

**March 2020**

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**No review was granted or denied during the month of March 2020.**

## **COMMISSION DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 12, 2020

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

v.

SOLAR SOURCES MINING, LLC

Docket No. LAKE 2017-99

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

**DECISION**

BY: Rajkovich, Chairman; Young, and Althen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act” or “Act”) and concerns a citation issued by the Secretary of Labor’s Mine Safety and Health Administration (“MSHA”) to Solar Sources Mining, LLC. The citation alleges that Solar Sources failed to provide berms of substantial construction at a dump site as required by the mandatory safety standard at 30 C.F.R. § 77.1605(l) (“Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.”). Gov. Ex. 3.

Solar Sources contested the citation before the Commission. After a hearing, an Administrative Law Judge affirmed the alleged violation, found the violation was “significant and substantial,” (“S&S”)<sup>1</sup> and held that the violation was the result of high negligence and an unwarrantable failure to comply with the standard. 40 FMSHRC 462 (Mar. 2018) (ALJ). The Judge assessed a civil penalty of \$68,300, the same penalty that the Secretary had originally proposed.

Solar Sources filed a petition for discretionary review, which the Commission granted. On review, Solar Sources contends that the Judge erred in assessing the penalty because he failed to make adequate findings for each of the penalty criteria in section 110(i), 30 U.S.C. § 820(i), of the Mine Act as part of his analysis.

Given that the Judge clearly failed to follow Commission precedent and fell far short of making adequate findings, we agree. For the reasons contained herein, we vacate the Judge’s penalty assessment and remand the case to the Judge to complete his penalty criteria findings and reassess a penalty.

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<sup>1</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.”

## I.

### **Factual and Procedural Background**

This proceeding arises from an accident that occurred at the Shamrock Mine, an Indiana surface coal mine operated by Solar Sources. On June 27, 2016, miner Shawn Standish was on his second trip of the morning, driving a haul truck carrying slurry to the mine's dump pit. Standish backed his truck up to the edge of the dump pit and stopped the vehicle. He felt the truck's rear tires sink. Standish attempted to accelerate away from the edge, but his truck would not move. Standish made the decision to abandon the truck as it continued to sink. He climbed from its cab and jumped. The truck descended over the edge, landing upside-down 47 feet into the pit. Standish landed on the ground above, breaking both heels and one ankle.

MSHA Inspector Jason Noel investigated the accident. Noel issued a section 104(d)(1)<sup>2</sup> order, alleging that Solar Sources failed to conduct an adequate on-shift examination of the dump site as required by 30 C.F.R. § 77.1713(a). Gov. Ex. 4. The Judge vacated the order, finding that the cited exam actually occurred about 20 minutes prior to the start of the day shift.<sup>3</sup> The Secretary did not petition the Commission for review of the Judge's decision and, therefore, this order is not before us.

Noel also issued a section 104(d)(1) citation, alleging that a berm of substantial construction was not provided at the dump site as required by 30 C.F.R. § 77.1605(l). Gov. Ex. 3. The Judge affirmed the citation, finding that Solar Sources failed to provide berms as required by section 77.1605(l). 40 FMSHRC at 491-92. The Judge found that wet slurry repeatedly falling onto the berm during the dumping process compromised the integrity of the berm. He also found that although it is likely that the berm was originally substantially constructed, it had deteriorated over time. The Judge concluded that the violation was S&S, the result of high negligence, and an unwarrantable failure to comply with the safety standard. The Secretary had proposed a \$68,300 civil penalty through his special assessment protocol at 30 C.F.R. § 100.5. The Judge assessed the exact same amount as the proposed penalty, finding it to be "consistent with the record and the evidence introduced at hearing." *Id.* at 495 (citing *Rock N Roll Coal Co.*, 38 FMSHRC 2831, 2865 (Nov. 2016) (ALJ)).

Solar Sources contends that the Judge erred in assessing a civil penalty because he assessed a civil penalty without associated findings for each of the statutory penalty criteria set

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<sup>2</sup> Section 104(d)(1) authorizes the Secretary to issue a citation alleging an unwarrantable failure to comply with a mandatory safety standard and to issue an order withdrawing miners from any affected area if the Secretary determines that a second unwarrantable failure to comply occurs within the subsequent 90 days. 30 U.S.C. § 814(d)(1). An "unwarrantable failure" represents aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987).

<sup>3</sup> The Order alleged "[t]he certified person conducting the exam drove by the gob dump and only glanced the area." Gov. Ex. 4. The Judge reasoned that an examination that occurs prior to the start of a shift does not constitute an *on-shift* examination; the safety standard requires that the examination take place *during* the shift. *See* 40 FMSHRC at 490.

forth in section 110(i) of the Act. Solar Sources further maintains that the Judge erred when he found that the Secretary's "Narrative Findings for a Special Assessment" were consistent with the Judge's own findings and conclusions.

The Secretary maintains that the Judge made the required penalty criteria findings throughout his decision, and that substantial evidence in the record supports the Judge's penalty assessment.

## II.

### Disposition

The Mine Act bifurcates, between the Secretary and the Commission, the responsibility to propose and assess civil penalties. The Secretary *proposes* a civil penalty pursuant to section 105(a) of the Mine Act. 30 U.S.C. § 815(a). Then, if the operator contests the citation, a Commission Administrative Law Judge adjudicates the case and *assesses* the penalty.

The Secretary has promulgated penalty regulations for two types of proposed assessments: regular assessments and special assessments. Proposed regular assessments are made pursuant to 30 C.F.R. § 100.3. Regular penalty proposals result from the assignment of points to the appropriateness of the penalty to the size of the business, the operator's history of violations, negligence, and gravity based on the allegations in the citations.<sup>4</sup> The cumulative total of the points determines a penalty proposal through reference to a penalty table. MSHA promulgated the regular assessment regulations through notice-and-comment rulemaking.

Proposed special assessments are governed by 30 C.F.R. § 100.5, which only provides that "MSHA may elect to waive the regular assessment under [section] 100.3 if it determines that conditions warrant a special assessment." Section 100.5(b) states that "[w]hen MSHA determines that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in [section] 100.3(a). All findings shall be in narrative form." 30 C.F.R. § 100.5(b).

Section 105(d) of the Mine Act, in turn, provides mine operators with the right to contest the Secretary's proposed civil penalty before the Commission. 30 U.S.C. § 815(d). Pursuant to section 110(i) of the Act, the Commission *independently assesses* a civil penalty *de novo* based on findings of fact and consideration of six penalty factors:

[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

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<sup>4</sup> MSHA does not assign points for the effect upon the ability to stay in business or good faith in achieving rapid compliance.

gravity of the violation, and [6] the demonstrated good faith of the [operator] charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Upon finding a violation, a Judge assesses a penalty after a due process hearing and findings of fact. 30 U.S.C. § 815(d), 820(i); 29 C.F.R. § 2700.30(a). In assessing a penalty *de novo*, a Judge is neither bound by the Secretary's Part 100 regulations nor by the originally proposed penalty. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), *aff'g* 5 FMSHRC 287 (Mar. 1983). Judges are accorded broad discretion to assess civil penalties, but their decisions must reflect proper consideration of the section 110(i) penalty criteria. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). The Judge must provide an explanation if the penalty assessment substantially diverges from the Secretary's proposed *regular* assessment. *Sellersburg*, 5 FMSHRC at 293. The Commission reviews the Judge's penalty determination under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000).

In *Sellersburg*, the Commission established an abiding rule for penalty assessments. The Commission requires that, in assessing a penalty, the Judge must make:

[f]indings of fact on *each of the statutory criteria* [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient.

5 FMSHRC at 292-93 (emphasis added).

In *Cantera Green*, 22 FMSHRC 616, 621 (May 2000), the Commission further explained:

[w]hile the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria.

In *Cantera Green*, the Commission vacated and remanded penalty assessments because the Judge failed to fully consider the statutory criteria for each citation at issue and also "failed to adequately explain the basis for the penalties he assessed for the violations . . . ." *Id.* at 626.

The obligation to make findings on the penalty criteria is not merely a Commission predilection. Due process demands that the Commission inform operators adequately, and with sufficient specificity, of the basis upon which the Commission imposes a penalty. If the Judge

does not provide a discussion of the penalty criteria, including when appropriate how the penalty criteria interplay with one another, then the respondent is not informed sufficiently of the reasoning for a civil monetary penalty.

Further, without a cogent explanation by the Judge of the assessment, the Commission and reviewing courts cannot perform their review function conscientiously. A sufficient explanation is essential to the fair review of an assessment. Thus, in discussing each of the six criteria, the Judge must provide a clear and sufficient understanding of the basis for the assessed penalty.

This duty applies not only to making findings on each of the penalty criteria but also to analyzing any relationships between the criteria that may affect the ultimate penalty assessment. Thus, for example, a discussion of the size of a mine and the frequency of violations in juxtaposition may be informative to the reasoning behind a penalty evaluation more fully than looking at each criterion as a distinct element of a penalty.

We need not plow through a tedious review of the dozens of remands of penalty assessments due to the failure of Judges to make the necessary findings. Contrary to our dissenting colleague's assertions (slip op. at 33-36), remands are not extraordinary and are, in fact, necessary when a Judge does not follow Commission directives. Twenty years ago, the Commission remarked on the failure of Judges to meet the requirements rooted in due process and an adequate basis for review:

Despite the Commission's clear mandate in *Sellersburg* and related cases, and in its Procedural Rules, we have repeatedly found it necessary to remand cases for penalty assessments because judges have failed to enter the requisite findings. *See, e.g., Secretary of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 119, 142 (Feb. 1999); *Rock of Ages*, 20 FMSHRC at 126; *Secretary of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1539 (Sept. 1997); *Fort Scott*, 19 FMSHRC at 1518; *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1502-03 (Sept. 1997). In the majority of cases heard under the Act, records are developed on the section 110(i) criteria and penalties are assessed properly and efficiently. Cases in which this does not occur, however, have become frequent enough to give us pause. We intend that the three decisions we issue today will convey our message that it is imperative that this Commission avoid giving short shrift to our statutory duty to assess Mine Act penalties under section 110(i).

*Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000).<sup>5</sup>

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<sup>5</sup> Commission Procedural Rule 30(a) instructs Judges that their decisions "shall contain findings of fact and conclusions of law on each of the statutory criteria and an order requiring that the penalty be paid." 29 C.F.R. § 2700.30(a). This requirement serves two functions. First, (continued...)

Despite the decision in *Hubb*, the Commission continues to find it necessary to remand penalty determinations when Judges fail to supply adequate penalty assessments—that is, an assessment meeting the requirements of due process and adequately explaining the penalty assessment to allow Commission review. *E.g. Virginia Slate Co.*, 24 FMSHRC 507, 514-15 (June 2002); *Sedgman*, 28 FMSHRC 322, 342-44 (June 2006); *Mining & Property Specialists*, 33 FMSHRC 2961, 2964 (Dec. 2011); *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3104 (Dec. 2014).<sup>6</sup> That is precisely the situation with this Judge and this case.

Of course, the Commission does not exalt form over substance. It is not possible to enunciate a precise formula for recitation of penalty factors that would fit all cases. Consequently, as must be obvious, the evaluation of compliance with the requirement for an adequate review of all criteria is case-specific. The Commission does not remand assessments imposed with less than perfection when the Judge's explanation is sufficient in the context of the totality of the case to meet the requirements of due process and fair and informed review. *E.g., Spartan Mining Co.*, 30 FMSHRC 699, 724 (Aug. 2008) (stating that the operator took issue only with the two factors of negligence and gravity upon which the Judge based his assessment); *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016) (noting that the Judge made findings on five factors and making a finding on the sixth factor that the Commission found did not disturb the penalty assessed by the Judge).

The outcome of this case, therefore, does not depend upon identification of a legal standard for making penalty assessments. The standards are well established. Each decision must be case-specific, and the Commission's decision turns on whether the Judge's exposition of the penalty factors permits the Commission to determine that the Judge has fully considered the penalty criteria individually and in relationship to one another.

As set forth below, the Judge's discussion in this case falls far short of meeting the standard necessary for fair review, as required by Commission case law. Therefore, the only proper course is remand.<sup>7</sup>

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<sup>5</sup> (...continued)

the findings provide the operator with notice as to the basis of the penalty assessment. Second, the Commission is provided the information necessary to review the Judge's assessment. *See Sellersburg*, 5 FMSHRC at 292-93.

<sup>6</sup> The requirement for a sufficient explanation applies to *all assessments*. However, it is notable that the Mine Act utilizes a graduated scheme of enforcement. That graduated approach applies to the assessment of penalties—that is, penalties for violations increase toward a statutory maximum as they approach severely violative conduct. In considering imposition of a maximum (or close to maximum) penalty, it becomes particularly important under a graduated scheme of enforcement to completely discuss the full impact of each penalty criterion.

<sup>7</sup> Commissioner Traynor concurs on Parts A and B of this opinion, but writes separately to dissent from Parts C and D.

**A. The Judge Erred by Failing to Fully Consider the Statutory Penalty Criteria.**

In the proceeding before us, the Judge assessed a \$68,300 civil penalty and provided only a terse statement of the basis for his assessment.

Having found that the violation identified in Citation No. 9102704 was established and that the Inspector's evaluation of the gravity and negligence and his finding of unwarrantable failure and significant and substantial were demonstrated that no cognizable mitigation was advanced, the Court therefore finds, that upon application of the statutory criteria, the penalty proposed by the Secretary should be applied. [FN 15]

[FN 15] *The other statutory factors were duly considered.* From the parties' stipulation, it is noted that the factors of good faith and the ability to continue in business did not impact the penalty determination. Regarding production, Atkinson informed that the mine produces about 1.6 million (tons). Tr. 301. This means the Shamrock Mine is a large mine. The violation history is reflected in Exhibit P 2 . . . .

40 FMSHRC at 495 & n.15 (emphasis added).

From the foregoing, it is obvious that the Judge limited his analysis discussion to only two of six statutory factors in the text. In a footnote, he summarily discharged the "other statutory factors" as "duly considered." This abrupt footnote is no demonstration that he considered all criteria sufficiently. In addition to the overall short shrift given these statutory criteria, the Judge's decision was totally deficient of any evaluation of "the operator's history of previous violations" and "the demonstrated good faith of the [operator] charged in attempting to achieve rapid compliance after notification of a violation." See 30 U.S.C. § 820(i); 29 C.F.R. § 2700.30(a).

The record contains highly relevant evidence regarding the operator's violation history. Yet, the Judge did not engage in any analysis and did not make any finding on the possible significance of such evidence. The Judge merely references Government Exhibit P-2.<sup>8</sup>

The Judge's decision is devoid of reasoning as to whether this record of compliance had any effect on the penalty given his negligence and gravity findings. Judges must bear in mind that they are imposing civil penalties to incentivize compliance rather than criminal penalties to punish a crime. An operator's history of violations may be highly relevant to incentivizing

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<sup>8</sup> Ironically, that exhibit reveals a positive compliance record in that the operator had not had a berm violation in six years and only two such violations in its entire history. It did not have any unwarrantable failures in the 15 months preceding the citation. In fact, the operator had received only 19 citations under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), for which it was penalized a total of \$13,276.

compliance. In the absence of circumstances not present here, it is error to ignore the history of violations in imposing a penalty merely by noting an exhibit in the record.<sup>9</sup>

Moreover, the parties expressly argued the importance of the history of violations to the proper penalty. *See* Oral Arg. Tr. 15 (“a very good assessment history, very few . . . .”); Oral Arg. Tr. 66 (“a lot of violations for a company”). Thus, the Judge’s error of omission here is especially obvious because the significance of the history of violations was a matter of specific dispute. This is a “question of fact” that remains unresolved, despite our colleague’s protestations to the contrary. Slip op. at 33 & n.5.

The Judge also erred in stating that the parties had entered stipulations with respect to two penalty factors. 40 FMSHRC at 495 n.15 (“[f]rom the parties’ stipulations, it is noted that the factors of good faith and ability to continue in business did not impact the penalty determination.”). It is clear from the record that they *had not* entered into such stipulations. The parties’ joint stipulations have no reference at all to either good faith abatement or the impact of a \$68,300 penalty.<sup>10</sup>

In fact, the parties argued over the significance of the operator’s response to compliance “after notice of violations.” The parties continue to dispute the sufficiency of the operator’s efforts and, therefore, the Judge must make such a finding before reassessing a penalty.<sup>11</sup>

Accordingly, remand is essential in this case in the interest of justice. On remand, we direct the Judge to make specific findings regarding the operator’s history of violations and the operator’s actions related to attempting to achieve rapid compliance after notification of a violation, consistent with the requirements of Commission Procedural Rule 30(a) and section 110(i) of the Mine Act. He must review these factors taking into account the findings on the other penalty criteria. The Judge must then consider his penalty criteria findings along with the record evidence, reassess a civil penalty, and explain his rationale in an independent and reasoned manner.<sup>12</sup>

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<sup>9</sup> In *Wolf Run Mining Company*, 35 FMSHRC 536 (March 2013), the Commission stated that consistent with the graduated enforcement scheme of the Act, an operator’s past history of significant violations should be considered in considering assessing higher penalties. *Id.* at 542. By parity of reasoning, an operator’s history of few violations is relevant in considering the assessment of higher penalties.

<sup>10</sup> Because Solar Sources did not contend that payment of the penalty would affect its ability to stay in business, the mistake as it relates to that particular penalty criterion was harmless error. In *Sellersburg*, the Commission held, “In the absence of proof that the imposition of authorized penalties would adversely affect its ability to continue in business, it is presumed that no such adverse effect would occur.” 5 FMSHRC at 294.

<sup>11</sup> The Secretary argues that Solar Sources did not demonstrate good faith abatement efforts. Oral Arg. Tr. 37-38, 57.

<sup>12</sup> The Commission is concerned exclusively with the adjudicative process and does not have a basis, at this point, for determining whether or not the amount assessed by the Judge was appropriate.

**B. The Judge Need Not Reconcile the Differences Between His Penalty Analysis and the Secretary’s Narrative Findings for a Special Assessment.**

In assessing the \$68,300 penalty, the Judge stated that “the special assessment in this matter is consistent with the record and the evidence introduced at hearing.” 40 FMSHRC at 495 (citing *Rock N Roll Coal*, 38 FMSHRC at 2865). The Judge cited the non-precedential ALJ decision *Rock N Roll Coal* rather than the Commission’s relevant decision, *The American Coal Company*, 38 FMSHRC 1987 (Aug. 2016) (“*AmCoal I*”). We note, however, that *Rock N Roll Coal* actually contains findings for each of the penalty criteria and an explanation of the significance of those findings exerted on that Judge’s penalty calculation. 38 FMSHRC at 2865-66. Here, the Judge made no such findings. He gave no such explanation. Hence, he did not follow *Rock N Roll Coal* in a proper manner. There is certainly no error in citing a colleague’s decision; however, the Judge is bound by Commission precedent and his reliance on a non-precedential ALJ decision should have detailed and clarified how his own independent judgment was informed by the decision in *Rock N Roll Coal*.

Solar Sources contends that the Judge erred by finding that the Secretary’s “Narrative Findings for Special Assessment”<sup>13</sup> was consistent with the record evidence when, in fact, there were discrepancies between the Judge’s findings and the Secretary’s allegations. Specifically, the Secretary alleged that the operator knew or should have known of the poor condition of the berms because a certified person had performed an on-shift examination prior to the accident. Notably, the order alleging an inadequate on-shift examination was vacated by the Judge. Furthermore, the Secretary’s narrative alleged that the berms were constructed of slurry while the Judge found that, originally, the berms had been constructed of shot rock.

We find that the Judge’s error was *not* in failing to reconcile any differences between his findings and the Secretary’s pre-hearing allegations, but instead was in failing to exercise his own responsibility to conduct an independent and reasoned analysis, using *the record evidence*. See *AmCoal I*, 38 FMSHRC at 1995 (“The Judge’s assessment is made independently and, regardless of the Secretary’s proposal, the Judge must support the assessment based on the penalty criteria and *the record*.”) (emphasis added).

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<sup>13</sup> The portion of the Secretary’s “Special Assessment Narrative Form” used to derive the amount of the special assessment penalty proposal does not appear in this record. It was, however, provided to the mine operator in *AmCoal I*. 38 FMSHRC at 1996. The Secretary bears the burden of justifying his penalty proposal under the criteria, and “[w]hen a violation is specially assessed that obligation may be considerable.” *Id.* at 1993. Providing a rationale for a special assessment is essential to providing more clarity to the Judge, and to the Commission on review, and the Secretary is obliged to provide more than an opaque process and a secret theory of the case. See *Sellersburg*, 5 FMSHRC at 292-93 (explaining that requirement to discuss penalty criteria is necessary to provide adequate foundation for review).

On remand, the Judge is directed to independently reassess a penalty in accordance with *AmCoal I*. The Judge must then explain the rationale for his penalty assessment using the statutory penalty criteria and the record evidence.<sup>14</sup>

**C. The Judge is Not Required to Reconcile His Reassessed Penalty with the Amount Proposed by the Secretary According to his Special Assessment Procedures.**

In remanding this matter for penalty reassessment, we note that the United States Court of Appeals for the District of Columbia Circuit mused in the recent case, *American Coal Company v. FMSHRC*, that Commission case law “seems to point in two directions” regarding Commission Judges’ use of the Secretary’s penalty proposal as any sort of reference point. 933 F.3d 723, 728 (D.C. Cir. 2019). In strongly affirming the Commission’s independence in determining penalties, the District of Columbia Circuit stated a perception that, for it, seems to have been troubling—namely:

the Commission’s precedent seems to point in two directions. On the one hand, an ALJ’s penalty ‘assessment must be independent, and the Secretary’s proposal is not a baseline or starting point that the Judge should use [as] a guidepost for his/her assessment’ *American Coal*, 38 FMSHRC at 1990. On the other hand, ALJs are supposed to provide ‘an explanation of any substantial divergence from the penalty proposal of the Secretary.’

*Id.*

The court’s apparent impression of an inconsistency in Commission law demands prompt clarification. Affected parties, Commission Judges, and courts must understand the fundamental importance of the Commission’s penalty directives—especially because the “two directions” noted by the court *are not* separate, divergent paths. To the contrary, each directive is a discrete, bedrock principle of the Commission’s jurisprudence that operates with the other to ensure fair, equitable, and consistent penalty assessments.<sup>15</sup> The rationale for these directives rests upon the fundamental distinction between regular and special assessments.

Many Commission decisions state, directly or indirectly, that the Secretary’s penalty proposal is not a baseline or starting point, while other decisions require Judges to explain any substantial divergence from the penalty proposal of the Secretary. *Compare AmCoal I*, 38

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<sup>14</sup> “While the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria.” *Cantera Green*, 22 FMSHRC at 621.

<sup>15</sup> The circuit court correctly recognized that the Commission split evenly in its review of the Administrative Law Judge’s decision. Accordingly, it found that it would “review the ALJ’s legal determinations *de novo* and factual determinations for substantial evidence.” 933 F.3d at 726. On this point, no Commission decision was cited by the circuit court and it is unknown the extent to which, if at all, the court reviewed the separate opinions of the Commissioners.

FMSHRC at 1990 (stating that “the Secretary’s [penalty] proposal is not a baseline or starting point that the Judge should use a guidepost for his/her assessment”) *with Sellersburg*, 5 FMSHRC at 293 (requiring “a sufficient explanation of the bases underlying the penalties assessed by the Commission” for assessments which substantially diverge from MSHA’s proposal).

While, at first, these may appear to be on divergent paths, they work together to preserve the credibility of the administrative scheme and avoid the appearance of arbitrariness. In their proper context, each of these principles is correct. They are complementary approaches that serve the same important objective.

### (1) *The Basic Principles*

We established basic principles, long ago, for the fair and consistent assessment of penalties, which include both “directions” referred to by the circuit court along with a third important principle, in a case decided relatively soon after full implementation of the Mine Act. *Sellersburg*, 5 FMSHRC at 290-94. In *Sellersburg*, the operator challenged an Administrative Law Judge’s penalty assessments as excessive and an abuse of discretion. The operator further argued that the Judge erred by not following sufficiently the Secretary’s penalty assessment regulations. In support of its position, the operator noted the wide divergence between the penalties proposed by the Secretary and those assessed by the Judge, as well as the Judge’s failure to consider each of the statutory penalty criteria.

In considering these challenges, the Commission identified three principles that continue to guide Commission penalty jurisprudence:

1. The Secretary’s penalty proposals *do not bind* the Commission. The Commission assesses penalties *de novo* in accord with section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *Id.* at 291-92.
2. Judges *must make* findings of fact *for each* of the six statutory penalty criteria. *Id.*
3. Judges *must explain* any substantial divergence from the penalty proposal of the Secretary regarding regular assessments. *Id.* at 293.

The first two principles follow directly from the plain words of the Mine Act. The court’s decision in *American Coal* is the latest in a long line of decisions that leave no doubt whatsoever about the Commission’s authority to set penalties of contested citations and orders after hearing. Further, Commission case law, including the present case, reiterates the necessity for findings *on each* of the six penalty factors identified in the Mine Act. *See, e.g., Dolese Bros. Co.*, 16 FMSHRC 689, 695-96 (Apr. 1994) (remanding to the Judge where he failed to enter findings on four of the penalty criteria).

The third *Sellersburg* principle does not flow directly from the plain wording of the Mine Act. It arises from the Commission’s proper concern for the fair and equitable administration of

penalty assessments across a large, diverse industry, whose operators vary greatly in their types, sizes, sophistication, and safety performance.<sup>16</sup>

From these and other factors and subcategories, it is clear that the Commission sets penalties over an almost limitless number of permutations of penalty factors. Rather than promulgating rules or establishing generalized guidelines for the evaluation and weighing of penalty factors through case law, the Commission has relied upon the substantial divergence principle to establish general uniformity in the assessment of penalties. As explained below, however, this third principle cannot be applied to *special assessments* because it is grounded on the general transparency and consistency of MSHA's process for developing *regular assessment* proposals.

## **(2) Regular Assessments**

On May 30, 1978, MSHA published final rules pertaining to the proposed assessment of civil penalties under the Mine Act for coal mines and metal and nonmetal mines. 43 Fed. Reg. 23514, 23515 (May 30, 1978). The rules continued the use of a formula system developed by the Mine Enforcement Safety Administration ("MESA") for imposition of most penalties under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("Coal Act"). The formulaic system results in "regular" penalties. 30 C.F.R. §100.3. Regular penalties account for approximately 99 percent of the penalties proposed by MSHA.<sup>17</sup>

Under the regular point system, MSHA assigns numerical points to four of the six penalty factors—size of operator, frequency of violations, negligence, and gravity. The cumulative total of the points determines a penalty through reference to a penalty table. 30 C.F.R. § 100.3(g). This regular system achieves a kind of standardized and normative assignment of penalties

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<sup>16</sup> Operators range in size from family-owned businesses to multinational corporations. Moreover, even among similar types of operations of the same general size, mines have varying histories of violations. Negligence for a specific violation may fall along the continuum between no negligence and willful or intentional misconduct, and the gravity, as characterized by the Secretary, may also vary greatly.

<sup>17</sup> In *AmCoal I*, 38 FMSHRC at 1987, the Secretary submitted a supplemental statement in response to questioning at the Commission's oral argument in that case, stating that "In fiscal year 2015, slightly less than one percent of all assessments – 1,069 of 115,483, or .925 percent – were special assessments." Sec'y letter dated May 2, 2016 at 3.

across all sizes and kinds of operators and degrees of negligence and gravity.<sup>18</sup> The Commission recognized this benefit in *Sellersburg*, holding:

When based on further information developed in the adjudicative proceeding, it is determined that penalties are appropriate which substantially diverge from those originally proposed [by the Secretary], it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. **If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.**

*Sellersburg*, 5 FMSHRC at 293 (emphasis added).

MSHA's regular penalty system represents the agency's professional judgment on the relative importance of the facts of violation and each of the penalty factors and sub-factors. Given the normative formula used by MSHA to propose a penalty of record, the regular penalty system is useful for proposing, insofar as possible, fair and equal penalties across many operators and many penalty factors. When an operator receives a proposed assessment, it has a basis for determining how the penalty was calculated.

This transparency promotes public confidence in the penalty system, and the Commission has recognized the need to preserve consistency and transparency in our proceedings, while allowing our Judges to make generally binding findings of fact and to apply the law so that each case is decided on the particular facts and circumstances in the record. Commission Judges have the authority to assess the penalties, but the Commission has determined to provide instructions regarding that authority to accommodate the interests of fairness and consistency.

Thus, when the penalty assessed by the Judge substantially diverges from a proposed, *regularly assessed* penalty, the Commission *requires* Judges to provide an explanation for the

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<sup>18</sup> The regulations recognize the need for fairness in the assessment of penalties across the range of operators. Section 100.1 of the regulations provides:

This part provides the criteria and procedures for proposing civil penalties under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act). The purpose of this part is *to provide a fair and equitable procedure for the application of the statutory criteria* in determining proposed penalties for violations, to maximize the incentives for mine operators to prevent and correct hazardous conditions, and to assure the prompt and efficient processing and collection of penalties.

30 C.F.R. § 100.1 (emphasis added).

divergence to avoid an appearance of arbitrariness in penalty assessments.<sup>19</sup> Judges have properly followed the Commission's directive in literally hundreds of cases over the years since *Sellersburg* was issued in 1983.<sup>20</sup>

Recognition of the normative benefits of regular assessments does not diminish the Commission's duty and authority to set penalties independently based upon findings of fact on all penalty factors. Rather, the Commission has provided a directive to Judges in order to harmonize its exercise with the need for fairness and transparency in penalty assessments. While we reaffirm the requirement to explain an assessment that is substantially divergent from a proposed *regular* penalty, the Commission must recognize the differences between regular and specially assessed MSHA penalty proposals.

### **(3) Special assessments**

Special assessments require a different analysis than regular penalty proposals. MSHA calculates special penalties to substantially increase penalties calculated under the regular point system, in order to address agency enforcement priorities. It does so by adding points to the negligence and gravity elements, without accounting for other statutory penalty criteria or considering the specific facts of the violation. Considering a penalty thus calculated in the same manner as a regular assessment is inconsistent with *Sellersburg*, because the proposed special assessment is itself a substantial divergence from a regular penalty.

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<sup>19</sup> Accordingly, the Commission routinely refers to the role of regular penalty assessments in evaluating citations. See *Unique Electric*, 20 FMSHRC 1119, 1123 & n.4 (Oct. 1998); *Thunder Basin*, 19 FMSHRC at 1504; *Dolese Bros. Co.*, 16 FMSHRC at 695 (finding that the Judge was required to explain a 60% increase in his civil penalty assessment). See also *Dan J. Sheehan Co. v. OSHRC*, 520 F.2d 1036, 1040-1042 (5th Cir. 1975); *Clarkson Construction Co. v. OSHRC*, 531 F.2d 451, 456 (10th Cir. 1976).

<sup>20</sup> Of course, the circuit court is correct that, from the statutory perspective of the language of the Mine Act, the Secretary's proposed regular penalty is a litigating position. *American Coal*, 933 F.3d at 727. However, as a matter of Commission case law, the Commission has recognized that the penalty proposed through the regular penalty assessment procedures results from the only existing system designed to provide a measure of uniformity to assessments across the multi-factored penalty process. *AmCoal I*, 38 FMSHRC at 1990-92, 1994-95. As the circuit court also recognizes, Congress empowered the Commission to assess penalties of contested citations and orders after a due process hearing under the Mine Act. *American Coal*, 933 F.3d at 725. Given the Congressional basis for the Commission's authority, courts undoubtedly must defer to reasonable guidelines established by rule or case law by the Commission to superintend Administrative Law Judges in the assessment of penalties.

**(a) The Regulatory Guidance for MSHA**

As promulgated in 1978, section 100.5 (then section 100.4) identified specific categories of violations for review for possible special assessment.<sup>21</sup> *See* 30 C.F.R. § 100.4 (1978); 43 Fed. Reg. 23517, 23519 (May 30, 1978). In 2007, however, MSHA amended section 100.5 to eliminate any identification of categories of violations for possible special assessment. *See* 72 Fed. Reg. 13592, 13621-22 (Mar. 22, 2007). As amended, section 100.5 gives MSHA open-ended authorization for special assessments. The principal operative provision of the current section 100.5 is subsection (a) that states only, “MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment.” Subsection (b) provides that all findings shall be in narrative form. 30 C.F.R. § 100.5.

MSHA, then, makes special assessments through a combination of internal discretionary decisions and a special assessment formula. Neither of these aspects of special assessment has received public notice and comment. Thus, neither the consistency nor transparency of the regular penalty process is inherent in the special assessment process.<sup>22</sup>

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<sup>21</sup> The 1978 rule actually stated that special assessments may be appropriate in cases of “fatalities and serious injuries, unwarrantable failures to comply with mandatory health and safety standards or patterns of violations under section 104 of the Act, the operation of a mine in the face of a closure order, the failure to permit an authorized representative of the Secretary of Labor to perform an inspection or investigation, discrimination violations under section 105(c) of the Act, failure to abate a violation within the prescribed period, violations by individuals, violations by designated independent contractors, and in other appropriate cases.” 30 C.F.R. § 100.4 (1978). Prior to enactment of the MINER Act of 2006, that list had been refined to the following:

- (1) Violations involving fatalities and serious injuries;
- (2) Unwarrantable failure to comply with mandatory health and safety standards;
- (3) Operation of a mine in the face of a closure order;
- (4) Failure to permit an authorized representative of the Secretary to perform an inspection or investigation;
- (5) Violations for which individuals are personally liable under section 110(c) of the Act;
- (6) Violations involving an imminent danger;
- (7) Discrimination violations under section 105(c) of the Act; and
- (8) Violations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances.

30 C.F.R. § 100.5 (2006).

<sup>22</sup> Recently, however, an Executive Order was issued emphasizing the importance of transparency in administrative enforcement actions generally and especially for policies affecting enforcement. *See* Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, October 9, 2019.

The formula for special assessments provides for substantial increases in negligence and gravity points versus those that would be regularly-assessed, but the agency's authority to refer a penalty for special assessment is not limited to considerations of negligence or gravity. There is no penalty increase in the formula based on the size of the operator or frequency of violations. Accordingly, if a mine operator has an excessive history of violations, MSHA arbitrarily adds points to negligence and gravity rather than frequency to increase the total points for assessment.

Based upon the addition of points to negligence and gravity, the addition of penalty points through special assessment often results in a multiple (quadruple or quintuple) increase in the penalty. These enhanced proposed penalties arise only from the independent decisions of MSHA officials to heavily penalize a particular violation.

Accordingly, while the regulatory guidance may provide some assistance *to MSHA* in specially assessing a penalty, it does not provide adequate guidance to a Judge to ultimately set the appropriate penalty.

### **(b) MSHA'S Program Policy Manual Guidance**

MSHA's Program Policy Manual ("PPM") also provides some guidance to the agency on proposing special assessments, but it also falls short of proper guidance to a Commission Judge. MSHA announced via its PPM that it affirmatively will specially assess a few specific types of violations, but the types of violations subject to consideration have already been changed without input from the public, and the non-binding guidance in the PPM may be changed again, at any time, without notice or comment. III MSHA, U.S. Dep't of Labor, PPM, Part 100, at 101-02 (Dec. 2013).

Separately, the PPM identifies violations that MSHA officials *must* consider for special assessment. III, MSHA, PPM, Part 100, at 101. Together, these categories encompass more than 60 mandatory standards as well as all violations involving an injury or allegedly flagrant violation. The breadth of scope within which the agency exercises its discretion to specially assess is enormous and unregulated.<sup>23</sup> Coupled with the fact that MSHA assesses less than one percent of its penalties under the special assessment program, this vast expanse radically increases the danger for arbitrariness, because, obviously, not every violation so considered results in a special assessment. Oral Arg. Tr. 60.

The PPM also provides a summary of the internal procedures used to make special assessment decisions—generally, completion of a Special Assessment Recommendation ("SAR") form by a District Manager, transmittal of the SAR to the Office of Assessments, Accountability, Special Enforcement and Investigations ("OAASEI") typically for a final decision, but there is no limiting principle that determines which of these considered violations will be specially assessed, or how that conclusion is reached. *Id.* at 102-03. As a result, MSHA may issue citations with congruent fact patterns to mines of the same size and violation history, but then propose assessments in which the proposed penalties for one operator or citation are many multiples higher than the proposed penalty for the other operator or citation. *E.g., The*

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<sup>23</sup> MSHA has asserted that its authority to specially assess a penalty is plenary and unreviewable.

*American Coal Co.*, 40 FMSHRC 1011, 1043-44 (Aug. 2018) (“*Amcoal I*”) (sep. op. of Acting Chairman Althen and Comm’r Young).

There is no structural requirement that MSHA ever account for the basis for its decision to specially assess a penalty. The Secretary provides a special assessment narrative that briefly explains the factual allegations in support of the specially assessed penalty. However, this document does not explain *why* MSHA singled out this particular citation for special assessment.<sup>24</sup>

Further, the Secretary often claims that records related to the special assessment are privileged and thus not available for the respondent or the Judge. *See, e.g., Big Ridge, Inc.*, 34 FMSHRC 2999 (Nov. 2012) (ALJ). Of course, MSHA has the right to invoke evidentiary privileges. However, this secrecy related to special assessments creates impediments to responding to MSHA’s case and may adversely affect the Judge’s ability to evaluate the case properly.

### (c) Commission Guidance to Judges on Special Assessments

Thus, the *American Coal* court’s characterization of the proposed special assessment as a “litigation proposal” is entirely apt. Like all litigating positions, favorable consideration of the agency’s proposal for a high penalty is subject to the Secretary’s presentation of proof of facts warranting a high penalty. The mere fact the Secretary has proposed a high penalty is irrelevant. As we have held, and as appellate courts have affirmed, the Judge must make an independent assessment based upon the facts and penalty criteria without using the special assessment as any sort of baseline or reference point.

For all these reasons, the rationale of the *Sellersburg* principle regarding substantial divergence cannot be applied to specially proposed penalties. Doing so would perversely undermine the basis for *Sellersburg*’s duty to explain. Indeed, understanding that MSHA seeks a far larger penalty than the amount that the regular assessment formula would dictate, the entire focus of a Judge’s independent penalty inquiry must be on the factual findings as they relate to the penalty criteria, rather than on the amount sought by MSHA.

We have recognized the distinction between regular and special assessments, and today we emphasize it. Two principles apply uniquely to special assessments.

First, the Commission has held that MSHA “bear[s] the ‘burden’ before the Commission of providing evidence sufficient in the Judge’s discretionary opinion to support the proposed assessment under the penalty criteria. When a violation is specially assessed, that obligation may

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<sup>24</sup> MSHA does maintain such records—MSHA Form 7000-32—but it refuses to provide those records to respondents. Unfortunately, the narrative MSHA does provide may contain only cursory explanations of the basis for a special assessment. *See AmCoal II*, 40 FMSHRC at 1027 (Aug. 2018) (“[t]ypically, the narrative findings for special assessments are brief and conclusory”). In this case, the narrative was more robust than in other cases thereby illustrating one of the difficulties of an arbitrary system in which the degree of information may vary widely depending upon the individual judgment of the person preparing the material.

be considerable.” *AmCoal I*, 38 FMSHRC at 1993. In *American Coal*, 933 F.3d at 727, the court stated that MSHA did not bear any “burden” with respect to a penalty and backhanded MSHA’s penalty assessment as if it were unimportant—an impotent litigating position. It is necessary to understand, therefore, that when the Commission used the term “burden” in *AmCoal I*, 38 FMSHRC at 1993, it did not do so in terms of a preponderance of proof standard of review. Instead, the Commission meant that, in seeking to sustain the litigating position regarding a special assessment—that is, an especially large penalty—the Secretary must present evidence to sustain, in the Judge’s discretion, the need for a large penalty. This requirement recognizes that MSHA is seeking an extraordinary penalty and must justify its litigation proposal with evidence on each of the penalty factors.

Second, MSHA’s opaque process for deciding to assess specially and MSHA’s consideration of only two penalty factors in the assignment of penalty points is not a suitable basis for a penalty decision by the Commission. Therefore, when MSHA proposes a special assessment, the Judge must base a decision only upon a complete review of the evidence pertaining to each of the penalty factors, a weighing of those factors in the context of the facts, and a final resolution based only upon such careful and fully explained review.

No significance attaches to MSHA’s penalty which is specially proposed for litigation purposes. The Judge must assess the penalty *de novo* based only upon the Judge’s findings of fact related to each penalty criterion.<sup>25</sup> Of course, it is entirely appropriate for a Judge to fully consider the agency’s proposal to treat a given violation as especially egregious for enforcement purposes. The agency may argue that a violation is exceptional and deserves an enhanced penalty by explaining its decision before the Judge and supporting the explanation with evidence. Because the Mine Act provides the Commission and its Judges with the ultimate authority to assess penalties, a Commission Judge may agree with the agency’s proposed special assessment, or may assess a greater or lesser amount that is appropriate in his or her assessment of the statutory factors.

MSHA’s regulations in section 100.3 are a useful tool in maximizing judicial efficiency and ensuring that *regular assessments* are consistent, fair, and equitable. For that reason, the Commission requires Judges to explain significant deviations from proposed regular assessments.

When MSHA proposes a *special assessment*, however, there must be a full explication of the allegations related to each penalty factor. The Judge’s penalty assessment must be commensurate only with the actual factual findings after hearing. Should the Judge elect to explain a difference from MSHA’s proposed assessment, that is clearly an option. This safeguard against arbitrary sanctions is entirely consistent with *Sellersburg* and with the Commission’s historical exercise of its independent statutory authority.

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<sup>25</sup> In *AmCoal II*, 40 FMSHRC at 1035-38, then Acting Chairman Althen and Commissioner Young addressed the almost inevitable tug of an MSHA penalty proposal as an anchor to the Judge’s decision. Judges must avoid the unconscious effect of the special assessment and act only based on the penalty criteria.

#### **D. The Concerns in the Dissenting Opinions are Misplaced.**

Finally, we must review, albeit briefly, our colleagues dissenting views regarding the directives established in this opinion. Our colleagues respond to this straightforward opinion that essentially only reaffirms the right and duty of the Commission to set penalties. Although they write separately, they say essentially the same thing and are both misplaced.

Contrary to the declaration of our colleagues, our instruction to Judges is firmly grounded on our majority decision in *AmCoal I* and is precedential. It goes without saying that the manner in which the Commission instructs Judges to assess penalties under section 110(i) of the Mine Act is not a matter for dispute between parties to a Commission proceeding. Our charge, as a Commission, is to set forth policies, interpretations, and rules, including those governing penalty assessments under section 110(i).

As a corollary to this principle, our colleagues are incorrect in suggesting that we could only offer this opinion if the issue of divergence between a Commission assessment and a MSHA proposal was raised in a Petition for Discretionary Review. Slip op. at 23-24 & n.1, 36-37. The principle discussed here involves only a legal issue, and more specifically, a legal issue raised by the Commission to assure fairness and transparency in its decisions. We review legal issues *de novo*, and it is obviously necessary for us to apply the correct legal standard in deciding cases on review.<sup>26</sup>

The correct legal standard, as it applies to special assessments, was articulated by the Commission's majority decision in *AmCoal I*. Our decision in that case is a natural extension of the principles of *Sellersburg*. In fact, the Commission's institution of the *Sellersburg* requirement to explain substantial divergences between the Judge's penalty and an MSHA regularly proposed penalty *did not arise* out of a petition for discretionary review raising the issue of explanation of differences. The Commission, there, affirmed its right and duty to assess final penalties. In doing so, it also imposed a duty to explain a substantial divergence in the Judge's assessment from a proposal arrived at through the formally instituted, transparent, regular penalty point system adopted by MSHA. As we have explained, *Sellersburg* has functioned as a counter to potentially arbitrary outcomes, as was *AmCoal I*. Here, we refine that instruction consistently with its original and ongoing purpose.

The indecision reflected by a divided Commission created in *AmCoal*, 40 FMSHRC 1011, is what the circuit court perceived as incoherence driven by legal principles in tension. As our opinion reflects, however, there is no actual tension. Rather, both the *Sellersburg* and *AmCoal I* precedents are intended to ensure consistent, fair, and principled penalty assessments.

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<sup>26</sup> Beyond the practical necessity of applying the correct standard, Solar Sources did in fact *specifically* object to the Judge's conclusions as to the penalty and his failure to "adequately explain the basis for the \$68,300 penalty . . . as the Commission directed in *American Coal*, 38 FMSHRC 1987 (August 30, 2016), on how penalties, *including special assessments*, are to be calculated." PDR at 2 (emphasis added).

It was incumbent on the Commission to correct the court's misapprehension of our precedents and the operation of the Secretary's special assessment program. That, we have done.<sup>27</sup>

Here, we reaffirm the core principle that Commission Judges have the authority and duty to set penalties and that MSHA's proposed assessments constitute litigating positions. Moreover, in this opinion, the Commission clarifies that Judges *are not required* to explain their divergence from a special assessment.<sup>28</sup> To be clear, there is, however, absolutely no prohibition on a Judge to explain a divergence should the Judge be so inclined. Our colleagues do not dispute that MSHA's special assessments are opaque.<sup>29</sup> This obscurity gives MSHA the ability to enhance penalties at its sole discretion without ever committing to a rationale upon which that determination rests. Further, MSHA has not submitted any substantive aspect of the special assessment procedures to public notice and comment and it changed its special assessment procedures from a clearly-expressed, publicly-vetted process.<sup>30</sup> The Commission has never reckoned with this departure from principles of administrative law.

Thus, *requiring* our Judges to explain divergences from opaque MSHA penalty assessments serves neither the goal of transparency and public trust nor the principles of fair and objective assessments.<sup>31</sup> On the contrary, such a requirement would interject a foundational bias toward the enhanced penalty into the consciousness of the trier of fact, whether or not the reason for the enhancement has been validated by the trial process.

We thus agree that the fact that the penalty is specially assessed—standing alone—is completely irrelevant. Rather, the Judge must consider the proffered basis for the enhanced penalty and the evidence supporting it. The Commission then reviews the Judge's decision to determine whether substantial evidence supports findings of fact that underlie the penalty assessment and, in turn, whether the assessment is arbitrary and capricious when based upon

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<sup>27</sup> The Commission's instruction certainly does not create any danger or even significant changes to the fair assessment of penalties that our colleagues seem to fear or infer in their opinions.

<sup>28</sup> The views of the dissenters are internally irreconcilable. They recognize, even emphasize, the independence of our Judges' penalty decisions *but then* find we must require Judges to take into account or at least explain variances from opaque special assessments. Slip op. at 24-26, 37-39. Such a belief is at odds with the status of a Secretary's special penalty proposal as a uniquely unexplained litigating position.

<sup>29</sup> The dissenters do not identify any benefit for requiring an explanation for a variance from an assessment that was arbitrary from the outset. The decision to assess specially is discretionary and not governed by any mandated rules. In turn, MSHA makes the assessment through a system in which facts of the case may have no bearing upon the increase in the penalty.

<sup>30</sup> See slip op. at 14-15 and n.21, *supra*.

<sup>31</sup> Our dissenting colleagues note the motivation for *Sellersburg*—without any reference to language in *Sellersburg* or any other case to support that speculation. Slip op. at 25-26, 37-39.

facts supported by substantial evidence. The views of our colleagues notwithstanding, this is not a “new” or “additional” burden of proof on the Secretary (slip op. at 26-27, 37-39); it is the same burden he bears on every other issue under the Mine Act and the Administrative Procedure Act, 5 U.S.C. § 500 et seq.<sup>32</sup>

Our decision today does not make any draconian changes, or indeed changes at all, in the assessment process. We only reinforce the need for *all* penalties to be independently assessed, consistent with the Mine Act and our precedents. In order for us to ensure that is done in this case, and in future cases, we remind our Judges that they are free from unintended and irrational restraint, or anchoring, in their discretionary decision-making. Where the Secretary properly explains the basis for a special assessment, the Judge’s independent assessment will be informed by the facts of the case, and not a perceived need to justify a variance from an opaque special assessment.

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<sup>32</sup> One dissenting colleague goes so far as to presume that by retaining the *Sellersburg* explanation requirement for regular penalty assessments, we find that regular penalty assessments are “inherently reasonable.” Slip op. at 38. She misses the point entirely. We do not find any penalty to be “inherently reasonable;” we credit regular assessments as the product of a transparent process that provides a basis for the Secretary’s litigating position. There is a bulwark in that process against arbitrary results, unlike with special assessments. This is the entirety of the problem: The rationale for the application of *Sellersburg* does not apply to special assessments, because the Secretary has refused to provide regularity and transparency to that process.

We trust that the equivalency our colleague draws between regular and special assessments does not mean that she actually finds special assessments to be inherently reasonable, despite the Secretary’s obdurate failure to lift the veil and commit to a thesis for such assessments as a matter of policy. Such a position would be contrary to the principle we reinforce today: the right and duty of Judges to make independent assessments in every case, without being tethered to a policy decision whose foundations may or may not remain viable post-hearing.

### III.

#### Conclusion

In light of the guidance set forth in this Decision, and returning to the citation at issue, remand is essential in this case in the interest of justice. Accordingly, we direct the Judge to exercise his responsibility to conduct an independent and reasoned analysis, using the record evidence. That analysis is to include findings of fact or meaningful explanation on each of the statutory penalty criteria, and particularly in this case, to make findings regarding the operator's history of violations and the operator's actions related to attempting to achieve rapid compliance after notification of a violation, consistent with the requirements of Commission Procedural Rule 30(a) and section 110(i) of the Mine Act. The Judge should then reassess a civil penalty in accordance with the established Commission precedent of *AmCoal I*. Accordingly, we vacate the Judge's penalty assessment and remand the case to the Judge so that he may enter a penalty assessment consistent with this opinion.<sup>33</sup>

/s/ Marco M. Rajkovich, Jr.  
Marco M. Rajkovich, Jr., Chairman

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

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

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<sup>33</sup> Commissioner Traynor concurs with the decision to remand this case to the Judge based on Parts A and B only.

Commissioner Traynor, concurring with the majority on Parts A & B and dissenting from the majority on Parts C & D:

I agree with the majority's conclusions that the Judge erred in failing to fully consider the statutory penalty criteria and with their finding that the Judge need not reconcile the differences between his penalty analysis and the Secretary's narrative findings. In fact, had the majority's analysis ended here—where it should have—I would have likely signed their opinion. Yet, for the reasons described herein, I regretfully cannot.

The majority purports to decide issues that were not raised before the Judge in the proceeding below, not addressed in the operator's petition for discretionary review, and not briefed to us. Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823 (d)(2)(A)(iii), requires a party to "separately number[] and plainly and concisely state[]" each issue for which review is sought and further states that "[i]f granted, review shall be limited to the questions raised by the petition." Commission Procedural Rule 70(g), 29 C.F.R. § 2700.70(g), echoes this restriction. Here, the question of whether a Judge needs to adhere to our decision in *Sellersburg Stone Company*, 5 FMSHRC 287 (Mar. 1983), and explain any substantial deviation between the Secretary's special assessment and the Judge's penalty assessment was not raised in Solar Sources' petition. Nor was there an issue raised of whether a Judge must meet a newly announced and "considerable" burden to justify penalty amounts assessed in cases involving special assessment proposals. Accordingly, the parties did not have notice or the opportunity to be heard before the Commission on the issues implicated in the majority's attempt to upend long-settled legal principles.<sup>1</sup> These issues, which have nothing to do with resolution of the issues raised in Solar Sources' petition, are not properly before the Commission.

Tacitly acknowledging their opinion exceeds the scope of the PDR, the majority claims that it has the right to "review legal issues *de novo*." Slip op. at 18. The Mine Act provides a mechanism for the Commission to review legal issues or Commission policy *sua sponte*, but the

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<sup>1</sup> The majority claims that Solar Sources specifically addressed these issues in its PDR when it alleged that the Judge did not "adequately explain, the basis for the \$68,300 penalty . . . as the Commission directed in *American Coal*, 38 FMSHRC 1987 (Aug. 30, 2016)" ("*AmCoal I*"). PDR at 2; slip op. at 19 n.26. They are incorrect. In *AmCoal I*, the Commission found error in a Judge's *de novo* penalty assessments and accordingly remanded the citations—originally subjected to the Secretary's special assessment procedures—ordering the Judge to reassess the penalties consistent with the opinion. 38 FMSHRC at 1998. Notably, *American* repeatedly cites *Sellersburg* favorably, for the exact legal proposition that the majority now aims to overturn, stating explicitly that the Judge is "require[d] [to] explain a substantial divergence from the [specially assessed] penalty proposed by the Secretary." *Id.* at 1996. In fact, the *American* decision noted that *Sellersburg* requirements "do[] not constrain the independence of the Judge to make a final penalty assessment . . ." *Id.* Accordingly, the majority's instructions here are certainly *not* "firmly grounded on our majority decision in *AmCoal I* and [] precedential." Slip op. at 18. Nor can Solar Sources' PDR be construed as the majority suggests.

majority did not utilize it here. 30 U.S.C. § 823(d)(2)(B).<sup>2</sup> Because the majority has addressed legal issues *sua sponte*, without a prior grant of review, they act *ultra vires* of the Mine Act. 30 U.S.C. § 823(d)(2)(B). (“If a party’s petition for discretionary review has been granted, the Commission *shall not raise or consider additional issues in such review proceedings except in compliance with the requirements of this paragraph.*”) (emphasis added).

Though much of what the majority opinion purports to decide exceeds our statutory authority and is therefore without precedential value, I write for the benefit of our Judges and the public about two particular aspects of the majority’s approach to penalty assessment that are inconsistent with over 35 years of precedent and practice. First, the decision in *American Coal Co. v. FMSHRC*, 933 F.3d 723 (D.C. Cir. 2019), is the most recent in a long line of precedents prohibiting our Judges from exercising their penalty assessment authority differently depending on whether the Secretary proposes penalties under his regular or special assessment regulations. Second, equally settled law prohibits our Judges from subordinating their assessment role to the point counting system used to compute the Secretary’s proposals or any inflexible standard of proof irrelevant and ill-suited to their independent exercise of wide discretion.

**A. Judges Should Continue to Explain Any Substantial Divergence Between a Proposed Penalty and Final Assessment Without Regard for How the Secretary Proposed the Penalty.**

In *American Coal*, the D.C. Circuit uncritically observed that our precedent “seems to point in two directions” by: 1) requiring that our Judges make an assessment independent from the Secretary’s penalty proposal while at the same time 2) explaining any substantial divergence from the proposal. 933 F.3d at 728. The majority misreads the opinion, projecting on the court a “troubling” perception of “an inconsistency in Commission law” that “demands prompt clarification.” Slip op. at 10. Yet nothing in the court’s opinion describes the “two directions” as troubling, inconsistent, incompatible, unworkable or in need of change. Ultimately, the court endorsed our “two directions” as equally necessary by affirming in that case “*all that matters here* is that the ALJ satisfied *both* of those standards, provided an independent and reasoned basis for the penalty calculation, and supported all relevant factual determinations with substantial evidence.” 933 F.3d at 728 (emphasis added). Even in a case involving a proposal for a penalty that was specially assessed, the court held it *matters* that our Judges explain any substantial divergence from the government’s proposal.

In an opinion it frames as a response to the D.C. Circuit, the majority in this unrelated case purports to release our Judges from the responsibility of satisfying one of these two standards—the substantial divergence explanation—in those cases in which the Secretary proposes a special rather than regular assessment. This would create the first ever exception to what has for several decades been a universal requirement in all civil penalty cases that our

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<sup>2</sup> “At any time within 30 days after the issuance of a decision of an administrative law judge, the Commission may in its discretion . . . order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved . . . .” 30 U.S.C. § 823(d)(2)(B).

Judges explain any substantial divergence between the Secretary’s proposal and the final assessment. *See Sellersburg*, 5 FMSHRC at 287. The majority’s rationale for this carve-out is couched in a lengthy explanation of how the Secretary’s discretionary decision to propose a specially assessed penalty is different than the computation of points under the regular assessment proposal process. In short, the majority claims the original rationale for the substantial divergence explanation in our *Sellersburg* decision—avoiding the appearance that penalties are arbitrarily raised or lowered after contest—is not present unless the Secretary’s proposed penalty is rooted in the regular assessment process point calculations. This conclusion flows from the majority’s belief that only explanations of a divergence from a penalty computed by the regular point system can preserve “consistency” and “transparency” in our penalty proceedings. Slip op. at 13-15.

In *Sellersburg*, we were not, as the majority contends, motivated to require an explanation of substantial divergence by a desire to foster consistent penalty assessments. Nor did we seek to foster “consistency” in penalty assessments or “equal penalties across many operators . . . .” *Id.* at 13. Consistency is not referenced anywhere in the *Sellersburg Stone* opinion or in the Mine Act. And it is not a goal our Judges are required by any other source of law to pursue.<sup>3</sup> *See Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 186 (1973) (rejecting argument that agency must achieve “uniformity of sanctions for similar violations” where no such requirement is found in the enabling statute).

Transparency motivated our *Sellersburg* decision. There, we introduced the concept of a substantial divergence explanation with the observation that in our early penalty assessment cases “the Secretary’s proposed penalties are usually of record in a Commission proceeding.” 5 FMSHRC at 293. We wanted to ensure the Secretary’s recommended penalties would remain a matter of record, and a Judge’s assessment and explanation of any divergence readily apparent in the text of our decisions.

Our *Sellersburg* rule requiring explanation of divergence enables Congress, agency officials and the public to examine and evaluate the role of both parties to our bifurcated model. We have for decades required written explanations of substantial divergence in cases involving both regular and special assessment proposals, in part, because Congress recognized “that the purpose of civil penalties, convincing operators to comply with the Act’s requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.” S. Rep. No. 95-181, at 45 (1977) reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978). Any reader of a civil penalty decision can easily ascertain the penalty amount proposed, and review a Judge’s explanation of why the Commission arrives at a final assessment greater or less than the proposed amount. Just because such explanation may not be reducible to a mathematical expression does not mean it is without value. The transparency benefits of our rule are equally true in special assessment cases and it is difficult to understand

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<sup>3</sup> The appropriate process for assessing penalties is set forth more fully in Section B, below, followed by a discussion of the proper standards by which the Commission reviews its Judges’ assessments.

how exempting a subset of our cases from the rule providing these benefits could be justified by transparency concerns.

The majority states they will exempt special assessment cases from our *Sellersburg* rule requiring substantial divergence explanations because “the Commission must recognize the differences between regular and specially assessed MSHA penalty proposals.” Slip op. at 14. But when we review penalties, any focus on the Secretary’s internal process for proposing penalties is misplaced. Asking our Judges to distinguish between regular and special assessments to determine whether or not a substantial divergence explanation is needed is not consistent with the principle that “[w]hat internal remedial enforcement judgments the Secretary might or might not have made in suggesting a penalty amount are beside the point.” *American Coal Co.*, 933 F.3d at 727; *see also Mach Mining LLC v. Sec’y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016); *U.S. Steel Mining Co.*, 6 FMSHRC 1148, 1150 (May 1984) (“[I]t is irrelevant to the Commission for penalty assessment purposes whether a penalty proposed by the Secretary in a particular case was processed under [30 C.F.R. §] 100.3 [regular assessment regulation] . . . or [30 C.F.R. §] 100.5 [special assessment regulation.]”).

### **B. We Do Not Review a Discretionary Penalty Assessment Decision for Evidentiary Support, Whether the Proposal is Regularly or Specially Assessed.**

We have long held that the discretionary decision to assess a penalty amount “must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.” *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). And findings on each of the penalty criteria must be supported by substantial evidence. But never before the majority’s decision in this case have we indicated that we will scrutinize the Judge’s discretionary assessment decision itself for “substantial,” “considerable,” or any other type of evidentiary support. Never before the majority’s decision have we attempted to apply *any* burden of proof to the assessment decision itself (in addition to the section 110(i) findings), let alone a burden that increases when the Secretary proposes a special rather than regularly assessed penalty.

The majority suggests we apply a seemingly demanding version of substantial evidence review to penalty assessment decisions we have long reviewed only for abuse of discretion, explaining that in the case of a specially assessed penalty, the Secretary bears a burden to explain and justify with substantial evidence that the facts of the case support the proposition that the particular violation “is exceptional and deserves an enhanced penalty.” Slip op. at 17-18; *see also id.* at 17 (“[I]n seeking to sustain the litigating position regarding a special assessment—that is, an especially large penalty—the Secretary must present evidence to sustain, in the Judge’s discretion, the need for a large penalty.”).

In *The American Coal Co.*, 38 FMSHRC 1987, 1993 (Aug. 2016) (“*AmCoal I*”), we opined that the Secretary “bear[s] the burden before the Commission of providing evidence sufficient in the Judge’s discretionary opinion to support the proposed assessment under the penalty criteria. When a violation is specially assessed, that obligation may be considerable.” In the case at hand, the majority seizes on the conditional phrase, “*may* be considerable,” as support for a new proposition—the Commission will scrutinize a Judge’s penalty assessment for heightened evidentiary support in cases in which the penalty that was originally proposed was

specially assessed. In the majority’s new standard, the word “may” is now absent. And gone with that word “may” is the Judge’s wide discretion to independently assess a penalty amount after considering the statute’s section 110(i) factors and deterrent purpose.

The majority purports to make a Judge’s penalty assessment of contested penalties reviewable for substantial, even “considerable” evidence. Yet nowhere in *AmCoal I* did we express anything close to an intention to so radically alter the foundational standards governing our review: substantial evidence for each of the findings and then abuse of discretion for the explanation as to how the penalty amount chosen is supported by the section 110(i) findings and the Act’s deterrent purpose. Never before have we applied a substantial evidence, considerable evidence, or any other type of evidentiary review to the Judge’s discretionary choice of penalty amount. Furthermore, never before has the Commission suggested that the Judge alter his or her approach to a penalty assessment depending on how the Secretary’s originally proposed penalty was derived.

When the D.C. Circuit reviewed our decision in *The American Coal Co.*, 40 FMSHRC 1011 (Aug. 2018) (“*AmCoal IP*”), it explicitly rejected the argument that we must “require the Secretary to prove the grounds for his proposed penalty by a preponderance of the evidence” explaining that approach “fundamentally misunderstands the ALJ’s task.” *American Coal*, 933 F.3d at 726. Similarly, no evidentiary burden—whether substantial, a preponderance, or considerable—can be required as justification for the decision to assess any particular penalty amount. Such a burden would be inconsistent with the wide discretion we expect our Judges to exercise when determining a suitable penalty amount at the conclusion of the independent penalty assessment process described in our precedents.

### **1. The Judge Makes Evidentiary Findings and then Assesses a Penalty Supported by those Findings.**

That process begins with a Judge making a finding of fact on each of the section 110(i) penalty criteria by examining and weighing evidence material to each criterion. Each finding must be backed by substantial evidence. At that point, the Judge must consider the section 110(i) findings to assess a penalty amount. The Judge has wide discretion to assess any penalty amount within the statutory minimum and maximum. A Judge is “not required to weigh the criteria in assessing the penalty in the same manner that the criteria are weighed in the proposal of a penalty.” *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1980 (Aug. 2014).<sup>4</sup> “Judges have discretion to assign different weight to the various factors, according to the circumstances of the case.” *Id.* at 1979 (quoting *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001)). And a single finding on only one or two of the six criteria could justify assessment of the statutory maximum even where findings entered on the other criteria would tend to mitigate a penalty, if rationally

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<sup>4</sup> Despite the protests of the majority, a Judge has the discretion to assess a high penalty, for reasons independent of or similar to the Secretary’s original rationale. Accordingly, the Secretary’s failure to substantiate a particular allegation in his penalty narrative does not abridge the Judge’s discretion to assess a penalty. Similarly, the Judge’s discretion cannot be diminished by the contents of or omissions in the Secretary’s Program Policy Manual, specific calculations in MSHA Form 7000-32, or by the Secretary’s penalty proposal for a different violation at a different mine.

explained by reference to the section 110(i) findings or deterrence. *See Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016). For instance, the Commission has held that Judges have not abused their discretion for more heavily weighing gravity and negligence than the other criteria. *See, e.g., Signal Peak Energy, LLC*, 37 FMSHRC 470, 485 (Mar. 2015).<sup>5</sup>

We have consistently held that the Judge must provide an “adequate explanation of how these findings contributed to his penalty assessments.” *Cantera Green*, 22 FMSHRC at 622. “While the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the Judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria.” *Id.* at 621. Finally, where the amount that has been assessed is substantially more or less than the Secretary’s proposed penalty, the Judge must also explain the divergence. *Sellersburg*, 5 FMSHRC at 293.

## **2. The Commission Reviews the Judge’s Findings for Substantial Evidence and then Reviews the Judge’s Assessment for an Abuse of Discretion.**

Our review of a challenged penalty assessment is a two-step process. First, we review the findings of fact on each of the section 110(i) criteria under the substantial evidence standard, looking for “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). Then, we review the Judge’s assessment decision for abuse of discretion, which must be “bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act’s penalty assessment scheme.” *Sellersburg*, 5 FMSHRC at 294.

We do not evaluate whether the facts underlying the findings are of the type or quantity sufficient to justify some burden that varies according to the penalty amount. Where any argument for subjecting discretionary penalty assessment decisions to an evidentiary standard “goes wrong is in trying to extend that burden of proof to the Secretary’s suggested penalty amount.” *American Coal*, 933 F.3d at 727. The assessment decision itself, unlike the section 110(i) findings, is not a factual finding and therefore not in need of *any* evidentiary support, let alone “considerable” evidence, whether it is proposed as regular or special. *Sellersburg*, 5 FMSHRC at 294 (“[D]etermination of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact.”); *cf. Beall Const. Co. v. OSHRC*, 507 F.2d 1041, 1046 (8th Cir. 1974) (“The assessment of penalties by the administrative agency is not a factual finding but the exercise of a discretionary grant of power. Our review of such penalties is whether there has been an abuse of discretion.” (internal citation omitted)). Relatedly, the Secretary is not required to prove facts justifying his decision to propose a special rather than regular assessment, or facts justifying any divergence between the special assessment

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<sup>5</sup> The majority’s call for the Commission to review penalty assessments that approach the statutory maximum to determine if substantial evidence supports a finding that the underlying violation was “exceptional” cannot be reconciled with such discretion.

proposal and what the proposal would have been under the formula used to propose regular assessments.<sup>6</sup>

Indeed, the point system the Secretary uses to make regular penalty proposals should not in any way operate to limit or dictate the final amount assessed. And Judges deciding penalty amounts should decline to create in their minds an imitation of the point system to which they might subordinate their obligation to assess penalties that will deter violations of the Act.<sup>7</sup> The Mine Act sets the minimum and maximum penalties that can be assessed, and no “amount” or “type” of evidence is necessary to justify the assessment of a penalty anywhere along the spectrum ranging from this statutory minimum to maximum amount, as long as supported findings and deterrence are considered. Where along that spectrum a final assessment is located does not need to bear any relationship whatsoever to the point system’s “regimented formula [that] mathematically converts findings regarding the six statutory factors into predetermined dollar values.” *American Coal*, 933 F.3d at 725.

Penalty assessments are reviewed only for abuse of discretion. Requiring our Judges to justify their discretionary decision to assess any particular penalty amount by reference to some standard of proof would not be consistent with abuse of discretion review. Such a requirement would encroach on their discretion. Indeed, the D.C. Circuit has expressly held that no more than a limited set of things must be addressed in a Judge’s explanation of his or her exercise of discretion, and that these things are sufficient, without more, to adequately explain an assessment decision:

The ALJ rationally explained his penalty assessments with reference to each of the six statutory factors, and he expressly disclaimed any use of the Secretary’s proposed specially assessed penalties as a baseline or starting point. Rather than discounting the proposed penalties, he arrived at an independent determination of a penalty amount that would respond to the seriousness of the Company’s violations and would deter future violations. The ALJ also contrasted his judgment with that of the Secretary to the extent that there were any substantial deviations in his penalty amounts that would require an explanation. The **ALJ need drill no deeper**.

*Id.* at 728 (internal citations and punctuation omitted and emphasis added).

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<sup>6</sup> The majority here cannot square dicta in its opinion, including over five pages discussing the difference between a regular and specially assessed penalty proposal, with our precedential holding that the Secretary’s internal decision to make a regular or special assessment is “irrelevant to the Commission for penalty assessment purposes.” *U.S. Steel Mining Co.*, 6 FMSHRC 1148, 1150 (May 1984).

<sup>7</sup> In the same way, a proposed special assessment should not be an “anchor” or “starting point” for an assessment.

The D.C. Circuit in *American Coal* was not troubled by the “two directions” that have guided our penalty assessment process since our decision in *Sellersburg*. It affirmed them both. *Id.*

Accordingly, I strongly dissent from Parts C and D of the majority opinion, in which the majority asserts in dicta that Judges must exercise their discretionary assessment authority differently depending on whether the proposed penalty is regular or specially assessed. I also disagree with the majority’s characterization, also dicta, of our Judges’ highly discretionary penalty assessment process and the standards we apply to review the same. However, I agree with the majority in result only as to Parts A and B of their opinion, that the case should be remanded for specific findings regarding the operator’s history of violations and demonstrated good faith in achieving rapid compliance and for the Judge to assess a civil penalty.

/s/ Arthur R. Traynor, III  
Arthur R. Traynor, III, Commissioner

Commissioner Jordan, dissenting:

### **I. The Judge's Penalty Assessment Should be Affirmed**

The Mine Safety and Health Administration (“MSHA”) charged Solar Sources with violating a safety standard that requires berms at certain locations to prevent vehicles from overturning. The Judge found a violation and assessed a penalty of \$68,300, the amount of the Secretary’s specially assessed penalty proposal. On appeal, the operator challenges only this penalty. The majority remands the case, requiring the Judge to explain how the operator’s history of violations and its good faith abatement of the violation affected his penalty determination. For the reasons stated below, I believe that remand is unnecessary, and would affirm the assessment.

The citation was issued after an accident occurred in which a dump truck broke through a berm and went over an embankment to a slurry pit approximately 47 feet below.<sup>1</sup> The truck landed upside down. The driver jumped from the truck before it went over the embankment and was seriously injured.

The Judge found the violation was a result of the operator’s high negligence and unwarrantable failure<sup>2</sup> and significant and substantial (“S&S”),<sup>3</sup> rulings the operator did not appeal. The Judge noted the Secretary’s contention that the condition existed for a period of time and that the operator had knowledge that berms were a constant problem requiring attention. 40 FMSHRC 462, 493 (Mar. 2018) (ALJ). In short, this was an extremely serious violation.

Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). A Judge’s penalty assessment is reviewed under an abuse of discretion standard. *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).<sup>4</sup> As there is ample evidence supporting this assessment, I find that the Judge did not abuse his discretion.

Section 110(i) of the Mine Act requires that in assessing civil monetary penalties, the Commission consider six criteria: [1] the operator’s history of previous violations, [2] the

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<sup>1</sup> The citation charged a violation of 30 C.F.R. § 77.1605(l), which provides: “Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.”

<sup>2</sup> Unwarrantable failure means aggravated conduct, constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987).

<sup>3</sup> The term “significant and substantial” derives 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 contributed to the cause and effect of a . . . mine safety or health hazard.”

<sup>4</sup> An abuse of discretion may be found where there is no evidence to support the Judge’s decision or if the decision is based on an improper understanding of the law. *The American Coal Co.*, 38 FMSHRC 1972, 1984 (Aug. 2016).

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. 30 U.S.C. § 820(i).

The Judge's decision focused on two of these factors, gravity and negligence. In explaining his penalty assessment, the Judge stated:

Having found that the violation identified in Citation No. 9102704 was established and that the Inspector's evaluation of the gravity and negligence and his finding of unwarrantable failure and significant and substantial were demonstrated and that no cognizable mitigation was advanced, the Court therefore finds, that upon application of the statutory criteria, the penalty proposed by the Secretary should be applied.

40 FMSHRC at 495. He stated that the other section 110(i) penalty factors "were duly considered," and he mentioned each of them in a footnote. *Id.* at 495 n.15. "To be clear," he noted, "the Court's penalty determination has been determined by evaluation of the six statutory criteria." *Id.* at 495.

Turning to the gravity factor, this violation created an extraordinarily dangerous—and potentially fatal—hazard. In his S&S discussion, the Judge concluded that the lack of berms contributed to the danger of a vehicle veering off the elevated roadway and rolling, or falling, down the incline. *Id.* at 494. He emphasized that "[t]here is no question that the haul truck went through the berm and ended up going over the embankment, landing at the bottom of the slurry pit and that the haul truck driver, though receiving significant injuries from the accident, was fortunate to escape from his vehicle." *Id.* at 492.

Regarding negligence, the Judge stated (in his discussion of the merits of the unwarrantable failure allegation):

[T]he Secretary asserts that the duration of the inadequate berm was: "long enough for the hazard to have been identified and recorded in the onshift records;" of such extensiveness to cover the width of the slurry dumping area; without any efforts to address the hazardous berm's muddy consistency; and presented an obvious and dangerous hazard about which the Respondent should have known of its existence. *Id.* at 23-24. As stated before, and on the same bases, and as discussed further *infra*, the Court agrees that this was an unwarrantable failure.

*Id.* at 488. Thus, clearly the Judge determined that the negligence level of the operator was high.

The Commission has acknowledged that a Judge need not assign equal weight to each of the penalty assessment criteria and that it has previously held that Judges have not abused their

discretion by more heavily weighing gravity and negligence than the other penalty criteria. See *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373-74 (Sept. 2016); *Signal Peak Energy, LLC*, 37 FMSHRC 470, 484-85 (Mar. 2015); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001). Here, the Judge assessed a significant penalty in a case in which he found that a dangerous condition (that the operator admitted was a constant problem requiring attention) had existed for a period of time. This does not constitute an abuse of discretion.

Moreover, Commission precedent makes clear that remand is not required in this case. In *Sellersburg Stone Co.*, 5 FMSHRC 287 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984), for example, the Judge's decision contained discussion and findings on only two of the six statutory penalty criteria (negligence and gravity). The decision was "devoid of specific facts and findings bearing on the remaining four criteria." 5 FMSHRC at 292. In that case there was a wide divergence between the proposed penalties and the Judge's assessments.

Nonetheless, the Commission stated that a remand for the entry of findings on the criteria was unnecessary and would needlessly prolong the proceedings. In the interest of judicial economy, it entered the required findings rather than remanding for the Judge to do so, noting that there was no controversy between the parties concerning the record evidence bearing on each of these criteria. *Id.* at 293-94. In fact, the Commission acknowledged that, as in the instant case, "[t]he uncontroverted nature of the evidence bearing on these criteria may explain why the Judge did not make express findings in his decision." *Id.* at 294 n.9.<sup>5</sup>

The Seventh Circuit affirmed this decision, explicitly holding that "the Commission's entering of undisputed record information as findings was proper under the [Mine] Act." 736 F.2d at 1153. The court relied on language in the Mine Act stating that "[t]he Commission . . . may . . . modify the decision or order of the administrative law judge in conformity with the record." *Id.* (citing 30 U.S.C. § 823(d)(2)(C)).

The majority's insistence on remand in this case is antithetical to the Seventh Circuit's conclusion in *Sellersburg*:

The Commission must remand a case to the ALJ only if it  
"determines that further evidence is necessary on an issue of fact."  
Given the Commission's conclusion that uncontroverted evidence

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<sup>5</sup> Regarding the operator's history of violations, in *Sellersburg*, the Secretary had entered an exhibit into evidence indicating the number of violations charged and penalties for violations paid during the relevant two-year period. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983). The Commission determined that therefore the operator had at least a moderate history of previous violations. *Id.* In this case, the Secretary entered a similar exhibit into evidence, Ex. P-2, to which the Judge referred when referencing the operator's violation history. Solar Sources has never challenged the accuracy of this information. Although my colleagues assert that the Commission cannot make its own findings on this factor, slip op. at 8, I conclude that, given that there remains no factual dispute regarding the violation history, the parties' disagreement as to the significance of the uncontroverted evidence is not a reason to remand the case.

did not warrant further factual findings, such a remand was not required in this case.

*Id.* (citation and footnote omitted).

Similarly, in *Knight Hawk*, a unanimous Commission affirmed a \$70,000 penalty assessed by the Judge. The Judge below had discussed her findings related to five of the penalty criteria but did not make express findings about history of violations (although she was aware of the history). The Commission, relying on *Sellersburg*, stated that findings may be entered by the Commission on review based on undisputed record evidence. In the interest of judicial economy, the Commission made the finding on history, ruling that the operator's safety record weighed in favor of a penalty less than \$70,000. Nonetheless, it held that the Judge's determinations regarding the other criteria supported her penalty assessment, in particular because the gravity of the violation was S&S and undisputed. It noted that the Judge gave significant weight to the operator's negligence, the high degree of danger and the operator's failure to enforce the safety policy at issue. 38 FMSHRC at 2373-74.

The Commission's decision in *Signal Peak* also countenances against a remand here. In that case, the operator argued that the Judge did not provide adequate justification to account for the difference between the Secretary's proposed penalties (\$51,400) and the penalties which the Judge independently assessed (\$83,750). The Commission disagreed, and concluded that, except to the extent one of them exceeded the statutory maximum, the Judge did not abuse his discretion in raising the penalty amounts. 37 FMSHRC at 484-85.

In *Signal Peak*, the Judge's discussion regarding the history of violations mirrored the finding at issue here. The Judge stated only: "In terms of the mine's history of violations, the court has taken into account GX 21, the certified Assessed Violation and History Report." 34 FMSHRC 1346, 1382-83 (June 2012) (ALJ). Yet the Commission saw no need to remand the case for additional analysis of this factor.

In addition, in *Spartan Mining Co.*, 30 FMSHRC 699 (Aug. 2008), the operator argued that in raising the penalties from the amounts proposed by the Secretary, the Judge erred by failing to discuss the required penalty criteria under section 110(i). The Commission noted that the operator specifically took issue only with the two factors of negligence and gravity, and thus affirmed the Judge's general discussion of the other four penalty factors as adequate to support his penalty determinations. *Id.* at 723-24. Notably, the Judge's entire discussion of history of violations and abatement consisted of the following: "The history of violations and Spartan's abatement efforts are not a material factor in determining the appropriate penalty liability." 29 FMSHRC 465, 478 (June 2007) (ALJ). Again, no remand was required.

The majority also remands the case to the Judge to enter findings regarding whether the operator demonstrated good faith in attempting to achieve compliance after notification of the violation. Given that the sole evidence in the record regarding abatement confirms that all of the operator's efforts were mandated by MSHA, I am hard-pressed to see how this evidence could be used to change the amount of the penalty.

Moreover, the Judge discussed the operator's abatement efforts and their possible effect on his penalty determination in his discussion of the merits:

[Solar Sources'] Counsel took the position that the remedial measures the mine took after the incident should factor in the Court's final penalty assessment as part of its good faith. Tr. 347-48. The Court does not agree . . . . [While Solar Sources] touted the efforts it made post the berm accident to make matters safer for dumping, Fields [Steven Fields, the operator's safety director] indicated that the mine *had* to do it per MSHA requiring it. Tr. 516-17.

40 FMSHRC at 487 (emphasis in original).<sup>6</sup>

I struggle to see how remanding the case to the Judge to enter a finding on whether the operator demonstrated good faith in attempting to achieve compliance will produce anything beyond this already sufficient analysis of the issue.

The majority's reliance on *Hubb Corporation*, 22 FMSHRC 606 (May 2000), and *Cantera Green*, 22 FMSHRC 616 (May 2000), is misplaced. In *Hubb*, in which the Judge made a significant reduction in the penalties assessed from the penalties proposed by the Secretary, the Commission's ruling was based in part on the Judge's failure to explain the substantial deviation between the Secretary's two proposed penalties and his assessment, which *Sellersburg* requires. *Hubb*, 22 FMSHRC at 612-13. Of course, that is not relevant here, where the Judge assessed the amount proposed by the Secretary. Furthermore, in *Hubb*, the Judge did not even allude to the operator's abatement efforts, size, or the effect of the penalty on the operator's ability to continue in business. For one of the penalties, the Judge failed to mention the history of violations factor at all. For the other, he said merely that he took the operator's history into account. 20 FMSHRC 615, 620, 622 (June 1998) (ALJ). Hence, there were a myriad of reasons why remand was necessary.

*Cantera Green* is also distinguishable. In that case, the Judge assessed significantly lower penalties for ten violations despite concluding that the record supported a finding of high negligence and high gravity for these violations. He found that the operator's negligence and gravity were as great or event greater than the Secretary alleged, but the amount he assessed for the ten violations only ranged from approximately 20 to 70% of the penalties proposed by the Secretary. For six of these violations, he offered no explanation for this divergence. *Cantera*, 22 FMSHRC at 618-19.

The Commission expressed concern that the lack of a clear explanation for the assessed penalties was particularly troublesome because the penalties deviated substantially from those proposed by the Secretary. Remand was also warranted in that case because the Judge erred in numerous respects (such as his inconsistent use of the operator's size factor and a lack of

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<sup>6</sup> The citation indicates that after the plan was submitted to MSHA and approved, MSHA considered the violation to be abated. When asked why the operator revised its plan, Fields stated: "They [MSHA] made us do it." Tr. 517.

reasoning as to why he assessed a penalty of \$400 for nine violations and \$1,500 for the remaining disputed violation).<sup>7</sup> *Id.* at 622-26.

I do, however, agree with the majority in rejecting the operator's argument that the Secretary's special assessment narrative in his penalty proposal is inconsistent with the Judge's ultimate findings. Slip op. at 9. The narrative is no longer relevant once the case is before the Commission. As the D.C. Circuit recently stated in *American Coal Co. v. FMSHRC*, 933 F.3d 723, 727 (D.C. Cir. 2019), "[w]hat internal remedial enforcement judgments the Secretary might or might not have made in suggesting a penalty amount are beside the point."

When it passed the Mine Act, Congress was mindful of the need for an efficient penalty scheme, in order to induce operator compliance. The legislative history states that "civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency." S. Rep. No. 95-181, at 43 (1977), *reprinted* in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 631 (1978). Remanding this case to the Judge is a needless exercise that will simply delay the collection of this penalty. Accordingly, I would affirm the Judge, and respectfully dissent.

## **II. The Majority's Refusal to Apply *Sellersburg* to Penalties Proposed by Special Assessment is Procedurally Improper and Substantively Incorrect**

In a departure from longstanding Commission precedent, the majority instructs our Judges to treat penalties proposed in accordance with the Secretary's special assessment differently from the penalties the Secretary proposes via the regular assessment process. Reaching out to rule on an issue neither raised nor briefed by the parties, my colleagues conclude that Judges need no longer explain why their penalty assessments substantially deviate from a special assessment proposed by the Secretary. Their ruling contravenes recent court of appeals caselaw in this area.

### **A. The Majority's Ruling Exceeds the Scope of the Petition for Discretionary Review in Contravention of the Mine Act**

The Mine Act is quite specific regarding the limitations imposed on Commission review. Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), states that "[i]f granted, review shall be limited to the questions raised by the petition." Commission Procedural Rule 70(g), 29 C.F.R. § 2700.70(g), echoes this restriction. Moreover, Commissioners are not expected to consider or rule on issues that were not raised before the Judge below. Section 113(d)(2)(A)(iii) instructs parties that: "Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii),

The Commission has consistently rejected attempts by a party to raise issues beyond the scope of the petition for discretionary review. *See, e.g., Central Sand & Gravel Co.*, 23

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<sup>7</sup> In both *Hubb* and *Cantera Green*, the Commission did direct the Judge to enter qualitative findings regarding the history of violations, but nothing in these opinions indicates that the failure to do so would have by itself warranted a remand.

FMSHRC 250, 260 (Mar. 2001) (declining to depart from precedent and consider a party's argument not raised in its petition); *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 n.7 (June 2014) (declining to reach the issue of fair notice and due process because it was not raised by the operator in its petition); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1544 n. 4 (Sept. 1996) (declining to review a fair notice argument because the operator did not raise it in its PDR).

My colleagues' disdain for the Secretary's special assessment process is such that it has prompted them to reach beyond these statutory boundaries circumscribing the Commission's review.<sup>8</sup> In an effort to limit the effect of a specially assessed violation in proceedings before the Commission, the majority would vary the scope of a Judge's opinion depending on which method the Secretary used to compute the proposed penalty. Notably, this issue was not raised before the Judge in the proceeding below. Nor was it addressed in the operator's petition for discretionary review or even discussed by the parties in their briefs to us. The majority chooses to opine extensively on the deficiencies it believes underlie the Secretary's decision to specially assess certain violations, and to find fault with the manner in which the Secretary computes such penalties, but it sees no need to hear from the parties on this issue, including the Secretary, whose actions are the subject of their ire.

Although the majority, in bringing up this issue, has exceeded the Commission's proper scope of review, I feel compelled to respond to some of my colleagues' most erroneous assertions.

**B. The Requirement that a Judge Explain a Substantial Divergence from the Secretary's Proposed Penalty Should Apply to Both Regular and Special Assessments**

Looking for additional support for their procedural overreach, my majority colleagues rely on the recent decision in *American Coal*, 933 F.3d 723, for support. Unfortunately, that opinion does not provide them with even a fig leaf's worth of cover.

The majority's effort to distinguish between a Judge's treatment of regular and special penalty proposals contravenes the central principle guiding the D.C. Circuit's opinion in *American Coal*: that for purposes of assessing a penalty, it is irrelevant whether the Secretary's proposal was calculated under the regular or special assessment regulations. Indeed, the court emphasized that:

[T]he entire regulatory framework distinguishing between so-called "special" and "regular" assessments applies only to guide the Secretary. It "do[es] not extend to the independent

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<sup>8</sup> In rationalizing this unprecedented departure from time-honored statutory mandates, the majority makes the unremarkable assertion that "it is obviously necessary for us to apply the correct legal standard in deciding cases on review." Slip op. at 19. This is undoubtedly true, but pertains only to the legal standards needed to decide cases before us. Here, because the proposed and assessed penalties were identical, any opinion on the legal issue of whether the *Sellersburg* "substantial deviation" explanation requirement should apply is not only unnecessary but also unauthorized by law.

Commission,” and it is “not binding in any way in Commission proceedings.” . . . .

. . . .

. . . The only penalty calculation that matters is the Commission’s, which is independent of the Secretary’s.

*Id.* at 727 (citations omitted).

Moreover, in affirming the Judge’s penalty assessment, the court noted that:

[H]e arrived at an independent determination of a penalty amount that would respond to the seriousness of the Company’s violations and would deter future violations. The ALJ also contrasted his judgment with that of the Secretary “[t]o the extent that there were any substantial deviations in [his] penalty amounts that would require a[n] . . . explanation.” The ALJ need drill no deeper.

*Id.* at 728 (citations omitted). Thus, one of the grounds upon which the court in *American Coal* affirmed the Judge’s penalty assessment was precisely because he explained why his penalty deviated from the Secretary’s proposed special assessment.

Indeed, in special assessment cases my colleagues have essentially flipped *Sellersburg* on its head. An explanation will be required if the penalty has *not* diverged sufficiently from the special assessment. The Commission decisions in *AmCoal* illustrate this development.

In *The American Coal Co.*, 38 FMSHRC 1987 (Aug. 2016) (“*AmCoal I*”), cited by our colleagues, the Judge assessed a penalty of \$43,200. The Secretary’s special assessment penalty proposal was \$69,600. The Commission majority, concerned that the Judge may have been unduly influenced by the Secretary’s special assessment, vacated and remanded the Judge’s decision with instructions to the Judge that he explain whether he relied on the special assessment as a baseline. *Id.* at 1997. On remand the Judge stated that he did not rely on the Secretary’s proposed special assessment as a starting point, and he reaffirmed the penalties he assessed in his initial decision. 38 FMSHRC 2612 (Oct. 2016) (ALJ). A second appeal resulted in a 2-2 decision. *The American Coal Co.*, 40 FMSHRC 1011 (Aug. 2018) (“*AmCoal II*”). Despite the Judge’s assurance, the two majority colleagues concluded that the special assessments undoubtedly create an “anchoring effect,” *id.* at 1038, and that the Judge had still not provided a reasonable basis for what they considered to be unusually high penalties, especially as compared to the regular assessment MSHA could have proposed. *Id.* at 1036.

In contrast, a “regular” penalty proposal is considered by the majority to be inherently reasonable. I suspect no eyebrows would be raised by my majority colleagues should a Judge decide to impose an amount similar or equal to the amount computed under the Secretary’s regular assessment formula. Indeed, if a Judge decides to substantially increase the penalty from

the amount proposed by the Secretary in a regular penalty proposal, our colleagues insist *Sellersburg* would require the Judge to explain that divergence.<sup>9</sup>

Because the higher penalties proposed under the special assessment process are viewed by the majority as inherently arbitrary, and based on “a secret theory of the case,” slip op. at 9 n.13, a Judge who decides to impose a penalty anywhere close to the specially assessed amount proposed by the Secretary may find his or her opinion subjected to strict scrutiny. The Judge, as is the Judge in this case, may be accused of “failing to exercise his own responsibility to conduct an independent and reasoned analysis using *the record evidence*. See *AmCoal I*.” Slip op. at 9 (emphasis in original). Indeed the majority admits as much here, as it claims that requiring an explanation of divergences between MSHA’s special assessment and the penalty assessed by the Judge “interject[s] a foundational bias toward the enhanced penalty into the consciousness of the trier of fact, *whether or not the reason for the enhancement has been validated by the trial process*.” *Id.* at 20 (emphasis added). Apparently, therefore, even if the trial evidence would support an enhanced penalty, my colleagues will be reluctant to affirm it, having viewed the Judge as being biased towards MSHA’s proposal.

Consequently, I fear our Judges may conclude the only way to avoid numerous remands, and demonstrate their independence from what my majority colleagues consider to be the Secretary’s arbitrary special assessment, is to assess an amount significantly lower than the figure proposed by the Secretary. Moreover, according to my colleagues’ instruction, the Judge would not even need to explain the divergence.<sup>10</sup>

### C. Conclusion

For the foregoing reasons, I respectfully dissent from the opinion of the majority.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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<sup>9</sup> An explanation would also be required if his or her assessment was substantially lower than the Secretary’s proposed regular assessment.

<sup>10</sup> I recognize that theoretically a Judge could independently decide to assess a penalty significantly higher than the special assessment proposed by the Secretary, and consistent with my colleagues approach, no explanation would be required in that event either.



# **ADMINISTRATIVE LAW JUDGE DECISIONS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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875 GREENTREE ROAD  
PITTSBURGH, PA 15220  
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

March 3, 2020

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

v.

K C TRANSPORT, INC.,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2019-458  
A.C. No. 46-02444-487883 A8938

Mine: Elk Creek Plant

**ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY DECISION**  
**ORDER GRANTING SECRETARY’S MOTION FOR SUMMARY DECISION**  
**ORDER TO MODIFY**  
**ORDER TO PAY**

Before: Judge Lewis

On December 20, 2019, The Secretary of Labor (“Secretary”) and K C Transport (“Respondent”) filed with the undersigned cross-motions for partial summary decision in WEVA 2019-458.<sup>1</sup> The parties settled 18 of the 20 citations included in this docket prior to the motions for summary decision.<sup>2</sup> The two remaining citations at issue in the motions for summary decision are Citation Nos. 9222038 and 9222040, both for alleged violations of 30 C.F.R. § 77.404(c).<sup>3</sup>

<sup>1</sup> The parties were offered the opportunity to file Reply Briefs and they both did so on January 10, 2020.

<sup>2</sup> A Decision Approving Partial Settlement was issued on December 19, 2019.

<sup>3</sup> The full text of the Regulation is as follows:

**§ 77.404 Machinery and equipment; operation and maintenance.**

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

(b) Machinery and equipment shall be operated only by persons trained in the use of and authorized to operate such machinery or equipment.

(c) Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

(d) Machinery shall not be lubricated while in motion where a hazard exists, unless equipped with extended fittings or cups.

30 C.F.R. § 77.404.

Both citations were issued for conditions of trucks owned by Respondent that were in the parking area of K C Transport's truck maintenance facility in Emmett, West Virginia (the "Emmett facility" or "maintenance facility") at the time the citations were issued. The Respondent is challenging Mine Act jurisdiction over the Emmett facility and the trucks parked therein. The parties have stipulated that should this Court find that MSHA had jurisdiction over the trucks and location, the cited conditions would constitute violations of 30 C.F.R. § 77.404(c), that both violations were abated in good faith, that the gravity findings are accurate, and that the negligence for each citation should be modified from moderate to low. The parties further stipulated that the appropriate penalty amount for Citation No. 9222038 would be \$3,908.00 and the appropriate penalty amount for Citation No. 9222040 would be \$4,343.00. Accordingly, the only matter before this Court is a jurisdictional question.

For the following reasons, I grant the Secretary's Motion for Summary Decision and deny the Respondent's Motion for Summary Decision.

### **Undisputed Facts**

The parties in this case have worked diligently in creating a detailed list of joint stipulations.<sup>4</sup> They are as follows:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide civil penalty proceedings pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977.
2. On March 11, 2019, MSHA Coal Mine Inspector John M Smith was conducting inspection activities at the Elk Creek Prep Plant, Mine ID 46-02444.
3. The Elk Creek Prep Plant is owned and operated by Ramaco Resources, LLC. ("Ramaco Resources").
4. After completing his activities at the Elk Creek Prep Plant on March 11, 2019, CMI Smith traveled more than a mile up the hollow along the haul-road and then turned off the haul-road at Right Hand Fork Road and followed Right Hand Fork Road across a creek about 1000 feet to a location where K C Transport had constructed a parking area with two maintenance shipping containers. K C Transport purchased the gravel and stone for the parking lot and constructed the parking area. K C Transport also has commercial insurance to cover this facility.
5. Inspector Smith traveled up the haul-road and Right Hand Fork Road because he was looking for trucks to issue terminations for previously issued citations. When he reached K.C. Transport's maintenance lot, he observed the trucks cited in Citation Nos. 9222038 and 9222040.

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<sup>4</sup> Joint Stipulations will be designated by JS ¶ followed by the stipulation number.

6. At the time of the citations, K C Transport was in the process of constructing a new maintenance shop at that location. The construction materials for a planned approximately 60' x 70' metal building for the new maintenance shop had arrived at the site but were staged on pallets and the metal building had not yet been constructed. The parking area for the planned maintenance shop had been constructed and K C was using two shipping containers and two service trucks for its maintenance needs.
7. K C Transport is an independent trucking company which provides hauling services to various businesses, including coal hauling, earth hauling and gravel hauling.
8. K C Transport provides coal hauling services to various coal mine operators, including, but not limited to Ramaco Resources.
9. K C Transport operates truck maintenance and storage facilities at five (5) locations, including one at Bluefield West Virginia, one at Taz[e]well, Virginia, two at Princeton, West Virginia, one at Man, West Virginia and the one at issue in this proceeding in Emmett, West Virginia.
10. The new K C Transport maintenance area is located on Right Hand Fork Road, which is a road off the haulage road, which runs past the Elk Creek Plant operated by Ramaco Resources. It is located approximately 1000 feet from the haulage road.
11. The K C Transport maintenance facility is more than a mile up the hollow from the Elk Creek Plant. The Elk Creek Preparation Plant is the nearest coal extraction/preparation facility to K C Transport's maintenance facility.
12. There is a gate at the entrance to the K C Transport facility on Right Hand Fork Road and there is no other way into the hollow where it is located. At the time Citation Nos. 9222038 and 9222040 were issued, the gate was in need of repair and was not operational. KC Transport usually operates this maintenance facility on a 24-hour, 6 day a week basis. Right Hand Fork Road dead ends on the other side of the KC Transport facility. The road into the K C Transport facility is not a coal haulage road but does branch off from a haulage road.
13. K C Transport shares the parking area for its maintenance facility with a logging company. Ramaco Resources has no personnel or equipment at the facility.
14. K C Transport operates both on-road and off-road trucks out of this facility. The off-road trucks provide haulage for five (5) nearby Ramaco Resources' mines. The on-road trucks provide earth haulage services for AEP, gravel haulage services to other customers and coal haulage services for customers other than Ramaco Resources.

15. KC Transport asserts that about 60% of the services from this K C facility are to the five (5) nearby Ramaco Resource mines, including the 3 deep mines, a strip mine and a highwall mine. The other 40% of K C Transport's work from this location is to provide services for companies other than Ramaco Resources, including American Electric Power ("AEP") and other coal operators. For example, for the past 4-5 months, K C Transport has been working on a large earth moving project for AEP and the trucks working on this project are parked and maintained at the Emmett shop. Although the Secretary has no knowledge of these facts, the Secretary does not dispute the company's assertions.
16. This facility provides a convenient centralized maintenance facility in Logan County for KC Transport.
17. Representatives of Ramaco told K C Transport they could use the area where the trucks referenced in Citation Nos. 9222038 and 9222040 were located for a maintenance facility and assured K C Transport that this area was not on permitted, bonded mine property, so Ramaco would not be operating there. The Secretary has no evidence that K C Transports' facility is on permitted, bonded mine property. Ramaco Resources has no plans to operate a coal mine at the location where K C Transport maintains its maintenance area/shop. K C Transport uses the property for purposes of maintaining a portion of its truck fleet, including those trucks servicing the Ramaco Resources mines and customers other than Ramaco Resources.
18. The haul trucks cited in Citation Nos. 9222038 and 9222040 were owned by K C Transport and were located at KC Transport's Emmett, West Virginia maintenance facility when cited. The haul trucks referenced in Citation Nos. 9222038 and 9222040 were regularly used to haul coal from the five Ramaco mines to the Elk Creek prep plant at the time of the citations.
19. At the time that CMI Smith inspected the haul trucks referenced in Citation Nos. 9222038 and 9222040, the trucks were not hauling coal, were not on a haul-road and were parked at K C Transport's maintenance area for maintenance work to be performed on the trucks.
20. On March 11, 2019, K C Transport's maintenance/shop area, where the trucks referenced in Citation Nos. 9222038 and 9222040 were located, was property that was not permitted or bonded by the state of West Virginia. See Respondent's Exhibit A (map).
21. Until the Citation Nos. 9222038 and 9222040 were issued, MSHA never sought to enter or inspect K C Transport's Emmett maintenance shop or parking area at any time, from the time K C Transport constructed the parking lot to the time the citations were issued. MSHA has not attempted to enter or inspect this area or the trucks while at this location, since the citations.

22. On one occasion, on April 3, 2018, MSHA did cite a work trailer and muddy parking area that K.C. Transport had adjacent to where the haulage road intersects with Right Hand Fork Road. (Citation Nos. 9174394 and 9174395). However, MSHA vacated the citations for the work trailer and muddy parking lot. After this incident, K C Transport elected to construct the new facility approximately 1000 feet away from the haulage road up Right Hand Fork Road.
23. When Citation Nos. 9222038 and 9222040 were issued, MSHA did not attempt to inspect the shipping containers, service trucks or any other trucks at the location, nor did MSHA inspect the logging trucks which were located at K C Transport's maintenance area.
24. To get to KC transport's Emmett facility, it is necessary to pass along the Ramaco Resources, LLC's Elk Creek Plant haul-road until reaching the Right Hand Fork Road hollow where the facility is located. Then it is necessary to cross a creek and drive 1000' up Right Hand Fork Road to the facility.
25. KC Transport's maintenance facility where these trucks were inspected is located more than a mile from the Elk Creek Plant, approximately 4-5 miles from three (3) deep mines operated by Ramaco Resources, LLC and six (6) miles from a strip mines and highwall mines operated by Ramaco Resources. Thus, the closest location where coal is mined or prepared is more than a mile from this facility.
26. All of the Ramaco mines are accessed via the haul-road. That haul-road is a public road for some distance. However, before reaching the Elk Creek Plant, there is a gate limiting public access to the haul-road beyond that location. The gate is manned and only authorized persons are permitted beyond that point. The haul-road beyond the gate is maintained by Ramaco Resources and is no longer a public road. KC Transport's maintenance area is also accessed only by traveling through the gate and up the haul-road to the turn-off at Right Hand Fork Rd, although Right Hand Fork Road is not part of the haul-road.
27. At various times, the cited trucks have hauled coal from each of the Ramaco mines to the Elk Creek Plant. The cited trucks were not licensed to haul products over public roads at the time the citations were issued, but they have been in the past and they may be in the future.
28. On or about March 11, 2019, the trucks referenced in Citation Nos. 9222038 and 9222040 were only being operated on private land, including haul-roads operated by Ramaco Resources. There were other trucks parked at that same location which were used by K C Transport to haul coal and materials other than coal and for customers other than Ramaco.
29. The cited trucks are inspected regularly by MSHA when they are at the five (5) Ramaco Resources LLC mines and at the Elk Creek prep plant and along

- the haul-road. They had never previously been inspected at K C Transport's maintenance facility/parking area.
30. K C Transport operates about 35 trucks from the Emmett, West Virginia, Maintenance Facility.
  31. The proposed penalty amounts that have been assessed for the violations at issue pursuant to 30 U.S.C. Section 820(a) will not affect the ability of K C Transport to remain in business.
  32. MSHA Coal Mine Inspector John M Smith was acting in his official capacity and as an authorized representatives of the Secretary of Labor when Citation Nos. 9222038 and 9222040 involved in this proceeding were issued.
  33. True copies of each of the citations that are at issue in this proceeding along with all continuation forms and modifications, were served on K C Transport or its agent as required by the Act.
  34. Each of the violations involved in this matter were abated in good faith.
  35. Government Exhibit 1 is an authentic copy of Citation No. 9222038, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
  36. Government Exhibit 2 is an authentic copy of Citation No. 9222040,<sup>5</sup> with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
  37. Respondent's Exhibit A is a map of the area. Neither party contests its authenticity and it may be admitted into evidence for the purpose of demonstrating the layout of the area and the permitted, bonded areas for the Court as well as the location of K C Transport's facility in relation to the Elk Creek Plant.
  38. With respect to Citation Nos. 9222038 and 9222040, K C Transport contests that MSHA had jurisdiction over the trucks referenced in the citations, while located at KC Transport's Emmett, WV maintenance facility. K C Transport argues that both citations should be vacated for lack of jurisdiction at this location.
  39. With respect to Citation Nos. 9222038 and 9222040, should the administrative law judge find that MSHA did have jurisdiction over the trucks, while at K C Transport's maintenance facility, K C Transport concedes that the conditions then present would violate 77.404(c) if the trucks had been subject to

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<sup>5</sup> The parties erroneously listed this citation as 9222038.

- jurisdiction. With respect to Citation Nos. 9222038 and 9222040, should the administrative law judge affirm the finding that 77.404(c) was violated, the parties have agreed that the gravity findings set forth in the citations shall be affirmed.
40. With respect to Citation Nos. 9222038 and 9222040, should the administrative law judge find jurisdiction and affirm the finding that 77.404(c) was violated, the negligence for each citation shall be modified from moderate to low.
  41. With respect to Citation No. 9222038, should the administrative law judge find jurisdiction and affirm the finding that 77.404(c) was violated, the parties agree that the appropriate penalty amount is \$3,908.00.
  42. With respect to Citation No. 9222040, should the administrative law judge find jurisdiction and affirm the finding that 77.404(c) was violated, the parties agree that the appropriate penalty amount is \$4,343.00.
  43. For purposes of Section 110(i) of the Act, the proposed penalty amounts are appropriate given the operator's history of violations and the size of the operator.
  44. Government Exhibit 3 is a photograph depicting how the truck referenced in Citation No. 9222038 appeared at the time of inspection.
  45. Government Exhibit 4 is a photograph depicting how the truck referenced in Citation No. 9222040 appeared at the time of inspection.

Secretary Motion for Partial Summary Decision, 3-12.<sup>6</sup> Respondent's Motion for Summary Decision, 1-3; Secretary's Motion for Summary Decision, 4-5. In addition to the stipulated facts, the parties each submitted exhibits.

### **Summary Decision Standard**

The Court may grant summary decision where the "entire record...shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see also UMW, Local 2368 v. Jim Walter Res., Inc.*, 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56). The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure

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<sup>6</sup> References to the Secretary of Labor's exhibits are designated as "SX." References to Respondent's exhibits are designated "RX." References to the Secretary's Motion for Partial Summary Decision are designated "SB" followed by the page number. References to the Secretary's Reply Brief are designated "SRB" followed by the page number. References to the Respondent's Memorandum of Law in Support of Motion for Summary Decision are designated "RB" followed by the page number. References to Respondent's Reply Brief are designated "RRB" followed by the page number.

56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). A material fact is “a fact that is significant or essential to the issue or matter at hand.” *Black’s Law Dictionary* (9th ed. 2009, *fact*). “There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor.” *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007) (citation omitted). The court must evaluate the evidence “in the light most favorable to ... the party opposing the motion.” *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences drawn “from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.” *Id.* Though the moving party bears the initial burden of informing the court of the basis for its motion, it is not required to negate the nonmoving party’s claims. *Celotex*, 477 U.S. at 323. “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

### **Analysis**

This case concerns the limits of MSHA jurisdiction, and like many jurisdictional cases, it raises difficult, often novel issues, driven by the precise facts of the case. As Judge Manning has eloquently stated, “Jurisdictional issues under the Mine Act are often factually complex. The Commission and various federal circuit courts have wrestled with these issues... Whether MSHA has jurisdiction under the specific facts at issue here will be one of the key issues in these cases.” *Cox Transportation Corp.*, 22 FMSHRC 568, 569–70 (April 5, 2000) (ALJ). The case is made even more difficult because even though both parties are arguing about jurisdiction, their arguments are often not directed at each other.

K C Transport is an independent trucking business that provides hauling services to various businesses, including coal and gravel mines. JS ¶¶ 7, 8. It owns and operates five maintenance and storage facilities in Virginia and West Virginia. JS ¶ 9. At issue here are trucks that were located in the Emmett, West Virginia maintenance facility (hereinafter referred to as the “maintenance facility”). JS ¶¶ 4-6. The maintenance facility provides off-road trucks for haulage for five nearby Ramaco Resources mines and on-road trucks for earth haulage services for American Electric Power (“AEP”), as well as trucks for gravel and coal haulage for other customers. JS ¶ 14. Approximately 60% of the services from the maintenance facility are for the five nearby Ramaco Resources mines, including three deep mines, a strip mine, and a highwall mine. JS ¶ 15. The other 40% of K C Transport’s work from this facility provides services for AEP and other coal operators. JS ¶ 15. At the time of the citations, K C Transport was in the process of constructing a new maintenance shop at this location. JS ¶ 6.

In order to get to the maintenance facility, one travels along the Ramaco Resources Elk Creek Plant haul-road until reaching the Right Hand Fork Road, following that road for approximately 1,000 feet, until reaching the facility. JS ¶¶ 4, 10, 24. The haul-road “is a public road for some distance.” JS ¶ 26. The maintenance facility is located more than a mile from the Elk Creek Plant, approximately four to five miles from three deep mines operated by Ramaco

Resources, and six miles from strip mines and highwall mines operated by Ramaco. Therefore, the closest location where coal is mined or prepared is more than a mile from the maintenance facility. JS ¶ 25.

Here, an MSHA inspector at the Elk Creek Prep Plant traveled more than a mile up the hollow along the haul-road, then turned at the Right Hand Fork Road and traveled along it for approximately 1,000 feet, crossed a creek, and arrived at the maintenance facility. JS ¶ 4. Once he arrived, he cited two trucks that were undergoing maintenance at the off-site K C Transport maintenance facility for violations of 30 C.F.R. § 77.404(c).<sup>7</sup> JS ¶ 5; SX-1; SX-2. The mandatory standard provides that “repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.” 30 C.F.R. § 77.404(c). At the time the trucks were cited, the trucks were not hauling coal or on a haul-road; rather, they were parked at the maintenance facility for maintenance work. JS ¶ 19. The cited trucks have hauled coal from each of the Ramaco mines to the Elk Creek Plant. JS ¶ 27. The parties agree as to the gravity, negligence, and penalty amounts if this Court finds jurisdiction over the trucks here. JS ¶ 39-43.

### **Contentions of the Parties**

A difficult aspect of this case is that the parties do not seem to be on the same page as to what issue is before the Court, with the Secretary arguing for jurisdiction over the trucks and the Respondent arguing against jurisdiction over the maintenance facility. The Secretary states in its opening brief, “The parties agree that the only issue in dispute concerning the citations is whether the trucks are subject to MSHA coverage.”<sup>8</sup> SB at 1. Throughout its brief, the Secretary’s arguments are almost entirely in support of the trucks, rather than the facility, being under MSHA’s jurisdiction. The Secretary clarifies that “whether the maintenance area is a mine

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<sup>7</sup> Citation No. 9222038 states:

The red Mack tandem coal truck Co# 120 is jacked up with the wheels and tires off both back axles and is not blocked to prevent motion. The rear of the truck is jacked up by using blocking under the back end of the bed and using the motion of the bed when raised to lift the back wheels off the ground. Work is being preformed [sic] on the brakes located on the back axles of the truck. Standard 77.404(c) was cited 1 time in two years at mine 4602444 (0 to the operator, 1 to a contractor).

GX-1. Citation No. 9222040 states:

The bed on the Mack Co#5 coal truck is in the raised position and is not blocked against motion. A miner is observed standing on the frame of the truck under the raised unblocked bed. This citation was factor that contributed to the issuance of Imminent Danger Order No. 9222039 dated 3/11/2019. Therefore, no abatement time was set. Standard 77.404(c) was cited 2 times in two years at mine 4602444 (2 to contractor 77.404(c)).

SX-2.

<sup>8</sup> As will be discussed, *infra*, the parties did not in fact agree on this being the sole issue.

subject to MSHA coverage need not be decided in this case to determine whether MSHA coverage applied to the subject trucks.” SRB at 1.

In contrast, the Respondent states that “all that remains for the Court to decide is the purely legal issue of whether MSHA had jurisdiction over K C Transport’s Emmett facility.” RB at 6. The Respondent argues that “because K C Transport’s Emmett facility is not a ‘coal or other mine,’ as defined in the Federal Mine Safety and Health Act of 1977 (‘Mine Act’), the Court should find that MSHA was without jurisdiction over the facility and that Citation Nos. 9222038 and 9222040 should be vacated.” RB at 1. The Respondent’s brief vacillates between arguing against this position that the Secretary does not take and arguing that MSHA cannot assert jurisdiction over the trucks without jurisdiction over the maintenance facility. RB at 8.

The Secretary argues that the definition of a “mine” was intended to be read broadly, and that the trucks referenced in the citations are equipment that were used in the extraction and preparation of coal and therefore subject to Mine Act coverage. SB at 14. The Secretary makes clear that its argument is that the trucks, not the maintenance facility or any structures on the site, are under MSHA jurisdiction. SRB at 1. The Secretary argues that though the Act is clear, if this Court finds ambiguity, the Secretary should be accorded *Chevron* deference. SB at 15-16. If this Court does not extend MSHA jurisdiction to the trucks, the Secretary asserts that it would create “a bifurcated coverage scheme [that] would be impractical, if not impracticable, and would lead to confusion on the part of miners and the operator itself as to what standards were applicable at any given time.” *Id.* at 19. The Secretary refers to this bifurcated coverage between MSHA and OSHA as “an absurd result.” SRB at 3.

The Respondent argues that off-site facilities, such as the maintenance facility here, are not under MSHA jurisdiction. RB at 6-7. It further argues that location is key to understanding whether MSHA has jurisdiction over equipment, and that MSHA cannot simply attach jurisdiction to a piece of mobile equipment and follow that equipment “wherever it goes.” RB at 2. It argues that MSHA can cite the trucks at issue while they are at any of the Ramaco mines or Elk Creek preparation plant, but not when they are located in an area that is not under MSHA’s jurisdiction.

Because the parties’ briefs raise both the issue of whether the maintenance facility is a mine and whether the trucks are mines, this Court will consider both questions. Based on the following analysis, this Court rejects the Secretary’s argument that each of these trucks constituted a “mine” under the Act no matter where they are located. However, this Court also rejects the Respondent’s argument that the maintenance facility was not a “mine” under the Act. Rather, this Court finds that the maintenance facility was a “mine” under Section 3(h)(1)(C), and because the trucks were used in mining and parked at the facility, they constituted “equipment” under the same section. However, MSHA’s jurisdiction over the trucks is not limitless; though it is clear that MSHA had jurisdiction in the instant case, it would likely lack such jurisdiction if the trucks were at a non-mining site performing non-mining activities.

## Case Disposition

The first inquiry here must be “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-843. “In ascertaining the plain meaning of the statute, courts utilize traditional tools of construction, including an examination of the ‘particular statutory language at issue, as well as the language and design of the statute as a whole,’ to determine whether Congress had an intention on the specific question at issue. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989).” *MSHA v. Jim Walter Resources, Inc.*, 22 FMSHRC 21 (Jan. 31, 2000). If it is found that Congress has not addressed the question at issue, “the court does not simply impose its own construction on the statute... Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 842-843.

Examining the Mine Act, as well as relevant legislative history, I find that Congress has directly spoken to the precise question at issue. Though the definition of a “mine” under the Mine Act is broad and was intended to be read expansively, it was not intended to be limitless. The Secretary’s argument that MSHA has jurisdiction over a truck that was used to haul coal, no matter where that truck is located, expands MSHA’s jurisdiction to every road, parking lot, garage, and facility in the country. Mobile equipment such as trucks would essentially become rolling mines under the Secretary’s interpretation. Under the Secretary’s interpretation, if the trucks at issue here were hundreds of miles from the mine and were undergoing maintenance at a private mechanic, MSHA would have jurisdiction over those trucks. If the trucks were parked at a diner while the drivers ate, MSHA would have jurisdiction. If the trucks were hauling lumber for a lumberyard, MSHA would have jurisdiction. Beyond the absurdity of MSHA having geographically and functionally limitless jurisdiction over the trucks, there would also be the problem that any person working on the truck or driving it at any time might be considered a miner under Section 3(g) (“‘miner’ means any individual working in a coal or other mine.” 30 U.S.C. 802(g).)

“In enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.” *Donovan v. Dewey*, 452 U.S. 594, 602 (1981). As a result, Congress took care to put in place a strict regulatory scheme to protect the health and safety of miners at a mine. However, it carefully described what constituted a mine, creating three general categories that were geographically and functionally centered. Congress’s definition does not include trucks in whatever location they may be and whatever they may be doing. However, the Mine Act clearly defines a mine in a manner that includes, under the facts of this case, both the maintenance facility and the equipment (or trucks) therein. While MSHA cannot simply attach jurisdiction to the trucks and follow them wherever they may drive, it can

assert jurisdiction over the maintenance facility and all the equipment at the facility that is used for mining.<sup>9</sup>

Section 4 of the Mine Act makes clear that “Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter.” 30 U.S.C. § 803. The Act further provides in Section 3(h)(1) three categories of definitions for what constitutes a “coal or other mine” as:

(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1). Because the controversy in this case concerns whether either the maintenance facility and/or the trucks could constitute a “mine,” it is clear that subsection (A) concerning land, and subsection (B) concerning private ways and roads, are not at issue.<sup>10</sup> Specifically, it is the portion of subsection (C) that mentions “structures, facilities, equipment, machines, tools...used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits...or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals,” that the Secretary argues provides jurisdiction over the trucks. SB at 13.

When analyzing the definition of “mine” under the Act, one must not be “governed by ordinary English usage,” but rather by the broad definition and intent that Congress set forth. *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551 (D.C. Cir. 1984). The Commission has repeatedly emphasized that “The definition of a ‘coal or other mine’ in section 3(h) of the Mine Act is broad, sweeping and expansive.” *MSHA v. KenAmerican Resources, Inc.*, 42

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<sup>9</sup> It should be noted that if MSHA asserts jurisdiction over the maintenance facility, trucks and other equipment contained on the site, it must conduct inspections “of the mine in its entirety at least two times a year.” 30 U.S.C. § 813(a). In the instant case, the MSHA inspector only inspected the trucks, and “did not inspect the shipping containers, service trucks or any other truck at the location.” JS ¶ 23. It is not entirely clear from the record whether all this equipment was mining-related, but if so, MSHA would be required to conduct such comprehensive inspections.

<sup>10</sup> In *National Cement Co. of Ca. Inc.*, the Secretary took the position that Section 3(h)(1)(B) covers roads, but not vehicles on those roads. 573 F.3d 788, 794-796 (D.C. Cir. 2009).

FMSHRC 1, 6 note 12 (Jan. 16, 2020); *Jim Walter Resources*, 22 FMSHRC at 24; *MSHA v. Justis Supply & Machine Shop*, 22 FMSHRC 1292, 1296 (Nov. 03, 2000). This description was based on the congressional intent of the Mine Act. The Senate Report accompanying the Mine Act states that “it is the Committee’s intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation.” *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1554-55 (D.C. Cir. 1984) (quoting S. Rep. No. 461, 95th Cong., 1st Sess. 37 (1977), U.S. Code Cong. & Admin. News 1977, 3401, 3414). “Close jurisdictional questions are to ‘be resolved in favor of inclusion of a facility within the coverage of the Act.’ *Id.*

Following this directive to interpret the definition of a mine broadly, ALJs, the Commission, and Federal Courts of Appeal have found a broad variety of lands, roads, structures, facilities, and equipment to constitute a mine. Combined these provide a general framework for the breadth and limits of MSHA jurisdiction, as well as the appropriate analysis to determine jurisdiction.

In *Marshall v. Stoudt’s Ferry Preparation Co.*, the Third Circuit held that a preparation plant that separated low-grade fuel from sand and gravel dredged from a riverbed was a mine. 602 F.2d 589 (3<sup>rd</sup> Cir. 1979). Analyzing the Act’s use of the words, “structure” and “facility,” the Court stated that “although it may seem incongruous to apply the label ‘mine’ to the kind of plant operated by Stoudt’s Ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it[. T]he word means what the statute says it means.” *Id.* at 592. Similarly, In *Harman Min. Corp. v. FMSHRC*, the Fourth Circuit held that a plant’s “car dropping” facility, where railroad cars were loaded with coal, was a mine. 671 F.2d 794 (4<sup>th</sup> Cir. 1981). The Court held that the broad definition of “mine” included “all of the facilities used at a coal preparation plant.” *Id.* at 796. In *Donovan v. Carolina Stalite Co.*, the D.C. Circuit held that a slate gravel processing facility that was immediately adjacent to a quarry, but was not engaged in direct slate extraction was a mine because it fit within Section (C)’s inclusion of “structures.” 734 F.2d 1547 (D.C. Cir. 1984).

In *National Cement Co. of Ca. Inc.*, the D.C. Circuit held that the Secretary’s interpretation of Section 3(h)(1) was reasonable when it argued that Mine Act jurisdiction extended to a private road leading to the plant. 573 F.3d 788 (D.C. Cir. 2009). In this case, the Secretary explained the interplay between the three subsections of Section 3(h)(1)(B), which the Court accepted as reasonable. The Secretary interpreted the word “area” in Subsection (A) as “all-encompassing because virtually everything in an extraction area ... is necessarily related to [mining] activity.” *Id.* at 794. The Secretary interpreted Subsection (B) to cover mining roads, but not the vehicles traveling on those roads. *Id.* Lastly, the Secretary interpreted Subsection (C) to cover mining related vehicles traveling on mining roads. *Id.* at 795. “Subsections (B) and (C) can be read to work in tandem.” *Id.*

In the seminal case, *MSHA v. Jim Walter Resources, Inc.*, the Commission held that a central supply shop used to repair and maintain electrical and mechanical equipment at nearby

mines was a mine under the Act. 22 FMSHRC 21 (Jan. 2000).<sup>11</sup> The Commission reasoned that the language of the Mine Act was clear, stating:

The stipulated record is equally clear in establishing that the Central Supply Shop is a dedicated off-site facility of a (multiple) mine operator where employees receive, stock, maintain, and deliver equipment, tools, and supplies used at JWR's coal extraction sites, preparation plants, and Central Supply Shop, including, inter alia, rock dust, line curtains, hard hats, machine parts, and conveyor belts. Consequently, there is Mine Act jurisdiction because a "mine" includes "facilities" and "equipment ... used in or to be used in" JWR's mining operations or coal preparation facilities.

*Id.* At 25. In dicta, the Commission cited to the *W.J. Bokus Industries* for the proposition that "whether a mine operator's equipment is covered by the Mine Act is not determined by its location but rather by its function -- that is, whether it is used in extracting or preparing coal." *Id.* at Note 11.

In *MSHA v. W.J. Bokus Industries, Inc.*, the Commission found that gas cylinders kept in a garage adjacent to an asphalt plant and beside an office used by the mine were under MSHA jurisdiction. 16 FMSHRC 704 (April 1994). The garage was regularly used by miners on mining-related tasks. *Id.* at 708. In *W.J. Bokus*, it was unclear whether the ALJ found the garage itself to be under MSHA jurisdiction, but the Secretary's position appeared to be that the equipment in the garage was under MSHA jurisdiction *because* the garage was under MSHA jurisdiction ("The Secretary assert[ed] that the judge 'accepted that MSHA had jurisdiction over the garage.' He infers that the judge would not have examined jurisdiction over items in the garage unless he assumed that MSHA had jurisdiction over the garage itself." 16 FMSHRC at 707, FN 9). However, in reversing the ALJ, the Commission made clear that "we need not reach the issue raised by the Secretary, that the garage was a 'structure' or 'facility' used in mining and, therefore, a 'mine' within the meaning of section 3(h)(1) of the Mine Act." *Id.* at 708.

In *MSHA v. Justis Supply & Machine Shop*, the Commission relied on *Jim Walter Resources* to conclude that an off-site dragline assembly site was a mine under the Act. 22 FMSHRC 1292 (Nov. 2000). The Commission found that the dragline was equipment "to be used in" mining coal, and the site and employees at the site were devoted to building the dragline that would be used at the mine. Therefore, the dragline assembly site was a mine under the Act.

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<sup>11</sup> Similarly, in *MSHA v. U.S. Steel Mining Co.*, the Commission held that an off-site central repair shop, which had a separate Mine ID, and "exists and functions to repair and maintain electrical and mechanical equipment used in or to be used in USSM's underground and surface coal mines and its coal cleaning plant" constituted a separate "surface coal mine" under the Act. 10 FMSHRC 146, 149 (Feb. 1988). Also, in *MSHA v. W.F. Saunders & Sons*, ALJ Melick held that a preparation plant's truck shop and storeroom, which was primarily used to store and repair trucks used in mining, was a mine under the Act. 1 FMSHRC 2130 (Dec. 28, 1979) (ALJ).

In *MSHA v. State of Alaska, Dept. of Transp.*, the Commission held that a SAG Screener, a mobile piece of equipment that excavated material at pits along a gravel road and which had its own MSHA Mine ID, was a mine under the Act. 36 FMSHRC 2642 (Oct. 2014). The Commission examined Subsections (A) and (C) in conjunction and held that even though the dedicated right-of-way may not fall under the definition of “private ways and roads” in Subsection (B), it was a piece of equipment used in a mining area.

In *MSHA v. Austin Powder*, ALJ Andrews rejected the Respondent’s arguments that because an off-site storage facility was “not employed in” mining at the quarry, it was not a “mine.” 37 FMSHRC 1337, 1349 (June 8, 2015). He found that the storage facility was used to store explosives and related materials used in mining, and was therefore a “facility” under the Act. *Id.* at 1352. Similarly, In *MSHA v. Youngquist Brothers Rock, Inc.*, ALJ Gill found that MSHA had jurisdiction to cite a truck that may have been on a section of the mine property where a restaurant was located. 36 FMSHRC 2492 (Sept. 19, 2014) (ALJ). Judge Gill’s analysis focused on the location of the truck when it was cited and he found jurisdiction specifically because it was on an area that fell under the definition of a “mine.” Further relevant to the instant case, in *Youngquist* MSHA’s position was that if the truck been outside the mine gates, MSHA would not have had jurisdiction over it.<sup>12</sup> *Id.* at 2496. In *MSHA v. Jeppesen Gravel*, ALJ Melick held that a Caterpillar front end loader was under the Mine Act’s jurisdiction when it was being used to load gravel in a private way or road appurtenant to the area where the gravel was extracted. 32 FMSHRC 1749 (Nov. 18, 2010) (ALJ). In *MSHA v. Northern Illinois Service Co.*, ALJ Gill held that MSHA had jurisdiction over a service truck and its contents when that truck was on mine premises, even if it was also used at non-mine locations. 36 FMSHRC 2811 (Nov. 10, 2014) (ALJ).

More recently, ALJ Simonton held that a parking lot and office that were located on mine property and adjacent to the plant’s active extraction sites was a mine under the Act. *MSHA v. Rain for Rent*, 40 FMSHRC 1267, 1271 (Aug. 22, 2018). The Judge emphasized that the “parking lot is on Natividad Plant property, adjacent to active extraction sites, and used for mine-related purposes.” *Id.* at 1272. In finding jurisdiction, Judge Simonton concluded that the “office and parking lot are thus geographically and functionally related to the mining process at Natividad Plant and are subject to MSHA jurisdiction under the Act.” *Id.*

In *MSHA v. Maxxim Rebuild Co.*, the Commission held that an off-site maintenance shop that was used primarily to maintain, repair, and fabricate equipment used in the mining process was a mine under the Act. 38 FMSHRC 605 (April 2016). However, this decision was reversed by the Sixth Circuit, in a sweeping decision that rejected *Jim Walter Resources* and much of the Commission’s reasoning on jurisdiction. *Maxxim Rebuild Co. v. FMSHRC*, 848 F.3d 737, 740 (6<sup>th</sup> Cir. 2017). In looking at the three subsections in the definition of a “mine,” the Court emphasized, “Location, location, location: All three definitions are place connected and place

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<sup>12</sup> MSHA has stated this position in several cases. In *MSHA v. Drilllex, Inc.*, the inspector “further confirmed that his enforcement jurisdiction over the respondent is limited to any trucks actually found on quarry or mine properties, and that in the instant case, he inspected the truck after it was driven onto the mine site in question.” 9 FMSHRC 1972, 1975 (Nov. 24, 1987).

driven.” *Id.* at 742. The Sixth Circuit held that MSHA jurisdiction “extends only to such facilities and equipment if they are in or adjacent to—in essence part of—a working mine.”<sup>13</sup> *Id.* at 740. Since the maintenance shop was not attached to or adjacent to a working mine, it did not fall under the Act’s definition of a mine. *Id.* at 742. With regards to equipment, the Court held that such equipment’s use in mining is not dispositive of MSHA jurisdiction. “It does not cover mining ‘equipment’ or for that matter mining ‘machines, tools, or other property’ wherever they may be found or made.” *Id.* at 740.<sup>14</sup> In reaching its conclusion, the Court stated that for the same reason it was rejecting the Commission’s decision in *Maxxim Rebuild*, it rejected the Commission’s decision in *Jim Walter Resources*. *Id.* at 744. Throughout the decision, the Court expressed dismay that the Secretary’s position provided no natural limits. It emphasized that “The Secretary’s interpretation also has no stopping point,” *Id.* at 743, and that the definition’s “locational focus” provides such a limit. *Id.* at 742.

This is not the only instance of a judge expressing that MSHA’s jurisdiction, while broad, must have limits. In *Bush & Burchett, Inc. v. Reich*, the Sixth Circuit rejected the argument that any road appurtenant to a mine was within MSHA’s jurisdiction, stating:

Not only does the statute not compel such a reading, but also such a reading is contrary to common sense. Without some limitation on the meaning of “roads appurtenant to,” MSHA jurisdiction could conceivably extend to unfathomable lengths since any road appurtenant to a mine that connects to the outside world would necessarily run into yet other roads, thus becoming one contiguous road. Because of the potential reach of MSHA jurisdiction if the definition in § 802(h)(1)(B) is left unfettered, “private ways and roads” cannot simply mean “any

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<sup>13</sup> Similarly, in *MSHA v. Pickett Mining Group*, ALJ Rae found that MSHA lacked jurisdiction over a Ford tractor. 36 FMSHRC 2444 (Sept. 8, 2014) (ALJ). Judge Rae’s analysis looked at the location of the tractor and its use. She found that there was no evidence that the tractor has been or will be used in mining activities, and that at the time of citation the tractor was not located at any location that could be deemed part of an extraction area.

<sup>14</sup> While the Respondent uses the Sixth Circuit position to advance its argument, the Secretary uses the Commission decision to advance its argument. RB at 10-12; SB at 14. The Secretary argues that not only is the Sixth Circuit’s reversal of the Commission in *Maxxim Rebuild* not binding precedent in this case, which arises out of the Fourth Circuit, but that “the lower unanimous decision by the Commission affirming MSHA coverage is the applicable precedent for this case.” SRB at 2. This Court questions the Secretary’s argument that a Circuit Court reversal (without remand) only disturbs the Commission’s decision in the applicable Circuit. Nonetheless, whether the Commission’s decision still governs ultimately has little bearing on the instant decision. This is due to the fact that the Commission’s *Maxxim Rebuild* decision does not stand alone for the proposition that off-site facilities and equipment are under MSHA jurisdiction. Rather, it is but one of many cases over decades of jurisprudence analyzing Mine Act jurisdiction.

road.” Otherwise, there could conceivably be no limit to MSHA jurisdiction, a result Congress clearly did not intend.

117 F.3d 932, 937 (6th Cir. 1997). Similarly, *Dilip K. Paul v. P.B – K.B.B., Inc.*, the Commission held that an engineering office that was responsible for designing an exploratory shaft, as well as providing personnel, equipment, and materials, was not a mine under the Act. 7 FMSHRC 1784 (Nov. 21, 1985). The Commission stated that “while we have recognized that the definition of ‘coal or other mine’ provided in section 3(h) of the Mine Act is expansive and is to be interpreted broadly, the inclusive nature of the Act’s coverage is not without bounds.” *Id.* at 1787 (citations omitted).<sup>15</sup>

Analyzing this jurisdictional map that arises through a review of the outer bounds of the Mine Act’s definition of a “mine,” the facility and equipment at issue here falls squarely within the definition. The off-site maintenance facility and trucks at issue here are much like the central supply shop at issue in *Jim Walter Resources*, the gas cylinders at issue in *W.J. Bokus*, the off-site dragline assembly site at issue in *Justis Supply & Machine Shop*, the off-site Screener at issue in *State of Alaska Department of Transportation*, the off-site storage facility at issue in *Austin Powder*, and other cases discussed *supra*. The Respondent is correct that the location of the trucks and the maintenance facility matter, and that the Secretary’s idea of the trucks being rolling mines would lead to an absurdity.

However, in this instance, the maintenance and trucks were located four to five miles from Ramaco’s three deep mines and more than a mile from the Elk Creek Plant. JS ¶ 25. In *Jim Walter Resources*, the central shop was not on the property of any one of the coal extraction sites, but rather one mile from the closest site, six miles from two of the sites, and 25 miles from the farthest site. 22 FMSHRC at 22. In *U.S. Steel Mining Co.*, the shop at issue was located approximately eight and a half miles from one mine, five miles from another mine, and a half mile from the cleaning plant. 10 FMSHRC at 147. The location of K C Transport’s maintenance facility is not remote from the extraction and processing sites. Indeed, its proximity leads to the second question concerning the maintenance facility and trucks’ functions.

K C Transport asserted that approximately 60% of the services from the maintenance facility are to the five nearby Ramaco Resource mines, and the other 40% is split between other companies, including other coal operators. JS ¶ 15. These services include operating on-road and off-road trucks used in coal, gravel, and earth haulage. JS ¶ 14. The two cited trucks at issue here have been used at various times to haul coal from each of the Ramaco mines to the Elk Creek Plant. JS ¶ 27. The trucks used to haul the coal from the mine to the processing facility fit well within the Mine Act’s definition of equipment used in the work of preparing coal. The transportation of coal from those mines to that preparation plant is an integral part of the mining and preparation process. Furthermore, the maintenance of the trucks at the facility is essential to

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<sup>15</sup> In *MSHA v. Ammon Enterprises*, ALJ Zielinski discussed in dicta the question of whether MSHA would have jurisdiction over trucks loading mined materials that were stockpiled and separated by a screen, calling it a “gray area.” 2008 WL 4190445 at Note 9 (July 10, 2008) (ALJ). He further stated that if the mining operations had been closed, “that the loading of trucks from the stockpiles would not be considered within MSHA’s jurisdiction.” *Id.*

the coal hauling and preparation process. This interpretation is in line with the Commission's reasoning in *W.J. Bokus*, where the Commission found compressed gas cylinders, a stove, and a grinder to be equipment used in mining. 16 FMSHRC at 707-709. The Commission reasoned that miners worked in the garage where the gas cylinders were kept on mining-related tasks, the grinder had been used to maintain mining equipment, and the stove warmed the garage where the miners worked. *Id.*

I find the possibility of the "bifurcated coverage scheme" that the Secretary warns of to be not quite as absurd as the Secretary states. In fact, it is already in existence many times over in most aspects of mining and other industries. There are various interagency agreements and memoranda of understanding between OSHA and MSHA precisely because jurisdiction often shifts between the agencies. *See eg State of Alaska, Dept. of Transportation*, 36 FMSHRC 2642; *W.J. Bokus Industries*, 16 FMSHRC 704. Despite the Secretary's dire warnings of a bifurcated coverage scheme covering the trucks when they are on mines and/or engaged in mining-related activities, and when they are not on mines engaged in activity unrelated to mining, this Court is confident that the Department of Labor can adequately determine which agency and statute provides coverage.<sup>16</sup>

Therefore, this Court finds that MSHA had jurisdiction over the trucks at issue as well as the maintenance facility. Accordingly, under the prior agreement of the parties, Citation No. 9222038 is affirmed, but modified to "low" negligence with a penalty amount of \$3,908.00. Citation No. 9222040 is affirmed, but modified to "low" negligence with a penalty amount of \$4,343.00.

### **ORDER**

It is **ORDERED** that Citation Nos. 9222038 and 9222040 be modified to "low" negligence, and the Respondent, K C Transport, Inc., is **ORDERED** to pay the Secretary of Labor the sum of \$8,251.00 within 30 days of this order.<sup>17</sup>

/s/ John Kent Lewis  
John Kent Lewis  
Administrative Law Judge

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<sup>16</sup> Judge Manning described the various statutory jurisdictions controlled by the Secretary of Labor thusly: "The Secretary takes what is often called a 'nooks and crannies' approach when interpreting OSHA jurisdiction. OSHA fills in the nooks and crannies that other safety statutes do not cover." *Cox Transportation Corp.*, 22 FMSHRC at 580.

<sup>17</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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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March 26, 2020

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

v.

BRAGG CRANE SERVICE,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2019-0303  
A.C. No. 26-00803-487971 6KB

Mine: Spanish Springs Pit #6

**DECISION AND ORDER**

Appearances: Sonya P. Shao, U.S. Department of Labor, Office of the Solicitor, 350 S. Figueroa Street, Suite 370, Los Angeles, CA 90071

Perry P. Poff, Donell, Melgoza & Scates LLP, 3300 Sunset Boulevard, Suite 110, Rocklin, CA 95677

Before: Judge Simonton

**I. INTRODUCTION**

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Bragg Crane Service (“Bragg” or “Respondent”), pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.<sup>1</sup> This case involves one Section 104(a) citation alleging a violation of 30 C.F.R. § 56.16009. The Secretary proposed a penalty of **\$2,615.00**. The citation was designated as significant and substantial (S&S), highly likely to result in a fatal injury, and involving high negligence on the part of the Respondent.

The parties presented testimony and documentary evidence at a hearing held in Reno, Nevada on October 23, 2019. MSHA Inspector Kimberly Hakala testified for the Secretary. Bragg mechanic/oiler Kyle McPartland, crane operator Zachary Cramer, and branch manager Dean Stone testified for Respondent. After fully considering the testimony and evidence presented at hearing and the parties’ post-hearing briefs, I modify Citation No. 9374373 as set forth below. I assess a penalty of **\$200.00**.

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<sup>1</sup> In this decision, the joint stipulations, transcript, Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Jt. Stip.,” “Tr.,” “Ex. S-#,” and “Ex. R-#,” respectively.

## II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations of fact included in their prehearing submissions:

1. Respondent was at all times relevant to this matter an independent contractor performing services or construction at Spanish Springs Pit #6.
2. The subject mine is a “mine” as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. At all times relevant to this case, the products of the subject mine entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
4. Bragg Crane Service is subject to the jurisdiction of the Mine Act, 30 U.S.C. § 801, *et seq.*
5. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815, 823.
6. 30 C.F.R. § 56.16009 is a mandatory health or safety standard as that term is defined in Section 3(1) of the Mine Act, 30 U.S.C. § 802(1).
7. The citation contained in Exhibit A attached to the Petition for Assessment of a Penalty for this docket is an authentic copy of the citation at issue in this proceeding.
8. The individual whose name appears in Block 22 of the citation at issue in these proceedings was acting in her official capacity as an authorized representative of the Secretary when the citation was issued.
9. The exhibits offered by the parties are authentic, but no stipulation was made as to their relevance or the truth of the matters asserted therein.

Joint Prehearing Statement at 3; *See* Tr. 7.

### III. SUMMARY OF TESTIMONY

#### a. The Secretary

MSHA Inspector Kimberly Hakala<sup>2</sup> testified for the Secretary. She stated that on December 10, 2018, she went to Spanish Springs Pit #6 to conduct a regular inspection. Tr. 14. Once she arrived, she learned that Bragg was on site that day to pick a hopper away from the primary plant. Tr. 15. She testified that Martin Marietta's plant manager, Abram Woodward, accompanied her while she observed the pick, and that he took photos. Tr. 17.

The hopper was lifted off of the plant, rotated, and placed on the ground. Tr. 18, 21, 24, 64–65. Hakala witnessed the entire job from an elevated catwalk, approximately 60–80 feet away from where the load was ultimately placed. Tr. 44–45, 69–70; *see* Tr. 17; Ex. S–7, p. 2. Hakala testified that two tag lines were attached to the load, and that one of the lines was initially held by a man on an elevated catwalk. Tr. 19, *see* Ex. S–7, p. 2. She stated that the man moved along the catwalk while holding the tag line and then threw the tag line to the ground to be retrieved by another miner. Tr. 19. Then, according to Hakala, a Bragg employee and a Martin Marietta employee who were both on the ground “moved in”—the Martin Marietta miner to retrieve the tag line and the Bragg miner to observe where the hopper was in relation to the plant structure. Tr. 19–20.

Hakala testified that when the two miners moved in towards the tag line, the hopper was positioned directly above them. Tr. 20. She issued a verbal imminent danger order<sup>3</sup> to Woodward based on her observation that the miners were standing beneath the load and were in danger of being struck by it. Tr. 21. Hakala stated that Woodward shouted down to the miners, they moved out from under the load, and “within moments both of them came back in.” Tr. 22–23. After Hakala told Woodward again to remove the miners from the area, he shouted to them a second time and they thereafter stayed out from underneath the suspended load. Tr. 23. Hakala explained that she believed the miners went back in the second time in order to retrieve the tag line again, since they had dropped it the first time they were told to move away from the load. Tr. 23.

Hakala further testified that after the hopper was placed on the ground, she and Woodward made their way down to the ground level to have a safety briefing with the miners, where she explained why she issued the imminent danger order. Tr. 24, 53. She stated at hearing that McPartland, the Bragg employee on the ground during the pick who identified himself as the “leadman,” told her during this safety briefing that he was not directly under the load but was two feet to the side of it, within the “fall zone” of the hopper. Tr. 24–26, 56.

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<sup>2</sup> Kimberly Hakala has been an MSHA inspector for nearly eight years. Tr. 12. She previously worked for approximately 10 years in various roles at her family's gypsum limestone operation. Tr. 13.

<sup>3</sup> This 107(a) order, Order No. 9374371, was issued to Martin Marietta, not Bragg Crane Service. It was withdrawn by the Secretary at hearing.

## **b. The Respondent**

Bragg mechanic/oiler Kyle McPartland,<sup>4</sup> crane operator Zachary Cramer,<sup>5</sup> and branch manager Dean Stone<sup>6</sup> testified for Respondent. McPartland was the signalman for this job, and asserted at hearing that he has no supervisory responsibility in his position. Tr. 96, 114. He testified that after the Bragg employees arrived at the mine site on December 10, 2018, they received site-specific training and were then escorted to where the hopper was located to set up the crane and had a safety meeting with the Martin Marietta employees involved in the job. Tr. 99–100. McPartland said that the dimensions of the fall zone—the area where the hopper might end up in the event it fell or tipped over—were not discussed in exact terms. Tr. 133. Once the rigging was set up and the miners were getting ready to pick the hopper, Inspector Hakala arrived and asked a few questions. Tr. 102.

McPartland stated that the lift began upon his signal, while he was located on an elevated catwalk observing the boom angle of the crane. Tr. 105–06. He and one Martin Marietta miner then went down to the ground level to observe the hopper's location as it was moving into place. Tr. 107–08; *see* Ex. S–7, p. 2. By his estimate, Hakala was 80 to 90 feet away from him at this point in the pick. Tr. 108.

According to McPartland, the tag line held by the miner who stayed up on the catwalk was never dropped. Tr. 109. McPartland stated that the miner was preparing to throw the line down to the Martin Marietta miner on the ground right before Woodward yelled at him not to throw it. Tr. 109. The load was brought in closer and rotated accordingly—without either tag line ever being dropped—and then lowered onto the ground. Tr. 108–09, 140–41.

McPartland testified that Hakala talked to him individually once the load was on the ground. Tr. 115. According to him, she never questioned him about how close he was to the load or whether he would have been struck by the load if it fell. Tr. 115. McPartland stated that he remembered his conversation with Hakala to be limited to questions about his name and his role in the company and about her opinion that more tag lines should have been used. Tr. 116.

McPartland asserted that he moved away as the hopper was moving closer to him, and that no miner ever entered an area where he would have been struck by the load. Tr. 116, 149. He stated that the closest he was to the load as it was lowered was 10 feet away. Tr. 117.

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<sup>4</sup> Kyle McPartland has worked for Bragg as a mechanic/oiler for 11 years. Tr. 95–96.

<sup>5</sup> Zachary Cramer has worked as a crane operator for Bragg since January 2016 and has been a crane operator since August 2015. Tr. 156–58. Prior to becoming a crane operator, he worked as a certified rigger and signalman for three years. Tr. 160.

<sup>6</sup> Dean Stone worked for Bragg Crane from 1977 to 1995 as a crane operator. Tr. 202. After a hiatus from the industry, he returned to Bragg in 2009 and has been a branch manager since. Tr. 203.

Zachary Cramer operated the crane during the inspection at issue. According to Cramer, it was Martin Marietta—not Bragg—that decided to use two tag lines to control the load. Tr. 164–65. He testified that at one point, he heard someone yell “stop, don’t throw the tag line down” as the Martin Marietta crew member on the catwalk holding the tag line was coiling up the line and apparently preparing to throw it down. Tr. 170. He stated that the miner never threw the line down and held onto it until the hopper was on the ground. Tr. 170.

Cramer testified that a fall zone of 10 feet was identified prior to the pick, and that everyone involved in the job was told to stay 10 feet clear of the hopper. Tr. 173–74. He stated that he never saw anyone enter the fall zone, and that no one was ever in danger of being crushed by the hopper. Tr. 168, 172. He said that if he had seen someone in the fall zone, he would have stopped operation of the crane immediately. Tr. 168. Cramer also testified that though he heard Inspector Hakala was on site that day, he never saw or spoke to her. Tr. 163.

#### **IV. PARTY ARGUMENTS**

##### **a. Secretary’s Argument**

The Secretary argues that Respondent violated 30 C.F.R. § 56.16009 when employee Kyle McPartland failed to stay clear of a suspended load. Secretary’s Post-Hearing Brief (Sec’y Br.) at 6–7. The Secretary alleges that the miner on the catwalk behind the hopper threw the tag line he was holding down to the Martin Marietta maintenance worker on the ground. *Id.* at 3. Following this, the Martin Marietta miner moved in to retrieve the tag line, and McPartland moved in to observe the hopper. *Id.*; Tr. 19, 46. Inspector Hakala observed the miners directly under the suspended load, and issued a verbal imminent danger order to plant manager Abram Woodward, who shouted down to the miners to get out from under the load. Tr. 20–21; Sec’y Br. at 3. The Secretary argues that both miners then went back into the fall zone and Hakala issued a second verbal order for them to move out from under the load. *Id.* After the second warning, they stayed out from under the load. Sec’y Br. at 3; Tr. 22–23.

The Secretary argues that Hakala then came down to the ground level and spoke with the miners as a group. Tr. 60–61; Sec’y Br. at 3–4. During that discussion, McPartland admitted to being two feet to the side of the hopper’s vertical fall line. Tr. 24; Sec’y Br. at 4. The Secretary contends that the violation should remain designated as high negligence and that any injury resulting from the violation would be fatal. Sec’y Br. at 7–8.

##### **a. Respondent’s Argument**

Respondent contends that the citation should be vacated because miners were neither directly under the load nor in the load’s fall zone at any time during the pick. Respondent’s Post-Hearing Brief (Resp. Br.) at 13. Respondent alleges that the miners involved in the pick operation stayed a safe distance from the hopper and moved away as the load moved. *Id.* at 13; Tr. 168–69. If anyone had gone under the load or into the fall zone, McPartland or Cramer would have stopped work. Resp. Br. at 12, 13; Tr. 117, 168.

Alternatively, Respondent argues that if a violation occurred, “there was no reasonable likelihood that the crane’s rigging would fail, or that any employee was otherwise in jeopardy of being injured by the load.” *Id.* at 14. Respondent therefore asserts that there was no likelihood of injury and no negligence. *Id.* at 15.

## V. DISPOSITION

### a. Fact of Violation

Inspector Hakala alleged in Citation No. 9374373 that Respondent violated 30 C.F.R. § 56.16009:

Two miners were observed under an approximate 40,000 pound suspended load while attempting to remove the hopper from the Primary Plant. One miner was directing the load and the other miner was trying to grab the suspension line from a third miner who was above the load. The hopper was suspended approximately 20–25 feet above the miners. This condition exposes miners to fatal type injuries in the event of an accident. A verbal imminent danger order was issued to the mine's Plant Manager. Order # 9374371 was issued in conjunction with this citation and citation #9374372.

Ex. S–3.

The standard provides that “[p]ersons shall stay clear of suspended loads.” 30 C.F.R. § 56.16009. Hakala determined that the violation was highly likely to result in injury, that the injury could reasonably be expected to be fatal, and that the violation was significant and substantial (S&S) and affected two people. Ex. S–3. She determined the violation was the result of high negligence. *Id.*

It is undisputed that § 56.16009 requires miners to not only stay out from directly under suspended loads, but to also stay clear of the area that could be affected if a load were to fall. Sec’y Br. at 6; Resp. Br. at 10–12; *see Anaconda Co.*, 3 FMSHRC 299, 301 (Feb. 1981) (considering substantively identical rule later recodified at § 56.16009 per Recodification of Safety and Health Standards for Metal and Nonmetal Mines, 50 Fed. Reg. 4048-01 (Jan. 29, 1985)). The regulation aims “to prevent persons from being hit by such loads through barring persons from locating within a hanging load’s possible arc or radius.” *Haines & Kibblehouse, Inc.*, 30 FMSHRC 504, 517 (June 2008) (ALJ).

The Commission has long held that “[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The Commission has described the Secretary’s burden as:

The burden of showing something by a “preponderance of the evidence,” the most common standard in the civil law, simply requires the trier of fact “to believe that the existence of a fact is more probable than its nonexistence.”

*RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). For the reasons that follow, I find that the Secretary has presented sufficient evidence to show that McPartland went into the fall zone in violation of § 56.16009. However, I find that he did not go directly under the suspended load.

During this inspection, Bragg’s crane lifted a 40,000 pound hopper from Martin Marietta’s primary plant and lowered it onto the ground as depicted in Exhibit 7, page 3. While observing the job, Hakala stood on an elevated catwalk near where the hopper was located before it was lifted off of the plant. Tr. 43; Ex. S–7, p. 2, 3. Consequently, the load moved away from her as it was lowered onto the ground. By both Hakala’s and McPartland’s estimates, Hakala was approximately 80 feet away from the miners when she allegedly observed them walk into the fall zone of the suspended load. Tr. 44, 108. Therefore, in addition to her less-than-ideal vantage point, she was a significant distance from the miners on the ground.

At hearing, Hakala testified numerous times that the miners appeared to go directly under the suspended hopper. Tr. 20, 21, 47, 69. However, she was inconsistent when asked about particular details of the violation. When asked during cross-examination whether McPartland was in any danger at the time the critical photo in Exhibit 7, page 2 was taken, she said that “it’s possible if this thing were to tip that he would be *really close* to that fall zone where he’s at right now.” Tr. 45–46 (emphasis added). When later questioned by the court about the same photo, Hakala said that the entire area inside of the pictured yellow bollards—within which McPartland is standing in the photo—was within the fall zone of the hopper with the hopper in its photographed location. Tr. 85–86. On re-cross, Hakala was again asked if anyone was in the fall zone at the time the photo was taken. Tr. 91. She responded that “he’s in a position where *he could be as it continues to move*.” Tr. 92 (emphasis added). It is unclear whether Hakala believed McPartland was really close to the fall zone, definitely in the fall zone, or possibly in the fall zone at the time the photo was taken. Moreover, she evaded and ultimately failed to answer Respondent’s question about how high the load was at the precise time the violation occurred, instead only repeating her estimation of the height of the load at the beginning of the pick. Tr. 81–82.

Given the above inconsistencies in Hakala’s testimony and her sub-optimal viewpoint during the inspection, I find that the Secretary has failed to show by a preponderance of the evidence that McPartland was ever *directly under* the suspended load.

Crucially, the Secretary failed both at hearing and in his post-hearing brief to articulate the specific parameters of the fall zone in this case. I ascertain nevertheless that the fall zone of

the suspended hopper was 10 feet around the load, particularly because Cramer, Bragg's crane operator, testified that "a fall zone was identified" and that people were told to stay 10 feet clear of the load. Tr. 174.

In its correspondence to MSHA four days after the inspection, Bragg stated that "no employee was ever less than 6 to 10 feet from the vertical fall line of the suspended hopper." Ex. R–A, p. 1 (emphasis added). However, according to Hakala's notes, written as she interviewed the miners following the pick, McPartland asserted that the miners were never directly under the load but were approximately two feet from the vertical fall line. Ex. S–4, p. 1; Tr. 26–28. Though the exact distance between McPartland and the vertical fall line at the moment of violation may be indeterminate, I find that sufficient evidence supports the finding that he violated 30 C.F.R. § 56.16009 by entering the established fall zone of 10 feet.

Accordingly, the fact of violation is affirmed.

#### **b. Gravity**

A violation is significant and substantial (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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: 1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984).

The Commission has held that the second element of the *Mathies* test addresses the extent to which a violation contributes to a particular hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Analysis under the second step should thus include the identification of the hazard created by the violation and a determination of the likelihood of the occurrence of the hazard that the cited standard is intended to prevent. *Id.* at 2038. At the third step, the Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *West Ridge Resources, Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010). Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

Hakala explained at hearing that she designated this citation as S&S because "it was reasonable to believe that there was an injury of a fatal type that would occur." Tr. 36. She testified that she designated the citation as highly likely because "it was highly likely that they could be crushed by this load *should it fall*." Tr. 34 (emphasis added).

I have already determined that Bragg violated § 56.16009, a mandatory safety standard, because McPartland entered the fall zone of the suspended hopper. The safety hazard posed by the violation is that the suspended load could injure a miner on the ground if it were to fall. I find, however, that it is unlikely this hazard would occur. Though an injury would be of a fatal nature if the load were to fall, Hakala's determination that such an event was highly likely is incorrect. Bragg prepared carefully and took the precautions necessary to ensure that the hopper would be lifted and relocated without incident. *See* Tr.120–28; *see also* Ex. R–A. The load was unlikely to fall.

Worth noting here, mine operator Martin Marietta Materials, Inc. was issued a nearly identical citation for this violation. The citation was settled in Docket No. WEST 2019-0228. In his settlement motion in that case, the Secretary stated that “[p]ersons were clear of (not under) the load.” Mot. For Settlement at 3, *Martin Marietta Materials Inc.*, WEST 2019-0228. The Secretary requested that the court modify the gravity designations to reflect that injury was unlikely and that the violation was not S&S. The court accepted the Secretary's explanations for the modifications and approved the settlement. Decision Approving Settlement, *Martin Marietta Materials Inc.*, WEST 2019-0228. Because the representations made in that related operator case differ from the Secretary's position in the present case, the Court instructed the parties to address whether the doctrine of judicial estoppel affects this proceeding.<sup>7</sup> Unpublished Order dated Nov. 12, 2019. After briefing the issue of judicial estoppel, the Secretary affirmatively chose not to brief how this violation was S&S or highly likely to result in a fatality. Sec'y Br. at 5–6. Without invoking judicial estoppel, I find that the settlement reached in WEST 2019-0228 nevertheless lends notable support to the notion that this violation was unlikely to result in injury and was not S&S.

Because injury was unlikely, the third factor of the *Mathies* test is not met. I find that the this violation was unlikely to result in injury, that the injury could reasonably be expected to be fatal, that two people were affected, and that the violation was not S&S.

### c. Negligence

Under the Mine Act, operators are held to a high standard of care, and “must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” 30 C.F.R. § 100.3(d). MSHA's regulations define reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.

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<sup>7</sup> Discussed by the Supreme Court in *New Hampshire v. Maine*, the doctrine of judicial estoppel prevents parties from taking a certain position in a legal proceeding and then assuming a contrary position in a later proceeding. 532 U.S. 742, 749–50 (2001). Because the respondents are different in these cases, I will not invoke the doctrine. However, I have taken judicial notice of the representations made and settlement reached in the corresponding operator case.

Inspector Hakala designated the citation as high negligence, explaining at hearing that McPartland, as the “individual in charge, had direct knowledge and he was involved in the imminent danger and the violation itself.” Tr. 35. I find that the Secretary failed to credibly establish that McPartland was in charge. McPartland credibly testified that he did not have any supervisory responsibility. Tr. 96.

I find that Bragg’s negligence is low. McPartland should not have entered the fall zone, but based on the testimony and evidence presented in this case, it is clear to me that to the extent he entered the fall zone, his presence there was momentary. Furthermore, Bragg took comprehensive safety precautions ahead of and during the pick. For instance, the miners involved in the job all took part in a safety meeting prior to the pick. Tr. 100–01. In its configuration that day, the crane was authorized to lift a load much heavier than the hopper. Ex. R–A, p. 7, *see* Resp. Br. at 6–7. The rigging utilized was also rated for far more weight than was being lifted. Resp. Br. at 7.

Given the considerable mitigating circumstances, I reduce Bragg’s negligence from high to low.

## VI. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties *de novo* for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ 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.

30 U.S.C. § 820(i).

The Secretary proposed a regularly assessed penalty of \$2,615.00. Bragg has no history of previous violations. Bragg did not present evidence regarding its size or argue that the size of the penalty was disproportionate. Further, Bragg did not contend at hearing or in its submissions in this case that the penalty amount would affect the company's ability to continue in business. As discussed in greater detail above, I find this violation to be non-S&S and unlikely to result in a fatal injury. I reduce Bragg's negligence from high to low in light of the significant mitigating circumstances. No evidence was presented on good faith in compliance. In light of these considerations, I assess a penalty of **\$200.00**.

## VII. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **\$200.00** within 30 days of this order.<sup>8</sup>

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

Distribution: (Email<sup>9</sup>)

Sonya P. Shao, U.S. Department of Labor, Office of the Solicitor, shao.sonya.p@dol.gov

Perry P. Poff, Donell, Melgoza & Scates LLP, perry@oshalaw.net

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<sup>8</sup> Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

<sup>9</sup> For the foreseeable future, Federal Mine Safety and Health Review Commission (FMSHRC) notices, decisions, and orders will be sent only through electronic mail. Because FMSHRC will not be monitoring incoming physical mail or faxes, parties are encouraged to submit all filings through the agency's electronic filing system. If you are not able to file through our electronic filing system, please send an email copy and we will file it for you.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9900 / FAX: 202-434-9954

March 27, 2020

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

v.

CONSOL PENNSYLVANIA COAL CO.,  
LLC,  
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 2018-0243  
A.C. No. 36-07230-467980

Docket No. PENN 2018-0255  
A.C. No. 36-07230-470217

Bailey Mine

**DECISION**

Appearances: Matthew R. Epstein, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;

James McHugh, Esq., Hardy Pence PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”), on behalf of the Mine Safety and Health Administration (“MSHA”), against Consol Pennsylvania Coal Company, LLC (“Consol”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). The Secretary seeks a total penalty of \$11,067.00 for ten violations of his mandatory safety standards.<sup>1</sup>

A hearing was held in Pittsburgh, Pennsylvania. The following issues are before me: (1) whether the violations were attributable to the level of gravity alleged; (2) whether the violations were attributable to the degree of negligence alleged; and (3) the appropriate penalty. The parties’ Post-hearing Briefs and Consol’s Reply Brief are of record.

For the reasons set forth below, I **AFFIRM** two citations, as issued, and three citations, as modified; and assess penalties against Respondent.

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<sup>1</sup> The parties reached a settlement on five of the ten contested citations. The total civil penalty proposed for the remaining five citations adjudicated in this proceeding is \$7,409.00.

## **I. Joint Stipulations**

The parties have stipulated as follows:

1. Respondent is an operator, as defined in section 3(d) of the Mine Act, at the mine where the citations were issued.
2. Bailey Mine is a mine, as defined in section 3(h) of the Mine Act.
3. The operations of Respondent at Bailey Mine are subject to the jurisdiction of the Mine Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge, pursuant to Mine Act sections 105 and 113.
5. Bailey Mine is owned by Respondent.
6. Payment of the proposed penalties will not affect Respondent's ability to remain in business.
7. The individual whose name appears in Block 22 of each citation in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.
8. The citations were properly issued and served by a duly authorized representative of the Secretary upon an agent of Respondent at the date, time, and place stated in each citation, as required by the Act.
9. Exhibit A to each of the above-captioned dockets contains authentic copies of the citations at issue.
10. Respondent stipulates to the authenticity and admissibility of the R-17 certified mine history forms (P-9).

Tr. 14-16.

## **II. Factual Background**

Consol owns and operates the Bailey Mine, an underground coal mine in Wind Ridge, Greene County, Pennsylvania. On May 17, 2018, Walter Young, an MSHA inspector and ventilation specialist, conducted an E02 methane spot inspection of the mine, accompanied by his supervisor Jeremy Williams, Consol respirable dust coordinator John Opfar, and Consol safety inspector Cody Rogers. Tr. 270-72. Young cited Consol for two worn high pressure shield hoses on the 6-J longwall working section; and wet accumulations of combustible materials at the 6-J working section conveyor belt storage unit. Exs. P-5, P-6.

On June 28, 2018, Inspectors Young and Williams returned to the mine for another methane spot inspection, accompanied by Consol safety inspectors James Jones and Matt Cunningham. Tr. 58-60. Young observed several conditions for which he cited Consol: an inadequately ventilated charging battery in the No. 3 crosscut, between the No. 3 belt and No. 2 track entries; an energized ISE box on the pump car in the No. 2 track entry with the outby door ajar and disconnected external control levers; and an unsupported area of mine roof between the last longwall shield and the 5-L tailgate travelway. Exs. P-2, P-3, P-4.

### **III. Findings of Fact and Conclusions of Law**

#### **1. Citation No. 9077362**

##### **A. Fact of Violation**

Inspector Young issued 104(a) Citation No. 9077362 on May 17, 2018, alleging an “S&S” violation of section 75.1725(a) that was “reasonably likely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Consol’s “moderate” negligence.<sup>2</sup> The “Condition or Practice” is described as follows:

The Mine Operator failed to maintain the high pressure shield to shield hoses on the 6-J Longwall Working Section (039-0 MMU), inby the number 10.5 crosscut in safe operating condition at the following locations:

1. Between the numbers 62 and 63 shields. The outer jacket of the hose was worn off for an area measuring 2 inches long by 3 inches wide exposing the inner wire braiding to damage. The inner braiding was rusted and deteriorating from oxidation and rubbing on the pontoons of the shields when they were advanced.
2. Between the numbers 64 and 65 shields. The outer jacket of the hose was worn off for an area measuring 24 inches long by 3 inches wide exposing the inner wire braiding to damage. Broken strands were present. The inner braiding was rusted and deteriorating from oxidation and rubbing on the pontoons of the shields when they were advanced. The Operator immediately removed the shields from service until the condition could be corrected. Both outer protective hose sleeves were damaged at the cited locations.

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<sup>2</sup> 30 C.F.R. § 75.1725(a) provides that “[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.”

Standard 75.1725(a) was cited 16 times in two years at mine 3607230 (16 to the operator, 0 to a contractor).

Ex. P-5. The citation was terminated on May 17, when both damaged high pressure hoses were replaced. Ex. P-5. Consol has conceded the violation, but contests the S&S designation and the degree of negligence ascribed to the violation. Resp't Br. at 18.

## B. Gravity

In *Mathies Coal Co.*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987). Resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The Commission has explained that the second *Mathies* criterion requires the judge to define the hazard to which the violation contributes, and then determine "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016); *see ICG Illinois, LLC*, 38 FMSHRC 2473, 2475-76 (Oct. 2016). When evaluating the third *Mathies* criterion, the judge is to assume that the hazard identified in step two has been realized, and then consider whether the hazard would be reasonably likely to result in injury in the context of "continued normal mining operations." *Newtown Energy*, 38 FMSHRC at 2045 (citing *Knox Creek Coal Corp.*, 811 F.3d 148, 161-62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek*, 52 F.3d at 135)); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The Secretary maintains that the violation was S&S because the damaged hoses created a risk of highly pressurized fluid leaks and, because the hoses were facing the pan line, they "could break loose entirely and whip through the air" in an area where miners travel. Sec'y Br. at 6-7. Additionally, the Secretary argues that the pressure tests on the damaged hoses offered by Consol should be discounted because they do not account for continued degradation and repeated pressurization during the normal course of mining. Sec'y Br. at 5-7. Consol makes the counter argument that despite the damage, the pressure testing performed at Fairmont Supply Company ("Fairmont") demonstrated that the hoses could withstand pressure far exceeding that to which they were subjected during normal mining. Resp't Br. at 18-21. Consol also contends that if one or both hoses were to fail, it would be highly unlikely for a miner to be in close proximity to

either because of Consol's automated system for moving the longwall shields. Resp't Br. at 19-20.

Inspector Young testified that he identified damaged high pressure hoses between the numbers 62 and 63, and 64 and 65 shields, with braiding visible through the outer jackets and oxidation on the exposed steel braiding. Tr. 273, 289, 299-300, 334. Young explained that the hoses use hydraulic fluid to pressurize the shield system, and that the cited hoses carry 2,500 psi of static pressure and approximately 5,000 psi of operating pressure when the shields are advancing. Tr. 274-75, 293, 304. He noted that there was slack in the hoses, which caused rubbing on the longwall pontoons. Tr. 292-93, 307. He testified that high pressure leaks at 4,000 psi can pierce human flesh and that if a "hose blows off" and swings, it could kill miners traveling or working along the pan line. Tr. 299. Young explained that the longwall shields are moved manually when there are bad roof conditions, and that miners can override the computer program ensuring that they are two shields away from an advancing shield. Tr. 310-14, 321-323. Additionally, Young acknowledged that, under some circumstances, oxidation can occur quickly, that it usually turns steel a dark color, and that the outer jacket of the cited hoses is black. Tr. 309, 334, 340. Finally, he stated that the only way to determine the extent of damage to a hose is to send it out for testing, and that MSHA did not test the cited hoses. Tr. 308, 334.

Consol respirable dust coordinator John Opfar explained that the longwall operation is supported by over 200 shields, each equipped with three hoses. Tr. 545-46, 591. He testified that, typically, the longwall shields are advanced automatically, and that they only begin to advance once the shearer has passed and is approximately 10 shields further along the working face. Tr. 588-90. Additionally, he explained that when conditions require that shields be moved manually, miners can only advance a shield using a computer program that operates two shields away from the advancing shield; this keeps miners approximately 11 feet from the advancing shield and the highly pressurized hoses. Tr. 588-90. Opfar acknowledged that when the longwall shields advance, the hoses can pull and rub, and he identified the location of the deterioration as facing the shields. Tr. 587.

Consol conference officer Robert Gross testified that the cited hoses carried approximately 5,000 psi when pressurized to advance the longwall shields. Tr. 625, 642, 654, 666. He stated that Consol had the hoses proof and burst pressure tested at Fairmont's facility.<sup>3</sup> Tr. 633, 644-45. He also stated that both hoses passed the proof pressure test, that neither hose burst, and that the burst test established that one could withstand 19,000 psi without leakage, while the other began to leak at 17,000 psi. Tr. 645-47, 652-55. Finally, Gross explained that, despite the damage to the outer jackets, both hoses had internal layers of intact braiding. Tr. 649-50.

Todd Clyde, the distribution center manager at Fairmont, testified that the company assembled and sold the cited hoses to Consol. Tr. 672-73, 685. He also stated that Consol had

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<sup>3</sup> Gross and Fairmont employee Todd Clyde explained that the proof pressure testing procedure doubles the maximum pressure determined by the manufacturer for 30 seconds to ensure that hoses are in safe operating condition; burst pressure testing pressurizes hoses to four times the pressure that they would undergo during normal mining conditions. Tr. 643, 674.

the hoses tested at Fairmont, and that the testing methods at its facility are accepted by hose manufacturers. Tr. 672, 682.

The fact of violation has been conceded. Regarding the second *Mathies* criterion, continued operation of the damaged hoses contributed to their failure, i.e., highly pressurized fluid leakage and uncontrollable detachment from the shields.

The Secretary seeks to discredit Consol's pressure testing, contending that it does not take into account wear and tear from continued friction and pressure changes occurring during the normal course of mining. Sec'y Br. at 6-7. The Commission has explained that, in evaluating the contribution of a violation to the cause and effect of a hazard, "it is assumed that normal mining operations will continue." *Mach Mining, LLC*, 40 FMSHRC 1, 4 (Jan. 2018) (citing *U.S. Steel*, 6 FMSHRC at 1574-75); see also *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Accordingly, continued stress on the hoses and highly pressurized fluid leakage must be considered when evaluating the risk of hose failure, alongside evidence of their condition at the time that they were cited by Young. While the record establishes that many layers of braiding remained intact and that the hoses could withstand pressure far greater than that utilized to move the shields, continued operations subjected them to rubbing the pontoons as the longwall advanced. While the test results indicated the unlikelihood of the hoses failing at the time that Young observed the damage, given the extent of exposed braiding and oxidation, along with wear and tear in the context of continued mining, I find it reasonably likely that these hoses would fail. Accordingly, the second step of *Mathies* is met.

Regarding the third step of *Mathies*, Consol argues that miners would not have been exposed to the hazard arising from the damaged hoses. The record indicates that shield hoses are only pressurized to 5,000 psi when the longwall advances and, under normal circumstances, automated longwall advances do not require miners to be located in the immediate area. However, under adverse roof conditions, when Consol elects to advance the longwall manually, it utilizes a computer program that precludes advancement unless miners are 11 feet away from the pressurized hoses that are advancing the shield. Other than the Secretary's bare contention that miners can override the manual system, the Secretary does not rebut or reckon with this evidence in any meaningful way. Moreover, the Secretary has not identified any scenario in which a miner would be exposed to the hazard created by the failed highly pressurized hoses. Accordingly, the Secretary has failed to establish a reasonable likelihood of injury and, therefore, this violation was not S&S.<sup>4</sup>

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<sup>4</sup> The Secretary's cite to *Mountain Coal*, in support of his contention that the violation was reasonably likely to result in an injury, cuts the other way. See Sec'y Br. at 5-7 (citing *Mountain Coal Co., LLC*, 31 FMSHRC 1220, 1238 (Oct. 2009) (ALJ) (the judge's non-S&S finding was based, in part, on the cited hoses being located behind the shields where miners did not regularly travel)). Similarly, the non-S&S finding in this matter is premised upon the Secretary's failure to place miners in close proximity to the pressurized hoses under either computer program, automated or manual.

## C. Negligence

The Secretary contends that Consol was moderately negligent in committing the violation. Sec’y Br. at 7. Consol argues that its negligence should be low because there were hundreds of hoses used to operate the longwall, and the condition was difficult to identify. Resp’t Br. at 21. The evidence establishes that the damage was on the non-visible back side of the hoses facing the shields, and that the oxidation on the inner steel braiding and the hoses’ outer jackets were similar in color; therefore, their cited condition was not readily observable from the travelway. Additionally, only two out of approximately 600 hoses were cited. Finally, the Secretary did not establish how long the condition had existed. I find these factors mitigating and, accordingly, that Consol’s negligence was low in violating this standard.

### 2. Citation No. 9077364

#### A. Fact of Violation

Inspector Young issued 104(a) Citation No. 9077364 on May 17, 2018, alleging an “S&S” violation of section 75.400 that was “reasonably likely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Consol’s “moderate” negligence.<sup>5</sup> The “Condition or Practice” is described as follows:

Damp to wet accumulations of combustible materials consisting of loose coal, coal fines and coal dust, black in color, were permitted to accumulate under the rear of the 6-J Working Section Conveyor Belt Storage Unit and 0.5 crosscut. These accumulations measured 13 feet long by 6 feet wide by 2 to mostly 12 inches in depth. These accumulations were in contact with the return side of the bottom conveyor belt and the stationary roller (outby roller). These accumulations were packed and worn smooth from the conveyor belt being operated overtop of them. The accumulations were built up to the point where [sic] the conveyor belt was almost rubbing the tight side of the take-ups [sic] frame.

The Operator removed the Conveyor Belt from service immediately after the issuance of this citation until the condition could be corrected.

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<sup>5</sup> 30 CFR § 75.400 provides that “[c]oal 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.”

Standard 75.400 was cited 109 times in two years at mine 3607230 (109 to the operator, 0 to a contactor).

Ex. P-6. The citation was terminated on May 17, after the operator removed the accumulations from the area. Ex. P-6. Consol has conceded the violation, but contests the S&S designation and the degree of negligence ascribed to the violation. Resp't Br. at 22.

## **B. Gravity**

The Secretary argues that the citation was S&S, and that the hazard is a "mine fire from the combination of heat from the belt and combustible coal." Sec'y Br. at 8. Consol maintains that an ignition was unlikely to occur because of the wet conditions in the area, the mixed nature of the accumulations, and the presence of water sprays, an overhead fire suppression system, a CO monitor, a fire resistant belt, and a nearby attendant. Resp't Br. at 22-23.

Inspector Young testified that he observed accumulations underneath the 6-J working section conveyor belt storage unit that extended 6 feet in width, 2 to 12 inches in depth, and 12 feet in length. Tr. 347. He stated that the accumulations were in contact with the belt and rollers in several places, noting that multiple rollers were under pressure, that accumulations were underneath the take-up structure, and that the belt had polished the accumulations. Tr. 347, 353, 374. He also noted that none of the rollers were damaged, and that the belt was not in contact with the take-up structure. Tr. 347, 353, 373-74. Young testified that he observed chunks of coal within the wet mixture of dirt, rocks, and other debris, and that the accumulations were not rock dusted. Tr. 347, 350, 364-65, 385. In his opinion, the quantity indicated that the accumulations had existed for two to three shifts, and that it would have taken time for the belt to have polished them. Tr. 347, 351-52. He noted that the outside guarding was clean, which he believed to be another indication that a spill had not occurred recently. Tr. 393-94. In Young's opinion, continued mining operations could dry out the accumulations and cause a fire, and the accumulations had almost built up enough to cause the belt to rub against the frame of the take-up structure. Tr. 350-51, 374-75. Finally, Young explained that the mine was subject to a five-day spot inspection cycle for methane, and that he did not cite Consol for elevated levels of methane that day. Tr. 58-59, 258.

Consol respirable dust coordinator John Opfar testified that the belt was in contact with the accumulations, that the belt was functioning at least intermittently at the time that the accumulations were cited, and that there was coal in the accumulations. Tr. 561-62, 564-65. He explained that spillage can occur when the belt is turned off and on. Tr. 564. He noted that the accumulations were wet and contained a mixture of materials. Tr. 561. He also testified about the fire prevention equipment employed by the mine, which includes an overhead fire suppression system, a CO monitor, fire resistant belts, and sprinklers. Tr. 553-54, 561-67. Opfar also noted that an attendant was stationed near the accumulations, and that he could have addressed any smoldering or fire. Tr. 561-62, 565-567.

The fact of violation has been conceded. Regarding the second *Mathies* criterion, the discrete safety hazard against which section 75.400 is directed is fire or explosion contributed to by accumulations of combustible materials.

In cases involving combustible accumulations, the Commission has clarified that when considering the second and third steps of the *Mathies* analysis, “the likelihood of an injury resulting depends on the existence of a ‘confluence of factors’ that could trigger the ignition or explosion.” *Mach Mining*, 40 FMSHRC at 3-4 (citing *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1992 (Aug. 2014)). “Factors include any potential ignition sources, the presence or potential for presence of methane, float coal dust accumulations, loose coal or other ignitable substance, and the types of equipment operating in the area.” *Id.* at 4; *see also Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 971 (May 1990); *Texasgulf*, 10 FMSHRC at 501-03. Belt rollers contacting accumulations can be potential ignition sources even if the belt is not rubbing against any structure and there are no broken rollers. *See id.* at 4-6; *see also Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1139-42 (May 2014). Additionally, equipment operating in coal accumulations constitutes an ignition source for S&S purposes, even absent any defects in the equipment. *See Buck Creek*, 52 F.3d at 135. Finally, it is well established that a fire in an underground coal mine poses a significant risk of injury to miners. *Id.* at 135-36; *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985).

Consol argues that the wetness of the accumulations made it unlikely for a fire to occur. Resp’t Br. at 22-23. However, the Commission has long explained that “wet coal accumulations pose a significant danger in underground coal mines” because they can dry out through frictional contact with the belt or rollers, and propagate a fire or explosion. *Mach Mining*, 40 FMSHRC at 4-6 (citing *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-30 (Aug. 2013); *Black Diamond*, 7 FMSHRC at 1120-21).

Consol next contends that the presence of an overhead fire suppression system, a CO monitor, sprinklers, and fire resistant belts reduce the likelihood of the hazard causing an injury. Resp’t Br. at 22-23. However, it is well settled that these safety measures are not valid considerations in determining whether a violation is S&S. *Buck Creek*, 52 F.3d at 135-36 (the court rejected the operator's contention that other fire prevention safety measures mitigated the S&S nature of an accumulation); *see also Sec’y of Labor v. Consolidation Coal Co.*, 895 F.3d 113, 118 (D.C. Cir. 2018); *Knox Creek*, 811 F.3d at 162; *Cumberland Coal Res., LP*, 717 F.3d 1020, 1028-29 (D.C. Cir. 2013), *aff’g* 33 FMSHRC 2357 (Oct. 2011); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015). Furthermore, as the Commission has recognized, adopting the position that redundant safety measures provide a defense to an S&S finding “would lead to the anomalous result that every protection would have to be nonfunctional before a[n] S&S finding could be made.” *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011).

Consol also maintains that a fire was unlikely because the accumulations were a mixture of combustible and noncombustible materials. Resp’t Br. at 22. On this point, I credit Young’s testimony, based on his experience and observation of the coal in the accumulations, that there was sufficient coal to provide a fuel source.

Finally, Consol advances the argument that the nearby attendant could prevent an ignition from occurring or clean up any accumulations. Resp’t Reply Br. at 5. However, the Commission requires that an S&S determination be made at the time that a citation is issued, “without any assumptions as to abatement,” and in the context of “continued normal mining operations.” *Paramont Coal Co.*, 37 FMSHRC 981, 985 (May 2015); *U.S. Steel*, 6 FMSHRC at

1574. In the present case, the evidence establishes that the accumulations had accrued over a few shifts because of the quantity, that they had been polished by the belt, and that there was no spillage on the guarding; in that timespan, no one, including the attendant, had addressed them. It follows, therefore, that the attendant had no effect on the likelihood of a fire or explosion occurring.

The cases cited by Consol in support of a non-S&S designation are premised upon facts that are distinguishable from the facts at hand. *See* Resp't Br. at 22-23. In *Brody Mining, LLC*, the judge found a non-S&S violation where the accumulations were loose and not compacted, they were wet with water rather than hydraulic oil, there was no evidence of heat coming from the belt, and redundant safety measures made ignition unlikely. 33 FMSHRC 1329, 1382, 1384-85 (May 2011) (ALJ). Here, the accumulations were packed and polished by the belt to the point that they had become smooth, indicating that there had been significant contact and friction with the belt. In *Mach Mining, LLC*, the judge found that the accumulations could have accrued in a relatively short time, that approximately half of the material was noncombustible rock, and that the roller contacting the accumulations was no longer in use. 33 FMSHRC 763, 773 (Mar. 2011) (ALJ).<sup>6</sup> In this case, by contrast, the cited accumulations were present significantly longer than a shift, the mixture was black and contained chunks of coal, and the accumulations were in contact with functioning rollers.

The evidence establishes that there were numerous points of contact between the accumulations and the belt, and there were multiple rollers under pressure, all of which created points of friction.<sup>7</sup> Moreover, there were chunks of coal in the accumulations, and the belt had polished them. Furthermore, despite no evidence of excessive methane levels on the section at the time that Young cited the accumulations, the fact that Bailey is subject to a five-day spot inspection cycle for methane heightened the potential for an ignition in the context of continued normal mining.<sup>8</sup> Finally, at least one miner, the attendant, would have been in close proximity to a fire. Based on these facts, I find that the coal accumulations contributed to the reasonable likelihood of a fire, a hazard that would be reasonably likely to result in an injury. Accordingly, the second and third *Mathies* criteria have been satisfied.

As the Seventh Circuit expressed in *Buck Creek*, a finding that “a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation” is a common sense conclusion. 52 F.3d at 135-36; *see also Black Diamond*, 7 FMSHRC at 1120 (recognizing

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<sup>6</sup> In both cases, the judges' reliance on redundant safety measures was misplaced and, to the extent that their non-S&S findings were based on the wetness of the accumulations, such reasoning has been rejected by the Commission. *See Cumberland Coal*, 717 F.3d at 1028-29; *Mach Mining*, 40 FMSHRC at 4.

<sup>7</sup> I also note that, had this condition continued unabated, there was a heightened likelihood of the belt coming into contact with the take-up structure, creating another source of friction and increasing the potential for an ignition.

<sup>8</sup> The Commission has recognized that methane liberation can compound the likelihood of ignition in accumulation cases. *Mach Mining*, 40 FMSHRC at 4.

that “ignitions and explosions are major causes of death and injury to miners”). Based on the facts in this case and the relevant precedent, I find a reasonable likelihood that any injury arising from a mine fire would be of a reasonably serious nature, satisfying the fourth *Mathies* criterion. Accordingly, I find that this violation was S&S.

### C. Negligence

The Secretary asserts that Consol was moderately negligent in committing the violation because the accumulations were not caused by spillage, and had been building up for two to three shifts. Sec’y Br. at 8. Consol argues that its negligence should be low because the accumulations were hard to identify, they could have accrued between examinations, and they could have been caused by the belt being turned off and on. Resp’t Br. at 23. The evidence establishes that the accumulations had existed for at least two shifts and had not been caused by a sudden event, and that no action had been taken to remove them. Based on these facts, I find that Consol was moderately negligent in violating the standard.

## 3. Citation No. 9077374

### A. Fact of Violation

Inspector Young issued 104(a) Citation No. 9077374 on June 28, 2018, alleging an “S&S” violation of section 75.340(a)(1)(i) that was “reasonably likely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Consol’s “moderate” negligence.<sup>9</sup> The “Condition or Practice” is described as follows:

The battery scoop charging station located in the 5-L Longwall Working Section (008-0 MMU) between the numbers 1 and 2 entries at the number 3 crosscut was ventilated with intake air that was not coursed into a return air course or to the surface and was being used to ventilate working places. When smoked with a chemical smoke tube the air being used to ventilate the scoop batteries was being coursed inby to the 5-L Longwall Working Section’s last open crosscut (4 crosscut). This smoke tube reading was taken at the track entry side of the battery being charged, 18 feet inby the ribline of the track entry (number 2 entry).

Standard 75.340(a)(1)(i) was cited 11 times in two years at mine 3607230 (11 to the operator, 0 to a contractor).

Ex. P–2. The citation was terminated on June 28, when the ventilation was corrected by hanging a piece of line brattice across the opening to the crosscut and enlarging the hole in the stopping.

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<sup>9</sup> 30 C.F.R. § 75.340(a)(1)(i) provides, in relevant part that “battery charging stations . . . shall be housed in noncombustible structures . . . . When a noncombustible structure or area is used, these installations shall be . . . [v]entilated with intake air that is coursed into a return air course or to the surface and that is not used to ventilate working places.”

Ex. P-2. Consol has conceded the violation, but contests the S&S designation, the number of persons affected, and the degree of negligence ascribed to the violation. Resp't Br. at 7, 23.

## **B. Gravity**

The Secretary contends that this violation was S&S because the improper ventilation would expose miners to toxic fumes and smoke from the battery charging station, and urges the assumption of an emergency, i.e., a battery fire, in the *Mathies* analysis. Sec'y Br. at 9-10 (citing *Cumberland Coal*, 717 F.3d at 1028-29). Alternatively, the Secretary asserts that, even if a fire were not assumed, the conditions in the mine on the day in question would render the ventilation dangerous to miners. Sec'y Br. at 10.

Consol maintains that it would be inappropriate to assume an emergency in the *Mathies* analysis because section 75.340(a)(1)(i) is not an emergency standard. Resp't Reply Br. at 5-6 (citing *Cumberland Coal*, 717 F.3d at 1028-29; *ICG Illinois*, 38 FMSHRC at 2473). Moreover, Consol contends that determining whether a fire was likely to occur is an essential part of the S&S analysis and that, given the good condition of the cited battery, a fire was unlikely. Resp't Br. at 7-9. Additionally, Consol explains that, even if a fire were to occur, miners' exposure would be limited because intake air coming from the primary escapeway would dilute any smoke or contamination coming from the No. 2 track entry before it reached the working face. Resp't Br. at 8, 23-24.

Inspector Young testified that he encountered a noticeable increase in temperature near the No. 3 crosscut, and found that the heat was coming from a battery charging in the crosscut and the connected charger. Tr. 60-61, 70-71. He testified that the battery was located near the stopping in the crosscut, that there was no ventilation curtain at the charging station, and that there was a disconnected charger also sitting in the crosscut. Tr. 60-61, 64, 82-83, 90, 94, 130. The battery in the No. 3 crosscut was connected to a charger mounted on the train in the No. 2 track entry, and Young explained that MSHA does not cite chargers that are mounted on trains. Tr. 65, 70, 91-92. He opined that charging batteries are dangerous because if they catch fire, they can create toxic smoke and carbon monoxide. Tr. 64, 141. Young stated that he released multiple smoke tubes 13, 15, and 18 feet from the ribline of the track entry to determine whether the area was properly ventilated. Tr. 63-64, 68, 125, 127. He explained that when he took a smoke test at the 18 foot mark at the front edge of the battery, some smoke went through the stopping in the crosscut to the return belt entry and some went toward the ribline, continuing up the track entry toward the face. Tr. 116, 122, 124-25, 127, 130. When he released smoke at the 15 foot mark, he observed the smoke swirling; at the 13 foot mark, he observed the smoke traveling toward the face. Tr. 127. Young then explained that, in the event of contamination coming from the battery, once intake air from the No. 1 primary escapeway met the contaminated air in the No. 2 track entry, some of the combined air would be siphoned off at the last open crosscut into the return belt entry, but there would be no way to quantify the amount of contamination ventilating the face. Tr. 76, 80-81, 116. He noted that in assessing the gravity of the violation, he took into account other ventilation in the mine and the potential for dilution of any contaminated air, and he acknowledged that Consol employs a fire suppression system, CO monitors, and a fire resistant curtain over the battery. Tr. 117-18, 131, 154.

Consol safety inspector Justin Jones testified that he observed Young perform the smoke test over the battery, and that the smoke remained stagnant; however, he also stated that the smoke split and some traveled toward the face when Young performed smoke tests closer to the ribline. Tr. 417-19, 430. He explained that any air traveling toward the face would get diluted by intake air coming from the primary escapeway, that some of the contaminated air would get siphoned off, and that there was no damage to the charger or the battery at the time of inspection. Tr. 418, 422-23, 425. Finally, he noted that miners are equipped with self-contained self-rescue devices (“SCSR”), and that Consol utilizes fire suppression systems, CO monitors, and a fire resistant curtain over the battery. Tr. 418-19.

The fact of violation has been conceded. Regarding the second *Mathies* criterion, the discrete safety hazard that section 75.340(a)(1)(i) is intended to prevent is “delivery of smoke or other products of combustion to the working place by the intake air current.” 57 Fed. Reg. 20868-01, 20888 (May 15, 1992).

Addressing the Secretary’s position as to the second *Mathies* criterion, the Commission and the D.C. Circuit have applied *Cumberland Coal* to standards that only become relevant in emergency situations, such as lifelines, escapeways, and refuge chambers. See e.g., *Cumberland Coal*, 717 F.3d at 1026-28; *ICG Illinois*, 38 FMSHRC at 2476; *Small Mine Dev.*, 37 FMSHRC 1892, 1900-01 (Sept. 2015); *Black Beauty Coal Co.*, 36 FMSHRC 1121, 1123 (May 2014); *Spartan Mining Co.*, 35 FMSHRC 3505, 3508-09 (Dec. 2013). The standard at issue, section 75.340(a)(1)(i), is not within the ambit of the situations that would render it an emergency standard. Therefore, at this juncture, the particular facts attendant this violation are analyzed to determine the reasonable likelihood of smoke and other products of combustion reaching the working face, irrespective of any emergency.

In support of its contention that the charging battery posed no risk of fire because it was not found to be defective, Consol cites several cases for the proposition that the S&S designation is primarily premised upon the likelihood of a battery fire occurring. Resp’t Br. at 8 (citing *Rebco Coal, Inc.*, 36 FMSHRC 181, 186 (Jan. 2014) (ALJ); *Roxcoal, Inc.*, 33 FMSHRC 2303, 2313 (Sept. 2011) (ALJ); *Zeigler Coal Co.*, 14 FMSHRC 203, 219 (Jan. 1992) (ALJ); *Mathies Coal Co.*, 4 FMSHRC 2222, 2234-35 (Dec. 1982) (ALJ)). These cases, involving similar violations but different facts, are of limited value. In *Roxcoal*, in finding that a battery fire was unlikely and that the violation was non-S&S, the judge noted that any contaminated air in the travelway would be coursed quickly to the return. 33 FMSHRC at 2313. There is no such indication in the present case. In *Zeigler Coal* and *Rebco Coal*, the inspectors did not designate the violations S&S, and the judges did not make findings on S&S. See 14 FMSHRC at 219; 36 FMSHRC at 186. In *Mathies Coal*, the cited battery charging equipment was not in use, whereas here, the battery was being charged. See 4 FMSHRC at 2234-35.

Additionally, MSHA has explained that section 75.340 requirements are designed “to protect miners if a fire originates at underground transformer stations, *battery charging stations*, substations, rectifiers and water pumps.” 57 Fed. Reg. at 20888 (emphasis added). MSHA has also explained that the requirements are “necessary to safely operate [battery] chargers, regardless of the location” because charging batteries liberate hydrogen, and “[t]here is a

demonstrated history of fires caused by battery chargers.” 61 Fed. Reg. 9764-01, 9786 (Mar. 11, 1996).<sup>10</sup>

In the present case, the evidence establishes that the air at the charging battery in the No. 3 crosscut split, some ventilating through the stopping into the return belt entry, and some migrating in by the track entry and mixing with intake air from the primary escapeway before coursing the working face. Accordingly, the second *Mathies* requirement has been satisfied.

Regarding the third *Mathies* criterion, Consol’s contention, that its overhead fire suppression system, CO monitors, fire resistant curtain, and SCSRs for its miners would reduce the likelihood of injury, is clearly contrary to long held precedent. The Commission and Federal Courts of Appeals have explained that redundant safety measures are not valid considerations in determining whether an injury is reasonably likely to occur. *See e.g., Knox Creek*, 811 F.3d at 162; *Cumberland Coal*, 717 F.3d at 1029; *Brody Mining*, 37 FMSHRC at 1691.

While the evidence establishes that contaminated air originating in the No. 3 crosscut and traveling in by the track entry was diluted by intake air from the primary escapeway, and that some of the combined air was siphoned off at the last open crosscut and ventilated into the return belt entry, an unknown quantity of residual contaminants reached the working face and, in the event of a fire at the charging battery, smoke and other products of combustion would be reasonably likely to reach the entire crew, resulting in serious respiratory and other injuries. Accordingly, I find that the third and fourth *Mathies* criteria have been satisfied, and that this violation was S&S.

### **C. Negligence**

The Secretary contends that Consol was moderately negligent in violating the standard because the heat emanating from the battery and charger was obvious. Sec’y Br. at 10. Consol argues that its negligence was low because there were no defects found on the battery or the charger, and the Secretary did not establish how long the condition had existed. Resp’t Br. at 11. The evidence establishes that the charging battery and charger were generating noticeable heat. Additionally, the hole in the stopping was insufficient for adequate ventilation of the charging battery into the return belt entry, and there was no other ventilation control at that location. Based on these facts, I find that the Consol was moderately negligent in violating the standard.

## **4. Citation No. 9077375**

### **A. Fact of Violation**

Inspector Young issued 104(a) Citation No. 9077375 on June 28, 2018, alleging an “S&S” violation of section 75.512 that was “reasonably likely” to cause an injury that could

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<sup>10</sup> Consol acknowledges that charging batteries liberate hydrogen. Resp’t Reply Br. at 6 (citing *Lion Mining Co.*, 16 FMSHRC 921, 923-24 (Apr. 1994) (ALJ); *Nats Creek Mining Co.*, 17 FMSHRC 115, 129-30 (Feb. 1995) (ALJ); *Bethenergy Mines, Inc.*, 11 FMSHRC 1999, 2002-06 (Oct. 1989) (ALJ)).

reasonably be expected to be “fatal,” and was caused by Consol’s “moderate” negligence.<sup>11</sup> The “Condition or Practice” is described as follows:

The energized 480 A.C. Volt control panel containing the VFD#1 and VBD#2 breakers on the ISE Pump Car located in the number 2 entry, just outby 3 crosscut, in the 5-L Longwall Working Section (008-0 MMU) was not frequently examined, tested, and properly maintained by a qualified person to assure safe operating condition. When inspected the outby door was not closed and after further investigation neither of the breaker control levers on the outside of this panel were not [sic] operational. The metal extensions that fit between the actual machine breaker and the exterior breaker control reset handles were not connected. Due to this condition, a person would have to reset these breakers manually by inserting the bare metal square stock and using a tool to turn/reset the breakers, exposing them to contacting the energized components inside the control box.

Ex. P-3. The citation was terminated on June 28, after the breaker control levers were properly reinstalled and the control panel door was closed securely. Ex. P-3. Consol has conceded the violation, but contests the S&S designation and the reasonably expected injury, and the degree of negligence ascribed to the violation. Resp’t Br. at 12, 24.

## **B. Gravity**

The Secretary maintains that the violation was S&S because the open door on the ISE pump circuit breaker (“ISE box”) exposed miners to 480 volts of electricity as they passed through the area. Sec’y Br. at 10. Furthermore, the Secretary contends that miners and electricians could have been electrocuted if they had attempted troubleshooting at the ISE box. Sec’y Br. at 10-12.

Consol argues that the alleged hazard was not reasonably likely to occur because miners did not travel on the tight side of the track entry where the ISE box was accessed. Resp’t Br. at 12. Additionally, Consol contends that unqualified miners would be unlikely to operate the breakers because such behavior is contrary to their training, mechanics and electricians are on-site to perform electrical tasks, the conditions requiring resetting the breakers were not present at the time in question and, were de-energizing the panel necessary, qualified miners could do so at the load center rather than the control panel. Resp’t Br. at 14-15. Finally, Consol maintains that the reasonably expected injury should be reduced from “fatal” to “lost workdays or restricted duty” because only electricians wearing protective gloves would be expected to encounter the hazard while troubleshooting, the power could be turned off prior to

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<sup>11</sup> 30 C.F.R. § 75.512 provides, in relevant part, that “[a]ll electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected.”

troubleshooting, and the Secretary “failed to produce any evidence demonstrating the relationship between volts and amps[,] and the number of amps required to make 480 volts lethal.” Resp’t Br. at 24-25.

Inspector Young testified that he observed the outby door open approximately three inches on the ISE box, and that the breaker control levers were disconnected; he found one of the control lever connector rods lying on the bottom of the box, six inches from the energized components, and the other lying a couple of feet away from the ISE box in another car. Tr. 166-67, 174, 190-91, 194. He opined that vibrations from the pump could have opened the door, but that at least one of the disconnected control rods had been removed intentionally. Tr. 204-05. He explained that contact with the live components would cause fatal injuries because the ISE box is energized by 480 volts of electricity from the load center, which is used, in part, to power the ISE pump, that the pump was most likely plugged into a 600 or 800 amp breaker inside the box, and that contacting even 480 volts at half an amp would be fatal. Tr. 168-69, 185-86, 201-02. Young asserted that the ISE box was in a “high traffic area,” that miners traveled on both sides of the equipment, and that they could accidentally contact the live control panel by tripping. Tr. 167-68, 188, 192. According to him, despite miner training and availability of qualified mechanics and electricians, unqualified miners could have attempted troubleshooting at the box which, without the control rods, would expose them to the energized components. Tr. 167-68, 173-74, 183, 194-95, 197-203. He also acknowledged that only electricians, wearing protective gloves, are permitted to troubleshoot at the ISE box when energized, that the power to the box could have been shut down at the load center, and that there were no conditions on the day in question that required resetting the breakers. Tr. 167-69, 175, 194-96.

Consol safety inspector Justin Jones testified that one of the control panel doors was open only a few inches, and that miners do not travel on the tight side of the track entry where the ISE box was located because the hydraulic lines running along that side make travel “inconvenient.” Tr. 469, 473-74, 483-84. However, he testified that even if a miner were to fall where the box was located, it would likely close the door to the box. Tr. 483. Jones explained that in the event that the breakers required resetting, a mechanic or electrician with protective gear could access the ISE box control panel or turn off the power to the box at the load center for the longwall train, and that miners are trained not to troubleshoot electrical equipment. Tr. 474, 477, 490-92.

The fact of violation has been conceded. Regarding the second *Mathies* criterion, the discrete safety hazard against which section 75.512 is directed is serious electric shock or electrocution.

The cases relied upon by the Secretary to establish that the violation was S&S are distinguishable. In *Big Ridge*, the judge affirmed an S&S finding where a 480-volt power cable was damaged in three places, and there was substantial evidence that miners were active in the area. See Sec’y Br. at 12 (citing *Big Ridge, Inc.*, 36 FMSHRC 999, 1021-24 (Apr. 2014) (ALJ)). In the instant matter, by contrast, the door on the ISE box was open three inches at best, and the box was located in an infrequently traveled area, significantly reducing the likelihood of accidental contact with the energized components. In *McElroy Coal*, the judge affirmed an S&S finding where a power center could have electrocuted miners not in direct contact with the live components, because the electricity could “track” to objects, such as steel-toed boots, in close

proximity to the exposed power source, and there was evidence that clothing, lunch pails, and other items were stored on top of the power center. *See* Sec’y Br. at 12 (citing *McElroy Coal Corp.*, 30 FMSHRC 45, 57-58 (Jan. 2008) (ALJ)). Here, the evidence indicates that the danger was confined to the energized components inside the ISE box.

Consol cites to *Zapata Coal*, in which the judge found a non-S&S violation where covers on three electrified 480-volt breaker boxes were open two to three inches and not properly secured, because exposure to the hazard was minimal and injury was unlikely. *See* Resp’t Br. at 12 (citing *Zapata Coal Corp.*, 6 FMSHRC 2639, 2646-47 (Nov. 1984) (ALJ)). This case presents similar facts. It is uncontested that one of the doors accessing the energized control panel inside the ISE box was open a few inches, that the box was located on the tight side of the track, and that travel on that side was inconvenient. The Secretary has failed to establish that unqualified miners would be traveling the tight side with any frequency, or that they would reset the breakers in the box. Moreover, the Secretary has not rebutted evidence that qualified mechanics and electricians troubleshoot electrical equipment, or that qualified miners could shut down power to the ISE box at the load center. Consequently, I find that accidental contact with the energized components was unlikely. Therefore, the Secretary has failed to establish the second *Mathies* criterion, and this violation was not S&S.

Regarding the injury that would reasonably be expected, Consol contends that by failing to demonstrate the relationship between voltage and amperage, the Secretary has not established that 480 volts of electricity would be lethal. Consol does not challenge that the ISE box was energized with 480 volts from the load center, or that the power for the ISE pump ran through the box. Furthermore, Consol does not rebut that, in all likelihood, the pump was connected to a 600 or 800 amp breaker, or that contacting 480 volts at even half an amp would be fatal. Consequently, the only evidence on this point stands. Therefore, in the unlikely event that an unqualified miner were to contact the energized components, the reasonably expected injury would be fatal.

### C. Negligence

The Secretary argues that Consol was moderately negligent in committing the violation because weekly examinations were required, the condition was obvious, and the state of the control rods indicated improper handling of the equipment. Sec’y Br. at 12. Consol contends that low negligence is appropriate because the latches on the door could have come loose inadvertently, the box was located in a non-obvious location, there was no evidence that the door was open at the time of the last examination and it was not reported, and Consol was not cited for an inadequate examination. Resp’t Br. at 15. Balancing the evidence that the door was only ajar rather than wide open, and that the condition was not readily observable and of unknown duration, against the evidence of equipment mishandling indicated by one of the disconnected breaker control levers being found in another car, I find that Consol was moderately negligent in violating the standard.

## 5. Citation No. 9077376

### A. Fact of Violation

Inspector Young issued 104(a) Citation No. 9077376 on June 28, 2018, alleging an “S&S” violation of section 75.202(a) that was “reasonably likely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Consol’s “moderate” negligence.<sup>12</sup> The “Condition or Practice” is described as follows:

The mine roof in areas where persons work or travel was not adequately supported or otherwise controlled to protect persons from hazards related to falls of the mine roof, between the last tailgate shield (#273 at spad number 11+11) and the 5-L Tailgate Travel way on the 5-L Longwall Working Section. The unsupported area measured 5.5 feet wide by 18.5 feet long and would not allow face personnel to safely access the tailgate travelway in the event of an emergency.

Standard 75.202(a) was cited 13 times in two years at mine 3607230 (13 to the operator, 0 to a contractor).

Ex. P-4. The citation was terminated on June 28, after the mine roof was supported with posts, making the tailgate safely accessible. Ex. P-4. Consol has conceded the violation, but contests the S&S designation and the degree of negligence ascribed to the violation. Resp’t Br. at 15-17.

### B. Gravity

The Secretary, arguing that the violation was “almost *per se*” reasonably likely to cause an injury, contends that the violation was S&S because “there were signs of pressure in the roof and actual material falling off the roof.” Sec’y Br. at 12-13. He contends that the foreman would be exposed to the hazard because he is required to pass through the cited area to take air readings every four hours. Sec’y Br. at 12-13. The Secretary also asserts that some miners might travel to the face through the tailgate, and that an emergency might force the entire crew to evacuate through the tailgate. Sec’y Br. at 12-13. On the other hand, Consol argues that it would be unlikely for a miner to be in the cited area at the precise time of a rock fall and that, outside of emergency situations, only a foreman would travel in the area. Resp’t Br. at 16-17.

Inspector Young testified that the area of unsupported roof was roughly 5.5 feet wide and 18.5 feet long between the end of the longwall and the tailgate, and that the condition likely arose from the longwall getting “off sights.” Tr. 212-13, 234. He stated that he observed unconsolidated pieces hanging and large chunks of material falling from the roof in that area. Tr. 210. Young opined that miners could travel through the cited area to reach the working face,

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<sup>12</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.”

or could be required to escape through the tailgate in an emergency. Tr. 215-16, 257. He explained that because the mine has two escapeways located on the headgate side, the mine is required to maintain a passable travelway to the tailgate and that, under normal conditions, the section foreman would cross from the longwall into the tailgate to take air readings. Tr. 235, 259-61. He also testified that it takes two hours for the longwall to complete a round trip, and he was of the opinion that whether the longwall advancing would terminate the condition is speculative; he admitted, however, that the cited condition can arise unexpectedly, and come and go as longwalls advance. Tr. 246, 249, 253-54, 256.

Consol safety inspector Justin Jones testified that the foreman would take an air reading in the area between the end of the longwall and the tailgate every four hours. Tr. 406, 514-15. He explained that the advancing longwall would have resolved the roof condition within the hour because, when the longwall shearer completed its next pass, it would have “knocked out” the cited area and the shields would have advanced. Tr. 515. He testified that under normal circumstances, miners would not travel to and from the longwall face through the tailgate, but acknowledged that in the case of an emergency, escape through the tailgate might be necessary. Tr. 514, 520. He noted that there had not been an emergency requiring usage of the tailgate as an escapeway during his six years working at the mine. Tr. 520. In his opinion, the roof appeared “in fine condition to pass under.” Tr. 530. Additionally, he noted that miners had been setting posts in the tailgate earlier in the shift. Tr. 510-11; Ex. R-20.

The fact of violation has been conceded. Considering the second step of *Mathies*, the roof was unsupported and fairly large chunks were already falling when the inspector came upon the area. The discrete safety hazard contemplated by this standard is roof falls in areas where persons work or travel. Accordingly, the second *Mathies* step is met.

Consol identifies cases in which judges made non-S&S findings based upon considerations of the likelihood of hazards occurring, i.e., roof falls, in conjunction with the unlikelihood of miners being at those precise locations when the hazards occurred, in concluding that injuries were unlikely. Resp’t Br. at 16; Resp’t Reply Br. at 9 (citing *Peabody Midwest Mining LLC*, 35 FMSHRC 2419 (Aug. 2013) (ALJ); *Freedom Energy, Mining Co.*, 32 FMSHRC 1809, 1829 (Dec. 2010) (ALJ); *Ohio Cty. Coal Co.*, 31 FMSHRC 1486, 1489 (Dec. 2009) (ALJ)). However, the Commission has indicated that when considering the likelihood of injury under the third *Mathies* criterion, the hazard is assumed to have occurred. *Newtown Energy*, 38 FMSHRC at 2038.

The Secretary does not refute Consol’s contention that the hazard would have been resolved within the hour. The evidence establishes that it would have taken roughly an hour for the longwall shearer to complete the second half of its roundtrip at the time in question, and that the cited condition can arise unexpectedly and is not unusual; it can come and go. Accordingly, I find that the longwall’s advance would have cut away and corrected the unsupported roof by 12:30 that afternoon.

The Secretary’s assertion that miners could travel through the tailgate to reach the working face is contradicted by evidence that miners would only travel through the tailgate if there were an emergency that rendered the primary escapeways unusable. Moreover, the

Secretary has failed to establish any emergency conditions present during the longwall cycle that was underway. Additionally, while miners setting timbers in the tailgate earlier in the shift were nearby, the Secretary has not shown that they worked in the unsupported area between the end of the longwall and the tailgate, or that they traveled through it while the condition existed. Ex. R-20; Tr. 510-11. The evidence establishes that the assistant foreman took a methane reading in the tailgate at 9:20 in the morning. See Ex. R-5 at 4; Ex. P-4. It follows that the next reading would have occurred sometime around 1:20 that afternoon, well after the hazard would have been cut away and the longwall advanced. Despite the evidence of falling rock from the unsupported roof at the time of inspection, I find that the Secretary has failed to establish that anyone would have been exposed to the hazard between the longwall and the tailgate during its duration. Consequently, I find that the hazard was unlikely to result in an injury. Therefore, the Secretary has failed to establish the third *Mathies* criterion, and this violation was not S&S.

### C. Negligence

The Secretary contends that Consol was moderately negligent in violating the standard because miners were working in the area and failed to address the condition. Sec'y Br. at 13. Consol contends that its negligence was low because this condition can arise in the ordinary course of longwall mining, and the condition was not reported. Resp't Br. at 17. There is no evidence that miners were working or traveling directly under the unsupported roof, or that Consol was aware of the hazard before the inspector identified it. Moreover, the evidence establishes that unstable roof conditions can arise unexpectedly as the longwall operates. I find that these factors mitigate the negligence and, therefore, that Consol's negligence was low in violating this standard.

### IV. Penalties

While the Secretary has proposed a total civil penalty of \$11,067.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). See *Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, and based on a review of MSHA's online records, I find that Consol is a large operator. The record also indicates that Consol demonstrated good faith in achieving rapid compliance after notice of the violations, and consideration of its history of violations, from the Assessed Violation History Reports, follows for each citation. Consol has stipulated that imposition of the proposed penalties will not adversely affect its ability to remain in business. Jt. Stip. 6.

The remaining criteria involve consideration of the gravity of the violations and Consol's negligence in committing them. These factors have already been discussed fully. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

### **1. Citation No. 9077362**

It has been established that this violation was unlikely to cause an injury and non-S&S, and that Consol's negligence was low. In the fifteen-month period preceding issuance of this citation for damaged shield hoses, 10 violations of section 75.1725(a) became final orders of the Commission. Ex. P-9 at 1-2. Given that section 75.1725(a) is a general equipment maintenance standard, and that the record is lacking as to the specific nature of those violations, I find Consol's violation history neither a mitigating nor aggravating factor in assessing the appropriate penalty. The Secretary has proposed a penalty of \$749.00. Applying the civil penalty criteria, I find that a penalty of \$200.00 is appropriate.

### **2. Citation No. 9077364**

It has been established that this S&S violation was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, and that Consol was moderately negligent. In the fifteen-month period preceding issuance of this citation for combustible accumulations, 67 violations of section 75.400 became final orders of the Commission. Ex. P-9 at 8-10. Given the volume of coal produced at Bailey, I find Consol's violation history significant, but not an aggravating factor in assessing the appropriate penalty. Applying the civil penalty criteria, I find that a penalty of \$1,211.00, as proposed by the Secretary, is appropriate.

### **3. Citation No. 9077374**

It has been established that this S&S violation was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that six persons would be exposed to the hazard, and that Consol was moderately negligent. In the fifteen-month period preceding issuance of this citation for inadequate ventilation of a charging battery, 10 violations of section 75.340(a)(1)(i) became final orders of the Commission. Ex. P-9 at 11-12. Given that section 75.340(a)(1)(i) is a general standard relating to ventilation of underground electrical installations, and the record is lacking as to the specific nature of those violations, I find Consol's violation history neither a mitigating nor aggravating factor in assessing the appropriate penalty. Applying the civil penalty criteria, I find that a penalty of \$1,539.00, as proposed by the Secretary, is appropriate.

### **4. Citation No. 9077375**

It has been established that this violation was unlikely to cause a fatality and non-S&S, and that Consol was moderately negligent. In the fifteen-month period preceding issuance of this citation for inadequate ISE box maintenance, 33 violations of section 75.512 became final orders of the Commission. Ex. P-9 at 5-6. Given that section 75.512 is a general standard relating to maintenance of electrical equipment, and that the record is lacking as to the specific nature of those violations, I find Consol's violation history neither a mitigating nor aggravating factor in assessing the appropriate penalty. The Secretary has proposed a penalty of \$3,161.00. Applying the civil penalty criteria, I find that a penalty of \$1,000.00 is appropriate.

**5. Citation No. 9077376**

It has been established that this violation was unlikely to cause an injury and non-S&S, and that Consol’s negligence was low. In the fifteen-month period preceding issuance of this citation for inadequate roof support, 9 violations of section 75.202 became final orders of the Commission, and I find Consol’s violation history neither a mitigating nor aggravating factor in assessing the appropriate penalty. Ex. P–9 at 3-4. The Secretary has proposed a penalty of \$749.00. Applying the civil penalty criteria, I find that a penalty of \$200.00 is appropriate.

**IV. Approval of Settlement**

The Secretary has filed Motions to Approve Partial Settlement respecting five of the ten citations involved in these dockets. A reduction in penalty from \$3,658.00 to \$2,005.00 is proposed. The citations, initial assessments, and proposed settlement amounts are as follows:

Docket No.	Citation No.	Initial Assessment	Proposed Settlement
PENN 2018-0243	9076103	\$336.00	\$184.00
	9079127	\$1,118.00	\$559.00
	9076446	\$502.00	\$326.00
	9074941	\$953.00	\$524.00
	<b>TOTAL:</b>	<b>\$2,909.00</b>	<b>\$1,593.00</b>
PENN 2018-0255	9077570	\$749.00	\$412.00
	<b>TOTAL:</b>	<b>\$749.00</b>	<b>\$412.00</b>
<b>GRAND TOTAL:</b>		<b>\$3,658.00</b>	<b>\$2,005.00</b>

I have considered the representations and documentation submitted in these matters under section 110(k) of the Act, and I conclude that the proffered settlement is appropriate under section 110(i) of the Act, and is in the public interest. Specifically, regarding Citation No. 9076103, the Secretary has found the gravity to be less than originally assessed based upon Respondent’s contentions that no copper wire was exposed, and that the area was not regularly traveled. Regarding Citation No. 9079127, the Secretary has found the gravity and negligence to be less than originally assessed based upon Respondent’s contentions that three jacks would continue to stabilize the bucket if the pin failed, and that the condition could have arisen at any time. Regarding Citation No. 9076446, the Secretary has found the gravity to be less than originally assessed based upon Respondent’s contentions that there were no problems with the ventilation or permissibility, and that the area was adequately rock dusted. Regarding Citation No. 9074941, the Secretary has found the gravity to be less than originally assessed based upon Respondent’s contention that the hose had been pressure tested and could withstand five times the operating pressure. Regarding Citation No. 9077570, the parties believe that the violation was issued under the incorrect standard, and the Secretary has found the gravity to be less than originally assessed based upon Respondent’s contentions that the shuttle car was not in operation

at the time of inspection, that it was not energized, and that a pre-operational exam had not been performed.

**ORDER**

**WHEREFORE**, it is **ORDERED** that Citation Nos. 9077364 and 9077374 are **AFFIRMED**, as issued; and that Citation Nos. 9077362, 9077375 and 9077376 are **AFFIRMED**, as modified.

**WHEREFORE**, the Secretary's Motions to Approve Partial Settlement are **GRANTED**, and it is further **ORDERED** that the Secretary **MODIFY** Citation Nos. 9076103 and 9074941 to reduce the level of gravity to "unlikely" and remove the "significant and substantial" designation; Citation No. 9079127 to reduce the level of gravity to "unlikely" and remove the "significant and substantial" designation, and reduce the degree of negligence to "low;" Citation No. 9076446 to reduce the level of gravity to "2 persons affected;" and Citation No. 9077570 to allege a violation of 30 C.F.R. § 75.517, and reduce the level of gravity to "unlikely" and remove the "significant and substantial" designation.

**WHEREFORE**, it is further **ORDERED** that Consol Pennsylvania Coal Company, LLC, **PAY** a civil penalty of \$6,155.00 within 30 days of the date of this Decision.<sup>13</sup> **ACCORDINGLY**, these cases are **DISMISSED**.

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

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<sup>13</sup> Payment should be made electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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March 30, 2020

KOMSAN (TROY) WOODEN,  
Complainant,

v.

GENESIS ALKALI, LLC,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2018-0306-DM  
MSHA No. RM-MD-18-06

Mine: Genesis Alkali @ WESTVACO  
Mine ID: 48-00152

## **DECISION AND ORDER**

Appearances: Komsan (Troy) Wooden, pro se, Rock Springs, Wyoming, Complainant

Erik M. Dullea, Esq., Ephraim Hintz, Esq., Husch Blackwell LLP,  
Denver, Colorado, for Respondent

Before: Judge L. Zane Gill

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

This proceeding arises from section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. § 815(c)(3). Komsan (Troy) Wooden alleges that Respondent Genesis Alkali, LLC terminated his employment because he engaged in section 105(c) protected activities. Respondent argues that Wooden has failed to meet his burden to establish a prima facie case because there is no causal nexus between the protected activity and the adverse action taken against him. Respondent argues that Wooden’s probation and termination was instead the result of unprotected workplace violations that would have justified adverse action irrespective of Wooden’s engagement in protected activities.

For the reasons that follow, I find that Wooden engaged in section 105(c) protected activities and that his probation and termination constitute adverse action. However, I find that there is insufficient evidence to infer a causal nexus between Wooden’s protected activities and this adverse action. For this reason, I find that Wooden has failed to state a prima facie case for a section 105(c) discrimination claim. Even if Wooden were to have met his prima facie burden, ultimately, I also find that Respondent provided sufficient evidence to rebut the prima facie case, or, alternatively, presented a credible and sufficient affirmative defense that Wooden’s probation and termination were motivated by unprotected activities.

## II. FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

Respondent is the operator of the Genesis at Westvaco Mine, an underground trona mine and surface milling facility located in Sweetwater County, Wyoming. (Tr. 38:19-38:21) Complainant Wooden was first employed by Genesis on June 3, 2013. (Wooden Dep. 45:8-45:15) He worked as a maintenance mechanic at Genesis until December, 2017. During the course of his employment, Wooden worked at several different plants at Westvaco. On January 5, 2017, Wooden began working at the Caustic Plant, where he remained until his employment was terminated in December, 2017. (Tr. 11:1-11:15; 13:4-13:6)

Wooden's discharge from employment is the subject of this case. Wooden alleges a series of events which he claims shows that Respondent's management harbored animus against him, animus that he claims led the Respondent to single him out for retaliatory probation and termination. Although Respondent's management was aware that Wooden had participated in some protected activity, it does not agree that all of the instances Wooden claims were protected activity constituted protected activity in fact. In rebuttal, Respondent maintains that Wooden was fired for two instances of misuse of company vehicles. Following the first instance of unauthorized vehicle use, management placed Wooden on Decision Making Leave (DML) and negotiated a Last Chance Agreement (LCA) which provided that further violation of company rules or expectations would result in immediate discharge. (Tr. 454:3-10) Following the second vehicle incident barely four weeks later and after Wooden signed the Last Chance Agreement, management terminated Wooden without reference to any instances of protected activity. (Tr. 481:3-16) Respondent contends that it would have fired Wooden for the unprotected activity alone, irrespective of his involvement in any protected activity.

On January 16, 2018, Wooden filed a discrimination complaint with MSHA relating to his termination. On March 2, 2018, MSHA notified Wooden that there was insufficient evidence to support his section 105(c) allegations. Wooden initiated this case on April 3, 2018. The parties presented testimony and documentary evidence at a hearing in Rock Springs, Wyoming. Respondent submitted a brief, and Wooden submitted a short written statement, both of which were received and considered in preparing this decision. The parties stipulate that the Administrative Law Judge ("ALJ") and the Commission have subject matter jurisdiction over this action pursuant to section 113 of the Mine Act, 30 U.S.C. § 823.

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<sup>1</sup> The findings of fact here and below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness's testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness's testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (ALJ is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

### III. ANALYSIS

The question before me is whether Wooden's probation and termination were influenced by his involvement in "protected activity." As part of his burden to make a prima facie showing of discriminatory intent, Wooden must show that his probation and termination were motivated, at least partially, by his engagement in protected activity under section 105(c). I must determine whether the evidence in total, including the inferential evidence, has sufficient circumstantial weight to satisfy his prima facie burden to show discrimination.

To establish a prima facie case of discrimination under section 105(c)(1), Wooden must show: (1) that he engaged in a protected activity; and, (2) that the adverse action he complains of was motivated, at least in part, by that activity. *Sec'y of Labor on behalf of Robinette v. United Castle Coal, Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d. Cir. 1981). The operator may rebut the prima facie case by showing "either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner v. Nat'l Cement of CA*, 33 FMSHRC 1059, 1064 (May 2011). The operator may also defend affirmatively by proving that, "it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone." *Id.*

Wooden testified about several incidents preceding his probation and termination that created an impression in his mind that Genesis was singling him out. These incidents fall into two groups: Genesis' reaction to Wooden's protected activity, and events that do not relate to protected activity, yet may show animus. In evaluating these events and issues, I am aware that it is possible that the Respondent's actions toward Wooden for unprotected activities may infer malice toward him that could have led to his being singled out for adverse treatment in those incidents that are legitimately considered "protected activity."

#### A. Wooden engaged in protected activity.

To satisfy the first prong of the *Pasula-Robinette* test for a prima facie case of discrimination, Wooden must show that he engaged in protected activity. *Robinette*, 3 FMSHRC at 803; *Pasula*, 2 FMSHRC at 2786. While section 105(c)(1) does not include the term "protected activity", Commission cases have nevertheless found that the section defines certain protected activities. An individual covered by section 105(c)(1) engages in protected activity if (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation[;]", (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101[;]", (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding[;]", or (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

When a complainant asserts that he engaged in a protected activity that is not expressly enumerated under the Mine Act, the activity may still be protected if it furthers the purpose of the legislation. The legislative history of the Mine Act states that Congress intended "the scope of the protected activities be *broadly interpreted* by the Secretary." S. Rep. No. 95-181 at 35 (1977) (emphasis added). Moreover, the history notes that "the listing of protected rights

contained in [what eventually became section 105(c)(1)] is intended to be illustrative and not exclusive,” and that the section should be “construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” *Id.* at 36. I find that there is ample evidence to demonstrate that Wooden engaged in a number of protected activities.

### **1. MSHA Complaint and Racial Slur**

From January 2017 to April 2017, Clyde Muir was Wooden’s immediate supervisor at the Genesis Caustic Plant. (Tr. 12:19-12:23; 552:1-552:12) On April 3, 2017, MSHA inspector Ben Jones came on site and requested to speak to miners (not management) about some issues, including defective metal ladders. According to Wooden’s testimony, Muir wanted to participate in the meeting with the inspector, but Inspector Jones did not allow his involvement. (Tr. 13:24-14:18) A few days later on April 6, 2017, Muir accused Wooden of calling MSHA and making a safety complaint. (Tr. 15:5-11; 279:3-280:4) The accusation related to an earlier incident when Wooden had reported that the steering and suspension on a company truck he had used to drive home a few days prior was defective. Muir raised the issue of the inspector’s visit by snidely suggesting to Wooden that if he wanted to complain about the truck, he should take it up with the MSHA inspector. (Tr. 14:19-15:11) During his site visit, Jones had given Wooden his business card with a contact number. Wooden used this number to contact Inspector Jones about Muir’s statements regarding the defective truck. In response, Jones returned to the site along with another inspector, Brett Stenson. (Tr. 15:11-17)

Wooden also revealed Muir’s hostile reaction to Wooden’s report of the defective steering and suspension on a company truck to Genesis Safety Manager Andrea Walton. (Tr. 15:11-17) Walton assured Wooden that he was within his rights to complain about Muir’s comments, reminded Muir that all miners have the right to contact MSHA, and then referred the matter to human resources. (Tr. 279:3-280:10) On April 30, 2017, approximately two weeks after Wooden complained about Muir, Genesis terminated Muir for, among other things,<sup>2</sup> accusing Wooden of contacting MSHA and making derogatory comments about Wooden’s ethnicity. (Tr. 361:10-364:5; 375:17-376:5; 552:2-23; 579:8-20; 579:13-23; Wooden Dep. 120:13-122:6; Ex. R-43, p.3)

Wooden’s interactions with the MSHA investigators, including a possible hazard complaint to MSHA and reporting a defective ladder to an MSHA inspector, constitute protected activity, as does his interaction with the company’s safety manager. However, the evidence fails to support a finding that Wooden’s probation and ultimate termination for repeated unauthorized use of a company vehicle was in any way connected to this protected activity or to Muir’s missteps.

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<sup>2</sup> Muir made a statement to a group of miners that implied that a bad odor in the break room was caused by food brought in by Wooden. (Tr. 375:17-376:5) By extension, since it was widely known that Wooden was half Thai (his mother) (Tr. 13:21-22; 20:14-16), those who heard the comment understood it to be racially insulting. (Tr. 361:20-362:10; 363:12-20)

## 2. Magnet Lift and Management Response

On May 1, 2017, Maintenance Manager Rick Scorcz (Tr. 17:16-25) instructed Wooden and two other miners to lift a 275-lb. magnet into the bed of a pick-up truck. (Tr. 16:5-17) The men knew the magnet was heavy, but decided to lift it without machine help (Tr. 120:4-25), although they did use a length of pipe as a lifting pole. (Tr. 16:20-17:15) As they were lifting, Wooden had trouble because he was shorter than the other two men. (Tr. 121:2-8) The magnet shifted on the lift pole and Wooden strained a muscle in his right shoulder. (Tr. 16:20-17:15) Wooden reported his injury to interim supervisor Dorothy Yacobacci (Tr. 285:12-18) who told Wooden to go to Medcor to get his shoulder checked. (Tr. 18:4-16) Medcor did not treat Wooden's shoulder. He was prescribed over-the-counter pain pills. (Tr. 18:20-19:1) Since there was no treatment given, Wooden's injury was non-reportable. (Tr. 281:3-8) Wooden thought that was the end of it. (Tr. 18:19-19:3)

The Safety Department at Genesis performs Root Cause Analysis meetings to identify the causes of miners' injuries with the intent of preventing the recurrence of similar incidents. (Tr. 267:24-268:4) On May 10, 2017, Wooden was summoned to an RCA meeting held in response to the magnet lift incident. (Tr. 19:4-6; 153:6-16)<sup>3</sup> Maintenance Director Andre Azevedo attended the meeting. Azevedo is a non-native English speaker (Brazilian). At one point, Azevedo attempted to make the point that he believed discipline for Wooden was appropriate, and because of his limited English skill, made an inappropriate analogy to his father's use of corporal punishment accompanied by a gesture to his belt. (Tr. 176:18-176:24) Because of Azevedo's inappropriate and inexcusable outburst, the RCA meeting was abruptly terminated by Scorcz.<sup>4</sup> Management regarded the outburst as a breach of protocol and took prompt and appropriate disciplinary action against Azevedo. Human Resources was directed to investigate the incident. Azevedo was quickly and vigorously reprimanded by the site's vice president and informed that similar actions in the future would be "career limiting." (Tr. 368:24-370:20)

On May 18, 2017, Wooden and union steward, Casey Warne, were called into another meeting relating to the magnet incident. (Tr. 142:13-19) This meeting was not a fact-finding event. The company wanted to inform Wooden that they had looked into the Azevedo incident and taken swift corrective action. (Tr. 149:9-20)

On May 26, 2017, Moeller returned from shoulder surgery (Tr. 130:24:131:2; 734:21-25) and called another meeting to do a full root cause analysis of the magnet incident. (Tr. 739:24-741:3) On July 17, 2017, Wooden received a "first conference," a low level of discipline, for his role in the magnet lift incident based on his failure to communicate to his co-workers that he was struggling to maintain control of the magnet as they lifted it into the bed of the pick-up truck. (Tr. 22:8-16; 255:12-256:24; 379:3-380:2; 592:4-22) His co-workers were not disciplined for their roles in the magnet incident, but received coaching and counseling. (Tr. 133:1-11; 380:3-

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<sup>3</sup> A root cause analysis (RCA) is a process that allows the company to investigate workplace accidents in order to learn from them and promote safer conduct going forward. (Tr. 149:21-150:4; 267:24-268:6; 275:10-19; 307:19-308:2; 401:15-402:1)

<sup>4</sup> Scorcz was filling in for Maintenance Area Manager Mike Moeller. (Tr. 21:10-19; 183:5-10)

381:10; 616:7-617:10; Ex. R-19) Wooden believed that Genesis' actions relating to the magnet incident constituted targeted harassment against him. (Tr. 108:10-109:23)

Former Genesis HR Manager Kimberly Huber testified that first conferences were the lowest level of actual discipline that the company could impose and that their issuance was a "regular course of business [when] working to try to correct employee conduct ..." even though the union grieved most of the discipline actions. (Tr. 552:15-23; 554:20-555:9) No one in management, including Azevedo, argued that Wooden should be disciplined simply because he reported his shoulder strain or because of the argument with Azevedo during the RCA. (Tr. 380:18-381:10) Even if Wooden had not reported a shoulder strain after lifting the magnet, had the Safety Department learned about the event and the height disparity causing a potential accident separately, Safety still would have conducted an RCA. (Tr. 414:23-415:9) The reason Wooden received a first conference was not because he reported an injury, but rather that he took an unnecessary risk by manually lifting the magnet when he was aware of the substantial weight of the magnet after lifting it onto a cart. (Tr. 746:18-747:6; Ex. R-62, p. 7)

The union filed a grievance on behalf of Wooden in opposition to the first conference. (Tr. 554:7-554:10) The union later abandoned its grievance rather than taking the dispute to arbitration. (Tr. 554:5-554:17) In August 2017, Wooden filed a 105(c) complaint with MSHA. (R-62 pp.17-18) Wooden described the magnet lift incident to MSHA Special Investigator Ken Valentine during a subsequent interview. Wooden admitted the magnet was heavy enough that the miners felt they should use mechanical means to lift it. (Tr. 746:19-747:6; Ex.R-62 p. 7) Wooden's statements to Valentine regarding the miners' behavior and decisions were consistent with Moeller's testimony and supported the issuance of a first conference to Wooden for his risk tolerance based on Wooden's admitted awareness of the magnet's weight. (Tr. 740:2-741:3)<sup>5</sup>

Wooden's disclosure of his shoulder injury and his section 105(c) complaint filed with MSHA over his first conference constitute protected activity. However, the evidence fails to support a finding that Wooden's probation and ultimate termination for repeated unauthorized use of a company vehicle was related to this protected activity in any way.

### **3. Self-Direct Charter and Inspection Forms**

In the fall of 2017, Genesis was preparing to implement and comply with an MSHA revised rule on workplace examinations.<sup>6</sup> This "Self-Direct Charter" expected greater employee engagement and gave participants additional accountability, responsibility, and authority to make decisions in exchange for a wage increase. (Tr. 594:2-594:17) The company emphasized a company-wide policy of completing on-shift shop inspection forms. Wooden interpreted this

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<sup>5</sup> In its negative finding for Wooden's 105(c) complaint, MSHA specifically stated that there was insufficient evidence to prove Genesis violated the Mine Act in its response to the magnet lift incident. (Wooden Dep. 188:14-189:4)

<sup>6</sup> See Examinations of Working Places in Metal Non-Metal Mines, 83 Fed. Reg. 15055, 15056 (Apr. 9, 2018) (describing the multiple extensions to the effective date on October 5, 2017, from October 1, 2017 to June 2, 2018).

new policy focus as being directed at him and believed that he would be exposed to a new degree of scrutiny and perhaps discipline. As a result, Wooden was reluctant to sign forms related to the new policy and interpreted management's efforts to get his signature as harassment. Specifically, Wooden believed that anyone participating in the new Self-Direct Charter should have additional training covering the requirements of the on-shift inspections, and that he had not been so trained. (Tr. 118:3-119:17) He was concerned that he might make a mistake in performing the on-shift inspections due to a lack of proper training that would expose him to possible discipline. (Tr. 24:9-24:18) However, Wooden had attended several training events on workplace examinations provided by Genesis in 2017. (Ex. R-1, p.2; Tr. 269:3-270:19)

Further, Wooden placed significant emphasis on the alleged harassment he faced about shop inspection forms, but in his answers to the Court's questions, he admitted he had never been disciplined for missing an item during a shop inspection. (Tr. 190:13-17) Wooden selectively invoked the F Crew Charter's protections at the hearing and testified that he could make management-level decisions, but he did not expect to be held accountable for making these decisions. (Tr. 22:24-23:12; 29:16-30:6; 198:4-199:1)

Wooden's communications with management about the Self-Direct Charter constitute a protected activity. However, there is insufficient evidence to support a finding that Wooden's probation and ultimate termination for repeated unauthorized use of a company vehicle was in response to this activity.

## **B. Wooden was terminated for misusing company vehicles on two occasions.**

Without doubt, some of the incidents Wooden testified about are properly considered protected activities. However, Genesis cites two instances of Wooden's unprotected activity as justification for his probation and termination. Like most MSHA discrimination cases, this dispute centers on the question of motivation. An analysis of Wooden's relevant unprotected activities follows.

### **1. The Camper Incident**

The predicate for Wooden's termination occurred on October 25, 2017, when he used a company vehicle to tow his camper from his home in Rock Springs, Wyoming, to a location in the back country where he liked to hunt. (Tr. 30:13-15; 349:19-350:9) Wooden did not have permission to use a company vehicle for personal use. He argued that such personal use was appropriate and in keeping with prior practice and company culture (Tr. 223:18-224:1; 561:17-562:4), claiming that he was justified in using a company truck to tow his personal camper because other employees had used company vehicles for personal purposes in the past. (Tr. 199:18-201:14; 223:18-224:1; 619:6-14; Ex. R-27) The evidence proves otherwise. (Tr. 443:12-17)

Wooden's misuse of the vehicle was discovered when his manager, Mike Moeller, saw the company truck pulling a camper through town on October 26, 2017 (Tr. 440:17-441:21; Ex. R-25) and confirmed that Wooden had signed the truck out by reviewing vehicle check-out records. On November 1, 2017, the company started its normal process of investigating what had

happened. (Tr. 31:2-11) It was confirmed that Wooden had used a company truck to tow his personal camper, that he did not seek permission to do so (Tr. 489:10-21; 500:20-501:4; 645:24-646:5; 654:25-655:13), that there was no company history or practice that would justify such use (Tr. 442:20-443:11), and that Wooden prevaricated during the fact-finding process with the intent to minimize his violation. (Tr. 603:7-25; 606:17-607:4; 607:17-608:11; 618:21-619:5; 622:8-623:7; Ex. R-28)

Genesis did not have a specific policy preventing this type of use by hourly employees (Tr. 201:20-204:3; 225:17-25; 446:14-448:20; 511:16-512:2), but it presented convincing evidence that no such prior practice had ever been tolerated. (Tr. 222:24-223:12; 242:11-25; 243:1-3; 448:21-24; 704:20-24) In fact, another employee, Jarvis Koeven, had been put on Decision Making Leave (DML) probation prior to Wooden's event for a single occurrence of essentially the same violation. (Tr. 471:13-472:2; 473:3-11; 559:23-560:5; Ex. R-44) Further, a supervisor Wooden claimed had previously allowed personal use of a company truck had been fired in part because he agreed to allow an employee to take a piece of company equipment for personal use. (Tr. 620:14-24) Instead of taking care to be certain that using a company vehicle for personal use was permissible, Wooden exhibited a reckless lack of judgment which was repeated weeks later.

During the fact-finding process for this camper-towing incident, there was discussion of simply firing Wooden rather than placing him on DML probation. (Tr. 559:6-19) Some members of management felt that this incident alone justified termination. (Tr. 614:12-19) Wooden was offered a DML instead of termination on November 2, 2017. (Tr. 31:2-11; 614: 9-11) The DML included a Last Chance Agreement (LCA). It was clear under the terms of the LCA that any violation of company expectations after that point in time could result in immediate termination. (Tr. 480:10-19; 531:21-532:3; Ex. R-30) The evidence put forth by Wooden does not support his excuse. However, this first instance of misuse of a company vehicle was resolved by the imposition of the last-chance discipline agreement (DML).

## **2. The Overtime Event**

Wooden was fired for a second incident of unauthorized use of a company vehicle less than a month after being placed in a last-chance status for the unauthorized camper-towing event. (Tr. 481:3-16) On December 13, Wooden and a co-worker, Josh Holloway, were assigned to a project that involved repairing some drain line piping. (Tr. 57:20-58:9) Keith Herren, their supervisor for the project (Tr. 59:2-23), announced that there might be overtime for Wooden and Holloway's project depending on various factors to be determined as the week progressed. (Tr. 707:2-6; 707:24-708:1) By company practice, overtime had to be specifically approved by a supervisor. (Tr. 133:12-19; 501:5-502:11; 683:21-684:21; 689:25-690:14; Ex. R-37) A worker could not assume that there would be overtime. (Tr. 707:7-12) Despite knowing how overtime was announced and the way by which it must either be confirmed or allowed to lapse, Wooden took it upon himself to assume that he could work the pipe project into overtime. (Tr. 33:13-38:1; 500:11-16) Close to the end of the day, Wooden talked to Herren, who asked him how the job was going. Wooden said nothing about working overtime to finish the project. (Tr. 635:12-19; 675:5-14) Wooden testified that he assumed overtime would be approved, but he did not take

advantage of the opportunity to get clarification from Herren when the two of them spoke shortly before shift end.

When compared to coworker Holloway's contrasting reaction to the same situation, Wooden's intemperance is apparent. Holloway understood that overtime had not been approved. (Tr. 491:15-22) Nor did he fault Herren for his getting "whistle-bit" by losing track of the time and working past the end of his shift. (Tr. 660:6-9) Holloway accepted personal responsibility and had no intention of filing a grievance over the overtime issue. (Tr. 639:4-24; 659:5-11; 713:11-17; Ex. R-39) In contrast, Wooden defended his actions by testifying that he expected Herren to state affirmatively that there would be no overtime and that saying nothing was not enough. (Tr. 673:12-20)

After working past the end of his normal shift (Tr. 75:22-24; 659:9-20; 711:11-18), Wooden unilaterally decided to use a company truck to drive home. (Tr. 33:13-38:1; 115:21-116:8; 353:4-354:13; 624:2-6; 645:24-646:13; 716:11-18; 747:24-748:3; Ex. R-31; Ex. R-33) He did not use any of the available options (Tr. 497:15-498:20; 499:11-21; 645:24-646:5; 654:14-655:13; 685:1-6) to get last-minute management approval to drive the company vehicle home, even though he knew of the options and how to proceed. (Tr. 497:15-498:20; 624:2-6; 645:24-646:13; 716:11-18; 747:24-748:3; Wooden Dep. 254:3-11; Ex. R-33; Ex. R-37) Puzzlingly, Wooden placed a call (unanswered) to Andy Martinez, his union president, instead of calling a management official for permission to drive the vehicle home. (Tr. 37:4-18; Tr. 654:25-655:13) He then sent a text message to Herren, not requesting permission to use a vehicle, but instead accusing Herren of dropping the ball by not expressly stating that there would be no overtime for the pipe project. (Tr. 714:10-715:2) Herren texted in reply that overtime was not authorized. Wooden then took Moeller's assigned vehicle, signed it out at the guard station without authorization, and drove it home. (Tr. 498:21-499:4; Tr. 654:14-24; Ex. R-35)

This action violated the last chance agreement from the camper towing incident only a month before. (Tr. 350:24-351:6; 481:3-16; 624:2-6; 645:24-646:13; 716:11-18; 747:24-748:3) Wooden claimed that he believed his supervisor wanted him to work overtime, and under normal overtime practices, would have authorized him to use a company vehicle to get home after the overtime work. But the evidence shows that the supervisor did not authorize overtime and that Wooden took a company vehicle home without permission and without even attempting to either confirm the overtime or obtain permission to use the vehicle.

Wooden was terminated on December 20, 2017. (Ex. X; Ex. R-41) The overtime incident reveals no malice or overreach by management toward Wooden. When Wooden violated the vehicle use practices for a second time within a month, particularly considering that he knew that he was on disciplinary probation and that any disciplinary infraction could result in his immediate firing, the company acted appropriately and justifiably. Any prior friction felt by Wooden between himself and management is not evident in the two vehicle misuse incidents.

**C. Wooden’s probation and termination were not motivated by his protected activity.**

The second prong of the *Pasula-Robinette* test for a prima facie case of discrimination requires a showing that Genesis took an adverse action against Wooden that was motivated, at least in part, by Wooden’s protected activity. *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev’d on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir. 1981). This second prong of the *Pasula-Robinette* test may be further separated into two sub-questions: (1) whether there was an adverse action; and, if so, (2) whether there was a motivational nexus, at least in part, between the adverse action and the Complainant’s protected activity.

**1. Wooden’s probation and termination constitute adverse employment actions.**

The Commission has defined “adverse action” as “an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship.” 601 F.3d at 428 (quoting *Sec’y on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847–48 (Aug. 1984)). The Commission has recognized that, while “discrimination may manifest itself in subtle or indirect forms of adverse action,” at the same time “an adverse action ‘does not mean any action which an employee does not like.’” *Hecla-Day Mines Corp.*, 6 FMSHRC at 1848 n.2 (quoting *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981)). Consequently, where the action alleged to be adverse against the miner is not self-evidently so, such as a discharge or suspension would be, the Commission will closely examine the surrounding circumstances to determine the nature of the action. *Id.* at 1848. “Determinations as to whether an adverse action was taken must be made on a case-by-case basis.” *Id.* at 1848 n.2. The Commission has found that a discharge, demotion, or termination is an adverse employment action. *See McKinsey*, 36 FMSHRC at 1186 (citing 30 U.S.C. § 815(c)(1)); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff’d*, 770 F.2d 168 (6th Cir. 1985). Wooden was first placed on probation and ultimately terminated from his employment, and thus has shown that adverse action was taken against him. Genesis does not deny this.

**2. There was no motivational nexus between Wooden’s protected activity and the adverse action taken against him.**

Having established the existence of both a protected activity and an adverse action, Wooden must next show that the adverse action was motivated, at least in part, by the protected activity. *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev’d on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir. 1981). It is significant that hostility or animus on a person-to-person level is not enough to show the required motivational nexus. Management’s hostility must be shown to arise from the claimant’s involvement in protected activity. *Turner* reiterated the clear difference in the quantum of proof a claimant must provide to ultimately prevail in a discrimination case as opposed to the minimal showing required to establish the prima facie case. 33 FMSHRC 1059 (May 2011). “[T]o make out a prima facie case of discrimination, the [discriminatee] need only submit enough evidence so that the record *could* support an inference” that the termination resulted, at least in part, from protected safety complaints. *Id.* at 1066 (internal citations omitted) (emphasis in original).

The Commission has noted that “direct evidence of motivation [. . .] is rarely encountered; more typically, the only available evidence is indirect.” *Chacon*, 3 FMSHRC at 2510. Such indirect, circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse action; (2) knowledge of the protected activity; (3) hostility or animus toward the protected activity; and, (4) disparate treatment. *Id.*; *Turner*, 33 FMSHRC at 1066; *Matthew Bane v. Denison Mines (USA) Corp.*, now known as *Energy Fuels Resources (USA), Inc.*, 39 FMSHRC 897, 917-18 (ALJ, Apr. 27, 2017). The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* In *Bradley v. Belva Coal Co.*, with regard to the issue of motivation, the Commission found that “circumstantial evidence [...] and reasonable inferences drawn therefrom may be used to sustain a *prima facie* case.” 4 FMSHRC 982, 992 (June 1982) (citing *Chacon*, 3 FMSHRC at 2510-12). “Furthermore, inferences drawn by judges are ‘permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.’” *Colo. Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)).

#### **a. Coincidence in Time**

The Commission has stated that “[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer’s motive [...]” *Chacon*, 3 FMSHRC at 2511. The Commission has also stated, “[W]e ‘appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.’” *Hyles*, 21 FMSHRC at 132 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)). Although improper motive has been found in cases with varying periods between the protected activity and the adverse action, improper motivation is often found “where the complainant proved that the operator knew of the protected activities and that only a short period of time elapsed between the protected activity and the discharge.” *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 958 (Sept. 1999) (citing *Sec’y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1997)).

The evidence of timing does not support a finding or inference of a motivational nexus between Wooden’s protected activity and the adverse action taken against him. Genesis did not terminate Wooden until at least four months after the occurrence of Wooden’s most recent protected activity, the first MSHA investigation following Wooden’s first discrimination complaint. (Ex. R-62) Importantly, following this event, Wooden was not disciplined again until he used the company truck to tow his camper in November. The timing between Wooden’s misconduct leading to his November and December disciplinary events was exclusively in his control. The discipline dealt by management was based solely on his actions and involved two intervening incidents of misuse of company vehicles in the span of about a month. There is no evidence of Genesis committing any acts of hostility, animus, or disparate treatment toward the complainant’s protected activity during this four-month period. To the contrary, management provided sufficient evidence to show that its reactions to Wooden’s actions and behavior during this period resulted in fair and consistent treatment, even in instances where Genesis could have imposed additional discipline.

## **b. Knowledge of the Protected Activity**

The Commission has held that “an operator’s knowledge of the miner’s protected activity is probably the single most important aspect of a circumstantial case.” *Baier*, 21 FMSHRC at 957 (citing *Chacon*, 3 FMSHRC at 2510). Whether the operator had knowledge of the protected activity may be “proved by circumstantial evidence and reasonable inferences.” *Id.* The Commission has also held that “discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1).” *Moses*, 4 FMSHRC at 1480. Additionally, the Commission has held that “a supervisor’s knowledge of the protected activity may be imputed to the operator where knowledgeable supervisors are consulted regarding the miner’s employment.” *Sec’y of Labor on behalf of Pappas v. Calportland Co.*, 38 FMSHRC 137, 146 (Feb. 2016); *see also Turner*, 33 FMSHRC at 1067–68 (imputing knowledge and animus of miner’s direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (stating that “[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions.”).

The Respondent does not dispute its knowledge of the events listed above. However, management’s knowledge of protected activity alone does not prove wrongdoing. Genesis admitted its knowledge of Wooden’s protected activity, but Wooden has the burden to prove that Genesis was motivated by this knowledge. Wooden failed to provide convincing evidence that knowledge of his protected activity motivated Genesis to place him on probation or terminate his employment for misuse of company vehicles.

## **c. Hostility or Animus**

The Commission has held that “[h]ostility towards protected activity – sometimes referred to as ‘animus’ – is another circumstantial factor pointing to discriminatory motivation. The more the animus is specifically directed toward the alleged discriminatee’s protected activity, the more probative weight it carry[s].” *Chacon*, 3 FMSHRC at 2511. Animus can take the form of action or inaction. *Turner*, 33 FMSHRC at 1069. Wooden claimed that Genesis was hostile towards his protected activity. However, there is no evidence of this alleged animosity. The examples Wooden provided at hearing were subjective and unconvincing.

Wooden testified at the outset of the trial that harassment directed at him escalated following his complaint to the safety department about Clyde Muir. (Tr. 14:19-15:20) The testimony and documents related to Wooden’s complaints about Muir show that Genesis agreed with Wooden and took prompt corrective action against Muir. Andrea Walton immediately reminded Muir that Wooden had every right to speak to MSHA, and because Walton was troubled by Muir’s response, she notified HR, who in turn commenced an investigation into Muir’s conduct. (Tr. 15:5-11; 279:3-280:4; 279:3-280:10) Contrary to Wooden’s belief, the trial record shows that management did not fault Wooden for Muir’s behavior and eventual discharge. (Tr. 552:13-552:23)

Genesis did not show hostility or animus in its response to the magnet lift incident. The Root Cause Analysis process was used to identify risky behavior and minimize the possibility of

injuries from similar events in the future. Genesis did not target Wooden in relation to Azevedo's outburst during the RCA meeting. Rather, Genesis investigated Azevedo's actions and determined that they fell short of what was expected of management personnel. (Tr. 375:6-375:16) Wooden testified that Genesis called him into a fact-finding meeting on May 18, 2017, (Tr. 21:1-21:4), but in truth, the May 18 discussion was intended for Genesis to provide Wooden with feedback about its reaction to Azevedo's outburst during the RCA meeting. (Tr. 368:24-369:3) The testimony and documents related to Wooden's complaints about Azevedo show that Genesis agreed with Wooden and took prompt corrective action against Azevedo.

Wooden placed significant emphasis on the alleged harassment he faced about shop inspection forms, but in his answers to the Court's questions, he admitted he had never been disciplined for missing an item during a shop inspection. (Tr. 190:13-190:17) The documents Genesis produced and the testimony supporting them did not reveal any animosity directed at Wooden. To the contrary, the evidence shows that the company tried to address Wooden's concerns. Wooden's testimony that Keith Herren harassed him, targeted him, and was untruthful is also contradicted by Wooden's statements to MSHA Investigator Valentine during his August 29, 2017 interview, in which Wooden made favorable comments about working with Herren at the time Wooden claimed he was being harassed. (Ex. R-62 pp. 11, 13-14)

Another example of alleged harassment occurred on September 8, 2017, when Rick Skorz and Andre Azevedo visited the Caustic Maintenance shop to ask about workplace exam forms. Wooden exited the forklift he was operating to get the forms, and Azevedo asked if it was permitted to leave the forklift running while unattended. (Tr. 27:17-28:16) Wooden stated it was an acceptable practice at Genesis to leave a forklift running while unattended as long as the Forklift's tires are chocked. Wooden claimed that this question from Azevedo was harassment, but he failed to mention that he was not disciplined for leaving the forklift running, or that Tamara Fennell returned to tell him that Azevedo had checked the procedures and confirmed that Wooden was correct. (Wooden Dep. 150:8-151:19)

The decision to issue Wooden a first conference letter after the magnet lifting incident was unrelated to any protected activity by Wooden. Wooden's probation and termination were the result of bad judgment and a failure to follow protocols. Wooden knew he could face termination for any disciplinary infraction going forward. (Tr. 349:19-350:9; 461:23-462:11) Irrespective of whether the employer's past actions toward Wooden could be characterized as responses to his protected activity, standing either alone or considered in the context of prior history, the second of these two incidents justifies the firing.

The fact that the termination incident involved a second episode of unauthorized use of a company vehicle was considered an aggravating factor as the company considered its options. (Tr. 349:19-350:9; 356:20-357:12) Wooden did not put on any evidence to show that there was any confusion about what was required of him when he signed the DML. (Tr. 531:2-532: 3) Under the circumstances, one is left in disbelief that Wooden would jeopardize his job by assuming he had permission to work overtime and to use a company vehicle without permission a second time.

The evidence does not convince me that Genesis committed acts of hostility, animus, or disparate treatment in reaction to Wooden's intervening protected activity. I conclude that there was nothing approaching a "continuous escalating series of wrongdoings" against Wooden. *See Sec'y of Labor (MSHA) obo Pappas, v. CalPortland Co.*, 39 FMSHRC 718, 751 (ALJ, Mar. 31, 2017) (rejecting the Secretary's assertion that the operator's actions were a continuous event).

#### **d. Disparate Treatment**

Disparate or inconsistent treatment is another indirect indicium of discrimination. "Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Chacon*, 3 FMSHRC at 2512. It has been recognized that "precise equivalence in culpability between employees" is not required in analyzing a claim of disparate treatment under traditional employment discrimination law. *Pero*, 22 FMSHRC at 1361, 1368 (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976)). Rather, the complainant must simply show that the employees were engaged in misconduct of "comparable seriousness." *Id.* at 1368.

Wooden did not present any evidence of disparate treatment by Genesis in connection with the magnet lift incident. The coaching and counseling given to Fausett and Gamper was justified by reasonable mitigating circumstances. The trial record shows that Genesis' treatment of Wooden was consistent with its treatment of other miners in similar situations, before and after Wooden's protected activity. In the eighteen months before Wooden received his first conference, Genesis issued first conferences to twelve other miners for risk-related behaviors. (Exs. R-45; R-79) In fact, the one example that Wooden produced during discovery as evidence of an unpunished injury incident actually resulted in a first conference for risk tolerance similar to Wooden's discipline. (Tr. 434:21-436:14) Wooden received the first conference in reaction to his unsafe behavior, not his protected activity. (Tr. 553:16-554:4) Genesis' actions toward Wooden relating to the magnet lift incident were an attempt to alter his behavior and avoid repeated hazardous conduct in the future.

In the fall of 2017, Genesis was preparing for the effective date of MSHA's revised rule on workplace examinations. When the company issued a new policy on completing shop inspection forms, Wooden interpreted it as being directed at him personally and believed that he would be exposed to a new degree of scrutiny and perhaps discipline. Wooden placed significant emphasis on the alleged harassment he faced about shop inspection forms, but in his answers to the Court's questions, he admitted he had never been disciplined for missing an item during a shop inspection. (Tr. 190:13-190:17) In reality, the policy of completing on-shift shop inspection forms was a company-wide policy and could not have reasonably been adopted for the purpose of disciplining or punishing Wooden or enforced in such a way that would lead to disparate treatment against him. Wooden alleged that Herren harassed him and singled him out. Other witnesses' testimony confirmed that Herren set the same level of expectations for the entire crew, as required by MSHA regulations and company procedures. (Tr. 125:25-126:5; Tr. 727:20-731:16)

Wooden's misuse of a company vehicle does not constitute a protected activity under the Mine Act, but it is telling that management's response to this incident was fair and even-handed. Although Genesis could have immediately terminated Wooden's employment for towing the camper, Tamara Fennell, the HR Business Partner for Maintenance, and Kimberly Huber advocated for issuing a DML to Wooden to maintain consistency with its previous discipline. In 2011, Genesis employee Jarvis Koeven had driven a company truck to Salt Lake City without authorization. Genesis issued Koeven a DML that included an unpaid suspension and a last chance agreement for his misuse of a company vehicle. (Tr. 559:23-560:5)<sup>7</sup> Like Wooden, Koeven did not comply with the terms of his last chance agreement and was discharged. (Tr. 469:15-470:22; 560:6-561:8)

The company's disciplinary records refute Wooden's and his union's (reluctant and unsubstantiated) claims that Wooden was targeted. Wooden failed to provide evidence that he was treated differently than other employees in similar situations. I cannot find that Wooden was the recipient of disparate treatment.

#### **e. Opportunities to Impose Discipline**

After Wooden received the first conference for the magnet lifting even, he was not disciplined again until November, when he towed his camper using the company truck. (Tr. 748:8-749:19; 190:1-20) Genesis had additional opportunities to impose formal discipline, but opted for coaching and counseling instead. (Tr. 26:1-22; 563:24-564:16; 696:24-698:6; 190:1-20)<sup>8</sup> Despite Genesis knowing about Wooden's protected activity, when Wooden's subsequent conduct in the second half of 2017 qualified for discipline, including potential termination, Genesis took a different approach. Wooden could have been disciplined for multiple events: (i) failing to properly chock a forklift's tires after he finished operating the forklift; (ii) forgetting to wear rubber boots while working in the caustic area; and, (iii) throwing away an empty plastic tool case for a power tool that had been in a Genesis truck Wooden was assigned to drive home after working overtime. (Tr. 566:15-22; 696:24-697:2; 26:1-27:6; Ex. R-22) Instead of disciplining Wooden for these instances, Keith Herren provided non-disciplinary coaching and counseling in an attempt to improve Wooden's behavior.<sup>9</sup>

Genesis also exercised leniency with Wooden in October, 2017, after he used the company vehicle to tow his personal camper. (Tr. 454:24-455:6; 603:10-23; Ex. R-27) Genesis could have terminated Wooden at that time. (Tr. 465:23-466:15) Firing Wooden would have

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<sup>7</sup> Koeven had received another DML in 2009 for taking a company truck home without authorization, but the two-year sunset provision for that DML had expired approximately one month before Koeven drove a second truck to Salt Lake City.

<sup>8</sup> The intervening events were not discipline, as defined by Genesis' policy and practice, even though Wooden and other witnesses perceived them as such. (Tr. 440:1-12) In the final analysis, the intervening events resulted in Wooden being treated in an evenhanded and consistent manner.

<sup>9</sup> Wooden saw this counseling as a form of harassment. (Tr. 26:1-27:5)

arguably been in compliance with the company's Positive Performance Program,<sup>10</sup> particularly since Wooden initially lied about his misuse until he realized Genesis already knew the truck had been seen pulling a camper. (Tr. 602:22-603:9; Ex. R-27) Although some members of management considered this a termination-level offense, management elected to issue him a DML. (Tr. 615:5-616:6)

#### IV. RESPONDENT'S REBUTTAL

Under section 105(c), 30 U.S.C. § 815(c), the operator may rebut the miner's prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800; *Turner*, 33 FMSHRC at 1064. Genesis denies that Wooden was terminated in violation of the Mine Act, and argues instead that any adverse action was not motivated in any part by protected activity. While I have already found that Wooden failed to provide sufficient evidence to meet his prima facie burden, I will nevertheless address the Respondent's rebuttal.

Wooden engaged in several instances of protected activity. The Respondent argues that Wooden was terminated, not for any reason related to that protected activity, but for his misuse of a company vehicle on two occasions. Based on the evidence available to me, I find that Wooden has failed to demonstrate that his probationary status and the termination of his employment were related to his protected activity. Wooden alleged that the discipline he received was not fair (Tr. 507:18-25), but that is not an element of a section 105(c) claim. The company's decisions were valid business decisions, consistent with long-standing policies and the collective bargaining agreement with the union.

In analyzing a mine operator's asserted justification for taking adverse action under the *Pasula-Robinette* framework, the inquiry is limited to whether the reasons are based in fact, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. *Turner*, 33 FMSHRC at 1073. The ALJ may not impose his own business judgment as to an operator's actions, *Chacon*, 3 FMSHRC at 2516-517, and he may not substitute his own justification for disciplining a miner over that offered by the operator. *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 989 (Sep. 2001). While the intermediate steps of the *Pasula-Robinette* test include shifting burdens, the ultimate burden of persuasion on the question of discrimination remains with the complainant. *Robinette*, 3 FMSHRC at 818 n.20.

Respondent's stated reason for terminating Wooden was plausible and not pretextual for the following reasons. First, Genesis made the business decision to terminate Wooden for misusing a Genesis truck twice in four weeks. Second, Wooden could have been discharged for the first misuse alone. (Tr. Tr. 606:24-607:4; 216:17-216:23; Ex. R-27) Wooden knew the Last Chance Agreement came with a probationary period in which Genesis could terminate him for

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<sup>10</sup> Genesis has a progressive disciplinary system, known as the Positive Performance Policy ("PPP"). (Tr. 341:10-341:22) As an alternative to the PPP, Genesis supervisors may engage in coaching and counseling of their employees to encourage them to alter subpar behaviors without resorting to formal discipline. (Tr. 339:13-339:21)

any misconduct that would normally result in discipline. Third, only four weeks after agreeing to the LCA, Wooden used another truck without authorization. Not only was this unprotected activity, it was substantially similar to his previous misconduct. The proximity in time between his two instances of vehicle misuse stunned Genesis' HR team, which could not believe Wooden committed the same unprotected activity he engaged in to receive his DML a second time. (Tr. 624:7-13) Given these facts, I find that Genesis' reason for terminating Wooden is plausible and not pretextual.

## V. RESPONDENT'S AFFIRMATIVE DEFENSE

If the operator cannot rebut the prima facie case, it may nevertheless defend affirmatively by proving that it was motivated by the miner's unprotected activity alone. It is not enough under section 105(c) for the operator to show that the miner deserved to be fired for engaging in the unprotected activity. The operator must show that it did, in fact, consider the miner deserving of discipline for engaging in the unprotected activity alone and that it would have disciplined him in any event. *See Robinette*, 3 FMSHRC at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

The Commission has articulated several indicia of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Bradley*, 4 FMSHRC at 993. The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has stated that, "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

As discussed above, I find that Genesis discharged Wooden in response to Wooden's unprotected activities. However, even assuming that Wooden's protected activity partially motivated Genesis to issue the DML for towing his camper, and then discharge Wooden for once again using a company truck without authorization four weeks later, Genesis still did not violate section 105(c) of the Mine Act because it proved each element of its affirmative defense. As previously discussed, there is sufficient evidence to find that: (i) Genesis would have issued Wooden a DML and invoked the provisions of the Last Chance Agreement in the absence of his protected activity; (ii) Genesis was motivated by Wooden's repeated misuse of company vehicles; and (iii) these actions alone supported the discipline he received. I find that it is reasonable to terminate an employee under these circumstances.

## VI. CONCLUSIONS OF LAW

Wooden failed to establish a prima facie case of discrimination under section 105(c) of the Mine Act. The operator's stated reasons for discharging Wooden were plausible and not pretextual. Genesis affirmatively defended its decision to place Wooden on probation and ultimately terminate his employment. Therefore, based on a thorough review of the record, I conclude that Wooden failed to prove by a preponderance of the evidence that either the probation or the termination constituted discrimination in violation of section 105(c) of the Act.

## VII. ORDER

Komsan (Troy) Wooden's complaint and this proceeding are **DISMISSED**.

/s/ L. Zane Gill  
L. Zane Gill  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 31, 2020

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

v.

SUNBELT RENTALS, INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. VA 2013-0291  
A.C. No. 44-00068-316647

Mine: Roanoke Cement Company

**DECISION AND ORDER AFTER REMAND**

Appearances: Andrew Tardiff, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, and Willow E. Fort, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner

Respondent: Travis W. Vance, Esq., and Collin G. Warren, Fisher & Phillips LLP, Charlotte, North Carolina, for Respondent

Before: Judge McCarthy

**I. Statement of the Case**

This case is before the undersigned after a second remand from the Commission 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) (the Act). Citation No. 8723677 remains at issue and charges scaffold-erection subcontractor Sunbelt Rentals, Inc. (Sunbelt or Respondent) with a highly negligent and significant-and-substantial section 104(a) violation of 30 C.F.R. § 56.18002(a) after a non-fatal accident occurred on January 8, 2013. At the time of the accident, § 56.18002(a) provided that “[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.” 30 C.F.R. § 56.18002(a) (2013). MSHA proposed a specially-assessed civil penalty of \$51,900.

The sole issue currently on remand before the undersigned is the assessment of the penalty for Citation No. 8723677.

## II. Procedural Background

As the facts and history of this case are detailed in *Sunbelt Rentals, Inc.*, 40 FMSHRC 573 (April 2016) (ALJ) (*Sunbelt III*), only the relevant facts will be discussed here. The undersigned initially issued an order granting the Respondent's Cross-Motion for Summary Decision. *Sunbelt Rentals, Inc., et al.*, 35 FMSHRC 3208 (Sept. 2013) (ALJ) (*Sunbelt I*). On July 12, 2016, the Commission vacated the undersigned's summary decision in favor of all Respondents and remanded all three dockets. *Sunbelt Rentals, Inc., et al.*, 38 FMSHRC 1619 (July 2016) (*Sunbelt II*).<sup>1</sup>

After holding a hearing in Roanoke, Virginia, on May 23-24, 2017—and after careful review of the record, and the parties' post-hearing briefs, and accepting the Commission's remand as the law of the case—the undersigned found, as relevant here, that Sunbelt violated 30 C.F.R. § 56.18002(a) by failing to adequately examine the seventh level of the preheat tower at least once during the January 8, 2013 shift, and by failing to promptly initiate corrective action to remove a falling-material hazard. The undersigned further found that the violation resulted from Sunbelt's high negligence. *Sunbelt III*, 40 FMSHRC at 603-05.

The undersigned assessed a penalty of \$23,750 based upon the consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act.

The Respondent appealed *Sunbelt III* to the Commission. As relevant here, the Respondent challenged the findings in *Sunbelt III* of a violation and that any violation was significant and substantial and resulted from high negligence.

The Commissioners issued four opinions: one by Commissioners Young and Althen, presented as the majority opinion; one by Commissioner Jorden, concurring, in part, and dissenting, in part; one by Chairman Rajkovich, dissenting in part, concurring in part, and joining in result the opinion of Commissioners Young and Althen only on the issue of negligence; and one by Commissioner Traynor, concurring with Commissioner Jordan's opinion. *Sunbelt Rentals, Inc.*, 2020 WL 508744 (Jan. 2020) (*Sunbelt IV*). The initial question before the undersigned is whether, given the fractured opinions of the Commissioners, the undersigned has any further jurisdiction in this matter.

Under Commission Procedural Rule 69, a judge's jurisdiction "terminates when his decision has been issued." 29C.F.R. § 2700.69(b). Jurisdiction may be returned to a judge after a remand from the Commission. The contours of such a remand provide the sole and specific issues that a judge may consider on remand. *Boswell v. Nat'l Cement Co.*, 15 FMSHRC 935, 937 (June 1993). As such, it is paramount for a judge on remand to determine what, if any, majority opinion dictates how to proceed.

The Supreme Court has stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent" of a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the

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<sup>1</sup> Prior to a hearing after the first remand, two of the three dockets settled, leaving Sunbelt the sole Respondent.

narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ). The Court of Appeals for the District of Columbia has refined the *Marks* rule by defining one opinion as “narrower” than another “only when one opinion is a logical subset of other, broader opinions” and ruling that “the narrowest opinion must represent a common denominator of the Court’s reasoning; it must embody a position implicitly approved by” a majority. *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1992). The Supreme Court has also held that decisions of administrative agencies “must be set forth with such clarity as to be understandable” because a reviewing court “must know what a decision means before the duty becomes [that of the reviewing court] to say whether it is right or wrong.” *Chenery Corp. v. Fed. Water & Gas Corp.*, 332 U.S. 194, 195-97 (1947) (quoting *United States v. Chicago, M., St. P. & P.R. CO*, 294 U.S. 499, 511 (1935).

A brief analysis of the opinions in *Sunbelt IV*, as relevant here, is in order. In their opinion, Commissioners Young and Althen affirmed the finding of a violation and that finding that it was significant and substantial. However, Commissioners Young and Althen analyzed the evidence and found that “[t]he record simply does not support the notion that [an examiner-agent of Sunbelt] showed an aggravated lack of care.” *Sunbelt IV*, 2020 WL 508744, at \*11 (opinion of Commissioners Young and Althen). Commissioners Young and Althen concluded that the violation “was a result of the operator’s ordinary negligence.” *Id.* at \*14. Consequently, Commissioners Young and Althen voted to remand this matter “for a reassessment of the penalty” based on ordinary negligence. *Id.*

Commissioner Jordan, concurring, in part, and dissenting, in part, ruled that there was substantial evidence to support a finding of high negligence and voted to uphold the undersigned’s findings in *Sunbelt III*.

Dissenting in part and concurring in part, Chairman Rajkovich found that there was “no substantial evidence of a violation” and stated that he would reverse on those grounds. *Id.* at \*17 (opinion of Chairman Rajkovich). However, Chairman Rajkovich also stated that, in the alternative, he joined Commissioners Young and Althen in finding “the lower level of negligence.” *Id.* at \*21. Specifically, Chairman Rajkovich stated that “given [his] view that there was no violation, it would be wholly inconsistent for [him] to find that the record supports the notion of an aggravated lack of care, warranting a label of ‘high negligence.’” *Id.*

Finally, Commissioner Traynor wrote a separate opinion concurring with Commissioner Jordan. In his opinion, Commissioner Traynor opined that, because of the inconsistency between Chairman Rajkovich’s two positions, there was no valid majority on the issue of negligence.

Taking all of these separate opinions together, there is no common rationale for a finding of ordinary negligence. The opinion of Commissioners Young and Althen clearly states a rationale for finding ordinary negligence; however, Chairman Rajkovich does not join in that reasoning, only in the result. *Compare id.* at \*11-14 (opinion of Commissioners Young and Althen) (stating the reasoning for finding ordinary negligence in Part III E), *with id.* at \*21 (opinion of Chairman Rajkovich) (joining Part III A and B but not E of the opinion of

Commissioners Young and Althen).<sup>2</sup> Both Commissioners Jordan and Traynor would have upheld the undersigned’s finding of high negligence. Without a common rationale, there is no rationale to form as the basis for precedential effect in other cases. *United States v. Davis*, 825 F.3d 1014, 1016 (9th Cir. 2016).

As there is no common rationale, the next question must be whether, without a common rationale, there is a valid majority remanding the matter—and returning jurisdiction—to the undersigned. However, even without a common rationale, a lower court is still bound by the specific result of a higher court’s decision. *See, e.g., id.* (“[W]here we can identify no rationale common to a majority of the Justices, we are bound only by the result.”); *King v. Palmer*, 950 F.2d at 784. In *Sunbelt IV*, the result, at least, is clear: Chairman Rajkovich joined the opinion of Commissioners Young and Althen in the result—a remand solely on the issue of the penalty with ordinary negligence. *Sunbelt IV*, 2020 WL 508744, at \*16 (opinion of Chairman Rajkovich) (“I concur in result only in the opinion of Commissioners Young and Althen.”). Accordingly, the undersigned remains bound by the majority result on ordinary negligence.

Consequently, although lacking a common rationale, a majority of the Commission validly remanded this case to the undersigned solely to decide the amount of the penalty given ordinary negligence.

### III. Penalty Assessment

It is well established that the Commission Administrative Law Judges assess civil penalties de novo for violations of the Act. Section 110(i) of the Act delegates to the Commission the “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). When an operator contests the proposed penalty, the Secretary petitions the Commission to assess the proposed penalty. 29 C.F.R. § 2700.28. The Act requires, that “in assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria:

[1] the operator’s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the

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<sup>2</sup> Chairman Rajkovich’s opinion, while a pragmatic decision to craft a majority result on the issue of negligence, adopts two seemingly contradictory positions. As an initial position, Chairman Rajkovich finds that there was no violation; but as an alternate position, Chairman Rajkovich finds that, “if [t]here [w]as a [v]iolation, it was [d]ue to [n]o [m]ore than [o]rdinary [n]egligence.” *Sunbelt IV*, 2020 WL 508744, at \*21 (opinion of Chairman Rajkovich). As Chairman Rajkovich correctly notes, “[w]hen there is not a finding of violation, the issue of negligence is never reached.” *Id.* Chairman Rajkovich also correctly notes that, “given [his] view that there was no violation, it would be wholly inconsistent for [him] to find that the record supports the notion of an aggravated lack of care, warranting a label of ‘high negligence.’” *Id.* However, it is equally inconsistent to find *any* level of negligence, including ordinary negligence, given Chairman Rajkovich’s position that there was no violation.

person charged in attempting to achieve rapid compliance after notification of a violation.

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 factual findings on the statutory penalty criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising this discretion to determine the amount of a penalty, the Commission has recognized that a judge is not bound by the penalty proposed by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

As the Commission only changed the level of negligence found in *Sunbelt III*, the findings and analysis from that decision largely stand with the notable exception of substituting the undersigned’s finding and analysis in *Sunbelt III* of high negligence with the Commission’s findings and “analysis” of ordinary negligence.

When determining a proper assessment for this violation, the undersigned considered:

- 1) the Respondent’s three prior violations of this standard in the 15 months prior to the accident;
- 2) the Respondent’s size as a small contractor who worked only 26,667 hours in mines in 2012;
- 3) the Respondent’s ordinary level of negligence;
- 4) the presumption—given the Respondent’s failure to introduce any specific evidence to support or substantiate its inability to pay or any adverse impact on its ability to remain in business—that the penalty will not have an effect on the Respondent’s ability to continue in business;
- 5) the high level of gravity of the significant and substantial violation; and
- 6) the timely abatement made in good faith.

Based upon the undersigned’s consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act, the undersigned assesses a penalty of \$17,300.00. This amount is the result of an independent determination by the undersigned of the statutory criteria and a penalty amount that would respond to the seriousness of the violation and would deter future violations. The undersigned did not use the Secretary’s proposed specially assessed penalty as a baseline or starting point for this determination. *American Coal Co. v. FMSHRC*, 933 F.3d 723, 728 (D.C. Cir. 2019).

#### IV. ORDER

Citation No. 8723677 is **MODIFIED** by the Commission's decision in *Sunbelt IV* to reduce the level of negligence from high to ordinary. Respondent, Sunbelt Rentals, Inc., is **ORDERED** to pay a total civil penalty of \$17,300.00 within 30 days of the date of this Decision and Order.<sup>3</sup>

/s/ Thomas P. McCarthy  
Thomas P. McCarthy  
Administrative Law Judge

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<sup>3</sup> Payment should be sent to: Pay.gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508> or, alternately, Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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March 31, 2020

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

v.

THE HARRISON COUNTY COAL  
COMPANY,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2020-0203  
A.C. No. 46-01318-505388

Mine: Harrison County Mine

**ORDER ACCEPTING APPEARANCE**  
**DECISION APPROVING SETTLEMENT**  
**ORDER TO MODIFY**  
**ORDER TO PAY**

Before: Judge McCarthy

This case is before the undersigned upon a 101-citation Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This docket was created prior to the policy of splitting dockets with excessive amounts of citations. Under the current policy, this docket would not have been accepted in its current, voluminous state.

The Secretary of Labor’s Conference and Litigation Representative (“CLR”) filed a notice of limited appearance with the penalty petition. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The CLR has filed a motion to approve settlement proposing a reduction in the penalties from \$59,978.00 to \$58,109.00. The CLR states that Citations No. 9185453, 9186421, and 9187211 have been vacated. The Secretary’s discretion to vacate a citation or order is not subject to review. *E.g., RBK Constr. Inc.*, 15 FMSHRC 2099 (Oct. 1993). Citation No. 9186521 remains unchanged, but the CLR justifies the reduction in penalty by stating there is a legitimate factual and legal dispute regarding gravity and negligence. The CLR also requests that Citation No. 9186420 be modified to reduce the level of negligence from moderate to low.

The Respondent’s parent company, Murray Energy Holdings Co., filed for Chapter 11 Bankruptcy Protection on October 29, 2019, in the United States Bankruptcy Court for the

Southern District of Ohio, *In re Murray Energy Holdings Co.*, Case No. 19-56885. As stated in the settlement motion, some of the citations in this docket are subject to the bankruptcy proceeding, while other citations are not. As stated below, the Respondent will pay the citations in accordance with terms of the settlement agreement.

Section 362(a) of the Bankruptcy Code provides for an automatic stay of the commencement or continuation of any administrative or judicial proceedings against a Chapter 11 Bankruptcy petitioner. 11 U.S.C. § 362(a). An exception to this stay, however, is granted by §362(b)(4), which exempts from the automatic stay any proceeding by a governmental unit to enforce its police or regulatory power. 11 U.S.C. §362(b)(4). This exception has been applied to cases seeking equitable relief and cases concerning monetary damages or penalties. *See In re Commerce Oil Co.*, 847 F.2d 291, 297 (6th Cir. 1988); *United States v. Nicolet, Inc.*, 857 F.2d 202, 208-10 (3d Cir. 1988); *U.S. v. Oil Transport Co., Inc.*, 172 B.R. 834 (Bankr. E.D. La. 1994); *U.S. v. Energy Intern., Inc.*, 19 B.R. 1020 (Bankr. S.D. Ohio 1981) (holding that action by the United States to collect a civil penalty assessed by the Department of the Interior, Office of Surface Mining, against debtor, for numerous violations of Surface Mining Control and Reclamation Act of 1977, was one to enforce its regulatory power and thus not stayed by the debtor's filing of a bankruptcy petition)).

The Commission has held that the Secretary of Labor, Department of Labor, and MSHA are “government units” within the meaning of 362(b)(4), as the Secretary of Labor brings civil penalty proceedings in an effort to effectuate and enforce the mandatory safety standards of the Mine Act. *Big Laurel Mining Corp.*, 37 FMSHRC 1997, 1997-99 (Sept. 2015); *Hidden Splendor Res., Inc.*, 35 FMSHRC 1548, 1549-50 (June 2013); *Hoist Excavating, Inc.*, 17 FMSHRC 101, 102 (Feb. 1995); *Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1530 (Aug. 1990).

Although the entry of a money judgment by a governmental unit, if related to its police or regulatory powers, is not affected by the automatic stay, actual enforcement of such judgment must take place through the bankruptcy court. *In re Weller*, 189 B.R. 467, 471 (Bankr. E.D. Wis. 1995); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 834 (9th Cir.1991); *NLRB v. P.I.E. Nationwide, Inc.*, 923 F.2d 506 (7th Cir.1991); *Eddleman v. U.S. Dept. of Labor*, 923 F.2d 782 (10th Cir.1991); *In re Tauscher*, 7 B.R. 918 (Bankr. E.D. Wis. 1981).

The undersigned considered the representations and documentation submitted in this case, and the undersigned concludes that the proffered settlement is fair, reasonable, appropriate under the facts, and protects the public interest under *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016), and is appropriate under the criteria set forth in § 110(i) of the Act. The settlement amounts are as follows:

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>	<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>
9185453	\$654.00	\$0.00	9185713	\$344.00	\$344.00
9185454	\$514.00	\$514.00	9185714	\$2,550.00	\$2,550.00
9185455	\$514.00	\$514.00	9185715	\$121.00	\$121.00
9185456	\$405.00	\$405.00	9186425	\$154.00	\$154.00
9185457	\$230.00	\$230.00	9186426	\$558.00	\$558.00
9185979	\$372.00	\$372.00	9186427	\$319.00	\$319.00
9185458	\$214.00	\$214.00	9186428	\$121.00	\$121.00
9185459	\$214.00	\$214.00	9186429	\$250.00	\$250.00
9185706	\$250.00	\$250.00	9186430	\$1,345.00	\$1,345.00
9186408	\$604.00	\$604.00	9189333	\$154.00	\$154.00
9186409	\$372.00	\$372.00	9189334	\$474.00	\$474.00
9186410	\$405.00	\$405.00	9186431	\$604.00	\$604.00
9186411	\$121.00	\$121.00	9189336	\$121.00	\$121.00
9186412	\$142.00	\$142.00	9185716	\$214.00	\$214.00
9186413	\$558.00	\$558.00	9186434	\$2,993.00	\$2,993.00
9189323	\$474.00	\$474.00	9186435	\$2,353.00	\$2,353.00
9185707	\$121.00	\$121.00	9186436	\$344.00	\$344.00
9186414	\$121.00	\$121.00	9186437	\$121.00	\$121.00
9186415	\$474.00	\$474.00	9186438	\$474.00	\$474.00
9186416	\$474.00	\$474.00	9186439	\$474.00	\$474.00
9186417	\$250.00	\$250.00	9185717	\$181.00	\$181.00
9186418	\$1,852.00	\$1,852.00	9185718	\$214.00	\$214.00
9186419	\$2,763.00	\$2,763.00	9185719	\$372.00	\$372.00
9189324	\$474.00	\$474.00	9186520	\$405.00	\$405.00
9189325	\$121.00	\$121.00	9186521	\$1,057.00	\$688.00
9189326	\$708.00	\$708.00	9186522	\$604.00	\$604.00
9189327	\$270.00	\$270.00	9182135	\$250.00	\$250.00
9185708	\$832.00	\$832.00	9182136	\$121.00	\$121.00
9185709	\$6,148.00	\$6,148.00	9186523	\$121.00	\$121.00
9186420	\$405.00	\$181.00	9186524	\$121.00	\$121.00
9186421	\$250.00	\$0.00	9186525	\$121.00	\$121.00
9186422	\$902.00	\$902.00	9189342	\$604.00	\$604.00
9186423	\$832.00	\$832.00	9189343	\$372.00	\$372.00
9185710	\$121.00	\$121.00	9186480	\$604.00	\$604.00
9185711	\$2,763.00	\$2,763.00	9186527	\$1,345.00	\$1,345.00
9186424	\$181.00	\$181.00	9186528	\$181.00	\$181.00
9189331	\$121.00	\$121.00	9186529	\$154.00	\$154.00
9189332	\$250.00	\$250.00	9186530	\$154.00	\$154.00
9185712	\$604.00	\$604.00	9186532	\$250.00	\$250.00

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>	<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>
9186533	\$214.00	\$214.00	9186484	\$2,550.00	\$2,550.00
9186481	\$1,345.00	\$1,345.00	9186538	\$832.00	\$832.00
9186535	\$474.00	\$474.00	9186539	\$168.00	\$168.00
9187211	\$372.00	\$0.00	9186540	\$319.00	\$319.00
9187212	\$474.00	\$474.00	9186541	\$121.00	\$121.00
9186482	\$604.00	\$604.00	9189350	\$372.00	\$372.00
9189345	\$372.00	\$372.00	9189351	\$474.00	\$474.00
9189346	\$372.00	\$372.00	9189352	\$121.00	\$121.00
9189347	\$121.00	\$121.00	9189353	\$121.00	\$121.00
9189348	\$1,242.00	\$1,242.00	9186545	\$270.00	\$270.00
9189349	\$121.00	\$121.00	9189354	\$250.00	\$250.00
9186483	\$270.00	\$270.00	<b>TOTAL</b>	<b>\$59,978.00</b>	<b>\$58,109.00</b>

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

It is **ORDERED** that Citation No. 9186420 be **MODIFIED** to reduce the level of negligence from moderate to low.

It is further **ORDERED** that the operator pay a total penalty of \$58,109.00 pursuant to the terms of the settlement agreement.<sup>1</sup>

/s/ Thomas P. McCarthy  
 Thomas P. McCarthy  
 Administrative Law Judge

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<sup>1</sup> Payment should be sent to: Pay.gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508> or, alternately, Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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