apply only to violations which occur after the date the increase takes effect.” Sec. 6, Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410, 104 Stat. 890 (28 U.S.C. § 2461 note)), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, Title III, § 31001(s)(2), Apr. 26, 1996, 110 Stat. 1321) and the Federal Reports Elimination Act of 1998 (Pub. L. No. 105-362, Title XIII, §§ 1301(a)(1), 1301(a)(2), Nov. 10, 1998, 112 Stat 3280). These violations occurred in 2009; therefore the pre-adjustment maximum of \$60,000 applies.

50.10(a), (b), and (c) of the Secretary's regulations. Accordingly, the assessment of a penalty for a non-flagrant violation of section 50.10(b) is governed by section 110(a)(2) of the Act.<sup>22</sup> The Judge erred by assessing a penalty in excess of \$60,000 for Citation No. 8463717.

Additionally, Signal Peak alleges that the Judge did not provide adequate justification to account for the difference between the Secretary's proposed penalties and the penalties which the Judge independently assessed. Although Commission Judges are accorded broad discretion in assessing civil penalties, such discretion is not unbounded, and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Act.<sup>23</sup> *See, e.g., Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In this regard, the Commission has recognized that substantial deviations from the Secretary's proposed assessment must be adequately explained. *Id.* at 621. However, the Judge's findings need not be exhaustive; rather, they must be sufficient to provide the Commission with a basis for determining whether the Judge complied with the requirement to consider the section 110(i) criteria. *Id.*

The Judge addressed all six section 110(i) criteria, particularly noting the impact of his gravity and negligence findings on the assessed penalties. 34 FMSHRC at 1382-83. With regard to gravity, the Judge emphasized that both violations placed miners in danger by interfering with MSHA's ability to investigate. *Id.* at 1383. With regard to negligence, the Judge considered both violations "egregious failures," noting that the "decision not to call MSHA, in violation of . . . [section] 50.10, was in no way a borderline call for which reasonable minds could differ," and noted that the Secretary described Signal Peak's failure to inform MSHA of the accident before

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<sup>22</sup> Penalties for non-flagrant violations of section 50.10(d) (for failure to report "any other accident") are governed by section 110(a)(1) of the Act rather than section 110(a)(2), as these violations have no counterpart in section 103(j). Here, however, there was no violation of section 50.10(d) because the roof fall was not, in and of itself, a reportable accident. *See supra* p. 9. Citation No. 8463717 involves a non-flagrant violation of section 50.10(b) only. Therefore the maximum assessable penalty is governed by section 110(a)(2) of the Act. The lower penalty for an accident involving death or a reasonable potential to cause death is an anomalous result given Congress' concern in enacting section 103(j). Nevertheless, it is compelled by a fair reading of the various Acts and regulations involved.

<sup>23</sup> Section 110(i) states in relevant part:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).



resuming mining as a “blatant disregard of [section 50.12].”<sup>24</sup> *Id.* at 1383, 1375. Given the broad discretion accorded to Commission Judges within the confines of the section 110(i) framework, the Judge’s findings of particularly high gravity and negligence adequately explain the deviation between the proposed and assessed penalties.<sup>25</sup>

We therefore conclude that, except to the extent that the penalty for Citation No. 8463717 exceeds the statutory maximum, the Judge did not abuse his discretion in raising the penalty amounts.

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<sup>24</sup> The Judge also found that Signal Peak did not show good faith, as that term is employed under 30 U.S.C. § 820(i). 34 FMSHRC at 1383.

<sup>25</sup> Relying on our decision in *Hidden Splendor Resources, Inc.*, 36 FMSHRC \_\_\_ (Dec. 2014), Commissioner Althen would vacate and remand this decision, instructing the Judge to explain why he substantially diverged from the Secretary’s penalty proposal. Slip op. at 17. However, the two cases are readily distinguishable. In *Hidden Splendor*, the Judge explained why the penalty would not affect the operator’s ability to pay, but as for the other factors, simply stated: “I have reviewed the Assessed Violation History Report, which is not disputed. At all pertinent times, Hidden Splendor Resources, Inc. was medium in size. The violations were abated in good faith. The gravity and negligence findings are set forth above.” 34 FMSHRC 3310, 3380-81 (Dec. 2012) (ALJ). In other words, the Judge did not specify how his findings on gravity, negligence, or any other factor (apart from the operator’s ability to pay) impacted his penalty assessment. In contrast, in this case the Judge’s penalty analysis details the gravity and negligence associated with the citations. In addition to the negligence findings cited above, the Judge specified that “regarding the violation of 30 CFR § 50.12, the failure of Signal Peak to preserve the evidence, that can be viewed as more serious because it eliminated MSHA’s ability to assess the accident site.” 34 FMSHRC at 1383-84. In other words, unlike in *Hidden Splendor*, the Judge here specified which factors he weighed more heavily and why. We note that the Commission has held that Judges have not abused their discretion by more heavily weighing gravity and negligence than the other penalty criteria. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001); *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010).

Commissioner Althen also states that the Judge erred in assessing the size of the operation, by rejecting the tonnage in Exhibit A in favor of testimony regarding shipping goals. However, it is only 30 C.F.R. Part 100, governing the Secretary’s proposed penalties, that refers to tonnage. *See* 30 C.F.R. § 100.3(b). Section 110(i), governing a Judge’s assessment of penalties, only requires that a Judge consider whether the penalty is appropriate to the size of the business. Considering testimony regarding numbers of employees and shipping goals seems to fit within that description.

### III.

#### Conclusion

For the foregoing reasons, we vacate the \$74,250 penalty imposed by the Judge for Order No. 8463717 and impose a penalty of \$60,000. The Judge's findings with respect to Citation Nos. 8463717 and 8463718 are otherwise affirmed.

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

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

Commissioner Althen, concurring in part, dissenting in part:

I concur with the Majority on all issues except the decision to assess a maximum penalty for Citation No. 8463717 and to affirm the \$9,500 assessment for Citation No. 8463178.<sup>1</sup> I would find the Judge abused his discretion by increasing by fifty percent (50%) and five hundred percent (500%), respectively, penalties already specially assessed by the Secretary without acknowledging that the increases are substantial or explaining the basis for such substantial increases and by erroneously applying certain statutory penalty criteria.

### Background

#### A. Penalty Assessments

The Commission has held that if a Judge's penalty assessment differs substantially from the Secretary's proposal, the Judge must explain the variance in the assessed penalty from the proposed penalty. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (1983), *aff'd*, 736 F.2d 1147 (D.C. Cir. 1986); *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000). The Judge need not make exhaustive findings and may assign different weights to different criteria, but must provide an adequate explanation of why the penalty assessment diverges from the penalty proposal. *Cantera Green*, 22 FMSHRC at 622.

In the recent decision in *Hidden Splendor Resources, Inc.*, 36 FMSHRC \_\_ (Dec. 2014), the Commission vacated and remanded a reduction of a penalty from a proposed \$6,459 to an assessed \$5,000 – a relatively paltry reduction of \$1,459 and 23% respectively. Our basis was that, even though the Judge considered and made findings on all six penalty criteria, he “did not offer any explanation for the divergence.” *Id.*, slip op. at 6. Having so recently found an explanation necessary for very small dollar and percentage changes, it seems clear that an explanation is even more important for changes in the tens of thousands of dollars and of 50% and 500% – decreases and increases from penalty proposals should be subject to the same standard. Only if a proper explanation is provided for the assessment and if the penalty criteria are properly applied is the final assessment not arbitrary. *Id.*; *Unique Electric*, 20 FMSHRC 1119, 1123 n.4 (Oct. 1998) (quoting *Sellersburg Stone*, 5 FMSHRC at 293); *Cantera Green*, 22

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<sup>1</sup> The Secretary proposed penalties of \$49,500 and \$1,900 for Citation No. 8463717 and Citation No. 8463178, respectively. The Judge increased the penalties to \$74,250 and \$9,500, respectively. 34 FMSHRC at 1346 n.1. The Commission's reduction of the penalty for Citation No. 8463717 to the maximum allowed by law does not obviate the abuse of discretion in failing to explain the substantial change from the penalty assessed by MSHA. Further, the maximum penalty of \$60,000 and the unchanged penalty of \$9,500 continue to constitute substantial changes from the assessed penalties. Although the Commission has not defined the term “substantial” or reduced the term to a percentage variance, all must agree that changes of 50% from \$49,500 to \$74,250 (\$24,750) and of 500% from \$1,900 to \$9,500 (\$7,600) are substantial.

FMSHRC at 621-23; *Virginia Slate*, 23 FMSHRC 482, 493 (May 2001); *Rushford Trucking*, 22 FMSHRC 598, 602 (May 2000); *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986).<sup>2</sup>

## B. Special Assessments

The regular penalty point schedule set out in 30 C.F.R. § 100.3 provides a basis for dispassionate and uniform penalty proposals. In this case, however, MSHA exercised its unbridled discretion to propose a penalty as a “special assessment” summarily provided for at 30 C.F.R. § 100.5. Special assessments are made on the basis of narrative findings rather than the uniform tables for regular assessments. 30 C.F.R. § 100.5(b). Although the regulations do not explain how specially assessed penalties are calculated, the Secretary has posted information styled as “guidelines” on the MSHA website.<sup>3</sup> Under the guidelines, except perhaps in very rare instances, specially assessed penalty proposals are based upon finding a heightened degree of negligence and/or gravity – that is, negligence or gravity apparently beyond the contemplation of the regular point system.<sup>4</sup>

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<sup>2</sup> I do “rely[ ] on” *Hidden Splendor* for the accepted proposition that Judges must explain substantial divergences from the Secretary’s penalty proposal. *See slip op.* at 15-16 n.25. *Hidden Splendor* is most notable here, however, as a case in which the Judge’s findings on each of the penalty criteria were essentially parallel to the Secretary. We remanded the case for an explanation of a penalty reduction of less than \$1,500 as compared to the nearly \$25,000 increase in this case. The sauce for the goose must be the sauce for the gander. In that vein, one may wonder if the majority would accept a fifty percent penalty reduction partially based upon a finding that the operator apparently planned to reduce production in coming years. *See infra* p. 20.

<sup>3</sup> Available at [www.msha.gov/PROGRAMS/ASSESS1.htm](http://www.msha.gov/PROGRAMS/ASSESS1.htm) (follow “Special Assessment Guidelines” hyperlink) (last visited February 26, 2015). As it behooves Commission Judges to explain substantial divergence from the proposed penalty, it would seem to behoove the Secretary to explain substantial divergence from the regular penalty criteria. However, the Mine Act permits the Secretary to propose penalties on the basis of narrative findings. It is up to the Commission to guard against overly lenient or punitive penalty proposals by the Secretary.

<sup>4</sup> The primacy of negligence and gravity is shown by MSHA’s explanation that the assessments are made on the basis of five of the six criteria (omitting the effect on the operator’s ability to continue in business) and the description of special assessment penalty point assignments for the other three penalty criteria:

(1) For size of business, the guidelines state “[f]or most special assessments, MSHA assigns the regular assessment penalty points for size derived from § 100.3(b), Tables I through V;”

(2) For violation history, “MSHA assigns the regular assessment penalty points for Violation History from Tables VI and VII [of § 100.3(c)]. For special assessments MSHA assigns the regular assessment penalty points for Repeat Violation History from Tables VIII and IX [of § 100.3(c)], except for flagrant violations;” and,

(3) For abatement and good faith, the guidelines state “[i]n general, if an operator abates a citation within a reasonable period of time, as prescribed by the citation, the total number of

(continued...)

The subjective nature of special assessments does not render MSHA's role in the assessment process irrelevant to a Judge's assessment. However, it is important that the Judge recognize the specially assessed nature of the proposed penalty in explaining why his/her

findings warrant a substantial increase or decrease from the penalty proposal. Otherwise, the Commission cannot know whether the Judge took into account, or even realized, that MSHA made a special penalty proposal on the basis of heightened negligence and/or gravity without the uniformity and predictability provided by the regular point system.

### C. The Judge's penalty decision

Regarding Citation No. 8463717, the Secretary specially assessed the penalty at \$49,500. As in *Hidden Splendor*, the Judge essentially agreed with the findings of MSHA with respect to the six penalty criteria, except for a lesser degree of injury to the one affected miner and incorrect application of the size of business criterion. He then assessed a penalty of \$74,250. 34 FMSHRC at 1384.

Regarding Citation No. 8463718, MSHA proposed a specially assessed penalty of \$1,900. The Judge agreed with MSHA's finding except he found the hazard to have occurred, thereby warranting a five-fold increase from the penalty proposed by MSHA from \$1,900 to \$9,500. *Id.*<sup>5</sup>

### Errors Warranting Remand

The Judge's decision is a well-written expository opinion. However, the Judge made a number of errors and/or oversights affecting his penalty assessment that jeopardize the credibility of the penalty assessment process and fail to explain sufficiently the very substantial modifications to the specially assessed penalties proposed by the Secretary.

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<sup>4</sup> (...continued)

special assessment penalty points is reduced by 2 points." The guidelines also permit special assessment penalty points for an unwarrantable failure, imminent danger order, and for defiance of a withdrawal order.

<sup>5</sup> Although explanations are best made explicitly, an explanation sometimes may be implicit. For example, the Judge's finding that the hazard occurred might explain implicitly a substantial increase in the penalty for violation of 30 C.F.R. § 50.12. We note that, while the violation occurred, MSHA was able to examine the site and make suggestions to prevent recurrence.

Slip op. at 3. The Judge's finding that the hazard occurred, therefore, most likely reflects a finding that the hazard would have occurred if a reporter had not made an inquiry regarding the incident. Even that finding might have constituted an implicit explanation had the Judge not committed other errors indicating more may have been at work in the increased penalty than a different gravity finding.

First, with respect to Citation No. 8463717, the Judge assessed a penalty of \$74,250, an amount that is exactly 150% of the proposed penalty of \$49,500 but that clearly exceeded the statutory maximum penalty. It is taken as a given that every Judge knows the maximum penalties under the Mine Act. It is also a given that a Judge would not intentionally violate the Mine Act by assessing a penalty not permitted by law. We may only speculate on the reason for this error – simple oversight, error by an assistant, commitment to a 150% penalty, etc. The over-assessment standing alone might not warrant reassessment of the penalty except to comply with the Mine Act’s maximum. However, here, it is a template for a host of other errors casting doubt on whether the penalty adjustment was a well-reasoned, properly-supported change from the proposed penalty or an arbitrary decision to punish the operator to the limit of the law and beyond.

Second, MSHA’s penalty petition, which the Judge accepted, states mine and mine controller production of 275,220 tons (Exhibit A). Nonetheless, the Judge’s assessment refers only to speculative future production. In assessing the penalty, the Judge does not refer to the actual production but instead opines: “[b]y any measure Signal Peak is a large mine, presently employing about 240 people and *with a goal of shipping a million tons of coal per year.*” *Id.* at 1382 (emphasis added). While the Judge does not state explicitly that he considered this goal in increasing the penalty, such consideration is the only reasonable reason for the discussion of the operator’s future production plans in the penalty assessment portion of his opinion, especially as he does not there identify the actual, relevant production. Thus, with respect to the penalty criterion of size of the business of the operator, the Judge identifies not the actual size of the mine and mine controller – the penalty criterion – but instead long term plans for future years. The Mine Act does not permit assessments based upon a Judge’s speculation about an operator or controlling entity’s future size – an entirely speculative future in the mining industries.

Third, in assessing the penalty, the Judge states: “[t]he Secretary seeks a *minimum* penalty of \$51,400.00 for the two violations.” *Id.* (emphasis in original). Thus, he asserts MSHA’s proposed penalty was a “minimum” – even emphasizing the term “minimum.” This is the only place in the opinion where the Judge identifies MSHA’s penalty proposal. Even then he aggregates the penalties for two violations and describes the total proposed penalty as a minimum. Indeed, he repeatedly expressed a finding that MSHA’s proposed penalty was a minimum. *Id.* at 1384 n.60.

The Secretary did not propose a modified assessment during the hearing. The proposed specially assessed penalty in this case was not a product of the point system but instead resulted from an individualized review by MSHA’s special assessment office – a higher than regular penalty assessment. It was a deliberately arrived at penalty proposal. It was neither minimum nor maximum. An assertion that the Secretary’s proposed penalty is a “minimum” does not “explain” a substantial increase in the proposed penalty. Of course, it is most unlikely the Secretary would ever state that his proposed penalty was a “maximum” but certainly the Commission would not

accept a substantial downward adjustment based upon a claim that the Secretary's proposal was a "maximum."<sup>6</sup>

Fourth, the Judge's penalty discussion does not even acknowledge that increases of 50% and 500% respectively constituted substantial variances from the proposed penalty requiring explanation. The Judge makes no effort to explain the reasons for his changes. He identifies the Commission's authority to assess penalties but fails to discuss the obligation to explain (meaning give good, substantial reasons) for substantially changing a penalty proposal by the Secretary.

The Judge does find negligence and gravity were "egregious." However, just as he does not discuss the Secretary's assessment or reason for his changes, he does not take into account that MSHA had already assessed maximum penalty points for negligence and gravity and then gone further and substantially increased the regular assessment proposal on the basis of a special assessment turning on egregious negligence and gravity. It is impossible to reconcile acceptance of such erroneous failure to explain his increase, especially when coupled with other clear errors, with the Commission's decision in *Hidden Splendor*, *supra*.

Fifth, the Judge either did not understand or did not think it important to note that the proposed assessment was a special assessment in which the penalty proposal was already increased above the regular point system on the basis of heightened negligence and/or gravity. Without that understanding, the increase is a substantial increase on top of a substantial increase above the otherwise predictable penalty without an explanation by MSHA for its increase or by the Judge for his overlapping substantial increases.

By not explaining the very substantial modifications as compared to the proposed penalties, the Judge creates the danger of the appearance of arbitrariness against which *Sellersburg Stone Co.* and its progeny are designed to protect. The Judge increased an already increased penalty to – in fact beyond – the maximum without substantial explanation. The

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<sup>6</sup> It is also noteworthy that the Judge created out of whole cloth a heretofore unknown interpretation of "reasonable potential to cause death" by defining this phrase to mean that the possibility of death is "not far-fetched." 34 FMSHRC at 1368. In creating his far-fetched definition, the Judge summarily rejects: (1) the inspector equated "reasonable potential to cause death" with "life threatening," Tr. 189; (2) the preamble to the Emergency Mine Evacuation regulation equates "reasonable potential to cause death" with "life threatening," 71 Fed. Reg. 71,430, 71,433-34 (Dec. 8, 2006); (3) numerous Commission Judges have used "life threatening" in construing "reasonable potential to cause death," *Vulcan Construction Materials, L.P.*, 35 FMSHRC 2868, 2879 (Aug. 2013) (Judge Gill); *Cemex, Inc.* 35 FMSHRC 1355, 1365 (May 2013) (Judge Miller); *Walker Stone Co.*, 23 FMSHRC 180, 183 (Feb. 2001) (Judge Feldman); *Consolidation Coal Co.*, 9 FMSHRC 1950 (Nov. 1987) (Judge Broderick); *Climax Molybdenum Co.*, 2 FMSHRC 1967, 1970-1971 (July 1980) (Judge Morris); and (4) the Secretary's reliance in his post-hearing brief upon the interpretation of the standard as meaning a "life threatening" condition. S. Post-Hearing Brief, p. 10. An interpretation as abstruse as "not far-fetched" sheds no light on the nature of an event having a "reasonable potential to cause death." The Mine Act is a mature statute. There is no reason to invent new and even more ambiguous interpretations of its terms.

penalty assessment appears, therefore, to be a reflexive rather than reflective action apparently flowing from intent to inflict maximum financial pain.

### Conclusion

Penalties should reflect as objective as possible application of the penalty criteria. Based upon the decision in this case, I find no assurance of such a process.

The Judge assessed a penalty above the statutory maximum; he erred in his application of the appropriate size of business factor; he erred by categorizing the specially assessed proposed penalty as a minimum; he gave no consideration to findings by MSHA and other Commission Judges that “reasonable potential to cause death” equates with “life threatening;” he did not recognize his assessments were substantial changes from the already specially assessed proposed penalties; he did not recognize he had a duty to explain the change, and did not do so.

These errors constitute an abuse of discretion. As in *Hidden Splendor*, I would remand the penalties associated with the violations to the Judge for further explanation consistent with the requirements for explanation of substantial divergences and for proper application of the penalty criteria.

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



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 31, 2015

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

Docket Nos. SE 2007-203-R  
SE 2007-294

v.

JIM WALTER RESOURCES, INC.

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

**DECISION**

BY: Nakamura, Acting Chairman; Althen, Commissioner

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), and involve a citation issued to Jim Walter Resources, Inc. (“JWR”) by the Department of Labor’s Mine Safety and Health Administration (“MSHA”), after a fatal roof fall at JWR’s No. 7 coal mine. The citation alleges a violation of the safety standard in 30 C.F.R. § 75.202(a), which requires that the roof of areas where persons work or travel be supported to protect persons from roof falls.<sup>1</sup>

The Administrative Law Judge held that the Secretary failed to prove a violation of the cited standard and therefore dismissed the citation. *Jim Walter Res., Inc.*, 34 FMSHRC 1386 (June 2012) (ALJ). The Judge held that the Secretary failed to establish that, prior to the roof fall at issue, the roof conditions would have alerted a reasonably prudent person of the need for additional support. The Secretary filed a petition for discretionary review of the Judge’s decision, which we granted.

We reverse the Judge with respect to his dismissal of the citation, and conclude that 30 C.F.R. § 75.202(a) was violated.

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<sup>1</sup> 30 C.F.R. § 75.202(a) provides that “[t]he 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.”

## I.

### **Factual and Procedural Background**

On October 12, 2006, Jerry McKinney, a miner and special projects manager, was seeking to improve ventilation in the underground portion of JWR's No. 7 coal mine near Tuscaloosa, Alabama. As part of this work, McKinney was examining the permanent stopping just north of survey station, or spad, 3575. McKinney observed a large roof fall just south of spad 3575, which measured 62 feet long, 11 to 16 feet wide, and 1 to 4 feet thick. It is undisputed that the roof between the location of this roof fall, just south of spad 3575, and the permanent stopping, located just north of spad 3575, was supported by bolts, straps, timbers and t-boards.

While McKinney was performing this examination, he was fatally injured by the fall of a piece of roof rock 83 inches long, 43 inches wide and 7 inches thick. There were no eyewitnesses to the fatal accident. The Secretary contends that McKinney was standing under the unsupported brow of the prior roof fall at the time of the accident, while the operator contends that McKinney was standing 6 to 10 feet north of the prior roof fall at the time of the accident.

A few hours after McKinney's body was found, MSHA Inspector Harry Wilcox inspected the accident site. On February 15, 2007, MSHA issued Citation No. 7689677, alleging a violation of 30 C.F.R. § 75.202(a) because "[t]he mine operator failed to support or otherwise control the mine roof to protect persons from hazards related to falls." Gov't Ex. 15. The citation also alleged that the violation was "significant and substantial," and was a result of moderate negligence by the operator. The proposed penalty for the citation was \$35,500.

The Judge dismissed the citation because he concluded that the Secretary had failed to prove a violation of section 75.202(a) under the "reasonably prudent person test"<sup>2</sup> previously adopted by the Commission in *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987), and *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275 (Dec. 1998).<sup>3</sup> The Judge held that the Secretary had failed to prove that there were objective indicia prior to the roof fall that would have alerted a reasonably prudent person that additional roof support was necessary. 34 FMSHRC at 1392-95.

On appeal, the Secretary asserts that the Judge erred by applying the reasonably prudent person test. The Secretary argues that operators are strictly liable for Mine Act violations and that, as a result, if a roof falls, the roof was not supported or otherwise controlled to protect persons from hazards related to roof falls. Thus, the Secretary essentially claims that under the

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<sup>2</sup> The Judge stated that the Secretary had "the burden of establishing the existence of 'objective signs [that] existed prior to the roof fall' . . . and that these objective signs would have alerted a reasonably prudent person to install additional roof support beyond that which had been actually provided at the time." 34 FMSHRC at 1393.

<sup>3</sup> The standard at issue in *Canon* was the former version of 30 C.F.R. § 75.200, the predecessor to section 75.202(a). 9 FMSHRC at 668.

plain meaning of section 75.202(a), a roof fall demonstrates a per se violation of the standard.<sup>4</sup> Alternatively, the Secretary argues that if the standard is found to be ambiguous, his interpretation of the standard as requiring a finding of a per se violation when a roof fall occurs is reasonable and entitled to deference.

JWR contends that the Judge correctly applied the reasonably prudent person test for roof fall violations of section 75.202(a). JWR claims that under the plain meaning of the standard, an operator is liable for a roof fall only if, prior to the roof fall, a reasonably prudent person would have recognized that additional roof support was necessary. Alternatively, JWR argues that even if the Commission finds the standard to be ambiguous, the Secretary's interpretation is unreasonable and thus not entitled to deference.

## II.

### Disposition

The operator urges us to apply the reasonably prudent person test to the requirements of section 75.202(a). On the other hand, the Secretary asks us to interpret the standard to mean that, in all cases, if a roof falls, the roof was not supported or otherwise controlled to protect persons from hazards related to falls of the roof, in violation of section 75.202(a). Under the stark and tragic facts of this case, however, we need not decide whether to adopt one or the other of these tests in all roof fall cases involving allegations of unsupported roof. Such tests "are not presented by the [facts] now before us." See *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 275 (2009).

The language of the standard states that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). Thus, under the plain language of the standard<sup>5</sup> and the strict liability approach governing Mine Act violations, the Secretary, to prevail here, need only show (1) that the roof fall occurred in an area where persons work or travel and (2) that the roof was not supported to protect persons from hazards related to falls.

With regard to the first question, the Judge concluded that the accident site was not an area where persons "work or travel." 34 FMSHRC at 1394 n.10. We disagree.

The Commission has interpreted the phrase "work or travel" as used in section 75.202(a) to be circumstance specific. *Cyprus Empire Corp.*, 12 FMSHRC 911, 917-18 (May 1990). In

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<sup>4</sup> In the absence of a roof fall, the Secretary would retain the reasonably prudent person test to determine whether the cited standard had been violated.

<sup>5</sup> When 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 *Dyer v. U.S.*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

*Cyprus*, the Commission held that whether miners normally “work or travel” in a particular area is irrelevant if the specific circumstances at issue do not reflect normal circumstances. *Id.* In the instant case, the Judge stated that the accident site was not an area where persons “work or travel” due to the rocks on the floor of the green path.<sup>6</sup> 34 FMSHRC at 1394 n.10. However, the Judge ignored the fact that at the time of the fatal accident, McKinney was at the accident site, performing a work-related function — seeking to improve ventilation in the mine. Therefore, the specific circumstances demonstrate that the accident site was an area where a miner worked and traveled.

This leaves the issue of whether the operator failed to support the roof “to protect persons from hazards related to falls.” When Inspector Wilcox arrived on the scene, Jerry McKinney was lying fatally injured beneath a large roof fall. Accordingly, the only conclusion to be reached is that the roof was not supported to protect the miner from a roof fall. As previously mentioned, the Mine Act is a strict liability statute, and this fatality resulting from a fall of roof material where persons work or travel unquestionably demonstrates a violation of section 75.202(a). The roof fall that pinned McKinney under a piece of rock, resulting in his death, amply demonstrates that the roof was not supported in a manner to protect him from hazards related to falls.

In light of the record in this case, we need not go further and choose between the reasonably prudent person test and the approach suggested by the Secretary. It is unnecessary under the facts here to choose between application of the reasonably prudent person test and the adoption of a different test applicable across the board to the host of conditions that might arise, especially in the absence of a record bearing upon a broader range of circumstances. It is sufficient here to find that the roof in this case, located in an area where persons work or travel, was not supported. Accordingly, we hold that the operator violated the standard.<sup>7</sup>

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<sup>6</sup> In his decision, the Judge stated that “[t]he various possible paths to the areas at issue from the main track entry, via various crosscuts are indicated by different colored lines in the *Report of Investigation* (Government Exhibit 10, p. 12 [Appendix B]) (“Gx”) and referred to in the text as green, red, or blue route, path or pathway, respectively.” 34 FMSHRC 1391 n.3. The accident site was part of the rarely travelled green path, while the red path was used as the primary travelway.

<sup>7</sup> We recognize that the decision in *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987), was reached in a factual context similar to that in the present case. However, in light of the determination set forth immediately above, we decline to follow the *Canon* decision.

### III.

#### **Conclusion**

We reverse the Judge's finding that no violation occurred, and remand the case to the Chief Administrative Law Judge<sup>8</sup> for further proceedings, including whether the violation was "significant and substantial," and what penalty assessment is appropriate.

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

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

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<sup>8</sup> The Judge who originally decided this case has since retired.

Commissioner Cohen, concurring:

I agree with the result reached by my colleagues, as well as their reasoning. I write separately in order to address footnote 7 of their opinion. Essentially, I conclude that the disposition in this proceeding effectively overrules the Commission's decision in *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987).

In *Canon Coal*, the Commission reviewed a Judge's decision to vacate an order alleging a violation of the safety standard in 30 C.F.R. § 75.200 (the predecessor to 30 C.F.R. § 75.202(a)) that was issued by the Secretary to the operator after a fatal roof fall accident. In order to prove a violation in this instance, the Judge had required the Secretary to demonstrate, in essence, "that objective signs existed prior to the roof fall that would have alerted a reasonably prudent person to install additional roof support beyond the support that actually had been provided by the operator." *Id.* at 668. The Commission affirmed the Judge's decision to vacate the order.

The analysis in *Canon Coal* does not reflect an appropriate interpretation of the requirements of the safety standard considering the standard's specific directive to protect miners and the strict liability nature of the Mine Act. A roof that falls and kills a miner was obviously not supported "to protect persons from hazards related to falls of the roof" as required by the safety standard. 30 C.F.R. § 75.202(a); *see also* 30 C.F.R. § 75.200 (1987). Because the Commission's holding in *Canon Coal* conflicts with both the language of the safety standard and the Mine Act, I have to conclude that it was wrongly decided.

The overruling of *Canon Coal* does not necessarily affect subsequent Commission decisions which cited it, one of which, *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275 (Dec. 1998), was also relied on by the Judge in the present case. In *Harlan Cumberland*, the Commission, citing *Canon Coal*, applied the reasonably prudent person standard to a violation of 30 C.F.R. § 75.202(a) in a situation where a roof fall had not actually occurred. The Commission's decision today does not disturb *Harlan Cumberland*.

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 31, 2015

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

v.

NEWMONT USA LIMITED

Docket Nos. WEST 2010-652-RM  
WEST 2010-1584-M

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

**DECISION**

BY: Nakamura, Acting Chairman; and Althen, Commissioner

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). At issue is a single order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2),<sup>1</sup> to Newmont USA Limited ("Newmont") at its Midas Mine, a gold mine in Nevada. The order alleges a violation of 30 C.F.R. § 57.8528, which provides: "Unventilated areas shall be sealed, or barricaded and posted against entry."

On January 5, 2012, the Judge issued his decision in this case. 34 FMSHRC 146 (Jan. 2011) (ALJ). The Judge concluded that a violation occurred and that the violation was significant

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<sup>1</sup> Section 104(d)(2) provides:

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(2).

and substantial ("S&S").<sup>2</sup> He further concluded that the violation was not attributable to an unwarrantable failure to comply with the standard<sup>3</sup> and reduced the civil penalty from \$35,500 to \$5,000.

The Secretary and the operator filed cross-petitions for discretionary review of the Judge's decision, which the Commission granted. For the reasons that follow, we affirm the Judge's finding of violation, vacate and reverse his S&S finding, and vacate and remand his non-warrantable failure finding. We also remand his penalty assessment.

## I.

### **Factual and Procedural Background**

#### **A. Factual Background**

On January 26, 2010, MSHA inspector Shon Guardipee began his regular inspection of the Midas Mine at the top of a spiral<sup>4</sup> with Newmont employee Ivan Castellanos and Jamie Wallake, the Miner Representative. As Guardipee approached the 5301 heading, which was the access off of the main haulage, he observed that the sill or auxiliary fan at the 5301 level was off and that the ventilation bags in the headings were tied off. There were signs hanging by a rope across the headings stating: "Danger, Heading Inspection Required." When Guardipee questioned the operator's and miners' representatives accompanying him, they informed Guardipee that the headings had been inactive for a week and a half. Guardipee subsequently issued the Order, and designated the violation as S&S and attributable to an unwarrantable failure to comply.

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<sup>2</sup> The S&S 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." 30 U.S.C. § 814(d)(1).

<sup>3</sup> The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, which 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." 30 U.S.C. § 814(d)(1).

<sup>4</sup> The mine's headings are located off of vertical spirals connecting to main haulage roads. Tr. 23, 215; *see also* Sec'y Ex. B (cross-sectional map looking west at the Midas Mine and depicting the main haulage roads and spiral system as well as the ventilation). Newmont uses both a primary and secondary ventilation system. The primary ventilation is comprised of main fans and booster fans, as well as two intakes and four exhaust ducts, which are used to provide general airflow for the main haulage roads and spirals within the mine. Newmont's secondary ventilation system provides additional airflow for the specific spirals and their headings. This is done through sill fans, or auxiliary fans, which pull air from the main haulage roads into internal raises developed alongside each spiral. Subsequently, the spiral is fed air from the internal raise, and ventilation bags then direct the air toward the working faces in each spiral's heading. *See* Sec'y Ex. QQ. Each heading within a spiral is located 50 feet above or below the other heading. The air pulled upward into Spiral 1 "Ts off" into the 1-5301 North and South Headings.



On January 5, 2012, the Judge affirmed the violation and the S&S designation. He vacated the unwarrantable failure designation and assessed a civil penalty of \$5,000 rather than the \$35,500 proposed by MSHA.

## **B. The Judge's Decision**

### **1. Whether a Violation Occurred**

The Judge concluded the operator violated section 57.8528 by failing to barricade the headings and failing to adequately post signs against entry. He found that the headings were "unventilated" under the language of the standard, because the operator had shut down the auxiliary fan and tied off the ventilation bags in the headings. *Id.* at 161.

The Judge found that the plain language of 30 C.F.R. § 57.2 unambiguously defines "barricade" to require the "prevent[ion] [of] vehicles, persons or flying materials" from entering unventilated areas, such as the headings in question. *Id.* According to the Judge, this requirement was not met because the operator had merely strung a rope barrier from rib-to-rib at the entrance to each heading and the signage merely stated: "Danger, Heading Inspection Required." The signage did not state that entry into the headings was prohibited or that the headings were unventilated. *Id.*

### **2. Whether the Violation Was S&S**

The Judge also concluded that the violation was S&S. *Id.* at 161-62. He found that the hazards of low oxygen and a build-up of toxic gases were reasonably likely to occur and that the rope across the entry to a heading with a warning sign that inspection was needed was an insufficient barricade and signage to comply with the standard.

Although the Judge acknowledged that new miners at the Midas Mine are required to take a four-week training class that included inspection procedures for entering headings, Tr. 228, he further found that subcontractors do not have to take this training. Thus, he concluded that subcontractors might unwittingly enter an unventilated heading notwithstanding the rope and signage that an inspection was required.

The Judge also considered the testimony of Kevin Hirsch, Assistant District Manager for the Western District of MSHA, that mines need to be ventilated to ensure that oxygen remains at the appropriate levels above 19.5 %. The Judge subsequently reasoned that, without proper ventilation, oxygen levels may not be continually adequate. 34 FMSHRC at 151, 162; Tr. 119. Consequently, he concluded that low oxygen was reasonably likely to occur, assuming continuation of normal mining operations.

The Judge further found that a build-up of toxic gases was reasonably likely to occur. 34 FMSHRC at 161-62. Although the Judge recognized that the mine was non-gassy and that this may be a mitigating factor for S&S purposes, he concluded that the operation of the diesel and other equipment in the mine made it reasonably likely that the build-up of toxic gases would occur. Accordingly, the Judge found that the barricade procedures did not reduce the reasonable

likelihood of miners suffering exposure to toxic gases or a lack of oxygen. As a result, the Judge found that the violation was S&S.

### **3. Whether the Violation Resulted from an Unwarrantable Failure to Comply**

The Judge concluded that the violation did not result from an unwarrantable failure to comply with the standard. He referred to a meeting in June 2009 between MSHA and mine operators, including members of Newmont management, at which the parties discussed the requirements of section 57.8528. He found, however, that they only discussed what MSHA would accept as a "barricade," as opposed to the meaning of "unventilated," which would determine *when* a "barricade" must be used in the first place. 34 FMSHRC at 151, 164; Tr. 40-44. While noting that Newmont was cited six times under the standard after the 2009 meeting, based upon the testimony of Newmont witnesses, the Judge held that the operator possessed a good faith belief that its policy of roping off headings due to be worked on in the near future complied with the standard.

The Judge further found that, in response to the six citations, Newmont updated its barricading procedures. Under the revised procedure, Newmont continued the practice of stringing a rope with a sign cautioning "Danger, Heading Inspection Required" across headings that were presently in production or development, or scheduled for production or development within four weeks. The Judge found that Newmont considered such headings to be active headings. Based upon his finding that Newmont had a good faith belief that its procedures complied with MSHA's requirements, the Judge held that the operator's violation of section 57.8528 did not result from an unwarrantable failure to comply with the standard.

### **4. The Penalty**

The Judge assessed a civil penalty of \$5,000 rather than the \$35,500 penalty proposed by the Secretary. In doing so, he relied in part on the settled penalty amounts for the prior citations to conclude that the proposed penalty in the instant case was "excessive." *Id.* at 165.

## **II.**

### **Disposition**

#### **A. The Judge Properly Concluded that a Violation Occurred.**

##### **1. The Secretary's definition of "unventilated" is reasonable and entitled to deference.**

30 C.F.R. § 57.8528 provides: "Unventilated areas shall be sealed, or barricaded and posted against entry." The Secretary asserted that the face of the heading was "unventilated" because air did not sweep the face in a manner that would provide oxygen and clear contaminants. The term "unventilated" is not defined in the standard. Thus, the standard is silent with respect to whether a face is "unventilated" if airflow is insufficient to sweep the face.

When a standard does not provide a definition for a term, the Commission looks to the term's ordinary meaning. *See, e.g., Jim Walter Res. Inc.*, 28 FMSHRC 983, 987 (Dec. 2006). "Unventilated" is the opposite of "ventilated," and "ventilate" has been defined as "to expose to air and esp[ecially] to a current of fresh air (as for purifying, curing, or refreshing)." *Webster's Third New Int'l Dictionary Unabridged* 2541 (1986). This indicates that airflow must be sufficient to "purify" or "refresh" the area that is being ventilated. This definition supports the Judge's interpretation that air must sweep the face in order for the area to be ventilated. Although we do not find the dictionary definition to lead inexorably to a plain meaning for "unventilated," we arrive at the same outcome as the Judge, for we must defer to the Secretary's interpretation.

If a term is ambiguous, the Commission defers to the Secretary's interpretations of his own regulations as long as they are reasonable. *Tilden Mining Co.*, 36 FMSHRC 1965, 1967 (Aug. 2014) (Secretary's interpretation is reasonable and entitled to deference); *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678-82 (Dec. 2010). In *Auer v. Robbins*, the Supreme Court found that an agency's interpretation of its own regulation is entitled to deference unless it is plainly erroneous or inconsistent with the regulation. 519 U.S. 452, 461 (1997). Here, the Secretary's interpretation clearly is reasonable and is neither erroneous nor plainly inconsistent with the language and the purpose of the standard.

In the context of underground mining, a heading is not "refreshed" unless the airflow is sufficient to sweep its face, regardless of any primary ventilation or natural airflow. MSHA has noted that "auxiliary ventilation is often necessary to supply air to dead-end working places, maintain uncontaminated environments, and to condition air in faces for temperature and humidity control." New and Revised Safety and Health Standards for Radiation (Radon Daughter Exposure); Fire Protection and Control; Ventilation, Loading, Hauling and Dumping; Travelways and Escapeways; Hoisting; and Sanitary Facilities, 44 Fed. Reg. 31908, 31912 (June 1, 1979) (adopting section 57.8534, which describes procedures for the shutdown or failure of auxiliary fans). Further, the Secretary's interpretation is consistent with the standard's purpose, which is to protect miners from the dangers posed by headings with inadequate oxygen and accumulations of noxious gases. Thus, the term "unventilated" includes airflow that is insufficient to sweep a heading's face, and we hold that the term "unventilated" in section 57.8528 includes the failure to provide sufficient airflow to sweep the face.<sup>5</sup>

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<sup>5</sup> Newmont argues that the Secretary's interpretation would reduce the flexibility of operators to direct air where it is needed—that is, to areas where miners are working and where equipment is emitting potentially noxious gases. It contends that, under the Secretary's interpretation, the failure to barricade a heading when turning off a fan for short periods of time, e.g., two minutes or so, to have a conversation, talk on a radio, or repair a ventilation bag, would violate the standard. Such a brief stoppage is not the case before us, and the Secretary has not asserted the position put forward by the operator. *But see* Tr. 123-24. We decline to act on the basis of conjecture of events that are not before us. Moreover, policy decisions to promulgate regulations effectuating the safety purposes of the Mine Act are the province of the Secretary. The Commission adjudicates whether a regulation is reasonable and not plainly inconsistent with the Act. *See Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1 (D.C. Cir. 2003).

**2. Substantial evidence supports the Judge's finding that the airflow in the 1-5301 headings was insufficient to sweep the face when Newmont turned off the auxiliary fan and tied off the ventilation bags.**

Newmont's witnesses did not dispute Guardipee's conclusion that the airflow in the headings was insufficient to sweep the face. Tr. 271. On the contrary, Sid Tolbert, the Mine Supervisor at the Midas Mine, admitted on cross-examination that the natural flow in the mine was insufficient to sweep the face. He acknowledged that air would sweep the face only when the auxiliary fan was running and the ventilation bags were operational. 34 FMSHRC at 162; Tr. 271. As a result, we find that substantial evidence supports the Judge's finding that the airflow in the 1-5301 headings was insufficient to sweep the face when the operator turned off the auxiliary fan and tied off the ventilation bags. Accordingly, we affirm the Judge's finding of a violation.

**B. The Judge Erred in Concluding that the Violation was S&S.**

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 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 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).

There is not substantial evidence to support a finding that the violation contributed to a discrete hazard reasonably likely to result in an injury. Guardipee's air readings in the North Heading showed no evidence of any build-up of contaminants. Tr. 64; Sec'y Ex. A, at 6. Furthermore, Guardipee failed to take any readings in the South Heading, and he went no further into the South Heading than immediately after the point where the ventilation bags were choked off, which was only about 13 feet into the heading. Tr. 322. Significantly, the mine is non-gassy.

Furthermore, the operator presented undisputed testimony that whenever the equipment would be running in the headings, the operator, as a precautionary measure, would block off the opposite, unventilated heading to prevent access by miners. Tr. 294. In addition, any air that could become contaminated from drilling and blasting in the headings would not recirculate through the mine, but rather vent upwards through the portal exhaust. Tr. 226. The Secretary did not offer any evidence to the contrary. These factors do not support a finding of a build-up of toxic gases in the headings creating a reasonable likelihood of injury to a miner.

Concerning the likelihood of any oxygen deficiency, Guardipee's air readings in the North Heading showed no evidence of any loss of oxygen, and, as stated above, he failed to take any readings in the South Heading. Further, the operator's witnesses testified that the rock strata of the mine would not allow for any loss of oxygen to occur, a point which the Secretary did not dispute. Tr. 256, 291. The record evidence of the geology of the mine thus mitigates the likelihood of any oxygen deficiency. We note that the Secretary failed to introduce evidence of the likelihood of a hazard from oxygen-deficient air. In sum, substantial evidence does not support the reasonable likelihood of the build-up of toxic gases or lack of sufficient oxygen that would be reasonably likely to result in injury to miners.<sup>6</sup> Accordingly, we reverse and vacate the Judge's S&S finding.

**C. The Judge Erred in Vacating the Secretary's Unwarrantable Failure Designation.**

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek*, 52 F.3d 133, 136 (7th Cir. 1995) (approving unwarrantable failure test).

Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). All of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated or whether mitigating circumstances exist. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

The Judge erred by failing to determine whether the operator's belief that it was in compliance was objectively reasonable. The Judge found that "Hirsch gave 'operators specific guidance about what the Western District would accept as a barricade,'" but no guidance regarding *when* a barricade must be used. 34 FMSHRC at 164. The Judge therefore concluded that the operator possessed a good faith belief that its policy of roping off headings that were to

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<sup>6</sup> The Secretary argues that Kevin Hirsch, the MSHA Assistant District Manager, stated that headings need to be ventilated to ensure that oxygen remains at the appropriate levels above 19.5 %, and to prevent oxygen levels from changing unexpectedly in the future. Tr. 27. This statement, however, is contradicted by Tolbert's testimony that even with the auxiliary fans off, there would still be sufficient air circulation in the mine. Tr. 227, 236, 241. For example, Newmont checked the air circulation in August 2011 during a power outage. The mine did not have any problems with air quality or quantity at that time. Tr. 242.

be worked in the near future in non-working areas complied with the standard. His analysis, however, overlooks the fact that, as a matter of law, an operator's belief that it is in compliance constitutes a defense to an unwarrantable designation only if the belief was objectively reasonable. *See IO Coal*, 31 FMSHRC at 1356-60. The Judge erred by failing to make a finding as to whether the belief was "objectively" reasonable and explaining the reasons for such a finding.

We remand the case to the Judge to make factual findings on the elements of an unwarrantable failure and whether the operator had an objectively reasonable belief that the rope and sign utilized by the operator complied with the regulation.

**D. The Judge's Penalty Assessment Must be Remanded.**

The Judge assessed a civil penalty of \$5,000 rather than the \$35,500 penalty proposed by the Secretary. The penalty assessment must be remanded.

In reviewing the Judge's assessment, it appears that he improperly relied in part on penalty amounts from similar citations that had previously been settled in finding that the proposed amount was "excessive." 34 FMSHRC at 164-65; *see also* Tr. 312-13. This constitutes an abuse of discretion, as the amount of penalties assessed in the context of a settlement should not be used to arrive at penalties assessed in a very different context—in a decision on the merits after a hearing.<sup>7</sup> There is no way a Judge can know the facts in settled cases sufficiently to consider the penalty in such cases in determining a penalty in a litigated case. Further, the Judge cannot know other factors that may have played a role in reaching settlement. Use of settlements as templates for penalty assessments, therefore, would violate the obligation of the Judge to make an independent judgment and would be made based on insufficient knowledge of facts, including the motivations for settlement. In short, the results of settlements should not be considered in the assessment of penalties.

Accordingly, in light of the foregoing, we remand the case to the Judge to re-assess the penalty. In so doing, he should also consider: (1) our deletion of the S&S designation; and (2) his unwarrantable failure finding made on remand.<sup>8</sup>

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<sup>7</sup> As in *Sequoia Energy, LLC*, 36 FMSHRC 832, 835 n.5 (Apr. 2014), we need not reach the broader question of whether the Judge acted improperly by considering past penalty amounts assessed against the operator. We find error based on the narrower issue of the use of past settlements as a point of comparison.

<sup>8</sup> Furthermore, as with all penalty cases, if the Judge's assessment of the penalties "substantially diverge[s]" from those originally proposed, the Judge must "provide a sufficient explanation of the bases underlying the penalties assessed by the Commission." *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

### III.

#### **Conclusion**

For the reasons stated above, we affirm the Judge's finding of a violation, but reverse and vacate the Judge's S&S finding. We also reverse and remand the case to the Judge to make additional factual findings regarding whether the violation resulted from an unwarrantable failure. Finally, we remand the case so that the Judge may re-assess the penalty in accordance with this decision.

/s/ Patrick K. Nakamura

Patrick K. Nakamura, Acting Chairman

/s/ William I. Althen

William I. Althen, Commissioner

Commissioner Cohen concurring in part and dissenting in part:

I dissent because I conclude that the Judge's decision to affirm the order as a significant and substantial (S&S) violation is supported by substantial evidence in the record. I concur with my colleagues as to the need to vacate and remand the Judge's unwarrantable failure findings, but write separately on that issue because I conclude that Newmont's alleged "good faith" belief that it was in compliance cannot be found to be objectively reasonable. I join with the majority on all other issues.

### **A. Significant and Substantial**

The Judge determined that the Secretary sustained his burden of proof regarding each of the four elements of the test outlined in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). 34 FMSHRC 146, 161-62 (Jan. 2012) (ALJ). My colleagues reverse the Judge, finding that his decision is not supported by substantial evidence in the record. They conclude that the evidence does not "support a finding that the violation contributed to a discrete hazard reasonably likely to result in an injury." Slip op. at 6.

In reviewing a Judge's decision to affirm or reject a S&S designation, the Commission traditionally examines his findings regarding each of the four *Mathies* elements to see if they are supported by substantial evidence. *See, e.g., Black Beauty Coal Co.*, 34 FMSHRC 1733, 1741-44, 1748-49 (Aug. 2012). I conclude that the Judge's findings here regarding each of the four elements of the *Mathies* test are supported by substantial evidence. "Substantial evidence" only requires "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

#### **1. The underlying violation of a mandatory standard**

I join my colleagues in finding a violation of the standard. Slip op. at 6.

#### **2. A discrete safety hazard – that is a measure of danger to safety – contributed to by the violation**

The Judge found that the violation contributed to the danger that a miner will "access the area and be overcome by noxious air or a lack of oxygen." 34 FMSHRC at 161. I conclude that while the Judge articulated the relevant hazard, his description of the hazard was over-inclusive. *See Black Beauty*, 34 FMSHRC at 1741. It is sufficient to describe the relevant hazard as *a danger that a miner will access the area and be exposed to noxious air or a lack of oxygen.*

The Judge's conclusion that the Secretary sustained his burden of proof with respect to the second element is supported by substantial evidence in the record. The rope that hung across the 1-5301 headings was insufficient to prevent either the intentional or unintentional access of the area by a miner. 34 FMSHRC at 161-62; *see also* Dep. Tr. 46, 51, 52; Sec'y Ex. A, at 6. The Judge correctly concluded that the rope would not prevent a miner from traveling under or stepping over it.



While Newmont may provide rigorous training to its own employees regarding the inspection of headings, the Judge noted that Newmont's subcontractors do not receive the same benefit. As a result, the Judge found that the signs hanging from the rope which stated, "Danger, Heading Inspection Required" were not a sufficient warning. The sign failed to state that the area was unventilated or inactive, and as a result contributed to the danger that a miner may access the area. 34 FMSHRC at 162-63.

The hazard in this case includes a miner being exposed to noxious air or lack of oxygen. I disagree with my colleagues' conclusion that there is no substantial evidence in the record which supports the existence of this hazard. While the limited readings the inspector took in the headings neither indicated a lack of oxygen nor the build-up of gases at the exact time the inspection took place, this is not dispositive. As the Judge noted, conditions in a mine can change unexpectedly. 34 FMSHRC at 162. This is particularly true in this instance as the headings at issue were in a development area of the mine. *See* Tr. 213, 216. During this process, which can range from several weeks to years, the area is not mined continuously; instead, miners regularly visit the headings to take samples. Tr. 235, 285, 288-89. Depending on the information obtained from the samples, mining activities may proceed in these areas. Tr. 235. Significantly, the development process also includes drilling, blasting, and the use of diesel equipment which produces carbon dioxide and nitrogen dioxide. Tr. 255. Drilling and blasting work had occurred in the 1-5301 North heading during the month prior to the inspection. Tr. 264-65. As the Judge noted, the gases emitted by diesel and other equipment "can build up over time in unventilated areas." 34 FMSHRC at 162.

The actions of the inspection party are themselves indicative of the potential that noxious gases and/or lack of oxygen existed in the unventilated 1-5301 headings. MSHA Inspector Shon Guardipee proceeded about 13 feet into the South Heading when he saw that the ventilation bag was tied off. He turned around and realized that Mine Foreman Ivan Castellanos and the other members of the inspection party had not crossed the rope and followed Guardipee into the heading. Tr. 322. Castellanos testified that he did not enter the heading, and had "held my people back," because "there was a hazard present." *Id.* He explained that it was against company policy to enter a heading which was unventilated. Tr. 327.

### **3. A reasonable likelihood that the hazard contributed to will result in an injury**

The issue for the third element of the *Mathies* test is whether the hazard contributed to by the violation was reasonably likely to result in injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010). The Judge found that it was reasonably likely that a miner accessing the unventilated areas would be overcome by noxious air or a lack of oxygen. 34 FMSHRC at 161. I conclude that the Judge's decision is supported by substantial evidence.

I decline to join my colleagues in reweighing the testimony to account for the operator's precautionary measures that are taken during development work in the mine, or to make factual findings as to how air in the mine would potentially circulate. *See* Slip op. at 6. As stated above, the hazard of exposure to noxious air or inadequate oxygen has already been established under step 2 of the *Mathies* test.

I disagree that the Secretary "failed to introduce evidence of the likelihood of a hazard from oxygen-deficient air." Slip Op. at 7.<sup>9</sup> The Secretary's evidence included the identification of a similar situation at the nearby Barrick Meikle Mine, not long before the violation in this case, where one miner entered an unventilated area and lost consciousness, a second miner attempted to save him and either lost consciousness or became disoriented, and it took a third miner turning on ventilation fans to get the other two to safety. 34 FMSHRC at 150. It was this incident which triggered the inclusion of a presentation on the barricading required by 30 C.F.R. § 75.8528 at MSHSA's meeting with mine operators in Elko, NV in June 2009. Tr. 40-41, 76; 34 FMSHRC at 151.

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

The Judge concluded that it was reasonably likely that an injury that would occur would be of a reasonably serious nature. 34 FMSHRC at 161. The inspector concluded the injury would be expected to be fatal. Sec'y Ex. F. The Judge noted that Inspector Guardipee provided specific examples of miners losing consciousness from noxious air in similar situations. 34 FMSHRC at 150. Newmont does not dispute that losing consciousness due to exposure to noxious air is a reasonably serious injury.

In conclusion, I would affirm the Judge's factual findings and conclusions regarding each of the *Mathies* elements as they are supported by substantial evidence in the record.

**B. Unwarrantable Failure**

I agree with my colleagues that the Judge erred in vacating the Secretary's unwarrantable failure designation and that the case must be remanded for reconsideration of that issue. The Judge vacated the unwarrantable failure designation because he found that Newmont was not on notice of the Secretary's interpretation of the regulations. 34 FMSHRC at 164. Thus, the Judge determined that Newmont "possessed a good faith belief that its policy of roping off headings that were to be worked in the near future complied with the regulations." *Id.*

My colleagues rightly conclude that the Judge erred by failing to make a finding on whether Newmont's belief was objectively reasonable. However, I would go further and find, under the facts in this case, that any belief which Newmont had that its procedures complied with the regulations was not objectively reasonable.

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<sup>9</sup> It really should not be necessary for the Secretary to introduce case-specific evidence that noxious gases or inadequate oxygen can result in injury to miners. The history of mining is replete with such examples, including the 2010 disasters at the Sago and Aracoma Mines. As the Commission has noted, "[t]he dangers of low oxygen are well-known and obvious," and so "[o]xygen levels less than the required level constitute substantial evidence of a reasonable likelihood of an injury-producing event occurring." *Kellys Creek Res. Inc.*, 19 FMSHRC 457, 462 (Mar. 1997).

The Judge's determination that Newmont was not on notice is based on his finding that at the June 2009 meeting in Elko, NV, MSHA Assistant District Manager Kevin Hirsch gave specific guidance as to what its Western District would accept as a barricade, but did not set forth policy as to when a barricade must be used under 30 C.F.R. § 57.8528. However, the Judge's determination does not take into consideration what occurred between the June 2009 meeting and the issuance of Order No. 6482848 on January 26, 2010. Sec'y Ex. F.

Between October 14 and October 22, 2009, MSHA issued six separate citations to Newmont at the Midas Mine for violations of section 57.8528. Sec'y Exs. Q, W, CC, GG, JJ, MM. Four of these citations (Sec'y Exs. W, CC, GG, MM) explicitly stated that the heading in question lacked a barricade, and a fifth citation (Sec'y Ex. JJ) stated that there was only a partial barricade. Any question in the minds of Newmont's management from the June meeting as to when a barricade was needed should have been dispelled by the six citations issued in October.

Moreover, MSHA Inspector Jack Stull testified, without contradiction, that on October 20, 2009, in the course of his issuing Citation No. 6488537 for lack of a barricade and a proper sign at the 1-4750 South Heading (Sec'y Ex. W), Midas Mine Health and Safety Specialist Sandy McFarland became "really mad," swore at Stull, and "said that they're not going to put a barrier up in all the headings that are going to be mined soon." Tr. 145-46. The next day Stull and his supervisor Jim Fitch met with McFarland and other Newmont officials. Tr. 153-54. In a meeting lasting an hour, Fitch explained barricading as required by 30 C.F.R. § 57.8528. Tr. 155-57; Sec'y Ex. K, at 15-16. Surely, any reasonable question of what section 57.8528 required was dispelled by the events of October 20-21.

In November, following the issuance of the October citations, Newmont changed its barricading procedures. Tr. 237-38, 295. The new policy created three categories of headings – "Active Heading" (headings are presently in production or development or scheduled for production or development within four weeks), which only require a rope barrier; "Short Term Inactive Heading" (headings which are scheduled for production nor development within 4 to 12 weeks, or have been removed from active status due to changes in ground or ventilation), which require a snow fence barricade or a berm; and "Long Term Inactive Heading" (headings which are scheduled for production or development beyond 12 weeks, or where mining activities are complete), which require a chain link fence. NM Ex. 8.<sup>10</sup> Significantly, while the barricades for Short Term Inactive and Long Term Inactive Headings are "intended to restrict access into the area", the rope barrier for Active Headings is only "intended to impede access." *Id.* Moreover, the signage required for Active Headings does not clearly restrict access but only says "Heading Inspection Required." *Id.*

The distinction in the new barricading policy between areas requiring a snow fence, berm or chain link fence designed to "restrict access," and areas requiring only a rope barrier designed to "impede access" is keyed to the length of time until production or development – i.e., more or less than four weeks. Although Newmont's new barricading policy explicitly references and quotes section 57.8528, it totally ignores the distinction which triggers the need for a barricade –

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<sup>10</sup> In the transcript, the updated barricade procedures are referred to as "Exhibit 4." Tr. 237-40, 295, 306. However, this document is marked as "Exhibit 8" in the record.

whether an area is "unventilated." Despite the series of section 57.8528 citations and the meeting with MSHA in October, Newmont's new barricading policy simply does not require a barricade for an unventilated area if the area is scheduled for production or development within four weeks.

Moreover, the 1-5301 headings which are the subject of the January 26, 2010 Order in this case do not appear to even be within Newmont's new policy allowing rope barriers for areas scheduled for production or development within four weeks. According to Midas Mine Supervisor Sid Tolbert, on January 26, 2010, Newmont was still evaluating whether it would continue developing the 1-5301 North and South Headings, and had not scheduled either heading for production or development. Tr. 263. Hence, in merely putting up a rope barrier, Newmont was ignoring its own policy that rope barriers were to be used only for those headings actually scheduled for production or development within four weeks.

Given the series of six citations for section 57.8528 violations in October, McFarland's adamant behavior on October 20, the meeting with MSHA the next day, the promulgation of a new policy which does not recognize that the gravamen of section 57.8528 is whether or not an area is "unventilated," and Newmont's ignoring of its own policy in permitting the 1-5301 headings to be unbarricaded on January 26, 2010, the Judge's finding of "good faith" is doubtful. Even crediting the Judge's finding, it certainly cannot be said that Newmont's actions constituted objectively reasonable compliance with section 57.8528.

Finally, I note that in the Judge's unwarrantable failure analysis, he did not explicitly consider and weigh several of the factors enumerated in Commission decisions such as *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013) and *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). Such factors include the duration of the violation, the danger posed by the violation, and the history of violations of section 57.8528 showing that Newmont had been placed on notice that greater efforts were necessary for compliance. In considering the issue of unwarrantable failure on remand, the Judge should consider these factors.

/s/ Robert F. Cohen, Jr.

Robert F. Cohen, Jr., Commissioner

# **COMMISSION ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 27, 2015

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

v.

FREEPORT-MCMORAN CHINO  
MINES COMPANY

Docket No. CENT 2014-453-M  
A.C. No. 29-00708-349622

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On June 23, 2014, the Commission received from Freeport-McMoran Chino Mines Company (“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 orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 5, 2014, and became a final order of the Commission on June 4, 2014. Freeport asserts that it failed to timely contest the proposed assessment since during the allotted time period for contesting the proposed assessment, its Health and Safety Manager was out of the country on other company business. Freeport attempted to file its contest on June 6, 2014, two days late. 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 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/ Patrick K. Nakamura  
Patrick K. Nakamura, Acting Chairman

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

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



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 27, 2015

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

v.

LCT ENERGY, LP

Docket No. PENN 2014-819  
A.C. No. 36-09939-342560

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 29, 2014, the Commission received from LCT Energy, LP (“LCT”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on February 3, 2014, and became a final order of the Commission on March 5, 2014. LCT asserts that it failed to timely contest the proposed assessment due to a clerical error, and has altered its procedures to ensure that future proposed assessments are timely contested. LCT made timely payment to MSHA for the citations it did not contest, and filed its motion to reopen very shortly after receiving a notice of delinquency. The Secretary does not oppose the request to reopen.

Having reviewed LCT'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/ Patrick K. Nakamura  
Patrick K. Nakamura, Acting Chairman

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

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 27, 2015

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

v.

COLWELL CONSTRUCTION  
COMPANY

Docket No. SE 2014-191-M  
A.C. No. 38-00738-323449 PPJ

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On March 10, 2014, the Commission received from Colwell Construction Company (“Colwell”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 6, 2013 and became a final order of the Commission on July 8, 2013. Colwell asserts that it is a sub-contractor and did not contest the violations due to a lack of information or access to the relevant documentation at its office. The Secretary does not oppose the request to reopen and notes that some confusion may have existed with the initial issuance of the citation naming the mine owner, Bluegrass Materials, as the operator. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Colwell'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/ Patrick K. Nakamura  
Patrick K. Nakamura, Acting Chairman

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

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 27, 2015

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

v.

N.A. DEGERSTROM, INC.

Docket No. WEST 2014-501-M  
A.C. No. 26-00550-339911 AT0

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On March 26, 2014, the Commission received from N.A. Degerstrom, Inc. (“Degerstrom”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 3, 2014, and became a final order of the Commission on February 3, 2014. Degerstrom asserts that it timely contested the proposed assessment at issue. Degerstrom filed its motion to reopen immediately upon receiving the Secretary's delinquency notice.

The Secretary does not oppose the request to reopen, but he says there is no record of a notice of contest being received for this proposed assessment.

Having reviewed Degerstrom'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/ Patrick K. Nakamura  
Patrick K. Nakamura, Acting Chairman

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

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 27, 2015

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

v.

BRAND ENERGY &  
INFRASTRUCTURE SERVICES

Docket No. WEST 2014-526-M  
A.C. No. 26-02673-337166  
D405

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 1, 2014, the Commission received from Brand Energy and Infrastructure Services (“Brand”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on November 25, 2013, and became a final order of the Commission on December 26, 2013. Brand asserts that its counsel, who contested the underlying citation, did not receive the proposed assessment as it was mailed to a company address in Georgia, rather than to its regional office in California. The Secretary does not oppose the request to reopen, but he notes that the proposed assessment was delivered to the company's address of record, where receipt was acknowledged, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Brand'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/ Patrick K. Nakamura  
Patrick K. Nakamura, Acting Chairman

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

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



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 27, 2015

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

v.

TATA CHEMICALS (SODA ASH)  
PARTNERS

Docket No. WEST 2014-582-M  
A.C. No. 48-01497-344166

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 25, 2014, the Commission received from Tata Chemicals (Soda Ash) Partners (“Tata”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 3, 2014, and became a final order of the Commission on April 2, 2014. Tata asserts that it failed to timely contest the proposed assessment due to the individual who was responsible for contests being on medical leave, and his assistant being reassigned to different duties as part of a corporate reorganization. The person who then received the proposed assessment, Brett Harding, was inexperienced with the procedures for contesting MSHA penalties and did not realize that the citations and orders had been split into two proposed assessments. Harding mistakenly believed that the citations and orders in proposed assessment No. 000344166 had been timely contested since Tata had properly contested other citations and orders issued during the same inspection. When he discovered the mistake, he acted to rectify it. Tata filed this motion to reopen within less than a month of the proposed assessments becoming final, and accompanied it with an affidavit containing a detailed explanation of the cause of the default.

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 Tata'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/ Patrick K. Nakamura  
Patrick K. Nakamura, Acting Chairman

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

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 27, 2015

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

v.

TATA CHEMICALS (SODA ASH)  
PARTNERS

Docket No. WEST 2014-586-M  
A.C. No. 48-00155-344161

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 28, 2014, the Commission received from Tata Chemicals (Soda Ash) Partners (“Tata”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 3, 2014, and became a final order of the Commission on April 2, 2014. Tata asserts that it failed to timely contest the proposed assessment due to the individual who was responsible for contests being on medical leave, and his assistant being reassigned to different duties as part of a corporate reorganization. The person who then received the proposed assessment, Brett Harding, was inexperienced with the procedures for contesting MSHA penalties and did not realize that the citations and orders had been split into two proposed assessments. Harding mistakenly believed that the citations and orders in proposed assessment No. 000344161 had been timely contested since Tata had properly contested other citations and orders issued during the same inspection. When he discovered the mistake, he acted to rectify it. Tata filed this motion to reopen within less than a month of the proposed assessments becoming final, and accompanied it with an affidavit containing a detailed explanation of the cause of the default.

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 Tata'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/ Patrick K. Nakamura  
Patrick K. Nakamura, Acting Chairman

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

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 30, 2015

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

v.

PETRO CHEMICAL INSULATION,  
INC.

Docket No. KENT 2014-606  
A.C. No. 15-00365-348946 V7D

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On June 25, 2014, the Commission received from Petro Chemical Insulation, Inc. (“Petro”) a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On May 3, 2014, Petro received a proposed penalty assessment from the Secretary. On May 26, 2014, MSHA deemed the proposed assessment to be a final order of the Commission when it appeared, due to an MSHA error, that the operator had not filed a Notice of Contest within 30 days. However, the proposed assessment did not become a final order of the Commission until June 2, 2014.

Petro asserts that it timely contested the penalty as it mailed its contest on May 30, 2014, and its contest was received by MSHA on June 2, 2014. The Secretary does not oppose the request to reopen and notes that the operator had timely contested the penalty, but due to an MSHA error, the case had been marked as delinquent.

Having reviewed Petro’s request and the Secretary’s response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator timely contested the proposed assessment. Section 105(a) states that if an operator “fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty, . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission.” 30 U.S.C. § 815(a). Here, Petro notified the Secretary of the contest. This obviates any need to invoke Rule 60(b) of the Federal Rules of Civil Procedure in order to consider reopening a final order.

Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

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

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 30, 2015

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

v.

RHINO EASTERN, LLC

Docket No. WEVA 2014-892  
A.C. No. 46-08758-341184

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On May 2, 2014, the Commission received from Rhino Eastern, LLC (“Rhino”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 16, 2014, and became a final order of the Commission on February 18, 2014. Rhino asserts that it timely contested the proposed assessment, but for some reason, MSHA did not receive its contest. Rhino also represents that it has added a second oversight level to the process of contesting citations and orders to ensure that paperwork is timely filed. The Secretary does not oppose the request to reopen, but he asserts that there is no record of a notice of contest filed for these penalties.

Having reviewed Rhino'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/ Patrick K. Nakamura  
Patrick K. Nakamura, Acting Chairman

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

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



# **ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 3, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of DALLAS BROOKS

TEMPORARY REINSTATEMENT  
PROCEEDING

Docket No. WEVA 2015-432-D  
HOPE-CD 2015-03

v.

KINGSTON MINING, INC.,  
Respondent

Mine: Kingston No. 2 Mine

**DECISION AND ORDER OF REINSTATEMENT**

Appearances: J. Matthew McCracken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA for Complainant

Arthur Wolfson, Esq., and R. Henry Moore, Esq., Jackson & Kelly, PLLC, Pittsburgh, PA for Respondent

Before: Judge Rae

This case is before me upon an application for temporary reinstatement brought by the Secretary of Labor, on behalf of Dallas Brooks, under section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §815(c) and 29 C.F.R. §700.45. The application seeks reinstatement of Mr. Brooks as a roof bolter at the Kingston No. 2 mine pending final disposition of the discrimination complaint he filed on January 6, 2015 as a result of his suspension on September 24, 2014 and termination on October 1, 2014.

A hearing was held on February 25, 2015 in South Charleston, WV. For the reasons set forth below, I grant the application for temporary reinstatement and retain jurisdiction over this matter until final disposition of the complaint on the merits.

Statement of Facts

Brooks has been a roof bolter at the Respondent’s Kingston No. 2 mine on the day shift for the past three years. In his position, he installs roof bolts using a two-man bolter which he operates with his partner Timothy Patterson. After the continuous miner makes the cut into the coal, the bolter comes in behind it in the return air course and installs the bolts. The approved mine ventilation plan restricts the miners to bolting only once per shift in the return air (or downwind). Working downwind more than once per shift is a violation of state and federal law and poses a health risk to the miners.

Brooks testified that it was common practice to bolt downwind three or four times a shift at least three days per week. The frequency of this practice increased in 2014 when, according to Brooks, management cut down on the overtime that was authorized. Prior to that, the bolters would install the second set of bolts after the end of the regular shift four or five nights a week. According to Brooks, he felt pressured into bolting downwind several times per shift by his section foreman, Josh Bullard. Brooks testified that Bullard told him that if the bolting was not done during the shift, Brooks would be forced to work overtime or would be replaced. Brooks further testified he and Bullard commuted to and from work together and Bullard told Brooks that he didn't want to stay late so Brooks would have to get the bolting done during the shift. Repeated comments of this nature from Bullard made Brooks believe that if he didn't bolt downwind several times per shift to complete the bolting by the end of the shift, he would be fired. This prompted Brooks to make safety complaints. He testified that he made verbal complaints to Bullard at morning meetings. Bullard's response was that he reported it to his boss who said it had to be done because the miner could not be idled. Bullard said he had also spoken with Superintendent Daniel Helmondollar about it but nothing was done. Brooks testified that upper management was aware of the practice as he and other roof bolters had filled out the "Running Right" cards as well making anonymous complaints about working downwind. These cards are reviewed by upper management and are displayed on a television monitor stamped "addressed" although it was never corrected. The issue came to a head when Brooks' roof bolting partner, Patterson, walked into Helmondollar's office on September 23, 2014 and stated that he would not work in this manner any further. Helmondollar then contacted Shad West, Human Resources manager, and together they commenced an investigation the following day which led to the suspension and eventual termination of Bullard, Patterson, Brooks and the two other section roof bolters.

Both Helmondollar and West testified that they had no knowledge of Brooks making any safety complaints about working downwind. Bullard had never communicated any such complaints to them. If he had, the matter would have been addressed immediately. During the investigation of Patterson's complaint, West and Helmondollar interviewed Bullard and each of the roof bolters. Bullard said he told the bolters that if they did choose to operate in the dust more than once per shift, that he can't be held responsible for that if he's not around where they are or able to see them. He denied any complaints being made to him by Brooks. West testified that when he questioned Brooks, Brooks told him that he was never asked to do anything illegal and that he bolted downwind so he didn't have to stay late. Brooks did not allege that he made any complaints to anyone when questioned by West. West further testified that each of the bolters confirmed that they voluntarily bolted downwind several times per shift. At that point, the decision was made to suspend the four roof bolters and Bullard. The only miner not suspended was the scoop operator who filled in as a roof bolter on occasion. He told West that he had refused to bolt downwind and had never done so.

Helmondollar testified that he was aware of "Running Right" cards being submitted complaining of working downwind in violation of the ventilation plan in 2013. There were three or four of them and he immediately held safety talks with all foremen and miners and told them the ventilation plan must be followed. No further complaints were received until Patterson came to his office on September 23<sup>rd</sup>. Although Brooks testified that he raised the issue with Helmondollar at a meeting in August 2014, Helmondollar denied this allegation. Helmondollar

did state that when Brooks was questioned on September 25<sup>th</sup>, Brooks did mention that he had made safety complaints to Bullard. Brooks also stated he didn't want to work overtime as a reason for bolting more than once in return air.

### Application of Law

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

Unlike a trial on the merits of a discrimination complaint brought by the Secretary where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of a temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 45(d), 29 C.F.R. §2700.45(d), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought."

In its decision in *Jim Walters Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11<sup>th</sup> Cir. 1990), the Court noted that the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. The standard is whether a miner's complaint appears to have merit. The Commission has set forth the elements to be considered under this standard: 1) that the miner has engaged in some protected activity under the Act, and 2) that the adverse action complained of was at least in part motivated by the protected activity. *Sec'y of Labor o/b/o Baier v. Durango Gravel*, 21 FMSHRC 953 (Sept. 1999). The motivation can be established by showing knowledge of the protected activity, hostility or animus towards the protected activity, and coincidence in time between the activity and the adverse action. The last element alone may be sufficient to find improper motive. *Durango Gravel* at 957. A temporary reinstatement hearing is not the appropriate forum for a determination of credibility between competing versions of events in evaluating whether a complaint appears to have merit. *CAM Mining LLC*, 311 FMSHRC 1085 (Oct. 2009).

While there are several statements made by Brooks in his testimony and written statements that contradict each other, I find sufficient evidence under the "not frivolously brought" standard to find he engaged in protected activity. He testified that he made safety complaints to Bullard, a member of management, on several occasions most notably within the three month period before he was terminated. He also testified that he filled out complaint cards previously which Helmondollar acknowledged he was aware of a year or so earlier although he testified that he believed the issue had been resolved. Helmondollar testified that Brooks made no safety complaints that he was aware of yet he admitted that Brooks did say to him that he had made such complaints to Bullard. Bullard stated to Brooks that he brought the complaints to the attention of upper management, including to Helmondollar, but nothing was done in response.

Helmondollar denied that Bullard did so. Even though Helmondollar admitted that Brooks told him he had complained about working downwind, Helmondollar and West made the determination that Brooks did so voluntarily which caused him to be terminated.

Whether Helmondollar had knowledge of safety complaints made by Brooks requires an assessment of credibility not properly addressed in this forum. The same holds true as to whether Brooks actually made safety complaints to Bullard or whether he elected to bolt in return air in violation of the ventilation plan voluntarily. The fact that Brooks told Helmondollar when interviewed that he had made safety complaints to his supervisor as Helmondollar confirmed is sufficient at this juncture to find that Brooks engaged in protected activity by complaining about illegal bolting. That the miners bolted in return air more than once per shift has been established. His suspension and termination were directly related to this conduct. The nexus in time between the safety complaints Brooks testified to making and his termination is sufficient to establish motivation for the purposes of this hearing.

I find the complaint is not frivolously brought.

The Respondent made a motion to dismiss the complaint as untimely. Brooks was suspended on September 25, 2014 and ultimately discharged on October 1, 2014. He filed his complaint on January 9, 2015, 100 days later. While the statute provides that a complaint be filed with the Secretary within 60 days after the discriminatory action has occurred, Commission case law is clear that the filing period is not jurisdictional. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381 (Dec. 1999). Whether a complaint is untimely requires a factual determination on a case by case basis. A late filing may be excused on the basis of justifiable circumstances including ignorance, mistake, inadvertence, and excusable neglect. When a serious delay causes legal prejudice to the respondent, dismissal may be required. *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918 (Nov. 1996). Brooks testified that he was unaware of his right to file a complaint for being discharged. MSHA Investigator Humphrey testified that when he interviewed Brooks in relation to an anonymous complaint of a violation of the ventilation plan, it was obvious to him that Brooks had no idea of his rights. On the other hand, Kingston failed to present any evidence of prejudice suffered as a result of this insubstantial delay. It is highly unlikely that any could be found.

I deny Respondent's motion to dismiss.

Kingston Mining, Inc., is hereby **ORDERED** to immediately reinstate Dallas Brooks to his duties as a roof bolter as of the date of his suspension and termination at the same rate of pay and number of weekly hours with restoration of all other benefits to which he was then entitled.

Mr. Brooks' reinstatement will end upon a final order on the underlying discrimination complaint case in chief. 30 U.S.C. §815(c)(2).

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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 5, 2015

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

v.

AMES CONSTRUCTION, INC.,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-274  
A.C. No. 26-02674-339615

Mine: Mill/Autoclave Operations

## DECISION

Appearances: Ryan Pardue, U.S. Department of Labor, Office of the Solicitor  
1244 Speer Blvd., Suite 216, Denver, CO 80204

Donna V. Pryor, Jackson Lewis P.C.  
950 17<sup>th</sup> Street, Suite 2600, Denver, CO 80202

Before: Judge Simonton

## I. INTRODUCTION

This case is before me on a civil penalty petition filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (MSHA), against Ames Construction, Inc. (Respondent), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. This case involves one 104(a) citation issued on November 4, 2013 at the Barrick Gold Mill Autoclave Operations site for alleged improper housekeeping within a mobile storage trailer. The parties presented testimony and documentary evidence at a hearing held in Salt Lake City, Utah beginning December 10, 2014 followed by submission of post hearing briefs.

At hearing, MSHA Inspector Jack Stull testified for the Secretary. Ames Site Foreman David Jackson and Carpenter Jose Rodriguez testified for the Respondent. For the reasons that follow, Citation No. 8701612 is **VACATED**.



## II. MOTION IN LIMINE

Prior to hearing, the Respondent moved to exclude photos and training documents created after the alleged housekeeping violation had been abated to Inspector Stull's satisfaction. Resp. Mot., 1. The Respondent argued that post-abatement photos did not have any relevancy in proving the existence of a violation prior to mandatory abatement efforts. *Id.* at 3-5 citing FRE 407; *Sec'y of Labor v. B&S Trucking Co.*, 17 FMSHRC 411, 414 (ALJ Melick)(March 1995). The Secretary opposed the Respondent's motion, arguing that the photos and training documents would only be entered to detail abatement efforts and document what clutter was removed from the trailer. Sec'y Response, 4. At hearing the court allowed counsel to present brief oral arguments on this issue. Tr., 8-11. Upon questioning by the Court, both the Secretary and the Respondent confirmed that the operator had successfully and promptly abated the alleged violation. Tr. 9. The parties also confirmed that MSHA Inspector Stull had taken photos prior to issuing the citation that documented the condition of the trailer prior to the requested abatement. Tr. 8. Based on these representations, the undersigned excluded post abatement photos from consideration as the photos did not have any relevancy to the existence of a prior violation and were inadmissible per Federal Rule of Evidence 407.<sup>1</sup> Tr., 10.

## III. FINDINGS OF FACT

### A. Citation No. 8701612

MSHA Inspector Jack Stull issued Citation No. 8701612 for an alleged violation of 30 CFR §56.20003(a) on November 4, 2013. Stull alleged within the citation that:

At the T.C.M Leach Project, Elutions Area, Contractor Trailer #730804, housekeeping was an issue. Multiple tripping hazards were found in and around the travel area located inside the trailer. Two miners were observed accessing the trailer earlier in the shift to get tools. In the event of an accident involving a miner tripping and falling, lost workdays or restricted duty injuries would be expected to occur. The Foreman in the area was aware that the trailer was (in) need of cleaning, but failed to take action to ensure that the work was performed prior to miners accessing it.

GX 11, 1.

Stull designated Citation No. 8701612 as a high negligence violation that was reasonably likely to contribute to the occurrence of an injury resulting in lost workdays or restricted duty.

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<sup>1</sup> The court has previously admitted post-abatement photos of a condition in a separate proceeding. *SCH Terminal, Inc.*, 2014 WL 6723959, \*14 (November 2014)(ALJ Simonton). However, in that, case, the admitted post-abatement photos were the only photos depicting the relevant condition and the court relied on them for the limited purpose of corroborating the inspector's testimony regarding pre-abatement conditions.

Stull also determined that the housekeeping violation was significant and substantial. The Secretary has proposed a regularly assessed penalty of \$12,248.00 for Citation No. 8701612.

## 1. Testimony

### a. The Secretary

MSHA Inspector Jack Stull testified for the Secretary. Stull testified that when he approached a mobile trailer at approximately 8:30 AM on November 4, 2013 he observed two workers exiting the trailer with buckets. Tr. 34-35. Stull stated that when he looked into the trailer he observed a yellow box<sup>2</sup> with rounded feet at the entrance of the trailer sticking out, a folding chair with a water cooler on top, and several sheets of plywood lying at an angle. Tr., 27-28. Stull determined that these items presented a tripping hazard and measured the narrowest part of middle walkway in the trailer at 13 inches. Tr. 31. Stull testified that he considered walkways less than 24" wide unsafe but stated that this standard was "just (his) own opinion." *Id.*

Stull testified that the two workers he saw exiting the trailer appeared to head towards a concrete project approximately 15-20 feet away from the trailer. Tr. 33, 34-35. Stull stated that he attempted to ask the workers where their boss was but the workers appeared to be uncomfortable communicating in English and left. Tr. 35. Stull stated that an Ames supervisor arrived shortly thereafter. *Id.* Stull stated that the Ames supervisor told him that "he knew that the trailer needed cleaning but he was busy with this concrete project right now." *Id.* Stull determined that this comment indicated high negligence on the part of Respondent's management. Tr. 35-36, 44. Stull stated that lost workday injuries including broken bones and contusions were likely to occur from the alleged tripping hazards present in the trailer. Tr. 43. Stull indicated that he had reviewed accident reports where significant injuries had resulted from trips and falls. Tr. 44.

Stull stated that Ames management informed him that the trailer had just been moved that morning. Tr. 45. Stull did not consider that a credible mitigating factor because the trailer was not connected to a truck and a grounding wire was already connected to the trailer at 8:30 AM, one and a half hours after. *Id.* Stull did not believe that the trailer had just been moved. *Id.*

On cross-examination, Stull stated that prior to abatement, it was not necessary to step over anything to access any tool or material in the trailer. Tr. 51-52. Stull did maintain that a broom head was sticking out into the aisleway at head level and needed to be pushed back. *Id.*

Stull testified that after being notified of the alleged violation, Ames abated the violation by widening the walkway in the trailer and hanging tools up on nails or stacking them in the shelving. Tr. 47-48. Stull stated that the abatement was complete by 9:00 AM. Tr. 47.

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<sup>2</sup> The "yellow box" described by Inspector Stull was readily identified in the inspection photo as a standard temporary power box as later confirmed by Ames Foreman Jackson. Tr. 100.

## **b. The Respondent**

Ames's carpenter, Jose Rodriguez, testified for the Respondent.<sup>3</sup> Tr. 78. Rodriguez stated that he worked on a small labor crew at the Barrick mine site directed by Foreman Dave Jackson. Tr. 80.

Rodriguez testified that Ames had recently moved the storage trailer in order to clear space for another company. Tr. 81. Rodriguez stated that he opened the trailer after the company had its morning meeting on Monday. Tr. 82. Rodriguez testified that Foreman Jackson had told them when they first moved in and on Monday morning to clean the trailer. Tr. 83. Rodriguez stated that he removed several buckets from the trailer to get them out of the way before Inspector Stull spoke with him. Tr. 85. Rodriguez stated that he did not have any trouble moving around in the trailer. *Id.* Rodriguez stated that Inspector Stull only asked him where the foreman was and did not ask him any other questions. Tr. 87.

Concrete Foreman David Jackson testified regarding Citation No. 8701612 and the conditions of the cited trailer. Jackson stated that the cited trailer was a tool trailer that was approximately 20 feet wide by six feet wide inside to inside. Tr. 96, 98. Jackson testified that he and his crew relocated the trailer the Friday evening before the citation was issued to make way for a crane move. Tr. 101-02. Jackson testified that the temporary power box, water cooler, sheets of expansion material, and power (screed) pointed out by Inspector Stull were moved into the trailer for the crane move. *Id.*

Jackson stated that when his crew returned to the jobsite the next Monday he conducted a safety meeting with his crew that lasted about thirty minutes. Tr. 103. Jackson testified that he instructed Mr. Rodriguez and Mr. Sherez early on Monday morning to remove the material stored temporarily in the trailer. Tr. 103-04. Jackson stated that extension cords, spare harnesses, and other tools were stored in their normal position. Tr. 104-05.

Jackson testified that when Inspector Stull asked him if he knew there was a hazard he answered yes. However, Jackson became frustrated when Stull accused him of willfully exposing his workers to a hazard and did not inform Inspector Stull that he had assigned workers to clean up the trailer. Tr. 106. On cross-examination, Jackson stated that when he acknowledged that there was a hazard in the trailer he was simply agreeing that some material needed to be removed from the trailer. Tr. 117.

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<sup>3</sup> Jose Rodriguez testified with the aid of a translator. Tr. 79. Mr. Rodriguez stated in English that he could understand and speak English but felt more comfortable using a translator to avoid possible confusion. *Id.*

## B. The Cited Standard

30 CFR 56.20003(a) mandates:

Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

30 CFR 56.20003(a).

The MSHA Program Policy Manual does not provide any guidance regarding what constitutes a violation of 30 CFR § 56.2003. A Commission Administrative Law Judge has upheld an alleged violation of 56.20003(a) even in the absence of a significant hazard when the Secretary has shown that deficient housekeeping conditions were extensive. *Baker Rock Crushing Company*, 2010 WL 3616493, \*6 (August 2010)(ALJ Barbour)(affirming non S&S 56.20003(a) citation when Secretary demonstrated existence of an “accumulation of dirt, dust and hydraulic fluid spillage *throughout* the rock breaker area.”(emphasis added). However, an ALJ has vacated an alleged violation of 30 CFR 56.20003(a) when the judge has found that:

The photograph taken by the inspector shows a trailer that is relatively clean and orderly. (Ex. P-8). Spare hoses and belts are hung from hooks on the wall; other hoses are coiled along one side; various cans, including oil barrels, are located along that same side; and a pathway leads into the area. The only slightly cluttered area is at the back of the trailer, but even that area is rather clear of impediments to walking. There are long pieces of metal along one side, but the floor is clearly visible along the path...

*Beco Construction Company*, 23 FMSHRC 1182, 1194 (October 2001) (ALJ Manning).

An ALJ has also vacated an alleged violation of 30 CFR 56.20003(a) when the Respondent credibly demonstrated that workers had not been exposed to recently formed accumulations *and* the Respondent had already initiated clean-up efforts. *Stringtown Materials LP*, \_4, Docket No. CENT 2004-229-M, (unpublished May 18, 2005)(ALJ Zielinski).

## C. Analysis

As an initial matter, I find that 30 CFR § 56.20003(a) applied to the mobile trailer cited by Inspector Stull. Ames uses the trailer to store small tools and construction materials. Tr. 81, 98-99. Accordingly, the trailer fits the definition of a “storeroom” listed in 30 CFR 56.20003(a).

After reviewing all testimony and evidence presented, I find that the Secretary has not established by a preponderance of the evidence that the Respondent failed to maintain the mobile trailer in a “clean and orderly condition.” Although Inspector Stull objected to the positioning of a temporary power box, folding chair, and water cooler at the front of the trailer; it appears there were at least several feet of clear space to the side of these items through which the workers

could enter the trailer. GX 3. The photo submitted by the Secretary also indicates that small tools, including shovels, brooms, and breaker bars were placed upright and out of the main walkway within secure shelving. *Id.* On the opposite side of the trailer it appears that rain gear, safety harnesses and extension cords were placed on racks and hung in an orderly fashion. *Id.* The point Inspector Stull marked on the inspection photo as measuring at 13 inches wide is a small isolated section of the center walkway that otherwise appears to be approximately three feet wide throughout trailer. *Id.* As such, I find that the evidence submitted indicates that the trailer was, in fact maintained in a relatively clean and orderly fashion prior to the issuance of Citation No. 8701612. *Beco Construction Company*, 23 FMSHRC 1182, 1194.

The inspection photo does indicate that there were two sheets of expansion material toward the back of the trailer leaning at a low angle. GX 3. However, as these sheets were butted up against a large metal concrete finishing screed, I do not credit Inspector Stull's testimony that the plywood was likely to slide out into the walkway and cause an accident. GX 3; Tr. 29-30. I also note that Inspector Stull stated that it was not necessary to step over any item to walk in the trailer, and did not provide for any support for his individual belief that a continuous 24" wide walkway was necessary to comply with 30 CFR § 56.20003(a). Tr. 31, 51-52. Accordingly, I find that the Secretary has not demonstrated that conditions in the trailer presented a hazard.

I also credit the testimony of Rodriguez and Jackson that the items Inspector Stull objected to had been placed there temporarily for a recent trailer move. Tr. 81, 100. Foreman Jackson credibly testified that it was necessary to move the trailer the Friday before and store extra material in the trailer over the weekend while a large crane was moved on site. Tr. 100. Jackson and Rodriguez both testified that Jackson instructed his crew to remove those temporary materials after the Monday morning safety meeting. Tr. 83, 103-04. Rodriguez stated that after he opened up the storage trailer on Monday morning, he and his partner removed the buckets from the front of the trailer and intended to remove the expansion material, temporary power box, and concrete finishing screed before Inspector Stull contacted them. Tr. 83-86.

Inspector Stull testified that he thought the two Ames laborers were not cleaning the trailer on the basis that no other materials had been removed from the trailer and the laborers appeared to leave the trailer and head towards a concrete project with buckets. Tr. 34-35, 36-37, 46. However, according to Stull, the concrete project was only 15 to 20 feet away from the trailer. Tr. 33. Additionally, after observing the workers remove the buckets from the trailer, Stull quickly contacted the workers and asked them where their boss was. Tr. 35. Given that Stull first observed the Respondent's laborers only shortly after the conclusion of the morning safety meeting, it is unsurprising that Rodriguez and his partner had not yet made significant progress in reorganizing the trailer. Tr. 85, 104. As such, I find the record demonstrates that the Respondent's employees were actively engaged in cleaning the trailer prior to the time Inspector Stull issued Citation No. 8701612. *Stringtown Materials LP*, \_4, Docket No. CENT 2004-229-M.

Inspector Stull emphasized that after he issued Citation No. 8701612, the Respondent's employees cleared out the materials he objected to and significantly widened the interior walkway. Tr. 48. However, I have already found above that the Secretary has failed to prove that the presence of these items violated 30 CFR 56.20003(a). Thus, evidence showing that Ames

removed and rearranged additional items in the mobile trailer after Inspector Stull issued the citation is not sufficient to sustain the alleged violation.

Having found that the trailer was kept in a relatively clean and orderly condition free of safety hazards, and that the Respondent's employees were actively removing materials normally stored elsewhere at the time of the citation in order to clean the trailer; I find that the Secretary has not established a violation of 30 CFR 56.20003(a).

#### **IV. ORDER**

Accordingly, Citation No. 8701612 is **VACATED** and this matter is **DISMISSED**.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 12, 2015

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

v.

HUMPHREYS ENTERPRISES, INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. VA 2012-504  
A.C. No. 44-07133-290886

Mine: No. 26 Strip

DECISION AND ORDER

Appearances: Najah A. Farley, Esq., and Ryan M. Kooi, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Petitioner;

William J. Sturgill, Esq., Sturgill Law Office, P.C., Wise, Virginia, for Respondent.

Before: Judge Paez

This case is before me upon the Secretary’s Petition for the Assessment of Civil Penalty filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). In dispute are one section 104(d)(1) citation and one section 104(d)(1) order issued to Humphreys Enterprises, Inc. (hereinafter “Humphreys” or “Respondent”) by the Mine Safety and Health Administration (“MSHA”) at the Lyons Pit section of Humphreys’ No. 26 Strip mine. In order to prove the citation and order before me in this proceeding, the Secretary must establish the existence of each violation “by a preponderance of the evidence,” that is, the trier of fact must find the existence of fact is more probable than its nonexistence. *RAG Cumberland Res.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

I. STATEMENT OF THE CASE

Both of the alleged violations in this docket were issued following a quarterly inspection of Respondent’s No. 26 Strip mine by MSHA Inspector Stonewall Eldridge. Citation No. 8172475 charges Humphreys with a violation of 30 C.F.R. § 77.1000 for failing to maintain spoil slopes at a 45-degree angle as required by the mine’s ground control plan. Order No. 8172476 alleges a violation of 30 C.F.R. § 77.1313(a) for failing to conduct an adequate on-shift examination. Both of these alleged violations are designated as “significant and substantial”

(“S&S”)<sup>1</sup> and determined to be the result of Respondent’s unwarrantable failure to comply with a mandatory health or safety standard.<sup>2</sup> The Secretary proposes a penalty of \$2,000.00 for each alleged violation for a total proposed civil penalty of \$4,000.00.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. VA 2012-504 to me, and I held a hearing on May 8, 2014, in Abingdon, Virginia.<sup>3</sup> The Secretary presented the testimony of MSHA Inspector Stonewall Eldridge and Geotechnical Engineer Gregory Rumbaugh. (Tr. 15:18–25, 105:1–8.) Humphreys presented the testimony of four witnesses: Mine Foreman Terry A. Brooks, Surveyor Jewell E. Carty, Engineer James R. Jones, and Humphreys’ Safety Director Lawrence E. Clapp. (Tr. 144:1–5, 167:1–8, 173:2–8, 183:3–9.) The briefing schedule closed in August 2014, with both the Secretary and Humphreys submitting simultaneous post-hearing briefs, and the Secretary filing a reply brief.<sup>4</sup>

## II. ISSUES

The Secretary asserts that both the citation and order in this docket were properly issued and that each was an S&S violation of the Mine Act and an unwarrantable failure to comply with a mandatory health or safety standard. (*See* Sec’y Br. at 13–32.) Accordingly, the Secretary believes his proposed penalty is appropriate. (*Id.* at 32.) In contrast, Respondent believes that the conditions at the Lyons Pit section of Humphreys’ No. 26 Strip mine on December 27, 2011, were safe and that the mine was following its MSHA-approved ground control plan. (Resp’t Br. at 37–38.) In particular, Respondent disputes not only the accuracy of Inspector Eldridge’s angle

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<sup>1</sup> The S&S terminology is taken from section 104(d)(1) of the Mine Act, which distinguishes violations “of such nature as could significantly or substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1).

<sup>2</sup> The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which 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.”

<sup>3</sup> At the hearing, the Secretary and Respondent submitted exhibits and a list of stipulations. In this decision, the Secretary’s exhibits are referenced as “Gov’t Ex. #,” Respondent’s exhibits are referenced as “Resp’t Ex. #,” and the stipulations are referenced as “Joint Stip. #.” Government Exhibit 19 includes four photographs, which were also admitted separately as Respondent Exhibits 1, 2, 5, and 6. Government Exhibit 20 includes four photographs also marked Respondent Exhibits 3, 4, 7, and 8. For ease of description, the photographs are referenced in this decision as Respondent Exhibits 1 through 8. Further, the cross-section map of the Lyons Pit was marked as Government Exhibit 21 and Respondent Exhibit 10, and is referred to as “Gov’t Ex. 21” throughout this decision. Similarly, a map of the Lyons Pit area was marked as Government Exhibit 22 and Respondent Exhibit 9, and is referred to as “Gov’t Ex. 22” in this decision.

<sup>4</sup> In this decision, Respondent’s Brief will be referenced as “Resp’t Br.,” the Secretary’s Post-Hearing Brief will be referenced as “Sec’y Br.,” and the Secretary’s Reply Brief as “Sec’y Reply.”



measurements but also the meaning of Humphreys' notations in its on-shift examination records. (Resp't Br. at 15–16, 23–24.) Therefore, Respondent contends Citation No. 8172475 and Order No. 8172476 should be vacated. (Resp't Br. at 37–38.) Respondent further contends, in the event the alleged violations are upheld, that the cited conditions were neither S&S nor due to the operator's unwarrantable failure. (See Resp't Br. at 13–36.) Thus, Respondent argues that the Secretary's proposed penalties should be vacated or reduced. (*Id.*)

Accordingly, the issues before me are: (1) whether the Secretary has carried his burden of proof that the conditions described in Citation No. 8172475 violated 30 C.F.R. § 77.1000; (2) whether the record supports the gravity and unwarrantable failure designations for Citation No. 8172475; (3) whether the Secretary has carried his burden of proof that the conditions described in Order No. 8172476 violated 30 C.F.R. § 77.1313(a); (4) whether the record supports the gravity and unwarrantable failure designations for Order No. 8172476; and (5) whether the proposed penalties for each alleged violation are appropriate.

### III. FINDINGS OF FACT

#### A. Operations at Humphreys Enterprises No. 26 Strip Mine

Respondent Humphreys Enterprises operates the No. 26 Strip mine, located in Norton, Virginia. (Joint Ex. 1: Stip. 1; Gov't Ex. 3.) The No. 26 Strip mine contains four coalbeds. (Gov't Ex. 3.) The alleged violations in this matter relate to Humphreys' mining activity of the Lyons coalbed, in an area of the mine known as the Lyons Pit. The coal seam at the Lyons Pit was initially covered by "spoil," which is material, such as rock, dirt, and tree roots, that has accumulated over the coal seam. (Tr. 23:4–8.) To access the coalbed to remove coal, Humphreys had to dig a path through the spoil for their equipment to reach the coalbed. (Tr. 149:8–150:13.)

MSHA regulations at 30 C.F.R. § 77.1000 require operators such as Humphreys to "establish and follow a ground control plan for the safe control of all highwalls, pits, and spoil banks," and to file a copy of their ground control plan with their local MSHA district office. See 30 C.F.R. § 77.1000, 77.1000-01. Humphreys Enterprises submitted the ground control plan for their No. 26 Strip mine to the appropriate MSHA District Manager in Norton, Virginia on April 27, 2009. (Gov't Ex. 3.) The plan was developed in conjunction with engineering services provided to Humphreys by Appalachian Technical Services, and establishes pit dimensions and mining practices for the No. 26 Strip mine that are designed to ensure safe and stable ground conditions. (*Id.*) The ground control plan specifies that the maximum angle of deposited spoil at the Lyons Pit is 45 degrees. (*Id.* at 2.)

In December 2011, Humphreys Enterprises began operations in the Lyons Pit. (Tr. 149:21–23.) First, dozers started removing spoil and pushing it into piles to create a pathway for rubber-tired mining equipment to get to the coalbed. (Tr. 149:8–150:11.) As the dozers moved toward the coal seam, they pushed spoil into two spoil banks running along the left and right sides of their path. (*Id.*) The right-side spoil bank was part of an existing highwall that had been created by a previous mining company. (Tr. 22:7–25.) The left-side spoil bank, in contrast, consisted completely of spoil that Humphreys had dug out to access the coalbed. (Tr. 22:20–25.) The "toe" of the right-side spoil bank, where the spoil bank meets the pit floor,

had been dug back to widen the floor so the path would be wide enough for “two production loaders and a truck in between them” to travel abreast for double loading while removing spoil material. (Tr. 36:19–37:8, 51:16–52:6; *see* Joint Ex. 1: Stips. 14–17.) This equipment moved in to the area on December 21, 2011, which meant the Lyons Pit became “active” on that day. (Tr. 148:8–14; Joint Ex. 1: Stip. 6.) By December 27, the day of the inspection, Humphreys’ production loaders and haulers had advanced past the spot between the two spoil banks but had not yet reached the exposed coalbed; Humphreys was still in the process of removing the spoil material in front of the coalbed but now only one hauler (or truck) at a time was driving between the spoil banks. (Tr. 24:10–24, 51:22–52:11.)

B. Inspection at the Lyons Pit on December 27

1. Ground Control Violation

On December 27, Inspector Eldridge arrived at the Lyons Pit portion of the No. 26 Strip Mine at approximately 7:15 a.m. to conduct a regular EO1 (or quarterly) inspection. (Tr. 19:5–6, 20:23, 21:4.) Prior to arriving at the mine, Eldridge had prepared for the inspection by reviewing the mine’s files, including its ground control plan. (Tr. 19:11–17.) Once Eldridge arrived at the mine, he met with Mine Foreman Terry Brooks and began traveling around the facility with him. (Tr. 20:24–21:3.) He traveled with Brooks down into the pit area, where equipment operators were loading overburden and hauling it to the overburden dump area with both production spreads.<sup>5</sup> (Tr. 21:7–11.)

As Eldridge walked into the pit, he followed the path Humphreys created between the right and left spoil banks to access the coal seam. (Tr. 21:23–22:11.) While in the pit, Eldridge immediately noticed the spoil banks on each side of the Lyons Pit appeared to be too steep. (Tr. 26:7–11.) He discussed the spoil banks with Brooks and documented the conversation contemporaneously in his inspection notes. Eldridge wrote, “I commented that the left side of the pit the spoil had been sloped some but was not finished. [Brooks] stated that they had started sloping it but pulled off of it. The Right [sic] side spoil has not been touched (sloped) at all.” (Tr. 26:17–22, 29:15–22; Gov’t Ex. 2 at 5–6.)

Because the slope on both the left and right spoil banks appeared to be greater than the required maximum angle, Eldridge took out his Abney hand level and began to measure the angles on the spoil banks.<sup>6</sup> (Tr. 32:5–14.) Using the hand level, Eldridge measured the right-side spoil slope’s angle to be sixty-nine degrees, and the left-side spoil slope’s angle to be sixty degrees. (Tr. 34:25.) To support his measurements, Eldridge took several photographs of the spoil slopes. (Tr. 35:1–5; Gov’t Exs. 4–10.) Eldridge also noted that the “toe” of the slope, where the spoil bank met the mine pit floor, had been dug out of the spoil banks, presumably to

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<sup>5</sup> A “production spread” at the Lyons Pit consists of a production loader and a couple of haulers. (Tr. 19:20–22.)

<sup>6</sup> The Abney hand level is a standard MSHA-issued piece of equipment often used to measure slope angles and grades. (Tr. 34:16–20.)

allow equipment removing spoil material to get through, thus increasing the slope angle. (Tr. 36:7–11.)

Eldridge considered the left and right spoil banks to be hazardous to miners because they had not been sloped down to the required 45-degree angle, and he had documented equipment traveling within approximately three feet of the recently cut-out “toe” of the slope. (Tr. 37:11–19.) In addition, Eldridge observed larger diameter boulders and water seepage on the right-side spoil slope. (Tr. 38:9–11; Gov’t Ex. 5.) The seepage concerned him because it indicated the spoil was saturated with water and thus unstable.<sup>7</sup> (Tr. 38:10–15.) Eldridge believed these conditions were S&S and an unwarrantable failure under section 104(d)(1) of the Act.

To abate the spoil slope condition, the mine constructed two earth berms 30 feet away from the toe of each spoil bank, which would prevent any miners or equipment from getting too close to the spoil banks and being covered with spoil in the event of a structural failure. (Tr. 50:10–51:16.) Humphreys flagged each berm with red tape so miners could easily identify and avoid the hazardous area. (Tr. 51:7–13, 53:6–10, 162:19–23; Gov’t Exs. 11–14.) This method of abatement was appropriate because equipment no longer needed to be close to the toe of the spoil bank (nor did any additional material need to be cut out of the toe); at that point in the mining process at the Lyons Pit, the operator was moving only haulers in and out one at a time, rather than digging between the spoil banks with both loaders abreast as a unit and a truck in between to haul out the spoil. (Tr. 51:16–52:14.) After Humphreys constructed the berms, Eldridge issued Citation No. 8172475, which reads verbatim:

The mine operator is not following the established ground control plan for the safe control of all highwalls, pits and spoil banks. The spoil banks located in the Lyons Strip Pit are not being sloped to 45 Degrees or less as stated in the Ground Control Plan dated April 27, 2009. The spoil bank on the right side of the pit is on a 69 Degree slope and stands 35’ to 40’ high. The left side spoil bank is on a 60 Degree slope and stands 50’ to 55’ high. Two production loaders are working sideways underneath the high spoil while loading two haulers. The foreman engaged in aggravated conduct constituting more than ordinary negligence by allowing the equipment to work underneath the hazardous spoil. This violation is an unwarrantable failure to comply with a mandatory standard.

(Gov’t Ex. 1; *see* Joint Ex. 1: Stips. 12, 14–15.)

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<sup>7</sup> The rainfall and temperature changes during December caused freeze and thaw cycles, which create further instability. (Tr. 39:19–23.) When water freezes, it expands, wedging into the spoil around it. (Tr. 39:17–24.) When the ice thaws, it contracts, allowing the same area to accommodate more water than before. (*Id.*) When the water freezes again it will wedge the spoil out even further. (*Id.*) Thus, over time, these freeze-thaw cycles contribute to instability. (*Id.*)

Eldridge marked this citation as “reasonably likely” due to both the steepness of the spoil banks and the recent rain and consequent water saturation that would contribute to the slope’s instability. (Tr. 54:6–22.) He also determined this violation could cause “permanently disabling” injuries because, in the event of a spoil slope failure, spoil material would come down over equipment on the pit floor. (Tr. 55:10–18; Gov’t Ex. 1.) Eldridge believed this was S&S and would lead to serious injuries, even though the body of the equipment itself might provide some protection from the crushing injuries. (*Id.*) Because Eldridge had not observed any miners on foot in the area, he marked the type of injury as “permanently disabling” rather than “fatal.” (*Id.*) Eldridge also designated this citation as an unwarrantable failure with high negligence because he thought an experienced foreman should have easily recognized the condition, given how obvious the steepness of the spoil banks had been upon entering the Lyons Pit. (Tr. 55:19–56:22.)

## 2. On-shift Examination Violation

Eldridge continued his inspection by looking at the mine’s examination records, noting that the day shift examination notes for December 21 state “spoil high” under the “Hazardous Condition” section of notes on the Lyons Pit. (Tr. 56:1–4; Joint Ex. 1: Stip. 8; Gov’t Ex. 16.) These on-shift examination notes also state under the “Action Taken” section, “working down with dozers.” (Joint Ex. 1: Stip. 9; Gov’t Ex. 16.) Yet, the high spoil conditions Eldridge observed on December 27 were not recorded in the on-shift examination book for either the December 21 evening shift or on December 22. (Joint Ex. 1: Stips. 10–11; Gov’t Exs. 17–18.) As a result, Eldridge issued Order No. 8172476, which states verbatim:

Adequate on shift examinations are not being done in the Lyons strip pit. The Lyons strip pit became active on December 21, 2011, on the day shift at which time the foreman recorded in the on shift examination book that the pit had “High Spoil” and the corrective action recorded was “working down with dozers”. No hazards were reported in the exam book for the night shift, also working in the Lyons pit on December 21, 2011. No spoil hazards are reported in the exam book for either shift on December 22, 2011. The mine was idle four days during the holidays and resumed work today, December 27, 2011. The spoil banks in the Lyons pit are not sloped to a maximum of 45 Degrees as stated in the Ground Control Plan. No entries of any kind have been documented in the exam book for today. The foreman engaged in aggravated conduct constituting more than ordinary negligence by not documenting and correcting the spoil bank hazards. This violation is an unwarrantable failure to comply with a mandatory standard.

(Gov’t Ex. 15.)

Mine Foreman Terry Brooks conducted both pre-shift and on-shift examinations on December 27. (Tr. 150:15–20.) Over the course of the shift, Brooks explained he would look at

the spoil banks in the Lyons Pit approximately once an hour, and they appeared safe and stable to him during the shifts prior to the inspection. (Tr. 154:18–23, 159:17–22.) Brooks also acknowledged that the mine’s on-shift examination notes on December 21 indicate high spoil in the Lyons Pit area but maintained this was in reference to the spoil in a different area than the one Eldridge had cited. (Tr. 154:1–6.)

C. Humphreys’ Spoil Bank Survey

When Humphreys’ Safety Director Clapp arrived at the Lyons Pit on December 27, 2011, he spoke with Brooks and learned that the mine had been issued a section 104(d)(1) citation and a section 104(d)(1) order during the inspection earlier that day. (Tr. 184:8–14.) He then walked to the pit and saw the cited area had been barricaded and flagged. (Tr. 184:18–25.) Because Clapp did not believe the spoil banks were sloped at an unsafe angle, he decided to conduct his own survey of the spoil slopes. (Tr. 185:2–10.) He had ordered similar surveys in the past because he felt his surveyors’ equipment was far more accurate than hand-held equipment, such as the Abney hand level. (*Id.*) Clapp instructed the foreman and night shift foreman not to disturb the areas that had been flagged off. (Tr. 184:24–25.) On his way home from the mine that day, Clapp stopped by the mine office and told Humphreys’ surveyor Roger Jones that their surveyors should meet him in the Lyons Pit to conduct a survey the next morning. (Tr. 185:8–10.)

On December 28, 2011, Humphreys’ surveyor Jewell Carty went to the Lyons Pit to conduct a survey of the cited spoil slopes. (Tr. 168:22–69:15.) Upon arriving at the pit, Carty and a survey team met with Brooks and Clapp. (Tr. 169:1–6.) Clapp informed them that a citation had been written on the slope and instructed them as to where he wanted them to take a cross-section of the slope. (Tr. 206:15–24.) The surveyors then conducted a survey of the sections of the spoil slopes that had been flagged the day before. (Tr. 169:10–18.) They sent their survey data to the engineering department, where a cross-section survey map was produced under the supervision of Carty’s supervisor, Roger Jones. (Tr. 168:13–17, 169:16–170:7; Gov’t Ex. 21.) This map shows the slope angles on the right and left side spoil banks to be approximately 44.4 and 45.8 degrees, respectively. (Gov’t Ex. 21.) Although both Carty and Jones had surveying experience, neither one is a licensed land surveyor. (Tr. 170:21–25, 181:24–25.)

#### IV. PRINCIPLES OF LAW

A. 30 C.F.R. § 77.1000

Section 77.1000 requires that:

Each operator shall establish a ground control plan for the safe control of all highwalls, pits, and spoil banks to be developed after June of 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.

30 C.F.R. § 77.1000. The Commission has recognized that this section requires operators of surface coal mines to establish and follow a ground control plan. *RNS Servs., Inc.*, 18 FMSHRC 523, 523 n.1 (Apr. 1996). Humphreys' ground control plan required the spoil banks in the Lyons Pit to be sloped at an angle no greater than 45 degrees. (Gov't Ex. 3.)

B. 30 C.F.R. § 77.1713(a)

Section 77.1713(a) requires that:

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

30 C.F.R. § 77.1713(a). Under this standard, an operator must ensure that a certified person regularly checks active working areas for hazards, records them, and corrects any hazardous conditions. *See Black Castle Mining Co.*, 36 FMSHRC 323 (Feb. 2014). In order to establish a violation of this standard, the Secretary must show hazardous conditions were present in the Lyons Pit when the mine was active on December 22 and 27, 2011, and that these conditions were not recorded in the on-shift examination book or corrected as required by the applicable standard.

C. Significant and Substantial

Both of the alleged violations in this docket were designated as S&S violations. A violation is S&S if, “based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

Besides specifying the elements I must consider in examining an S&S designation, the Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission found that “an inspector’s judgment is an important element in an S&S determination.” *Mathies*, 6 FMSHRC at 5 (citing *Nat’l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135–36 (stating that ALJ did not abuse discretion in crediting the opinion of an experienced inspector). The Commission has also observed that “the reference to ‘hazard’ in the second element is simply a recognition that the violation must be more than a

mere technical violation—i.e., that the violation present a measure of danger.” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (citing *Nat’l Gypsum*, 3 FMSHRC at 827). Moreover, the Commission has indicated “[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742 n.13 (Aug. 2012). In addition, “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citations omitted), *aff’d on other grounds*, 717 F.3d 1020 (D.C. Cir. 2013). Finally, the Commission indicated an evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

#### D. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. 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*, 52 F.3d at 135–36 (approving Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. The Commission has identified several such factors, including 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 is obvious or poses 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), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001), *appeal voluntarily dismissed* (Oct. 19, 2001) (“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, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

### V. ANALYSIS, FURTHER FINDINGS OF FACT, AND CONCLUSIONS OF LAW

#### A. Additional Findings of Fact

The parties disagree on the angle at which the spoil banks in the Lyons Pit were sloped. The parties presented conflicting evidence regarding their perceptions of the slope angles, the accuracy of angle measurements taken with an Abney hand level, and the reliability of the cross-

section map produced by Humphreys. The parties also disagree as to the meaning of the “spoil high” notation in the mine’s examination book during the day shift on December 21.

### 1. Angle of the Spoil Bank Slopes at the Lyons Pit

Several witnesses testified about their visual impressions of the spoil bank slope angles at the Lyons Pit, based on both their recollections and analysis of photographs. Inspector Eldridge testified it was immediately apparent to him that the spoil banks in the Lyons Pit appeared to be steeper than 45 degrees, and he supported his observations by taking photographs and angle measurements. (Tr. 26:6–11, 32:7–34:25; Gov’t Exs. 4–14.) I find Eldridge’s testimony to be credible, particularly because his photographs depict spoil slopes that appear very steep. (See Gov’t Exs. 4–14.) To further support Eldridge’s contention that the spoil banks were steeper than 45 degrees, the Secretary presented the testimony of Gregory Rumbaugh, an MSHA engineer asked to investigate the spoil slope citation at the Lyons Pit. Rumbaugh has extensive relevant experience, and he sufficiently and competently explained why the photographs and documents he reviewed indicated that Humphreys was in violation of its ground control plan.<sup>8</sup> As he pointed out, several features in the photographs indicate the spoil banks were steeper than 45 degrees, including reference objects and areas where the toe had been cut back to create a steeper angle. (Tr. 113:14–116:23; Gov’t Exs. 4–14.) Throughout their testimony, both Eldridge and Rumbaugh convincingly explained why the spoil slopes were sloped at approximately 60- to 70-degree angles.

In contrast, Humphreys’ Foreman Brooks testified that he had regularly examined the slopes for potential hazards, that they appeared safe to him, and that he knew the ground control plan required the slopes to be at a 45-degree angle. (Tr. 146:22–147:18, 154:15–23.) However, Brooks later admitted he had never reviewed the ground control plan in its entirety. (Tr. 165:10–15.) He was also unable to tell Inspector Eldridge the plan’s maximum allowable spoil slope angle when asked on the day of the inspection. (Tr. 30:14–20.) Brooks’ testimony indicates he was not sufficiently familiar with the mine’s ground control plan. It is unclear how Brooks could be certain the spoil slopes were safe and in compliance with the ground control plan without knowing the specifics of the plan. Because of the inconsistencies in Brooks’ testimony, I find it to be unreliable and outweighed by Inspector Eldridge’s testimony.

Respondent also argues that the Secretary’s photographs and measurements were not accurate enough to support a violation. Safety Director Clapp argued that the angle at which a photograph is taken can have a great impact on the perceived slope, and he took his own pictures to show this. (Tr. 186:6–7, 188:1–10; Resp’t Exs. 1–8.) Clapp and surveyor Jewell Carty also doubted the precision of Inspector Eldridge’s Abney hand level, suggesting that his measurements might be off by several degrees. (Tr. 193:13–194:7, 171:11–172:16.) Both men

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<sup>8</sup> Prior to joining MSHA, Rumbaugh had approximately 10 years of work experience as a land engineer, which included experience with the excavation of new slopes at a mine, as well as investigations of various geotechnical aspects of engineering projects. (Tr. 105:18–106:14.) Specifically, Rumbaugh has experience investigating a fatal accident caused by an embankment failure, as well as evaluating embankment and highwall stability. (Tr. 107:22–25, 109:19–24.)



suggested that correct use of the hand level required a steady hand and some estimation, and both felt that modern surveying equipment might be more accurate. (*Id.*) Although the Secretary's expert, Rumbaugh, admitted that both the angle of a photograph and the estimation involved for Abney hand level use might affect an angle perception by a few degrees, the difference between a 45-degree slope and a 60-degree slope is well beyond these margins. (Tr. 132:4–11, 136:15–24.) Ultimately, I find that any discrepancies between an angle measurement taken with different instruments would be minor, and thus agree with the Secretary that the Abney hand level provided a reasonable approximation of the slope angles in this case. (Tr. 132:4–11.)

Furthermore, Respondent relies on the cross-section map created from Humphreys' surveyors' data as evidence that both spoil slopes in the Lyons Pit were sloped at close to a 45-degree angle, as required by Respondent's ground control plan. (Gov't Ex. 21.) However, several circumstances surrounding Humphreys' survey and creation of this cross-section map lead me to determine that the survey map is not reliable. Primarily, I find convincing Rumbaugh's explanation as to why Respondent's survey and cross-section map are unreliable. Rumbaugh drew on his extensive geotechnical engineering experience and review of conditions at the Lyons Pit. He opined that Humphreys' cross-section map could not be representative of the actual condition of the spoil banks because the data points selected for the survey were not spread out or numerous enough to depict an accurate representation of the slope angles. (Tr. 122:19–127:14, 142:16–19; Gov't Exs. 21–22.) For an accurate survey, Rumbaugh stated that surveyors would have taken roughly 100 to 200 ground surface "shots," in contrast to the mere 12 taken by Humphreys' unlicensed surveyors.<sup>9</sup> (Tr. 127:8–19.) Additionally, the Humphreys employee actually taking shots for the survey, Jewell Carty, was not a licensed land surveyor. (Tr. 170:21–25.) Although Carty testified that Roger Jones would stamp his work if necessary, Jones himself was also not a licensed land surveyor and had not stamped the survey. (Tr. 171:1–4, 181:24–25.) These deficiencies cast into question the level of professional accountability and supervision present in Humphreys' survey and map production, and thus undermine the survey's reliability. For these reasons, I give no weight to the cross-section map produced by Respondent.

Thus, I find that the Secretary has shown by a preponderance of the evidence that the spoil banks in the Lyons Pit on December 27 were sloped at an angle greater than 45 degrees in violation of Humphrey's ground control plan.

## 2. Interpretation of examination notes

The parties also presented conflicting testimony regarding the "spoil high" notation in the mine's on-shift examination book for December 21, 2011. (Gov't Ex. 16.) Respondent maintains that the "spoil high" notation in the on-shift examination book on December 21 was referring to high spoil *in front* of the loaders, not to the cited areas on the side spoil banks. (Tr. 151:21–154:6; Resp't Br. at 8, 23.) Brooks testified that on December 21, he observed high

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<sup>9</sup> The mine's safety director, Eddie Clapp, believed that the Humphreys' surveyors took the appropriate points "where they need to." (Tr. 189:11–17.) However, Clapp himself is not a surveyor.

spoil in front of the loading equipment, recorded this in his examination book, and had a dozer work down the material so it would not be unsafe for the loaders going in to pick up the spoil material in front of them. (Tr. 152:1–20.) According to Brooks, the “spoil high” notation in his examination notes on December 21 had been in reference to a different area, that is, the spoil in front of the loading equipment. (Tr. 154:1–6.)

Yet, Brooks’ own contemporaneous actions give me significant pause about the accuracy of his testimony on this point. As the parties have stipulated, Brooks recorded “spoil high” and “working down with dozers” in his December 21 on-shift examination. However, Brooks’ on-shift record does *not* reference the location of the “spoil” in question. Although he may have testified to the best of his recollection at the hearing, his own contemporaneous account provides no basis for determining which “spoil” he meant. Even more troubling, Brooks admitted that he did not raise this point with Inspector Eldridge at the time of the inspection. (Tr. 154:7–9.) Given his position as a foreman responsible for safety hazards and the potentially costly penalty facing Humphreys, it is reasonable infer that Brooks would have mentioned the meaning of his “spoil high” notation when Eldridge issued the citation. In view of the above, I have serious doubts regarding the accuracy of Brooks’ claim that his “spoil high” notation referred to a third spoil pile.

In contrast, Inspector Eldridge’s account corresponds well with his contemporaneous inspection notes. Eldridge testified that he was certain the on-shift examination notes on December 21 referred to conditions on the left- and right-side spoil banks because, “[t]he two spoil banks on the left side and the right side going into the Lyons Pit were the only two spoil banks that they had going as far as getting on the Lyons seam . . . .” (Tr. 61:12–16.) Eldridge also testified that when he discussed the spoil slopes with Brooks, Brooks stated that the spoil had been high and that he had started sloping down a particular area with dozers but had pulled off to do something else. (Tr. 62:23–63:1.) When observing the area Brooks referred to, Eldridge noted that it was obvious to him where they had started sloping the spoil. (Tr. 62:22–23.) On each point, Eldridge’s notes from the day of the inspection buttress his account. (*See generally* Gov’t Ex. 2 (recording his observations).)

Based on the testimony and evidence before me, I therefore credit Eldridge’s testimony on this point, and I find that the plain and direct “spoil high” notation on December 21 referenced material on the spoil banks in the same location as the cited condition.

B. Citation No. 8172475 – Spoil Bank Slope

1. Fact of Violation

Section 77.1000 requires each operator to establish a ground control plan for the safe control of all highwalls, pits, and spoil banks, and to follow their established ground control plan. *See* 30 C.F.R. § 77.1000. Humphreys’ ground control plan established that spoil banks in the Lyons Pit would be sloped at an angle no greater than 45 degrees. (Joint Ex. 1; Gov’t Ex. 3.)

For the reasons discussed above, I have found the Secretary’s evidence regarding this violation to be credible, and that the photographs and testimony support upholding the violation.

I give little weight to Respondent's evidence. At best, Respondent's arguments suggest that the angle measurements and the photographs of the slopes could overstate the slope of the spoil banks by a few degrees. Yet, the slopes were measured at 60 and 69 degrees, far greater than the 45 degrees required by the ground control plan, and photographs of the area support that finding. (Tr. 34:24–25, Gov't Exs. 4–14; Resp't Exs. 1–8.) Even after accounting for a small margin of error, it is still obvious from the photographs that the slopes were fairly steep. (Gov't Exs. 4, 6.) Therefore, I determine that Respondent Humphreys Enterprises violated 30 C.F.R. § 77.1000.

## 2. Gravity and S&S determination

To establish an S&S violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies*, 6 FMSHRC at 3–4.

As discussed above, the first element of the *Mathies* test, a violation of a mandatory safety standard, has been established. Further, Eldridge and Rumbaugh credibly testified that the steepness of the spoil slopes could create a hazard because the spoil material could slide or topple, particularly when considering the water seepage and freeze-thaw conditions present at the Lyons Pit in December 2011. (Tr. 38:4–15, 128:5–10.) Thus, the Secretary has shown the presence of the second *Mathies* factor, that this violation contributed to a discrete safety hazard of the steep spoil slopes failing and causing rocks and spoil material to drop into the pit below.

With respect to the third *Mathies* element, this hazard was reasonably likely to result in an injury for several reasons. First, the “toe” of the spoil bank had been cut out and dug back. Because the toe of a spoil bank helps prevent the failure of the material above it, the removal of the toe can lead to slope instability. (Tr. 113:19–114:5.) In addition, there had been recent rain as well as water seepage on the spoil banks, which Rumbaugh testified can create slope instability by as much as a factor of two.<sup>10</sup> (Tr. 57:7–10, 114:24–115:2, 159:10–15, 165:22–166:2; Gov't Ex. 2 at 11.) Particularly in December when the inspection took place, any water present in the slopes would have undergone freeze and thaw cycles, which means that the expansion of water would create gaps in the spoil material and lead to further instability. (Tr. 38:11–12, 39:14–24.)

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<sup>10</sup> Respondent objects to the Secretary's evidence regarding the presence of water on the spoil slopes in the Lyons Pit. Specifically, Respondent asserts that neither the text of Citation No. 8172475 nor Eldridge's notes mention water seepage. (Resp't Br. at 21.) Although water seepage is not mentioned in the text of the “violation” portion of Citation No. 8172475, the inspector had designated the citation as S&S, and evidence of water seepage is relevant to consideration of the third *Mathies* factor (rather than for showing the violation itself). A Judge's decision as to whether a particular violation is S&S is a circumstantial inquiry that must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (citing *National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981)). In this instance, the particular facts surrounding this violation include the weather conditions and water content of the spoil slopes in the Lyons Pit during December 2011.

Respondent argues that the likelihood of a spoil bank failure was low because the spoil banks had existed for years, as another coal company had been in the area prior to Humphreys, and no failures had occurred. (Resp't Br. at 26.) This argument is inapplicable to the left side spoil bank because it consisted entirely of new spoil material. (Tr. 22:20–25.) Further, even if the slopes were stable at the time another mining company was in the area, Humphreys' practice of digging back the "toe" of the slope created an additional source of instability. (Tr. 76:2–77:9, 114:1–5.) Most importantly, Respondent's arguments regarding the absence of slope failure in the years prior to this inspection are misplaced. The Commission has held that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citations omitted), *aff'd on other grounds*, 717 F.3d 1020 (D.C. Cir. 2013). Thus, the Secretary has satisfied his burden of proof on the third *Mathies* element.

Regarding the fourth *Mathies* factor, this citation was marked as "permanently disabling," because Inspector Eldridge had documented equipment operating close to the spoil banks and thought that, in the event of a spoil bank failure, large boulders and spoil material would come down onto the equipment and expose miners working in the pit to crushing injuries. (Tr. 37:17–20, 44:1–4.) Further, miners were working parallel to the spoil slopes, which Rumbaugh testified would increase their exposure to falling material in the event of slope instability. (Tr. 128:11–129:1.) In contrast, Clapp did not think any injuries resulting from this hazard would be severe because miners are never on foot in this area, so no miner would be directly exposed to hazards. (Tr. 194:17–195:15.) Clapp noted that the height of each spoil bank was not that much larger than the average height of the equipment used in the pit, which meant that there would have to be a "massive failure" to cover a hauler in spoil material.<sup>11</sup> (Tr. 195:1–15.) However, Rumbaugh credibly testified that he had investigated similar circumstances in the past, and could remember instances in which equipment operators had become trapped in the falling material. (Tr. 128:5–10.) I agree with Eldridge's determination. Because operators were working parallel to the slopes, at times within three feet of the spoil banks, I determine that the type of injuries reasonably likely to result from a spoil bank failure would be permanently disabling. The Secretary has therefore established the fourth *Mathies* element. Having determined that the Secretary has proven all four of the factors required by *Mathies*, I conclude that Citation No. 8172475 was appropriately designated as S&S.

### 3. Negligence and Unwarrantable Failure

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. The Commission has identified several such factors, and I will discuss each of these factors below.

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<sup>11</sup> Clapp estimated the average height of equipment to be about 20 feet, and the parties' joint stipulations state that on December 27, 2011, the right spoil bank was approximately 35 feet high and the left spoil bank was approximately 50 feet high. (Tr. 195:1–12; Joint Stip. 14–15.)

The facts of this violation indicate the presence of several aggravating circumstances at the Lyons Pit. First, the violation was extensive in that the mine operator was out of compliance with its ground control plan for significant portions of both spoil banks. The violative conditions were also obvious, and Inspector Eldridge noticed immediately that the spoil slopes appeared too steep. (Tr. 55:21–25.) Even an untrained eye can ascertain from photographs of the Lyons Pit that the spoil slopes are very steep. (Gov't Exs. 4–14.) Further, the operator's efforts in abating the violative condition were minimal in that Brooks had instructed the dozers to work down the slope, but had called them off the job and done nothing further. For the reasons stated in my S&S analysis, the violation posed a high degree of danger that miners could suffer serious injuries from falling or sliding rocks and debris from the spoil banks. Moreover, the "spoil high" notation in the on-shift examination book on December 21 indicates that the operator had knowledge of the existence of the violation for the few shifts leading up to Eldridge's inspection on December 27. (Gov't Ex. 16.)

The other unwarrantable failure factors are relatively insignificant as either mitigating or aggravating factors. With respect to the length of time the violation existed, the violation in question was first present when documented in the examination notes on December 21, and the slopes were still too steep during the inspection on December 27. Even after accounting for the mine closure over the Christmas holiday from December 22 through 26, there were still four shifts during which miners were exposed to hazardous conditions. (Tr. 156:1–2; Joint Ex. 1: Stip. 13.) The Secretary did not present any evidence that Humphreys had been on notice from MSHA that greater efforts were required for compliance with its ground control plan at the Lyons Pit. Indeed, Humphreys had just begun operations in the area and the spoil banks could not have existed for longer than a few weeks. After considering all the unwarrantable failure factors, I conclude that the above-discussed aggravating factors—particularly the operator's knowledge of the condition, the obvious nature of the violation, and the degree of danger it posed—all support an unwarrantable failure designation. Consequently, I determine that the Secretary proved the ground control violation was the result of the operator's unwarrantable failure.

Inspector Eldridge designated the citation as high negligence because he determined this violation was obvious, as he had noticed almost instantly upon walking into the Lyons Pit that the spoil slopes appeared to be too steep. (Tr. 55:21–25.) This meant that a miner with experience in evaluating hazards, such as a certified foreman, should have noticed the condition long before the spoil banks were allowed to accumulate to that degree. (*Id.*) The mine's Safety Director Eddie Clapp disagreed with the negligence designation assigned to the citation because he felt that the violation came down to a difference of opinion between the inspector and the foreman as to the angle of the spoil slopes. (Tr. 198:16–199:6.) However, in the mine's on-shift examination book from December 21—six days before Eldridge's inspection—Mine Foreman Brooks noted high spoil in the Lyons Pit. (Tr. 56:1–4; Gov't Ex. 16.) Thus, the record demonstrates that mine personnel had actual knowledge of this hazard and failed to address it adequately. Accordingly, I conclude that a high negligence designation is appropriate.

#### 4. Penalty Analysis

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of the penalty relative to the size of the operator's business, the operator's negligence, the penalty's effect on the operator's ability to continue in business, the violation's gravity, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. *See* 30 U.S.C. § 820(i). Further, the Secretary has proposed the statutory minimum of \$2,000.00 for this section 104(d)(1) citation, and I am bound to go no lower than that minimum amount. 30 U.S.C. § 820(a)(3)(A); *Stansley Mineral Res. Inc.*, 35 FMSHRC 1177, 1180 (May 2013).

Respondent's violation history shows that it has no history of previous violations at this mine. (Gov't Ex. 25.) Further, the parties have stipulated as to the size of the mine and that the total proposed penalty in this matter will not affect Respondent's ability to continue in business. (Joint Ex. 1: Stips. 19–20.) I find the proposed penalties to be appropriate for the size of the operator. As detailed above, I have found that Humphreys displayed high negligence amounting to unwarrantable failure and that this violation was S&S. Nothing in the record suggests the operator did not demonstrate good faith in achieving compliance after notification of the violation. Upon consideration of these factors, I conclude that a penalty of \$2,000.00 is appropriate for this violation.

#### C. Order No. 8172476 – On-shift Examination Violation

##### 1. Fact of Violation – 30 C.F.R. § 77.1713(a)

I have found that the spoil banks on both sides of the Lyons Pit were far steeper than allowed by Humphreys' ground control plan from December 21 through 27, and Respondent's on-shift examination notes during most of this period show no record of this hazard. (Gov't Exs. 16–18.) Thus, Respondent also violated 30 C.F.R. § 77.1713(a) by failing to note the obvious hazards in its on-shift examination records.

##### 2. Gravity and S&S determination

The first *Mathies* factor, the violation of a mandatory safety standard, has been established. The second *Mathies* factor requires that the violation contribute to a discrete safety hazard. *Mathies*, 6 FMSHRC at 3–4. In this instance, the violation caused a lack of notice of steep spoil banks at the mine, which contributed to the hazard of steep, unstable spoil banks on either side of the pit. With respect to the third *Mathies* factor, this hazard was reasonably likely to cause an injury because it created a workplace where miners entered the Lyons Pit and traveled parallel to the potentially unstable slopes without protection from possible slope collapse. Further, the absence of any notation in the onshift records made it more likely that the steep slopes would last for longer periods of time because miners would not be aware of the need to slope down the spoil. Although not binding on my decision in this matter, I note that other Commission Administrative Law Judges have also found violations of this standard to be S&S, citing similar concerns that a failure to record hazards will leave those hazards uncorrected and make it more likely for miners to be assigned to work in unsafe conditions without any warning

of possible danger. See *Ky. Fuel Corp.*, 36 FMSHRC 159, 172 (Jan. 2014) (ALJ); *Extra Energy Inc.*, 34 FMSHRC 3285, 3294 (Dec. 2012) (ALJ). Finally, *Mathies* requires that the injury in question be of a “reasonably serious” nature. *Mathies*, 6 FMSHRC at 3–4. As discussed above, a spoil bank failure would cause large boulders and spoil to come down onto equipment in the Lyons Pit, which would be reasonably likely to cause permanently disabling, crushing injuries for equipment operators working close to the slopes. Thus, I determine that the fourth *Mathies* factor has been met.

Having determined that the Secretary has proven all four of the factors required by *Mathies*, I conclude that Order No. 8172476 was appropriately designated as S&S.

### 3. Negligence and Unwarrantable Failure

The Secretary again claims that Humphreys’ level of negligence was “high.” (Sec’y Br. at 32; Sec’y Reply at 4.) In addition, the Secretary characterizes the operator’s conduct as an unwarrantable failure to comply with a mandatory standard. (Sec’y Br. at 32.; Sec’y Reply at 4.) According to the Secretary, Respondent’s knowledge of the violative condition, its previous—and ineffective—efforts to abate the condition, and the duration of the condition demonstrate that Humphreys’ actions constitute “aggravated” conduct that is greater than ordinary negligence. (Sec’y Br. at 30–32.) For its part, Humphreys claims: (1) it had no notice that the condition was violative, (2) that the condition was not dangerous, and (3) that it did not believe the spoil material was hazardous.<sup>12</sup> (Resp’t Br. at 30–31, 34–36.) In addition, Respondent notes that Humphreys promptly abated the condition. (*Id.* at 31.)

Based on the evidence before me, two of the Commission’s unwarrantable failure factors are again relatively insignificant. Although the condition in this case existed for several days, I recognize that the mine did not operate between December 22 and December 26. (Tr. 156:1–2.) Thus, miners were only present for a few shifts. In addition, the Secretary did not introduce any evidence that Respondent was on notice that greater efforts were necessary for compliance, as Humphreys had just begun the process of working in the Lyons Pit that month. (Tr. 149:3–23.) In some cases, this lack of notice might constitute a mitigating factor in an unwarrantable failure analysis. See *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3080–81 (Dec. 2014). Yet, the Commission has refused to consider a lack of prior notice from MSHA as a *mitigating* factor when an operator’s “‘good faith’ belief that it was not required to note [a condition it believed to be non-hazardous] in its weekly examination and promptly correct the hazards . . . was not objectively reasonable.” *Mach Mining, LLC*, 35 FMSHRC 2937, 2942–43 (Sept. 2013). Here, the slope of the spoil banks violated Humphreys’ ground control plan by several degrees, and Humphreys objectively should have known that it was required to record the conditions in its on-shift reports. Accordingly, I determine that duration and notice neither aggravate nor mitigate Respondent’s conduct in this case.

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<sup>12</sup> Humphreys’ also reiterates its claim that the “high” spoil notation on the December 21 on-shift examination referred to a different area of the mine. (Resp’t Br. at 28–29, 35.) Given my factual findings on this point, see discussion *supra* Part V.A.2, I need not revisit this argument in the context of my unwarrantable failure analysis.

However, the five remaining (and interconnected) factors enunciated by the Commission suggest that Humphreys' on-shift examination violation constitutes aggravated conduct that is greater than ordinary negligence. The spoil banks for each bank exceeded 45 degrees. This condition was obvious to anyone conducting an on-shift examination. Specifically, Inspector Eldridge identified the spoil banks as excessively steep almost immediately. Moreover, Mine Foreman Brooks himself identified the condition in his December 21 exam record. Indeed, he initiated—but did not complete—efforts to abate the violative condition. These abatement efforts demonstrate his awareness of this obvious condition, which exposed Humphreys' miners to the serious danger of being struck or crushed by falling rocks and dirt. In spite of this danger, neither Brooks nor any other miner ever recorded these obvious conditions during any of the next three shifts. Notwithstanding the actual duration involved, Humphreys' failure was extensive because both excessively steep spoil banks were unreported for *every* active shift between Brooks' initial notation on December 21 and Eldridge's inspection on December 27.

In many cases, previous efforts to abate a violative condition might somewhat temper an operator's violative conduct. The Mine Act establishes a high standard of miner safety, and operators should be encouraged to make efforts to protect their miners. But in this case, Respondent's half-hearted abatement efforts highlight the magnitude of Humphreys' negligence. After Brooks called off Respondent's efforts to address the excessively steep slopes on December 21, no further steps were taken to address those conditions until Eldridge arrived on December 27. Despite Brooks' knowledge that these obvious, extensive, and dangerous conditions required attention, Humphreys' safety examiners did not note the conditions in their on-shift reports for the next three days.

At best, Humphreys' failure to document these hazards and take adequate action to correct them constitutes a level of indifference or disregard for miner safety. Thus, I conclude that Respondent's conduct in this case constituted an unwarrantable failure to comply with a mandatory standard. For the same reasons, I likewise conclude that Respondent's level of negligence was "high."

#### 4. Penalty Discussion

Under section 110(i) of the Mine Act, I must consider the following six criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of the penalty relative to the size of the operator's business, the operator's negligence, the penalty's effect on the operator's ability to continue in business, the violation's gravity, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). Further, the Secretary has proposed the statutory minimum penalty of \$2,000.00 for a section 104(d)(1) violation, and I am bound to go no lower than that minimum. *See* 30 U.S.C. § 820(a)(3)(A); *Stansley Mineral Res. Inc.*, 35 FMSHRC 1177, 1180 (May 2013).

Respondent's violation history shows that they have no history of previous violations at this mine. (Gov't Ex. 25.) The parties have stipulated to the mine's size and that the proposed penalty will not affect Respondent's ability to continue in business. (Joint Ex. 1: Stips. 5, 19–20.) I conclude that the proposed penalty is appropriate given the operator's size. I have



determined that the Secretary's negligence and gravity designations for this violation are appropriate as written. Nothing in the record suggests the operator did not demonstrate good faith in achieving compliance after notification of the violation. Upon consideration of these factors, I conclude that a penalty of \$2,000.00 is appropriate for this violation.

## VI. ORDER

For the reasons above, it is hereby **ORDERED** that Citation No. 8172475 and Order No. 8172476 be **AFFIRMED** as written. Humphreys Enterprises is **ORDERED** to pay a civil penalty of \$4,000.00 within 40 days of the date of this decision.<sup>13</sup>

/s/ Alan G. Paez  
Alan G. Paez  
Administrative Law Judge

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/sd

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<sup>13</sup> Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
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March 13, 2015

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

v.

NORTHERN AGGREGATE, INC.,  
Respondent

**CIVIL PENALTY PROCEEDINGS**

Docket No. LAKE 2014-110-M  
A.C. No. 21-02623-335857-01

Docket No. LAKE 2014-111-M  
A.C. No. 21-02623-335857-02

Mine: Portable Crusher

Docket No. LAKE 2014-180-M  
A.C. No. 21-03781-338680

Docket No. LAKE 2014-217-M  
A.C. No. 21-03781-341073

Mine: Plant 5

Docket No. LAKE 2014-183-M  
A.C. No. 21-03527-338678

Docket No. LAKE 2014-216-M  
A.C. No. 21-03527-341072

Docket No. LAKE 2014-430-M  
A.C. No. 21-03527-347702

Mine: Plant 3

**DECISION AND ORDER**

Appearances: Michele A. Horn, Esq., Office of the Solicitor, U.S. Department of Labor,  
Denver, CO, for the Petitioner

Benjamin Wangberg, Esq., Jones, Fuller, Wallner, Cayko, Pederson &  
Huseby, Ltd., Bemidji, MN, for the Respondent

Before: Judge Rae

## **I. STATEMENT OF THE CASE**

This case is before me upon seven petitions for assessment of civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d).

The above-captioned dockets were consolidated for hearing. Violation 8740833, which was the sole violation at issue in consolidated docket LAKE 2014-182, was settled prior to hearing. The following violations were also settled prior to hearing: Violations 8740831, 8740832, and 8740834 contained in docket LAKE 2014-111; Violations 8740697, 8740700, 8740702, 8740703, and 98740706 contained in docket LAKE 2014-183; and Violation 8740707 contained in docket LAKE 2014-180. My order approving settlement of these violations is dated October 7, 2014. Thirteen violations contained in the seven consolidated dockets remained for hearing.

A hearing was held in Carlton, Minnesota on October 21-22, 2014, at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence at length and have cited to the testimony, exhibits and arguments I found critical to my analysis and ruling herein without including a summary of testimony given by each witness. Based upon the entire record and my observations of the demeanor of the witnesses, I uphold Violations 8672802, 8740705, 8740698, 8740699, 8740701, 8740827, and 8740836, modify Violations 8740695, 8740828, 8740829, and 8740835, and vacate Violations 8740696 and 8740830 for the reasons set forth below.

## **II. BACKGROUND**

The parties have stipulated to the following facts:

1. Northern Aggregate, Inc. (“Northern Aggregate” or “Northern”) at all times relevant to these proceedings engaged in mining activities and operations at Plant 3 and the Portable Crusher in Beltrami County, Minnesota and at Plant 5 in Hubbard County, Minnesota.
2. Northern Aggregate’s mining operations affect interstate commerce.
3. Northern Aggregate is subject to the jurisdiction of the Mine Act.
4. Northern Aggregate is an “operator” as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the mines where the contested citations in these proceedings were issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Mine Act.
6. Stephen Dale Cotie, Wilbert Wayne Koskiniemi, and Thaddeus J. Sichmeller were at the time the citations were issued authorized representatives of the United States of America’s Secretary of Labor, assigned to MSHA, and were acting in their official capacity when issuing the citations at issue in these proceedings.

7. The certified copy of the MSHA Assessed Violations History reflects the history of the citation issuances at the mines for 15 months prior to the date of the citations at issue and may be admitted into evidence without objection by Northern Aggregate.

Joint Exhibit 1; Tr. 12.<sup>1</sup>

Northern Aggregate operates portable sand and gravel mines owned by Rick Schulke and his two sons Eric and Kyle. Tr. 13, 425. Northern Aggregate uses two portable crushing plants which change operational locations and close during the winter months, typically from December through March. Tr. 13-15, 283. They employ cone crushers, which rotate and funnel large rocks down against the walls of the cone exerting pressure on the rocks thereby breaking them into small marketable sizes. Tr. 19, 378-79. The violations charged in these dockets arose out of inspections conducted in September and October 2013 by MSHA Inspectors Stephen Dale Cotie, Wilbert Koskiniemi, and Thaddeus J. Sichmeller.<sup>2</sup>

### III. LEGAL PRINCIPLES

#### A. Gravity/Significant & Substantial (S&S) Designation

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

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

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

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<sup>1</sup> In this decision, the abbreviation “Tr.” refers to the transcript of the hearing. The Secretary’s exhibits are numbered S-1 through S-14 and the Respondent’s exhibits are numbered R-1 through R-4.

<sup>2</sup> Cotie is an industrial hygienist with a Master’s Degree of Science in public health and industrial hygiene and toxicology. He has worked in this field for three decades, spending the last ten or eleven years as a health specialist and general inspector for MSHA. Tr. 16. Koskiniemi has been an MSHA inspector since 2013. Before that, he worked as a police officer and court security officer for many years and ran an excavating company from 2004 to 2008. Tr. 65-67. Sichmeller has about 20 years of experience in the mining industry, including about 7 years of work as a millwright performing mechanical work relating to the milling process. He has worked as an MSHA inspector since 2003. Tr. 156-57.

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

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

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

The S&S nature of a violation and the gravity of the violation are not synonymous. Gravity, generally expressed as the degree of seriousness, is an element that must be assessed for every violation, while an S&S determination is made only in the context of enhanced enforcement under section 104(d) of the Mine Act. The gravity assessment and a finding of S&S are frequently based upon the same or similar factual circumstances, *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987), but the focus of the inquiries differs. The Commission has pointed out that the focus of the gravity inquiry “is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996); *see also Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that notwithstanding likelihood of injury, some violations are serious in the context of the standard violated and the Mine Act’s deterrent purposes – for example, violations of an important safety standard; violations demonstrating recidivism or defiance on the operator’s part; or violations that can combine with other conditions to set the stage for disaster).

#### B. Negligence/Unwarrantable Failure

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Mine Act, an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). High negligence is defined as having occurred in connection with a violation when “[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances.” *Id.* § 100.3, Table X.

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

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors or mitigating circumstances exist. These factors often include (1) the extent of the violative condition, (2) the length of time the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *see Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2011). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries*, 23 FMSHRC at 711.

The factors listed above must be viewed in the context of the factual circumstances of a particular violation, and it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that the violation is unwarrantable. *Wolf Run*, 35 FMSHRC at 3520-21; *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1193 (Oct. 2010); *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). However, all factors that are relevant should be considered. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007).

### C. Acceptable Means of Service of Violations

Northern argues that all thirteen of the violations at issue here should be vacated because the Secretary has failed to present proof they were actually served upon the operator. Resp.'s Br. at 1. Northern also contends that because the Secretary did not serve violations properly, the operator lacked knowledge of prior violation 8672801 contained in Exhibit S-5g, which was the basis for the Secretary's unwarrantable failure designation for Citation Number 8740698. *Id.* at 10-11; Ex. S-5.

Of the thirteen violations at issue in this docket, twelve were personally served on the operator at the time of issuance: Inspector Sichmeller personally served violations 8740827, 8740828, 8740829, 8740830, 8740835, and 8740836 to Foreman Alan Speck during the September 4, 2013 inspection of the Portable Crusher, and Inspector Koskiniemi personally served violations 8740705, 8740695, 8740696, 8740698, 8740699, and 8740701 to Eric Schulke during the October 31, 2013 inspection of Plant 3 and Plant 5. Tr. 105-07, 224-25. Northern's witnesses confirmed it is typical for MSHA inspectors to discuss violations with a company

representative during the inspection and provide a copy of the violation on the spot. Tr. 279, 374-75, 424. This constitutes adequate service.

The remaining violation at issue in this docket, Citation Number 8672802, was issued verbally by Inspector Cotie at Plant 5 on October 22, 2013 and a hard copy was later sent by certified mail to Northern's address of record on file with MSHA. Tr. 29, 33. The prior violation that the operator denies knowing about, Citation Number 8672801, was issued in the same manner by Cotie on September 12, 2013. Tr. 42-43. The inspector's testimony that the citations were mailed to Northern's address of record is credible and I find that they were in fact mailed. This is adequate service under the Mine Act. Section 104(a) of the Mine Act does not require personal service of violations. 30 U.S.C. § 814(a). Section 109 specifies only that violations "shall be delivered" to the mine office and requires operators to maintain an up-to-date address on file with MSHA for this purpose. *Id.* § 819; *see also* 30 C.F.R. Part 41 (placing burden on mine operator to ensure address is correct). The MSHA Citation and Order Writing Handbook does not mandate that the operator be given a written violation at the time it is observed but requires the inspector to tell the operator about the violation and discuss the circumstances. *Citation & Order Writing Handbook*, Ch. 7 § II, available at <http://www.msha.gov/READROOM/HANDBOOK/PH13-I-1.pdf>. Consistent with these guidelines, Cotie discussed each citation with a company representative during the inspection before mailing the written copies to the office. Tr. 29, 42. Cotie's actions were appropriate and sufficient to effect service and notice.

#### IV. FINDINGS OF FACT AND ANALYSIS

##### 1. Citation No. 8672802/Docket No. LAKE 2014-217<sup>3</sup>

This section 104(d)(1) citation was issued on October 22, 2013 by Inspector Cotie at Plant 5 and alleged a violation of 30 C.F.R. § 56.20011. This mandatory standard requires that "[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches." Signs are required to be visible, legible, and display the type of hazard present and any necessary protective action required. 30 C.F.R. § 56.20011.

The citation is predicated upon Cotie's observation of rocks being ejected into the workplace from the Norberg cone crusher absent the appropriate warning signs or barricades, which had been removed from all approaches. Ex. S-1; *see* Ex. S-1a; Photographs S-1b, c, d. The citation documents that the operator had been informed of the hazard on a previous occasion but had continued to conduct business without properly correcting the situation. Ex. S-1.

Cotie evaluated the violation as S&S with high negligence, highly likely to cause a permanently disabling injury affecting one person, and an unwarrantable failure. Ex. S-1. The Secretary has proposed a penalty of \$6,458.00.

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<sup>3</sup> The dockets and violations were not presented at trial in numerical order. They will be addressed herein in the order in which they were presented at trial.

Prior to the issuance of this citation, Cotie had issued two other citations for the same hazardous condition. On September 11, 2013, Cotie had issued Citation Number 6190795<sup>4</sup> at Plant 5 when he observed rocks being ejected from the Norberg cone crusher. Ex. S-1e; *see* Exs. S-1f, g. A barricade had been erected only on the north side of the crusher. The rocks in the debris field were sufficiently large, in Cotie's opinion, to cause significant injuries to a miner entering the area whether or not he was wearing hard hat. Tr. 19-21. Upon making this observation, Cotie spoke with the operator about some options that would eliminate the danger, such as erecting a screen above the crusher or, as a less expensive option, using old conveyor belting material to act as a barrier. Tr. 21-24. Cotie returned 14 days later to check on the operator's progress in building the suggested barrier and extended the citation. Ex. S-1e. However, when Cotie returned on November 25, 2013 to terminate the citation, the barrier had not been constructed and the crusher had been moved from the mine site. Tr. 25; Ex. S-1e.

On September 12, 2013 Cotie issued the second prior violation, Citation Number 6190800,<sup>5</sup> for rocks flying from a cone crusher at a different operation (Plant 3) at the same pit. At this operation, Northern had erected a barricade on only one side of the crusher. Mining operations were moved before the condition was rectified and the citation was terminated on September 23, 2013 for this reason. However, Cotie had discussed the violation with the lead man who was present when the citation was issued; also, the citation states that the operator must comply with the cited standard and the condition must be corrected prior to resuming crushing activities, otherwise MSHA will consider continued activity to be "aggravated conduct constituting more than ordinary negligence." Ex. S-6g, h, i; Tr. 35-38.

### The Violation

When Cotie returned to the mine on October 22, 2013 on a follow-up inspection, he saw the crusher back in operation. Tr. 27, 29. It was still ejecting rocks of significant size to distances of up to 25 feet, but this time there were no barriers on any of the approaches, no warning signs or berms, and the operator had not heeded MSHA's warning to remedy the situation before resuming operations. Tr. 27-28; Ex. S-1a. In Cotie's opinion, the situation had in fact deteriorated from the last time he cited the crusher because now there was nothing at all restricting access to the hazard zone and the crusher was in a more active part of the work site, increasing the chances that miners would be exposed to flying rocks. Tr. 27-28. Due to this increased danger and Northern's failure to take any corrective action since the September citations were issued, Cotie issued this enhanced unwarrantable failure citation for failure to erect barricades and signage to warn of a hazard that was not immediately obvious to miners. Ex. S-1; Tr. 30-31.

Northern argues that the hazardous condition was immediately obvious and therefore does not fit within the meaning of the standard at 30 C.F.R. § 56.20011. However, the condition did not become obvious until a miner was close enough to be struck by the ejecting rocks. Depending upon which direction a miner approached, his view of the danger could be blocked by

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<sup>4</sup> MSHA's Mine Data Retrieval site shows this citation was not contested and payment of the \$2,106.00 penalty is delinquent. *See* <http://www.msha.gov/drs/drshome.htm>.

<sup>5</sup> This citation has been paid and is closed.



equipment, the crusher, or other objects in the area until it was too late. Also, the crusher was not necessarily ejecting rocks constantly. There were likely lulls in which a miner could approach and be very close to the crusher before it spewed rocks once again without barricades or signs warning employees not to draw near.

I find this violation has been established.

#### S&S/Gravity

The violation was assessed as S&S because Northern's failure to erect barricades or signage allowed unrestricted access to the crusher, which was spewing rocks large enough to cause serious head injuries to a miner whether or not he was wearing a hard hat and safety glasses. Tr. 32. At the time the violation was observed, there were tire tracks in the area as well as a small Bobcat in the trajectory path, showing that miners accessed the area around the crusher where the rocks were being thrown. *See* Exs. S-1b, S-1c.

The foregoing evidence establishes that this violation of a mandatory safety standard contributed to the discrete safety hazard that a miner would be struck in the head or other parts of the body by flying rock. Northern's failure to take any remedial action before putting the crusher back into production despite having been issued two prior citations for the same hazard shows that the hazardous condition would have continued to exist under continued normal mining operations. This, along with the Bobcat, tire tracks, and other evidence that miners routinely accessed the debris field, is sufficient to establish a reasonable likelihood that the hazard contributed to by this violation would result in injury if normal mining operations were to continue. Due to the size and weight of the rocks, any injury resulting from this violation would be very serious, if not fatal, in nature. This violation is properly assessed as S&S.

The gravity of this violation is very serious in that it exposed any miner within a substantially large radius of the ejecting rock to a potentially fatal injury.

#### Negligence/Unwarrantable Failure

Inspector Cotie testified he issued this citation as an enhanced 104(d)(1) citation (i.e., an unwarrantable failure to comply with a safety standard) because he had spent time discussing the situation with management in the past and believed the operator was aware of the hazard but had taken no action to address it. Tr. 30-31.

#### Operator's Knowledge of Existence of Violation

The operator knew that this violation existed long before the citation was issued. Inspector Cotie had issued two citations six weeks earlier on September 11 and 12, 2013 for the same hazard – rocks being ejected from cone crushers at the pit without safety barriers. Exs. S-1e, S-6g. Cotie had discussed the situation at length in person with company representatives. Tr. 21-24, 37-38. Eric Schulke, the overseer of the pit, was personally aware of the situation. *See* Tr. 373-74, 384-87, 403-13.

### Operator's Notice that Greater Efforts at Compliance Were Necessary

The two prior citations and the discussions with Cotie sent a clear message to Northern that it needed to address the hazard identified in the citations, thereby placing Northern on notice that greater efforts at compliance with the Mine Act were necessary. After Northern moved its operations without addressing the hazard, it was notified by MSHA on September 23, 2013 that failure to correct the hazard before resuming mining activities would be considered aggravated conduct constituting more than ordinary negligence. *See* Ex. S-6g. This specific warning from MSHA provided the operator with further notice of the need for greater compliance efforts.

### Operator's Abatement Efforts

The abatement effort factor measures an operator's response to violative conditions that it knew or should have known about before the citation was issued. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Both the abatement efforts undertaken, and the level of priority the operator has placed on abating conditions for which it received notice that greater compliance efforts were necessary, should be considered. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009). It must then be determined whether the operator's efforts "were taken with sufficient care under the circumstances, even if ultimately unsuccessful in completely preventing a violative condition." *Windsor Coal Co.*, 21 FMSHRC 997, 1005 n.9 (Sept. 1999).

Cotie's conversations with the operator about the two prior citations had included discussion of various options for addressing the hazard. Tr. 22-23, 385, 406. Yet despite the two prior citations, the pointed conversations with Cotie, and the warning that failure to correct the hazard before resuming mining activities would result in enhanced penalties, the Plant 5 crusher was operational once again on October 22, 2013 without any corrective action having been taken. In fact, the berm that had been erected on the north side of the crusher was no longer present, leaving no barriers to prevent access to the debris field around the crusher. Tr. 27-28. The situation had deteriorated. I find that Northern's failure to take any abatement action despite full knowledge of the need to do so is a significant aggravating factor in this case.

### Extensiveness of Violation & Degree of Danger Posed

The degree of danger posed by Northern's failure to prevent access to the area around the crusher was very high. Rocks the size of cantaloupes were being flung from the crusher up to 25 feet outward into an area trafficked by miners on foot and in small equipment such as the Bobcat seen in the photograph in Exhibit S-1b. This placed miners at risk of serious, if not fatal, injuries.

This condition was extensive in that its scope and magnitude, including the size of the rocks and the large area affected, put any miner within a 25-foot radius of the crusher in danger of potentially fatal injuries.

### Obviousness & Duration of Violation

The violative condition, while not immediately obvious to all miners, was obvious to management. The inspector's photographs depict an unmistakable debris field that extends into

areas traversed by miners, clearly indicating the presence of a hazardous condition. *See* Exs. S-1b, S-1c, S-1d.

This condition had existed at least since the previous citation was issued at Plant 5 on September 11, 2013. Most likely the condition dated back to April 2013 when Northern's season had begun, as the mine's entire purpose is to crush rock for sale and there is no reason to believe Northern's mode of operating had changed since the season started. I find this condition was of substantial duration and was patently obvious.

### Conclusions

The factors discussed above establish unwarrantable failure, particularly the operator's knowledge of the violation; the fact that the operator was on notice of the need for greater compliance efforts; the high degree of danger posed by the violation; and the operator's failure to abate the condition despite the foregoing three factors. Eric Schulke admitted that after having received two prior citations for the same hazardous condition, he chose to simply continue operating the crusher without fixing the problem. Tr. 409-10. This shows a disregard for safety amounting to more than ordinary negligence. I find that this violation was an unwarrantable failure to comply with a mandatory safety standard.

High negligence is appropriate because the operator knew of this violation and there are no mitigating circumstances.

#### 2. Citation No. 8740705/Docket No. LAKE 2014-180

This 104(a) citation was issued by Inspector Koskiniemi on October 31, 2013 at Plant 5 for a violation of 30 C.F.R. § 56.16006, which requires that "[v]alves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use." The narrative portion of this citation indicates that Inspector Koskiniemi found oxygen and acetylene cylinders by the control trailer with regulators, torch heads, and hoses attached without the protective caps on the valves. Ex. S-2; *see* Photographs S-2b. He did not know when the cylinders had last been used, but he determined they were not in use at the time he saw them because the hoses were coiled and the torch head was resting on the regulator. Tr. 114-15. He assessed the violation as non-S&S and unlikely to cause an injury, with low negligence and potential to cause a fatal injury affecting one person. Ex. S-2. The Secretary seeks a penalty of \$176.00.

#### The Violation

The cylinders were secured to a stable cart on a platform where there was little likelihood they would be hit and damaged, and the company representative told Koskiniemi he had merely forgotten to put the caps on the valves. Tr. 69-70, 112-15; Ex. S-2a. Koskiniemi's concern was that the valves could be broken off the cylinders while they were being stored without the protective caps on them. The cylinders, which held pressurized gas, would then become projectiles that exposed any miner within their path to a fatal injury. The pressure behind a

launched cylinder, in Koskiniemi's opinion, would be sufficiently forceful to penetrate a brick wall. Tr. 68-69.

Northern's position is that the valves did not need to be capped because the cylinders were not being stored, as they were being used intermittently throughout the day of the inspection. Resp.'s Br. at 4-5; Tr. 399-403, 418-20. In *FMC Corporation*, the Commission discussed the meaning of the term "storage" within the context of a safety standard that regulated storage of blasting agents and found that the term was sufficiently broad to include both short-term and long-term storage. 6 FMSHRC 1566 (July 1984). Several ALJ cases since then have relied on *FMC Corporation* to conclude that compressed gas cylinders were being temporarily stored within the meaning of § 56.16006 under various circumstances. See *Woodring Co.*, 16 FMSHRC 1716 (Aug. 1994) (ALJ) (finding that cylinders were stored, not in use, when operator had used them briefly earlier in the day then placed them in truck with no indication of immediate need or intention to reuse them); *Martin Marietta Aggregates*, 11 FMSHRC 633 (Apr. 1989) (ALJ) (finding that cylinders were "temporarily stored," despite being readily available for use with gauges and hoses attached, because there was no evidence suggesting when they were last used or would next be used); *Phelps Dodge Corp.*, 6 FMSHRC 1930, 1937 (Aug. 1984) (ALJ) (finding that cylinders were being stored temporarily or semi-permanently when evidence suggested they had been left in a walkway without being used since at least the prior shift).

I find that the cylinders were being stored and were not in use at the time of the inspection. Because the valves were not capped, a violation of § 56.16006 occurred.

### Gravity & Negligence

Low negligence is appropriate here, as there are sufficient mitigating circumstances: the tanks were secured to a stable cart, they were in an out-of-the-way location where there was little likelihood they would be hit or damaged, and the company representative stated that he had simply forgotten to put the caps on.

This violation is non-S&S and the gravity is low in that an injury was unlikely to occur because the tanks were unlikely to be hit or damaged.

### 3. Citation No. 8740695/Docket No. LAKE 2014-183

This 104(a) citation written by Inspector Koskiniemi on October 31, 2013 at Plant 3 charges a violation of 30 C.F.R. § 56.11027. The cited mandatory standard requires, in relevant part, that working platforms "be of substantial construction and provided with handrails and maintained in good condition." The citation alleges that the railing on an elevated work platform above the jaw crusher had come out of its pocket. This allowed the railing to swing open, creating a 16-inch gap directly over the jaw crusher hopper into which a miner could fall and suffer a fatal injury. Ex. S-3; Tr. 72; see Ex. S-3b. Koskiniemi assessed the violation as S&S, reasonably likely to result in a fatal injury to one miner, and the result of low negligence. Ex. S-3. The Secretary proposes a penalty of \$117.00.

## The Violation

The platform above the jaw crusher is about ten feet off the ground. Ex. S-3a. Miners access the platform to observe the crusher, check clogs, and perform routine maintenance on the crusher. Tr. 73-74. The jaw crusher's function is to take the large rocks as they are dug out of the pit and break them down into sizes that can be further broken down by the cone crushers. Tr. 72. It was the inspector's opinion that the vibration attendant to the operation of the crusher caused the railing on the crusher's top work platform to pop out of place. Tr. 73, 116.

The operator established on cross-examination that the platform was of substantial construction and that the railing had been in place at the time the required shift examination had been performed. Tr. 116-17. The railing is removable and no one was on the platform at the time of the inspection. Tr. 117-18, 395-96, 416. However, § 56.11027 is a strict liability standard, and the duty to maintain working platforms includes keeping the railings "popped into" the pockets to ensure the platform can be used safely. *See Ames Constr., Inc.*, 33 FMSHRC 1607, 1611 (July 2011) (noting Mine Act imposes liability for violation of mandatory health and safety standards "without regard to fault"), *aff'd*, 676 F.3d 1109 (D.C. Cir. 2012). The platform was available for use at the time it was cited and it provided access to work areas. I find that a violation occurred.

## S&S/Gravity

The inspector testified he assessed this violation as S&S because miners were required to access the platform to perform maintenance of the jaw crusher and other duties. He also stated he was aware of prior fatalities from miners falling into jaw crushers. Tr. 73-74.

A violation of a mandatory safety standard occurred in that the handrail was not in place, satisfying the first *Mathies* element. Miners were required to access the platform for maintenance and other tasks, which could have exposed them to a fall hazard when the handrail was in the condition the inspector observed. Thus, this violation contributed to the discrete safety hazard of a miner falling from the platform, satisfying the second *Mathies* element.

However, the Secretary has not established a reasonable likelihood the hazard contributed to would have resulted in injury even assuming continued normal mining operations. The handrail had been in place when the platform was last examined and could have popped out at any time due to the normal vibration and shaking of the crusher. Tr. 73, 116-20. It was not physically damaged. Its condition was patently obvious and easily fixed. There is no evidence anyone accessed the platform while the railing was out of place, and plant operator Eric Schulke credibly testified that this condition would have been fixed immediately as soon as it was noticed. Tr. 396. Thus, no miners were exposed to the hazard while it existed, and if normal mining operations had continued there is no evidence to suggest that the operator would not have shut down the crusher and safely put the railing back into place before the platform was accessed for any purpose that would have exposed a miner to danger. For this reason, I find this violation was not S&S.

I accept the inspector's testimony that falling onto the jaw crusher could cause a fatal injury. Even if the jaw crusher were not operational, a fall from the platform's 10-foot elevation

onto equipment or the ground could cause a serious or fatal injury. I find the gravity of this violation to be reasonably serious in that it could have resulted in a fatal injury to a miner.

### Negligence

This violation was properly assessed as low negligence as there is no evidence to establish that the operator knew of the violative condition before Koskiniemi discovered it and it had existed for a short period of time.

#### 4. Citation No. 8740696/Docket No. LAKE 2014-183

Inspector Koskiniemi issued this 104(a) citation on October 31, 2013 at Plant 3 for a violation of 30 C.F.R. § 56.12004. The cited mandatory standard requires in relevant part that electrical conductors exposed to mechanical damage be protected. The narrative section of the citation states:

The energized 480 volt cable for the Pioneer jaw crusher was pulled out of the fitting under the electrical panel on the west side of the JCI dual screener. About 1-1 ½ inches of the inner conductors were exposed to mechanical damage. The insulating covers on the inner conductors appeared to be in good condition. This condition exposes persons to shock/burn hazards of 480 volts with resulting injuries.

Ex. S-4. The violation was assessed as non-S&S, unlikely to result in injury, with low negligence and potential to cause a fatal injury. Ex. S-4. The Secretary seeks a penalty of \$100.00.

The inspector was told that the cited cable energizes the jaw crusher. Tr. 76-77. As depicted in Ex. S-4b, the outer insulating cable had pulled down and out of the fitting at the bottom of the electrical panel, leaving the inner conductors exposed to the elements and potentially to mechanical damage. Tr. 77. The individual inner cables each have insulating jackets, which were undamaged. Tr. 78, 124, 336. The area where the exposed portion of the cable was located is rarely if ever accessed and the condition was not easily seen, forming the basis of the inspector's non-S&S and low negligence assessments. Tr. 78-79, 121-23.

While the Secretary established that the inner conductors were exposed, there is no evidence the exposed portion of the cable was subject to mechanical damage, as the exposed part was not in contact with other equipment and was located below the electrical panel in an area that was not accessed by miners or exposed to the weather. The violation is VACATED.

#### 5. Citation No. 8740698/Docket No. LAKE 2014-430

This section 104(d)(1) citation was written on October 31, 2013 by Inspector Koskiniemi for another violation of 30 C.F.R. § 56.11027 at Plant 3. The lengthy Condition or Practice section of the citation reads:

The railings on the elevated work platform on the south end of the JCI dual screener 6203 were broken in numerous places creating a fall hazard of about 6-7

feet to the ground or 3-4 feet onto the tail end of a transfer conveyor with resulting injuries. All four of the railing uprights on the south end were broken at the base, one upright on the west side was broken at the base, two uprights on the east railing was broken on the south end so that it would give way under pressure. The condition was cited two times prior to this. The last citation, #8672801, was terminated due to moving and the operator was informed that they were required to repair the railings prior to working at another mine site. The operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-5.

This violation was assessed as reasonably likely to result in a fatal accident affecting one miner, S&S, and the result of high negligence in addition to the unwarrantable failure designation. Ex. S-5. The Secretary proposes a civil penalty in the amount of \$2,700.00.

About six weeks earlier on September 12, 2013, Inspector Cotie had cited the same screener platform for a violation of the same safety standard. Ex. S-5g (Citation No. 8672801).<sup>6</sup> The function of the screener is to shake materials back and forth to separate them by size. Tr. 39. Cotie testified that miners need to access the elevated work platform at the end of the screener to perform maintenance activities and remove materials such as large rocks from the screen. Tr. 41-42, 47. He cited the screener platform for a violation because five of the seven upright supports for the platform's handrail were broken and the remaining two were severely damaged to the point that he doubted they could support a person's weight, creating a fall hazard for miners accessing the elevated platform. Tr. 38-41; Exs. S-5g, S-5h, S-5i. Cotie testified he discussed the violation with the lead man who was running the screener and mailed a hard copy of the citation paperwork to Northern's office by certified mail. Tr. 42-43.

### The Violation

On October 31, 2013, Inspector Koskineemi again observed that numerous vertical uprights to the railing on the dual screener platform were broken, substantially compromising the integrity of the railing. Tr. 80. He was aware that Cotie had issued a citation for several of the same uprights being broken about six weeks earlier. Tr. 81-82. He identified in photographs S-5c, S-5d, and S-5e the specific parts of the damaged railing that Cotie had cited in September that were still damaged on October 31, 2013. Tr. 83-84. The Secretary presented Exhibits S-5g, S-5h, and S-5i from the September 12, 2013 inspection conducted by Cotie. Exhibit S-5g is Cotie's written citation, which states that the operator had been cited during the previous inspection (in September 2012) for the same violation, and the condition had deteriorated since then. Cotie terminated the citation on September 23, 2013 because Northern had moved its mining operations to a different location without correcting the cited condition. Ex. S-5g; Tr. 60-61. The citation contains a warning that the operator must comply with the cited standard before resuming activities at another mine, and failure to do so will be considered aggravated conduct constituting more than ordinary negligence. Ex. S-5g. Exhibit S-5i contains various photographs of the damaged railing as it existed on September 12, 2013. It is apparent from the photographs

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<sup>6</sup> MSHA's Mine Data Retrieval System shows this violation has been paid and closed.

that the damage cited by Cotie corresponds with the damage cited by Koskiniemi on October 31, 2013, depicted in Exhibits S-5c through S-5e.

Koskiniemi said the cited platform was located above a transfer conveyor that was fed by a hopper that in turn was fed by the output conveyer exiting the screener. Tr. 85; Photograph Ex. S-5f. The platform was six or seven feet above the ground. Tr. 85; Ex. S-5. Koskiniemi described the breaks on the railing as rusted, indicating they were not fresh. Tr. 130, 154. The inspector stated that Eric Schulke was agitated when confronted with this violation but did not deny that he knew of the condition. Tr. 88-90, 127, 129. Schulke testified that he was unaware of the prior citation and was not aware of the poor condition of the railing. Tr. 414-15. However, Foreman Sam Goeden, who accompanied Koskiniemi during the October 31 inspection,<sup>7</sup> acknowledged that the railing supports had been broken for some time. Tr. 129-30.

I find the evidence supports a violation of the mandatory standard.

### S&S

Because miners performed maintenance on this platform elevated six or seven feet above the ground and above moving conveyors and tail pulleys, the broken railings exposed them to a potentially fatal fall. Tr. 86-87. The inspector had personal knowledge of a fall from a lesser height resulting in a fatality. Tr. 87, 132. For these reasons, he determined the condition was S&S and reasonably likely to cause a fatal injury.

Northern argues that this violation is not S&S for the same reasons Citation Number 8740695 was not S&S, specifically in that the platform was not frequently accessed and would not be prior to being repaired. I find a significant distinction between the two violations, however. In the prior situation, a railing had popped out of its pocket sometime after the previous examination had been done. The evidence established that this could occur at any time from vibrations created by the machinery. The railing needed no repair. Here, the welds had broken and the rails were rusted and damaged. It is clear from Cotie's citation and the photographs taken by Koskiniemi that this condition had existed for a significant period of time and required more substantial welding and repair work to make safe. The operator failed to make these repairs despite being warned of the repercussions and had no intentions of doing so, as evidenced by the fact that they put the platform back in service without repairing it. Thus, it is clear to me that in the course of continued normal operations it was reasonably likely that this continuing violation contributed to a discrete safety hazard that was reasonably likely to result in an injury-causing event. A miner could lose his footing or lean against the railings, which would give way under pressure, resulting in a fall either onto dangerous moving equipment or to the ground below. Such a fall would be reasonably likely to result in very serious, if not fatal, injuries. This violation is S&S.

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<sup>7</sup> See Tr. 87, 92, 129, 145 (Koskiniemi's testimony identifying Sam Goeden as the plant operator who accompanied him during the October 31, 2013 inspection); Tr. 417 (Eric Schulke's testimony confirming Goeden is a foreman at the plant). I do not credit Eric Schulke's remark that he "doubt[ed] that [Goeden] was there the whole time or all of the time" with Koskiniemi during the inspection. Tr. 417.



The gravity of this violation is very serious in that it exposed at least one miner to a fatal injury.

### Negligence/Unwarrantable Failure

Inspector Koskiniemi testified he characterized this violation as a section 104(d)(1) unwarrantable failure with high negligence because the mine owners were aware of the hazard and had been cited for it a month and a half before but had not repaired it. Tr. 86.

### Operator's Notice of Need for Greater Compliance Efforts & Operator's Knowledge of Violative Condition

As discussed above, Cotie had issued prior citation 8672801 for the same violative condition just six weeks earlier on September 12, 2013. In fact, Cotie noted that the platform had been cited for the same condition during the last inspection and the condition had since worsened, giving rise to his subsequent warning to repair the railing before resuming operations at any location. Exs. S-5g, S-5h. The two prior citations and Cotie's warning served to place Northern on notice that greater efforts at compliance with the cited standard were necessary.

Northern denies it had knowledge of the prior citation issued by Cotie or the condition of the railing. Resp.'s Br. at 10-12; *see* Tr. 388-95, 413-15. However, Cotie credibly testified he had discussed the violation with a company representative at the time he cited it and Koskiniemi and Cotie both testified that the citation had been sent by certified mail to Northern's address on file with MSHA. Tr. 42-43, 126-27. As discussed above, this was proper service.

Moreover, the breaks in the handrail supports were old and rusted and the photographs clearly show these were the same breaks observed by Cotie six weeks earlier. Tr. 130, 154; *compare* Exs. S-5c, S-5d, S-5e with photos in Ex. S-5i. The damage was obvious and had existed long enough that it should have been discovered during shift examinations. Indeed, the foreman accompanying Koskiniemi during the October 31 inspection acknowledged the damage had existed for a long time. Tr. 129-30. I conclude that the operator knew of this violation.

### Operator's Efforts in Abating the Violation

Northern was aware of the violation and the need for greater compliance efforts due to the prior similar citations. Koskiniemi had returned to the mine on October 31, 2013 because he had received a commencement of operations filed by Northern indicating they had resumed operations at this location. Tr. 128. Yet the violative condition persisted with the operator's full knowledge of the situation. Tr. 129-30. In fact, when Koskiniemi issued the citation he was confronted by Eric Schulke, who accused Koskiniemi of trying to put him out of business. Tr. 88. Schulke then informed the inspector that he intended to fire up the plant in 30 minutes whether the railings were repaired or not because he had production to meet. Tr. 89. When he was told that a closure order would be issued in that event, he replied that regardless of the closure order, he was not going to shut down production. Tr. 89-90. Eventually, he calmed down and repaired the railing. Tr. 90.

Schulke's behavior evidences Northern's intentional failure to abate the hazardous condition. I find this to be a significant aggravating factor.

#### Obviousness, Extensiveness, Dangerousness, and Duration of Violation

As evidenced by the inspector's photographs, this violation was obvious in that the damage to the railing would have been easy to see during a shift examination. *See* Tr. 145-46; Exs. S-5b to S-5e. The violation was extensive in that the majority of the uprights supporting the handrail were broken all the way through at the base, defeating the purpose of having a railing. *See* Ex. S-5. This violation posed a high degree of danger because it placed miners at risk of a potentially fatal fall from the elevated platform onto equipment or the ground below if they leaned on the defective railing. The evidence suggests that this dangerous violation had existed for a lengthy duration because it had been cited during the two previous inspections and the fractured pieces of the railing were rusted, showing that these clearly were not fresh breaks.

#### Conclusions

Based upon the two prior violations issued for the same condition, the operator's failure to abate the September 12, 2013 citation issued by Cotie, the further deterioration and extensive damage to the railings, the obviousness of the violation, the operator's knowledge of the condition both when Cotie cited it and when Koskiniemi cited it again on October 31, 2013, the length of time the condition had existed, the threat by Eric Schulke to operate the plant without repairing the railing, and the extremely dangerous hazard and serious result likely to occur therefrom, I find that the operator exhibited an extreme and reckless, if not intentional, disregard for the safety of its miners. This was an unwarrantable failure to comply with the mandatory standard. The operator also displayed high negligence.

#### 6. Order No. 8740699/Docket No. LAKE 2014-216

Issued on October 31, 2013 by Inspector Koskiniemi, this section 104(d)(1) order alleges another incidence of rocks being ejected from a Norberg cone crusher, this time at Plant 3, without barricades, warning signs, or any devices that would provide protection against flying rocks. The order alleges a violation of the mandatory standard at 30 C.F.R. § 56.14110, which states: "In areas where flying or falling materials generated from the operation of screens, crusher, or conveyors present a hazard, guards, shield, or other devices that provide protection against such flying or falling materials shall be provided to protect persons."

The order describes the affected area as the main travelway between the crusher trailer and the control/generator trailer, which is a location frequented by miners on foot. The violation is written as an unwarrantable failure, referring back to Citation Number 6190800 (Ex. S-6g), a 104(a) citation written by Cotie on September 12, 2013 for failure to erect barricades at the Plant 3 crusher. It is also assessed as reasonably likely to result in a fatal injury affecting one miner and S&S with high negligence. Ex. S-6. The Secretary has proposed a penalty of \$2,000.00.

## The Violation

Koskiniemi testified that as he was walking towards one of the conveyors, he heard “a lot of noise, racketing, shaking vibrating by the cone crusher.” Tr. 90. Apparently, a piece of steel had fallen into the crusher, and as he approached the area, he suddenly noticed dozens of rocks up to eight inches in size “strewn everywhere” and being ejected from the crusher without warning. Tr. 91. His photographs illustrate the size and quantity of rocks being ejected from the crusher and the debris field. *See* Exs. S-6b to S-6f. The rocks had fallen around the electrical panel, which is accessed by miners in order to start up and shut off the equipment. Tr. 95; *see* Ex. S-6e. The stairway to the control trailer, which is frequently accessed for storage purposes and to control the plant, was also within the debris field. Tr. 99, 138.

Foreman Sam Goeden was operating the crusher the day of the inspection. He made a comment to Koskiniemi about walking into the area of the rock shower, at which point Koskiniemi told him there should be some sort of warning or barricade. Tr. 91-92, 139-40. According to the order documentation, Goeden was aware that Northern had previously been cited for this hazard. Ex. S-6a.

The Respondent argues that although it is impossible to entirely eliminate ejection of rocks from the cone crusher, there were signs on the crusher itself warning of falling rocks and employees knew to stay out of the area. Resp.’s Br. at 14-15. As Koskiniemi testified, however, the signs on the crusher were not readily observable from all directions and were not obvious enough to keep him out of the area. Tr. 136, 147; *see* Exs. R-2, R-3. There were employees on-site and rocks were being ejected some 15 to 20 feet outward right up to the control trailer, the electrical panel, and other regularly accessed sites. Ex. S-6a; Tr. 151-53. Section 56.14110 requires protection from such flying or falling materials. The regulatory language is much stronger than merely advising that employees must be aware of the danger: the regulation requires actual protection against the danger by use of a guard, shield, or other device. 30 C.F.R. § 56.14110. Barricades and warning signs at the perimeter of the debris field would have accomplished this protection, but were not provided. This violation has been established.

## S&S/Gravity

The violation was assessed as S&S because the cone crusher was ejecting dozens of rocks large enough to cause serious injuries 15 to 20 feet outward into a well-traveled area. Ex. S-6a; Tr. 91, 99. This contributed to the discrete safety hazard that miners would be struck in the head or other parts of the body by flying rock.

Northern had been issued three prior citations for this same hazard yet had failed to take any remedial action before putting the Plant 3 cone crusher back into operation in an area that was frequently accessed. Exs. S-1, S-1e, S-6g. This shows that the hazard would have continued to exist if normal mining operations had continued. The electrical panel that employees used to start and stop the equipment and the stairway to the control trailer were both within the crusher’s debris field, establishing a likelihood that miners would walk through the debris field during normal mining operations. Tr. 95, 99; *see* Ex. S-6e. Because the debris field was a frequently accessed area and the operator displayed no intent to correct the hazard, I find that the hazard

contributed to by this violation was reasonably likely to result in injury during continued normal mining operations.

The rocks being ejected from the cone crusher were up to 8 inches in diameter. Ex. S-6a. Koskiniemi testified that hard hats would have been insufficient to prevent serious injury in the event of being struck by one of these large rocks. Tr. 99. I find that the evidence establishes a reasonable likelihood that any injury caused by this violation would be very serious, if not fatal.

This violation is S&S.

The gravity of this violation is very serious in that it exposed any miner within a substantially large radius of the cone crusher to a potentially fatal injury.

#### Negligence/Unwarrantable Failure

Inspector Koskiniemi testified he issued this order under section 104(d)(1) because the operator had been cited previously for the same condition and was aware of the hazard, yet once again he had observed rock strewn everywhere without the operator taking any action to address the problem. Tr. 97-98.

#### Operator's Knowledge of Existence of Violation

The operator knew of this violation. Inspector Cotie had previously issued citations to the operator on September 11, September 12, and October 22, 2013 for the same hazard. Exs. S-1e (Citation No. 6190795), S-6g (Citation No. 6190800); S-1 (Citation No. 8672802). Cotie had discussed each of the prior citations with company representatives at the time of issuance. Tr. 21-24, 37-38, 54-56. Eric Schulke, the overseer of the pit, was personally aware that ejection of rocks from the cone crushers was a problem. *See* Tr. 373-74, 384-87, 403-13. The plant operator, Sam Goeden, was also aware of the problem. Ex. S-6a.

#### Operator's Notice that Greater Efforts at Compliance Were Necessary

The three prior similar citations and Cotie's discussions with company representatives placed Northern on notice that greater efforts at compliance were necessary. The most recent prior similar citation, Citation Number 8672802, had been issued just a week earlier and assessed as a 104(d)(1) unwarrantable failure to comply with a mandatory safety standard. Ex. S-1. Although that citation had been issued under a different mandatory standard, the hazard was the same, and the unwarrantable failure designation should have served as a strong warning to the operator that greater compliance efforts were needed. In addition, Northern had been specifically notified on September 23, 2013 at the time Cotie terminated Citation Number 6190800 that failure to correct the hazard in the future would be considered aggravated conduct constituting more than ordinary negligence. *See* Ex. S-6g.

### Duration of Violation & Operator's Abatement Efforts

This violation had existed at least since Citation Number 6190800 was issued at Plant 3 on September 12, 2013. Most likely the condition dated back to April 2013 when Northern's operating season began, as there is no indication that this was an unusual condition at the mine or that it had arisen suddenly.

Despite the three prior citations, MSHA's specific warnings to correct the hazardous condition, and the operator's full knowledge of the situation, Northern took no action to abate the condition from the time it was first cited in September until this violation was issued six weeks later. I find that the operator's failure to abate the violation for six weeks showed a blatant disregard for safety.

### Obviousness, Extensiveness, and Degree of Danger Posed

This violation was very obvious. Dozens of rocks up to eight inches in size were "strewn everywhere" in the vicinity of the crusher. Tr. 91. The photographs the inspector took show airborne rocks being flung from the crusher and large rocks piled on top of energized electric cables and in the main travelway next to the electrical control panel. Exs. S-6b, S-6d, S-6e, S-6f. The danger was clear and the violation was occurring in plain sight of the crusher operator, Foreman Goeden.

This violation also posed a high degree of danger. The crusher was throwing large, heavy rocks 15 to 20 feet outward into areas frequently traversed by miners, including the main travelway and the area where the electrical panel and control trailer were located. *See* Tr. 95, 99, 138, 151-53; Exs. S-6a, S-6d, S-6e. This placed miners at risk of very serious or fatal injuries regardless of whether they were wearing safety gear.

This condition was extensive in that its scope and magnitude, including the size of the rocks and the large area affected, put any miner within a substantial radius of the crusher in danger of potentially fatal injuries from flying rock.

### Conclusions

Considering the operator's knowledge of this violation, the three prior citations and the specific warnings from Cotie that failure to correct the condition would constitute aggravated conduct, the obviousness of the violative condition, the high degree of danger it posed within an extensive and frequently traveled area of the mine, and the fact that the violation had existed for more than six weeks without being abated, this violation was an unwarrantable failure.

Because the operator knew of this violation and there are no mitigating factors, the operator also demonstrated high negligence.

#### 7. Citation No. 8740701/Docket No. LAKE 2014-183

Koskiniemi issued this 104(a) citation during his October 31, 2013 inspection at Plant 3 for another alleged incidence of damage to an electrical cable under 30 C.F.R. § 56.12004.

Koskiniemi observed that the outer covering of the 480-volt cable to the Kolberg Superstacker conveyor was cut in two places, exposing the inner conductors to mechanical damage. The inner conductors were in good condition. The damaged areas were approximately nine feet above the ground. Koskiniemi assessed the violation as unlikely to result in a permanently disabling injury to one miner, non-S&S, and the result of low negligence. Ex. S-7. The Secretary proposes a penalty of \$100.00.

### The Violation

The damaged cable runs from the electrical panel to the conveyor, which moves crushed rock to the stockpiles. Tr. 101. The inspector surmised that the damage was caused by the cable rubbing on steel or being pinched. Tr. 102; *see* Ex. S-7d (photograph depicting metal equipment near cable). The area where the damage occurred is not easily accessed. Tr. 104.

The Respondent argues that § 56.12004 was not violated because the damaged portions of the cable were not subject to mechanical damage. Resp.'s Br. at 16-17. However, the very fact that the cable's outer jacket was damaged – in this case, apparently by rubbing or pinching – gives rise to an inference that the exposed interior of the cable will be subject to the same damage if the condition is not corrected. *See Carmeuse Lime & Stone*, 33 FMSHRC 1654, 1661-63 (July 2011) (ALJ); *Sangravl Co.*, 33 FMSHRC 1242 (May 2011) (ALJ). As explained by the inspector, the damage to the outer jacket meant that the cable's inner insulation was “out in the harsh elements” exposed to mechanical damage through contact with rocks, dirt, water, and pinch points and sharp edges on the metal equipment nearby.<sup>8</sup> Tr. 110-11, 141-43. Accordingly, I reject Northern's argument that the cable was not subject to mechanical damage.

Respondent's witness, Master Electrician Dean Prestby,<sup>9</sup> opined that the damaged cable was adequately protected and posed no risk to humans because the inner insulation was intact. Tr. 340-42. However, damage to an electrical cable's outer cover gives rise to the discrete safety hazard of an electric shock in the event that the exposed inner insulation is damaged by the same work conditions that damaged the outer cover. Thus, the conductors are not adequately protected when the outer cover is damaged, which constitutes a violation of § 56.12004 due to the strict

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<sup>8</sup> Northern argues I should adopt a definition of “mechanical damage” that includes only “damage to electrical conductors as part of a machine's operative function . . . or from being exposed to operating machines.” Resp.'s Br. at 8. However, the language of the mandatory safety standards is intended to be interpreted broadly and the Secretary and Commission have never adopted such a narrow definition of mechanical damage. *See, e.g., Northern Illinois Serv. Co.*, 36 FMSHRC 2811, 2819 (Nov. 2014) (ALJ) (finding that “the effects of weathering and/or friction” can constitute mechanical damage); *Northwest Aggregates*, 20 FMSHRC 518, 526 (May 1998) (ALJ) (finding that a cable was subject to mechanical damage when moisture and dirt could enter it). The Secretary's interpretation of a mandatory safety standard is entitled to deference where reasonable, *Auer v. Robbins*, 519 U.S. 542, 461 (1997), and in this case it is reasonable to conclude that the cable was exposed to mechanical damage.

<sup>9</sup> Prestby testified he is an electrical contractor with 28 years of experience working on mining equipment such as crushers and hot mix plants. He is licensed as a Master Electrician in Minnesota and North Dakota. Tr. 332-33.

liability nature of the Mine Act and the mandatory safety standards. *See Northshore Mining Co.*, 35 FMSHRC 1889, 1893 (June 2013) (ALJ); *Concrete Materials, Div. of Sweetman Constr. Co.*, 35 FMSHRC 690 (Mar. 2013) (ALJ); *Carmeuse Lime & Stone*, 33 FMSHRC 1654; *Sangravl*, 33 FMSHRC 1242; *Carmeuse Lime, Inc.*, 29 FMSHRC 266 (Mar. 2007) (ALJ); *John Cullen Rock Crushing & Gravel*, 17 FMSHRC 375 (Mar. 1995) (ALJ). Prestby did not know that damage to a cable's outer jacket violates § 56.12004 and generally displayed a lack of familiarity with MSHA's safety regulations. *See* Tr. 356-58. For example, he said he would not cut the power to make an electrical repair to a cable if there were no bare wires showing, but this would be a violation of MSHA's lock out/tag out requirements. Tr. 360-61. Prestby was also very reluctant to admit on cross-examination that a cable's inner wires are less protected when the outer cover is missing, and suggested that rather than repairing a damaged cable jacket or providing another layer of insulation, his preferred method for preventing contact with the inner wires was simply to avoid touching them. Tr. 359-61. This testimony detracts from his credibility and indicates to me that regardless of his electrical background, he is far more willing to take short cuts and expose persons to danger than the Mine Act contemplates. For these reasons, I discredit his opinion that the cable's inner conductors were adequately protected.

I find that this violation has been established.

### Gravity & Negligence

This violation is non-S&S and unlikely to cause injury because the damaged portion of the cable was not easily accessed by miners and the inner conductors were in good shape. Tr. 104. Low negligence is appropriate because the damage to the cable was not easily seen due to its location approximately nine feet above the ground. Tr. 105.

#### 8. Citation No. 8740827/Docket No. LAKE 2014-111

Inspector Sichmeller issued this 104(a) citation on September 4, 2013 for a violation of 30 C.F.R. § 56.12004 at the Portable Crusher. In this instance, the outer protective jacket of the 480-volt power cord supplying power to the superior power stacker was cut in four places. The cuts ranged from one to two inches in length and exposed the inner conductors, which were found to be discolored from exposure to dirt and moisture. Ex. S-8.

This violation was assessed as S&S, reasonably likely to cause a fatal injury affecting one miner, and the result of moderate negligence. The violation was terminated on September 11, 2013 because the mine had closed without being inspected for compliance. A warning was included in the termination paperwork placing the operator on notice that the hazard must be corrected before putting the cable back into use to avoid an unwarrantable failure violation. Ex. S-8. The Secretary has proposed a \$1,944.00 penalty.

### The Violation

Foreman Alan Speck told Sichmeller that this was a 480-volt cable. Tr. 161. It ran from the generator down the conveyor frames and connected to a number of pieces of equipment. Tr. 164. It had been used earlier in the day. Tr. 161. The largest of the cuts the inspector observed in the cable's outer jacket was a half inch or more in width and two inches long. Tr. 159-60; *see* Ex.

S-8c. He could not determine if the inner conductors were damaged or not because there was so much dirt packed inside the cable. Tr. 159.

The Respondent again argues that it did not violate § 56.12004 because the cable was not exposed to mechanical damage and was adequately protected in that its inner insulation and conductors were intact. Resp.'s Br. at 17-18. I reject these arguments for the reasons discussed above in connection with Citation Number 8740701. The cited cable was subject to mechanical damage in that the same conditions that had damaged the outer jacket could also damage the inner insulation, exposing miners to an electric shock hazard due to the exposure of the inner conductors. In fact, there is evidence the inner parts of the cable had already incurred mechanical damage, as the insulation was discolored and encrusted with mud and dirt and some of the inner conductors were visible. Tr. 251-53. The inspector could not even tell whether the conductors were intact. Tr. 159. Although Prestby testified that the cable was adequately protected and posed no shock hazard, he did not observe it in situ and apparently failed to consider the evidence that the cable's interior was already damaged. Tr. 358. For the reasons noted above, his opinion is further discredited because his views on safety do not comport with the protective purpose of the Mine Act and regulations.

I find that the cable's inner conductors were not adequately protected from mechanical damage. This violation has been established.

#### S&S/Gravity

Sichmeller assessed this violation as S&S because, unlike the situation cited by Koskiniemi, the condition of the inner conductors could not be determined because they were covered with dirt and moisture. It was apparent, however, that there was discoloration, indicating that deterioration had already set in. Tr. 162, 251-52. Also considered was the location of the cable. Because the cable connected conveyors and other pieces of equipment, it crossed over frames and other "exposure points," making mechanical damage likely. Tr. 163. The final consideration was that the electrical power system to which the cable was attached was improperly grounded at the time of the inspection. Had a miner made contact with the damaged cable while it was connected to the improperly grounded system, the miner could have become the ground fault, leading to electrocution. Tr. 163-64, 275-76. The inspector believed that the injury reasonably likely to occur would be a fatality, based upon his knowledge of the mining industry. Tr. 164.

I find that this violation contributed to the discrete safety hazard that a miner would come into contact with the cable's inner wires. This hazard was reasonably likely to result in injury during continued normal mining operations based on the cable's location, which was subject to both continued mechanical damage and human contact; the fact that the cable's inner insulation was already damaged, exposing some of the inner wires; the improper grounding of the electrical system to which the cable was attached; and the voltage carried by the cable. These factors establish a reasonable likelihood of human contact with a bare conductor and resultant electrical shock. I reject Prestby's contrary testimony that the cable posed no shock hazard because he did not observe the wires himself, and moreover he appears not to have accounted for the preexisting damage to the cable's inner insulation that had already exposed the inner wires, which by his



own testimony would have presented a shock hazard. *See* Tr. 358-59. This was a 480-volt cable capable of producing an electrical shock that would cause very serious or even fatal injuries. Because this violation contributed to a discrete safety hazard that was reasonably likely to result in serious injury with continued normal mining operations, the violation is S&S.

The gravity of this violation is serious in that it posed a risk of serious injury or death due to electrical shock.

### Negligence

Moderate negligence is appropriate because the four damaged sections of the cable were relatively large, were visible from the main travelway alongside the conveyors, and should have been discovered during a workplace examination. Tr. 165.

#### 9. Order No. 8740828/Docket No. LAKE 2014-110<sup>10</sup>

This section 104(d)(2) order was written on September 4, 2013 by Inspector Sichmeller for a violation of 30 C.F.R. § 56.12025 at the Portable Crusher. The cited mandatory standard states in pertinent part: “All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection.” 30 C.F.R. § 56.12025. The narrative section of the citation reads as follows:

There was not ground provided for on site (sic) Generator trailer and the ground rod provided for the job trailer was pulled and sitting in the Job trailer. This did not ensure proper grounding of the electrical equipment and exposed personnel to the electrical hazards. Reportedly by the on site (sic) foreman he had pulled the ground for the job trailer and had never reinstalled prior to putting the plant back in operation today, and that he was never provided anything for grounding the Main generator trailer and the trailer has been on site since he arrived and moved to this location in 8-13-2013. The company was cited for this violation on the past regular safety inspection. The company has engaged in aggravated conduct constituting more then (sic) ordinary negligence by not ensuring that proper grounding of equipment is being conducted or providing proper grounding equipment to be installed at the site. This violation is a (sic) unwarrantable failure to comply with a mandatory standard.

Ex. S-9.

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<sup>10</sup> Initially issued as a 104(d)(1) citation, this violation was amended to a 104(d)(2) order after Sichmeller reviewed the mine file and realized the mine was on the d-chain. Tr. 166. The d-chain refers the Mine Act’s graduated enforcement scheme promulgated in section 104(d). Once a section 104(d)(1) order has been issued, subsequent similar violations at the same mine must be issued as 104(d)(2) orders until such time as an inspection of the mine discloses no similar violations. 30 U.S.C. § 814(d)(2); *see Lodestar Energy, Inc.*, 25 FMSHRC 343, 345 (July 2003). During the most recent previous inspection of the Portable Crusher slightly less than a year earlier on September 25, 2012, the operator had been issued a 104(d)(1) citation (No. 8665360) and two 104(d)(1) orders (Nos. 8665362 and 8665263), one of which was issued for a grounding violation. *See* Ex. S-14; Ex. S-9e. Sichmeller’s amendment of the type of issuance was based on these prior violations.

The violation was assessed as reasonably likely to result in a fatal injury to one miner, S&S, and the result of high negligence. The citation states that the cited standard was violated on one prior occasion at the mine within the preceding two years. Ex. S-9. The Secretary proposes a penalty of \$7,176.00 for this violation.

## The Violation

### *Secretary's Evidence*

As Sichmeller was conducting his inspection, his attention was drawn to the main generator trailer, the metal trailer housing the electrical system that powers all the plant equipment, by a sign posted on the trailer stating that it must be grounded. Tr. 167, 172; *see* Ex. S-9b. Electrical grounding is the process of connecting an electrical circuit to the ground to make the earth part of the circuit. 30 C.F.R. § 56.2. This can be accomplished through various means, such as a ground plate or a rod driven into the ground and wired to the electrical system. Tr. 170.

Sichmeller saw there were no ground plates or rods at Northern's generator trailer and it was not in direct contact with the ground because it was sitting on tires and wooden blocks. Tr. 167-68; *see* Ex. S-9c. He discussed the situation with Foreman Alan Speck. The generator trailer had recently been moved to the site on August 13, 2013. Tr. 168. Speck had spoken with Kyle Schulke about grounding the generator trailer but nothing was ever brought to the site to provide grounding. Tr. 176; Ex. S-9a. Sichmeller observed a ground rod hanging in a different trailer, the job trailer, but the rod was not in use. *See* Ex. S-9d. Speck said the rod had previously been used to ground the job trailer but was pulled before Labor Day weekend to avoid vandalism and was never reinstalled. Tr. 176-77.

Northern had been issued a 104(d)(1) order by Inspector John Koivisto approximately one year earlier on September 25, 2012 under similar circumstances. In that instance, the inspector found the ground rod inside the generator trailer. The inspector determined that the foreman on duty had engaged in aggravated conduct constituting more than ordinary negligence in that the foreman was aware the trailer needed to be grounded but simply had not taken the time to install the ground rod. Ex. S-9e.<sup>11</sup>

### *Respondent's Evidence*

Kyle Schulke testified based on his experience working at the mine and conversations with electricians that ground rods are useful only for guarding against lightning strikes. Tr. 288, 322, 331. He believed that all the equipment at the plant was tied together in a single system or circuit and that grounding at any point in the system was sufficient to protect all of the linked components. Tr. 288-89, 293, 316, 327. At first he testified the system was grounded by means of a panel lying on the ground with all the wires running to it. Tr. 288-89, 293. He later said that the ground rod at the job trailer provided grounding for the entire system. Tr. 314. Subsequently he stated that even though the ground rod at the job trailer had been pulled over Labor Day weekend and not replaced, the entire system was still grounded by virtue of the interlinked plant

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<sup>11</sup> The Mine Data Retrieval System indicates this order, Order No. 8665362, was paid without contest and is closed.

equipment that was in contact with the ground. Tr. 317-18. He also stated without explanation that the generator itself was “internally” grounded. Tr. 292-93.

Master Electrician Prestby testified ground rods serve no purpose and have no effect on electrical systems. Tr. 347, 370-71. He prepared a report stating that a ground rod has “nothing to do with personal safety” because it cannot clear a ground fault, since it does not provide a path back to the power source to trip the circuit breaker and thereby disconnect the electrical current. Ex. R-1. On cross-examination, however, he conceded that the generator trailer needed to be provided with some method of grounding and that MSHA prefers use of a grounding electrode such as a plate or rod. Tr. 364-65.

### *Analysis*

The cited generator is the source of electrical power to the entire plant. Electricity tends to run back to the source in the case of a short circuit, making the fault to ground at the generator very important. Tr. 182. Power would run back to the generator if a short circuit were to occur, and anyone coming into contact with the metal generator trailer would suffer a shock because no grounding electrode was provided and the trailer was on wooden blocks and rubber tires, meaning the metal frame was not in contact with the ground to serve as an alternate means of protection. Also significant is the fact that during the inspection, power cables running from the generator to the conveyors and other electrical equipment were found to be deteriorated, posing an additional shock hazard.

It appears from the two almost identical grounding violations issued during two consecutive inspections that Northern is extremely lax in its adherence to the mandatory grounding standard. *See* Exs. S-9, S-9e. Northern offered testimony that the entire electrical system at the mine was grounded, but I find this testimony to be not credible and manufactured after the fact. Kyle Schulke is not an electrician and has no formal training in this discipline, and his testimony was inconsistent and unconvincing. Tr. 286-87. Prestby’s testimony was evasive but ultimately he grudgingly conceded on cross-examination that the generator trailer should have been grounded.<sup>12</sup> Tr. 286-87, 364-65. The evidence does not demonstrate that there was a ground on the mine’s electrical system at any point. Furthermore, the generator as the source of the power was the most important component to be grounded. This violation is established.

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<sup>12</sup> Prestby’s testimony on this point exemplifies the evasiveness and reluctance to admit obvious facts that detract greatly from his credibility:

Q: Okay. Do you agree that the generator trailer needed to be grounded?

A: The generator needed to have an equipment grounding conductor. Grounded as far as connected to the earth, or cords, or what?

Q: I’m asking in general.

A: That’s a loose term, grounding is a loose term.

Q: So it needed to have some kind of grounding, correct, regardless of it was earth grounding or wire grounding?

A: Wire grounding, yes.

Q: It needed to have some kind of grounding?

A: Yes.

Tr. 363-64.

### S&S/Gravity

The inspector assessed this violation as S&S. He testified based upon his training and knowledge of mining industry fatalities that improper grounding is reasonably likely to result in fatal electrocutions. Tr. 186.

There is sufficient evidence to conclude this violation contributed to the discrete safety hazard of the generator not being properly grounded, which could result in a potentially fatal electrical shock if a miner were to inadvertently become a ground fault. Because there was a violation of a mandatory safety standard which contributed to a discrete safety hazard and any injury resulting from the hazard would likely be serious, the first, second, and fourth *Mathies* elements are satisfied.

However, there is no evidence of the likelihood a ground fault would occur or the likelihood a miner would come into contact with any source of electrical shock resulting from the failure to ground the generator trailer. The Secretary presented no evidence as to where the generator trailer was located, who accessed the area, whether access had occurred while the trailer was ungrounded, and when or how often access would be expected to occur during continued normal mining operations. The Secretary also did not present evidence of any factors or conditions, such as wet conditions around the trailer, that would have increased the likelihood of a ground fault or other dangerous electrical event occurring. There is also no evidence as to how often or why someone would contact one of the damaged cables that the inspector cited as making this violation more serious. Because the Secretary has not established a reasonable likelihood of human contact or a ground fault, he has not established a reasonable likelihood the hazard this violation contributed to would result in an injury-causing event during continued normal mining operations. For this reason, the evidence does not establish this violation is S&S.

Although the violation is not S&S, its gravity is serious by virtue of its contribution to the discrete safety hazard of a potentially fatal electrocution accident.

### Negligence/Unwarrantable Failure

The inspector believed that high negligence was appropriate here because the operator had previously received a 104(d)(1) citation from Koivisto for the same hazard and because Foreman Speck had discussed the need for grounding with Kyle Schulke, yet nothing had been done to ground the trailer. Tr. 187. The same considerations led the inspector to issue this violation as a 104(d)(2) unwarrantable failure order. Tr. 188. The inspector's testimony does not address the unwarrantable failure factors, but the Secretary argues in his closing brief that the unwarrantable failure designation is appropriate because of the additional electrical violations issued the same day, the prior similar citation issued by Koivisto a year earlier, the conversation between Speck and Schulke, and the fact that the electrical system had not been properly grounded since the operator moved to the site on August 13, 2014. Br. of Sec'y at 17.

### Operator's Notice that Greater Efforts at Compliance Were Necessary

Inspector Koivisto had cited the mine for the same violation during the previous annual inspection on September 25, 2012. That violation was issued to a different foreman, Jeff Johnson, who had promptly abated the condition by reinstalling the ground rods, which had been pulled and sitting in the generator trailer at the time of the inspection. Ex. S-6e. Kyle Schulke testified he was not familiar with the prior violation. Tr. 319.

The Secretary's reliance on the prior similar violation as a factor supporting unwarrantable failure implies that the violation placed the operator on notice that greater efforts at compliance with § 56.12025 were necessary. However, a single prior violation does not serve to place the operator on notice of an ongoing serious problem at its mine. Also, because the prior violation was easily abated by a different foreman and promptly terminated without the involvement of any other company representatives, I credit Schulke's testimony that he was not aware of the prior violation and I find that the violation likely did not engender in the operator a heightened awareness of the need for greater compliance efforts.

### Duration of Violation

This violation existed at least from the time the generator trailer was moved to the site on August 13, 2013 to the time the inspector noticed it on September 4, 2013. The inspector confirmed through his conversation with Foreman Speck and his review of continuity and ground resistance testing records that the generator trailer had not been grounded the entire time it was on-site. Tr. 175-76. Thus, this violation lasted at least three weeks.

### Operator's Knowledge of Existence of Violation & Abatement Efforts

Foreman Speck told the inspector he had discussed the need for grounding with Kyle Schulke when the generator trailer was moved to the site, yet no form of grounding had been provided. Tr. 176; Ex. S-9a. Schulke said he believed the entire electrical system at the site was grounded through alternative means, but his explanation of how the system was grounded was not persuasive. Additionally, Prestby, who set up the system, admitted that the trailer needed to be grounded. Tr. 363-64. I do not credit mine management with a good faith belief that the generator trailer was in compliance with the requirements of § 56.12025, which clearly required the trailer itself to be grounded. The operator knew of this violation.

Although the operator knew of this violation, no abatement efforts were undertaken during the three weeks the violation existed.

### Obviousness, Extensiveness, and Degree of Danger Posed

The Secretary has not presented evidence that this condition was obvious, extensive, or posed a high degree of danger to miners. There is no evidence as to where the generator trailer was located, who accessed it, how often, or why, making it impossible to determine whether the violative condition was readily visible and to whom; whether it would have been obvious during

a shift examination; whether it affected an extensive area or number of people; or whether there was a likelihood of human access that would increase the danger posed by the violation. There is also no evidence of the likelihood that a dangerous electrical event such as a ground fault would occur, which hinders my ability to assess the degree of danger posed. However, there is evidence that the violation was not extensive in that the only measure required to abate it was to reinstall the ground rod at the generator trailer.

### Conclusions

On balance, I find that this violation is not an unwarrantable failure. Although the operator knew of this violation and failed to take any abatement efforts for the three weeks it existed, the evidence does not show that the violation was obvious, extensive, or highly dangerous to miners, or that the operator was on notice of an ongoing problem that required greater compliance efforts. The operator's conduct demonstrated a disinterest in worker safety, but the evidence is insufficient to establish that this conduct rose to the level of intentional misconduct or a reckless disregard for safety. Accordingly, I find that the Secretary has not presented enough evidence to support an unwarrantable failure designation. Because this violation is not an unwarrantable failure, the type of action is hereby modified to a section 104(a) citation.

High negligence is appropriate here, as the grounding rod was intentionally pulled out and never reinstalled when the generator trailer was moved to this location. The fact that a grounding rod was found in the job trailer indicates the operator was well aware of the necessity for grounding but was lax in providing such grounding and disinterested in the safety of the miners in this respect.

#### 10. Order No. 8740829/Docket No. LAKE 2014-110

Sichmeller issued this section 104(d)(2) order<sup>13</sup> on September 4, 2013 for another electrical violation relating to grounding at the Portable Crusher. This violation was written under 30 C.F.R. § 56.12028, which requires continuity and resistance testing of grounding systems immediately after installation, repair, or modification and annually thereafter. The safety standard also requires the operator to keep a record of the resistance measured during the most recent tests that can be made available to the Secretary or his representatives upon request. 30 C.F.R. § 56.12028. Sichmeller issued this violation after determining that such testing had not been conducted at the main generator trailer since its installation at the site on August 13, 2013. Testing also had not been conducted on the job trailer when it was placed back in service after its grounding system had been modified by pulling the ground rod before Labor Day weekend. Ex. S-10.

This violation was assessed as reasonably likely to result in a fatal injury to one miner, S&S, and the result of high negligence. The citation also states the violation is an unwarrantable failure and references the fact that the cited standard had been violated on one prior occasion at

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<sup>13</sup> As with violation 8740828, Sichmeller initially wrote this violation as a 104(d)(1) order and later modified it to a 104(d)(2) order.

the mine within the preceding two years. Ex. S-10. The Secretary proposes a penalty of \$7,176.00 for this violation.

### The Violation

The circumstances of this violation are similar to those surrounding violation 8740828. Sichmeller testified that under the cited mandatory safety standard, continuity and resistance testing, which is a means of verifying adequate grounding by measuring “earth resistance to ground” in ohms, should have been conducted at the generator trailer when it was installed on-site on August 13, 2013 to ensure it was properly grounded. Tr. 190-92. The operator’s records show the job trailer and various other equipment underwent a continuity test on August 14, 2013, but the main generator trailer was not tested. Ex. S-10b; Tr. 320. Kyle Schulke had performed the test starting from the ground rod at the job trailer. Tr. 314-15.

Inspector Sichmeller was puzzled as to why the job trailer was provided with a ground rod, which he believed was unnecessary. *See* Tr. 177-80, 273-74. Nonetheless, because the job trailer had a grounding system and that system had been modified when the ground rod was pulled before Labor Day weekend, he felt that an additional continuity and resistance test should have been conducted on the job trailer when mining operations resumed after Labor Day. Tr. 192, 196.

A 104(d)(1) order had been issued by Inspector Koivisto a year earlier for a violation of the same safety standard under somewhat different circumstances. In that instance, Koivisto had found no records at all that continuity and resistance testing had been performed. The citation was terminated after the operator provided documentation that resistance measurements had been taken for various equipment at the mine, including the generator. Ex. S-10d.

Relying on its previously rejected argument that the generator trailer does not need to be independently grounded, Northern contends the August 14, 2013 continuity and resistance test did not need to include a resistance measurement at the generator. Resp.’s Br. at 21. Prestby also suggested that since the generator was the starting point of the circuit, it would have no individual resistance and therefore would not need to be tested. Tr. 368. I find no basis for the assertion that resistance testing does not need to be conducted at the generator. The mandatory safety standard does not provide an exception for the starting point of the circuit. Moreover, as the source of power, the generator poses the greatest risk of shock, since power tends to flow back to the source in the event of a short circuit. Thus, of all the components of the electrical system, it is particularly important to conduct resistance testing on the generator to ensure it is safely grounded. The operator conducted such testing to terminate the prior citation written by Koivisto and its witnesses testified resistance testing should start at the generator. Tr. 262, 274-75, 368; Ex. S-10d. Clearly the operator knew the generator should be tested yet failed to do so. This violation has been established.

The operator also failed to perform a continuity and resistance test at the job trailer after its grounding system was modified by pulling the ground rod. Presumably the test was not performed because the operator had never reinstalled the ground rod. The operator should have

reinstalled the ground rod and tested it to make sure it was functioning properly. Because no test was conducted, this was also a violation of § 56.12028.

### S&S/Gravity

The inspector designated this violation S&S. The discrete safety hazard contributed to by this violation is the same as that posed by the operator's failure to ground the generator trailer. Specifically, if adequate continuity and resistance testing is not conducted, the operator has no way to detect inadequate grounding, which could result in a serious, potentially fatal electrical shock. Accordingly, I find that this violation contributed to a discrete safety hazard and could have been expected to cause a reasonably serious or even fatal injury.

However, the Secretary has presented no evidence that a ground fault or other dangerous electrical event was likely to occur and no evidence of the likelihood of human contact if such an event were to occur. With respect to the job trailer, the Secretary has not shown that the trailer posed a shock hazard. In fact, the inspector suggested that the job trailer's grounding system, although subject to the testing requirements of § 56.12028, may not actually be necessary. If the job trailer does not need to be grounded, presumably it does not pose a shock hazard at all. With respect to the generator trailer, the Secretary has failed to present evidence tending to show the trailer's location, the likelihood miners would access that area, or the existence of any conditions that would make a ground fault likely. In short, the evidence is insufficient to establish a reasonable likelihood the hazard contributed to by this violation would result in an injury-causing event during continued normal mining operations. Because the third *Mathies* prong is not satisfied, I find that this violation is not S&S.

Although the violation is not S&S, its gravity is serious by virtue of its contribution to the discrete safety hazard of a potentially fatal electrocution accident.

### Negligence/Unwarrantable Failure

The inspector assessed this violation as an unwarrantable failure with high negligence because the operator had offered no mitigating circumstances, and because the inspector believed the prior similar violation issued by Koivisto on September 25, 2012 had placed the operator on notice that it needed to make greater compliance efforts. Tr. 199-200. The Secretary proffers the same arguments it offered for violation 8740828 to support the unwarrantable failure designation. Br. of Sec'y at 17.

For the same reasons that violation 8740828 was not an unwarrantable failure, I conclude that this one is not either.

### Whether the Violation Was Extensive, Obvious, and Posed a High Degree of Danger

The hazard posed by this violation was the same as that posed by violation 8740828 – an electrocution hazard stemming from failure to ground the two trailers. The Secretary has presented no evidence concerning the location of the cited trailers, who accessed them, how often, or why. It is unclear what area was affected and who would have been endangered. There



is also no evidence as to whether conditions were wet or dry in the area or whether a ground fault was likely to occur, which would have increased the degree of danger if proven. I find that the evidence is insufficient to show this hazard was extensive, obvious, or posed a high degree of danger to miners.

#### Operator's Notice that Greater Compliance Efforts Were Necessary

Although the operator was issued a prior similar violation on September 25, 2012, the circumstances of that violation differ significantly from this one. On the prior occasion, the operator was cited for failure to conduct any continuity and resistance testing at all when it began operations at a new worksite. Ex. S-10d. By contrast, here, the operator produced documentation showing it had conducted some testing on August 14, 2013 after setting up operations at a new location. Ex. S-10b. However, the testing was deficient in that it did not include the generator trailer, and additionally, the operator had failed to conduct a new test when the electrical system was modified by pulling the ground rod at the job trailer. The prior violation would not have placed the operator on notice that these specific circumstances would necessitate greater compliance efforts.

#### Operator's Knowledge of Existence of Violation

The generator trailer had been included in the continuity and resistance testing performed on September 25, 2012 to terminate the prior violation issued by Koivisto. *See* Ex. S-10e. This shows the operator was aware the generator trailer needed to be included in such testing, despite its assertions to the contrary. Kyle Schulke had conducted a continuity test on August 14, 2013 when mining operations began at the new site and knew the generator trailer was not included in the test.

The operator also knew that the ground rod had been pulled at the job trailer and should have known that it was violating the mandatory safety standard by not reinstalling the rod and re-testing the grounding system at the job trailer.

#### Duration of Violation & Operator's Abatement Efforts

This violation began with respect to the generator trailer when the operator failed to include it in the initial continuity and resistance testing conducted on August 14, 2013. Thus, the violation lasted for three weeks before the inspector cited it. The operator took no efforts to abate the violation during this time period.

With respect to the job trailer, the violation existed for less than a day. The job trailer's grounding system had been modified before the Labor Day holiday, and the system should have been re-tested on the day of the inspection when mining operations resumed.

#### Conclusions

The operator should have known of this violation, but there is no evidence the violation was extensive, obvious, or posed a high degree of danger. With respect to the job trailer, the

duration of the violation was very brief. Although the violation lasted longer with respect to the generator trailer, which had not been tested since it was moved to the mine site, the operator had conducted some continuity testing when it moved to the site and was not specifically on notice from MSHA that greater compliance efforts were necessary. I find that the evidence is not sufficient to establish that this violation was an unwarrantable failure. The violation is hereby modified to a section 104(a) citation.

High negligence is appropriate here because the operator was aware of the necessity for continuity and resistance testing, as evidenced by its completion of such tests in the past, but failed to conduct proper tests.

11. Citation No. 8740830/Docket No. LAKE 2014-111

Sichmeller issued this 104(a) citation during his September 4, 2013 inspection of the Portable Crusher after finding that the rear brake light, turn signal, and tail light on the CAT 980H front end loader did not function when tested, in violation of 30 C.F.R. § 56.14100(b). He cited a collision hazard as a likely result of this condition and assessed the violation as S&S, reasonably likely to cause an injury resulting in lost workdays or restricted duty for one miner, and the result of moderate negligence. Ex. S-11. The Secretary proposes a penalty of \$585.00.

The cited mandatory safety standard states, “Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.” 30 C.F.R. § 56.14100(b). Whether a defect is corrected in a timely manner depends on how long the defect existed and when the operator knew or should have known about it. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001). Where there is no evidence as to when the defect arose, the Secretary has not established that it was not corrected in a timely manner. *Id.*

Here, the Secretary has presented no evidence as to how long the 980 loader’s rear brake light, turn signal, and tail light were defective. The same loader was previously cited for the same defect on September 25, 2012. Ex. S-11b. That was almost a year earlier, which is not significant for this type of violation. Blown out light bulbs and loose wires on mobile equipment are common occurrences that can occur at any given moment without warning. *See* Tr. 244, 298-99, 439. Northern also presented evidence that this particular loader is “finicky” and known to have wiring issues. Tr. 300, 439. The loader was parked and not in use at the time of the inspection and there is no evidence showing when it was last used. Tr. 245. Thus, aside from the uncertainty over when the defect arose, it is also uncertain when the operator could or should have known about it.

The Secretary has failed to show the cited defect was not corrected in a timely manner. This citation is VACATED.

12. Citation No. 8740835/Docket No. LAKE 2014-111

During his September 4, 2013 inspection of the Portable Crusher, Sichmeller issued this 104(a) citation for a violation of the mandatory standard at 30 C.F.R. § 56.14101(a)(2). The citation states that the parking brake on the CAT 950G loader would not hold the truck when it was tested with a fully loaded bucket on an inclined roadway. Ex. S-12. The cited standard is

violated when a parking brake fails to hold equipment when tested on the maximum grade the equipment travels while holding its typical load. 30 C.F.R. § 56.14101(a)(2).

Sichmeller marked the citation as S&S, reasonably likely to result in a fatal accident affecting one miner, and the result of moderate negligence. Ex. S-12. The Secretary seeks a penalty of \$1,944.00.

### The Violation

The cited 950 loader is used to move materials at the mine. When tested on a feed ramp, which has less of an incline than the maximum grade at the mine, the 950 loader rolled backwards when the park brake was engaged. Tr. 220-21.

Richard and Kyle Schulke testified that a different loader, the 980, was used to feed the crusher in the pit area, whereas the 950 was used strictly to load outgoing trucks on flat land away from the pit's steep inclines. Tr. 301-02, 309-10, 436-37. However, neither of the witnesses was regularly onsite. Tr. 282, 285, 441. They did not have firsthand knowledge of how the loader was used on a day to day basis. Also, Kyle Schulke stated that the 950 and 980 were used interchangeably to load trucks. Tr. 297. As the inspector pointed out, the cited 950 loader is capable of being used anywhere at the mine and the common, expected practice in the industry would be to use it as a backup if another loader such as the 980 went down. Tr. 235-36.

I find the Secretary has established a violation.

### S&S

The inspector designated this violation S&S. The Secretary has established an underlying violation of a mandatory safety standard that contributed to the discrete safety hazard of unexpected movement of the 950 loader when in the parked position, satisfying the first two elements of the S&S analysis under *Mathies*. See Tr. 222.

However, the Secretary has not established a reasonable likelihood that this hazard would result in injury with continued normal mining operations under the particular facts surrounding this violation. The inspector provided only two reasons for issuing the citation as reasonably likely to cause injury, neither of which is compelling.

First, the inspector noted that the operator had been cited one year ago for failing to lower the bucket on a loader when it was parked. Tr. 222-23; Ex. S-12a. Despite the inspector's assertion to the contrary, this single prior incidence in no way establishes a "practice" at the mine that would have contributed to the likelihood of an injury-causing event under the circumstances of this only tangentially related violation.

Second, the inspector stated that the safety standard Northern violated is included in MSHA's Rules to Live By, a group of standards for which MSHA provides additional training because of their past involvement in mining fatalities. Tr. 223. However, the inclusion of the violated standard in the Rules to Live By fails to establish likelihood of injury under the

particular facts of this case. These facts include the operator's undisputed testimony that the 950 loader was used primarily for loading stockpiled material onto trucks on flat land. *See* Tr. 233-34, 301-02, 309-10, 436-37. Even in the event that the loader were parked on an incline, the Secretary did not offer evidence that anyone would be near it to incur injury if it were to slide.

Because the Secretary has failed to prove a reasonable likelihood that the hazard this violation contributed to was reasonably likely to result in injury, I find that this violation is non-S&S. Although it is non-S&S, the violation is reasonably serious in that it contributed to the discrete safety hazard of the truck rolling unexpectedly when in the parked position, which could have caused a serious or fatal crushing injury.

### Negligence

The inspector assessed this violation as involving moderate negligence, reasoning that the operator had been issued another parking brake violation during the same inspection and others in the past. Tr. 224; Ex. S-12a. However, the operator did not know of this violation before the citation was issued, and the Secretary has presented no evidence as to how long the violation existed or when the operator should have discovered it. *See* Tr. 224, 302; Ex. S-12a. The prior similar citations do not establish when the operator had reason to know the parking brake was defective on this particular vehicle; this particular defect could have been a recent development. I find that low negligence is more appropriate than moderate negligence based on what the Secretary has been able to prove.

#### 13. Citation No. 8740836/Docket No. LAKE 2014-111

Inspector Sichmeller issued this 104(a) citation during his September 4, 2013 inspection of the Portable Crusher because the reverse alarm on the Bobcat Skidsteer Model 863 did not function when tested. The citation was issued under 30 C.F.R. § 56.14132(a), which requires that manually-operated horns or other audible warning devices on mobile equipment be maintained in functional condition. The violation is assessed as S&S, reasonably likely to result in a fatal injury affecting one miner, and involving moderate negligence. Ex. S-13. The proposed penalty is \$1,944.00.

### The Violation

Sichmeller testified that this piece of equipment may not have been equipped with a backup alarm from the factory, but one had been installed on it. Tr. 231. When tested it did not function. The skidsteer is used throughout the mine and was evidently used prior to the inspection near the job trailer, as tire tracks were visible there. Tr. 225-26, 231. The skidsteer can move as quickly in reverse as in forward motion and is not equipped with side mirrors, resulting in an obstructed or limited view when operating in reverse. Tr. 225, 232-33.

Northern asserts that this machine had a rearview mirror, enabling operation in reverse without obstructed views. Resp.'s Br. at 27; *see* Tr. 306, 440. But rearview mirrors alone are not sufficient to provide a panoramic backwards view to the skidsteer operator. They also do not provide an audible warning to miners on foot or operating other machinery that the skidsteer is about to move in reverse. Section 56.14132(a) requires audible warning devices to be maintained

in functional condition regardless of whether or not the operator's rearward view is obstructed. The presence of a rearview mirror thus has no bearing on whether or not a violation of the cited standard occurred.

Northern also argues the reverse alarm was an aftermarket installation not required by MSHA. Resp.'s Br. at 27; *see* Tr. 304, 439-40. This argument fails. Even if it was not factory-installed, the alarm was provided for safety on the machine and was not maintained in functional condition, violating the standard. *See* Tr. 265-66.

This violation has been established.

### S&S/Gravity

The inspector issued this citation as S&S and reasonably likely to cause a fatality because the skidsteer is a very heavy machine capable of causing serious crushing injuries and can be used to move materials and clean up throughout the mine, including areas where other miners are working on foot. Tr. 227.

The skidsteer operates in congested spaces, as confirmed by Kyle Schulke, who testified it is used several times per day to clean underneath the conveyors. Tr. 303. He and Richard Schulke stated that miners are trained not to stand behind it, and therefore would not be at risk of being struck by the skidsteer. Tr. 304, 440. However, if training alone were sufficient to protect miners, the mandatory safety standards would all be superfluous. Miners do not always do what is most prudent, which is why operators are charged with a higher degree of care to protect the health and safety of the miners. Absent a reverse alarm, a miner would not necessarily know that the skidsteer was about to travel in reverse and that he was too close to it. The violation therefore contributed to the discrete safety hazard that a miner would be run over after failing to realize the skidsteer was about to travel backward. Such an injury-causing event was reasonably likely to occur during continued normal mining operations based upon the frequency with which the skidsteer was used every day, the congested location where it was operated, and the fact that as many as four miners would be working around it while in operation. *See* Tr. 230. The injuries expected to occur from being struck by this piece of heavy machinery, which would include broken bones and fatal crushing injuries, would be very serious in nature. I find that the *Mathies* criteria are met and this violation is S&S.

The gravity of this violation is serious due to the very serious nature of the injuries expected to result from the violation and the fact that there are often as many as four miners working in and around the skidsteer while it is operating.

### Negligence

Because the skidsteer was operated frequently and therefore should have been examined frequently, and because it had just been used prior to this inspection, the operator should have known the reverse alarm was not working. *See* Tr. 231, 303. A mitigating factor is that the condition could have been a fairly recent development, considering that the Secretary presented no evidence of how long it had existed. I find that moderate negligence is appropriate.

## V. PENALTIES

### Legal Principles

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (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).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary nor are they governed by MSHA's Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247 (May 2006).

### Assessment

The parties have stipulated that the penalties initially proposed by MSHA will not affect Northern's ability to remain in business and that the violations were abated in good faith. Joint Exhibit 1.

The size of the operator's business is relatively small, as it is a family owned, seasonally operated business with fewer than thirty employees. Tr. 425. I have taken into account the appropriateness of the penalties to the size of the operator's business, as well as the desired deterrent effect of the civil penalties in comparison to the size of the operator and its overall resources. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-69 (Aug. 2012); *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1505 (Sept. 1997).

I have also taken into account the operator's history of previous violations, which is set forth in Exhibit S-14. The exhibit shows that the operator was cited for 58 violations in the 15 months preceding the 2013 inspections, but it fails to set forth a qualitative assessment of whether this number of violations is high, moderate, or low, detracting from its utility in the penalty analysis. The Secretary requests that MSHA's initially proposed penalties for violations 8672802, 8740698, and 8740699 be doubled based on the operator's history of previous violations. Specifically, the Secretary argues the operator was cited for the same violations during the previous inspection. Br. of Sec'y at 25. I reject the Secretary's request. Pursuant to the

Commission's statutory authority to assess all civil penalties under section 110(i) of the Mine Act, I have instead considered and weighed the six statutory penalty criteria *de novo* without basing the penalty assessment exclusively on MSHA's proposal and the prior violations.

The gravity and negligence of each violation is discussed within the body of the decision above.

Based upon the findings as set forth herein, I impose the following penalties:

- A. Docket Number LAKE 2014-110
  - 1. Order No. 8740828 - \$1,449.00
  - 2. Order No. 8740829 - \$1,449.00
- B. Docket Number LAKE 2014-111
  - 1. Citation No. 8740827 - \$1,944.00
  - 2. Citation No. 8740830 - VACATED
  - 3. Citation No. 8740835 - \$750.00
  - 4. Citation No. 8740836 - \$1,944.00
- C. Docket Number LAKE 2014-180 / Citation No. 8740705 - \$176.00
- D. Docket Number LAKE 2014-183
  - 1. Citation No. 8740695 - \$100.00
  - 2. Citation No. 8740696 - VACATED
  - 3. Citation No. 8740701 - \$100.00
- E. Docket Number LAKE 2014-216 / Order No. 8740699 - \$2,000.00
- F. Docket Number LAKE 2014-217 / Citation No. 8672802 - \$6,458.00
- G. Docket Number LAKE 2014-430 / Citation No. 8740698 - \$2,700.00

## VI. ORDER

Northern Aggregate, Inc. is hereby ORDERED to pay the sum of \$19,070.00 within thirty (30) days of the date of this Decision and Order.<sup>14</sup>

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

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<sup>14</sup> Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
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March 16, 2015

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

v.

BIG LAUREL MINING CORPORATION,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. VA 2012-619  
A.C. No. 44-07087-297654

Mine: Mine No. 2

## DECISION

Appearances: Ryan M. Kooi, Esq., Office of the Regional Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;

Kelby T. Gray, Esq., Dinsmore & Shohl, LLP, Charleston, West Virginia,  
for Respondent.

Before: Judge Paez

This case is before me upon the Petition for the Assessment of a Civil Penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). In dispute is one section 104(d)(1) order issued by the Mine Safety and Health Administration (“MSHA”) to Big Laurel Mining Corporation (“Big Laurel” or “Respondent”) as the owner and operator of Mine No. 2 in Wise, Virginia. To prevail, the Secretary must prove the cited violation “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

The parties stipulated to the following:

1. Respondent was an “operator” as defined in [section] 3(d) of the [Mine] Act, 30 U.S.C. § 802(d), at [Mine No. 2,] the [m]ine at which the order in this matter was issued.
2. The operations of Respondent at [Mine No. 2] are subject to the jurisdiction of the [Mine] Act.

3. [This] proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and its assigned Administrative Law Judges, pursuant to [s]ections 105 and 113 of the [Mine] Act.
4. The order in this matter was issued and served by a duly authorized agent of the Secretary of Labor upon a representative of Respondent at the date, time and place stated therein as required by the [Mine] Act.
5. The subject order is a true and authentic copy of the order issued and served on the mine operator.
6. The proposed penalty for the subject order will not affect the mine operator's ability to remain in business.
7. MSHA Inspector Kenneth Garrett issued Order No. 8181919 on May 23, 2012 during and inspection of Big Laurel Mining Corporation's Mine No. 2.
8. The inspection took place on the day shift.
9. Mine Foreman Tony Dean and Electrician Fabian Spears, Jr. travelled with Inspector Garrett during the inspection and were present when Order No. 8181919 was issued.
10. The photographs taken by Tony Dean, identified as [Exhibits GX-34(a), GX-34(b), GX-34(c), GX-34(d), GX-34(e), and GX-34(f), and also as] Exhibits 2R-9, 2R-10, 2R-11, 2R-12, 2R-13, and 2R-14, are authentic photographs.

(Joint Ex. 2.)<sup>1</sup>

## I. STATEMENT OF THE CASE

This case involves a single alleged violation at Big Laurel's Mine No. 2. The alleged violation involves Order No. 8181919, which charges Big Laurel with a violation of 30 C.F.R. § 75.400<sup>2</sup> for failing to clean up an accumulation of float coal dust. The Secretary characterizes Big Laurel's negligence as both high and an unwarrantable failure to comply with a mandatory health or safety standard. Although a withdrawal order was issued to the mine, no miners were withdrawn as a result of this order, nor was production interrupted. The Secretary proposes a specially assessed penalty of \$6,300.00.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. VA 2013-619 to me, and I held a hearing in Abingdon, Virginia, alongside two other Big Laurel dockets that are the subject of a separate decision. The Secretary presented testimony from MSHA inspector Kenneth Garrett. Big Laurel presented testimony from former electrician Fabian Spears, Jr. The parties each filed post-hearing briefs and reply briefs.

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<sup>1</sup> In this decision, the hearing transcript, the Secretary's exhibits, Big Laurel's exhibits, and the parties' joint exhibits are abbreviated as "Tr.," "Ex. GX-#," "Ex. 2R-#," and "Joint Ex. #," respectively.

<sup>2</sup> Section 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." 30 C.F.R. § 75.400.

## II. ISSUES

For Order No. 8181919, the Secretary asserts that Respondent failed to fulfill the duty imposed by 30 C.F.R. § 75.400 by allowing float coal dust to accumulate along the mine's coal conveyor belt. (Sec'y Br. at 8–11.) The Secretary claims that Big Laurel's actions constituted an unwarrantable failure because MSHA had placed the operator on notice that greater efforts at compliance with section 75.400 were necessary and the operator should have discovered the obvious violation in the eight hours prior to the MSHA inspection. (*Id.* at 11–15.)

In contrast, Big Laurel argues that the cited conditions did not constitute a violation of section 75.400 because the accumulated material was not float coal dust. (Resp't Br. at 5–12.) Alternatively, Big Laurel claims it was not negligent in allowing the float coal dust to accumulate and that its actions did not amount to the kind of aggravated conduct supporting an unwarrantable failure determination. (*Id.* at 12–22.)

Accordingly, the following issues are before me: (1) whether the Secretary has carried his burden of proof that Respondent violated the Secretary's mandatory health or safety standards regarding the clean-up of accumulations of combustible material in an underground coal mine; (2) whether the record supports the Secretary's assertions regarding the gravity of the alleged violations; (3) whether the record supports the Secretary's assertions regarding Big Laurel's negligence in committing the alleged violations, including the unwarrantable failure determination; and (4) whether the Secretary's proposed penalties are appropriate.

For the reasons that follow, Order No. 8181919 is **MODIFIED** to remove the unwarrantable failure designation.

## III. FINDINGS OF FACT

Big Laurel's Mine No. 2 was a room-and-pillar coal mine located in Wise County, Virginia. Big Laurel developed the mine by cutting a series of entries and perpendicular crosscuts that together form a grid if viewed from above. (Tr. 751:10–17, 863:16–19.) Crosscuts intersected the entries approximately every 80 feet. (Tr. 880:17–20.) Each crosscut was approximately 20 feet wide. (Tr. 744:15–18, 764:3–4.) To keep the mine's entries in a safe condition, Big Laurel put down gravel and other material in the travelway entries. (Tr. 853:7–10.) Big Laurel maintained these travelways by occasionally grading the floor to make it level and remove mud that had built up. (Tr. 853:7–13.) Big Laurel pushed this waste material, or gob, into piles in the crosscuts so it would be out of the way. (Tr. 853:14–854:4.)

Big Laurel transported its excavated coal to the mine surface on a series of motor-driven conveyor belts. (Tr. 786:5–12, 787:16–17.) Where two coal belts meet, one belt dumps coal from its head onto the tailpiece of the second belt. (Tr. 786:7–12.) This process of transferring the coal from one belt to another can create coal dust, including float coal dust. (Tr. 785:18–786:1, 786:7–12.) Float coal dust is particularly fine coal dust that can propagate an explosion even in small amounts.<sup>3</sup> (Tr. 783:8–18.) Float coal dust is so fine that it can be suspended in the air and

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<sup>3</sup> MSHA has defined float coal dust as “coal dust consisting of particles of coal that can pass a No. 200 sieve.” 30 C.F.R. § 75.401(b).

carried by the air current ventilating a mine. (Tr. 860:10–12, 863:10–15.) Float coal dust is particularly dangerous when suspended in the air. (Tr. 893:4–19.) Because conditions in a mine can change quickly, float coal dust can accumulate rapidly along a belt line. (Tr. 806:20–21, 882:10–16, 883:2–7.) To control the generation of this dust, Big Laurel equipped its coal conveyor belts with water sprayers that sprayed the mined coal as it traveled to the surface. (Tr. 819:1–3, 854:10–14.) In addition, Big Laurel regularly spread rock dust over the mine surfaces to coat the float coal dust and reduce its ability to cause an explosion. (Tr. 854:5–9, 854:15–855:5, 856:10–22.)

On May 23, 2012, Inspector Kenneth Garrett visited Big Laurel's Mine No. 2 as part of MSHA's regular quarterly inspection of the mine. (Tr. 743:16–18.) Garrett had worked in underground mines for approximately seven years at the time of the inspection, including two years as an MSHA inspector. (Tr. 737:1–4, 739:10–12.) Garrett was aware that Big Laurel had a history of accumulations violations at Mine No. 2, including violations for float coal dust. (Tr. 790:1–20.) During the pre-inspection conference in April 2012, Garrett emphasized MSHA's concern over Big Laurel's compliance with section 75.400, reiterating warnings that MSHA had issued a few months earlier. (Tr. 790:17–20.)

Afterward, Inspector Garrett, Mine Foreman Tony Dean, and Electrician Fabian Spears traveled down the No. 1 belt to inspect the condition of the coal conveyor belt and its drive motors. (Tr. 751:10–17.) When the party reached the No. 31 crosscut at approximately 10:00 a.m., Garrett noticed that the area appeared to have a coating of black float coal dust. (Tr. 755:10–15.) The black material covered an area approximately 20 feet long and five feet wide. (Tr. 801:3–6.) The black material not only covered the mine's floor, ribs, roof, and the belt structure but also a large pile of gob that had been pushed into the No. 31 crosscut. (Tr. 757:12–20.) This pile of gob spanned the entire crosscut and rose nearly to the mine roof, effectively closing off the entire crosscut. (Tr. 756:10–21.) The layer of black material had settled on top of a layer of lighter-colored rock dust that was still visible in patches. (Tr. 758:8–13.) The black material made the affected area stand out from the rest of the mine, which appeared well rock-dusted. (Tr. 757:5–11, 779:14–780:18.) Garrett reached up to the roof to feel the black material and determined it was float coal dust. (Tr. 759:15–760:1.) Although the belt, roof, and mine floor were wet, the black dust was drying out. (Tr. 774:20–22, 816:22–817:6.) This black dust was not suspended in the air. (Tr. 812:13–17.)

The affected area was located in an active working area. (Tr. 801:10–12.) In the entry for the No. 1 belt, the air current flowed from inside the mine out to the surface. (Tr. 786:22–787:7.) A coal belt exchange and belt drive motor were located at crosscut No. 32, one crosscut upwind from the area covered in black dust. (Tr. 856:4–6.)

Although the black dust covered a large area, Garrett did not find any belt rollers turning in accumulations of the material. (Tr. 816:18–21.) Garrett also did not find any methane or other ignition sources in the area. (Tr. 817:11–14.)

Based on his observations, Garrett issued Order No. 8181919, alleging a violation of 30 C.F.R. § 75.400:

Accumulations of float coal dust black in color has been allowed to exist deposited on top of rock dusted surfaces in the No. 31 x-cut between the belt and travelway entries. Float coal dust is observed the entire width of the x-cut approximately 20 [feet] wide and extending to the mine roof as a result of the dust deposited on a [five-foot] mound of gob. This condition exposes miners to explosion related accidents.

75.400 has been cited 44 times in the last two years. Mine management was notified 2/10/2012, and reminded at a pre-inspection conference this quarter that continued non-compliance of this standard would result in a[n] evaluation of high negligence.

The affected area is located [one] break outby a date board used by the certified examiners that travel by this location on a regular basis conducting required examinations. The black float coal dust is obvious and extensive. Mine management has engaged in aggravated conduct constituting more than ordinary negligence by allowing float coal dust to accumulate. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. GX-29.) Because there were no ignition sources in the vicinity, Garrett designated the violation as unlikely to cause an injury resulting in lost workdays or restricted duty. (Tr. 781:1-4; Ex. GX-29 at 1.) Garrett characterized Big Laurel's negligence as "high" and as an unwarrantable failure to comply with a mandatory health or safety standard. (Ex. GX-29 at 1.)

Mine Foreman Dean and one other miner abated the violation quickly by spreading two bags of rock dust by hand over the affected area. (Tr. 802:17-803:5.) Inspector Garrett issued the order at 10:00 a.m. and terminated it at 10:35 a.m. (Ex. GX-29.) Garrett did not require that the coal conveyor belt be shut down or miners removed from the area while the alleged accumulation was abated. (Tr. 818:16-22.)

#### IV. PRINCIPLES OF LAW

##### A. 30 C.F.R. § 75.400 – Accumulations

A violation of section 75.400 occurs "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it could cause a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980) ("*Old Ben II*") (footnote omitted). This judgment is viewed through the objective standard of whether a "reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light, Mining Div.*, 12 FMSHRC 965, 968 (May 1990), *aff'd*,

951 F.2d 292 (10th Cir. 1991) (“*UP&L*”). In addition to being combustible, the material cited must be of a sufficient quantity to cause or propagate a fire or explosion. *UP&L*, 12 FMSHRC at 968 (quoting *Old Ben II*, 2 FMSHRC at 2808). Although spills can occur quickly, accumulations of combustible material substantial enough to cause or propagate a fire are prohibited, even if recent. See *Black Beauty Coal Co. v. Fed. Mine Safety & Health Review Comm’n*, 703 F.3d 553, 558–59 & n.6 (D.C. Cir. 2012) (rejecting operator argument regarding recency of spill); *Prabhu Deshetty*, 16 FMSHRC 1046, 1049 (May 1994) (rejecting a defense based on recentness of the spill). The Commission has consistently held that an inspector’s observations alone may be sufficient to establish a violation of section 75.400. See, e.g., *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1289-90 (Dec. 1998) (declining to engraft a laboratory testing requirement onto section 75.400).

## **B. Unwarrantable Failure**

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (1987). It is characterized by “indifference,” a “serious lack of reasonable care,” “reckless disregard,” or “intentional misconduct.” *Id.* at 2003–04; see also *Buck Creek Coal*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test). Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. The Commission has identified several such factors, including: the length of time a violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and the operator’s knowledge of the existence of the violation. See *IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (Dec. 2009). These factors are viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All relevant facts and circumstances of each case must be examined to determine whether an actor’s conduct is aggravated or mitigating circumstances exist. *Id.*

## **V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW**

### **A. Further Findings of Fact**

Respondent challenges two factual findings underlying the Secretary’s argument. First, Big Laurel challenges the Secretary’s assertion that the discovered black material was float coal. (Resp’t Br. at 5–12, Resp’t Reply at 4–7.) Second, Respondent argues that the cited conditions did not exist for more than a few hours. (Resp’t Br. at 15–16.)

#### **1. Whether the Material Was Float Coal Dust**

Respondent claims the Secretary has not credibly established that the cited black material was float coal dust or another combustible material. (Resp’t Br. at 5–12; Resp’t Reply at 4–7.) Instead, Respondent contends that the discovered material was a combination of black mud, wet,

gray-colored rock dust, and gravel. (Resp't Br. at 5–7.) Additionally, Respondent claims that Inspector Garrett's testimony is unreliable. (*Id.* at 10–12.)

Inspector Garrett identified the black dust as float coal dust by both appearance and feel. (Sec'y Br. at 10.) Garrett testified that he touched the discovered accumulation to confirm the material was float coal dust. (Tr. 759:15–760:1.) Garrett testified unequivocally that the discovered material was black, like coal. (Tr. 771:4–21.) According to Garrett, the black dust covered the floor and the gob pile, extended over the ribs and roof, and coated the top of the belt, the chains and other parts of the belt hanging structure, and the bottoms of the belt rollers. (Tr. 757:14–20, Ex. GX–31(a), Ex. GX–31(b).) Garrett further testified that the cited area in the No. 31 crosscut stood out from the rest of the mine, which was covered with a light-colored rock dust. (Tr. 757:5–11, 779:14–780:18.) This same light-colored rock dust could be seen in patches underneath the black accumulations. (Tr. 776:6–13.) Photographs taken during the inspection show a large area frosted with black material, while neighboring areas are a consistent light color from being rock dusted. (Ex. GX–31(a), Ex. GX-31(b), Ex. 2R-13.)

Garrett also identified the likely source of the float coal dust as the coal belt exchange point at the No. 1 belt's head, located just one crosscut upwind from the affected area. (Tr. 785:18-787:7.) According to Garrett, the accumulation could not be gravel dust from a parallel entry, as the gob pile almost completely blocked the flow of air from the opposite side of the crosscut. (Tr. 798:7-799:11.) Finally, Garrett testified the material was not dark-colored rock dust, and that in his seven years in underground mines, including three years with MSHA, he had never seen a mine use black rock dust or dark gray rock dust that turned black when wet. (Tr. 799:12–21.)

Contrary to Respondent's assertions, I find Garrett's testimony to be credible.<sup>4</sup> Garrett identified the material as float coal dust by both sight and touch, and he provided a logical source for the float coal. Photographs of the area support Garrett's explanation, lending credence to his testimony.

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<sup>4</sup> Respondent attacks Garrett's testimony on two grounds. (Resp't Br. at 7–12; Resp't Reply at 7.) First, Big Laurel asserts that Garrett's testimony was inconsistent with the text of Order No. 8181919 and his contemporaneous notes from the inspection. (Resp't Br. at 11–12; Resp't Reply at 7.) Second, Big Laurel attacks Garrett's experience as a mine inspector and argues his testimony is unreliable because he did not cross the operational coal conveyor belt to closely examine the gob clogging the crosscut in question. (Resp't Br. at 7–9.) Both arguments fail. Although Garrett's testimony at hearing expanded beyond the material in his inspection notes, nothing in Garrett's notes contradicts his testimony. Second, I recognize the extensive training that MSHA inspectors receive, as well as the fact that Garrett had worked in underground mines for a total of approximately seven years. *See Harlan Cumberland Coal*, 20 FMSHRC at 1289-90 (affirming an ALJ's reliance upon the testimony of an experienced inspector). Garrett had sufficient training and experience to ably identify float coal dust, one of the most dangerous elements in underground coal mining, by both sight and touch. Indeed, Garrett touched the black material on the roof and determined it was float coal dust. Respondent has not presented any evidence to contradict Garrett's testimony.

In contrast, Respondent asserts that the black material was a mixture of dark-colored rock dust and wet mud produced from regular re-graveling and re-grading a nearby travelway. (Resp't Reply at 4.) In support of its argument, Respondent points to the testimony of then-electrician Spears. (*Id.*) Spears testified that because the mine was dark, he could not identify the black material without crossing the coal conveyor belt to reach the gob pile and touch the material. (Tr. 859:7–860:10, 862:9–18, 866:1–14.) When Inspector Garrett stopped to examine the conditions at the No. 31 crosscut, Spears and Mine Foreman Dean crossed the belt line to get a closer look at the pile of gob. (Tr. 842:7–22.) Spears testified that he found “just mud and rock dust” at the gob pile. (Tr. 866:15–19). Spears claimed that Dean attempted to show the mud to Garrett, but that the inspector ignored the mine foreman. (Tr. 869:15–870:13.) Spears further testified that Mine No. 2 used dark grey rock dust that darkened further when wet. (Tr. 858:1–20.)

After examining the evidence, I find that Spears' testimony contains a number of shortcomings. Although Spears insisted Mine No. 2 regularly used dark grey rock dust, Spears—despite his fourteen years in the coal mining industry—was unable to recall any specific details about the darker rock dust. (Tr. 899:8–900:20.) Spears also failed to explain why the mine would haul in a small amount of this unorthodox, dark grey rock dust for use in a single crosscut, while the remainder of the belt entry and the nearby crosscuts were coated with a traditional, light-colored rock dust. Moreover, although Spears criticized Garrett's decision to ignore the material Dean showed him, Garrett did see Dean reach into the gob to grab wet mud, and not just dust from the surface. (Tr. 842:7–22.) Given these inconsistencies, I find that Spears's testimony on this matter is not credible.

Looking at the credible evidence before me, I therefore find that the accumulated material was float coal dust.

## 2. Duration of the Accumulation

Respondent also challenges the Secretary's assertion that the float coal accumulation had existed for at least two shifts. (Resp't Br. at 15.) Big Laurel notes that the No. 1 belt was checked and found clear of float coal accumulations at 12:00 midnight and again at 5:10 a.m., a few hours prior to Garrett's inspection. (*Id.*; Ex. 2R–14.) Conversely, Garrett believed that the amount of accumulated float coal dust and the lack of float coal dust suspended in the air suggested the accumulation had occurred at least two shifts prior to the inspection. (Tr. 797:18–798:6.) Garrett admitted, however, that conditions along a belt line can change. (Tr. 806:20–21, 826:2–10.) Spears also said that belt conditions can change rapidly between regular examinations. (Tr. 882:10–16.) Moreover, I note that Inspector Garrett did not issue a citation to Big Laurel for an improper examination. (Tr. 828:18–20.)

Considering these circumstances and the admitted potential for conditions along the belt line to change rapidly, I have doubts about the duration of the accumulation. Given the evidence before me, I determine that the Secretary has not established by a preponderance of the evidence that the float coal accumulation lasted for more than one shift. Accordingly, I find that the accumulation of float coal developed after the mine's last beltline examination at 5:10 a.m.



## B. Analysis and Conclusions of Law

### 1. Violation of § 75.400

I have already found that the accumulated material discovered in the No. 31 crosscut was float coal dust, and that the area was “in active workings.” 30 C.F.R. § 75.400. Float coal dust “is considered so dangerous that it is mentioned specifically in section 75.400 as a material that an operator must not permit to accumulate.” *Twentymile Coal Co.*, 36 FMSHRC 1533, 1539 (June 2014). Garrett testified that very little float coal dust is needed to propagate an explosion, and that the accumulated quantities were sufficient to be dangerous. (Tr. 783:8–22.) In light of these facts, I determine that a reasonably prudent person, familiar with the mining industry and protective purposes of section 75.400, would have recognized these conditions as the type of hazardous conditions the regulation seeks to prevent. *See Old Ben II*, 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.”). I therefore conclude that Big Laurel violated 30 C.F.R. § 75.400.

### 2. Gravity

The Secretary asserts that the float coal dust accumulation was unlikely to cause an injury, but if an incident did occur, it could be reasonably expected to result in injuries causing lost workdays or restricted duty to one miner. (Sec’y Br. at 11; Ex. GX–29 at 1.) Inspector Garrett testified that the lack of any heat source or methane, and the wetness of the area near the accumulation made a fire or explosion unlikely. (Tr. 781:1–13.) Garrett also testified that the violative conditions could result in injuries such as smoke inhalation and burns. (Tr. 784:3–15.) Finally, Garrett testified that only one person was working in the area of the accumulation.<sup>5</sup> (Tr. 785:10–17.) Although Big Laurel has not directly disputed the Secretary’s allegations regarding gravity, I nevertheless determine the Secretary proved that the violation was unlikely to cause injury, that the injuries most likely to result would result in lost workdays or restricted duty, and that the conditions affected only one miner.

### 3. Negligence and Unwarrantable Failure

The Secretary has characterized Big Laurel’s negligence as high and designated this violation as an unwarrantable failure. In support of his allegations, the Secretary points to the obviousness, extent, and duration of the violation. (Sec’y Br. at 13–14.) In addition, the Secretary asserts that Respondent made no effort to address the violation prior to the inspection despite being on notice that greater efforts were necessary to comply with section 75.400. (*Id.* at 14–15.)

Respondent contends that the Secretary’s negligence and unwarrantable failure determinations are inappropriate. (Resp’t Br. at 12.) Big Laurel asserts that the conditions were not extensive and that any accumulation of float coal dust did not pose a danger or hazard to miners. (*Id.* at 13–15.) Big Laurel further argues that it had no knowledge of the accumulation, the violation was not obvious, and the violation lasted for a short amount of time. (*Id.* at 15–17.) Respondent contends it was not on notice that it needed to improve its efforts to prevent float

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<sup>5</sup> Big Laurel has not disputed the Secretary’s allegations regarding gravity.

coal dust accumulations. (*Id.* at 17–21.) Finally, Respondent avers that it nevertheless had taken steps to prevent such accumulations and that it abated the violation rapidly and in good faith. (*Id.* at 21–22.)

Looking to the Commission’s aggravating factors in the unwarrantable failure determination, two of the factors support the Secretary’s argument. First, the condition was obvious. Inspector Garrett testified he had no difficulty seeing the condition and that the black dust stood out sorely from the surrounding area of the mine. (Tr. 799:22–800:7.) In addition, Garrett could reach up to touch the black dust without having to cross the belt and walk into the crosscut. (Tr. 759:20–760:9.) Second, Big Laurel’s history of section 75.400 violations and repeated warnings from MSHA put the mine on notice that it needed to improve its efforts to prevent accumulations of combustible materials.<sup>6</sup>

The remaining factors do not conclusively weigh in favor of either party. First, because the conditions were obvious and Big Laurel was on high alert for such accumulations, I determine that the mine reasonably should have known of the accumulated float coal dust. Nevertheless, the Secretary has not presented any evidence suggesting that Big Laurel had actual knowledge of the conditions prior to the inspection. Second, because Big Laurel did not have actual knowledge of the accumulation, the mine operator made no efforts to abate the conditions. Although Respondent presented evidence that it regularly rock dusted the belt line and that the surrounding areas were well coated in rock dust, its regular rock dusting plan proved insufficient to catch and ameliorate this float coal accumulation.

Third, I have already determined that the accumulation occurred after the preshift examination at 5:10 a.m. The Secretary’s unwarrantable failure determination was premised, in part, on the fact that Big Laurel conducted multiple examinations of the affected area and

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<sup>6</sup> Big Laurel contends that its past history of section 75.400 violations and MSHA’s warnings served only to put the mine on “general notice,” and not “on notice that greater compliance efforts were necessary or required with regards to alleged float coal dust on gob piles in crosscuts.” (Resp’t Br. at 18–20 (citing *Cumberland Coal Res., LP*, 31 FMSHRC 137 (Jan. 2009) (ALJ); *Highland Mining Co.*, 34 FMSHRC 3108 (Dec. 2012) (ALJ); *Big Ridge, Inc.*, 36 FMSHRC 1677 (June 2014) (ALJ)).) The decisions Respondent relies upon are from Commission Administrative Law Judges, and are neither Commission precedent nor binding on other Judges of the Commission. 29 C.F.R. § 2700.69(d). Moreover, the Commission has held that past violations of section 75.400 do not need to be “factually indistinguishable from the cited condition” to provide notice that greater efforts are necessary for compliance with the standard. *Big Ridge, Inc.*, 35 FMSHRC 1525, 1530 (June 2013). Although an operator may draw a distinction demonstrating an anomaly, it bears the burden of rebutting the Secretary’s “contention that the prior violations did, in fact, put the operator on notice.” *Twentymile Coal*, 36 FMSHRC at 1538–39. Big Laurel has not demonstrated such an anomaly to rebut the Secretary’s contention in the case at hand, as the mine’s past violations included citations for coal dust accumulations along belt lines. (*See Ex. GX–32, Ex. GX–33.*) Moreover, while section 75.400 may be a broad standard, it specifically mentions float coal dust as a type of material that cannot be permitted to accumulate. 30 C.F.R. § 75.400; *Twentymile Coal*, 36 FMSHRC at 1539. Accordingly, I determine that Respondent was on notice that greater efforts were necessary to comply with the regulation.

neglected to notice and address the accumulation. The Secretary's only credible evidence regarding the duration of the violation was testimony that the float coal dust was no longer in suspension. This evidence alone is insufficient to show the violation had existed for a long time. Given the low degree of danger that Inspector Garrett found this violation posed, I do not determine that the accumulation's existence for a few hours constitutes aggravated behavior. *Cf. Midwest Material Co.*, 19 FMSHRC 30, 34-36 (Jan. 1997) (attributing violation to operator's unwarrantable failure where the duration was only a period of a few minutes because it posed a high degree of danger, involved a foreman, and the violative condition may have continued but for occurrence of accident).

Fourth, the evidence regarding the extent of the violation is conflicting. Although Inspector Garrett testified that the float coal dust generally covered an area 20 feet long and five feet wide, the Secretary did not present substantial evidence regarding the depth of the accumulations or the pervasiveness of the coating of float coal dust. Furthermore, two miners were able to abate the conditions "fairly quickly" by hand-dusting and without an interruption to Big Laurel's operations, and Inspector Garrett was able to terminate the order within 35 minutes of its issuance. (Tr. 802:15-803:1, Tr. 818:16-22.) Such rapid abatement suggests the violation was not extensive. *See Manalapan Mining Corp.*, 35 FMSHRC 289, 295 (Feb. 2013) (considering the time to abate the violative conditions when assessing the extent of a violation).

Finally, the evidence before me does not indicate the violation here was highly dangerous. As I have discussed in prior holdings, accumulations of float coal dust rank among the most dangerous conditions in an underground coal mine. *See Black Beauty Coal Co.*, 36 FMSHRC 2548, 2562 (Sep. 2014) (ALJ). Here, surprisingly, the Secretary has presented evidence that the conditions surrounding this violation lowered the threat posed by this accumulation. Indeed, it is telling that Inspector Garrett, despite issuing a withdrawal order, neither required the coal conveyor belt to be shut down nor the area evacuated while Dean and Spears rock dusted the affected area.

Nonetheless, I find it disturbing that Big Laurel failed to heed repeated warnings that its efforts at addressing accumulations were insufficient, and thus allowed a potentially explosive amount of float coal dust to accumulate in a well-traveled section of the mine. Yet notice and obviousness alone do not push Big Laurel's conduct into the realm of intentional misconduct, indifference, reckless disregard, or a serious lack of reasonable care. Where an MSHA inspector does not consider a violation sufficiently dangerous to enforce his own withdrawal order, I have difficulty giving credence to his justification for that order. In light of these facts and circumstances, I cannot conclude that the Secretary has met his burden of proving aggravated conduct amounting to an unwarrantable failure on the part of Respondent.

Although the Secretary has not shown that Respondent's actions amounted to an unwarrantable failure to comply with a mandatory safety standard, I still conclude the Secretary has met his burden of showing that Big Laurel was highly negligent.<sup>7</sup> Respondent failed its duty

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<sup>7</sup> The Commission has recognized that a finding of high negligence *suggests* an unwarrantable failure. *San Juan Coal Co.*, 29 FMSHRC 125, 136 (Mar. 2007). Nevertheless, a finding of high negligence does not necessarily compel a finding of an unwarrantable failure. *E. Associated Coal Corp.*, 13 FMSHRC 178, 186-87 (Feb. 1991).

to ensure that float coal dust did not accumulate in the No. 2 Mine. The float coal accumulation, if exposed to an ignition source, posed the threat of a potentially catastrophic explosion, and yet abatement of the condition required only minimal effort. *Cf.*, *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (calculating negligence by comparing the potential harm to the expense of measures to prevent that harm). Although the Secretary has not provided evidence sufficient to support an unwarrantable failure determination, Big Laurel likewise has not provided evidence explaining its conduct. Big Laurel's rock dusting policies were insufficient to catch and address an obvious float coal dust accumulation. Despite the relatively short duration, the lack of suspended float coal dust suggests Respondent had ample time to find and remedy the problem prior to the inspection. Accordingly, I conclude that Respondent's negligence was high. *See* 30 C.F.R. § 100.3(d) at Table X (suggesting "high negligence" where the "operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.")

Based on the above, Order No. 8181919 is **MODIFIED** to remove the unwarrantable failure designation.

### **C. Penalty**

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty, including the operator's history of previous violations; the appropriateness of the penalty relative to the size of the operator's business; the operator's negligence; the penalty's effect on the operator's ability to continue in business; the violation's gravity; and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary proposed a specially-assessed penalty of \$6,300.00 for Order No. 8181919. The parties have stipulated that the proposed penalty would not infringe on Respondent's ability to remain in business. While I have affirmed the violation and the Secretary's negligence allegations, I have removed the unwarrantable failure designation. Respondent had 44 violations of section 75.400 in the two years prior to this violation. (Ex. R2-3.) Once this order was issued, nothing suggests that Respondent failed to make a good faith effort to achieve rapid compliance with the safety standard. Considering all of the facts and circumstances set forth above, I hereby assess a civil penalty of \$3,000.00.

## VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Order No. 8181919 is **MODIFIED** to a section 104(a) citation by removing the unwarrantable failure designation.

WHEREFORE, Respondent is **ORDERED** to pay a penalty of \$3,000.00 within 40 days of this Decision.<sup>8</sup>

/s/ Alan G. Paez  
Alan G. Paez  
Administrative Law Judge

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/lct

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<sup>8</sup> Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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March 18, 2015

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

v.

MACH MINING, LLC,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2012-66  
A.C. No. 11-03141-268040-01

Docket No. LAKE 2013-294  
A.C. No. 11-03141-310246

Mine: Mach #1 Mine

## **DECISION AND ORDER**

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

Christopher D. Pence, Esq., Hardy Pence LLC, Charleston, West Virginia,  
for Respondent.

Before: Judge Paez

This case is before me upon the petitions for the assessment of civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). In dispute are four section 104(a) citations issued to Mach Mining, LLC (“Mach” or “Respondent”) at its Mach #1 Mine. To prevail, the Secretary must prove his charges “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom.*, *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotations omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

### **I. STATEMENT OF THE CASE**

Chief Administrative Law Judge Robert J. Lesnick assigned Docket Nos. LAKE 2012-66 and LAKE 2013-294 to me and I consolidated them for hearing. The Secretary initially charged Mach with a total of seven section 104(a) citations. On August 4, 2014, counsel for the Secretary alerted me that three alleged violations had settled, and I disposed of those citations in a separate decision issued August 28, 2014. Thus, four section 104(a) citations remain at issue. First, Citation No. 8424601 in Docket No. LAKE 2012-66 charges Mach with violating its ventilation plan under 30 C.F.R. § 75.370(a)(1) for failing to maintain a ventilation curtain within forty feet

of the coal face for every cut.<sup>1</sup> The Secretary designated the violation as significant and substantial (“S&S”)<sup>2</sup> and proposed a specially-assessed penalty of \$2,900.00 for Citation No. 8424601 based on 30 C.F.R. § 100.5.

In addition, Citation Nos. 8444918, 8444919, and 8444920 in Docket No. LAKE 2013-294 charge Respondent with a failure to maintain its roof bolting equipment in permissible and operating condition under 30 C.F.R. § 72.630(b).<sup>3</sup> The Secretary has proposed a total penalty of \$1,414.00 for these three violations according to his points system at 30 C.F.R. § 100.3.

Upon proper notice, I held a hearing in Evansville, Indiana.<sup>4</sup> The Secretary presented testimony from Inspectors Danny Ramsey and J. Scott Lee. Mach presented testimony from Foreman Johnnie Dotson, former Superintendent Johnny Robertson, and Roof Bolter Dale Dodd. After requesting extensions, the parties each filed closing briefs and reply briefs.

## II. PARTIES’ ARGUMENTS AND ISSUES

The Secretary argues that the allegations underlying each of the citations are valid and that his proposed penalties are appropriate. (Sec’y Br. at 27.) Although MSHA Inspector Ramsey characterized Mach’s negligence as “moderate” for Citation No. 8424601 (Ex. G–2), the Secretary in his post-hearing brief asks that I modify Mach’s level of negligence to “high” for

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<sup>1</sup> Section 75.370(a)(1) provides:

The 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. The ventilation plan shall consist of two parts, the plan content as prescribed in [section] 75.371 and the ventilation map with information as prescribed in [section] 75.372. Only that portion of the map which contains information required under [section] 75.371 will be subject to approval by the district manager.

<sup>2</sup> The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

<sup>3</sup> Section 72.630(b) provides: “Dust collectors shall be maintained in permissible and operating condition. Dust collectors approved under Part 33—Dust Collectors for Use in Connection with Rock Drilling in Coal Mines of this title or under Bureau of Mines Schedule 25B are permissible dust collectors for the purpose of this section.”

<sup>4</sup> In this decision, the hearing transcript, the Secretary’s exhibits, and Mach’s exhibits are abbreviated as “Tr.,” “Ex. G–#,” and “Ex. R–#,” respectively. The parties also admitted a list of stipulations in a joint exhibit, which was admitted as Ex. G–12.

Citation No. 8424601 based on testimony from Mach's supervisors demonstrating their knowledge that no line curtain was installed during the most recent cut. (Sec'y Br. at 14–17, 27.)

In contrast, Respondent contends the citations at issue should be vacated or modified. (Resp't Br. at 10–13, 16.) Specifically, Mach argues that the ventilation plan requirement at issue in Citation No. 8424601 is ambiguous. (*Id.* at 4–10.) Thus, Mach maintains that the alleged violation of 30 C.F.R. § 75.370(a)(1) should be vacated. (*Id.* at 10.) In the alternative, Respondent argues that the citation should be modified to remove the S&S designation because a reasonably serious injury was not reasonably likely. (*Id.* at 12; Resp't Reply at 8–10.) Pointing to the ventilation plan's "ambiguity" and MSHA's previous failures to enforce the plan provision at issue, Mach also claims that it did not act negligently. (Resp't Reply at 7–8.) In addition, Mach argues that Citation Nos. 8444918, 8444919, and 8444920 should be vacated because the Secretary failed to demonstrate that the roof bolting machines in question were not maintained in permissible and operating condition. (Resp't Br. at 13–16; Resp't Reply at 10–11.)

Accordingly, the following issues are before me: (1) whether the cited conditions constituted violations of the Secretary's mandatory health or safety regulations; (2) whether the record supports the Secretary's allegations as to the gravity of each of the cited conditions; (3) whether the record supports the Secretary's allegations regarding Mach's level of negligence, including whether I should increase the level of negligence associated with Citation No. 8424601 to "high"; and (4) whether the proposed penalties for these violations are appropriate.

For the reasons that follow, Citation No. 8424601 is **AFFIRMED** as written, and Citation Nos. 8444918, 8444919, and 8444920 are **VACATED**.

### III. BACKGROUND AND FINDINGS OF FACT

Mach #1 is a longwall, underground coal mine in Johnson City, Illinois. (Tr. 23:3, 26:11–27:25; Ex. G–4 at 1.) Longwall coal panels are extremely large blocks of coal that are mined using a shearing system that creates long cuts of coal along the face of the longwall panel. (Tr. 26:17–27:3.) To do so, Mach must develop corridors that will allow the operator to access the longwall panel. (Tr. 27:4–9, 28:6–18, 56:8–17, 118:13–21; Ex. R–1.) To create these access corridors, Mach uses a continuous mining machine to cut long, parallel pathways—known as entries—through the seam of coal surrounding the longwall panel. (Tr. 27:10–12, 28:12–18, 56:8–17; Ex. R–1.) As mining progresses, Mach also cuts perpendicular access corridors—known as crosscuts—that connect the mine's entries. (Ex. R–1; *see* Tr. 143:3–144:1.) When viewed from above, this network of access corridors resembles an elongated checkerboard. (Ex. G–14; Ex. R–1; Ex. R–2; Ex. R–3.)

Coal mining at Mach #1 Mine requires numerous cuts, which produce harmful dusts and explosive gasses that must be ventilated to protect Respondent's miners. (Tr. 34:6–36:12, 44:1–4.) These cuts create significant rock and coal dust, which is harmful for miners to inhale. (Tr. 35:3–36:12.) Mach #1 Mine is also a "gassy" mine that liberates over 1,000,000 cubic feet of methane in a 24-hour period. (Tr. 23:9–24:14, 94:16–18.) In concentrations of five to fifteen percent, methane is explosive (Tr. 36:4–7, 45:20–46:1), but the presence of coal dust lowers the explosive range for methane (Tr. 36:4–12).



Given these dangers, the Secretary's health and safety regulations require mine operators to control methane and respirable dust by proposing and following ventilation plans. 30 C.F.R. § 75.370(a)(1). A ventilation plan must be suitable to the mine's conditions and mining system, and it must be approved by MSHA. *Id.* Ventilation plans require mine operators to use a variety of mechanisms to direct a specified volume of fresh air through the mine's entries and crosscuts to its working areas, then sweep harmful and contaminated air out of the mine. *See, e.g.*, 30 C.F.R. § 75.371 (describing the content of ventilation plans). Accordingly, Mach employs a network of barriers and curtains to direct fresh air to the working areas of the mine. (*See, e.g.*, Tr. 33:13–19, 42:23–43:1, 62:7–11.) At the time of these violations, Mach #1 Mine operated on blowing ventilation that forced air through the mine. (Tr. 23:2–8, 39:13–24, 51:10–22, 60:4–61:6, 142:14–20, 151:21–152:20; Ex. G–15.) As part of this system, Mach used “wing” curtains and “line” curtains in conjunction to direct fresh air traveling down an entry or crosscut toward the continuous miner as it cuts into the coal seam. (Tr. 51:1–6, 126:21–127:3, 130:1–15, 144:11–20, 149:20–150:5, 172:16–174:9; *see* Ex. G–15.) The fresh air from the wider corridor would be funneled into a smaller channel between the rib and the line curtain. (Tr. 51:1–6, 144:11–20; *see* Ex. G–15.) In turn, this channel would direct fresh, ventilating air to the area where the continuous mining machine was cutting coal, thus releasing methane and creating dust. (Tr. 51:1–6, 126:21–127:3, 130:1–15, 144:11–20, 149:20–150:5, 172:16–174:9; *see* Ex. G–15.)

Mach's continuous mining machines also have several mechanisms designed to address dust and methane hazards, including: scrubbers, methane monitors, and water sprays. (Tr. 36:3–14, 45:17–18, 93:10–19, 106:25–108:17, 150:6–22, 151:5–10.) In addition, Mach would periodically check methane levels in its cuts every twenty minutes. (Tr. 93:23–94:6.)

To help secure the ceiling—also known as the roof—of these entries and crosscuts, Mach uses machines to install long metal roof bolts designed to provide support. (*See* Tr. 192:19–25, 213:10–22, 280:23–281:2, 283:9–18.) As part of the process, roof bolting machines drill into the rock roof above them. (Tr. 189:4–6, 214:1–7.) Drilling into the roof creates either silica or coal dust, which are harmful when inhaled. (Tr. 213:10–214:7, 226:13–227:9.) To protect the machine operators, roof bolters use dust collection systems to limit the amount of dust to which miners are exposed. (Tr. 189:4–191:19, 194:2–5, 194:15–18.)

#### IV. PRINCIPLES OF LAW

##### A. 30 C.F.R. § 75.370(a)(1) — Ventilation Plans

Section 75.370(a)(1) requires operators to develop and follow an approved ventilation plan designed to control methane and respirable dust and that is suitable to the mine's conditions and mining system. 30 C.F.R. § 75.370(a)(1); *see Peabody Coal Co.*, 16 FMSHRC 2199, 2203 (Nov. 1994) (affirming ALJ's conclusion that a ventilation plan is violated when an operator does not follow its specific terms).

## B. 30 C.F.R. § 72.630(b) — Dust Collectors

Section 72.630(b) requires that mine operators maintain dust collection systems in two ways. *See* 30 C.F.R. § 72.630(b). First, operators must maintain dust collectors in permissible condition.<sup>5</sup> *Id.* Specifically, section 72.630(b) defines “permissible” dust collectors to include collectors approved under 30 C.F.R. part 33 or under Bureau of Mines Schedule 25B. *Id.* According to Part 33 of the Secretary’s regulations regarding dust collectors, the term permissible “as applied to a dust collector means that [the dust collector] conforms to the requirements of [Part 33], and that a certificate of approval to that effect has been issued.” 30 C.F.R. § 33.2(a). Because MSHA issues certificates of approval to dust collection systems as a whole, *see* 30 C.F.R. § 33.9 (indicating that “[i]ndividual parts of dust collecting systems will not be certified for performance”), permissibility therefore requires that dust collection systems be maintained as MSHA approved them. *Cf. Tri County Coal, LLC*, 34 FMSHRC 3255, 3274–75 (Dec. 2012) (ALJ) (concluding that although a hole in a vacuum hose did not render a dust system inoperable because it provided enough suction, the hole rendered the system non-permissible because it would not have been approved with the hole in the hose). Second, section 72.630(b) requires mine owners to maintain dust collection systems in “operating” condition. 30 C.F.R. § 72.630(b). As I observed in *Liggett Mining, LLC*, 33 FMSHRC 1702 (July 2011) (ALJ), “the plain use of the word ‘operating’ is synonymous with ‘functional’, a word defined as ‘performing or able to perform its regular function.’” *Id.* at 1714 (citing *Webster’s Third New Int’l Dictionary* (Unabridged) 921, 1581 (2002)). Thus, the Secretary may demonstrate a violation of section 72.630(b) by proving either (1) that the dust collection system was not maintained as it had been approved; or (2) that the dust collection system was not in operating condition.

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<sup>5</sup> In its briefs, Mach claims that “permissible” as used in section 72.370(b) refers to “permissible” as defined in section 318 of the Mine Act, 30 U.S.C. § 878(i). (Resp’t Br. at 13–14.) Specifically, Mach suggests that I follow the Administrative Law Judge’s reasoning from an unrelated proceeding involving Respondent. *See Mach Mining, LLC*, 35 FMSHRC 2827, 2832–33 (Aug. 2013) (ALJ) (discussing the meaning of “permissible” in the context of section 72.370(b) and vacating the citation.) However, the decision upon which Mach relies is not persuasive. Although “permissible” may *often* be a term of art used to ensure that electrical equipment will not cause a mine explosion or mine fire, it is not *always* so limited. Here, Respondent ignores the second sentence of section 72.630(b), which specifically incorporates the definition of “permissible” used in Part 33 of the Secretary’s regulations. 30 C.F.R. § 72.630(b) (“Dust collectors approved under Part 33—Dust collectors for Use in Connection with Rock Drilling in Coal Mines of this title or under Bureau of Mines Schedule 25B are permissible dust collectors for the purpose of this section.”). Thus, the text of section 72.630(b) *specifically* incorporates 30 C.F.R. part 33—including the definition at 30 C.F.R. § 33.2. Moreover, the regulatory history of section 72.630(b) reveals that the regulation writers were targeting respirable dust rather than potential ignitions. *See Air Quality: Health Standards for Abrasive Blasting and Drill Dust Control*, 59 Fed. Reg. 8318, 8323–25 (1994). In the context of section 72.630(b), the meaning of “permissible” therefore is defined in accordance with Part 33.

### C. Significant and Substantial

A violation is S&S “if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission indicated that “an inspector’s judgment is an important element” in an S&S determination. *Mathies*, 6 FMSHRC at 5 (citing *Nat’l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). The Commission has also observed that “the reference to ‘hazard’ in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present *a measure of danger*.” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (emphasis added) (citing *Nat’l Gypsum*, 3 FMSHRC at 827). Moreover, the Commission clarified “the correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742 n.13 (Aug. 2012). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

### D. Negligence

Although the Secretary’s 30 C.F.R. part 100 regulations are not binding on the Commission, *see Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014), the Secretary’s definitions of negligence in those provisions are illustrative. According to the Secretary, negligence is “conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). These standards indicate that high negligence is found where “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* at Table X. Moreover, the standards prescribe moderate negligence where “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.*

## V. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW— VENTILATION VIOLATION—CITATION NO. 8424601

### A. Additional Findings of Fact

Inspector Ramsey visited Mach #1 Mine on March 22, 2011, to conduct an inspection and traveled to the South Mains #2 portion of the mine along with then-Mine Superintendent Johnny Robertson. (Tr. 24:15–25:16, 138:17–19.) The South Mains #2 section consisted of six entries numbered consecutively from left to right. (Tr. 28:9–10, 29:11–24, 61:7–23, 115:8–14, 117:1–13, 120:16–121:2; Ex. G–14; Ex. R–1; Ex. R–2; Ex. R–3.) Ventilating air traveled into the section through Entry Nos. 5 and 6, turned to the left to sweep across the section in the crosscut, then turned left again to return to the surface through Entry Nos. 1 and 2.<sup>6</sup> (Tr. 61:24–62:1, 63:10–16, 64:8–68:12, 121:3–20, 142:8–13; Ex. G–14.) A conveyor belt in Entry No. 4 transported coal out of the mine. (Tr. 143:3–10.)

Upon arriving on the section, Inspector Ramsey began an imminent danger run through the area. (Tr. 25:23–24; Ex. G–3 at 1.) By March 22, the operator had progressed nine full crosscuts into the coal seam and was in the process of developing Crosscut No. 10. (Tr. 69:21–70:1.) While standing in the intersection of Entry No. 3 and Crosscut No. 9, Ramsey measured 39,848 cubic feet per minute (C.F.M.) of air, which complied with the requirements of Mach’s ventilation plan. (Tr. 62:20–63:9; Ex. G–14; *see* Ex. G–3 at 1.) At that point, Ramsey observed Mach’s continuous miner developing Crosscut No. 10. (Tr. 25:23–26:3, 32:21–33:12; Ex. G–3 at 3; Ex. G–14; Ex. G–15.) The continuous miner operator had completed his crosscut connecting Entry No. 4 to Entry No. 3, then continued in a straight line to mine the crosscut from Entry No. 3 into Entry No. 2. (Tr. 25:23–26:3, 33:9–10, 70:16–71:3, 120:4–10, 121:21–122:2, 142:21–24; Ex. G–3 at 3; Ex. G–14; Ex. G–15; Ex. R–1; Ex. R–2; Ex. R–3.) Therefore, the miner operator approached the cut head-on (or flush), rather than making a perpendicular turn from Entry No. 3 to cut into the coal towards Entry No. 2. (Tr. 25:23–26:10, 70:16–71:3, 71:20–72:1, 82:1–10, 122:3–24; Ex. G–3 at 3; Ex. R–2.) Based on Mach’s ventilation plan, that meant fresh air coming down Entry Nos. 5 and 6 surged left at Crosscut No. 10 and now was at the miner’s back and contacting the flush face of the coal when Mach began the cut from Entry No. 3 into Entry No. 2. (Tr. 72:9–14, 78:9–15, 122:25–123:2, 128:11–13, 130:20–21, 145:22–24.)

At the time, Mach used a consistent cut pattern as it developed the South Mains to access new longwall panels. (Tr. 30:8–31:25, 125:6–25, 143:3–144:7, 154:14–16; Ex. G–14; Ex. R–1; Ex. R–2; Ex. R–3.) Mach’s mining plans allowed Respondent to cut up to forty feet at a time.<sup>7</sup>

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<sup>6</sup> Neither party introduced evidence suggesting that Entry Nos. 3 or 4 were involved in ventilating the section.

<sup>7</sup> Each forty-foot cut consisted of four smaller cuts. First, Mach cut twenty-feet deep on the right side of the crosscut, then moved over to the left side and made another twenty-foot cut. (Tr. 74:12–17, 98:13–99:11, 124:14–19.) Next, Mach cut an additional twenty feet on the right side of the crosscut, then made a fourth cut on the left side. (Tr. 74:18–23; 98:13–99:11, 124:14–19.) Because the distance between entries at Mach #1 Mine exceeded fifty feet, Respondent needed to complete multiple forty-foot cut cycles to complete each crosscut connection between entries. (Tr. 171:9–11.)

(See Ex. G-4 at 36; Ex. G-13 at A4.) As Mach progressed deeper into the mine, it would then cut its crosscuts to connect the entries in accordance with its ventilation plan. (Tr. 143:3-144:1.) Because Mach wanted to encourage familiarity, consistency, and proficiency with its mining process, Respondent employed the same crosscut procedure for every crosscut. (Tr. 123:22-126:5, 143:22-144:7.) In doing so, Mach did not install any line curtain during the first forty-foot cut it made into a flush coal face with ventilating air at the back of the miner.<sup>8</sup> (Tr. 124:20-126:5, 144:11-14, 148:14-150:5, 154:14-16.) Over the previous three years, Mach had made hundreds of such “flush” cuts. (Tr. 125:6-25.) MSHA had not issued a citation to Mach for this mining process. (Tr. 126:1-9.)

By the time Inspector Ramsey approached the area, the continuous mining machine had cut forty feet beyond the rib line into the coal block separating Entry No. 3 and Entry No. 2.<sup>9</sup> (Tr. 39:21-23, 71:16-19, 73:24-74:6, Tr. 89:24-90:4, 91:16-92:23, 98:13-99:7; Ex. G-3 at 4; Ex. G-15.) Because the roof bolts in Entry No. 3 had been spaced a few feet short of the rib line, this meant that the continuous miner had exceeded the ventilation plan’s forty-foot limit. (See Tr. 86:13-88:24.) As a result, the coal face was located approximately forty-two or forty-three feet from the last row of roof bolts.

No line curtain had been provided at any point to direct air to the front of the continuous miner driving this cut. (Tr. 33:13-34:5, 39:21-24, 51:25, 92:25-93:2, 124:20-125:5, 134:3-135:6, 135:19-22; Ex. G-3 at 3.) However, the continuous miner’s “scrubber” system and water sprays were running and operational. (Tr. 107:10-108:17, 150:6-22.) The atmosphere contained two- to three-tenths of one percent of methane. (Tr. 36:3-14, 44:23-24, 45:17-18, 93:5-9, 151:5-10; Ex. G-3 at 3.)

Based on his observations, Inspector Ramsey issued Citation No. 8424601, providing:

The approved ventilation plan was not being followed in [Crosscut No. 10] between [Entry No. 2 and Entry No. 3] on the South Main[s] #2 unit. A forty (40) [foot] cut had been mined without a ventilating line curtain being installed. The approved ventilation plan requires [a] ventilating line curtain [to] be installed and maintained no further than 40 feet from the deepest penetration.

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<sup>8</sup> Although Foreman Dotson claimed no line curtain was necessary for this first forty-foot cut because it was a “flush” cut, he admitted that he would set the line and wing curtain up at the second to last row of bolts for the *second* forty-foot cut in the crosscut. (Tr. 130:1-15, 136:5-19, 137:1-2; *see also* Tr. 144:14-20, 148:14-149:5 (Superintendent Robertson indicating the same).) Thus, Mach would provide a curtain at the face for every cut *besides* the initial “flush” cut.

<sup>9</sup> In mining terms, the wall of an entry is known as the “rib.” (See, e.g., Tr. 60:24-61:3.) The junction point between the entry’s rib and ceiling is known as the “rib line.” (See Tr. 86:10-86:23, 88:19-89:3, 90:3-4, 134:24-135:1.) When an operator mines its perpendicular crosscuts, it necessarily cuts into the entry’s rib. (See Tr. 86:10-86:23.) Although the entry’s rib has been mined, the rib line forms the intersection point of an entry and a crosscut.

Standard 75.370(a)(1) was cited 21 times in two years at [Mach #1 Mine] (21 to the operator, 0 to a contractor[]).

(Ex. G-2.) Ramsey designated the citation as S&S and indicated that it would affect one miner. (*Id.*) In addition, he characterized Mach's negligence as moderate (rather than high) because he was unsure whether anyone from Mach was aware of the missing line curtain. (Ex. G-2; Tr. 47:24-49:1, 50:5-10.) Ramsey did not take an air reading at the cut or measure the direction of air at that time. (Tr. 100:1-101:10.) Finally, Mach installed a ventilating line curtain at the face to abate the citation. (Ex. G-2; Tr. 43:11-12.)

**B. Violation of 30 C.F.R. § 75.370(a)(1)**

This case turns on whether Mach's ventilation plan required Respondent to install a ventilating line curtain to direct fresh air to the continuous miner for *every* cut.<sup>10</sup> According to the Secretary, Mach's 2008 Plan "unambiguously" required Mach to maintain a line curtain within forty feet of the face for all cuts. (Sec'y Br. at 10-11.) Based on Inspector Ramsey's observations, the Secretary argues that Mach violated its approved ventilation plan when it mined into the crosscut without a line curtain. (*Id.*) In contrast, Mach contends that no line curtain is required for the first forty-foot "flush" cut. (Resp't Br. at 8-9; Resp't Reply at 4-6.) In addition, Respondent claims that Inspector Ramsey's testimony highlighted ambiguity in the plan's provision regarding the use of a line curtain on a forty-foot cut. (Resp't Br. at 6-8, 10; Resp't Reply at 6.)

Looking at the 2008 Plan, the provision explaining the forty-foot cut sequence states that, "Using blowing ventilation[,] the curtain will be no more than 40' from the face." (Ex. G-13 at A4.) Based on the plan's depiction, this provision specifically measures forty feet from the last row of bolted roof. (Ex. G-13 at A4.) Despite Respondent's attempt to create ambiguity about

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<sup>10</sup> At the hearing, the Secretary introduced copies of two different ventilation plans: one approved on March 18, 2008 ("2008 Plan") and another approved, coincidentally, on March 18, 2011 ("2011 Plan"). (Ex. G-4; Ex. G-13.) The ventilation citation in this case was issued on March 22, 2011. (Ex. G-2) It is uncontroverted that Mach did not receive a copy of MSHA's approval until March 26, 2011. (Tr. 54:1-15, 141:7-24, 157:8-12, 158:20-159:6; Resp't Br. at 5.) According to Respondent, I must therefore determine whether the 2008 Plan or 2011 Plan applies. (Resp't Reply at 6.) Given the carefully constructed plan approval process established in 30 C.F.R. § 75.370, *see ICG Knott County, LLC*, 35 FMSHRC 2784, 2810-14 (ALJ) (discussing the "comprehensive process" established by section 75.370 for "ventilation plan proposal, approval, and implementation"), and general principles of fair notice, *see Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), it would appear inequitable to enforce the 2011 Plan against Respondent. Yet Mach also admits that the 2008 Plan and 2011 Plan contain "similar" language regarding the provision of a line curtain during a forty-foot cut. (Resp't Br. at 5-6.) The 2008 Plan states that: "Using blowing ventilation[,] the curtain will be no more than 40' from the face." (Ex. G-13 at A4.) The 2011 Plan provides: "Curtain setback from face — Maximum 40 feet when mining crosscuts and entries." (Ex. G-4 at 13.) Given this admitted similarity, I need not determine whether the 2008 Plan or 2011 Plan applies. For ease of discussion, I will focus on the 2008 Plan.

the treatment of “flush” cuts, Inspector Ramsey credibly testified that “flush” cuts do not differ from turning crosscuts. (Tr. 30:3–7.) Moreover, the 2008 Plan does not include any exception for “flush” cuts. Thus, the text of the provision unambiguously prohibits an operator from mining more than forty feet beyond the last row of bolts without a line curtain. Further, as Superintendent Robertson and Foreman Dotson acknowledged, the “face” moves as mining progresses deeper into the coal seam. (Tr. 133:9–10, 160:3–5.) Accordingly, that provision reflects a continuing obligation: as the face moves deeper into the coal seam—and further from the line curtain—the curtain cannot be *more* than forty feet away from the face.

Mach might comply with this provision in several ways. For example, Respondent could hang a curtain on the last row of roof bolts, which were located approximately two feet from the rib line. Mach could then make an eighteen-foot cut on the right-hand side of the crosscut, an eighteen-foot cut on the left-hand side, a twenty-foot cut on the right-hand side and a twenty-foot cut on the left-hand side. Alternatively, Mach could hang a line curtain twenty feet from the rib line, make an eighteen foot cut on the right and left side, then rehang its line curtain at the last row of bolts, then make twenty-foot cuts on the right and left side.

What would *not* work is precisely what Mach did in this case: a cut sequence that extends forty-two or forty-three feet beyond the rib line without a line curtain. Notwithstanding any seemingly conflicting testimony on the part of Inspector Ramsey, *see* discussion *infra* Part V.D., the unambiguous text of the 2008 Plan precludes Mach from cutting more than forty feet beyond the last row of bolts without a line curtain. Here, the coal face was located more than forty feet away. Mach’s cut into the coal seam exceeded the plan requirement by two or three feet. No line curtain had been provided at any time. Thus, I conclude that Mach’s failure to comply with this provision of its 2008 Plan constitutes a violation of 30 C.F.R. § 75.370(a)(1).

### C. S&S and Gravity

Respondent’s ventilation plan violation has established the first element of the *Mathies* test for S&S. In addition, Inspector Ramsey described the explosion and dust hazards to which this violation would contribute. (Tr. 23:9–13, 34:6–35:2, 35:25–36:20, 44:1–14, 45:22–47:23.) Ramsey is an experienced inspector who had inspected Mach #1 Mine many times. (*See* Tr. 19:7–23:1.) Given his experience, his testimony is entitled to significant weight on this point. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that substantial evidence supported an ALJ’s S&S determination). Thus, I determine that the Secretary has also met his burden of proving *Mathies*’ second element.

However, Mach contends that the Secretary has not met his burden of proving that this violation was S&S because there was no “reasonable likelihood of a reasonably serious injury.” (Resp’t Br. at 11.) Mach notes that Inspector Ramsey did not take an air reading in Crosscut No. 10, that more than 39,000 C.F.M. of air was reaching the return entry, and that the methane levels did not exceed 0.3 percent. (Resp’t Br. at 11; Resp’t Reply at 8–9.) In addition, Mach argues that its methane detection and dust suppression measures reduce the likelihood of injury. (Resp’t Br. at 11; Resp’t Reply at 9–10.) Mach also notes that Ramsey did not observe miners working in suspended dust. (Resp’t Reply at 9.) Finally, Respondent claims that the miner

operator would have hung a line curtain before the next cut. (Resp't Br. at 11; Resp't Reply at 9–10.)

Nevertheless, the record before me demonstrates that these hazards were reasonably likely to result in reasonably serious injuries. Here, Inspector Ramsey credibly testified that he did not need to take an air reading at the intersection of Entry No. 3 and Crosscut No. 10 because he did not dispute that approximately 39,000 C.F.M. was present at the intersection. (Tr. 72:22–73:20.) Instead, he was concerned with what would happen without a curtain to direct that air to the face as required by the ventilation plan. (Tr. 73:19–20.) Without the missing line curtain directing air toward the face, he indicated that very little fresh air would reach the farthest reaches of Mach's forty-foot cut. (Tr. 39:15–41:7, 42:16–22; 72:22–73:7, 100:17–101:10; Ex. G–15.) Rather than sweeping the face, the air would short-circuit before reaching the deepest part of the cut. (Tr. 42:16–21, 72:22–73:7, 100:17–101:10; Ex. G–15.) In addition, Ramsey indicated that “sparks” from the mining process provided an ignition source for any accumulating methane. (Tr. 43:17–25.) He also explained that coal dust—which lowers the explosive range for methane ignition and contributes to lung disease—was present when he arrived at the crosscut. (Tr. 34:21–35:21, 44:23–45:2, 45:20–46:1, 107:22–108:5.)

Respondent's emphasis on secondary safety devices, the low level of methane, and Mach's periodic methane checks is inapposite. The Commission has repeatedly rejected operator arguments that additional safety measures prevent an S&S finding. *Big Ridge, Inc.*, 35 FMSHRC 1525, 1529 (June 2013); *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369–70 (Oct. 2011), *aff'd*, *Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013); *see also Buck Creek Coal*, 52 F.3d at 136 (“The fact that [Respondent] has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are presumably in place . . . precisely because of the significant dangers associated with coal mine fires.”) Thus, I accord little weight to the presence of the scrubber, water sprays, and methane monitor in my S&S analysis.

Moreover, Mach's emphasis on the relatively low concentration of methane and coal dust is similarly misplaced. An S&S analysis is not a mere snapshot. *See, e.g., Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014) (indicating that a Judge erred when he took a “‘snapshot’ approach” to the S&S analysis). Instead, the analysis examines the likelihood of injury in the context of continued mining operations. Although the methane concentration may have been relatively minor at the time Ramsey wrote the citation, he credibly testified that Mach #1 Mine was a gassy mine that released more than 1,000,000 cubic feet of methane every twenty-four hours.<sup>11</sup> Notwithstanding Mach's periodic methane checks and Superintendent Robertson's testimony that “normally five to six-tenths [of methane] is the most [he had] ever seen” on miner units (Tr. 151:18–20 (emphasis added)), Mach #1 Mine's high rate of methane liberation would allow methane concentrations to build rapidly. In addition, Ramsey specifically

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<sup>11</sup> Mach suggests in its reply brief that its “total methane liberation for purposes of placing the mine on spot inspection is calculated using the gob, which was created from several longwall panels.” (Resp't Reply at 9.) Thus, it appears Mach hopes I will infer that the *rest* of this mine releases relatively little methane. Yet it is unclear why that would be the case or how to quantify the impact of the gob. I therefore decline to draw any such inference.



testified that he saw dust in the crosscut. Although he did not see miners working in the dust, it is reasonably likely that this dust would accumulate without proper ventilation. As mining activities continued, Respondent's miners therefore would be reasonably likely to work in the dust. This dust would simultaneously lower the explosive range for concentrated methane and expose miners to dust inhalation injuries.

Lastly, dust inhalation and methane explosions are among the most dangerous hazards that miners face, and I do not doubt that any resulting injuries would be reasonably serious. As Inspector Ramsey noted, dust inhalation can lead to debilitating and fatal lung diseases. (Tr. 35:3–24.) Moreover, Ramsey indicated that methane ignitions can lead to burns. (Tr. 45:3–14.) I therefore conclude that the Secretary has proven *Mathies'* third and fourth elements.

In view of the above, the Secretary has met his burden of proof on all four elements of *Mathies*. Accordingly, I conclude that Citation No. 8424601 was appropriately designated S&S.

#### **D. Negligence**

Based on my review of the 2008 Plan, I have determined that the unambiguous language requires a line curtain within forty feet of the face on every cut. *See* discussion *supra* Part V.B. Thus, “a reasonably prudent person familiar with the protective purpose of the standard” would have ascertained the meaning of the provision. *See Mach Mining, LLC*, 35 FMSHRC 2937, 2942 (Sept. 2013) (describing the factors an Administrative Law Judge should consider in determining whether an operator's good faith belief that its conduct complied with regulations was also objectively reasonable). Based on the text of the provision, Mach reasonably should have known that its failure to provide a line curtain during the flush cut did not comply with its plan provision. This is a serious violation that could expose the miner operator to methane explosion and dust inhalation hazards in the course of continued mining operations. Respondent's conduct did not comport with the high standard of care the Mine Act requires, and it acted negligently when it failed to install the required line curtain.

In the Secretary's posthearing brief, he asks that the negligence designation for Citation No. 8424601 be increased from “moderate” to “high.” (Sec'y Br. at 14.) The Secretary notes that Inspector Ramsey initially designated Respondent's negligence as “moderate” because he believed Mach's “foreman was not actually aware of the condition.” (*Id.*) Pointing to testimony from Foreman Dotson and Superintendent Robertson, the Secretary states “the failure to maintain a ventilation curtain within 40 feet of a [‘flush’] cut was a deliberate and ongoing practice.” (*Id.* at 15.) Thus, the Secretary now claims Mach's level of negligence was high.

The Secretary apparently believes that the foreman's knowledge of the condition is the only factor bearing on negligence in this case. (*See* Sec'y Br. at 16–17 (citing cases regarding negligence and supervisor knowledge).) But supervisor knowledge is only one piece of the negligence analysis. *See, e.g., Mach Mining, LLC*, 35 FMSHRC at 2941–43 (indicating an operator's objectively reasonable, good faith belief that its conduct complied with regulations constitutes a mitigating factor). MSHA's prior interpretations and enforcement are also properly considered as mitigating factors. *See Sierra Rock Prods., Inc.*, 37 FMSHRC \_\_\_, slip op. at 4–5,

No. WEST 2010-1390-RM *et al.* (Jan. 13, 2015); *U.S. Steel Mining Co.*, 15 FMSHRC 1541, 1547 (Aug. 1993).

Here, Dotson and Robertson each credibly testified that Respondent employed this mining process for flush cuts as a matter of course. The 2008 Plan was in effect for three years. Mach had completed hundreds of flush cuts. Given the length of time and the frequency with which Mach employed this flush-cut system, it is reasonable to infer that an inspector would have observed this process at some point during MSHA's regular visits to the mine. Yet, it appears MSHA never issued a similar flush-cut citation in the three years the 2008 Plan was in effect. (*See* Tr. 126:1–9.) Despite his opportunity to present rebuttal testimony and evidence, the Secretary neither disputed the consistency of Mach's mining process nor presented evidence of similar citations for engaging in this process.

If anything, the record in this case suggests that MSHA's enforcement may have hindered, rather than helped, the proper implementation of this plan provision. For example, Inspector Ramsey had some difficulty explaining the provision at issue. Notwithstanding the unambiguous text of Mach's ventilation plan, Ramsey initially appeared to testify that a line curtain was not necessary for the first twenty feet of a flush cut. (Tr. 74:24–76:8, 82:15–24.) Later, he clarified his testimony: although the plan did not *specifically* require a line curtain for the first twenty feet of a cut, Mach would need to provide a curtain within twenty feet of the face at the *beginning* of a cut to ensure it complied with the overall forty-foot requirement *after* it completed this initial twenty-foot cut. (*See* Tr. 165:21–176:16.) Having heard Ramsey's initially muddled explanation firsthand, I can easily envision how a listener might incorrectly surmise that no line curtain was necessary during a flush cut in spite of the otherwise unambiguous text of the provision. I can likewise envision over the course of three years a similarly contradictory explanation from MSHA reinforcing Mach's misguided interpretation in this case.

In one sense, Mach's repeated and long-running application of a plan interpretation that is objectively unreasonable highlights the extent of Respondent's negligence. But in another, it suggests that MSHA unintentionally reinforced Mach's long-held interpretation. After three years and hundreds of cuts, it is unsurprising that Mach may have interpreted MSHA's silence as validation. Although Mach has the primary responsibility for the health and safety of its miners, MSHA's seemingly nonexistent—or, at least, inconsistent—enforcement of this plan provision somewhat mitigates Mach's negligence in this case. *See* 30 C.F.R. § 100.3(d) at Table X (characterizing negligence as moderate where mitigating circumstances are present). Accordingly, I conclude that the Secretary has not demonstrated a “high” level of negligence in this case.

Given the above, I determine that Mach's negligence in this case was moderate.

## VI. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW— ROOF BOLTER VIOLATIONS—CITATION NOS. 8444918, 8444919, AND 8444920

### A. Additional Findings of Fact

On November 27, 2012, Inspector Lee visited Mach #1 Mine to conduct inspections and sample dust pumps on the mining units. (Tr. 186:2–15; Ex. G–7 at 1.) After traveling to the No. 2 section of the mine, Lee examined the dust collection system on Mach’s #4 Fletcher roof bolter. (Tr. 211:9–21; Ex. G–7 at 1, 6.)

Mach’s roof bolting machines include dust collection systems. *See* discussion *supra* Part III. Acting like a large vacuum cleaner, the dust collection systems on Mach’s roof bolters suck dust away from the drill pot—which is the part of the machine that drills into the roof—and into a large hose. (Tr. 201:3–202:13, 208:5–16, 246:16–248:11; Ex. G–11; Ex. G–16; Ex. G–17.) The hose weaves through the body of the machine and eventually connects to a sealed dust box. (Tr. 208:5–16; 210:9–12, 246:16–21; Ex. G–11; Ex. G–16; Ex. G–17.) At junction points along the hose, clamps are used to help ensure a secure connection. (Tr. 189:18–22, 190:9–25, 194:2–5, 197:1–4, 197:20–198:13, 199:21–200:11, 208:17–23; Ex. G–11; Ex. G–16; Ex. G–17.) Inside the dust box, the roof bolter then sucks the dust-filled air through a replaceable dust filter. (Ex. G–11; Ex. G–16; Ex. G–17; Ex. R–5.)

This cylindrical filter consists of paper-like filter material and is hollow on the inside to allow air to pass through it. (Tr. 203:2–8, 248:12–24; Ex. R–4; Ex. R–5.) The filter material is encased in a metal framework. (Tr. 203:2–8, 248:12–14; Ex. R–4; Ex. R–5.) Throughout the outer body of the filter, this metal casing is a woven-wire mesh that allows air to reach the paper-like filter. (Tr. 203:2–8, 204:18–205:3, 248:12–14; Ex. R–4; Ex. R–5.) On each flat end of the cylindrical filter, the framework is solid metal, and one of these ends contains a gasket to ensure a secure seal with the dust box. (Tr. 203:2–8, 203:24–204:12, 252:23–256:1; Ex. R–4.) When functioning properly, the filter makes an airtight seal that releases now-filtered air from the roof bolter’s muffler. (Tr. 201:3–202:2; 203:9–17, 222:2–9, 282:8–283:4.) Given the dual drill pots on Mach’s roof bolters, they include two dust boxes and two filters. (Ex. G–16; Ex. G–17.)

Because certificates of approval from MSHA are required for dust collection systems, *see generally* 30 C.F.R. part 33 (discussing permissibility and approval of dust collection systems), manufacturers of roof bolters work closely with MSHA when designing their machines. (Tr. 194:13–195:7, 235:7–9.) Thus, manufacturers submit design plans to MSHA. (Tr. 193:17–194:1, 195:24–196:6, 233:21–24, 234:23–235:5.) An MSHA technical support group in Triadelphia, West Virginia oversees the approval process and issues certificates for approved systems. (Tr. 196:7–19, 232:12–18.)

During Lee’s November 27 inspection, he observed that the bolter’s hose was connected to the drill pot. (Tr. 211:9–21; Ex. G–7 at 6.) However, he noticed that the clamp securing the hose to the left drill pot was not in use. (Tr. 211:9–21, 242:20–243:5; Ex. G–7 at 6.)

Based on his observations, Inspector Lee issued Citation No. 8444918, providing:

The dust collection system on the roof bolter was not being maintained in a permissible, and operational condition. The suction hose for the left drill pot was not secured to the drill pot[']s union where the hose is attached. This condition was observed on the #4 roof bolter in Main East [No 2] working section, MMU 002.

Standard 72.630(b) was cited 13 times in two years at [Mach #1 Mine] (13 to the operator, 0 to a contractor).

(Ex. G-6.) To abate the citation, Mach installed a hose clamp. (*Id.*)

Lee continued his inspection of Mach #1 Mine on November 28 and traveled to the Head Gate 6 area of the mine. (Ex. G-10 at 1.) He again examined the dust collection systems on Respondent's roof bolting machines. (Tr. 218:9-12; Ex. G-10 at 5-6.) First, he examined Mach's #3 roof bolter. (Tr. 218:13-19; Ex. G-10 at 5-6.) Again, he observed that a clamp had not been used to secure the control system's hose to the left drill pot. (Tr. 218:20-219:23, 244:14-16; Ex. G-10 at 5.) In addition, he inspected the filters inside the dust control boxes and found that the filters showed small indentations and "dings" from when Mach's machine operator struck them against a metal object to clean them rather than replace them. (Tr. 220:7-17, 262:4-19, 281:5-22; Ex. G-10 at 5.) Given his observations, Lee issued Citation No. 8444919, providing:

The dust collection system on the roof bolter was not being properly maintained in permissible condition. The filters in both dust boxes were damaged and showed signs of being struck against an object[,] creating indentations in the mesh and ends of the filters. Also, the left suction hose was not secured to the left drill pot. This condition was observed on the [#3] roof bolter located in Head Gate 6, MMU 003.

Standard 72.630(b) was cited 14 times in two years at [Mach #1 Mine] (14 to the operator, 0 to a contractor).

(Ex. G-8 at 1.) Mach installed new filters to abate the citation.<sup>12</sup> (*Id.* at 2; Ex. G-10 at 6.)

That same day, Lee also inspected Respondent's #1 roof bolter in the same section of the mine. (Ex. G-10 at 1, 6.) Again, he examined the bolter's dust collection system. (*Id.* at 6.) He again found indentations in the bolter's dust filters. (*Id.*) Based on his inspection, he issued Citation No. 8444920, providing:

The dust collection system on the roof bolter was not being properly maintained in permissible condition. The filters in both

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<sup>12</sup> Lee did not explain how Respondent abated the clamp deficiency on the #3 bolter.

dust boxes were damaged and showed signs of being struck against an object[,] creating indentations in the mesh and ends of the filters. This condition was observed on the #1 roof bolter located in Head Gate 6, MMU 003.

Standard 72.630(b) was cited 14 times in two years at [Mach #1 Mine] (14 to the operator, 0 to a contractor).

(Ex. G–9.) To abate the citation, Mach again installed new filters. (*Id.*)

**B. Violation of 30 C.F.R. § 72.630(b)**

The Secretary contends that Citation Nos. 8444918, 8444919, and 8444920 constitute violations of section 72.630(b) because Mach’s roof bolter’s were not in permissible or operating condition. (Sec’y Br. at 21.) However, Inspector Lee admitted at the hearing that all three roof bolters were in operational condition at the time of his inspection. (Tr. 242:20–243:12, 244:12–245:1, 262:20–264:6.) Based on Lee’s testimony, I conclude that each roof bolter was capable of “performing . . . its regular function” of “absorb[ing] air contaminated with dust at the drill head, filter[ing] and contain[ing] the dust before it reache[d] the clean side of the system, and produc[ing] clean air on the return side of the machine.” (See Sec’y Br. at 21 (quoting *Liggett Mining, LLC*, 33 FMSHRC 1702 at 1714).) Accordingly, this case turns on whether the Secretary has met his burden of proving that the roof bolters in question were permissible under 30 C.F.R. § 72.630(b).

Permissibility in the context of dust collection systems requires the Secretary to demonstrate that the system was not maintained as it had been approved. See discussion *supra* Part IV.B. In this case, the Secretary presented testimony from Inspector Lee, as well as schematics depicting roof bolters similar to the roof bolters Respondent employed at the Mach #1 Mine. (Ex. G–16; Ex. G–17.) In addition, the Secretary introduced portions of a recent manual for the roof bolting machines at issue. (Ex. G–11.) I admitted the manual for the purpose of understanding the parts of a roof bolter. However, I refused to admit the manual for the written guidance it included because the manual clearly states “Revised 7/2013” on its cover page, which is more than eight months *after* Lee issued the citations before me.

Thus, the Secretary must depend on Inspector Lee’s testimony for the proposition that MSHA’s approval required securing clamps and placing new filters in the dust collection systems at issue. (Sec’y Br. at 22–25; see Tr. 189:18–24, 193:17–194:12, 197:1–25, 206:12–14, 219:25–221:9.) I note that Lee is an experienced miner and inspector who is familiar with dust collection systems on roof bolting machines. (Tr. 183:4–186:1.) In addition, his testimony appears somewhat sensible on its face. MSHA drafted section 72.630 to protect miners, and it seems sensible that the agency might require miner operators to apply clamps and replace filters rather than cleaning them.

Yet, looking closely at the Secretary’s actual evidence, I note that Lee provided no foundation for his testimony regarding the approved condition of these roof bolters. See Fed. R. Evid. 602 (requiring witnesses to testify based on personal knowledge). Although Lee has many

years of experience working in and inspecting mines, he has never worked in MSHA's approval office in Triadelphia or participated in the approval process. (Tr. 232:9–23.) He also has never reviewed the plans the manufacturer submitted to MSHA for approval of the roof bolters in question. (Tr. 233:17–234:22, 235:10–24.) Instead, he relied on his review of manuals he received from the manufacturer to form his opinions. (Tr. 205:6–9; 234:7–22.) Without knowledge of the approval process and final results—or even hearsay testimony about his conversations with MSHA officials in Triadelphia—I cannot credit Lee's testimony on this point.

Moreover, I cannot follow Judge Zielinski's approach in *Tri County Coal. Cf.* 34 FMSHRC at 3275 (“[T]he certificate of approval would not have been issued for a system with a hole in the vacuum hose.”) Although it is implausible that MSHA would approve a dust control system with a hole in its hose, MSHA *might* approve a system that included optional clamps and reusable filters as long as the system's effectiveness had not been compromised. Here, it is uncontroverted that the dust control systems were providing adequate suction. Accordingly, it is the Secretary's burden to prove that MSHA's approval required that the clamps be affixed and the filters changed rather than cleaned and reused as long as they remained functional.

This case is problematic. I believe Lee testified truthfully as to what he assumed MSHA had approved. His testimony appears sensible and *may* even be accurate. I am cognizant of the serious danger that respirable dust presents, and I understand the Secretary's diligence in enforcing his provisions. Judges must be circumspect about the evidence before them, but I recognize that a “see no evil” approach that discounts common sense does not serve the health and safety interests of miners. It is a fine line between healthy circumspection and suspension of disbelief, and this case places that line in sharp relief.

But the Secretary's diligence in enforcement must be matched by his diligence in prosecution. Here, the Secretary presented *no* evidence demonstrating what was included in that approval. Lacking any sort of approval documents, contemporaneous manuals, or other indications of the condition in which MSHA approved the roof bolter, the Secretary has not met his burden in this case. I cannot infer that clamps and new filters were required for permissibility merely because Inspector Lee's testimony seems sensible. To do so would substitute a plausible theory for actual evidence. Based on the unique—and ultimately deficient—record before me, I determine that the Secretary has failed to demonstrate by a preponderance of the evidence that the three roof bolters in this case were not being maintained in permissible condition.

In view of the above, I can only conclude that the Secretary has not proven that the cited conditions violated 30 C.F.R. § 72.630(b). Accordingly, Citation Nos. 8444918, 8444919, and 8444920 are hereby **VACATED**.

## **VII. PENALTY AND ORDER**

Although the Secretary proposes penalties, the Commission assesses penalties for violations of the Mine Act *de novo*. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). When assessing a civil penalty, section 110(i) of the Mine Act requires that I consider six criteria, including: the operator's history of previous violations, the appropriateness of the

penalty relative to the size of the operator's business, the operator's negligence, the penalty's effect on the operator's ability to continue business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance. 30 U.S.C. § 820(i). The criteria are not required to be given equal weight. *Jim Walter Res., Inc.*, 36 FMSHRC at 1979.

In the case before me, I vacated Citation Nos. 8444918, 8444919, and 8444920 and affirmed Citation No. 8424601 as written. I have concluded that Citation No. 8424601 was sufficiently grave to be characterized as S&S and that Mach's level of negligence was moderate. Looking at the violation history report for Mach #1 Mine, I note that nine section 104(a) citations for violations of 30 C.F.R. § 75.370(a)(1) became final orders in the twenty months prior to Citation No. 8424601. (Ex. G-1.) Five of those violations were designated as S&S. As I previously noted, none of these prior violations under section 75.370(a)(1) were shown to have involved the type of "flush" cut violation at issue in Citation No. 8424601.

In addition, the parties stipulated that the Secretary's proposed penalties will not affect Respondent's ability to continue in business and that Mach demonstrated good faith in abating the violations. (Ex. G-12 at 2.) The parties also stipulated that Mach #1 Mine produced nearly six million tons of coal in 2010 and more than seven million tons of coal in 2012. (*Id.*) Moreover, the mine's controlling parent produced more than 8 million tons of coal in 2010 and nearly 11 million tons of coal in 2012. (*Id.*) Although I am not bound by the Secretary's penalty criteria, I note that his regulations characterize Mach's levels of production on the high end relative to its competitors. *See* 30 C.F.R. § 100.3(b) at Tables I & II. I therefore determine that the Secretary's proposed penalty appears appropriate for the size of Mach's business. In considering all of the facts and circumstances of this matter, I determine that the Secretary's proposed penalty of \$2,900.00 is appropriate in this case.

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8424601 be **AFFIRMED** as written and that Citation Nos. 8444918, 8444919, and 8444920 be **VACATED**. Mach Mining, LLC, is **ORDERED** to **PAY** a civil penalty of \$2,900.00 within forty days of the date of this decision.

/s/ Alan G. Paez  
Alan G. Paez  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 18, 2015

KNIGHT HAWK COAL, LLC,  
Contestant,

v.

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

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

v.

KNIGHT HAWK COAL, LLC,  
Respondent.

CONTEST PROCEEDINGS

Docket No. LAKE 2014-120-R  
Citation No. 8448666; 11/14/2013

Docket No. LAKE 2014-121-R  
Citation No. 8439096; 11/14/2013

Mine: Prairie Eagle South Underground  
Mine ID: 11-03205

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2014-575  
A.C. No. 11-03205-351829

Docket No. LAKE 2014-647  
A.C. No. 11-03205-355399

Mine: Prairie Eagle South Underground

**DECISION**

Appearances: Edward Hartman, U.S. Department of Labor, Office of the Solicitor,  
Chicago, Illinois for the Secretary;

Mark E. Heath, Spilman, Thomas & Battle, Charleston, West Virginia for  
Knight Hawk Coal.

Before: Judge Miller

These cases are before me on notices of contest filed by Knight Hawk Coal, LLC, and petitions for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration (“MSHA”) against Knight Hawk pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. These dockets involve one 104(a) citation and one 104(d)(1) citation, with a total proposed penalty of \$78,209.00. Prior to the hearing, the parties reached a settlement regarding Citation No. 8448666. The settlement was read into the record and is addressed below. The parties presented testimony and evidence regarding the one remaining citation, Citation No. 8439096, at a hearing held on January 28, 2015 in St. Louis, Missouri.



## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Knight Hawk's Prairie Eagle South mine is a large underground coal mine located near Sparta, Illinois. At hearing, the parties stipulated to the jurisdiction of MSHA and the Commission. Knight Hawk Prehearing Report 6-7. Further, the parties stipulated that the mine timely, and in good faith, abated the violation, and that the proposed penalty will not hinder its ability to continue in business. *Id.* Furthermore, the parties stipulated that "[a]t the time of the accident on February 13, 2013, the decedent, Timothy Chamness, was remotely operating the Joy Continuous Mining Machine . . . in the 'red zone,' in violation of 30 C.F.R. 75.220(a)(1)[,]" and that the violation, which resulted in a fatality, was significant and substantial. *Id.* Finally, the parties agreed that pages 6 and 10 of the mine's roof control plan contain the red zone provisions at issue. Sec'y Ex. 3 pp. 6, 10.

Based upon the parties stipulations, my review of the entire record, my observation of the demeanor of the witnesses, and after consideration of all evidence and the post-hearing briefs, I find that the violation and S&S designation are appropriate, that the negligence is high, as alleged, and that the violation is a result of the operator's unwarrantable failure to comply with the standard.

### **Citation No. 8439096**

Citation No. 8439096 was issued by Inspector Harry Wilcox on November 14, 2013 pursuant to section 104(d)(1) of the Act for a violation of 30 C.F.R. § 75.220(a)(1). The citation alleges that the mine violated its approved roof control plan by failing to ensure that its employees did not work or travel in the red zone around the remote controlled continuous miner. Wilcox determined that the condition resulted in a fatal injury, was S&S, affected one person, and was a result of high negligence and the mine's unwarrantable failure to comply with the mandatory standard. The Secretary proposed a specially assessed civil penalty in the amount of \$70,000.00 for this alleged violation.

On February 13, 2013, Timothy Chamness, the operator of a remote controlled continuous mining machine, was killed in the No. 1 entry when he became pinned between the conveyor tail of a continuous mining machine and the right rib of the entry while repositioning the continuous mining machine from the third cut to the fourth cut at the No. 1 face. Following the fatality, the Secretary conducted an accident investigation and generated an accident report, which included a diagram of the accident scene. Sec'y Ex. 2 Appendix B. As a result of the accident, Inspector Wilcox issued the citation and alleged a failure to follow the approved roof control plan, which required that "[n]o one shall be in the red-zone when continuous miners are being trammed from place to place or being re-positioned in the working place." Sec'y Ex. 3 p. 6. The citation was terminated when the operator submitted, and MSHA approved, revisions to the roof control plan.

In order for the Secretary to prove a violation of section 75.220(a)(1) he must, first, establish that the provision allegedly violated is part of the approved and adopted plan, and, second, that the condition cited actually did violate the plan provision. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280-1281 (Dec. 1998) (citing *Jim Walter Resources, Inc.*, 9 FMSHRC

903, 907 (May 1987)). Knight Hawk has stipulated that, at the time of the accident, the continuous mining machine operator was operating the piece of equipment contrary to the mine's approved roof control plan and, therefore, in violation of section 75.220(a)(1).

Knight Hawk has stipulated that a fatal accident occurred and that the S&S designation is appropriate. A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" to be:

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

I have found a violation of a mandatory standard based upon the stipulations of the parties. As a result of the violation, a miner standing in the red zone was pinned and killed while tramming the continuous miner. Based upon the evidence of the accident and the stipulations of the parties, I find that the violation is significant and substantial.

Following the accident, Wilcox and others conducted an investigation during which they took the statement of Chamness' supervisor and spoke to six miners who indicated that they had seen miners in the red zone. Six of the interviewed individuals indicated that, while they were aware of the hazards associated with the red zone, no one at the mine had been disciplined for walking or working in the red zone. As a result, and based upon all of the information he learned during the course of the accident investigation, Wilcox designated the citation as high negligence and an unwarrantable failure to comply with the mandatory standard.

### **Negligence**

Each mandatory standard carries with it a duty of care to avoid violations of that standard and, if a standard is violated, a finding of negligence is made. *A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In this case, MSHA determined that the negligence was high. The Secretary, by regulation, defines negligence under the Act 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). High negligence, according to the Secretary's regulations, occurs when the operator knew or should have known of the violative condition and there are no mitigating circumstances. *Id.*

The negligence of Chamness in stepping into the red zone cannot be attributed to the Respondent for penalty purposes. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1113, 1116

(July 1995). However, the fact that an hourly employee committed a violation does not shield the mine from being deemed negligent. Rather, in instances such as this, the Commission looks to the operator's actual or constructive knowledge of the violative condition or practice and its supervision, training, and disciplining of its employees. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982). Here, while there is evidence that at least one poster and some training regarding the red zone was provided, there is also evidence to demonstrate that there was a complete lack of competent supervision and discipline.

Dale Winter, the mine superintendent, testified that the mine includes training on the hazards of the red zone in its new miner training, refresher training, and in some of its weekly safety meetings. Moreover, the mine has at least one poster warning against the hazards of the red zone, and the topic is included in the discussion of the roof control plan. He testified that, just a few days prior to Chamness' death, the mine held a refresher training for all miners, which was presumably attended by Chamness, and, during a discussion of the mine's roof control plan, there was a PowerPoint presentation which addressed the red zone and the hazards of working in the red zone. The training also included "no go" zones for other pieces of equipment, addressing the pinch point areas. Winter explained that approximately 15 minutes of the ten hour refresher training was dedicated to red zone issues. The diagrams and illustrations used in the annual refresher training were taken from materials provided to the mine by MSHA and primarily relate to the red zone of the continuous mining machine.

William Jankousky, the mine's safety director, agreed with Winter and testified that the dangers associated with working in the red zone have been a focus of MSHA over the past years. Since red zone violations often result in death, it is a very important topic to discuss with miners and, as a result, the mine has provided training on the issue.

Winter explained that the mine's discipline policy, as it relates to safety issues, calls for a verbal warning to a miner who commits an unsafe act. While Winter testified that a repeat or aggravated unsafe action could result in a letter of reprimand, a suspension or termination, he stated that he looks at repeated conduct on a case-by-case basis and the type of discipline is based upon the frequency of the conduct. For example, if he saw someone in a red zone seven months after being seen in the red zone previously, he would offer another verbal correction. He explained that the mine has a policy of leaving most of the discipline to the foreman, the immediate supervisor of the miners.

During his time at the mine, Winter has been involved in handing down two disciplinary actions related to the red zone. The first action occurred in 2009, just after the mine opened, and involved an employee backing up a continuous miner who stopped to hook up a cable strap and, in doing so, swung the tail and pinched his own arm. While the mine did not agree it was a red zone violation and, instead, classified it as an unsafe act near a pinch point, MSHA issued a citation for a roof control, red zone violation and, thereafter, Winter issued a letter of reprimand to the miner. Knight Hawk Ex. J p. 1. The second incident, in 2011, involved a verbal conflict between a surveyor helper and roof bolter operator. There, the roof bolter operator asked the helper to get out of the way, and, when the surveyor helper refused, the bolter operator trammed the roof bolter toward the helper, placing him in a pinch point area before he moved. The mine asserted that this was not a red zone violation pursuant to the roof control plan, and instead was a

violation of company policy. The bolter operator was suspended and subsequently discharged for intentionally placing a miner in harm's way.

Inspector Wilcox explained that he interviewed ten miners immediately after the accident and, on February 15<sup>th</sup>, the accident investigation team conducted additional interviews of seven of those miners. During the course of the accident investigation, Wilcox was not made aware of the two disciplinary actions Winter testified about, or any other action taken where a miner had been seen in the red zone. However, during interviews of the miners who worked with Chamness, Wilcox learned that each of those miners had observed miners in the red zone.

Wilcox testified that the seven miners interviewed by the accident investigation team were instructed as to the purpose and procedure of the investigation, and were asked if they had ever seen anyone in the red zone at this mine. Six of the miners agreed that they had seen other miners in the red zone, while one miner refused to answer. Wilcox explained that Richard Pasquino, the immediate supervisor of Chamness for the fifteen months prior to the accident, was one of the individuals interviewed by the accident investigation team. According to Wilcox, Pasquino told MSHA that he had observed Chamness in the red zone several times prior to the fatal accident. Although not specifically included in the questioning, Wilcox is certain that, because the questions centered on the accident that killed Chamness, the miners who were interviewed, including Pasquino were aware that the red zone referred to the area around the continuous miner, and that each of them stated that they had seen miners in the red zone. At hearing Pasquino denied that he intended his statement to mean the red zone associated with the continuous miner.

Pasquino and Winters both testified that the mine had a broader view of the red zone than that of MSHA. Pasquino explained that, at this mine, the term "red zone" was applied to every piece of equipment, not just the continuous miner, and that given the broad definition, miners could find themselves inadvertently in the red zone of a piece of equipment. Pasquino agreed that, prior to becoming a supervisor, he observed Chamness in a red zone three different times. However, in each of those instances, the red zone was not that of a continuous miner, but rather that of a different piece of equipment. Similarly, Pasquino asserted that, after he became a supervisor, he observed Chamness in the red zone two times, once on a scoop and once on a roof bolter, but not in the red zone of a continuous miner. Pasquino did not mention the incidents to Chamness prior to becoming a supervisor, but after becoming his supervisor, he counseled Chamness after both red zone incidents, which occurred roughly five months apart. While Pasquino acknowledged that the mine's policy probably required both supervisors and rank and file miners to report safety violations, he never did so because he felt it wasn't needed.

Pasquino indicated that he has not disciplined a miner during his time as a foreman and, rather, has addressed issues by counseling the offending miner. He acknowledged that the red zone is a dangerous area and continuing to work in the red zone can lead to more discipline, and eventually termination. He agreed that, if unsafe behavior continued on a weekly or daily basis, he may have done more than simply counseling. According to Pasquino, he saw no reason to involve the mine superintendent, or anyone else at the mine, in incidents where he counseled miners. However, Pasquino could not say if he had a duty to report any known violations to someone higher up.

I find that, because Pasquino had observed Chamness in the red zone multiple times, and had counseled Chamness twice about being in the red zone, he should have known that it was likely Chamness would again find himself in the red zone. Accordingly, I discount the testimony of both Winter and Pasquino, both of whom said they had no reason to believe Chamness would enter the red zone. Respondent failed to take sufficient steps to ensure that the mining machine operators, including Chamness, were staying out of the red zone when tramming the continuous miner. The mine had a responsibility both to take steps to better ensure that miners were not in the red zone and to take more substantial action against Chamness and other miners who were seen in the red zone, whether it be the red zone around the continuous miner or other equipment. It did neither. In reaching this conclusion I rely in part on the demeanor and attitude of the supervisors when discussing the red zone and the practice of counseling employees instead of taking some more definitive action to prevent miners from repeatedly entering the red zone, as defined by the mine operator or by MSHA.

I question whether the miners had the all-encompassing view of the red zone asserted by Knight Hawk, or if they understood the red zone as MSHA defines it. Nevertheless, my finding is the same in either case. Although Pasquino counseled Chamness twice during his 15 months as a supervisor, there is no evidence the Pasquino or anyone else at the mine followed through on any disciplinary action, nor is there any evidence that the mine established any specific programs, policies or procedures for addressing the red zone or disciplining miners in a way that would assure they would not enter the red zone after being observed doing so the first time.

Knight Hawk argues that, because MSHA did not ask Pasquino during the investigation what he understood the term “red zone” to mean, and because Pasquino’s accident investigation statement, Knight Hawk Ex. R, mentions other pieces of equipment, it cannot be shown that Chamness previously entered the red zone of a continuous mining machine. Pasquino testified that, during the investigation, when he responded that he had been in a red zone himself, he believed MSHA was asking about the red zone in the context of any piece of equipment in the mine, and not just the continuous miner. The mine argues that, because this mine defines the red zone as the area around not only the continuous miner, but also around other equipment, including ram cars and loaders, the miners who spoke with the MSHA investigation team, when discussing other miners in the red zone, did not necessarily mean the red zone as it related to a continuous miner and, therefore, their statements are of minimal value in this case.

The context in which the miners’ statements were made, along with the training materials and posters that include a continuous mining machine when discussing the red zone, lead me to find that most, if not all, of the discussion of the red zone during the investigation, related to the red zone as it applied to the continuous miner. The safety meetings covered “red zone/roof control” on some occasions, or covered, among other things, the roof control plan which refers to the red zone around the continuous miner. Further, while the mine’s annual refresher training materials include diagrams of a “red zone” with a continuous mining machine, Knight Hawk Ex. H p. 173-174, the diagrams for other pieces of equipment refer to the area as the “no go zone”. *Id.* at 176-181. All six miners who spoke to MSHA during the accident investigation made it clear that walking in the red zone was not an unusual practice. It follows that at least a portion of those occurrences were in the red zone area associated with the continuous miner. However, even if I accept that the miners were only seen near equipment other

than a continuous miner, it remains that, despite being told not to be in those areas, whether they be “red zones” or “no go zones,” miners were observed in those dangerous areas and none were disciplined. Accordingly, I find that the miners’ statements show that there were no consequences when miners did not comply with the mine’s policies regarding being in the wrong areas around equipment, whether the equipment was a continuous miner or something else.

The operator defends its lack of discipline by arguing that it was not required to discipline miners in the red zone because there was no evidence that, when a miner was seen in the red zone, it was the zone around the continuous miner. In essence, the mine argues that, since it has expanded the meaning of “red zone” beyond the definition MSHA utilizes, it should be excused from following policy and disciplining miners for being in the red zone as the mine defines it. The mine also asserts that, because its definition of the red zone is expansive, a miner could potentially be in the red zone thousands of times each year and therefore miners were observed in the red zone a small fraction of the thousands of possible opportunities. Even if the argument is based upon fact, it does not make it any less dangerous or any less prohibited to enter a red zone, even one time. Knight Hawk’s alleged expanded view of the red zone may in fact, dilute the need for extra caution in the red zone around the continuous miner.

The mine argues that Chamness’ failure to follow the verbal counseling instructions, to stay out of the red zone, are a significant mitigating factor in the negligence analysis. Knight Hawk Br. 22 (citing *Western Fuel-Utah*, 10 FMSHRC 256, 258-262 (Mar. 1998)). I disagree and find that the conduct of Chamness was foreseeable, unlike those of the employee in *Western-Fuels*. Accordingly, I reject the mine’s argument.

Based on the above discussion, I find that the mine was highly negligent in its training, supervision, and discipline regarding the issue of red zones. While some training was provided on the issue, it was essentially of no value and, in this particular instance, I find that it should not be considered a mitigating factor. Miners did not follow the training, and the mine did not enforce its own policies. The lack of discipline when miners were observed in the red zone rendered the training and supervision of those miners meaningless, and ultimately resulted Timothy Chamness losing his life after engaging in conduct that the mine knew was likely to occur. Accordingly, the Secretary’s high negligence designation is affirmed.

### **Unwarrantable Failure**

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and 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 conduct described as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) (“R&P”); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (approving Commission’s unwarrantable failure test). The Commission has explained that whether a citation is an “unwarrantable failure” is a question that should be evaluated based on the facts and circumstances in each case, and should be considered in light of a number of factors. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO*

*Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998) (Commissioner Marks, concurring in part and dissenting in part). Based on the following analysis of the factors enumerated by the Commission, I find the violation was a result of the mine's unwarrantable failure to comply with the mandatory standard.

*Length of time that the violation has existed.*

In *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009) the Commission emphasized that the duration of time that the violative condition exists is a "necessary element" of the unwarrantable failure analysis. The Commission, in remanding that case, instructed the judge to address the duration of the violative roof condition, which was found to have existed for multiple shifts and days, and determine if that duration qualified as an aggravating factor. In *Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010), the Commission explained that, even where the record of a case does not allow a judge to make a determinative finding with regard to how long a violative condition existed, the judge must analyze the element and "[e]ven imperfect evidence of duration in the record should be taken into account[.]" While the Commission has found that a duration of a "matter of seconds" may weigh against an unwarrantable failure finding, it has also held that a duration of a few minutes may support an unwarrantable failure finding. *Compare Dawes Rigging & Crane Rental*, 36 FMSHRC \_\_\_, slip op. 5 (Dec. 10, 2014) (noting that a miner who traveled under a suspended boom was only exposed for a "matter of seconds" which in turn weighed against a finding of unwarrantable failure), *with Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997) (Finding that a judge erred in relying upon the brief duration of the violation when vacating the unwarrantable failure designation. Noting that the only reason the duration of the violation ended was because a crane boom crushed and killed a miner who should not have been working under the boom).

While it is not entirely clear how long Chamness was in the red zone, here, as in *Midwest Materials*, the duration of the violation ended only because the miner was fatally injured by engaging in the exact activity the roof control plan, and in turn the standard, is designed to prevent. Even if this violation only existed for a short time, red zone violations can result in serious consequences in a short time and have been an ongoing issue at this mine since it opened in 2009.

The Secretary argues that, since the miners had been walking and working in the red zone for some time, without any disciplinary action, this element of the unwarrantable analysis is met. The mine, on the other hand, argues that miners may have been in a red zone associated with a machine other than the continuous miner and, therefore, it cannot be shown that the miners were violating the roof control plan on an ongoing basis.

I find that, while the violative condition, that is being in the red zone, may have existed for a short duration, it is reasonably likely that Chamness would have continued to do so had the

fatal injury not brought a stop to him operating the continuous miner. Accordingly, I find that this factor weighs in favor of an unwarrantable failure finding.

*Extent of the violative condition.*

In *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009), the Commission explained that the “extent of the violative condition is an important element in the unwarrantable failure analysis.” The Commission has explained that the purpose of this element is to “account for the magnitude or scope of the violation[,]” and the judge may analyze it by looking at, among other things, the “extent of the affected area as it existed at the time the citation was issued[,]” the number of persons affected, and the time and resources required to correct the condition. *Dawes Rigging & Crane Rental*, 36 FMSHRC \_\_\_\_, slip op. 5 (Dec. 10, 2014) (citing *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) and *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002)); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2331 (Aug. 2013). Moreover, a judge should not consider an operator’s past practices in connection with the extensiveness factor. *Id.* In *Dawes* the Commission found that, because only one miner endangered himself by walking under the suspended boom, the violation was not extensive. *Id.*

I agree that, given the number of miners who acknowledged that they had observed others in the red zone, the practice of working in the red zone was common. However, the Commission emphasizes the violation itself in discussing this factor and, here, there was only one miner working in the red zone at the time and it cannot be said that the violation was extensive. Accordingly, I find that this factor is not especially instructive in determining whether an unwarrantable failure exists.

*Whether the operator has been placed on notice that greater efforts were necessary for compliance.*

The Commission has explained that repeated, similar violations, and past discussions with MSHA about a problem at the mine may serve to put an operator on notice that increased efforts to comply are necessary. *IO Coal Co.*, 31 FMSHRC 1346, 1353-1354 (Dec. 2009). The prior violations relied upon to establish notice need not have been a result of an unwarrantable failure, nor do those violations need to have involved precisely the same activity, cited standard, or area of the mine. *Id.*; *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2344 (Aug. 2013).

The mine argues that it has had only one incident that related to a red zone violation since 2009, and Knight Hawk disciplined the miner for his involvement in the incident. The incident, which occurred shortly after the mine opened in 2009, resulted in a citation for a red zone violation after the miner’s arm was pinned by the conveyor on the continuous miner. The history of assessed violations provided by the Secretary demonstrates that the mine received one other citation for a violation of the roof control plan during the 15 month period prior to the accident in February, 2013. Sec’y Ex. 14.

The Commission has explained that its judges may take judicial notice of “extra-record information that is not the subject of testimony but is commonly known, or can safely be



assumed, to be true.” *Union Oil Co. of Ca.*, 11 FMSHRC 289, 300 n. 8. (Mar. 1989). In addition, the Commission has recognized that the existence of, and content in, MSHA public documents is subject to judicial notice. *Brody Mining, LLC*, 36 FMSHRC 2027, 2030 n. 4 (Aug. 2014) (taking notice of a report generated by the Department of Labor’s Office of Inspector General); *Black Diamond Constr. Inc.*, 21 FMSHRC 1188, 1202 n. 3 (Nov. 1999) (Commissioner Marks dissenting on other findings but taking judicial notice of MSHA handbook); *Jim Walter Resources*, 7 FMSHRC 1348, 1355 n. 7 (Sept. 1985)(taking judicial notice of an MSHA policy memorandum).

The witness for the mine, William Jankousky, the corporate safety director, agreed that there has been a great deal of emphasis by MSHA on the hazards associated with the red zone. A search for the term “red zone” on the MSHA’s website returns multiple pages addressing the importance of the red zone and the hazards associated with the area. I take notice of the search results, which include, among other things, summaries of accidents related to miners who were killed in the red zone, guidance on accident prevention which discusses red zone hazards associated with remote controlled continuous miners, statistics on fatalities which show section 75.220(a)(1) as the most cited standard for fatalities, information designed to increase hazard awareness among miners operating or working near continuous miners, graphics addressing red zone hazards and best practices for operators, and tips for avoiding injuries while operating and working near a continuous miner.<sup>1</sup> Moreover, MSHA includes the roof control plan standard, and in turn the red zone, in its Rules to Live By as one of the most frequently cited standards in fatal accident investigations. Fatality Prevention – Rules to Live By, <http://www.msha.gov/focuson/RulestoLiveBy/RulestoLiveByI.asp>.

Clearly MSHA has emphasized to mine operators the seriousness of the red zone. In an effort to curtail the many fatalities associated with the red zone, MSHA recently published a final rule which will require mines to install proximity detectors on continuous mining machines. 30 C.F.R. § 75.1732 (Published January 15, 2015 and effective March 16, 2015). Additionally, mine inspectors, while at the mine, routinely discuss red zone hazards and the fatalities that have occurred as a result of violations of the red zone portion of the roof control plan. Given all the information about the dangers of working in the red zone, and the emphasis MSHA places on the issue, the operator was on notice, and should have had a heightened awareness in identifying and correcting hazards associated with the standard, especially given the testimony that miners at this mine were observed working in the red zone on many occasions without consequence. I find that this factor weighs heavily in favor of an unwarrantable failure finding.

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<sup>1</sup> The search results were compiled by searching for the term “red zone” on MSHA’s website through its “Advanced Search” option, available at: [http://mshasearch.msha.gov/search?access=p&entqr=0&output=xml\\_no\\_dtd&sort=date%3AD%3AL%3Ad1&ie=UTF-8&lr=&client=MSHAResearch&ud=1&site=AllDocuments&oe=UTF-8&proxystylesheet=MSHAResearch&ip=10.2.12.238&proxycustom=<ADVANCED/>](http://mshasearch.msha.gov/search?access=p&entqr=0&output=xml_no_dtd&sort=date%3AD%3AL%3Ad1&ie=UTF-8&lr=&client=MSHAResearch&ud=1&site=AllDocuments&oe=UTF-8&proxystylesheet=MSHAResearch&ip=10.2.12.238&proxycustom=<ADVANCED/>)

*Operator's efforts in abating the violative condition.*

In evaluating the operator's efforts in abating the violative condition the judge should examine those abatement efforts made prior to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342 (Aug. 2013) (citing *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009) and *Warwick Mining Co.* 18 FMSHRC 1568, 1574 (Sept. 1996)). In *Consolidation* the Commission, in affirming the unwarrantable failure designation, noted the judge's finding that management did not take steps to remedy the type of condition cited despite being aware of a similar condition having been previously brought to their attention through the issuance of a citation.

Here, the mine took some steps to abate red zone issues by providing training to the miners. The mine included the issue of the red zones in its new miner training, task training and refresher training. Further, the red zone was sometimes a topic of discussion at the weekly safety meetings. However, there was little follow-through by the mine when it came to actually implementing and enforcing the training. When a miner was observed in a red zone, the incident was either not reported to management, or the person who was unlucky enough to be observed by a management member only received a counseling. The mine did little to support its suggestion that walking and working in the red zone were prohibited practices. Accordingly, I find that this factor weighs in favor of an unwarrantable failure finding.

*Whether the violation posed a high degree of danger.*

The Commission has found the high degree of danger posed by a violation to be an aggravating factor in support of an unwarrantable failure finding. *IO Coal Co.*, 31 FMSHRC 1346, 1355-1356 (Dec. 2009). The Commission has acknowledged that, conceivably, the degree of danger could be "so severe that, by itself, it warrants a finding of unwarrantable failure." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). Moreover, it has noted that a violation may be aggravated and unwarrantable where the hazardous nature of a violative condition is common knowledge. *IO Coal Co.*, 31 FMSHRC 1346, 1355-1356 (Dec. 2009) (citing *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding a violation to be an unwarrantable failure based on "common knowledge" that power lines are hazardous and precautions must be taken around them)). Further, when a mine operator ignores a chronic problem, the degree of danger and likelihood of something going wrong increases. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2343 (Aug. 2013). Furthermore, a high degree of danger may be evidenced where a fatal accident occurred as a result of the cited condition or practice. *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997).

Knight Hawk concedes, and I find, that the violation in this case certainly posed a high degree of danger. The continuous miner operator was killed as a result of the violation. The MSHA information provided to all mines demonstrates that working in the red zone is a major cause of fatalities in underground coal mines. The hazardous nature of working in the red zone was common knowledge, the mine knew the practice was occurring, and yet took no reasonable steps to prevent it from occurring in the future. As a result, the likelihood of an accident increased and, ultimately, resulted in a fatality. I find that the high degree of danger is an aggravating factor in this case.

*Whether the violation was obvious.*

The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009). Moreover, where an operator's conduct causes a violative condition to not be obvious, the operator cannot assert that the lack of obviousness is a mitigating factor in the unwarrantable failure analysis. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2343 (Aug. 2013) (citing *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1200-01 (Oct. 2010)) (upholding judge's unwarrantable failure finding where the operator deliberately ignored air velocity requirements in the mine's ventilation plan).

Knight Hawk concedes that the violation was obvious. Certainly the violation was obvious the moment Chamness stepped into the red zone. Given the many miners who had been observed in the red zone, the mine should have been aware of what had become a common practice and taken steps to better identify this type of violative conduct given how obvious it is and how easy it is to avoid.

*Operator's knowledge of the existence of the violation.*

In *IO Coal* the Commission reiterated the well settled law that, in addition to actual knowledge, an operator's knowledge of the existence of a violation may be established where the operator "reasonably should have known of the violative condition." *IO Coal Co.*, 31 FMSHRC 1346, 1356-1357 (Dec. 2009). The Secretary may establish that an operator "reasonably should have known of the violative condition" by showing that the "operator's knowledge of the specifics of its operations should have led it to conclude that violation charged would eventually occur[.]" *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1199-1200 (Oct. 2010) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-04 (Dec. 1987) and *Coal River Mining, LLC*, 32 FMSHRC 82, 92 (Feb. 2010)); *Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010) (remanding the case to the judge with the instruction to consider whether a supervisor reasonably should have known, based on knowledge of previous practices at the mine, that the violative condition would continue to occur.)

Here, when Knight Hawk management observed a miner in the red zone it would sometimes engage in discussion with the offending miner, but little else was done. Six miners, as well as Chamness' supervisor the night of the fatal accident, agreed that they had observed miners in the red zone. Chamness had been observed in the red zone prior to the date of the accident and the mine had not taken action to prevent the hazard from re-occurring. Given the information learned during the accident investigation, I find that the mine knew, or at the very least should have known, that miners continued to walk in the red zone. The fact that miners may have had a different view of what constitutes a red zone does not change my finding in this regard. No matter what the miners understood the red zone to be, working or standing in the red zone area was tolerated. The only disciplinary action taken by the mine against an offending miner was a written reprimand in 2009 after MSHA issued a citation for a violation of the roof control plan. I do not find the 2011 incident, discussed *supra*, to be applicable as far as disciplinary action is concerned, as it is obvious that the roof bolter intentionally moved his machine toward another miner. Nevertheless, that incident does serve to show the attitude of the miners toward the red zone.

While, as Knight Hawk contends, its roof control violation may have been brief and not extensive, under Commission precedent the Secretary satisfies her burden of establishing the unwarrantability of a roof control violation where a foreman knew of the violative condition, the violation occurred in a mine with a history of persons walking in the red zone, whatever that definition may be, and the violation created a hazard characterized by high danger. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610 (Aug. 1994). Because all of those elements are present here, and based upon my above findings with regard to the unwarrantable failure factors, which illustrate the mine's "indifference" and "serious lack of reasonable care" regarding red zone issues, I conclude that the violation was a result of the mine's unwarrantable failure to comply with the terms of its approved roof control plan and, in turn, the requirements of section 75.220(a)(1).

**Citation No. 8448666**

Citation No. 8448666 was issued by Inspector Terry Hudson on November 14, 2013 pursuant to section 104(a) of the Act for an alleged violation of 30.C.F.R. § 75.512. The citation alleges that the mine failed to maintain a continuous mining machine to assure safe operating conditions. Hudson determined that the condition resulted in a fatal injury, was S&S, affected one person, and was a result of moderate negligence. The Secretary proposed a civil penalty in the amount of \$8,209.00 for this alleged violation. Prior to hearing, the parties reached a settlement, the terms of which were read into the record.

The parties propose to reduce the negligence from "moderate" to "low," with a corresponding reduction in penalty, based on points, to \$3,074.00. The Secretary submits that the negligence is reduced because the location of the damage was such that it was not readily seen during the inspection. In addition, the parties further propose to amend the narrative of the citation to read as follows:

The Joy 14CM-15, Serial Number JM6284a, was not being maintained to assure safe operating conditions. The machine's trailing cable restraining clamp was located in such a manner that it was damaging the machine's hydraulic valve bank assembly wiring. When inspected, five of the solenoid coil control cables have been damaged with bare copper conductors showing on two of the coil control cables. The damaged control cables were the tail swing right and the stab up functions. This indicates that a complete and thorough examination was not done as required by this section. In addition data from the machine's on-board computer system, along with information gained during the interview process, indicate that immediately after the accident, the continuous mining machine's hydraulic system was not responding, preventing the tail swing left function from operating.

(Tr. 10-11).

I have considered the proposed modifications and find that they meet the requirements of the Act and, therefore, the settlement of Citation No. 8448666 is approved.

## II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine act delegates to the Commission and its judges “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act requires, that in assessing civil monetary penalties, the ALJ must consider six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), aff’d, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion that includes a consideration of the penalty criteria and the deterrent purpose of the Act. *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

Knight Hawk is a large operator. The gravity, negligence, and history of violations are addressed above. While Knight Hawk did abate the violation in good faith, it also argues that its post-accident installation of proximity detection devices should be considered a significant remedial measure that should be taken into consideration when assessing the penalty. While I commend Knight Hawk for installing the proximity detection devices, I find that that the \$70,000.00 proposed penalty for Citation No. 8439096 is appropriate in this case. The operator has stipulated that the penalty, as proposed, will not affect its ability to continue in business. Given my above findings, I assess a penalty of \$70,000.00 for Citation No. 8439096 and a penalty of \$3,074.00 for Citation No. 8448666.

## III. ORDER

I assess a total penalty of \$73,074.00 for both the settled citation and the citation addressed at hearing. Knight Hawk Coal Co. is hereby **ORDERED** to pay the Secretary of Labor the sum of \$73,074.00 within 30 days of the date of this decision. The contest cases, having been resolved in the penalty dockets, are dismissed.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 19, 2015

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

v.

SIERRA ROCK PRODUCTS, INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2011-1029-M  
A.C. No. 04-03489-253672

Sierra Rock Products

**DECISION ON REMAND**

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor through the Mine Safety and Health Administration (“MSHA”) against Sierra Rock Products, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). Following an evidentiary hearing in this and other Sierra Rock cases, I issued my decision on the merits. *Sierra Rock Products, Inc.*, 35 FMSHRC 49 (Jan 2013). The Secretary appealed my ruling on one withdrawal order to the Commission. On January 13, 2015, the Commission issued its decision. *Sierra Rock Products, Inc.*, 37 FMSHRC \_\_\_\_\_, 2015 WL 307554. The Commission remanded the case to me and, in accordance with its order, I enter the decision below.

**I. INITIAL DECISION AND COMMISSION REMAND**

In my decision, I modified Order No. 8561260 issued under section 104(d)(1) of the Mine Act. I affirmed the MSHA inspector’s determination that the violation was serious, was highly likely to result in a fatal injury, and was of a significant and substantial nature (“S&S”). I determined that the mine operator’s negligence was moderate rather than the result of its “reckless disregard” and I modified the order to a section 104(a) citation. 35 FMSHRC at 58. I reduced the penalty from \$52,500, as specially assessed by the Secretary, to \$6,000.

The Commission remanded the case to me “for further analysis in light of the cited standard and the relevant facts and circumstances” as discussed in its decision. *Slip op.* at 8. The Commission also vacated and remanded the penalty assessment in my decision “for reconsideration in light of any changes to the unwarrantability and negligence findings.” *Id.* Only Order No. 8561260 is before me on remand. I invited counsel for the Secretary and Sierra Rock to file statements of position on these issues and I considered their arguments.

Order No. 8561260 was issued for a violation of section 56.12017, which requires that power circuits be de-energized before work is performed on such circuits. 30 C.F.R. § 56.12017. The safety standard also requires that “[s]witches shall be locked out or other measures taken which shall prevent the power circuits from being energized without the knowledge of the individual working on them.” *Id.*

With respect to Order No. 8561260, I simply stated the operator’s negligence was moderate and was not the result of its aggravated conduct “[f]or the same reasons as discussed above[.]” *Sierra Rock Products, Inc.*, 35 FMSHRC at 58. This reference in my decision was to my analysis for Citation No. 8561252 and Order No. 8561261, which alleged violations of section 56.12040.<sup>1</sup> The Commission remanded the case to me for a “separate” analysis of negligence and unwarrantable failure for Order No. 8561260, considering the facts unique to the order. *Slip op.* at 5. The Commission’s decision directed me to consider several specific details on remand. These matters are discussed throughout the decision but are summarized in the penultimate paragraph as follows:

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

*Slip op.* at 8.

## **II. ANALYSIS ON REMAND**

On May 18, 2010, MSHA Inspector William Edminister issued Citation No. 8561252 at an electrical panel because the door to the electrical panel had to be opened to activate or shut down the conveyors, exposing the individual using the circuit breakers to energized electrical circuits within the panel.

On May 19, 2010, the inspector returned to the quarry and inspected an electrical panel in the motor control center (“MCC room”). Jim Hatler, the owner and operator of the mine, suggested that the inspector look at this panel because it was configured the same as the first panel cited and Hatler wanted to persuade the inspector that both panels were safe. Inspector Edminister informed Hatler that both panels violated section 56.12040. Hatler informed the inspector that the panels were inspected by MSHA during previous inspections and MSHA accepted the configuration of the panels during those inspections.

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<sup>1</sup> That safety standard states that “[o]perating controls shall be installed so that they can be operated without danger of contact with energized conductors.”



After conferring with the MSHA district office, Inspector Edminister informed Jim Hatler that he would issue Order No. 8561261 because the configuration of the second panel was the same as the panel involved in Citation No. 8561252. When Edminister communicated his decision to Hatler, he asked Hatler to return to the panel and de-energize it to allow Inspector Edminister to photograph the condition. The inspector testified that Hatler responded angrily; he “threw down some papers,” “[w]ent storming out” of the office, and “was raving the entire way to the MCC room.” (Tr. 50). Hatler admitted that he was angry with the inspector. (Tr. 170-71).

As Hatler and Inspector Edminister approached the MCC room, the inspector told Hatler that Hatler needed to de-energize the panel by using the main power switch located outside the panel rather than by reaching into the panel to flip the circuit breakers located 12 inches from the 480-volt electrical connection. Hatler admitted that Inspector Edminister asked him to de-energize the panel by turning off the main power switch:

[The inspector] told me that I had to de-energize [the panel] so he could collect his evidence. So then we went over, and I went in and I went to open the door [to the panel], and he informed me that I could not open the door, that I had to turn the main off.

(Tr. 170-71)

Inspector Edminister testified Hatler then “opened up the door very quickly, reached inside and looked like he racked out the three breaker switches.” (Tr. 50-51). Hatler testified that he “told [the inspector] in not such a nice tone that he had not proved to me in writing that he had – that I was in violation, and I wasn’t going to lock it out. And I opened the door and I reached in and turned the breakers off.” (Tr. 171). Hatler explained that he decided not to turn off the power at the main switch because he disagreed with the inspector’s assessment of the violation. Inspector Edminister issued an imminent danger order and Order No. 8561260.

#### **A. Unwarrantable Failure**

In analyzing this case a second time at the direction of the Commission, I place more emphasis on the seriousness of the violation and I find that Order No. 8561260 was caused by Sierra Rock’s unwarrantable failure to comply with section 56.12017. I conclude that the Sierra Rock demonstrated aggravated conduct that was greater than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). Hatler’s conduct was at least a serious lack of reasonable care. I find that the violation was the result of Sierra Rock’s unwarrantable failure to comply with the safety standard and that its negligence was high.<sup>2</sup>

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<sup>2</sup> Order No. 8561260 again becomes an order issued under section 104(d)(1) of the Mine Act. Because I held that the violation alleged in 104(d)(1) Citation 8561252 was not a result of Sierra Rock’s unwarrantable failure, I modified it to a section 104(a) citation. As a consequence, 104(d)(1) Order 8561257 became a section 104(d)(1) citation by operation of law and that citation is the predicate for the order at issue here.

I analyze each of the aggravated conduct factors in turn with respect to Order No. 8561260.

### **1. The Length of Time that the Violation Existed**

The condition did not exist for a long period of time, but the practice was long-standing. As I stated in my original decision, “Jim Hatler, in the inspector’s presence, opened the [door to the] electrical panel without first de-energizing the power within the panel and flipped the breaker switches to open the circuits to the conveyors.” 35 FMSHRC at 57. As a consequence, he exposed himself to live electrical components. The violation was an instantaneous action by the owner of the mine as opposed to an existing condition identified by the inspector. This was, however, a long-standing practice. Hatler was angry when he took this action and he did so after the inspector specifically asked him to de-energize the panel before he opened the circuits. I find that Sierra Rock’s violation of section 56.12017 existed over an extended period of time.

### **2. The Extent of the Violative Condition**

I find that the evidence establishes that the violation was extensive because it was a long standing practice at the plant to shut down the conveyors and restart the conveyors by opening the door to energized electrical panels and flipping the circuit breakers. I determined that the violation was serious, was highly likely to result in a fatal injury, and was S&S. Thus, Sierra Rock had a history of failing to de-energize power circuits before performing work upon the circuits in violation of section 56.12017. The violation was also extensive due to the serious hazard that was presented.

### **3. Whether the Operator Was Placed on Notice that Greater Efforts Were Necessary**

The operator had not been placed on notice that greater efforts were necessary to achieve compliance prior to this inspection. Sierra Rock argued that it had no knowledge that the electrical panel violated any safety standards based upon previous MSHA inspections. I credit the evidence presented by Sierra Rock that Hatler genuinely believed that Sierra Rock was complying with MSHA’s electrical safety standards. I do not know whether MSHA’s failure to enforce sections 56.12017 and 56.12040 was because other inspectors did not believe the subject panels violated the safety standards or whether the inspectors were simply unaware of the violations. Hatler was advised the previous day that he could no longer use the circuit breakers inside the panel to activate or deactivate the conveyors if the circuits in the panel were energized. Indeed, Inspector Edminister warned Hatler immediately prior to the violation that the panel had to be de-energized before he could reach into the panel. Given that MSHA had only started to enforce the two safety standards during the subject inspection, I hold that Sierra Rock was not placed on notice that greater efforts were necessary.

#### **4. The Operator's Efforts in Abating the Violative Condition**

Because Sierra Rock did not believe that its practices violated the cited electrical safety standards, it took no steps to abate the conditions. Nevertheless, the inspector advised Hatler to de-energize the subject electrical panel before he flipped the circuit breakers. This case presents an unusual circumstance because Hatler opened the circuits using the circuit breakers in an effort to show the inspector that his method was both safe and in compliance with MSHA's electrical safety standards. His method, however, was dangerous, especially considering the excited manner in which he performed it.

#### **5. Whether the Violation was Obvious or Posed a High Degree of Danger**

I find that a reasonably prudent person familiar with the hazards of energized electrical circuits would know that the practice used by Sierra Rock to shut down and start up conveyors created an obvious and serious safety hazard. Hatler believed that because he and his son were the only people who operated the circuit breakers, a safety hazard was not present because they had done it for years and were careful. As the Commission has noted, however, even "a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions[.]" *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). Even if I assume that Hatler was very conscientious when performing this function, fatigue or another distraction could easily cause him to make a fatal error. Because of the location of the electrical panel within the MCC room, the door could not be opened completely, which further contributed to the risk of an accident. I find that the violation was obvious and posed a high degree of danger.

#### **6. The Operator's Knowledge of the Existence of the Violation**

Hatler's belief that his actions did not violate the safety standard was unreasonable. The Commission held that the defense that an operator had a good faith belief that its conduct was in compliance with a safety standard requires not only a showing of good faith but also that the conduct was objectively reasonable under the circumstances. *IO Coal Co.*, 31 FMSHRC 1346, 1357-58 (Dec. 2009). Even if I assume that Hatler's actions were taken in good faith, I find that the cited procedure was objectively unreasonable given that live electrical components were 12 inches away from the circuit breakers.<sup>3</sup> The hasty and angry manner that Hatler acted also made his actions less reasonable and more dangerous.

#### **B. Negligence**

I find that Hatler's conduct exhibited a high degree of negligence. In assessing the negligence of a violation, the Commission considers "what actions would have been taken under

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<sup>3</sup> In the Commission's decision, Commissioner Robert F. Cohen stated that "[i]t is inconceivable that Hatler's angry act of putting his hand inside the electrical panel in defiance of the inspector's explicit warning, thus creating an imminent danger, could be determined to be characterized as an objectively reasonable act of good faith. *See, Consolidation Coal Co.*, 14 FMSHRC 956, 970 (June 1992) ('[N]o operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied')." *Slip op.* at 7 n. 9.

the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014). I find that the evidence establishes that a reasonably prudent person would not open the door to the electrical panel in this instance without first de-energizing the panel as the inspector directed. I find that Hatler’s conduct did not rise to the level of reckless disregard because he performed this task in the same manner for at least a decade without causing an injury or receiving a citation.

### **C. Other Matters**

The Commission asked that I discuss “the impact, if any, of the difference in the cited standards on the various unwarrantability factors.” *Slip op.* at 8. Given that I have now applied a distinct aggravated conduct analysis for Order No. 8561260, this issue is moot. In addition, I already discussed the impact of the “morning interaction between Hatler and the inspector regarding the MCC panel and the inspector’s instructions to de-energize before opening the panel.” *Id.* Finally, I concluded that Sierra Rock did not have “an objectively reasonable belief . . . that its conduct was in compliance with the cited standard.” *Id.* Sierra Rock abated the group of electrical violations by installing breaker panels outside the existing electrical panels.

### **D. Appropriate Civil Penalty**

The violation was serious, S&S, and Sierra Rock’s negligence was high. The assessed violation history report shows that Sierra Rock had a history of 13 violations in the 15 months preceding the instant inspection and that 3 of these violations were S&S. (Ex. G-11). Sierra Rock was very small. In 2010, it worked 9,461 man-hours and employed three to four people including Jim and Barry Hatler. 35 FMSHRC at 67. In my original decision I stated that I “reduced the penalties because of Respondent’s small size.” *Id.* The violation was abated in good faith. Sierra Rock did not establish that a reasonable penalty would adversely affect its ability to continue in business. At the hearing in this case, Sierra Rock introduced its corporate tax returns to prove that the Secretary’s proposed penalties would adversely affect its ability to continue in business. In my original decision, I held that this evidence was insufficient. *Id.* 66-69.

The Secretary specially assessed the \$52,500 penalty proposed for Order No. 8561260. 30 C.F.R. § 100.5.<sup>4</sup> In my original decision, I reduced the penalty to \$6,000. I assessed a total penalty of \$23,643 for all the citations and orders contested at the hearing by Sierra Rock.

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<sup>4</sup> The record does not state what penalty the Secretary would propose if he had used his regular assessment formula. Given the low history of previous S&S violations and the operator’s small size, I believe the proposed penalty under 30 C.F.R. § 100.3 would be higher than the minimum penalty of \$2,000 but less than \$12,000. In *American Coal Co.*, 35 FMSHRC 1774, 1822-24 (June 2013) (ALJ), former Commission Judge Michael Zielinski discussed the difficulty in assessing a penalty for a violation that the Secretary specially assessed. “The lack of transparency in the Secretary’s special assessment process . . . coupled with the Secretary’s refusal to disclose the bases for specially assessing a penalty, can frustrate” a judge’s ability to explain the disparity between the Secretary’s proposed penalty and the penalty assessed by the judge. *Id.* at 1822 (footnote omitted). The Secretary’s narrative findings attached to the penalty

(continued...)

Taking into consideration the six penalty criteria set forth in section 110(i) of the Mine Act, I assess a penalty of \$9,000.00 for this violation. As before, the operator's small size was an especially important factor in the penalty reduction.

### III. ORDER

For the reasons set forth above, Order No. 8561260 is **AFFIRMED** but the associated negligence is reduced from "reckless disregard" to "high." Sierra Rock Products, Inc. is **ORDERED TO PAY** the Secretary of Labor a total penalty of 9,000.00 for this order. Any unpaid portion of this penalty shall be remitted within 30 days of the date of this decision.<sup>5</sup>

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

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RWM

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<sup>4</sup> (...continued)

petition emphasize that he followed MSHA's special assessment procedures in this case because of the gravity of the violation and the operator's level of negligence. The Secretary has also posted at the MSHA website some general procedures that he follows when proposing a penalty that has been specially assessed. <http://www.msha.gov/PROGRAMS/assess/SpecialAssess/SpecialAssessments2011.pdf>. These pronouncements are not very helpful.

<sup>5</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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March 20, 2015

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

v.

HANSON AGGREGATES MIDWEST,  
LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2013-931-M  
A.C. No. 15-12905-324282

Mine: Laurel Quarry

**DECISION AND ORDER**

Before: Judge Andrews

Appearances: Emily O. Roberts, Esq., Office of the Solicitor, U.S. Department of Labor,  
Nashville, TN, Representing the Secretary of Labor

Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,  
Washington, D.C., Representing Respondent

**STATEMENT OF THE CASE**

This case is before the undersigned Administrative Law Judge on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Hanson Aggregates Midwest, LLC (“Hanson Aggregates” or “Respondent”) pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). Citation No. 8724144 was issued on December 5, 2012, with an assessed penalty of \$127.00. A hearing was held in Middlesboro, Kentucky on July 17, 2014, at which the parties presented testimony and documentary evidence. After the hearing, Post Hearing Briefs and Respondent’s Reply Brief were submitted and have been fully considered.

**ISSUES**

The issues to be determined are whether the citation was validly issued; whether the violation was the result of the operator’s moderate negligence; and whether and in what amount the assessment of a civil penalty against the operator is appropriate.

## JOINT STIPULATIONS

The parties agreed to the following stipulations, submitted and marked as Government Exhibit 1 at the hearing:

1. Hanson Aggregates Midwest, LLC, owns and operates Laurel Quarry, I.D. No. 15-12905, a limestone surface mine, which is located in Pulaski County, Kentucky;
2. Laurel Quarry is a “mine” as that term is defined in Section 3(h) of the Mine Act. 30 U.S.C § 803;
3. Respondent is subject to the Federal Mine Safety and Health Act of 1977;
4. 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;
5. At all times relevant to these proceedings, Laurel Quarry had an effect on interstate commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803;
6. Laurel Quarry is small, with 37,584 hours worked in 2012;
7. Copies of the citation in contest in this case are authentic and a copy was served on the Respondent by an Authorized Representative of the Secretary employed by the Mine Safety and Health Administration;
8. The Respondent timely contested the violation;
9. MSHA’s Proposed Assessment Data Sheet and “Exhibit A—Docket Number KENT 2013-931M” accurately set forth (a) the number of assessed penalty violations charged to Respondent for the period stated and (b) the number of inspection days per month for the period stated;
10. The penalty proposed will not affect the Respondent’s ability to continue in business;
11. The Respondent abated the citation timely and in good faith.

## EVIDENCE

### Testimony of Donald Michael Gabbard

Donald Michael Gabbard (“Gabbard”) is a mine inspector with the Department of Labor, Mine Safety and Health Division. He has both a four-year degree in education and a two-year degree in mining from Morehead State University. (Tr. 14)<sup>1</sup>. Gabbard attended the Mine Academy where he was trained to be an authorized representative of the Secretary of Labor in 2009. (Tr. 14). He has been employed with MSHA as either a mine inspector or trainee for approximately six years. (Tr. 14). Before working for MSHA, Gabbard worked on a surface coal mine for approximately six months and at an underground limestone mine for close to 28 years. (Tr. 15, 84). While at the limestone mine, Gabbard worked as a surveyor, a fill-in supervisor, and performed scaling operations. (Tr. 15). He held a blasting license for approximately 28 years. (Tr. 15). His experience includes roof control operator, running a bench and a face drill, maintenance, and production. In total, he has worked for approximately 35 years in the mining industry, including his time with MSHA. (Tr. 15-16).

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<sup>1</sup> Citations to the transcript will be labeled “Tr.” followed by the page number(s).

On December 5, 2012, Gabbard inspected Laurel Quarry, which is an open pit quarry that produces limestone. (Tr. 16-17). During his inspection, Gabbard issued a citation for loose ground, which consisted of a large boulder that he estimated to be approximately 5ft x 5ft x 3ft perched on a 40 foot highwall. (Tr. 17-18, 23). The citation was for a violation of standard 56.3200, which requires loose ground to be taken down or supported before work or travel is permitted in any area that could be affected by it. (Tr. 19). The standard also requires a warning or barricade to be in place until the loose ground condition is corrected. (Tr. 19).

Gabbard testified that the condition cited had been driven past while he and Respondent's Agent James Kirby ("Kirby") were on the bench road to inspect an excavator. (Tr. 19-20). The bench had been barricaded off with a berm that had to be moved in order for them to gain access to check the excavator. (Tr. 20-21, 115-117). He did not see the loose boulder as they drove by, due to the curvature of the road that goes around to the active bench. (Tr. 20). However, when they were on their way back from the excavator inspection, Gabbard explained that he could see the large boulder with air coming through the cracks around and behind it. (Tr. 20). He discussed the boulder with Kirby, who was adamant that he had not seen it before. (Tr. 21). They also discussed the need to have the boulder taken down since daylight could be seen around it. (Tr. 21). Gabbard could not recall whether Kirby agreed the boulder needed to be taken down, but testified Kirby understood it would have to be tested. (Tr. 21).

Gabbard explained that if the berm at the base of the wall had been properly constructed to 25 percent of the height of the wall away from the base of the wall, he would have found the boulder's condition to be safe even though it was loose. (Tr. 21-22). He testified that the berm was nowhere near the required 25 percent, and part of it was totally missing and banked up against the face of the highwall above it. (Tr. 22). Gabbard explained that this would make a ramp, which could cause the boulder to speed up and possibly cross the bench or fall into the work area over 100 feet below. (Tr. 22). He estimated that the rock on the highwall was about 40 feet high from the bench. (Tr. 22, 25). Gabbard further explained that he knew the boulder was loose because it was setting(sic) loose independently and he could see air or daylight behind the fractures on the side of the rock. (Tr. 23). Given the approximate size of the boulder, he estimated it weighed around 11,000 pounds. (Tr. 24, 111). Gabbard believed the condition of the loose boulder was "absolutely, 100 percent" a hazard, and if it had come down it could have crushed people using the roadway below causing fatalities. (Tr. 25, 87).

Gabbard stated that the road below the boulder was relatively narrow and there was a berm on the outside of the roadway to prevent falling over the bench to the lower work level. (Tr. 25). On the highwall side of the roadway, there was a partial berm in place, but some sections were nowhere near the required distance of 10 feet away from the base of the highwall. The back of the berm almost touched the highwall. (Tr. 26). Gabbard did not measure the width of the road; however he estimated that it was approximately 17 feet wide. (Tr. 112). According to Gabbard, the area affected by the loose material would definitely include the travel route to the bench and possibly even the workstation below because the bench was so narrow. (Tr. 26).

Gabbard opined that the condition had existed for a minimum of several weeks depending on when the bench had last been blasted or the last time there were severe rains. (Tr. 29). He could tell there had recently been rain because the bench was very muddy. (Tr. 29). The



bench was in existence when Gabbard previously inspected the mine several months prior. (Tr. 30). He also testified that this particular bench was exposed to scaling materials, drills, loaders, and supervisor's trucks as well as foot traffic from blasters. (Tr. 31). He believed that if the excavator was located on the bench and it had been used, then it was an active machine that would have been on the bench during the time the loose condition existed. (Tr. 32). Gabbard only saw the miner who accompanied him on the inspection in the affected area, but testified that the area was active because it contained a running machine that had been operated. (Tr. 32).

After spotting the condition, Gabbard stated that for about 40 minutes he and Kirby discussed getting the scaler off the bench and not exposing any miners to the loose condition. (Tr. 33). He testified that it was correct that he and Kirby were together at the time of the scaling. (Tr. 200). From where they were standing, he could not see where the boulder fell or any pieces of rock that might have fallen with it. (Tr. 200). Gabbard testified that the scaled material landed in the end of the berm that was right at the base of the highwall. (Tr. 35-36, 87). He testified the boulder did not clear the berm and that Kirby responded to this by saying, "it didn't clear the berm; it's not a violation." (Tr. 36). Gabbard believed it was still a violation but was influenced to lower it from Significant and Substantial ("S&S") to non-S&S. (Tr. 36).

Gabbard explained that it was still a violation because it could have cleared the inadequate berm had it bounced even the least bit to the west. (Tr. 37). Gabbard stated that based on his experience as a miner and as an inspector, it would not be possible to predict exactly how a loose boulder or loose material would fall. (Tr. 133). Gabbard suggested that if the boulder had fallen 10 separate times, it would not have fallen and landed the same way each time depending on what it hit, how much loose it knocked off, and what corner struck the wall. (Tr. 110). He believed they were very fortunate the pile of muck located right up against the face of the highwall was so soft and that the boulder went into this soft material. (Tr. 37). He testified that when the boulder fell into the leftover muck material, it sucked it in like "dropping a rock in the mud." (Tr. 37). He also stated that approximately 10 rocks did clear the berm and did come into the roadway although this was not in the citation. (Tr. 38, 87-88, 90). And, in reference to the large boulder at issue, he stated that it could have "absolutely" fallen in a different way, depending on its trajectory and how it struck the wall. (Tr. 39). Had the rock not been scaled, Gabbard testified that "something very ugly could have happened," with a potentially fatal accident due to vehicles and foot traffic on the bench. (Tr. 40-41).

Gabbard would have expected only one miner to have been affected by the situation, as there would usually only be one person going past the dangerous situation at a time whether it was a driller, supervisor, or mechanic. (Tr. 41-42, 122). He stated there was no warning sign posted indicating loose. (Tr. 42-43). There was, however, a barrier of muck in place at the bench entry. (Tr. 42).

Gabbard designated the citation as moderate negligence because the loose boulder was not highly obvious from one direction and could be overlooked. (GX-3, Tr. 44-45).<sup>2</sup> He

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<sup>2</sup> Hereinafter, Government exhibits will be referred to as "Gx" followed by a number. Respondent's exhibits will be referred to as "Rx" followed by a number.

explained that he was not able to observe the boulder until he was on his way out of the bench. (Tr. 45). Gabbard found this to be a mitigating circumstance, which prevented a finding of high negligence. (Tr. 45). He also stated that Kirby was adamant that he was unaware of the loose boulder and Gabbard believed him. (Tr. 45).

Gabbard is required to take notes during an inspection and he takes such notes from the time that he steps out of his vehicle until the time that he gets back in. (Tr. 45). These notes then become part of the report that he turns into his field office supervisor.<sup>3</sup> (Tr. 45). Gabbard took field notes during his inspection of Laurel Quarry in December 2012. (Tr. 46.) His notes contain in pertinent part:

Loose ground conditions were above the roadway to the upper . . . ABC bench. Access to this roadway had been bermed off but was opened so the equipment on the bench could be inspected. The workers' pickup and the supervisor's pickup both travel past the loose, which was hard to see from the entry view. Upon exiting the bench, this AR spotted and pointed out loose ground overhanging the roadway. The rock was approximately five foot by five foot by three foot cubed and was cracked loose to where open sky . . . could be seen behind the loose in one section. . . . The area was barricaded immediately. The excavator operator moved the berm with a dozer and drove a pickup past the loose. . . . When scaled, the loose was caught by the berm. The boulder did scale easily but did not clear the berm and enter the roadway.

(Tr. 48-49, GX-4).

His notes further indicated (1) that he had marked injury or illness as reasonably likely, but after further discussion he changed his marking to unlikely, (2) that the inspection party had travelled past the loose – this being the exposure, and that if left in this condition, it would be traveled past again, (3) the injury would be fatal by a crushing injury from a falling boulder, (4) the number of persons affected would be one – the next person in the area, and (5) the negligence was moderate due to the lack of visibility when approaching the bench, recent rains could have loosened material around the boulder, and the agent was adamant he was unaware of the condition. (Tr. 49-50; GX-3, 4)

Gabbard testified regarding details from the Regular Inspection Information form, which is an official U.S. Department of Labor, Mine Safety and Health Administration document. (GX-6). In the document citation number 8724144 was considered a non S&S violation because the boulder did not cross the protective berm when it was scaled and only smaller pieces entered the roadway. (Tr. 55). Gabbard explained that he referenced the protective berm in the citation because the berm was supposed to be 10 feet away from the base of the highwall, but in this case it was only four or five feet away. (Tr. 55-56). He stated the boulder ended up falling into the berm, but smaller rocks did enter the roadway. (Tr. 56). He only mentioned these rocks in his typed closeout notes. (Tr. 100).

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<sup>3</sup> The field notes are available at GX-4.

Gabbard took photos of both the violation and its abatement. (Tr. 56). These photographs comprised Government Exhibit 7, A-J. (Tr. 57.). During Gabbard's testimony, he gave a description of and explained what was portrayed in each photo. GX-7A was described as a picture of the boulder at issue. It showed how the sky could be seen on the left side where there was a crack, and how it appeared that nearly 70 percent of the boulder was not supported. (Tr. 58, GX-7A). GX-7B captured the boulder's profile where a crack could be seen with air going through it. (Tr. 58; GX-7B). GX-7C displayed a profile picture of the wall itself and other rocks that were protruding from it, which could have potentially affected the trajectory of the boulder when it was taken down. Gabbard explained that this particular photograph was also taken to show the road condition, the loose material, and to give perspective on the distance because it was deceiving. (Tr. 59-60). After examining GX-7C and RX-5, Gabbard explained that the berm ended before the end of the highwall and part of the slope shown in the photographs had to be treated as a highwall because it was so significant, and there was no berm at that point. (Tr. 202). Gabbard testified that the boulder came down pretty much right at the junction where the berm ended and the muck material began. (Tr. 204). Gabbard stated that there was no distance between the boulder and the face of the highwall and that nowhere in GX-15 could you see a definitive berm pulled out from the face at least 10 feet. (Tr. 205).

Gabbard testified that GX-7D was basically the same photograph as GX-7C except that it showed muck material at the bottom of the wall. (Tr. 63). Gabbard stated that on this side of the wall there was no berm whatsoever, only the muck pile, which could have caused any material that fell to gain speed. (Tr. 63).

He stated GX-7E was taken from the intake side to show that not only was the bottom of the boulder not connected to the wall, but also that there was a crack on the boulder's right side which extended back to where the boulder was not connected on the right side. (Tr. 64).

Gabbard testified that GX-7F depicted the boulder near the left of the picture and how the berm was nearly non-existent below the wall. (Tr. 65). He stated that most of the material near the base of the wall was primarily muck which could help the rock speed up, and in the far low right corner of the picture you could see where the berm began. (Tr. 65)

He said GX-7G showed the highwall after the boulder had been removed. (Tr. 66). Gabbard described GX-7H as a picture of the boulder after it was scaled from the highwall. (Tr. 67). He explained that the boulder landed approximately four to six feet away from the wall and that only half of it could be seen as the rest was buried in the soft muck. (Tr. 67).

Gabbard described GX-7I as an additional picture of the boulder where it landed in the loose material. (Tr. 68). Finally, he testified about GX-7J and explained that this photo was taken to show how there was not a proper berm in place and that additional rocks did fall into the roadway after the boulder was scaled. (Tr. 68) Red circles were drawn around the rocks in GX-15 since he did not have anything in writing describing which rocks had fallen in the road. (Tr. 102-103). Gabbard knew these rocks cleared the berm because they were fresh and not the same texture or color, and were drier, making it fairly obvious they came off the highwall with the boulder. (Tr. 69, 102-103). This exhibit showed all the pieces as they were right after the boulder was scaled, except for one rock that had been moved out of the roadway. (Tr. 69, 107).

Gabbard testified that “the citation would not have been issued if the berm had been the proper distance back and the proper height up in order to prevent the boulder from clearing the berm.” (Tr. 71-72). To be considered an adequate barrier, the berm would have to have been the required 25 percent from the wall to where it began. (Tr. 72). Estimating the highwall at approximately 40 feet would require the beginning of the berm to be at least 10 feet from the base of the wall. (Tr. 72). Gabbard explained that there was not enough room on the bench to create an adequate berm because the road was so narrow. (Tr. 73). MSHA provides an online handbook as well as policies on CD that can be referenced for guidance on how to properly build berms, and they are updated frequently. (Tr. 73–74).

The Haul Road Inspection Handbook provides guidance on how to use berms to protect miners from rock falls. (Tr. 76). Gabbard read from page 3 to explain how as a rule of thumb, “a barricade should be placed a distance out from the wall of either 15 feet, or one-fourth of the wall height, whichever value is greater.” (Tr. 76). The handbook also provides that the height of the barricade should be at least four feet; and where the highwall height exceeds 60 feet, barricades should be at least six feet high. (Tr. 76; GX-8). Gabbard testified that the protective berm was not four feet high in all places; in some instances the muck was more than four feet high, but there was not a constructive berm that was more than four feet high. (Tr. 76). He explained that in order for the berm to have met the 25 percent requirement, it should have been a minimum of 10 feet from the base of the wall to where the back side of the berm begins. (Tr. 77). According to Gabbard, the berm on the highwall side and below the loose ground conditions did not resemble these minimum dimensions at all. (Tr. 77). Gabbard further testified that he also uses the Highwall and Pit Enforcement Guidance document dated April 21, 2010, for guidance on how to use berms to protect from rock falls. (Tr. 79; GX-9). This document reduced to writing MSHA’s policy that a protective berm should be out from the base of the highwall a distance of 25 percent of the height of the highwall. (Tr. 79).

#### Testimony of James Ollie Kirby

James Ollie Kirby is a plant manager for Lehigh Hanson, which includes Hanson Aggregates Midwest. (Tr. 138). He is the plant manager at Laurel Quarry in Somerset, Pulaski County, Kentucky where he is responsible for communicating with his employees, safety, and ensuring the plant operation runs okay. (Tr. 138). He sometimes operates machinery himself and supervises a total of 16 employees. (Tr. 138-39). Kirby has been with Hanson Aggregates for 39 years. (Tr. 139). He has worked in the mining industry since 1997 and was in the construction business for the remainder of the time. (Tr. 139-40). In addition to working as a plant manager, Kirby also worked as a maintenance mechanic and an equipment operator. (Tr. 140). Most of his experience has been with surface mining. (Tr. 140).

Kirby was familiar with the highwall that was cited in this case, and he accompanied the Inspector during the inspection. (Tr. 140-41). Laurel Quarry is a surface mine that mines limestone aggregate. (Tr. 141). Production generally begins by removing the overburden to get to the rock, which is then drilled and blasted. (Tr. 141) Laurel Quarry has multiple highwalls, some are active and others are inactive. (Tr. 141-42). Kirby testified that there is a safety program at the mine including weekly toolbox meetings, annual safety audits, emails on safety concerns, and MSHA fatality alerts. (Tr. 142).

Kirby testified that when at the mine he examines the active highwalls every day to ensure that they are safe, meaning no loose rock material and adequate berms. (Tr. 143). If Kirby is unavailable, other employees are trained in highwall safety and will sometimes help with the examinations. (Tr. 143-144). Kirby reviews all workplace examinations after they are conducted and if conditions needing correction are found, they are corrected. (Tr. 144).

Kirby described the highwall at issue, which was located on the north side of the pit. (Tr. 145). He said it was the highest wall at the mine. The AT bench was located right in front of the wall. (Tr. 145). There was also a wall on the bench below, the ABC bench. Kirby explained the layout -- first you have the overburden, then the AT bench, and then the ABC bench below the AT. (Tr. 146). The boulder at issue was on the highwall above the AT bench. (Tr. 146).

Kirby testified that he had recently measured the distance between the berm and the wall in the area where the boulder was located. (Tr. 146). He said that the berm and the wall had been untouched since the time of the inspection. (Tr. 147). Kirby measured a distance of 15 feet from the inside of the berm to the base of the wall and 18 feet from the center of the berm to the base of the wall. (Tr. 147). He estimated that the wall was anywhere from 35-40 feet tall. (Tr. 147). With that estimation, the measurements he took would be approximately 30 percent of the height of the wall, which was more than the required 25 percent. (Tr. 147). Kirby also measured the width of the roadbed from the inside edge of the base of both berms and found it to be 25 feet wide. (Tr. 148-49). He testified that the road was not used very much given that it was inactive. (Tr. 149). Kirby remembered last being there on November 1, 2012 based on his blasting and drill logs, which he had just recently looked at within the last few weeks. (Tr. 150).

At the time of inspection, the whole bench was blocked off by a berm. (Tr. 150-51). Kirby stated that when the bench was last used in early November whoever was working would have been on a different part of the bench in an area past where the boulder was located. (Tr. 151-52). He explained that the bench dead-ends approximately 100 to 125 feet past where the boulder was located. (Tr. 152).

Kirby explained that they drove onto this bench during the inspection because of an excavator that was parked on the other side of the berm barricade that Gabbard wanted to inspect. (Tr. 153-54). The barricade had to be opened in order for them to get through to the excavator, which was located on the east end of the bench. (Tr. 154-55). Kirby asked his excavator operator to come up and start the excavator so it could be inspected. (Tr. 155). During the trip, they first crossed the barricade and then saw the excavator before they approached the area where the boulder was located. (Tr. 155). The last time that the excavator had been used was in late October when it was used for removing material from the wall for the ABC bench. (Tr. 155-56). He stated that somebody would have had to cross in front of the boulder in that early part of November. (Tr. 176) Kirby testified that the excavator had been parked in that area because it was a "pretty good size" and they did not have another need for it so they let it sit. (Tr. 156). Gabbard did not issue any citations for the excavator. (Tr. 156).

After the inspection, the excavator operator left, leaving only Kirby and Gabbard. (Tr. 157). Gabbard wanted to drive out on the bench while they were still up there, which they did, and Gabbard began inspecting the highwall. (Tr. 157-58). Neither Kirby nor Gabbard saw the

boulder when driving past the highwall for the first time. (Tr. 158). It was not until they were on their way back that they could both see the crack behind the boulder. (Tr. 158-59). Gabbard told Kirby that they had a problem, and Kirby agreed. (Tr. 160). Kirby reminded Gabbard that he had a berm, but Gabbard did not think the berm could catch the boulder. (Tr. 160). Kirby asked Gabbard to let him get the excavator and push the boulder off the wall and see where it would land. (Tr. 160). Gabbard agreed to that plan. (Tr. 160).

Kirby testified that they had a lot of rain in October and November and speculated that the gap behind the boulder was due to the rain. (Tr. 160-61). He stated that he had previously examined this highwall and had not seen the boulder in that condition. (Tr. 161). According to Kirby, Gabbard never mentioned the berm being inadequate during their discussions. (Tr. 161).

The excavator operator was called back up to do the scaling; he had to go all the way around the pit to the west side and come up to get to the boulder. (Tr. 162). The excavator did not have to drive past the boulder to get to this position. (Tr. 162). When the operator had the excavator in position, he was told to go ahead and push it off. (Tr. 163). Kirby estimated that he and inspector Gabbard were about 350 yards from the boulder when it was scaled. (Tr. 164). Due to the elevation, they could not see whether any other rocks fell along with the boulder. (Tr. 164-165). Kirby took a photograph on July 7, 2014 of the area on the wall where the boulder came off, and he testified that the area had been inactive up until the date of the photograph. (Tr. 168, Rx-4).

After the scaling was completed, Kirby and Gabbard went to inspect the boulder without making any other stops. (Tr. 169). Kirby testified that he saw where the boulder had fallen behind the berm, but did not see any rocks that had fallen into the roadway. (Tr. 170-171). He did not move any rocks from the roadway and did not know of anybody else moving any rocks. (Tr. 171-72). Kirby testified that the inspector was surprised to see that the boulder stayed behind the berm; basically that the berm did its job. (Tr. 172). Kirby believed the berm was in the right position to protect the miners because it was the right height and distance from the highwall. (Tr. 172, 174).

When asked about GX-7C, Kirby testified that it showed a pile of sandstone, shale and dirt that was piled up against the wall. (Tr. 185). He agreed that there was no space between that material and the wall and that it was sloped towards the road. (Tr. 185). Kirby also agreed that there was supposed to be a space between the wall and where the berm started. (Tr. 185). He explained that what was shown in GX-7C was not a picture of a highwall and was not the same wall the boulder was located on. (Tr. 186). He marked GX-16 to show where he saw a berm. (Tr. 187).

Kirby identified GX-14 as a picture of the scaled boulder. (Tr. 189). He agreed that there was material directly up against the wall, but that it was not part of the berm which was located on the south side of the picture. (Tr. 189). Kirby also examined GX-7C in comparison with RX-4 and noted that you could see the same area in displayed in GX-7C in RX-4. (Tr. 192). Kirby could not see the edge of the berm displayed in GX-7C in RX-4. (Tr. 192). He could, however, see where the highwall ended out past the boulder in both exhibits. (Tr. 193). Kirby marked on

RX-4 where the highwall ended and the material began to slope up against the wall. (Tr. 196, Rx-5). He testified that the sloped material began after the highwall ended. (Tr. 196).

Kirby told the inspector he did not agree with the citation because the berm held the boulder. (Tr. 173). Kirby did not think the boulder was loose. (Tr. 174). Kirby examined exhibit GX-7A and testified that he could see sky through the crack behind the rock, and felt that the rock was not secure but he would not say it was loose. (Tr. 182).

## **CONTENTIONS OF THE PARTIES**

The Secretary contends that Respondent violated 30 C.F.R. § 56.3200, that the violation could have resulted in a fatal injury to one miner, that the violation resulted from the operator's moderate negligence, and that the assessed penalty of \$127.00 is appropriate in light of the six 110(i) criteria. *See Sec'y Post-Hearing Brief* at pp. 6-11.

Respondent contends that it did not violate 30 C.F.R. § 56.3200 because there was no hazardous ground condition. Assuming *arguendo* that there was a hazardous ground condition, Respondent asserts that no employees would have been exposed to the hazard because the workbench was inactive. *See Respondent's Post-Hearing Brief* at pp. 8, 17.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

### Respondent Violated 30 C.F.R. § 56.3200

On December 5, 2012, at 1355 hours MSHA Inspector Donald Michael Gabbard issued this citation with the following Condition or Practice:

Loose Ground conditions were observed above the access road to the ABC level workbench. An approximate 5ft x 5ft x 3ft loose boulder was approx. 40 ft. above the travel route. This condition would expose persons using the route to crushing hazards if the boulder cleared the berm at the base of the highwall when falling. The roadway was used today to access the excavator on the bench. Crushing injury from falling material can be fatal.

The Termination Action indicated that the boulder was effectively scaled down. It did not cross the berm and enter the roadway. The Citation was terminated at 1405 hours. (Gx-3).

The cited standard, 30 C.F.R. §56.3200 provides the following:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

There is no general requirement that a violation of a regulation must create a safety hazard for a valid citation to issue. If conditions exist which violate the regulation, a citation is proper. *Allied Products, Inc.*, 666F.2d 890, 892-893 (5<sup>th</sup> Cir. 1982). Commission case law is consistent with this principle in that section 56.3200 “requires that operators restrict miners’ access to areas where hazardous conditions exist, whether or not it is likely that the hazard will result in an injury.” *Cyrpus Tonopah Mining Corp.*, 15 FMSHRC 367, (March 1993). In order to establish a violation of section 56.3200, the Secretary must demonstrate the operator’s failure to maintain highwall stability by correcting hazardous conditions before work or travel is permitted in an affected area. *See Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014). Whether a violation has occurred is measured against the standard of whether a “reasonably prudent person” familiar with the factual circumstances would recognize that a hazard existed within the purview of the applicable standard. *Id.* (citing *Spartan Mining Co.*, 30 FMSHRC 699, 711 (Aug. 2008)).

The Commission has affirmed the determination of an ALJ that §56.3200 was violated where a high spoil pile and a slope had not been taken down to prevent rocks from falling and miners were allowed to work and travel in an adjacent area. *Bellefonte Lime Company, Inc.*, 20 FMSHRC 1250, 1251 (Nov. 1998). In a case involving rocks on top of a highwall that were in danger of falling in an area that was not barricaded Judge Manning found there was a violation of §56.3200. I agree with his analysis of the two parts of the safety standard:

The safety standard provides that “[g]round conditions that create a hazard to persons shall be taken down or supported *before other work or travel is permitted in the affected area.*” (Emphasis added). The second part of the safety standard provides that “[u]ntil *the corrective work is completed*, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.” *Secretary v. Lehigh Southwest Cement Co.*, 33 FMSHRC 340, 349 (Feb. 2011)(Emphasis added).

In *Secretary v. Hoover, Inc.*, 33 FMSHRC 751, 756 (Mar. 2011) Judge Miller found that where there was loose material on a highwall and the area had not been bermed-off or barricaded there was a violation of §56.3200. The Judge pointed out that the mine could have barricaded the area if it did not want to scale the highwall, but failed to do so.



In the instant case the AT bench had been barricaded with a berm. Along the highwall side of the bench, there was muck material also referred to as a berm. However, the presence of muck or berm at the base of a highwall does not change the fact of a hazard presented by loose unconsolidated material, such as the large boulder, high on the face of the highwall. It follows that I do not find persuasive decisions suggesting that muck or berm at the base of a highwall means the loose material on a highwall that has not fallen does not constitute a hazard.<sup>4</sup> This is because in any given fall of rock the path and presence of obstacles that could change the path or trajectory of the rock, including the shape and size of the rock itself, would preclude precise prediction of the final resting spot.

The serious nature of the loose boulder observed by Gabbard is underscored by the overall conditions on the AT bench that day. Gabbard went to great lengths at hearing to establish that the berm that did exist did not meet MSHA's safety standards. (Tr. 22, 26, 44, 68, 71-73). Gabbard's testimony and the photographs support a finding that the berm material was not 10 to 15 feet from the base of the highwall to the beginning of the back of the berm. The road was narrow and there was not enough room for these dimensions to be met. I credit Gabbard's estimates that the bench was only 17 feet wide considering the outside berm, and hence there was insufficient width to accommodate an adequate berm pulled out 10 feet from the base of the highwall (GX-7C, GX-7D, GX-7F, GX-7J, GX-15). Kirby's reported measurements suggesting a much wider bench were taken long after the date of the citation, just before the hearing. His testimony is not supported by the contemporaneous photographs, and *exactly* where he made any such measurements was not *documented*. Certainly, the photographs in RX-4 and RX-5 are from a distance and not helpful. It is for these reasons that I place greater weight on the observations and estimates made by Inspector Gabbard at the time of the citation than the attempt by Kirby to discredit Gabbard's conclusions.

It was fortunate in this case that the large boulder happened to land in muck that was soft enough to absorb the impact and hold it against further bounce or travel. But the result could have been different, had it landed on a more solid pile of material and bounced, or been projected by obstacles in its path to go beyond the muck. Further, the photographs and testimony do show that some smaller rocks did fall onto the roadway. The presence of these fresh smaller rocks on the bench roadway supports the opinion of Inspector Gabbard that the berm was not adequate and the path of falling rock cannot be precisely predicted. To prevent violation of the safety standard, where there is loose unconsolidated material on a highwall, the area must be barricaded and a warning sign posted until such time as scaling is performed and completed.

The barricade to the bench was removed and the inspection party travelled along the AT and under the boulder before any scaling took place. As observed by Judge Lewis, under strict liability standards, Respondent "had the responsibility to ensure that its mine site was safe and that any hazardous highwall condition be corrected." *Secretary v. Tulsa Stone Company*, 35 FMSHRC 3392, 3398 (Nov. 2013). When a violation of the Act is found, operators are mandatorily subject to strict liability pursuant to section 110(a) of the Act, 30 U.S.C. § 820(a).

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<sup>4</sup> See, *Chico Crushed Stone Partnership*, 15 FMSHRC 524 (Mar. 1993)(ALJ), *Hanson Aggregates Southeast*, 28 FMSHRC 1049 (Nov. 2006)(ALJ), *Nelson Quarries, Inc.*, 30 FMSHRC 254 (Apr. 2008)(ALJ).

*See Wake Stone Corp.*, 2014 WL 1870764 (April 2014). Before, or upon, removal of the barricade the highwall should have been scaled before any access to the area was allowed.

The Secretary presented sufficient evidence of a hazardous condition associated with the highwall above the AT bench at Respondent's mine to establish a violation of § 56.3200. In making this finding, I rely primarily on the testimony of Inspector Gabbard who observed a loose boulder perched on the side of a highwall that was approximately 40 feet tall during his inspection of the subject mine on December 5, 2012. (Tr. 16-18, 23). Gabbard reasonably estimated the boulder was approximately 5ft x 5ft x 3ft in dimension and weighed 11,000 pounds. (Tr. 17-18, 23-24, 111). I credit Gabbard's testimony that he knew the boulder was loose because it was sitting on the highwall independently and he could see air or daylight behind the fractures on the side of it. (Tr. 23). The boulder was overhanging the roadway, sitting loose independently, not connected underneath to the wall, and nearly 70 percent was not supported. (TR. 23, 58, 64; GX-5, GX-7E) Given its loose condition, Gabbard considered it to be a definite hazard, and if it had come down off the highwall it could have caused a crushing fatality. (Tr. 25). Photographs of both the hazard and its abatement were taken during Gabbard's inspection, which were admitted into evidence at the hearing. (Tr. 56-69). GX-7A clearly depicted the crack on the left side of the boulder and it does also appear that nearly 70 percent of the boulder was unsupported. (Tr. 58, GX-7A). There were smaller rocks that had fallen out beyond any highwall berm and onto the roadway. (GX-15).

Kirby testified that in his opinion the boulder was not loose on the day of the inspection even though he agreed air could be seen coming through the crack. (Tr. 174, 182). His position was that the boulder did not pose a hazard, although it did need to be "taken care of" because if a rock that size became unstable it could fall off the highwall. (Tr. 183). However, unlike Inspector Gabbard, Kirby offered no reasons to support his conclusion that the rock was not unstable. Rather, his argument rested primarily on his repeated claim that it needed to be addressed even though it was not loose. Yet, while maintaining it was not loose, he would not say it was "secure". (Tr. 182, 183). I do not find his testimony to be credible. The evidence presented clearly shows that the boulder was cracking off the highwall because air could be seen through those cracks. A boulder of that size and magnitude that has become loosened from the highwall is most definitely a hazardous ground condition within the meaning of the cited standard.

The evidence further reflects that travel was permitted in the affected area before the hazardous condition was corrected. Prior to the inspection, the large boulder had not been removed or supported in any way. (Tr. 42). Kirby testified that this particular bench had not been used since the early part of November when they were last blasting, and he had not previously seen the boulder in this condition. (Tr. 149, 161, 175-76, 197). Perhaps, as Gabbard believed, Kirby did not know about the overhanging boulder. But under strict liability he should have known, since it is the responsibility of the operator to insure the safety of miners at the mine. Yet, during the inspection, the worker's truck and the supervisor's truck were both driven past the hazardous condition in route to examine the excavator that was located beyond the boulder thus exposing the excavator operator, the inspector, and the supervisor to the hazard before the condition was abated. (Tr. 48-49, 115,153-54,).

Inspector Gabbard believed the area had been active; however, it was inactive on the day of the inspection. The barricade to the AT was in place until it was opened to give access to the inspection party. (Tr. 115-16, 118, 154-55). Although Kirby testified the area had been inactive about a month, the excavator had not been tagged out, and he admitted that either he or the operator would have to travel past the boulder to remove the excavator if it was needed at another location. (Tr. 120, 180-82). Moving the excavator would again have resulted in exposure to the hazardous condition. (Tr. 119-120). Moreover, although the affected area had been barricaded off, there was no signage posted to warn against entry as required by the cited standard. (Tr. 42, 118).

Considering the loose condition of the boulder, Gabbard credibly testified that had it fallen on its own it could have taken a different path based on its trajectory and how it struck the wall. (Tr. 39, 110). This unstable condition clearly created a hazard to those present during the inspection and any other worker who may have travelled down the AT bench to retrieve the excavator or perform other work.

Respondent argues that the boulder did not pose a hazard because the berm effectively caught it when it was scaled off the highwall. *See Respondent's Post-Hearing Brief* at p. 8. However, this argument must fail. The hazard existed because of the loose boulder on the highwall that could have fallen at any time crushing whoever was below; it existed prior to the scaling. Whether it was effectively scaled and caught by the berm is after-the-fact and of no consequence to determining if there was a violation of the cited standard.

The hazardous condition posed by the boulder was not abated prior to travel in the affected area, and the area was not posted with a warning sign against entry. As such, I find that the Secretary has established by a preponderance of the evidence that a violation of the cited standard occurred.

### Gravity and Negligence

The Mine Act requires that the “gravity of the violation” be considered in assessing a penalty. 30 U.S.C. § 820. Gravity is an evaluation of the seriousness of the violation. The Secretary has promulgated a three-factor inquiry to determine the gravity of a citation for purposes of calculating the penalty. Those factors are the likelihood of the occurrence of the event against which a standard is directed, the severity of the illness or injury if the event has occurred or was to occur, and the number of persons potentially affected if the event has occurred or were to occur. 30 C.F.R. § 100.3(e).

Given the fact that the area had been barricaded off and the boulder was caught when it was scaled, I agree with Gabbard’s testimony that it was “unlikely” injury would have occurred. (Tr. 49-50, 92). But I also agree with Gabbard that had an injury occurred it would have been to one individual and it would have been fatal by a crushing injury from the falling boulder. (Tr. 41, 49-50, 122).

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine

Act, an operator is held to a high standard of care. **Moderate negligence** is where the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances. **Low negligence** is where the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances. 30 C.F.R. § 100.3(d).

I agree with Inspector Gabbard's determination that the difficulty in observing the boulder was a mitigating factor. He and Kirby did not see the boulder when they drove onto the AT bench past the highwall for the first time. (Tr. 20, 44-45, 158). It was not until they were on their way back out that they could see the crack behind the boulder. (Tr. 45, 158-59) Testimony from both Gabbard and Kirby indicated that there had recently been heavy rains in the area, (Tr. 29, 113, 160-61) and it is possible the rain either caused or accelerated the loosening of the boulder. Given that the precarious position and loosened condition of the boulder was not obvious, the possibility of weather factors, and that Kirby was adamant he was unaware of the condition, Gabbard determined the negligence to be moderate.

There are however, additional factors that Gabbard did not take into consideration. The bench beneath the highwall was barricaded against entry at the time of the inspection and probably for a period of time before the inspection. (Tr. 20-21, 42, 115-16, 150-51, 175-76). Furthermore, this material was only moved for purposes of the inspection. (Tr. 115-16). Kirby testified that nobody had even been to the AT bench since November when they were last blasting. I have found, above, that Kirby's testimony was not credible. However, it is reasonable to conclude that the AT bench was inactive for *some* period of time. It is, simply, that on this record that period of time cannot be determined with accuracy. Further, notwithstanding the nonconforming berm material and the narrow bench, the boulder did not fall onto the road. There was no dispute at hearing that when the boulder was scaled off the highwall the material at the base of the highwall on the AT bench did catch the boulder. (Tr. 35-36, 54, 56, 68, 87). While I am not in agreement, Gabbard did testify that the citation would not have been issued if there had been a berm meeting the guidelines published. By MSHA.

Based on the above discussion of mitigating circumstances, I find that Respondent acted with low negligence when it violated section 56.3200.

### Penalty

In this matter, the Secretary proposed a penalty of \$127.00 for Citation No. 8274144. When assessing a civil penalty, the Commission has affirmed that ALJs are not bound by the Secretary's proposals. *See* 30 U.S.C. § 820(i); *Performance Coal Co.*, 2013 WL 4140438 (Aug. 2013) (citing *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000)). Rather, the ALJ is independently responsible for determining the amount of the penalty in accordance with the six statutory criteria set forth in section 110(i) of the Act:

[1] the operator's history of previous violations, [2] the appropriateness of the penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the

violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. *Id.*

I have considered all six statutory penalty criteria. Laurel Quarry is a small mine with only 37,584 hours worked in 2012. During the approximate two years preceding the current violation, Laurel Quarry was only issued a total of eight citations, none of which were for a violation of section 56.3200. I find this to be a low history of violations. The parties stipulated that the Secretary's proposed penalty amount of \$127.00 would not affect the operator's ability to continue in business. They further stipulated that the citation was timely abated in good faith. As discussed *supra*, the Respondent acted with low negligence. Therefore, I reduce the civil penalty assessed to \$100 for this violation.

### **ORDER**

For the reasons set forth above, Citation No. 8724144 is **MODIFIED** to reduce the negligence from **moderate** to **low**. Hanson Aggregates Midwest, LLC is **ORDERED TO PAY** the Secretary of Labor the sum of \$100.00 within 30 days of the date of this decision.<sup>5</sup>

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

Distribution: (U.S. Certified Mail)

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Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., 1909 K Street, NW, Washington, D.C. 20006

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<sup>5</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
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March 24, 2015

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

v.

A MINING GROUP, LLC,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2014-194M  
A.C. No. 08-01340-343320

Mine: Bushy Hammock Quarry

## DECISION AND ORDER

Appearances: Brooke D. Werner McEckron, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, GA for Petitioner

Joshua Conrad, Plant Superintendent, A Mining Group, LLC, Lamont, FL for Respondent

Before: Judge Rae

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

This docket involves one citation issued under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820, (the “Act” or “Mine Act”), for a violation of mandatory standard 30 C.F.R. § 56.4201(a)(2). A hearing was held in Tallahassee, Florida on March 10, 2015 at which time the parties presented evidence and made closing arguments. For the reasons set forth below, I find the violation has been established and I modify the gravity and negligence and assess a penalty of \$100.00.

On January 7, 2014, MSHA inspector John Howerton conducted a regular inspection of the Bushy Hammock limestone mine operated by A Mining Group, LLC (“A Mining”). A Mining employs twenty miners at this location. The mine has five towers, two levels each, on which 7,000 gallons of water are poured over screens where the limestone is washed and sorted and then dropped onto a conveyer belt below. During his inspection, Howerton found that a fire extinguisher on one of the towers had not had its annual inspection completed; it was two months overdue. He issued Citation Number 8732840 under the mandatory standard which requires that all firefighting equipment be inspected at least every twelve months to ensure the mechanical parts, the amount and condition of extinguishing agent and expellant, and the nose, nozzle and vessel are in effective operating condition.

Howerton assessed the violation as unlikely to cause an injury and of moderate negligence affecting one person. Should an injury occur it would be expected to be permanently disabling. Ex. S-1. The Secretary seeks a penalty of \$285.00.

A Mining has stipulated to the fact that the inspection had not been done.<sup>1</sup> It argues, however, that it had been using the services of an independent contractor for at least the past eight years to perform the annual inspections. Tr. 37. The contractor, it argues, rather than A Mining, should have been cited for the violation. A Mining also argues that this fire extinguisher was not required by the regulations, which Howerton confirmed, and therefore should not have been cited.

The regulation imposes strict liability requiring only that all fire extinguishers in service must be inspected annually, regardless of whether they are required by another regulation. This fire extinguisher was in service and available for use by the miners. The fact that a citation would not have been issued had it not been in place, does not overcome the requirements of the regulation. The Act further imposes liability upon operators for the violations committed by an independent contractor. *See Asarco, Inc.-Northwestern Mining Dep't v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). I am therefore compelled to find the citation was properly assessed against A Mining.

The Secretary argues that the gravity of this violation is unlikely to result in an injury-causing event; however, he asserts there was a risk of an electrical motor or grease fire which would cause permanently disabling injuries as a result of the violation. He also asserts the operator's negligence is moderate because both monthly inspections of the fire extinguisher and daily workplace examinations of the towers were required; therefore, despite having a contractor to conduct the annual inspections, the operator should have discovered that the annual inspection had not been performed.

A Mining contests the moderate negligence assessment based upon the fact that the contractor was responsible for inspecting this equipment and they discharged the contractor's services as soon as they learned of this violation. Additionally, they argue that there were multiple factors which made the possibility of a fire virtually nonexistent, which I have considered regarding the gravity of the violation.

Conrad testified that each of the five towers is equipped with two to four fire extinguishers as well as two-inch fire hoses on each deck which also serve as a fire suppression system. Tr. 29. The office, tunnels, and motor control center each have five fire extinguishers in them as do all of the twenty pieces of equipment they operate, including the welding carts and trucks. In all, there are more than 50 fire extinguishers on the property. Tr. 6, 25, 37. When the mine is in operation, the screens are doused with 7,000 gallons of water to wash the stone, which Howerton agreed would prevent a fire. Tr. 24. The tower is accessed by miners to perform maintenance work such as welding when the washer is not in operation, which Howerton opined

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<sup>1</sup> The parties have also stipulated to the jurisdiction of Mine Act over the mine as well as the jurisdiction of the Federal Mine Safety and Health Review Commission and its judges over this proceeding. They also stipulate to the authenticity of the citation, the size of the operator, and the history of prior violations for penalty purposes. Joint Ex. 1.

would be the most likely cause of a fire. Tr. 24-25. The towers are not only equipped with fire extinguishers but when maintenance welding is done, as Conrad explained, the miners put down a fire blanket to catch any extraneous slag. Tr. 31. There were multiple exit routes from the tower that would not be hindered by the fire hazards identified by Howerton. Tr. 23. Howerton stated that unless a miner was standing at the exact location where a fire broke out, his escape would not be blocked in any way, and would not require the use of a fire extinguisher. Tr. 23-24. As Conrad stated, the purpose of the fire extinguishers is not to enable the miners to stand and fight a fire, it is to provide them with a safe means of escape which was already present. Tr. 44.

The Secretary also raised concern that an electrical fire at the motor or a grease fire would not be extinguishable with water. Conrad's unchallenged testimony was that the motor is located above the tower and it is equipped with overload protection which would trip the breaker to the motor before a fire would occur. Tr. 34. The only grease used on the tower is in a 3/8 inch diameter, 3 inch long hose which was self-contained and would extinguish a fire. Moreover, the grease used is not flammable and has a combustion flash point of approximately 450 degrees while the equipment operates at a substantially lower temperature of 50 to 60 degrees above ambient temperature. Tr. 31-38.

Conrad testified that the annual inspection sticker on the fire extinguisher was turned to face the back wall and it was locked in place. A miner conducting the monthly inspections or a workplace examination would not have had cause to check the annual inspection sticker during the course of his duties. Tr. 34.

Based upon these factors, I find that the gravity of the violation is extremely low. I also find significant mitigating circumstances leading me to the conclusion that the operator did not know and could not have known that its contractor, hired for the specific purpose of conducting the annual fire inspections, had missed inspecting this one extinguisher out of the 50 or more on the property. The condition had existed for only two months and there was no evidence that the extinguisher, although not required, was not in proper working order. A Mining discharged the contractor as a result of this violation and hired another company. The operator has been diligent in its fire prevention efforts. The negligence is very low.

Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. § 820(i). The Act requires that in assessing civil monetary penalties the Commission and its judges shall consider the six statutory penalty criteria: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

I have considered each of the six criteria above. The parties did not stipulate to the size of the operator, the ability to continue in business or the good faith compliance by the operator. A Mining provided testimony regarding the size of its business and I have reviewed the Assessed Violation History Report submitted in the Secretary's Prehearing Report which was not tendered as an exhibit but was not objected to by the Respondent in pretrial proceedings. Absent evidence



to the contrary from either party, I assume the penalty I impose will not affect the operator's ability to continue in business and that it demonstrated good faith in abatement of the violation. My gravity and negligence findings are stated above.

Having considered the six criteria and given that I have decreased the level of negligence and gravity of the violation, I find a penalty of \$100.00 to be appropriate.

### **ORDER**

It is ORDERED that Citation No. 8732840 be MODIFIED to no negligence. It is further ORDERED that A Mining Group, LLC, pay the Secretary of Labor the sum of \$100.00 within 30 days of the date of this Decision.<sup>2</sup>

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

Distribution:

Brooke D. Werner McEckron, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

Joshua Conrad, Plant Superintendent, A Mining Group, LLC, 19080 West US Highway 98, Lamont, FL 32336

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<sup>2</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 26, 2015

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

v.

REMINGTON, LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2012-533  
A.C. No. 46-09230-275179

Mine: Winchester Mine

**DECISION DENYING SETTLEMENT MOTION**

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a motion to approve settlement.<sup>1</sup> The originally assessed amount was \$8,325.00, and the proposed settlement is for \$4,163.00. The Court has reviewed the Secretary’s motion but has reservations about the basis offered for the 50% reduction in the penalty for Citation Nos. 8120822 and 8120824.

For No. 8120822, the cited standard, 30 C.F.R. § 77.1606, entitled “Loading and haulage equipment; inspection and maintenance,” provides that “[m]obile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation [and that] [e]quipment defects affecting safety shall be recorded and reported to the mine operator.” Thus, the focus of the standard is upon the inspection of equipment for defects prior to its use.

The Secretary’s motion states, in relevant part:

The Operator asserts that policies were properly in place for any independent contractors working on its property regarding the proper examination and maintenance of equipment. Additionally, all such independent contractors were required to undergo training before working on the mine’s property. Given the steps taken by the mine operator to ensure that independent contracting

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<sup>1</sup> In paragraphs 3 and 4 of the Motion to Approve Settlement, the Secretary continues to stake out his position that he need not explain the basis for settlement, a position which is immaterial and impertinent to the issues legitimately before the Commission. Those paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act.

companies on its property work in a safe manner, questions exist as to whether the citation was properly issued as highly likely or moderate negligence.

It is noted that, except for a minimal change in the rationale, and with absolutely no substantive changes to the text of the rationale, the second Citation, No. 8120824, repeats the language presented to justify Citation No. 8120822.

Examining the Secretary of Labor's offered language for Citation No. 8120822, it may be broken down into 2 asserted justifications:

1. The Operator's policies were properly in place for any independent contractors working on its property regarding the proper examination and maintenance of equipment.
2. All such independent contractors were required to undergo training before working on the mine's property.

From that, the Secretary asserts that “[g]iven *the steps taken* by the mine operator to ensure that independent contracting companies on its property work in a safe manner, questions exist as to whether the citation was properly issued as highly likely or moderate negligence.” (emphasis added). Yet, the Secretary's motion does not contend that the gravity or negligence findings should be modified. The only change is the 50% reduction in the penalty.

Therefore, it becomes necessary to analyze exactly what were “the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner.” This means, of course, steps taken *in advance of* the alleged violation. However, the motion does not identify at all the policies that were in place regarding the proper examination and maintenance of equipment, nor are any details provided about the training that “all such independent contractors were required to undergo [] before working on the mine's property.”

Set against the detail-free rationale are the allegations of the citation, which relate that an accident occurred with a loaded tractor-trailer coal truck in which the driver sustained a lost-time injury. That citation asserts that following an accident, it was found that 6 of 10 brakes on a tractor-trailer coal truck were not functioning properly. This was especially significant, as the truck lost power, began rolling backwards, and turned over and, as noted, with the driver being injured. In addition, there was another significant defect beyond the brake defects in that the seat belt tether was not connected to the body of the truck cab. As the Inspector stated in the citation, those defects should have been observed in the pre-operative check of the vehicle. Adding to the seriousness, the citation noted that the haul road where the accident occurred “is used by all persons, including miners and vendors traveling to and leaving the mine site.”

The citation concludes with the Inspector's statement that the operator “failed to provide adequate oversight to ensure the safety of persons on the mine property.” In abating the violation, the truck was removed from service and additional training was provided to truck operators.

In the Court's view, the Secretary's motion fails to identify the steps taken in advance to ensure that there are proper examinations of equipment, nor does the motion provide detail about the training provided for independent contractors prior to working on the mine's property. The claim that "policies were properly in place" for proper examinations is not supported in the motion and the facts alleged in the citation refute that claim. Thus, it is disconcerting for the Secretary to tout "the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner."

The second citation alleges a violation of 30 C.F.R. § 77.404, entitled "Machinery and equipment; operation and maintenance," which requires 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." The citation involves the same tractor-trailer truck and accident identified in Citation No. 8120822. The focus of this alleged violation is the requirement for *maintaining equipment in safe condition and removing such equipment when it is not safe*. The body of the citation essentially provides additional details concerning the statement in Citation No. 8120822, that 6 of the 10 brakes on the tractor trailer were not working. The post-accident investigation revealed that the truck's brake shoes were not contacting their drums, and that this was easily determinable. For the trailer itself, "all four brake units [on it] were functionally inoperable," and those defects were likewise easy to detect. The citation also added to the information provided in the first citation that the "truck operates in congested areas and travels [a] steep haulroad (*sic*)." For the abatement, the citation relates that "[t]he truck and trailer have been removed from service and *additional* truck inspection and maintenance programs have been implemented." (emphasis added).

The Motion's assertion that the operator had proper examination and maintenance procedures in place is negated by the statements in the citation that show that they were plainly ineffective. Policies claimed to be "properly . . . in place" cannot support a 50% reduction in a penalty, where those policies, properly in place or not, miss obvious defects. The citation makes this point, asserting that the operator failed to provide adequate oversight or programs to ensure that contractor equipment is being maintained in safe operating condition. In its rawest form, the Motion essentially seeks the large reduction for an examination and maintenance program which was demonstrably ineffective. Accordingly, merely repeating the inadequately supported justification offered for Citation No. 8120822 does not work for Citation No. 8120824 either. Therefore, the rationale for this 50% reduction is also unsupported. It seems obvious that, based on the citation's statement, which was not challenged in the Motion, the equipment was not being properly maintained and the defects were, as the citation alleges, easily detectable. Further, the Secretary cannot claim as the basis for its penalty reduction, that the training, alleged to have been provided for proper examination and maintenance, was properly in place where there was a need to implement additional truck inspection and maintenance programs.

In sum, an inspection program to ensure that defects affecting safety are detected, a training program to ensure that those who make such inspections are competent, and related training to ensure that unsafe equipment is immediately removed from service cannot be cited as the basis for a penalty reduction, let alone a reduction on the order of 50%, where such programs utterly fail to detect obvious defects and patently unsafe equipment. Accordingly, the Secretary's Motion is DENIED.

The Secretary is directed to either provide the required information to support the claims about the nature of the mine operator's policies that were in place and the details of the training provided prior to the accident and to then explain how those translate into a justification for a 50% penalty reduction, or to prepare for hearing. The Secretary is further directed to advise the Court of his intentions within two weeks from the issuance of this decision. The Court also directs the Secretary to advise it as to whether the contractor, Powers Trucking Company, was cited for these alleged violations, and if so, the status of such matters.

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

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# **ADMINISTRATIVE LAW JUDGE ORDERS**





**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
7 PARKWAY CENTER, SUITE 290  
875 GREENTREE ROAD  
PITTSBURGH, PA 15220  
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

March 12, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of CARLTON JOHNSON,  
Complainant

v.

BASF CORPORATION,  
Respondent

TEMPORARY REINSTATEMENT  
PROCEEDING

Docket No. SE 2015-201-DM  
Case No. SC-MD 15-01

22-00415  
Mine: BASF– Jackson, MS

**ORDER GRANTING TEMPORARY REINSTATEMENT**  
**OF CARLTON JOHNSON**  
**and**  
**ORDER APPROVING AGREEMENT**  
**REGARDING ECONOMIC TEMPORARY REINSTATEMENT**  
**FOR CARLTON JOHNSON**

Before: Judge Harner

Pursuant to section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) on March 10, 2015, filed an Application for Temporary Reinstatement of miner Carlton Johnson (“Complainant”) to his former position as a mechanic with BASF Corporation at its Clover Fork No. 1 Mine in Jackson, Mississippi (“Respondent”) pending final hearing and disposition of the case.

The case was assigned to me on March 11, 2015. The Secretary also filed a Settlement Agreement on Temporary Reinstatement along with his Application for Temporary Reinstatement. For the following reasons, the temporary reinstatement of Carlton Johnson is hereby **GRANTED**.

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine Act]” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95th Cong., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on

Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

The Commission's regulations control the temporary reinstatement procedures. Once an application for temporary reinstatement is served on the person against whom relief is sought, that person shall notify the Chief Administrative Law Judge or his designee within 10 calendar days whether a hearing on the application is requested. 29 C.F.R. § 2700.45(b). If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, s[he] shall issue immediately a written order of temporary reinstatement. *Id.*

In adopting section 105(c) of the Act, Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). The plain language of the Act states that "if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The judge must determine whether the complaint of the miner "is supported by substantial evidence and is consistent with applicable law."<sup>1</sup> *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

The Declaration of Mark Shearer was filed with the Complainant's Application for Temporary Reinstatement (Exhibit A) and asserts the following:

1. Mr. Shearer is a special investigator with the Mine Safety and Health Administration ("MSHA") and was assigned to conduct an investigation into a complaint filed by the Complainant. Decl. 1-3.
2. Respondent is engaged in the operation of a metal/non-metal mine at its Jackson, Mississippi, facility and its products enter commerce. Therefore, it is an "operator" within the meaning of Section 3(d) of the Act and a "mine" as defined in Sections 3(b), 3(h) and 4 of the Act. Decl. 4a and 4c.
3. The Complainant was employed at the Respondent's Jackson, Mississippi mine ("Mine") where he was employed as Electrical and Instrumental Technician and then as a mechanic. Decl. 4b.

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

4. The Complainant has asserted that he engaged in protected activity over a five month period by complaining to Respondent that a newly hired Electrical and Instrumental Technician did not know what he was doing and was engaging in unsafe work practices. In addition, the Complainant filed a safety complaint with MSHA, requesting an investigation. Decl. 4d, see also Exhibit B.
5. On October 7, 2014, 2014, the Complainant was discharged. Decl. 4e.
6. Based on the facts adduced during his investigation, special investigator Shearer believes that the discrimination complaint was not frivolously brought. Decl 4d and 4f.

Based upon the affidavit of the special investigator and the asserted facts therein, I find that the Secretary's complaint is not frivolously brought. **WHEREFORE**, it is hereby **ORDERED** that Carlton Johnson be **TEMPORARILY REINSTATED** to his former job at his former rate of pay, overtime and a benefit pending final order on the complaint or until this Order is dissolved.

1. In lieu of actual reinstatement, the parties have executed a Settlement Agreement providing for economic reinstatement. Respondent BASF Corporation ("BASF") shall economically temporarily reinstate complainant Carlton Johnson ("Johnson") rather than physically placing him back to work at the mine. This economic temporary reinstatement is effective March 16, 2015. This Agreement shall remain in effect until the entry of a final order of the Federal Mine Safety & Health Review Commission ("the Commission") regarding Johnson's underlying discrimination complaint (MSHA Case No. SC-MD-15-01) or until this Order approving this Agreement is dissolved, whichever shall occur first.
2. BASF shall pay Johnson at his regular rate of pay of \$21.44 per hour for 35 hours per week and 10 hours of overtime per week at one and one-half times his regular rate. The total gross wages per week starting March 16, 2015, until the Temporary Reinstatement terminates shall be \$1, 072.00 per week. BASF will provide the first check, which will include any back pay due for the period from March 16, 2015, until the date of this Agreement, on the next regularly scheduled payroll date. Johnson will receive paychecks in accordance with BASF's regular payroll policy from that point until the Temporary Reinstatement order is dissolved.
3. With respect to this temporary reinstatement pay, Johnson will be treated under the same terms and conditions of employment as all other similarly situated (physically employed) employees. Johnson's benefits shall be restored, including but not limited to, health insurance and 401(k) payments. Health insurance premiums shall not be deducted for the period of back pay. Johnson will have a health insurance premium deducted from his regular pay check in accordance with BASF's health plan. BASF shall be responsible for making all legal deductions and payments required by law for state and federal taxes.

4. BASF will notify Johnson before shutting down the mine and ceasing to employ any personnel at the mine.
5. All paychecks shall be issued to Johnson and shall be mailed to the following address:  
143 Pine Grove Drive, Florence, Mississippi 39073.
6. Complainant Johnson does not object to this Agreement.

**WHEREFORE**, it is **ORDERED** that the Settlement Agreement on Temporary Reinstatement for Carlton Johnson is **APPROVED**.

/s/ Janet G. Harner  
Janet G. Harner  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 12, 2015

SANDRA G. MCDONALD,  
Complainant,

v.

TMK ENTERPRISE SECURITY,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEVA 2014-387-D  
HOPE-CD 2013-10

Frasure Creek Mining, LLC  
Mine ID 46-07014 5G1

**ORDER DENYING MOTION TO AMEND COMPLAINT**  
**AND**  
**DISMISSAL ORDER**

This case is before me based on a discrimination complaint filed on January 7, 2014, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) (Mine Act). The complaint, filed by Sandra G. McDonald under section 105(c)(3), concerns her employment as a security guard by a security services contractor at a mine site operated by Frasure Creek Mining, LLC, (Frasure Creek) during the period, on or about, May 2011 through September 3, 2013. McDonald seeks to recover appropriate relief, including employment reinstatement and back pay under Section 105(c) of the Mine Act, from TMK Enterprise Security Services, Inc. (TMK), a business entity that had been incorporated in West Virginia.<sup>1</sup>

However, the evidence of record reflects that TMK’s corporate status was terminated by the state of West Virginia on June 12, 2009. Consequently, McDonald was never employed by TMK prior to its termination as a corporate entity. Rather, McDonald was employed by George King and Mark Toler, the former principles of TMK, who continued to operate their security services business as a non-corporate entity. During a January 22, 2015, telephone conference with McDonald’s counsel, although denying that they had discriminated against McDonald, King and Toler represented that they cannot re-employ McDonald due to the cessation of their business in fall 2014, and that they are financially incapable of providing the monetary relief sought by McDonald.

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<sup>1</sup> Section 105(c)(1) provides, in pertinent part:

No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because such miner ... instituted any proceeding under or related to this Act ....

30 U.S.C. § 815(c)(1).

In view of the above, on February 2, 2015, McDonald's counsel filed a Motion for Temporary Stay requesting that the hearing, previously scheduled for February 10, 2015, be continued and that this matter be temporarily stayed to allow counsel to determine the proper respondents who were responsible for McDonald's employment. Upon identification of the proper respondents, McDonald's counsel represented that a motion to lift the stay would be filed with an accompanying motion to amend the pleadings. Consistent with counsel's request, on February 3, 2015, I issued a stay order to provide counsel with an opportunity to amend the pleading by adding King and Toler as the proper respondents.

Thereafter, on February 18, 2015, McDonald's counsel filed a motion to lift the stay and to amend the named respondent responsible for her alleged discrimination. However, rather than amending the complaint to include King and Toler, McDonald's counsel seeks to add Frasure Creek as an entirely new respondent, under a new theory of the case. Specifically, McDonald's counsel now alleges:

Frasure Creek was intimately involved in and had direct knowledge of all of the hazard complaints at issue in this discrimination case, and had a direct role in effectuating an illegal and discriminatory course of conduct, by communicating and consummating an adverse employment action against the Complainant in retaliation for protected activity.

Mot. to Lift Temp. Stay and to Amend Compl., at 2 (Feb. 18, 2015).

Section 105(c)(2) of the Mine Act provides that upon receipt of a complaint of discrimination, the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission. . . ." 30 U.S.C. § 815(c)(2). Section 105(c)(3) of the Mine Act provides that, if the Secretary determines that no discriminatory violation has occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3). Thus, an investigation by the Secretary under section 105(c)(2), and his finding that no discrimination has occurred, are prerequisites for a miner's filing of a complaint on her own behalf under section 105(c)(3).

In seeking an amendment of McDonald's complaint to include Frasure Creek, McDonald alleges previously-unraised facts specifically relevant to Frasure Creek that were not investigated by the Secretary under section 105(c)(2) of the Mine Act. In *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991), a miner sought an amendment to his section 105(c)(3) discrimination complaint that differed substantially from the complaint the miner initially filed

with MSHA under section 105(c)(2), an amendment that constituted a theory of the case that MSHA had never previously investigated. The Commission held:

If the Secretary's . . . investigation . . . did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met.

13 FMSHRC at 546; *see also Pontiki Coal Corp.*, 19 FMSHRC 1009, 1018 (Jun. 1997).

Consistent with *Hatfield*, as the Secretary has not had the opportunity to investigate McDonald's complaint against Frasure Creek, McDonald's motion to redirect her discrimination complaint against the mine operator, rather than her security services former employer, shall be denied. In view of the fact that TMK was not McDonald's employer, and McDonald's counsel has elected not to amend the complaint to include King and Toler as respondents, the captioned discrimination matter against TMK shall be dismissed.

### **ORDER**

Accordingly, in the absence of a relevant investigation under section 105(c)(2), **IT IS ORDERED** that McDonald's motion to amend her complaint naming Frasure Creek Mining, LLC, as the respondent party **IS DENIED**.<sup>2</sup> **IT IS FURTHER ORDERED** that the captioned discrimination case against TMK Enterprise Security Services, Inc., **IS DISMISSED**. This dismissal is without prejudice to any discrimination complaint McDonald may file under section 105(c)(3) against George King and/or Mark Toler, as individuals.

/s/ Jerold Feldman  
Jerold Feldman  
Administrative Law Judge

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<sup>2</sup> In the event the Secretary investigates and declines to bring a complaint against Frasure Creek Mining on behalf of McDonald under section 105(c)(2), nothing herein shall preclude McDonald from filing a complaint on her own behalf against Frasure Creek Mining under section 105(c)(3) of the Mine Act. Moreover, nothing herein should be construed as addressing the jurisdictional issue of a non-employer's liability under section 105(c).

Distribution: (Regular and Certified Mail)

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/acp