

March and April 2018

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Previously unpublished in FMSHRC's Volume 39, No. 12:

R. Alexander Acosta, Secretary of Labor, MSHA v. Kenamerican Resources, Inc., Docket No. KENT 2017-0183 (Judge McCarthy, December 19, 2017)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 14, 2018

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf
of THOMAS McGARY and RON
BOWERSOX

and

UNITED MINE WORKERS OF
AMERICA INTERNATIONAL UNION,
Intervenor

v.

Docket No. WEVA 2015-583-D

THE MARSHALL COUNTY COAL CO.,
McELROY COAL CO., MURRAY
AMERICAN ENERGY, INC., and
MURRAY ENERGY CORPORATION¹

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). For the reasons that follow, we hold that the Respondents² did not preserve for Commission review the issue of whether the Administrative Law Judge erred by ordering Robert Murray, the Chief Executive Officer of Murray Energy Corporation, to read a statement to miners as part of the relief the Judge ordered for Respondents’ interference with miners’ rights in violation of section 105(c) of the Act, 30 U.S.C.

¹ Additional captions are listed in Appendix A to this order.

² The Respondents are the Marshal County Coal Company, Ohio County Coal Company, Harrison County Coal Company, Monongalia County Coal Company, Marion County Coal Company, Consolidation Coal Company, McElroy Coal Company, Murray American Energy, Inc., and Murray Energy Corporation.

§ 815(c).³ See 38 FMSHRC 2694, 2698-2701 (Oct. 2016) (ALJ); 37 FMSHRC 2597, 2608-09 (Nov. 2015) (ALJ).

I.

Factual and Procedural Background

This case originated with complaints of interference brought by the Department of Labor's Mine Safety and Health Administration ("MSHA") on behalf of six miners.⁴ The Respondents are the operators of five underground coal mines in West Virginia and associated corporate entities, including the owner and controller of the five mines, Murray Energy Corporation. The interference allegations arose from meetings, which all miners at each of the mines were required to attend, where Respondents addressed, among other topics, miners contacting MSHA pursuant to section 103(g) of the Act, 30 U.S.C. § 813(g),⁵ to alert the agency to perceived safety and health issues at the mines.

The successful interference claims were in large part based on PowerPoint slides shown during the presentations which stated that miners must inform management of the content of any section 103(g) complaints filed with MSHA. The Commission ruled that this requirement allowed the operators to readily learn the identity of any miner who makes an anonymous complaint to MSHA. 38 FMSHRC 2006, 2016 (Aug. 2016) ("*Marshall County I*"). We affirmed the Judge's opinion upholding against each of the five mines one count of interference with their miners' section 103(g) rights and dismissing a second count of such interference against the Marshall County Mine. *Id.* at 2011-22 (majority opinion), 2028 (Chairman Jordan and Commissioner Cohen, concurring).

With respect to the remedy in the case, when the case was initially before the Judge the Secretary of Labor requested, among other things, that CEO Murray be personally required to

³ Section 105(c)(1), 30 U.S.C. § 815(c)(1), provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this [Act].

⁴ As shown in the five case captions, MSHA filed each of the cases on behalf of United Mine Workers of America ("UMWA") International Safety Representative Ron Bowersox and another individual. Each of these individuals is a local UMWA representative at his or her respective mine. 37 FMSHRC at 2599.

⁵ Section 103(g)(1) provides that, if a miner or miner representative has reasonable grounds to believe that a violation of the Act or a mandatory standard exists, the miner or representative has a right to obtain an immediate inspection by MSHA. It further provides that the name of the person requesting an inspection shall not be revealed.

read a statement to all miners. The Secretary argued that because CEO Murray had conducted each of the meetings, he should be personally required to dispel any erroneous impressions regarding the miners' section 103(g) rights left by the original presentations. The Judge agreed, requiring CEO Murray "to hold a meeting at each mine in which he shall read a prepared and approved statement notifying miners that they are not required to contact management when making a complaint to MSHA." 37 FMSHRC at 2609.

On review, the Commission agreed with the Respondents that it was not clear from the Judge's decision who she intended would prepare the statement and who would approve the statement.⁶ Consequently, the Commission requested that the Judge on remand clarify who would be involved in the preparation of the statement, and who would be involved in its approval. In so doing, the Commission specifically referred to the requirement as one that the Judge had imposed on CEO Murray personally. 38 FMSHRC at 2026 ("we will permit the Judge to further clarify what she meant in requiring CEO Murray to read the 'prepared and approved' statement.").

On remand, the Judge noted that pursuant to her original decision all the parties were to agree on the language of the statement to be read by CEO Murray, but they had been unable to do so. Consequently, the Judge mandated the language of the statement. She also again specified that CEO Murray was to read the statement, but explained that he could do so either in person or through video conferencing, as long as he delivered it without comment or elaboration at meetings at each mine within 40 days of the date of her remand decision. The statement was also to be posted at each of the mines. 38 FMSHRC at 2698-2701. The statement drafted by the Judge is attached hereto as Appendix B.

Respondents again filed a PDR with the Commission, and, among other things, objected to the Judge requiring that CEO Murray personally read the statement. In the second PDR, Respondents contend that the requirement for a personal reading makes the order not remedial but rather punitive in nature, in that it would humiliate CEO Murray. Respondents maintain that this is impermissible under case law of the National Labor Relations Board ("NLRB"), the

⁶ In their Petition for Discretionary Review ("PDR") to the Commission in response to the Judge's original decision, Respondents did not otherwise address that aspect of the ordered remedy. An accompanying motion for stay included a request that the statement reading requirement, along with a separate notice posting requirement, be stayed until Respondents had exhausted their appeal rights. The Commission denied the stay with respect to the notice posting requirement but granted a stay with respect to the statement reading requirement pending the Commission's decision on review because the latter stay had not been opposed by the Secretary and that aspect of the remedy was "uniquely personal [in] nature" in that it specified that CEO Murray was required to read the statement to miners. 38 FMSHRC 220, 222 (Feb. 2016). In their subsequent opening brief, Respondents argued that the Judge erred by admitting into evidence an allegedly unauthenticated recording of the meeting and by using allegedly vague, imprecise language concerning the penalty provisions. Resp'ts Br. I at 24-27. In one sentence, Respondents argued that the requirement for CEO Murray to read the statement personally was improper due to admission of the unauthenticated recording. *Id.* at 26. They did not raise the present argument that the requirement was punitive rather than remedial.

agency that developed the personal reading requirement, and of courts reviewing NLRB personal reading requirement decisions.⁷

The Secretary opposed the granting of the PDR as contrary to the terms of the Mine Act. According to the Secretary, Respondents have not properly preserved for review the issue of whether, as part of the remedy, CEO Murray can and should be required to personally read a statement to miners.

The Commission thereafter granted review “regarding the question of whether the Judge erred in requiring . . . Robert E. Murray[] to personally read a prepared statement at the mines.” Unpublished Order dated Dec. 6, 2016.

II.

Disposition

The Secretary in his response brief renews his objection to the Commission’s consideration of the personal reading requirement issue, arguing that Respondents’ failure to preserve the issue establishes that the issue has been waived. The Secretary further contends that the failure to raise the issue that the reading requirement was punitive rather than remedial the first time the case was before the Commission means that the personal reading requirement then became “the law of the case,” and thus cannot be disturbed at this point. Respondents reply that the issue was raised below and since then preserved because it is related to, and intertwined with, other issues Respondents have pursued before the Commission.

Section 113(d)(2)(A)(iii) of the Mine Act provides that on Commission review “[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the [Judge] had not been afforded an opportunity to pass.” 30 U.S.C. § 823(d)(2)(A)(iii). The Mine Act’s legislative history describes this requirement as one that is “consistent with sound procedure[,] . . . do[es] not deny essential due process,” and is “consistent with [the Commission’s] duty to resolve matters under dispute in an expeditious manner.” S. Rep. No. 95-181, at 49 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978).

In deciding whether a party has properly preserved an issue for Commission review, we have noted that in order for a Judge to have been “afforded an opportunity to pass” on a matter, it “must have been presented below in such a manner as to obtain a ruling. . . . The matter must be raised with ‘sufficient specificity and clarity [so] that the [Judge] is aware that [he] must decide the issue.’” *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320-21 (Aug. 1992) (quoting

⁷ The Commission has drawn on case law interpreting provisions of the National Labor Relations Act (“NLRA”) for guidance in construing analogous Mine Act provisions, including in *Marshall County I*. See 38 FMSHRC at 2011 n.10 (noting analogous NLRA interference provision). The Commission has also recognized that “[t]he Mine Act’s remedial provisions . . . are modeled on section 10(c) of the NLRA” *Meek v. Essroc Corp.*, 15 FMSHRC 606, 616 (Apr. 1993).

Wallace v. Dep't of the Air Force, 879 F.2d 829, 832 (Fed. Cir. 1989) (citations omitted and alterations in original); *Shamrock Coal Co.*, 14 FMSHRC 1300, 1304 (Aug. 1992) (following *Beech Fork*).

A review of the record indicates that, as discussed below, Respondents had not one but two opportunities to object specifically and clearly before the Judge that requiring CEO Murray to read a statement to the miners was punitive rather than remedial. It took advantage of neither opportunity. Consequently, we decline to review this issue. See *Black Beauty Coal Co.*, 37 FMSHRC 687, 694-95 (Apr. 2015) (refusing to consider on review theory of violation that Secretary had not presented below, despite there being multiple opportunities).⁸

First, the Secretary's complaint requested that, should the Judge conclude that interference had been established, "a Murray Energy corporate officer" be ordered to read a notice to all miners regarding the section 105(c) violations. Sec'y's First Amended Compl. at 19, ¶60. At the subsequent hearing, the Secretary moved to amend the complaint to specify that CEO Murray be ordered to read the statement. The Secretary maintained that because the CEO was the presenter at the meetings with miners, a repudiation of his earlier statements would be more effective coming from him. Invited by the Judge to state a position at the hearing, Respondents objected to the amendment on the ground that it was "over the top," and stated that they would "deal with the amendment." Tr. 30.

Importantly, Respondents never followed up on their counsel's statement at the hearing that they would "deal" with the Secretary's "over the top" amendment to the complaint to specify that CEO Murray should be required to personally read the remedial statement. Respondents thus never proffered an actual basis for the objection they made at the hearing to the Secretary's amendment. They did not hint at, let alone make, an argument to the Judge that they now make in their second PDR — that under applicable law CEO Murray cannot be required to personally read the statement because it is punitive rather than remedial.

Second, in his post-hearing brief, the Secretary further explained why he believed an oral statement to miners was necessary, and why it should be delivered by CEO Murray. Sec'y's Post-H'rg Br. at 3, 26-28. Respondents did not address the issue. Instead, in their post-hearing brief, Respondents limited their arguments to whether interference had been established, and thus were entirely silent on any issue regarding remedies, including whether a statement should be read to miners by CEO Murray or any official of the Respondents.

⁸ Having found that Respondents never sufficiently preserved the personal reading requirement issue, we do not reach the Secretary's "law of the case" arguments.

In her initial decision, the Judge drew upon the broad remedial language of section 105(c)(2) of the Mine Act and NLRB case law⁹ to conclude that a high-level corporate official should be required to read a remedial notice to miners in this instance. She went on to order that CEO Murray was to hold “a meeting at each mine in which he shall read a prepared and approved statement notifying miners that they are not required to contact management when making a complaint to MSHA.” 37 FMSHRC at 2609.

It was entirely understandable that the Judge in her first decision did not address the cursory objection Respondents had made at the hearing because that generalized objection was not even repeated, much less adequately explained or supported by Respondents in their post-hearing brief. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (“issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and put flesh on its bones.”) (internal citations omitted). The Commission has held that if a Judge is unaware of a legal theory of a party, she is not obligated to address it in her decision. *Oak Grove Res., LLC*, 33 FMSHRC 2657, 2665 (Nov. 2011); *Beech Fork*, 14 FMSHRC at 1321; *Shamrock Coal*, 14 FMSHRC at 1304. Here the Judge clearly was not apprised by Respondents of the legal basis for their opposition to a reading requirement asserted in the current PDR. *See Sec’y of Labor on behalf of Stahl v. A&K Earth Movers, Inc.*, 22 FMSHRC 323, 324 (Mar. 2000) (holding that references by counsel during hearing to delays in initiating proceedings insufficient to preserve laches argument for review when argument was never otherwise laid out for Judge).

Respondents, as part of their second appeal, argue at some length that any reading requirement should be tailored to the circumstances of the case. However,

[t]he Mine Act establishes an orderly, two-tiered litigation system consisting of trial before a Commission judge and appellate review by the Commission. This system provides for the creation of the factual record before the trier of fact. The rationale for requiring lower tribunals to first pass upon questions is that subsequent review is not hindered by the lack of necessary factual findings and the lack of application of the lower court’s expertise or discretion.

Beech Fork, 14 FMSHRC at 1321 (citations omitted). Consequently, any “tailoring” of the remedy to the facts in this case was better done by the Judge, and the appropriate time for it was when the issue was first before the Judge. Respondents passed on that opportunity in this case.

⁹ The Judge relied on *Conair Corp. v. NLRB*, 721 F.2d 1355, 1385-87 (D.C. Cir. 1983). 37 FMSHRC at 2608. In that case, the Court upheld an NLRB order that a company president personally read a statement to employees after he held captive audience meetings where he made threats to employees about closing a plant if it were unionized and expressed his personal animus against unions. Similarly, in this case, the record is clear that the interference charges directly involved CEO Murray, as he had traveled from mine to mine, giving a prepared PowerPoint presentation at each shift that included statements regarding miners’ rights protected under section 103(g). *Marshall County I*, 38 FMSHRC at 2008, 2015-16.

Respondents passed as well on the opportunity to raise the issue before the Judge on remand. In their remand submissions to the Judge, the parties resumed their dispute over the substance of the statement. The Secretary urged that the Judge adopt, as the statement to be read to miners, the notice that the Secretary had originally proposed be posted in compliance with the Judge's order. Respondents maintained that a different notice, the one that was eventually posted, would suffice as the statement to be read to the miners.

Focusing on the content of the statement, Respondents thus once again entirely failed to specify before the Judge that they were objecting to CEO Murray having to personally read the statement. Respondents did not identify the identity of the speaker as being the basis for their continuing objection to the statement reading requirement. Indeed, on remand they identified the issue as "the content of a statement to be read by Mr. Robert Murray at meetings to be held at Respondents' mines . . ." Resp'ts Suppl. Br. on Remand at 7. Thus, they implicitly accepted CEO Murray as the reader of the statement. Apart from a footnote suggesting there are potential constitutional concerns with "an individual" having to read a statement in the case,¹⁰ Respondents limited their arguments to the Judge to whether the Secretary's recommended statement addressed matters that went beyond the scope of the Judge's original order.

Now, before the Commission for a second time, Respondents for the first time specifically object to CEO Murray having to read the statement to miners on the ground that such requirement is punitive rather than remedial. They argue that their initial objection to the Secretary's amendment to the complaint sufficiently raised the issue for purposes of review

¹⁰ In that footnote Respondents stated that they

wish to note for the record that compelling a reading of a statement by an individual implicates First Amendment protections, and that if the Secretary seeks to include further material or content, such content could potentially constitute compelled speech, if the reading of a statement authored solely by the government and ordered to be read by an individual does not already implicate such concerns.

Resp'ts Suppl. Br. on Remand at 9 n.6. Respondents thus obliquely suggested that, at some point in the process, the combination of (1) an individual being required to read a statement; and (2) the Secretary's involvement in the drafting of the statement, would give rise to First Amendment issues.

The Judge's rejection of the Secretary's proposed statement in favor of her own eliminates the second issue. As for the Respondents' "note for the record" and suggestion of the "potential[]" for there being compelled speech if "an individual" was required to read a statement, the reading requirement was decided upon and imposed by the Judge the first time the case was before her. It was not challenged by Respondents when this case was originally before the Commission on review. Respondents' footnoted statement during remand thus fell well short of what was required to put the Judge on notice that Respondents were now challenging the requirement that Mr. Murray personally read the statement on the basis asserted in the second PDR. "A 'passing reference to [a] claim . . . is insufficient to prevent . . . waiver.'" *Poree v. Collins*, 866 F.3d 235, 250 (5th Cir. 2017) (footnotes omitted) (alteration in original).

under 30 U.S.C. § 823(d)(2)(A)(iii) and Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d). They contend that because they raised a broad objection against the reading requirement earlier in the case, they should be permitted to resurrect at this latest stage of the case an argument that was not pursued until now. Respondents maintain that this is consistent with cases in which the Commission agreed to hear on appeal issues that were intertwined with or related to issues that were tried before the Judge but not directly addressed in the decision on review.¹¹

Specifically, Respondents contend that the personal statement reading requirement issue is intertwined with, or related to, their argument in the first appeal to the Commission that the Judge's decision and penalty in the case infringed upon their First Amendment rights. Resp'ts Reply Br. II at 11; Resp'ts Br. I at 27. However, Respondents made that argument only with regard to the Judge's consideration of a federal district court suit many of the Respondents had filed against the complainants. That issue was decided by a Commission majority in the Respondents' favor, but not on constitutional grounds.¹² The Commission had no reason to decide any First Amendment issues with respect to the statement reading requirement because those issues had not been raised in a meaningful manner by the Respondents and were in no way "intertwined" with the First Amendment issues implicated by the Judge's consideration of the federal court suit filing.¹³

Respondents also maintain that the issue of CEO Murray personally reading the remedial statement remained preserved through the multiple stages of this proceeding because of Respondents' continued objection to the Judge's admission into evidence of an audio recording of one of CEO Murray's presentations to miners. We decided that we did not need to reach Respondents' objection to that evidentiary ruling in the first appeal because there is sufficient evidence to establish interference with miners' rights without considering the tape recording. *Marshall County I*, 38 FMSHRC at 2019.

¹¹ See, e.g., *BHP Copper, Inc.*, 21 FMSHRC 758, 762 (July 1999) (concluding that points made by Secretary to Commission, while not identical to those made to the Judge, were sufficiently related to those below to permit the Commission to consider them under 30 U.S.C. § 823(d)(A)(iii)); *San Juan Coal Co.*, 29 FMSHRC 125, 130 (Mar. 2007) (considering on appeal unwarrantable failure factors not specifically argued by party or analyzed by Judge because they were so intertwined with evidence relating to factors that were addressed); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10-11 n.7 (Jan. 1994) (accepting argument as sufficiently related to one made below because it enlarged the one made below).

¹² As a result, the penalties assessed by the Judge were vacated as having been improperly increased. *Marshall County I*, 38 FMSHRC at 2024-26.

¹³ The First Amendment issue raised by Respondents in their first appeal was that the Judge's consideration of their lawsuit against some of the individual complainants in setting penalties constituted "a prior restraint upon Respondents' First Amendment Rights to seek redress in federal courts." Resp'ts Br. I at 23. Obviously, this is a totally different First Amendment issue than the present claim that the requirement that CEO Murray read the statement "could be viewed as compelled speech." PDR at 16.

That evidence consisted of the PowerPoint slides from the presentations. The presentations were given, in each instance, by CEO Murray. There was no disputing that he discussed the slides, including those addressing miners' section 103(g) rights. Thus, there was much more evidence tying CEO Murray to the interference than just the disputed tape recording. *See id.* at 2015-17.

In light of Respondents' multiple failures to make plain to the Judge any objection to CEO Murray being required to personally read a statement as part of the remedy, we affirm in result the Judge's decision on remand. The issues of whether, and the circumstances under which, a reading requirement can be ordered by a Judge as a remedy in a Mine Act discrimination or interference case are important ones, and would merit Commission consideration. However, fundamental issue preservation procedures were not adhered to by Respondents in this proceeding. Consequently, we cannot reach the issue of whether the Judge erred in her order with respect to CEO Murray.

III.

Conclusion

For the foregoing reasons, the Judge's decision is affirmed in result.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

Appendix A

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) on behalf
of RICK BAKER and RON
BOWERSOX

and

UNITED MINE WORKERS OF
AMERICA INTERNATIONAL UNION,
Intervenor

v.

OHIO COUNTY COAL CO.,
CONSOLIDATION COAL COMPANY,
MURRAY AMERICAN ENERGY, INC.,
and MURRAY ENERGY CORPORATION

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) on behalf
of ANN MARTIN and RON
BOWERSOX

and

UNITED MINE WORKERS OF
AMERICA INTERNATIONAL UNION,
Intervenor

v.

HARRISON COUNTY COAL CO.,
CONSOLIDATION COAL COMPANY,
MURRAY AMERICAN ENERGY, INC.,
and MURRAY ENERGY CORPORATION

Docket Nos. WEVA 2015-584-D
WEVA 2015-585-D
WEVA 2015-586-D
WEVA 2015-587-D

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) on behalf
of RAYMOND COPELAND and RON
BOWERSOX

and

UNITED MINE WORKERS OF
AMERICA INTERNATIONAL UNION,
Intervenor

v.

MONONGALIA COUNTY COAL CO.
CONSOLIDATION COAL COMPANY,
MURRAY AMERICAN ENERGY, INC.,
and MURRAY ENERGY CORPORATION

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) on behalf
of MICHAEL PAYTON and RON
BOWERSOX

and

UNITED MINE WORKERS OF
AMERICA INTERNATIONAL UNION,
Intervenor

v.

MARION COUNTY COAL CO.,
CONSOLIDATION COAL COMPANY,
MURRAY AMERICAN ENERGY, INC.,
and MURRAY ENERGY CORPORATION

Appendix B

The Federal Mine Safety and Health Review Commission has found that the Murray Energy Corporation and its West Virginia subsidiaries have violated the Federal Mine Safety and Health Act and has ordered me to read and abide by this notice. In an awareness meeting between April and July 2014, I outlined a policy requiring that any safety complaint made to MSHA also be made to management. That policy is rescinded. You have every right to make a complaint to MSHA without notifying any person at the mine.

Section 103(g) of the Federal Mine Act gives you the right to request that the Mine Safety and Health Administration conduct an immediate inspection of a condition or practice that you reasonably believe is an imminent danger or a violation of the Mine Act or its standards. Murray does not, and will not, require that you make the same safety or health complaints to management when you make complaints or reports to MSHA. You have a right, under section 103(g) of the Mine Act, to make those reports anonymously and confidentially.

Murray and its mines will not retaliate against or take any adverse action against any miner or other person because they have made an anonymous or confidential complaint to MSHA. All miners have a right to make a complaint to MSHA and all miners are protected from retaliation or adverse action for making a Section 103(g) complaint.

Section 105(c) of the Federal Mine Safety and Health Act prohibits Murray and any other mine operator from discriminating against its miners and from interfering with their rights under the Act, including the right to make anonymous complaints to MSHA. If any interference or discrimination or adverse action occurs related to your right to make an anonymous complaint, or any other action protected by the Mine Act, you have the right to immediately file a discrimination or interference complaint with MSHA.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 10, 2018

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

v.

Docket Nos. PENN 2014-108
PENN 2014-109

LEHIGH ANTHRACITE COAL, LLC
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket No. PENN 2016-135

SHANE T. WETZEL, EMPLOYED BY
LEHIGH ANTHRACITE COAL, LLC

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

DECISION

BY: Jordan, Young, and Cohen, Commissioners

These proceedings, which arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), involve enforcement actions taken by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) against Lehigh Anthracite Coal, LLC (“Lehigh”), and Shane Wetzel, a foreman employed by Lehigh. The alleged violations arose from an incident in which a miner worked under a dangerous highwall and bank. MSHA issued a citation to Lehigh alleging a violation of 30 C.F.R. § 77.1006(a)¹ that was significant and substantial (“S&S”) and the result of Lehigh’s unwarrantable failure to comply with the standard.² MSHA proposed a civil penalty of \$23,229 for the alleged violation.

¹ 30 C.F.R. § 77.1006(a) provides that “[m]en, other than those necessary to correct unsafe conditions, shall not work near or under dangerous highwalls or banks.”

² The “significant and substantial” and “unwarrantable failure” terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguished as more serious in nature any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard,” and establishes more severe sanctions for any violation caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

In addition, MSHA proposed a penalty of \$2,900 against Wetzel individually under section 110(c) of the Mine Act³ for knowingly authorizing the violation.

A Commission Administrative Law Judge concluded that the operator had violated section 77.1006(a), that the violation was S&S and caused by unwarrantable failure, and that Wetzel was liable under section 110(c) for knowingly authorizing the violation. 38 FMSHRC 2782, 2794-2805 (Nov. 2016) (ALJ). However, the Judge found that Lehigh's and Wetzel's negligence was "high" rather than "reckless," as alleged by MSHA, and assessed penalties of \$6,996 and \$1,000 against them, respectively. *Id.* at 2800-02.

The Secretary of Labor petitioned the Commission for review of the Judge's negligence findings and assessment of penalties. We granted review and heard oral argument. For the reasons that follow, we vacate and remand for further proceedings.

I.

Factual and Procedural Background

A. Facts

Lehigh operates the Tamaqua Mine, an open pit anthracite coal mine in Tamaqua, Pennsylvania. In order to extract coal, Lehigh uses explosives to blast open the pit, removes the rock covering the coal to expose the coal seam, and then digs the coal from the pit with an excavator.⁴ The rock is deposited in spoil piles located at the north and south sides of the top of the pit. A highwall is created as the pit increases in depth.

When the highwall becomes too unstable to keep an excavator in the pit, coal is removed from the pit using a dragline, a large, track-mounted vehicle which is operated from the surface beside the pit. *Id.* at 2784-85. The dragline has a boom crane that extends over the pit and a bucket attached to the boom. The bucket is lowered into the pit and then digs and scoops coal as it is scraped across the floor. After it has been loaded, the bucket is lifted and the extracted coal is dumped in a collection pile at the side of the pit. The bucket is nine feet long, six feet wide, and four feet deep, and can hold seven cubic yards of material. *Id.* at 2785.

At the time in question, the highwall, which was located on the north side of the pit, was nearly vertical, and the south wall had a slope of about 50 degrees. The mine resembled the shape of a modified "V," in that the distance between the walls at the top was approximately 50-60 feet, while the distance between the walls at the floor of the pit was approximately 10-30 feet. *Id.* at 2784.

³ Section 110(c) provides that "any . . . agent of [a] corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to . . . civil penalties." 30 U.S.C. § 820(c).

⁴ An "excavator" is a large track-mounted piece of equipment that swivels 360 degrees, has a long boom, and is similar to a backhoe although much larger. Tr. 58.

On the night of June 19, 2013, Larry McNeal, the dragline operator, stepped out of his cab to replace a light on the dragline while the bucket was resting on the floor of the pit. While he was out of the cab, McNeal felt two vibrations, which turned out to be coal falling off of the face of the south wall. The fall of coal buried the bucket. McNeal used the dragline controls in an effort to raise the bucket, but the bucket would not budge. *Id.* at 2785; Tr. 60; Ex. S-3 at 3; Ex. S-10; Ex. S-20 at 1.

McNeal called the second shift foreman, Shane Wetzel. Wetzel testified that, as the foreman, he was responsible for safety on his shift and making sure that miners in his charge complied with MSHA's regulations. If miners did not comply with those regulations, then Wetzel had the authority to redirect them and have them perform their work safely. Tr. 455-56.

Wetzel and McNeal tried repositioning the dragline. However, they were unable to pull the bucket free. Tr. 36; Ex. S-3 at 3.

Foreman Wetzel called truck driver Erik Osenbach and excavator-operator Richard Rudinsky to the pit. They considered abandoning the bucket, which would have sacrificed production for the shift, but discarded that option. They also considered building a road to access the pit, but rejected that option as infeasible or requiring too much time and loss of production. 38 FMSHRC at 2785; Tr. 38, 86-87, 328, 354, 356, 433-34.

Instead, they decided that one of them would descend into the pit to attach a chain to the "crow's foot"⁵ on the bucket so that an excavator, attached to the other end of the chain, could pull the bucket out. Foreman Wetzel proposed going into the pit himself, but Osenbach volunteered to go because Wetzel had "a wife and kids." 38 FMSHRC at 2786. Rudinsky drove the excavator to the pit, and Osenbach entered the pit and attached the chain.⁶ When the excavator attempted to pull the bucket out of the muck using the chain, the chain broke. *Id.* at 2785-86.

The crew then decided to try pulling the bucket out with a cable. Rudinsky used the excavator to dig a bench that was five feet down from the top of the west bank. The excavator was moved onto this bench to bring it closer to the buried bucket. Tr. 361.

Osenbach entered the pit a second time and hooked a cable to the bucket's control chains. The second attempt to use the excavator to pull out the bucket also failed. Osenbach was not wearing a safety belt or line during either of his two entries into the pit. Each of Osenbach's trips into the pit lasted approximately two minutes. 38 FMSHRC at 2785-86, 2796, 2802.

⁵ A "crow's foot" is the point at which the two control chains for the dragline attach to the bucket. 38 FMSHRC at 2785.

⁶ As part of the retrieval plan, the area was illuminated by the dragline and viewed to see if any material was moving, Osenbach attempted to keep his distance from the highwall and to minimize his time in the pit, and the dragline operator was provided with a horn to alert Osenbach if conditions became more hazardous. Tr. 89, 119, 330, 338, 340, 360, 362, 398-99, 440; Ex. S-20 at 3.

At 2:43 a.m., Wetzel sent an email to first-shift Foreman Louis Mitchalk informing him of the stuck bucket. Ex. S-13. When Mitchalk arrived at the pit a few hours later, he saw evidence that a miner had entered the pit and notified Lehigh's safety director, John Hadesty. Tr. 234-35.

Mitchalk and his crew then retrieved the stuck bucket by cutting the buried bucket free, attaching another bucket to the dragline, and using the new bucket to dig out the buried bucket. No miners entered the pit during the retrieval. Mitchalk testified that this method had been employed five times before by the operator. 38 FMSHRC at 2787; Tr. 70-73, 246, 256.

During the week of June 19, the operator conducted an investigation of the incident, interviewed witnesses, and gave written warnings to Wetzel, McNeal, Osenbach, and Rudinsky. Lehigh decided to forego its ordinary first step of providing verbal warnings because the miners' conduct was so dangerous. In addition, the operator formalized the procedure it had used to recover the buried bucket, sought and eventually received approval from MSHA for the procedure as part of its ground control plan, and provided training on the new procedure. 38 FMSHRC at 2787, 2802; Tr. 124-26, 245-46, 415-16; Ex. S-5 at 3, Ex. S-14, Ex. S-19 at 3.

On June 24, MSHA received an anonymous complaint about the incident. MSHA Supervisor Tom Yencho called the mine and issued a verbal imminent danger order over the phone. That same day MSHA Inspector David Labenski traveled to the mine, interviewed employees, and determined that no imminent danger was present since the situation had occurred five days earlier.

MSHA investigated the matter, using in part the materials gathered by the operator.⁷ On July 3, 2013, MSHA issued Citation No. 8000958, alleging an S&S violation and an unwarrantable failure to comply with section 77.1006(a) for allowing an employee to work near or under a dangerous highwall or bank. It also issued Citation No. 8000959, alleging an S&S and moderately negligent violation of 30 C.F.R. § 77.1710(g) for failure to wear safety belts and lines where there is a danger of falling. In addition, the Secretary later sought a section 110(c) civil penalty against Wetzel for his involvement in the violation of section 77.1006(a).

Lehigh and Wetzel challenged the citations, the special findings in the citations, and the penalty amounts. The matter proceeded to hearing.

⁷ The inspector's notes stated that throughout the investigation, Lehigh had been "very cooperative and share[d] info. freely when requested. Action was taken to correct the problem before anyone from MSHA knew about it and policies have been written to prevent further troubles. Company tries very hard to make jobs safe." Ex. S-3, notes for 7-8-13 at p. 7.

B. The Judge's Decision

The Judge affirmed the violation of section 77.1006(a), concluding that Lehigh violated the standard by permitting Osenbach to work near or under a dangerous highwall and bank.⁸ 38 FMSHRC at 2793-95. The Judge found that the highwall on the north side of the pit was “cracked and contained unconsolidated material that could fall at any time on a miner below.” *Id.* at 2794. He further concluded that the spoil banks on the south side had been undercut and posed a falling hazard. The Judge found that the coal seam on the south side was “cracked and fractured,” and that there was between a few hundred pounds and 10 tons of coal still hanging at the time Osenbach entered the pit. *Id.* at 2794, 2797. He stated that the two collapses from this coal seam a few hours earlier “not only indicated a high risk of further collapse, but also removed much of the lateral support for the remaining coal and spoil pile that had yet to fall” and therefore increased the risk of another fall. *Id.* at 2794. The Judge credited testimony that the limited space in the pit ensured that Osenbach would inevitably be near, if not under, those dangerous conditions. He concluded that Osenbach traveled to the bottom of the pit, and that the crow’s foot that he reached was within 10 feet of both the northern highwall and southern bank hazards. *Id.* at 2794-96.

The Judge also determined that Lehigh’s violation of section 77.1006(a) was S&S and had been caused by an unwarrantable failure. In concluding that the violation was S&S, the Judge found that it was “more than reasonably likely that material could have fallen from the highwall, spoil bank, or coal seam while Osenbach was down in the pit,” that it was “highly likely that an injury would have occurred,” and that any injury “could have reasonably been expected to be fatal.” *Id.* at 2795, 2797. The Judge based his unwarrantable failure determination in part on findings that the cited conduct posed a high degree of danger which was known and obvious to Lehigh. *Id.* at 2797-99.

Furthermore, the Judge held that Wetzel had authorized the violation of section 77.1006(a) within the meaning of section 110(c) of the Mine Act. *Id.* at 2800-01. He reasoned that Wetzel had admitted that it was his decision to send Osenbach into the pit, that the hazards in the pit were obvious, and that Wetzel had acknowledged that there was a level of risk in sending Osenbach into the pit by stating that there was a “moderate” level of risk and a “somewhat likely possibility . . . of some of the rocks coming down into the pit if someone was in there.” *Id.*

Finally, the Judge concluded that Lehigh’s and Wetzel’s violative conduct resulted from “high negligence” rather than “reckless disregard,” as alleged by MSHA, because Wetzel had been willing to go into the pit himself, Wetzel had a genuine misunderstanding regarding the hazards presented by the conditions, and some efforts had been undertaken to minimize Osenbach’s exposure to hazards while in the pit. *Id.* at 2800, 2801. The Judge assessed

⁸ The Judge also affirmed the violation alleged in Citation No. 8000959, concluding that the operator violated section 77.1710(g) because Osenbach failed to wear a safety belt or line where there was a danger of falling. 38 FMSHRC at 2802-03. The Judge further determined that this violation was S&S and had been caused by moderate negligence. *Id.* at 2803-04. The Judge’s findings regarding this citation are not at issue on appeal. PDR at 13 n.3.

penalties of \$6,996 and \$1,000 against Lehigh and Wetzel, respectively, rather than the penalties of \$23,229 and \$2,900 proposed by the Secretary.

The Secretary filed a petition for discretionary review challenging the Judge's negligence determinations and assessment of penalties, which we granted.

II.

Disposition

The Secretary argues that the Judge's conclusion that MSHA failed to establish reckless disregard is legally invalid and that the evidence of record and the Judge's own factual findings support such a determination. Lehigh and Wetzel did not file a cross-petition challenging any of the Judge's legal determinations and request that the Judge's decision be affirmed.

We accept as undisturbed the Judge's factual findings and credibility determinations and review his negligence holdings based on those findings.⁹ According to the Judge's findings, foreman Wetzel authorized Osenbach to enter the pit in circumstances that posed a high risk of fatal injuries to Osenbach -- not once but twice -- to attempt to avoid delays in production. 38 FMSHRC at 2785, 2795, 2797. Such findings support only one conclusion -- that Wetzel recklessly disregarded Osenbach's safety, both as to Lehigh's violation of section 77.1006(a) and Wetzel's knowing authorization of that violation as Lehigh's agent.

Section 110(i) of the Mine Act authorizes the Commission to assess civil penalties for violations under the Act and its implementing regulations, and includes negligence as one of the six factors the Commission is required to consider in so assessing a penalty.¹⁰ The Commission has recognized that in assessing a civil penalty, there is no requirement that equal weight be assigned to each of the section 110(i) factors. *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1979-80 (Aug. 2014) ("*JWR*"). "Rather, 'Judges have discretion to assign different weight to the various factors, according to the circumstances of the case.'" *Id.* at 1979 (citations omitted).

MSHA's regulations at 30 C.F.R. Part 100 address how MSHA calculates most proposed penalties in light of the section 110(i) factors applied by the Commission in the assessment of

⁹ The respondents' statement of facts in their brief includes many facts that conflict with the Judge's factual findings. Contrary to their statement of facts, however, Lehigh and Wetzel ultimately acknowledged in their brief that the Judge's "findings were not legally erroneous, contrary to law or unsupported by substantial evidence," and that the Judge's credibility determinations were entitled to deference. Resp. Br. at 15, 19.

¹⁰ The six statutory factors the Commission must take into account in assessing a penalty are: (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 operator charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

penalties. With respect to negligence, “MSHA has adopted a formulaic approach, categorizing negligence into five different levels from ‘no’ negligence to ‘reckless disregard,’ based on the existence of a mitigating circumstance, or multiple such circumstances, for the violation.” *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015) (citations omitted).

MSHA defines “reckless disregard” to mean that the “operator displayed conduct which exhibits the absence of the slightest degree of care.” 30 C.F.R. § 100.3(d).

Commission Judges are not bound in any way by the definitions in Part 100 when considering an operator’s negligence. *Brody*, 37 FMSHRC at 1702. Rather, a Judge “may consider the totality of the circumstances holistically.” *Id.* Nor was the Judge required to use MSHA’s penalty point system in his penalty assessment. *JWR*, 36 FMSHRC at 1980 (citations omitted) (“In determining the amount of a penalty, neither the Judge nor the Commission is restricted by the penalty proposed by the Secretary.”). The Judge’s decision properly acknowledged this principle and correctly articulated the appropriate framework for determining negligence under the Act. 38 FMSHRC at 2790-91.

In analyzing Wetzel’s negligence, however, the Judge noted the Secretary’s definition of “reckless disregard,” 38 FMSHRC at 2800 n.7, and determined that Lehigh’s and Wetzel’s level of negligence was high rather than reckless for three reasons. First, he concluded that Wetzel’s willingness to enter the pit himself showed a failure to properly evaluate the obvious safety risks around him rather than a reckless indifference to the safety of Lehigh employees. Second, he reasoned that Wetzel had a genuine misunderstanding of the hazards present, although Wetzel’s belief was not reasonable. Third, the Judge explained that the efforts taken to ensure that Osenbach stayed away from the longwall and did not linger in the pit demonstrated some degree of care to comply with the standard, although those efforts were “wholly inadequate.” 38 FMSHRC at 2800.

The Judge’s rationales for his negligence determinations are legally invalid.

In analyzing an operator’s degree of negligence, the Commission has recognized that “[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *Brody*, 37 FMSHRC at 1702 (citations omitted); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

First, we note that this case spotlights the difficulties that arise from applying, too literally, MSHA’s definitions of negligence in the assessment of penalties by the Commission and its Judges. While such definitions may appropriately guide inspectors, their rigidity adapts poorly to the holistic consideration of negligence by Commission Judges after a hearing. *See Hidden Splendor Res., Inc.* 36 FMSHRC 3099, 3105-08 (Dec. 2014) (Comm’r Cohen, concurring).

In particular, MSHA’s definition of “reckless disregard,” which focuses on whether an operator has exhibited the “slightest degree of care,” is either inappropriately subjective or, if read literally, almost indistinguishable from intentional misconduct by an operator’s agent. The definition is therefore not well suited to the objective “reasonably prudent person” standard used by Commission Judges.

We thus suggest Commission Judges should be guided by broader and more general common-law standards more congruent with the Act’s intent and purpose, i.e., to prioritize the health and safety of miners. “Reckless disregard” should therefore include, for example, situations where an operator knows or has reason to know of facts which create a high degree of risk of physical harm, and deliberately proceeds to act, or fails to act, in conscious disregard of, or indifference to, that risk. *Cf.* Restatement (Second) of Torts § 500 cmt (Am. Law Inst. June 2017).¹¹ Thus, the operator’s conduct would be measured objectively against the conduct under the same circumstances of a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation at issue. *See pp. 10-11, infra.*

The Mine Act recognizes that the “first priority . . . in the . . . mining industry must be the health and safety of its most precious resource – the miner.” 30 U.S.C. § 801(a). The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on operators, with the assistance of their miners. 30 U.S.C. § 801(e). We have long recognized that mine management should be held to a high standard of care. *See Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) (“a foreman . . . is held to [a] high standard of care”). *See also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1982-83 (Aug. 2014) (Comm’rs Young and Cohen, dissenting) (stating that, while not binding on the Commission, section 100.3(d) puts operators on notice of the Secretary’s expectation of the “high standard of care” operators owe to their miners.).

Managers not only act as directly responsible stewards for the health and safety of their miners, they also ensure that miners will conduct themselves as the Act envisions, in a manner that protects their own health and safety and that of their co-workers. “Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management’s commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care.” *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987). Wetzel, as a foreman, must be held to this higher standard of care.¹²

¹¹ We are not attempting to comprehensively define “reckless disregard,” but only setting forth, using language from the Restatement of Torts (a commonly-cited authority on questions of negligence), a description of a type of reckless disregard which describes foreman Wetzel’s actions in this case.

¹² Our colleague contends that “Wetzel was not mine management.” Slip op. at 21. But Wetzel, who acknowledged that he was responsible for miners’ safety on his shift, Tr. 455-56, was the only supervisor on duty at the time of this incident. It therefore does not matter that Wetzel was in charge only of a small group of workers: He was the agent responsible on behalf of the operator for the health and safety of each of those miners, a fact that has not been disputed before us.

This, then, is the appropriate scope of the duty that adheres to an operator's agent under the Act: It is not a duty to exercise reasonable care in the abstract, but rather the obligation to exercise a thoughtful prudence that takes into account the nature of mining, the mine environment, and the purposes of the mandatory safety standards implicated by the circumstances encountered therein.

Wetzel's conduct as a supervisory agent of Lehigh fell far short of his duty under the Act. Contrary to the Judge's first rationale, Wetzel's willingness to enter the pit himself does not amount to a factor which reduces the degree of negligence. As a foreman, Wetzel is held to a very high degree of care, and his actions set an example for other employees. Entering the pit himself and working below a dangerous highwall and bank in conditions that the Judge found to be highly likely to result in fatal injuries would have posed the same unjustifiable risks to Wetzel as to other miners.

Furthermore, Wetzel's entry into the pit would have still unjustifiably set an example of improperly prioritizing the retrieval of the bucket and resumption of production over miners' safety. In any event, Wetzel ultimately authorized a miner on his crew to go into the pit instead of himself – not once, but twice. Doing so showed no meaningful consideration of the exposure to danger inherent in the task.

Nor does the Judge's second reason – Wetzel's misunderstanding of the hazards presented by authorizing Osenbach to enter the pit twice – reduce the level of negligence attributed to the violative conduct. The Judge determined that Wetzel's belief that the south slope did not present a hazard and that Osenbach would be far enough away from the northern highwall hazards was not reasonable, even if it were genuine. 38 FMSHRC at 2800. As we have noted, the operator's agents are held to a very high standard of care. This duty requires a very high standard of care in evaluating hazards, and yet the Judge found that Wetzel's assessment of the danger was unreasonable.

The Commission has held that “if an operator has acted on an objectively reasonable and good faith belief that the cited conduct was in compliance with applicable law, such conduct will not be considered to be the result of an unwarrantable failure when it is later determined that the operator's belief was in error.” *Oak Grove Res., LLC*, 38 FMSHRC 1273, 1279 (June 2016) (citations omitted). Although this principle arose in the context of unwarrantable failure determinations, the Commission has engaged in similar considerations when reviewing a Judge's negligence determinations. *See, e.g., DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3090, 3097 (Dec. 2014); *Mach Mining, LLC*, 36 FMSHRC 1525, 1527 (June 2014).

In this case, the Judge correctly determined that the exception for “good faith” errors did not excuse the unwarrantable nature of Lehigh's violation of section 77.1006(a). He determined that Wetzel's belief that the violative conduct was safe was not reasonable given the obvious nature of the danger presented. 38 FMSHRC at 2799. Wetzel's unreasonable belief is similarly unavailing in mitigating the negligence determination for penalty purposes. Not only was the belief unreasonable, it disregarded what the Judge himself characterized as an “obvious” danger “highly likely to result in a fatal injury to a miner.” *Id.* at 2797-99.

The subjective “genuineness” of Wetzel’s belief does not override the requirement that a good faith belief must be objectively reasonable. As noted, the Commission applies an objective, rather than a subjective, standard of care and considers what actions would have been taken by a reasonably prudent person under the same circumstances. Thus, even accepting the Judge’s factual finding that Wetzel did not appreciate the obviously high degree of risk present, a reasonably prudent person in his position would have done so. *See, e.g., id.* at 2798 (finding that miner’s statement that Wetzel should not enter the pit because he had a wife and children, even if “made half in jest as the Respondent argues, . . . [is] in part a recognition of the high level of danger associated with the retrieval effort and that Wetzel should have understood this.”).

We further conclude that the Judge erred with respect to his third rationale for his negligence determination. In order to reduce the level of negligence, the operator’s actions would have to correct the hazardous condition. For instance, the D.C. Circuit has stated that a Judge reasonably concluded that an operator’s actions that “neither *prevented* nor *corrected* the hazardous condition” did not amount to a factor mitigating high negligence. *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1265 (D.C. Cir. 2016) (emphasis in original). Similarly, the Commission has concluded that the fact that a hazardous area was examined before it was entered did not reduce negligence because the exam “did not eliminate the risk . . . but rather served to measure the risk presented.” *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1244 (Aug. 1992).

The actions that were taken to reduce the hazards for Osenbach as he twice entered the pit were effectively meaningless in terms of realistically reducing those hazards. Nor did the actions demonstrate a real attempt to comply with the standard’s directive. As part of the retrieval plan, the area was illuminated by the dragline and viewed to see if material was moving, Osenbach attempted to keep his distance from the highwall and to minimize his time in the pit, and the dragline operator was provided with a horn to alert Osenbach if conditions became more hazardous. *See* n.6, *supra*. However, the Judge credited testimony that the lighting was inadequate for illuminating large portions of the pit (38 FMSHRC at 2796-97), and that, given the pit’s configuration and where he traveled, Osenbach would inevitably be exposed to the highwall, the spoil bank and the coal seam hazards (*id.* at 2794-95), which is expressly prohibited by the safety standard. Indeed, the Judge himself determined that such measures were “wholly inadequate.” *Id.* at 2800.¹³

Evidence that such wholly inadequate efforts were undertaken in “good faith” does not change the conclusion that such factors do not reduce the level of negligence. 38 FMSHRC at 2800. As discussed above, the subjective good faith of such actions does not reduce negligence where such actions are based on an objectively unreasonable belief. *Cf. IO Coal Co.*, 31

¹³ Our colleague alleges that we do not discuss the totality of the evidence because we “summarily declare the totality of actions ‘meaningless.’” Slip op. at 20. Our opinion notes with particularity the Judge’s own findings of fact and conclusions of law about the dangers present and the failure of Wetzel to apprehend those dangers or to take effective precautions to avoid exposing Osenbach to them. When we conclude, based on the Judge’s own evidentiary findings and legal conclusions, that Wetzel’s actions were “effectively meaningless in terms of realistically reducing those hazards,” we are simply adopting and restating the Judge’s finding that Wetzel’s actions were “wholly inadequate.”

FMSHRC 1346, 1358 (Dec. 2009) (stating that the Judge’s finding that a foreman “‘was not indifferent to his responsibilities’ . . . and ‘tried, but failed to meet the standard of care required of him,’ . . . does not dispose of the issue of reasonableness”).

In sum, the Judge’s determination that Lehigh’s and Wetzel’s negligence was “‘high’ rather than ‘reckless’” was based on legal error. 38 FMSHRC at 2800, 2802. Under the facts of this case as found by the Judge, while the level of negligence did not involve a conscious intention to cause harm to a miner, it did involve a conscious choice to take actions with knowledge of facts that would disclose to a reasonable foreman an unjustifiably high risk of potentially fatal injury to a miner.

Commission Judges have consistently found operators’ negligence to be “reckless disregard” where the violation was found to be motivated by a desire to avoid the loss of production. See *RAG Cumberland Resources, LP*, 23 FMSHRC 1241, 1261 (Nov. 2001) (ALJ); *Lhoist N. America of VA, Inc.*, 36 FMSHRC 2413, 2427 (Sep. 2014) (ALJ); *Regent Allied Carbon Energy, Inc.*, 37 FMSHRC 830, 857 (Apr. 2015) (ALJ); *Saiia Construction, LLC*, 38 FMSHRC 2291, 2306 (Aug. 2016) (ALJ) (“The [operator’s] message was loud and clear: production over human life”).

In this case, Wetzel’s conduct, individually and as imputed to Lehigh, amounted to reckless disregard based on the Judge’s own findings and conclusions. Wetzel ignored the obvious and high risk of fatal injuries to Osenbach in authorizing him to twice enter the pit, at night under poor illumination, where Osenbach was required to pass through and work in a narrow valley, menaced by unstable ground conditions following a collapse that removed lateral support from the remaining material on the highwall and buried the bucket under so much material that a dragline could not move it. 38 FMSHRC at 2794-96.

As the Judge also concluded, Wetzel sent Osenbach into the pit under these conditions when he knew that safe alternatives were available. He took this action so as to avoid sacrificing production of coal. 38 FMSHRC at 2785, 2799. Such actions demonstrate a degree of negligence best characterized as reckless disregard. See *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 719-23 (Aug. 2008) (where mine fan stopped and foreman directed miners to attempt to repair damaged cable rather than withdraw from working section, Judge properly characterized foreman’s action as reckless disregard); *Signal Peak Energy*, 37 FMSHRC 470, 482 (Mar. 2015) (where operator failed to immediately contact MSHA following an accident with a reasonable potential to cause death because of a desire to resume production, the Judge correctly found the violation to be reckless disregard).

We note that the Judge characterized this as a case in which “a supervisor directed a miner into a situation that posed an immediate and appreciable risk to the safety of that miner.” 38 FMSHRC at 2799. The Judge found that Wetzel did this knowingly. *Id.* at 2801. This is so contrary to the standard’s command that miners not work under or near dangerous highwalls that the operator cannot be said to have exercised any meaningful care for the safety of the miner endangered here.

We conclude that the record on review supports only the conclusion that the respondents recklessly disregarded the safety of a miner, and thus demonstrated the highest possible level of negligence for purposes of penalty assessment under section 110(i). To hold otherwise would be to find that an operator does not act with reckless disregard when its agents see hazardous conditions but fail to use the judgment responsible supervisors must exercise to avoid placing miners in peril, or when those agents recognize the likelihood of dire consequences but disregard that likelihood and allow or direct miners to expose themselves to mortal danger without justification. *See* 38 FMSHRC at 2797, 2799 (finding “obvious” dangers here were “highly likely to result in fatal injury to a miner”).

Given this determination, it is therefore unnecessary to remand the determination of respondents’ level of negligence to the Judge. *See, e.g., Walker Stone Co. v. Sec’y of Labor*, 156 F.3d 1076, 1085 n.6 (10th Cir. 1998); *Sedgman*, 28 FMSHRC 322, 331 (June 2006) (stating that remand unnecessary where Judge failed to examine whether certain actions violated a safety standard because record supplied “more than sufficient evidence” to uphold the citation).

We vacate the penalties assessed against the respondents and remand them for reassessment. On remand, the Judge may weigh the section 110(i) factors as he deems appropriate under the circumstances of this case.¹⁴

¹⁴ We note that upon discovering the incident prior to MSHA being notified, Lehigh itself investigated what had occurred, disciplined Wetzel and the other miners involved, and changed its policies so as to formalize the procedure it had used to safely retrieve the buried bucket. Such proactive actions may be considered under section 110(i) as “demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.” *See Hidden Splendor*, 36 FMSHRC at 3109 (Comm’r Cohen, concurring). We do not consider the statutory phrase “after notification of a violation” as being limited to notification by MSHA or its inspectors. An operator which is ultimately charged with a violation may receive “notification of a violation” where, as here, another foreman discovers the unsafe action and notifies the company’s safety director.

III.

Conclusion

For the reasons discussed above, we hold that the Judge's negligence determinations were based on legal error. We further vacate the penalties assessed against Lehigh and Wetzel with respect to the violation of section 77.1006(a) and remand for reassessment consistent with this decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

Acting Chairman Althen, dissenting:

I would not find the Judge made legal errors as asserted by the Secretary and found by my colleagues. Even had he made the asserted errors, substantial evidence supports the Judge's decision, and the Judge's penalty assessment does not constitute an abuse of discretion. I respectfully dissent.

I. Substantial Evidence Supports the Judge's Negligence Finding.

The Mine Safety and Health Administration ("MSHA") alleged reckless disregard based upon its definition in 30 C.F.R. § 100.3(d) Table X. There, MSHA defines "reckless disregard" as "the operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* This is a classic and completely acceptable definition of reckless disregard. After reviewing the evidence, the Judge found the Secretary had not proved an absence of the slightest degree of care. He found high negligence.

The Commission reviews a Judge's negligence determination under the substantial evidence standard. *Leeco, Inc.*, 38 FMSHRC 1634, 1636-37 (July 2016); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1976 (Aug. 2014). The majority does not address directly whether substantial evidence supports the Judge's decision. Instead, it focuses upon alleged legal errors. Our duty in this case, therefore, is two-fold. First, we must consider the legal errors asserted by the Secretary. Second, if errors occurred, we must decide whether such errors are sufficient to affect the outcome of the case. *Cf. Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996) (reviewing first for legal error, then for substantial evidence). "Substantial evidence is relevant evidence that a reasonable mind would accept as adequate to support the [Judge's] conclusion." *Craig v. Apfel*, 212 F.3d 433, 435 (8th Cir. 2000).¹

Further, "[i]n determining whether existing evidence is substantial, we consider 'evidence that detracts from the [Judge's] decision as well as evidence that supports it.'" *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000) (quoting *Warburton v. Apfel*, 188 F.3d 1047, 1050 (8th Cir. 1999)). However, "[w]e may not reverse the [Judge's] decision merely because substantial evidence" exists in the record that would have supported a contrary outcome. *Id.*

A Judge is not required to discuss all the evidence submitted, and a failure to cite specific evidence does not indicate that the Judge did not consider that evidence. *Craig*, 212 F.3d at 436. Importantly, therefore, we must consider all the evidence in evaluating a decision for substantial evidence purposes.

The operator, through its supervisor Wetzel, erred in sending a miner into the pit in an effort to free the bucket. The seriousness of the error springs not only from the level of danger to the miner but also, and perhaps more so, because it was not necessary to retrieve the bucket immediately through exposure of a miner to a potentially fatal situation. After the event was over and management learned of it, mine management responded quickly and aggressively to deter Wetzel or any other line foreman from making a similar mistake in the future. Although

¹ The Secretary suggests that the Commission just go ahead and assess the penalty proposed by MSHA. I concur with the majority's rejection of that approach.

Wetzel grievously failed in his duties, mine management was exemplary in fulfilling its duties to miner safety.

The issue before the Judge was not whether Wetzel was negligent but instead the level of negligence exhibited by Wetzel. The Judge applied MSHA's definition of reckless disregard as accepted and argued by both parties. He decided that the action was highly negligent rather than reckless disregard. The Judge based the decision upon a finding that Wetzel exercised a degree of care. As said, the outcome of our review depends upon the existence of any legal errors and whether substantial evidence in the record as a whole supports a finding that the Judge's decision was reasonable.

As explained below, I do not agree with the majority's findings of legal errors. Going further, the Judge pointed to a number of actions, and the record discloses other actions, demonstrating that Wetzel, and hence the operator, showed a degree of care. Of course, the issue before us is not whether we would have made the same finding. Ultimately, the only issue is whether, after reviewing the totality of the evidence, we should find the Judge's decision was unreasonable.

The facts show that Wetzel did not send a worker into the area unilaterally, immediately, or without discussion and consideration. He met with the entire crew. As a group, the crew discussed means of freeing the bucket, including attaching a chain to the bucket. They identified a procedure through which a miner would enter the pit very briefly to attach a chain to the crew's foot.

Wetzel examined the southern slope, judged that it was strong enough to support itself, and did not see any indication of future movement. Further, Wetzel considered the danger from the Northern highwall and decided Osenbach's route would keep him far enough from it to be safe.

Wetzel did not order Osenbach to go into the pit. In fact, Wetzel said he would hook the chain, but Osenbach then volunteered to do it.² Under the Judge's analysis, Wetzel showed regard for safety before he accepted Osenbach volunteering to go into the pit. Stated differently, Wetzel did not disregard safety consciously or unconsciously, nor did he act without any concern for safety. After a group discussion, he made a conscious decision that a miner could hook the chain to the bucket safely. The facts on the record that demonstrate that it was reasonable for the Judge to find a degree of care and a regard for safety include the discussion with the crew, review of conditions, a brief period of exposure, defining a route, lighting the area, and voluntary participation by a physically fit miner.

None of this undercuts the Judge's decision of high negligence, and this opinion is not in any sense a defense of Wetzel's conduct. Based on the evidence, the Judge reasonably found

² Not being the trier of fact and having only a transcript before us, we may not assign a reason for or significance to Osenbach's remark that he would go into the pit because Wetzel had children. See *Martin Cty. Coal Corp.*, 28 FMSHRC 247, 257 (May 2006) (stating that "fact-finding is not the province of the Commission").

that Wetzel made a decision to send/allow Osenbach to enter the pit, albeit an ill-conceived decision, in consultation with the crew, with a degree of care, and with regard for the safety of the miner.

Reviewing the entire record, the facts are sufficient to affirm the decision under the substantial evidence standard of review. For this reason, I dissent from the majority's decision to vacate the Judge's negligence determination and to hold, as a matter of law, that Wetzel and Lehigh's actions constituted reckless disregard.

II. The Judge Appropriately Used the Secretary's Definition of Reckless Disregard and Considered Facts Relating to the Level of the Operator's Negligence.

Had the majority found that, based upon the exclusion of certain evidence or conclusions, the evidence only supported a conclusion that the operator displayed the absence of a slight degree of care, I would have disagreed with but understood their decision. That is not their approach. Instead, the majority not only accepts the Secretary's conversion of a substantial evidence case into a "legal" case through asserted legal arguments but also surpasses even the Secretary by going further than the Secretary and suggesting, but not mandating, a different definition of reckless disregard for this case at the appellate level. Using that definition and disallowing certain findings by the Judge rather than reviewing the totality of the evidence, the majority reverses.

I have great respect for my colleagues and recognize that they will disagree, probably strongly, with me; nevertheless, I am constrained to address their opinion. Their decision strikes me as a desired result driving the law rather than the law driving a principled result.

When the Secretary alleges that an operator's actions exhibited reckless disregard for safety, he takes on a self-prescribed task of proving by a preponderance of the evidence "the absence of the slightest degree of care." 30 C.F.R. § 100.3(d). That is a standard and much-utilized definition of reckless disregard. In turn, that is the standard under which the parties tried the case and the standard to which the Judge held the Secretary. Neither party challenged the definition of reckless disregard before the Judge or us, nor did either party brief the effect of a different definition upon the outcome. The only arguments before us are the Secretary's arguments that the Judge could not legally consider certain facts or reach certain conclusions.

The majority accepts the Judge's findings of fact and credibility determinations. Slip op. at 6. They review the case under those fact and credibility findings. However, the majority ultimately fails to apply the substantial evidence standard. The term "substantial evidence" only appears one time in their opinion in an irrelevant footnote. Slip op. at 6 n.9. On top of that, the majority goes beyond the petition of the Secretary and refuses, in this instance, to allow the Judge to apply the longstanding definition of reckless disregard, although neither party objected

or provided any briefing of their alternative definition or its applicability to the facts of this case.³

A. The Majority Ignores Decades of Negligence Caselaw to Arrive at Its Suggested Definition of Reckless Disregard.

After public notice and comment, MSHA promulgated the definition of reckless disregard thirty-five years ago in 1982. Criteria and Procedures for Proposed Assessment of Civil Penalties, 47 Fed. Reg. 22,286 (May 21, 1982). There, MSHA said, “[t]he ‘reckless disregard’ category, for which the maximum number of points would be assigned, is characterized by conduct which exhibits the absence of even the slightest degree of care.” *Id.* at 22,289-90. Since that promulgation, the Commission and Judges have used that definition in literally dozens and dozens of cases.

For purposes of this case, however, the majority chooses to use an alternate definition of reckless disregard not used by the Judge or briefed by the parties. They explain their adoption of a “conscious disregard” definition by referencing the test for ordinary negligence — that is, “actions [that] would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” Slip op. at 7. The majority then essentially applies a “reasonable person test” to “conscious disregard” in a manner that reduces the burden of proving reckless disregard.

The majority apparently posits a false dichotomy between the definition of reckless disregard used by the Judge and their definition. In a field as vast as the law of negligence, it is natural that one may find different definitions for reckless disregard with slightly different wording or that conflict in minor ways. For example, some courts equate reckless disregard with gross negligence, using the “slight degree of care” touchstone. *See, e.g., Ave. CLO Fund, Ltd. v. Bank of Am., N.A.*, 723 F.3d 1287, 1300 (11th Cir. 2013) (“New York law defines gross negligence as ‘conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing,’ or ‘the failure to exercise even slight care.’” (citations omitted)); *Penunuri v. Sundance Partners, Ltd.*, 2017 UT 54, ¶ 35, — P.3d — (“In Utah, gross negligence is ‘the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result.’” (quoting *Blaisdell v. Dentrix Dental Sys., Inc.*, 284 P.3d 616, 621 (Utah 2012)) (citation omitted)).

³ I can only conclude that the majority implicitly agrees that under the definition that MSHA, the Commission, and the Commission’s Judges have routinely applied — the section 100.3 definition of reckless disregard — substantial evidence supports the Judge’s decision. Otherwise, there would be no reason to substitute summarily an alternate definition of reckless disregard that the majority then, incorrectly but more easily, finds to have been met. Despite Commission caselaw that Judges may use the Part 100 definitions and years of consistent use of the section 100.3 definition of reckless disregard, the majority reaches an outcome by “suggesting” a different definition of reckless disregard for purposes of this case. They do not explain any reason for departing from the standard definition in this one case. This case-by-case, “do whatever we feel is right” approach is contrary to principled adjudication.

Other courts find reckless disregard is a step beyond gross negligence. *See, e.g., Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 668 (D.C. Cir. 1996) (“There is a continuum that runs from simple negligence through gross negligence to intentional misconduct. Recklessness, or reckless disregard, lies between gross negligence and intentional harm.”); *Doe v. Boy Scouts of Am. Corp.*, 147 A.3d 104, 120 (Conn. 2016) (“More recently, we have described recklessness as a state of consciousness with reference to the consequences of one’s acts. . . . It is more than negligence, more than gross negligence.” (quoting *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 483 (Conn. 2015)) (alteration in original)).

Some authorities virtually equate reckless disregard with intentional misconduct, finding reckless disregard is close to an intentional wrongdoing. *See, e.g., Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907, 913 (W. Va. 1978) (“[West Virginia law] recognizes a distinction between negligence, including gross negligence, and wilful, wanton, and reckless misconduct. The latter type of conduct requires a subjective realization of the risk of bodily injury created by the activity and as such does not constitute any form of negligence.”).

Nowhere in this array of cases is there a suggestion that failing to act as a reasonably prudent person under similar circumstances — the definition of ordinary negligence — demonstrates reckless disregard. Indeed, jurisdictions using a “conscious disregard” standard often use absence of a slight degree of care as the touchstone of conscious disregard. *See, e.g., Ave. CLO Fund*, 723 F.3d at 1300 (“New York law defines gross negligence as ‘conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing,’ or ‘the failure to exercise even slight care.’” (citations omitted)); *District of Columbia v. Walker*, 689 A.2d 40, 44 (D.C. 1997) (defining gross negligence generally as “[t]he failure to exercise even slight care,” and gross negligence under a qualified immunity statute as requiring “such an extreme deviation from the ordinary standard of care as to support a finding of wanton, willful and reckless disregard or conscious indifference for the rights and safety of others.” (citation omitted) (alteration in original)); *Cf. Smith v. Brown & Williamson Tobacco Corp.*, 410 S.W.3d 623, 630-31 (Mo. 2013) (en banc) (stating that a showing of reckless disregard requires evidence that the defendant “knew of the defect and danger of the product and, by selling the product, showed *complete* indifference to or conscious disregard for the safety of others.” (emphasis added) (citations omitted)).

The case law is legend. In California, “gross negligence” is defined as either the “want of even scant care or an extreme departure from the ordinary standard of conduct.” *Van Meter v. Bent Constr. Co.*, 297 P.2d 644, 648 (Cal. 1956); *Franz v. Bd. of Med. Quality Assurance*, 642 P.2d 792, 798 (Cal. 1982) (en banc). Kentucky requires more than a showing of failure to exercise slight care to find gross negligence: As to gross negligence, this claim requires “something more than the failure to exercise slight care. We have stated that there must be an element either of malice or willfulness or such an utter and wanton disregard of the rights of others as from which it may be assumed the act was malicious or willful.” *City of Middlesboro v. Brown*, 63 S.W.3d 179, 181 (Ky. 2001). Gross negligence requires “‘first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by wanton or reckless disregard for the lives, safety or property of others.’” *Robbins v. New Cingular Wireless PCS, LLC*, No. CV 5:15-71, 2016 WL 1089252, at *4 (E.D. Ky. Mar. 18, 2016) (quoting *Brown*, 63 S.W.3d at 181), *aff’d*, 854 F.3d 315 (6th Cir. 2017). Or, as the

Supreme Court of Louisiana has defined the terms, “‘Reckless disregard’ is, in effect, ‘gross negligence.’ Gross negligence has been defined by this court as ‘the want of even slight care and diligence. It is the want of that diligence which even careless men are accustomed to exercise.’” *Lenard v. Dilley*, 805 So.2d 175, 180 (La. 2002) (citation omitted).

Authorities that equate “reckless disregard” with a failure to use the slightest degree of care are on the mark. The United States Supreme Court, quoting the Supreme Court of Vermont, has applied the following definition of gross negligence in a diversity jurisdiction case:

Gross negligence is the equivalent to the failure to exercise even a slight degree of care. . . . But it falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong.

Conway v. O'Brien, 312 U.S. 492, 495 (1941) (quoting *Shaw v. Moore*, 162 A. 373, 374 (Vt. 1932) (adopting Massachusetts’ gross negligence definition)). See also, e.g., *Saba*, 78 F.3d at 668; *Boy Scouts of Am. Corp.*, 147 A.3d at 120; *Mandolidis*, 246 S.E.2d at 913; *IPSCO Tubulars, Inc. v. Ajax TOCCO Magnathermic Corp.*, 779 F.3d 744, 752 (8th Cir. 2015) (“Gross negligence is ‘the failure to use even slight care.’” (quoting *Spence v. Vaught*, 367 S.W.2d 238, 240 (Ark. 1963))) (applying Arkansas law); *Ave. CLO Fund*, 723 F.3d at 1300; *Sundance Partners, Ltd.*, 2017 UT 54, ¶ 35; *Ambrose v. New Orleans Police Dept. Ambulance Serv.*, 639 So. 2d 216, 219 (La. 1994) (“Gross negligence has been defined as the ‘want of even slight care and diligence’ and the ‘want of that diligence which even careless men are accustomed to exercise.’” (quoting *State v. Vinzant*, 7 So. 2d 917, 922 (La. 1942))); *Colby v. Boyden*, 400 S.E.2d 184, 189 (Va. 1991) (“[G]ross negligence is the ‘absence of slight diligence, or the want of even scant care’” (quoting *Frazier v. City of Norfolk*, 362 S.E. 2d 688, 691 (Va. 1987))). In Texas, gross negligence requires proof of an objective element and a subjective element: “For the subjective element, [a defendant] must have ‘actual, subjective awareness of the risk involved and choose to proceed in conscious indifference to the rights, safety, or welfare of others.’” *Miller v. Mullen*, 531 S.W.3d 771, 779-80 (Tex. Ct. App. 2016) (quoting *Burleson v. Lawson*, 487 S.W.3d 312, 322 (Tex. Ct. App. 2016)). Under that standard, a “plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn’t care.” *Miller*, 531 S.W.3d at 780 (quoting *Turner v. Franklin*, 325 S.W.3d 771, 782 (Tex. Ct. App. 2010)).

From the foregoing, it appears that the majority has consciously disregarded the definitions of reckless disregard showing that a person who exercises care and considers the safety of the workers in making a decision involving safety is both exercising care and not “consciously disregarding” safety. Under the “absence of slight care” or the “consciously disregard” definitions, the ultimate issue is whether Wetzel showed regard or a slight degree of care for safety. If he exercised care, then he did not “disregard” safety. Such conclusion is

consonant with the plain meaning of “disregard.”⁴ Moreover, any disregard for or ignoring of safety must be “conscious” — that is, knowing. Therefore, the actor must knowingly/subjectively ignore or pay no attention to safety concerns.

These myriad decisions demonstrate that jurisdictions define gross negligence as the absence of even a slight degree of care and many jurisdictions consider reckless disregard to require a higher showing of culpability than gross negligence. Unlike MSHA’s definition of other degrees of negligence, there is overwhelming support in the law for MSHA’s definition of reckless disregard. I find no reason not to use the Part 100.3 standard of reckless disregard as the Commission standard. Moreover, nothing changes regarding the ultimate outcome of this case if we use the majority’s definition, especially when it appears the only reason to do so is to reverse the Judge’s finding.

B. The Majority’s Legal Analysis Misrepresents and Disregards Commission Precedent to Reach the Majority’s Desired Result.

Rather than finding substantial evidence does not support the Judge’s decision, the majority find the Judge’s “negligence determinations are legally invalid.” Slip op. at 7. They do not discuss meaningfully the totality of the evidence but summarily declare the totality of actions “meaningless.” *Id.* at 10.⁵

The majority first notes the duty of mine management. Unaccountably, in doing so, they fail to note that the Judge specifically recognized and took into account the duty of foremen regarding safety. 38 FMSHRC 2782, 2799 (Nov. 2016) (ALJ). Therefore, the majority is reciting an element that the Judge took fully into account. The fact that he considered the point cuts in favor of affirmance. Further, although Wetzel certainly was a manager, he was a “manager” in the sense of being the head of a tiny three or four person crew on a night shift. The majority quotes *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987), in which the Commission drew an important distinction between mine management and less senior supervisors. Slip op. at 8-9. The Commission stated, “Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction.” *Wilmont*, 9 FMSHRC at 688.

⁴ Disregard is “[t]o ignore or treat as unimportant; to pass by as undeserving of notice.” *Disregard*, Black’s Law Dictionary 573 (10th ed. 2014); *see also* Random House Dictionary of the English Language 569 (2d ed. 1987) (“to pay no attention to; leave out of consideration; ignore”).

⁵ My colleagues and I are professional attorneys. To the best of my knowledge, none of us has any educational, professional, or meaningful experiential background in actual mining processes, let alone the dynamic conditions of an anthracite mine. Yet, the majority feels qualified to opine authoritatively that meeting and discussing the situation with the entire crew, surveying the surface areas for stability, using lights, planning a route of entry and exit, minimizing the duration of any exposure, etc., are “meaningless.” Slip op. at 10.

Clearly, Wetzel was not mine management; he was in the category of lower level supervisors for whom the Commission in *Wilmot Mining Company* said mine management must set an example. Actual mine management set an example for him, other supervisors, hourly workers, and other operators' management by responding quickly and aggressively to the event. This is not to imply that foremen do not have a duty to exercise a high degree of care. It is merely to point out that emphasizing the duty of mine management is not meaningful in this case where the Judge factored Wetzel's status into his decision and mine management actually was proactive.

In turning to the more substantive part of the majority's decision, their explanation presents different twists on the same argument. The majority finds that Wetzel's willingness to enter the pit did not mitigate the hazard. Slip op. at 9. They say that Wetzel's "misunderstanding" of the hazard and "subjective" belief that it was safe to use the procedure to connect the chain to the bucket did not "mitigate" the hazard. *Id.* at 9-10. Although somewhat ambiguous, they also appear to state that actions taken to deal with a hazard do not "mitigate" negligence if those measures are not successful. *Id.* at 10-11.

An error common to these assertions is that they take the Judge to task for alleged "mitigation" findings he did not make. The Judge did not find that Wetzel's willingness to enter the pit, his belief, or his actions "mitigated" negligence. Nowhere in the decision did the Judge find mitigation. Instead, he cited facts to support his conclusion that Wetzel did not manifest an absence of a degree of care or, in the words the majority would prefer, a conscious disregard for the safety of the crew. Essentially, the Judge found that Wetzel's judgment was badly flawed and his conduct was highly negligent, but that Wetzel did show a degree of concern or care for the miners or, stated differently again, that he actually showed a conscious degree of care or regard for safety. The absence of a "mitigating" factor does not prove the Judge erred or that Wetzel or the operator exhibited reckless disregard.⁶

⁶ I do not agree with the majority's applying a new definition on appeal, and I do not think the new definition differs significantly, if at all, from section 100.3. As demonstrated, the long-used definition is a standard and acceptable one. However, MSHA's definitions of ordinary and higher negligence do differ markedly from the Commission's definition. MSHA defines all negligence as "high" negligence unless there is a mitigating factor. The Commission allows a finding of high negligence if, and only if, the Judge finds "an aggravated lack of care that is more than ordinary negligence." *American Coal Co.*, 38 FMSHRC 2062, 2084 (Aug. 2016) (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). These are obviously inconsistent approaches. We may aptly summarize the proper consideration of negligence as follows:

1. Taking into account the totality of the evidence, has the Secretary proved by a preponderance of the evidence that the operator did not take the actions that a reasonably prudent operator would have taken under the same or similar circumstances? If so, then the operator was negligent. If the operator acted prudently, then the operator was not negligent.

(continued...)

Another puzzler is the majority's reason for pointing out that an objectively reasonable belief in one's actions fully defeats an unwarrantable failure charge.⁷ The majority writes that the Judge could not consider Wetzel's "subjective" mental state because, in a different area of the law, unwarrantable failure cases, an objectively reasonable belief frees an operator from

⁶ (...continued)

2. The Judge must then place the negligence on a continuum from no negligence to the extreme forms of negligence. This continuum does not compel categorization or, more pertinently, great leaps or reductions in penalties based upon categorization. On a continuum, negligence may fall just above or below a "category." For Mine Act purposes, slight deviations from a particular category need not result in substantial penalty differences.
3. To the extent it is useful to classify a degree of negligence in a particular case,
 - (a) The normal finding for the failure to take actions that a reasonably prudent operator would have taken is ordinary negligence;
 - (b) If the Secretary proves by a preponderance of the evidence that the operator exercised aggravated lack of care amounting to less care than even an ordinarily careless person exercises then the negligence is higher than ordinary and is "high" or "gross."
 - (c) If the Secretary proves by a preponderance of the evidence that the operator showed a complete lack of concern or care for safety — that is, did not show the slightest degree of care — then the operator acted with reckless disregard.
4. For penalties assessed by MSHA under the regular point system, the *Sellersburg* rule applies. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1986). Therefore, if the penalty assessed by the Judge diverges substantially from the penalty proposed by the Secretary under the regular point system, the Judge must explain the reasons for diverging substantially from the Secretary's proposed penalty. The Judge must consider all penalty criteria.
5. If MSHA bases the penalty upon a special assessment, then the Secretary must bear the considerable burden of providing special reasons for a substantially enhanced penalty. Because a special assessment is arbitrary in the first instance, the Judge must evaluate the violation holistically and set a penalty that is fair and consistent with penalties that have been or should be assessed for similar violations by similarly situated operators throughout the same sector of the mining industries.

⁷ The majority cites *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3090, 3097 (Dec. 2014). Slip op. at 10. That case involved a finding of high negligence rather than reckless disregard. They also cite *Mach Mining, LLC*, 36 FMSHRC 1525, 1527 (June 2014). Slip op. at 10. That case involved the mine president/superintendent, and the Commission accepted a finding that the ignorance of the mine president was "slight mitigation," but was insufficient to defeat a high negligence finding.

liability for an unwarrantable failure.⁸ By focusing on whether Wetzel had an objective or subjective belief that descent into the pit was safe, the majority misinterprets the relevance of Wetzel's mental state to a finding of reckless disregard, especially since the majority prefers to make Wetzel's conscious refusal to care about safety a necessary element of the accusation.

As we have seen, when courts consider the higher levels of culpability such as gross negligence and reckless disregard, the mental state of the actor becomes an increasingly important consideration. The mental state of the actor is critical in the sense of whether the actor showed a degree of care for the safety of others: Did the actor consider safety and, if so, did he simply disregard the danger, showing that he disregarded the results of his actions upon worker safety? On the other hand, did he take steps demonstrating that he had a regard for safety?

Thus, as I have repeatedly and even tediously said, the issue regarding reckless disregard is whether the actor showed any degree of care or regard for safety. *See, e.g., Lascola v. Barden Miss. Gaming LLC*, 349 F. App'x 878, 886 (5th Cir. 2009) ("Reckless disregard is generally 'accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow.'" (emphasis added) (quoting *Maye v. Pearl River Cty.*, 758 So. 2d 391, 394 (Miss. 1999))); *City of San Antonio v. Hartman*, 201 S.W.3d 667, 672 n.19 (Tex. 2006) ("Because 'conscious indifference' and 'reckless disregard' are not defined in the statute, we give each its ordinary meaning. We have often interpreted these terms to require proof that a party *knew the relevant facts but did not care about the result.*" (emphasis added) (citation omitted)).

The majority does not cite persuasive precedent. In *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1265 (D.C. Cir. 2016), cited by the majority, slip op. at 10, the circuit court found the Administrative Law Judge reasonably concluded that the pre-violation conduct actually showed persistent negligence by the operator because the operator took no further steps to prevent the accumulation. Thus, the circuit court did not hold that whenever a violation occurs the operator must have been negligent. Indeed, the operator's actions were relevant and enhanced the finding of negligence.⁹

⁸ When an operator acts with an objectively reasonable belief that its actions were safe and in compliance with the law and regulations, it has not engaged in aggravated conduct constituting an unwarrantable failure.

⁹ The majority's phrasing puts the words of the Administrative Law Judge into the mouth of the circuit court and misses the key point that the prior actions served to prove negligence. The relevant passage is as follows:

Further, the ALJ could reasonably conclude that Mach's decision to turn off the main belt no more served to show that it was not highly negligent. Shutting off the main belt "neither *prevented* nor *corrected* the hazardous condition." *Mach Mining*, 36 FMSHRC

(continued...)

Similarly, the majority's citation to *BethEnergy Mines, Inc.*, 14 FMSHRC 1232 (Aug. 1992), does not support its position. The majority states that "the Commission has concluded that the fact that a hazardous area was examined before it was entered did not reduce negligence because the exam 'did not eliminate the risk . . . but rather served to measure the risk presented.'" Slip op. at 10 (quoting *BethEnergy*, 14 FMSHRC at 1244). In this curt summation, however, the majority omits key facts and context from the case.

The violation was for entering a dangered off area for reasons other than elimination of the hazard. 14 FMSHRC at 1236. In that context, the Commission stated:

The fact that [an acting construction foreman] examined the area before the cars were brought through it does not reduce BethEnergy's conduct to "moderate negligence," as argued by the operator (BE Br. at 34-35). The examination did not eliminate the risk posed by the unsaddled beams but rather served to measure the risk presented. Such deliberate conduct is appropriately characterized as a knowing neglect of the actions required by section 75.303(a).

Id. at 1244. Section 75.303(a), at that time, stated that "[n]o person other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter [a hazardous place while a danger sign] is . . . posted." *Id.* at 1232 n.1 (quoting 30 C.F.R. § 75.303(a)) (emphasis omitted). The violation, therefore, was for entering a hazardous place while a danger sign is posted. Examining the area, therefore, was not relevant to the standard and did not eliminate the risk of entering the area.

The Commission did not hold, as the majority misinterprets, that examining the area did not "reduce negligence." Indeed, the majority's misinterpretation is complicated by the fact that negligence was not even before the Commission: the Commission's statement in *BethEnergy* was made in the context of the unwarrantable failure analysis in which the Commission affirmed the Judge's unwarrantable failure finding. In *BethEnergy*, the Commission concluded that examination of a hazardous area does not negate an unwarrantable failure designation when the violation was for entering the area for a purpose other than to correct the hazardous condition,

⁹ (...continued)

at 2543. Instead, the ALJ concluded, the fact that Mach needed to stop production to correct the dangerous condition it had allowed to persist indicated how negligent Mach had been. Upon turning off the belt, Mach took no further step to clean up the accumulations.

Mach, 809 F.3d at 1265 (emphasis in original).

and the operator's agent knowingly had a danger sign removed and replaced before and after moving cars through the area. This is far different from the majority's characterization.¹⁰

If the test of negligence were whether the operator prevented the occurrence of a violation, every violation would automatically entail negligence. That is not our law. The test for even low or ordinary negligence is not whether a violation occurred but, again, whether the operator acted as a reasonably prudent mining operator would under similar circumstances. It is plainly incorrect to insinuate that the occurrence of a violation, standing alone, demonstrates negligence, let alone reckless disregard.

This is particularly important because the Mine Act is a strict liability statute. The operator is liable for a penalty for every violation attributable to it regardless of negligence. However, the Commission finds no negligence if the operator acted as a reasonably prudent person even though a citable violation or even fatal accident occurs. For example, in *Leeco, Inc.*, 38 FMSHRC 1634 (July 2016), the Commission considered a case in which a miner whom the operator had warned not to enter a red zone subsequently suffered a fatal injury in a red zone. The operator had taken a number of steps in addition to warning the miner not to enter a red zone. After the fatality, MSHA charged the operator with moderate negligence. The Commission first restated the Commission's test for ordinary negligence. *Id.* at 1637. It then reversed the finding of moderate negligence, holding,

Without evidence that a reasonably prudent operator would have done more under the circumstances, it was error for the Judge to conclude that Leeco's response to Smith's previous incident was insufficient.

Id. at 1639. Thus, the fact that the actions taken by the operator did not "prevent" a fatal injury to a miner from an unsafe act in which he had earlier engaged did not preclude a finding of no negligence when the operator acted in a reasonably prudent manner. The operator took the actions of a reasonably prudent operator and, accordingly, was not negligent.

Similarly, in *Jim Walter Resources*, 36 FMSHRC 1972, the Commission upheld a finding of no negligence in a case involving whether an operator had acted prudently in hiring and monitoring a contractor. A fall seriously injured a contractor's employee. Although the operator's hiring, training, and monitoring practices did not prevent the accident, the Judge found no negligence by the operator. The Commission sustained the Judge's decision finding that the operator acted in a reasonably prudent manner. *Id.* at 1976. *See also Nally & Hamilton Enters.*, 38 FMSHRC 1644, 1652 (July 2016) ("We affirm the finding of no negligence. The Judge found that the operator established and conducted a sufficient training and enforcement program to avoid liability under *Southwestern I.*"). The occurrence of a violation or an accident, standing

¹⁰ Ironically, in *BethEnergy*, which the majority contends stands for the proposition that examining an area did not reduce negligence, the Secretary did not allege that the operator's actions constituted "reckless disregard," and the inspector "did not believe that such conduct rose to the level of 'reckless disregard' because [the acting construction foreman] had made an examination of the area before he authorized a miner to enter it." 14 FMSHRC at 1236.

alone, most certainly does not prove any degree of negligence. Surely, the majority does not mean that anything and everything an operator understands, believes, and does are irrelevant to whether an operator has acted negligently, let alone with a reckless disregard of safety.

The majority further errs in that it does not examine the totality of the evidence to discern whether the Judge's decision is reasonable. Even were the majority's propositions regarding the understanding, beliefs, and actions of the operator correct, the majority does not adequately explore whether the operator's action showed a slight regard for safety. As a result, as the majority reaches the denouement of its decision, the majority simply reweighs or does not discuss the evidence regarding whether the Secretary proved the operator failed to show any slight degree of care or consciously disregarded safety through the foreman's discussions with the crew and other actions. Slip op. at 10-11.

Having intruded upon the Judge's duty and reweighed the evidence, the majority asserts that Wetzel's conduct "demonstrated the highest possible level of negligence." *Id.* at 12. Under the facts of this case, that finding is either absurdly incorrect or buys into the Secretary's proposition that the Judge should simply decide upon a category of negligence and, then, his/her work is complete, so that a finding of reckless disregard is always tantamount to the worst imaginable negligence. I do not think the majority actually can mean what it said.¹¹

III. Penalty Considerations on Remand

The majority decision remands the case for the assessment of a penalty. In doing so, the majority rejects the Secretary's suggestion that once the Commission places negligence in one of the MSHA-described categories, the Judge should accept the MSHA-proposed penalties. The majority eschews taking any position on the penalty, thereby suggesting they would not object to the same penalty as previously assessed. Consequently, I offer a few comments regarding penalties.

Neither the term "high negligence" nor the term "reckless disregard" appears in the Mine Act. Indeed, the term "negligent" appears only twice. Both uses are in section 105 and relate to the criteria by which the Secretary proposes and the Commission assesses penalties.¹² 30 U.S.C. § 815.

The term "gross negligence" appears once. That is in section 116 of the Act, which provides for certain limitations on liability. The section provides the limitations "shall not apply

¹¹ Indeed, had Wetzel not discussed the plan with the crew, had he not taken efforts to ensure Osenbach's safety, and had he not had a good faith belief that that the descent into the pit was safe, 38 FMSHRC at 2800, surely Wetzel's actions would have been worse than they were in this case. Yet the majority fails to grapple with the Judge's finding that Wetzel genuinely thought that descent into the pit was safe, opting instead to consider such information legally irrelevant in assigning culpability.

¹² Interestingly, even section 110(i) the Mine Act does not refer to degrees of negligence but only asks "whether the operator was negligent." 30 U.S.C. § 820(i).

where the action that is alleged to result in the property damages or injury (or death) was the result of gross negligence, reckless conduct, or illegal conduct” 30 U.S.C. § 826(a). The same section 116 also contains the only Mine Act usage of the term “reckless conduct.” Placement of that term in the same section with, and after, gross negligence must indicate that Congress considered reckless conduct a step beyond gross negligence bordering upon illegal conduct. The only other usage of the term “reckless” in the Mine Act is in the flagrant violation provision in section 110. 30 U.S.C. § 820(b)(2).

The absence of the terms “reckless disregard” or “high negligence” and the sparing use of reckless or even negligent highlight that the terms upon which this case appears to turn are completely drawn from MSHA’s penalty regulation at 30 C.F.R. § 100.3 rather than the Mine Act. There, they appear only for the purpose of assigning penalty points that result in substantial point changes under regular penalty regulations depending upon placement of negligence in a predefined category. The regulation assigns 35 points for high negligence, while reckless disregard adds an additional 15 penalty points to a total of 50 negligence points to the penalty calculation. 30 C.F.R. § 100.3(d). In every case, 15 additional penalty points substantially increases the penalty. When the other points reach a significant level in the range of 110 points, the additional 15 points begins to increase the MSHA assessment by tens of thousands of dollars. *See* 30 C.F.R. § 100.3(g).

The use of general categories of negligence obviously is helpful, but it does not permit us to ascertain where the Judge placed the negligence along the broad spectrum. Certainly, the Judge found Wetzel’s conduct severely lacking in ordinary care. Therefore, regarding a continuum, his view appears to place the negligence only a short step below reckless because Wetzel exercised some care. Accordingly, the majority’s change in terminology may perhaps be only a small nudge on the continuum in this case.

The majority has not reversed any of the Judge’s factual findings. Thus, the Judge may continue to take into account the entirety of Wetzel’s actions, including his meeting with the crew before acting, in assessing a penalty against him and the operator. Indeed, the majority permits or even urges the Judge to take into account the exceptional response by management into account is assessing the penalty. This is especially true, given that the Commission previously has found, albeit incorrectly in my view, that “deterrence” is a relevant factor that Judges may consider separately from the statutorily-prescribed criteria in assessing penalties. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-69 (Aug. 2012).¹³

If that is true, then the principle must work to permit a lowered assessment. Prior to involvement by MSHA, the operator acted aggressively to deter similar errors in the future. Because the operator took quick and decisive actions before any MSHA involvement, the Judge might well apply *Black Beauty* to find that the operator need not incur a severe fine to achieve

¹³ I look forward to the day when the Commission explicitly overrules its unfounded departure from the terms of the Mine Act in the *Black Beauty Coal Company* case. However, if a consideration outside the statutory criteria may influence the penalty, such factor may also assert a downward influence.

future compliance as it already positively demonstrated safety consciousness. As the majority emphasizes, if the Judge wishes to consider the operator's exemplary unilateral corrective action, he may do so. In that case, the Judge could reduce the penalty upon remand.

Conclusion

For the reasons set forth above, I respectfully dissent.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 25, 2018

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

v.

SIMS CRANE

Docket No. SE 2015-315-M

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

DECISION

BY: Jordan, Young, and Cohen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), and involves a citation issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Sims Crane (“Sims”). The citation alleges that Sims violated 30 C.F.R. § 56.16009¹ by allowing miners to work under a suspended spreader bar.² Sims contested the citation and the Secretary’s proposed civil penalty of \$100.

After a hearing on the merits, an Administrative Law Judge affirmed the citation and assessed a penalty of \$300 because he found that the operator’s negligence was greater than the Secretary had alleged. 38 FMSHRC 1008 (May 2016) (ALJ). Sims filed a petition for discretionary review challenging the Judge’s definition of what constitutes a “suspended load” for purposes of the standard.³

¹ Section 56.16009 provides that “[p]ersons shall stay clear of suspended loads.”

² A spreader bar is a lifting device located below the hook of a crane. It assists crane operators in balancing heavy objects by allowing the crane to attach to an object at multiple points. Tr. 29, 134-35. A spreader bar distributes the load across more than one point, thereby increasing stability during lifting. 38 FMSHRC at 1013.

³ Sims is joined in its opening brief by the following amicus curiae: Texas Crane Owners Association; Barnhart Crane and Rigging Co.; Chellino Crane, Inc.; Olori Crane Service, Inc.; L.W. Connelly and Son, Inc.; the International Union of Operating Engineers; Nabholz Industrial Services; Allegiance Crane and Equipment; Fagioli, Inc.; H.K.B., Inc.; Blackhawk Mining, LLC; and Revelation Energy, LLC. Additionally, the Specialized Carriers and Rigging Association, Crane Owners Association, and Mobile Crane Operators Group received leave of the Commission to file a separate joint amicus brief after the completion of the normal briefing period.

For the reasons that follow, we affirm in result the Judge's conclusion that Sims violated section 56.16009 when an employee walked under the suspended spreader bar.

I.

Factual and Procedural Background

During an MSHA inspection of the S.D.I. Quarry, a rock and sand mine in Florida, the inspector noticed a crane operating with a spreader bar attached to its hoist hook. He observed William Assad, a crane helper, standing under the spreader bar while the crane was scoping out⁴ its boom in preparation for dismantling and removing a shaker unit. Tr. 111.

The spreader bar at issue is a 625-pound cylindrical steel bar measuring between 10 and 14 feet long and 6 to 8 inches in diameter. The spreader bar was attached to the crane's hoist hook by means of two cables extending from opposite ends of the bar. These cables were secured to the spreader bar by u-shaped shackles which could only be detached by removing steel safety pins. At the time of the inspection, the bar was lifted approximately 25 to 35 feet in the air.

The inspector approached Assad and issued an oral imminent danger order requiring him to move out from under the spreader bar. 38 FMSHRC at 1014. While the inspector and Assad were talking, the crane operator, Milton Minchener, left the crane's cab and walked under the spreader bar to join the conversation. The inspector informed Minchener that he considered the spreader bar to be a "suspended load" and that MSHA regulations prohibited miners from working in a suspended load's fall zone. After Minchener expressed his disagreement with that interpretation, the inspector requested that Minchener provide his training papers for inspection. Minchener then turned around and walked under the spreader bar, back towards the crane's cab.

Afterwards, the inspector determined that the situation did not warrant an imminent danger order, and thus did not commit his oral order to writing. Instead, he issued a citation alleging a violation of 30 C.F.R. § 56.16009 for failing to stay clear of a suspended load. The violation was designated as non-S&S⁵ and unlikely to cause fatal injuries. The citation attributed moderate negligence to the operator. The Secretary proposed a penalty of \$100.

In his decision, the Judge applied a literal definition of what constitutes a "suspended load." Relying on a dictionary definition, the Judge found that, because the ordinary meaning of a "load" is so broad as to include anything having weight or mass, the spreader bar fit within the plain meaning of the standard. The Judge further found that the Occupational Safety and Health

⁴ "Scoping out" means extending the boom in order to position it above the object to be lifted.

⁵ 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."

Administration (“OSHA”) regulations addressing cranes are not dispositive for determining whether the spreader bar was a “load” under the MSHA standard. 38 FMSHRC at 1015-1016.

In determining an appropriate penalty, the Judge took into account that Minchener had walked under the spreader bar after Peters informed him that doing so was a violation of a mandatory safety standard. Accordingly, the Judge determined that the violative conduct was the result of high negligence and increased the civil penalty to \$300. *Id.* at 1017.

II.

Disposition

A. Interpretation of Section 56.16009

The issue before the Commission is whether the necessary presence of a miner in the fall zone of a spreader bar while rigging it for use violates section 56.16009. Sims contends that MSHA and OSHA regulations and industry standards distinguish a crane’s load from load-attaching equipment, i.e., spreader bars, slings, hooks, load blocks, etc., which, it asserts, are actually raised components of the crane. Further, Sims argues that, by including load-attaching equipment in the definition of “suspended load,” the Secretary’s construction of the standard would preclude certain tasks in the rigging process that require miners to work within the fall zone of load-attaching equipment.

The Secretary contends that the presence of a miner within the fall zone of a spreader bar for any purpose violates section 56.16009. During the briefing period, however, MSHA issued a Program Policy Letter (“PPL”) recognizing that “it is occasionally necessary for miners, including riggers, to stand near load attaching equipment in order to attach and detach this equipment to the object or materials being hoisted.” No. P17-IV-01 (Feb. 6, 2017). Although the Secretary continues to assert that any presence within the fall zone is a violation, the PPL assures operators that MSHA will not issue a citation if two conditions are met: (1) the miner must be “involved in the attachment of objects or materials to the load-attaching equipment or are detaching the load” and (2) “adequate measures are in place to protect miners from hazards associated with load-attaching equipment during these processes.” *Id.*

Absent some contrary indication, “words of statutes or regulations must be given their ‘ordinary, contemporary, common meaning.’” *FTC v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Cir. 2009) (quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000)). It is also axiomatic that regulatory language cannot be construed in a vacuum and must instead be read in its context and with a view to its place in the overall regulatory scheme. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

Similarly, statutes and regulations should not be construed to produce an absurd result. *Cf. Haggard Co. v. Helvering*, 308 U.S. 389, 394 (1940) (“A literal reading of [statutes] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.”). As recognized by the Secretary, miners going into the fall zone may be necessary for the rigging of load-attaching equipment on a crane.

See PPL quoted *supra*; Oral Arg. Tr. 58-63. An interpretation that section 56.16009 prohibits an activity that is required for safe and efficacious lifting and that may be performed safely is unreasonable.

A central goal of MSHA's regulatory scheme is to protect miners from falling or swinging objects. To this end, MSHA has promulgated several standards to achieve this goal for the safe operation of equipment at mines. The general rule guiding miners' interactions with objects suspended from cranes is set forth in 30 C.F.R. § 56.16009, which requires that miners "stay clear of suspended loads." It does not cover specific uses of spreader bars or suspended loads. Other MSHA regulations are more precise and explicitly allow miners to work within a fall zone of suspended loads or objects in specific circumstances. Under 30 C.F.R. § 56.14211, miners may perform work on top of, under, or from a raised component of mobile equipment once the component has been adequately blocked or mechanically secured to prevent accidental lowering.⁶ This allows miners to work within the fall zone of the spreader bar while rigging a load, if the standard's conditions are met. Applied literally, section 56.16009 would disapprove conduct that section 56.14211 expressly permits under the prescribed conditions.

Our interpretation of the general mandate in section 56.16009 must take into account the more precise language of section 56.14211. See *Harry C. Crooker & Sons, Inc. v. OSHRC*, 537 F.3d 79, 84 (1st Cir. 2008) ("It is a conventional canon of legal interpretation that specific provisions trump more general ones"); *Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs.") (citation omitted).

We conclude that sections 56.16009 and 56.14211 may be read harmoniously to arrive at a reasonable result—a result that is consistent with the requirements for both mine safety and necessary work on load-attaching equipment. See *Morton Salt*, 18 FMSHRC 533, 536 (Apr. 1996) (It is well-established that regulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions). Hence, if miners rig a spreader bar under the conditions prescribed by section 56.14211, there is no violation of section 56.16009. However, section 56.16009 prohibits miners from being in a fall zone when they are not engaged in rigging work. This interpretation is consistent with MSHA's general approach as expressed in the PPL.

It would be unreasonable to find that the Secretary adopted a standard, the effect of which is to make operators unable to perform necessary mining tasks, when such necessary tasks may be performed safely. See *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (regulations must be read to harmonize, not conflict, with the objectives of the Mine Act); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557-58 (Aug. 1993) (rejecting a literal

⁶ In addition, 30 C.F.R. § 56.14210 permits operators of self-propelled mobile equipment to work under "suspended loads" as long as the equipment is designed to protect the operator from falling objects. Also, miners are generally prohibited from riding on suspended loads or hoist hooks, 30 C.F.R. § 56.16011, and must use tag lines for loads that may require steadying or guidance while suspended. 30 C.F.R. § 56.16007.

reading of a standard derived from dictionary definition because it would lead to an absurd result).

B. Application of Interpretation to this Case

Our rejection of the Judge's interpretation of section 56.16009 does not fully resolve this case.⁷ The record shows three distinct instances of miners standing or walking under the spreader bar, possibly in violation of section 56.16009. The first instance was when Assad was under the spreader bar while the crane was scoping out its boom. The second instance was when Minchener walked under the spreader bar to talk to the inspector. The third instance was when Minchener walked under the spreader bar towards the crane's cab to retrieve his training papers.

We affirm the Judge in result based on the actions of Minchener, specifically the second time he went under the spreader bar.⁸ Minchener's second trip under the spreader bar, which was the basis of the Judge's increase in the degree of negligence and the penalty, occurred after the inspector stated that doing so would be a violative act, and was not work in furtherance of rigging the crane.⁹ Thus, Minchener's second trip under the spreader bar cannot be construed as "work" under section 56.14211 and is clearly a violative act.

⁷ MSHA did not cite the operator for violating section 56.14211.

⁸ Because we have found Minchener's second trip under the spreader bar to be a violation of section 56.16009, it is not necessary to determine whether Assad violated the regulation or whether Minchener violated it the first time he went under the spreader bar.

⁹ We decline to define the full scope of what types of work are part of the rigging process, as such a finding is not necessary to our conclusion that the standard was violated by Minchener's second trip under the spreader bar. At that point, Minchener had left the cab of the crane with the spreader bar suspended. After the inspector told Minchener that passing beneath the bar was a violation, he walked directly under it without any demonstrated need for doing so as part of the rigging process. Our colleague disagrees that there is a distinction between Minchener's two trips beneath the bar, but the Judge properly found that he had been told that doing so would be a violation. The inspector's theory of the violation was incorrect, but that doesn't change the fact that Minchener's second passage was unnecessary to the rigging process, and that he was given notice that this would be a violation before deciding to walk under the spreader bar a second time.

III.

Conclusion

For the reasons set forth herein, we affirm in result the Judge's determination that Sims violated section 56.16009.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

Acting Chairman Althen, concurring and dissenting:

I join in my colleagues' analysis and interpretation of the mandatory safety standard. I disagree only with their finding of a violation.

The inspector interrupted an ongoing lawful rigging process to declare a mistaken imminent danger. The miner left the cab and walked to the inspector to find the basis for the interruption just as he would if there were some other interruption in the midst of the process. My colleagues do not find his path to the inspector to be a violation.

Once the miner reached the inspector, the inspector ordered the miner to get his training papers from the cab. Obtaining those papers was as important to, or even more so, the continuation of ongoing rigging as the initial walk to the inspector. Clearly, the return to the cab was necessary for continuation of occurring lawful rigging tasks. The miner's disobedience of the inspector's prior instruction, although clearly improper,¹ is irrelevant to whether obtaining the demanded papers related to the ongoing rigging process.

Rigging is a short-term, continual process. Walking a route to the inspector was OK, but walking the same route to comply with the inspector's demand for records was not? If during the rigging process, a miner pauses, and briefly passes under the spreader bar to get his water bottle, he still is engaged in the process of rigging. If a miner briefly leaves one side of the spreader bar to answer a supervisor's question and walks beneath the spreader bar in returning to his station, he still is engaged in the process of rigging. I do not find reason to carve each movement during such an integrated process into second-to-second, moment-to-moment, violation/non-violation, metaphysical decision-making.

Because the miner's contumacy is irrelevant, I see no basis to differentiate his walk to the inspector to see what was occurring from his return to the cab to comply with the inspector's demand and permit continuation of the process. I would find the miner's return to the cab was incidental to continuation of an active and ongoing lawful rigging process and was not a violation of section 56.16009.

/s/ William I. Althen

William I. Althen, Acting Chairman

¹ I do not in any way excuse the miner's mistake in disobeying the inspector's demand to stay clear from the spreader bar. Apparently having heard the inspector's instruction, the miner needed to obey that instruction.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 5, 2018

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

v.

MIDWEST MECHANICAL INDUSTRIAL
SERVICES

Docket No. CENT 2016-510-M
A.C. No. 25-00998-413282 A8144

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 16, 2016, the Commission received from Midwest Mechanical Industrial Services (“Midwest”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 29, 2016, and became a final order of the Commission on July 29, 2016. Midwest asserts that it mailed the contest on July 14, 2016. The operator claims that the contest was never received by MSHA, but because the contest was not sent via certified mail, no record of the mailing exists. Midwest asserts that it contacted MSHA repeatedly to see if the package had arrived.

Attached to its motion to reopen, Midwest included a copy of the contest for this case. The contest included a cover page from a separate case (Case No. 000415616)¹ and the remittance coupon for that case and the case that Midwest seeks to reopen (Case No. 000413282). The cover page was signed by Jeff Allen, Midwest Vice President, on August 2, 2016. These facts appear to contradict Midwest's claim that it filed its contest on July 14, 2016. Instead, it appears likely that Midwest mistakenly included the contest of Case No. 00413282 when it subsequently contested Case No. 000415616 on August 2, 2016.

Midwest filed its request to reopen less than one month after the assessment became final and before a delinquency notice was issued. Moreover, even if Midwest did not file its contest of Case No. 000413282 until August 2, 2016, this was only four days after the assessment became a final order of the Commission. Midwest has not filed any other motions to reopen with the Commission in the last two years. The Secretary does not oppose the request to reopen.

¹ This case was properly contested and was assigned Docket No. CENT 2016-496-M. On June 28, 2017, Chief Judge Lesnick approved a motion to withdraw Midwest's contest and the case was dismissed.

Having reviewed Midwest's request and the Secretary's response, we find that Midwest inadvertently failed to timely contest this matter because it mistakenly confused two pending cases. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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

March 5, 2018

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

v.

TEXROCK INDUSTRIES, LLC

Docket No. CENT 2016-532-M
A.C. No. 41-049946-407205

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 30, 2016, the Commission received from Texrock Industries, LLC (“Texrock”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 9, 2016, and became a final order of the Commission on May 9, 2016. Texrock asserts that it filed its notice of contest on June 6, 2016 via overnight mail.¹ Texrock recognizes that this filing was late, but explains that the owner of this very small mine, who was tasked with responding to the assessment, was dealing with a severe family medical condition. The operator also notes that it had received a delinquency notice on June 24, 2016² and responded on July 8, 2016, noting that it had filed a contest and intended to challenge the issuances.³ The Secretary does not oppose the request to reopen.

¹ The actual letter filed by the Operator stating that it intends to contest the citation is dated May 13, 2016. However, the attached check and shipping receipts are dated June 6, 2016. Texrock's request to reopen does not explain this discrepancy, though it does state that the contest was filed on the later date, June 6, 2016.

² The delinquency letter was mailed on June 24, 2016. Texrock's request to reopen was not filed until August 30, 2016, more than 30 days after the delinquency letter was issued. Generally, an operator has 30 days to file a motion to reopen following receipt of a delinquency notice or provide an explanation for any delay beyond 30 days. *See Concrete Mobility, LLC*, 37 FMSHRC 1709, 1710 (Aug. 2015); *Lone Mountain Processing, Inc.*, 33 FMSHRC 2373 (Oct. 2011); *Highland Mining*, 31 FMSHRC 1313, 1317 (Nov. 2009). We consider the fact that the operator sent a response to the delinquency letter to MSHA on July 8, 2016 and the ongoing nature of the owner's family medical situation to be sufficient explanation for the delay in this unopposed matter.

³ In the July 8 letter, the operator states that it filed its contest via overnight mail on May 13, 2016. As noted above, by the time Texrock filed its motion to reopen, it conceded that the contest was mailed on June 6, 2016.

Having reviewed Texrock's request and the Secretary's response, we find that the operator's failure to timely file its contest in this matter was the result of a severe medical condition and constituted excusable neglect. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 5, 2018

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

v.

SSS, INC.

Docket No. CENT 2017-208-M
A.C. No. 23-00192-422615

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On February 21, 2017, the Commission received from SSS, Inc. (“SSS”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on October 20, 2016, and became a final order of the Commission on November 21, 2016. SSS asserts that it inadvertently mailed its notice of contest to MSHA’s payment processing plant in St. Louis, MO instead of to the MSHA office in Arlington, VA. The notice was mistakenly included with the payment for a citation the operator did not intend to contest. The operator did not learn of the mistake until it received a delinquency notice on February 6, 2017.¹ SSS has not filed any other motions to reopen with the Commission in the last two years and responded immediately upon discovering its mistake. The operator avers that it has implemented new procedures to ensure that this mistake does not recur. The Secretary does not oppose the request to reopen.

¹ After learning of its mistake, the operator immediately contacted the MSHA via telephone. According to the Motion to Reopen, during that telephone conversation MSHA informed the operator that it could request reopening but “interest and penalties would accrue until the [reopening] was decided . . .” While the Commission attempts to respond to all Motions to Reopen expeditiously, we recognize that there is some delay between the filing of a request and our subsequent Order. We do not believe it would be appropriate for MSHA to punish operators with penalties and interest for delays caused by the Commission’s deliberative process.

Having reviewed SSS's request and the Secretary's response, we find that the operator's failure arose from excusable error. It claims it inadvertently mailed the contest notice to the wrong address and the Secretary has not opposed the request to reopen. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 5, 2018

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

v.

TABLE ROCK ASPHALT
CONSTRUCTION COMPANY,

Docket No. CENT 2017-296
A.C. No. 23-01836-428136

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 25, 2017, the Commission received from Table Rock Asphalt Construction Company (“Table Rock”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 18, 2017, and became a final order of the Commission on February 17, 2017. Table Rock asserts that that it mailed a notice of contest regarding the citation at issue here to MSHA's payment processing office in St. Louis instead of to the MSHA office in Arlington, VA. The notice was mistakenly included with the payment for a citation the operator did not intend to contest. Table Rock provided documents showing that MSHA received its documents and that the payment for the uncontested citation cleared on February 14, 2017. Table Rock has not filed any other motions to reopen with the Commission in the last two years and responded immediately upon discovering its mistake. The Secretary does not oppose the request to reopen.

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 5, 2018

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

v.

RICKY J. PALASOTA, JR., employed by
BVS CONSTRUCTION, INC.

Docket No. CENT 2017-341-M
A.C. No. 41-04570-437020

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On May 30, 2017, the Commission received a filing denominated as a “Motion to Reopen Final Order.” The motion was filed by an attorney on behalf of Mr. Ricky J. Palasota Jr. (“Palasota Jr.”) The background of the motion is strange, to say the least.

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that on May 8, 2017 MSHA proposed an assessment of \$65,418.00 against an operator identified as BVS Construction, Inc. (“BVS”). MSHA assessed BVS as the operator of the Palasota Mine. Following appropriate procedures, MSHA mailed the assessment to BVS’ address of record and addressed it to Ricky Palasota Jr. because the MSHA Legal Identification Report listed both Palasota Jr. and a Ricky J. Palasota Sr. as officers. Further, the Mine Identification Report simply listed “Ricky J. Palasota” as the person in charge of health and safety at the mine. The assessment was against BVS, the operator, and not against Palasota Jr. personally.

BVS did not respond to the assessment. Accordingly, the assessment against BVS became a final order of the Commission with respect to BVS on June 7, 2017.

On May 30, 2017, eight days before the assessment against BVS became final, the attorney representing Palasota Jr. filed the instant Motion to Reopen a Final Order. At that time, there was no final order against BVS. More importantly for present purposes, there was not any proposed assessment against Palasota Jr. The contents of the motion demonstrate that Palasota Jr. and his attorney apparently believed the assessment was a personal assessment against him. The motion asserts that Palasota Jr. was not a shareholder or officer at BVS. It states that Ricky J. Palasota, Sr., is the owner of BVS and requests that the orders, which were not final when the motion was filed, be reopened so that Palasota Jr. could have the “opportunity to defend these allegations and citations.”

The Secretary avers that Palasota Jr. is not personally responsible for the assessed penalty. The Secretary further asserts that, because Palasota Jr. has no personal liability for the assessed penalty, he has no standing to move to reopen the penalty. *See Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 940-41 (6th Cir. 2013) (non-parties do not have standing to file a Rule 60(b) motion; the only exception applies when the moving non-party is strongly and directly affected by the judgement). As a result, the Secretary opposes the motion to reopen.

Based upon the filings before us, MSHA has not issued an assessment against Palasota Jr. The Secretary provided documentation showing that the proposed assessment was against only BVS, and MSHA delivered it to BVS' address of record. Thus, there is no proceeding against Palasota Jr. Accordingly, Palosota Jr. had neither the right nor the responsibility to challenge the assessment. Only BVS was responsible for contesting the assessed penalty and, now that the penalty has become final, BVS is responsible for paying the penalty.

In order to provide a completed record, the Motion to Reopen a Final Order is denied.¹

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

¹ This decision does not preclude the Secretary from seeking to collect an obligation of BVS from any other entity or person under an alter ego or other theory of derivative liability.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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March 5, 2018

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

v.

HUELSMAN-SWEENEY
CONSTRUCTION, INC.

Docket No. KENT 2017-314-M
A.C. No. 15-04469-434648

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 21, 2017, the Commission received from Huelsman-Sweeney Construction, Inc. (“Huelsman”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on March 29, 2017, and became a final order of the Commission on April 28, 2017. Huelsman explains in great detail that it has in place procedures to ensure that penalties are promptly contested and that it expressed its intent

to contest the penalty at issue to counsel on March 29, 2017, the day the proposed assessment was received. Moreover, counsel for Huelsman avers in an affidavit that its billing records confirm that counsel spoke with his client about this case and drafted the contest on the same date. Counsel further maintains that, per his normal procedure, he would have clearly indicated the proper mailing address and placed the contest in his secretary's inbox so that she could mail the contest to MSHA.

Huelsman states that both company management and counsel first learned that the contest was not timely filed from a delinquency letter sent by MSHA dated July 11, 2017. Significantly, Huelsman has not filed any other motions to reopen with the Commission in the last two years and filed its motion to reopen on July 21, 2017, less than 30 days after MSHA sent the delinquency notice. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

We recognize that the operator has implemented a usually reliable system for processing contests of proposed assessments and that both the operator and counsel took swift actions in responding to the proposed assessment and the subsequent deficiency letter. Therefore, having reviewed Huelsman's request and the Secretary's response, we find that the failure to timely file the contest with MSHA was the result of mistake or inadvertence and that the case warrants reopening. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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March 5, 2018

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

v.

THE AMERICAN COAL COMPANY

Docket No. LAKE 2009-35

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

ORDER

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), and is presently before the Commission a second time on review. On October 30, 2017, the Secretary of Labor filed a motion to settle the case pursuant to a settlement agreement he had reached with the operator, The American Coal Company (“AmCoal”). For the reasons expressed in their separate opinions herein, two Commissioners would grant the motion and two would deny. The motion, therefore, is denied in effect, and the Secretary is ordered to file a response brief in the case within 30 days of the date of the Order.

I.

General Factual and Procedural Background

The case involves two orders issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) alleging violations of 30 C.F.R. § 75.400¹ at AmCoal’s then Galatia Mine (now its New Era Mine) during a week in September 2007. MSHA cited AmCoal for loose coal and float coal dust accumulations at two separate belt transfer points and designated both violations as significant and substantial (“S&S”) and attributable to AmCoal’s

¹ Section 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.”

unwarrantable failure to comply with section 75.400.¹ Significantly, both violations were also subsequently assessed as “flagrant” under section 110(b)(2) of the Mine Act, 30 U.S.C. § 820(b)(2), which provides for greatly enhanced penalties.²

Following a hearing on the merits, the Judge affirmed both orders, upheld the designation of each as S&S and attributable to AmCoal’s unwarrantable failure, and found that both were flagrant violations. 35 FMSHRC 2208 (July 2013) (ALJ).

MSHA proposed a \$179,300 penalty for Order No. 7490584 (“the first order”). The Judge modified the first order to reduce the gravity from “Highly Likely” to “Reasonably Likely” and from “Fatal” to “Lost Workdays or Restricted Duty.” He assessed a final penalty of \$101,475.

MSHA proposed a \$164,700 penalty for the other order, No. 7490599 (“the second order”). The Judge modified it to reduce the gravity from “Highly Likely” to “Reasonably Likely” and the negligence from “High” to “Moderate, and assessed a final penalty of \$77,737.

The Commission granted AmCoal’s petition that it review the ALJ’s decision and the Secretary’s petition that it review the Judge’s reduction in the level of negligence and the reduction of the penalty in the second order. The Commission unanimously affirmed the Judge in all respects with regard to the first order, but a majority remanded the second order for further consideration of the negligence finding, the flagrant designation, and the penalty. 38 FMSHRC 2062 (Aug. 2016). On September 26, 2016, the Commission in an unpublished order denied AmCoal’s petition for reconsideration.

¹ 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.” The unwarrantable failure terminology is taken from the same section, and establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

² Section 8(a) of the Mine Improvement and New Emergency Response (“MINER”) Act amended section 110 of the Mine Act to create a “flagrant” violation designation and to provide for the assessment of an enhanced penalty. Pub. L. No. 109-236, 120 Stat. 493, 500 (2006). Thus, section 110(b)(2) of the Mine Act now provides that

[v]iolations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000. For purposes of the preceding sentence, the term “flagrant” with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2).

On remand, the Judge, again, determined that the operator's violation was flagrant and re-determined the negligence as High. 39 FMSHRC 1247 (Jun. 2017) (ALJ). As a result, the Judge imposed a penalty of \$112,380 for the second order. American appealed the Judge's remand decision.

Following AmCoal's submission of its opening brief, the Secretary moved to settle the case. The motion states that the parties agree to end all current appeals and forego further appeals based on the two premises to the settlement agreement:

(1) AmCoal agrees to accept the Commission's previous decision in this case affirming the "flagrant" and other designations accompanying Order No. 7490584 from [the Judge's initial decision] and not disturbing the [Judge]'s penalty assessment of \$101,475; and (2) the Secretary agrees to delete the "flagrant" designation accompanying Order No. 7490599, to change the gravity of the violation from serious injury or death to lost work days or restricted duty and from six (6) persons affected to two (2) persons affected, and to regularly assess a penalty for this violation as modified.

Mot. at 3. The regularly assessed penalty for the second order would be \$11,307. *Id.*

II.

The Commission's Authority to Approve Penalty Settlements Under the Mine Act

Under section 110(k) of the Mine Act, "[n]o proposed penalty which has been contested before the Commission . . . shall be compromised, mitigated, or settled, except with the approval of the Commission." 30 U.S.C. § 820(k). Settlements are committed to the "sound discretion" of the Commission and its judges. *See Madison Branch Mgt.*, 17 FMSHRC 859, 864 (June 1995) (citing *Medusa Cement Co.*, 12 FMSHRC 1913, 1914 (Oct. 1990)). The Commission is not bound by the parties' settlement agreement and may reject a settlement "based on principled reasons." *Knox County Stone Co.*, 3 FMSHRC 2478, 2480 (Nov. 1981). In exercising its discretion, the Commission evaluates whether a proposed reduction in a penalty or penalties "is fair, reasonable, appropriate under the facts, and protects the public interest." *Am. Coal Co.*, 38 FMSHRC 1972, 1982 (Aug. 2016).

III.

Separate Opinions of Commissioners

Acting Chairman Althen and Commissioner Young, in favor of approving the settlement and granting the motion:

Through the settlement submitted by the Secretary, the Secretary prevails on all disputed legal issues and the operator foregoes any further contest of such issues. The operator pays a substantial penalty to dispose of a case that is more than 10 years old and involves a mine that,

although producing millions of tons of coal in 2007, has not produced any coal for the last 15 months. The alternative is continued litigation, perhaps for years. As set forth below, the Secretary correctly judges that the settlement achieves the public interest. We would approve the settlement.

It is important to note at the outset that, in reviewing settlements, “[t]he Commission does not review the Secretary’s *decision to settle*. Rather, the Commission reviews the proposed reduction of civil penalties in settlements.” *Am. Coal*, 38 FMSHRC at 1980 (emphasis in original). We look at the total penalty amounts that are subject to the settlement, and evaluate “whether the proposed reduction of penalties is fair, reasonable, appropriate under the facts, and protects the public interest.” *Id.* at 1982; *see, e.g., Aracoma Coal Co.*, 32 FMSHRC 1639, 1640-49 (Dec. 2010), *aff’g* 30 FMSHRC 1160 (Dec. 2008) (ALJ).

Here, the parties have agreed to settle two orders, designated as subject to penalties for “flagrant” violations under the Mine Act, for a reduced total penalty amount. As detailed in the motion for approval of the settlement (Mot. at 3), the Secretary originally proposed a total of \$344,000 in penalties for the two violations. The Judge in his first decision agreed with the Secretary that both violations were flagrant and thus subject to enhanced penalties, but assessed a total penalty amount of \$179,212.

The Commission affirmed the Judge with respect to his flagrant determination and the penalties he assessed as to the first order, but remanded the second order to him for further consideration of whether it qualified as a flagrant violation as well as the operator’s negligence with respect to the violation. The Judge on remand again found the violation to be flagrant, increased the level of negligence from moderate to high, and increased his total penalty assessment for the second order by \$34,643, resulting in a new total assessment of \$213,855.

The Commission granted AmCoal’s petition for discretionary review as to the Judge’s decision on remand, and the operator filed its opening brief. Thereafter, upon the parties’ motion, the Commission delayed further briefing to permit the parties to submit their settlement motion. The primary focus of the proposed settlement is that AmCoal will not further appeal the Commission’s decision as to the first order, while the Secretary will delete the flagrant designation of the second order, and instead it will be subject to a regular penalty assessment of \$11,307.

Thus, AmCoal will be subject to a total penalty of \$112,782 for the two violations. This is approximately a 37% reduction of the penalty the Judge assessed in his initial decision, and a 47% reduction of the penalty the Judge assessed in his remand decision, which is presently the subject of Commission review.

As to whether this proposed reduction in penalties is “fair, reasonable, appropriate under the facts, and protects the public interest,” we take into account the following. First and foremost, AmCoal is foregoing its right under section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), to pursue an appeal of the Commission’s decision upholding the first order as a flagrant violation subject to a greatly enhanced penalty under the Mine Act. Our colleagues, in questioning the reduction in the gravity of the second order and ultimately refusing to approve

the settlement, do not view AmCoal's forfeiture of its right to a court appeal as "adequate consideration" for the reduction in penalties. Slip op. at 8 n.1. We disagree.

Our colleagues cite the Commission's unanimity in its decision as to the first order, but unanimous Commission decisions are hardly immune to court vacatur or even reversal. *See, e.g., Maxim Rebuild Co. v. FMSHRC*, 848 F.3d 737 (6th Cir. 2017), *rev'g* 38 FMSHRC 605 (Apr. 2016); *Noranda Alumina, L.L.C. v. Perez*, 841 F.3d 661 (5th Cir. 2016), *vacating and remanding* 37 FMSHRC 2731 (Dec. 2015); *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161 (D.C. Cir. 2013), *vacating and remanding* 33 FMSHRC 2373 (Oct. 2011); *see also North Shore Mining Co. v. Sec'y of Labor*, 709 F.3d 706 (8th Cir. 2013), *vacating* 34 FMSHRC 663 (Mar. 2012) (ALJ) (petition for discretionary review not granted by Commission). Our colleagues also characterize as "fully[]considered" the Commission's decision with respect to the first order. Slip op. at 8 n.1. We agree, but do not conclude that the thoroughness of our consideration will necessarily inoculate the Commission's decision from attack on appellate court review.

The Commission issued a lengthy opinion that included an extended discussion of the background of the flagrant violation provision and broke it down into its multiple constituent parts in reviewing the Judge's decision on both legal and substantial evidence grounds. The Commission also addressed how the flagrant provision fits into the Mine Act's graduated enforcement scheme, particularly with respect to the Mine Act's designation of some violations as S&S in nature and some violations as attributable to an operator's unwarrantable failure. The thoroughness of the Commission's opinion was largely necessitated by the almost total lack of legislative history of the provision. 38 FMSHRC at 2064-76.

While we are confident our decision would withstand court review, in light of the complexity of the issues raised by the flagrant violation provision and the Judge's reliance on an interpretation of the provision different than that upon which the Secretary tried the case (*see id.* at 2064-65), we understand how the Secretary might not be nearly as sanguine as our colleagues are regarding the result of court review. In our opinion, the public interest is served by this settlement because it establishes as final the decision we reached on the flagrant provision with regard to the first order. Given the prospect of further litigation at both the Commission and court levels following denial of this settlement motion, it is uncertain as to when the Commission's decision will otherwise become final.

The connection between the first and second orders in this case provides further reason to look at the proposed reduction in penalties with respect to the *total* of both penalties, and not just the reduction with respect to the penalty assessed for the violation in the second order. A reduction of 37% or even 47% is not unheard of when the Secretary decides to forgo pursuing a flagrant violation case, as he proposes to do here with respect to the second order. *See id.* at 2064 n.8 (discussing remand of flagrant violation issue in *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013), which resulted in removal of the flagrant violation designation and assessment of a penalty of \$70,000, or a little less than half of the \$142,900 penalty that the Secretary had proposed).

Moreover, recent circumstances militate in favor of approving the settlement of the penalties in this case so as to bring this case to a conclusion. According to MSHA's Mine Data

Retrieval System, the mine in question ceased producing coal in 2016 and had no production at all in 2017. In such circumstances the Commission has approved settlements that resulted in similar reductions in penalties including in a case involving a violation alleged to be S&S and attributable to the operator's unwarrantable failure. *See Big Ridge, Inc.*, 38 FMSHRC 1348, 1349 (June 2016) (approving settlement of case reducing the penalty Secretary was seeking by 42% in instance in which mine had closed); *see also UMWA on behalf of Franks v. Emerald Coal Res., LP*, 38 FMSHRC 935, 937-38 (May 2016) (approving settlement that reduced total penalties assessed by Judge 50% in case where mine had later closed).

Taking an intervening mine closure into account is reasonable because, in determining whether a settlement of penalties is in the public interest, the Commission looks at whether the settlement is consistent with the Mine Act's objectives. *Tazco, Inc.*, 3 FMSHRC 1895, 1896 n.1 (Aug. 1981); *Knox Cty. Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981). The Commission has identified deterrence of operator noncompliance with health and safety standards as one of the objectives of the Mine Act's penalty scheme, and considers it when a reduction in penalties is proposed as part of a settlement. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1865-69 (Aug. 2012).

Where the mine in question has closed, there is much less reason to employ the penalty process as a way to deter operator noncompliance with the Act. That is particularly true in this proceeding, where the violations in question took place more than 10 years ago, and the delay in the resolution of the case is in no way the fault of the parties.

Our colleagues would nevertheless deny the motion for settlement, focusing on the large reduction in the penalty assessed for the second order. As we have stated, analyzing the reduction without considering AmCoal's agreement to pay the full amount of the penalty assessed for the first order is not appropriate here.

Moreover, the settlement amount for the second order, \$11,307, does not substantially diverge from the penalties assessed against AmCoal for violations of section 75.400 during the two years preceding the two violations at issue here, including with respect to violations designated as S&S or attributable to the operator's unwarrantable failure. While our colleagues cite record evidence on the total number of final and non-final citations and orders issued to AmCoal for section 75.400 violations during the two years preceding the subject violations (slip op. at 9), they fail to note that same evidence establishes that, in almost all of those instances, the penalties paid were less than, and in many cases, substantially less than, \$11,307. This includes all but three of the 75 citations and orders designated S&S, and three out of the four previous instances where the AmCoal had paid a penalty for a citation or order attributable to its unwarrantable failure. Tr. II 125-26; Gov't Ex. 1.

In light of the foregoing circumstances of this case, we would serve the public interest by approving the settlement agreement and granting the motion.

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

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

Commissioners Jordan and Cohen, in favor of denying the settlement motion:

After review of the October 30, 2017, Motion to Approve Settlement Agreement, we do not believe that the terms proposed by the parties are consistent with the Mine Act. For the following reasons we would, in our discretion, deny the motion.

The parties characterize the settlement terms as an exchange in which they are “essentially splitting the difference.” Mot. at 6. That is, the Secretary agreed to drop the flagrant designation and to reduce the level of gravity and penalty on the second order in exchange for AmCoal’s acceptance of the first order as determined by the Judge and affirmed by the Commission.

The history of this case undermines the parties’ claim of an exchange. The Secretary has made significant concessions, removing the flagrant designation for the second order and reducing the penalty by around 90%. It is unclear what AmCoal has agreed to give in exchange for the Secretary’s concession. Upon AmCoal’s first appeal of the Judge’s decision, the Commission unanimously affirmed the Judge’s ruling on the first order. 38 FMSHRC 2062, 2076 (Aug. 2016). The first order was not before the Judge on remand and is not currently before the Commission on appeal. Thus, AmCoal has agreed to accept a ruling that is not currently being litigated and whose outcome is not uncertain. Stated another way, AmCoal merely agreed to “accept” what it was already bound to do. If the parties wished to “split[] the difference,” they would start from the \$112,380 assessed by the Judge for the second order, rather than also including in the calculation the \$101,475 penalty assessed by Judge, and affirmed by the Commission, for the first order. As far as the Commission is concerned, the first order assessment is final.¹

Similarly, we are troubled by the parties’ decision to change the gravity of the second order from “serious injury or death” to “lost workdays/restricted duty” as part of the settlement agreement. As noted above, we remanded the second order to the Judge to determine whether the flagrant designation was appropriate and to reevaluate the negligence. However, we explicitly did not remand the Judge’s decision regarding gravity. *Id.* at 2079 n.23. In short, the Judge, as trier of fact, has already made a determination on the level of gravity and the Commission has affirmed it. This change in gravity illustrates another concession by the Secretary unwedded to a concession by the operator.

The end result of the proposed bargain would be an elimination of the flagrant designation and a consequent massive reduction in the penalty amount for the second order. As noted above, the Commission’s authority to review settlements is contained in section 110(k) of the Act. In discussing this provision, Congress noted that excessive “compromising of the amounts of penalties actually paid” served to “reduce[] the effectiveness of the civil penalty as an enforcement tool . . .” S. Rep. No. 95-181, at 44, *reprinted in* Senate Subcommittee on Labor,

¹ We recognize that the operator could seek judicial review of the Commission’s decision regarding the first order and attempt to invalidate the assessment. However, we do not regard foregoing a possible future appeal of a fully-considered, unanimous, final Commission decision as adequate consideration for the drastic reduction of the penalty which the Secretary is proposing in the second order.

Committee on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632 (1978). Congress granted the Commission authority to review settlement agreements in order to guarantee that settlement negotiations occurred transparently, to prevent the Secretary from considering litigation costs and expenses as a reason for settlements, and to ensure that civil penalties were sufficient to “convinc[e] operators to comply with the Act’s requirement.” *Id.* at 632-633. The Commission has previously considered its duty to encourage operators to comply with the Act’s requirements to be a matter of ensuring that the penalties assessed under the Mine Act have a deterrent effect. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1865-69 (Aug. 2012).

We are concerned that a one-sided settlement agreement in which the Secretary concedes a \$101,073 reduction in penalty in exchange for no clear consideration does not further the purposes of the Act. We fear that such a large concession, tethered only to an action that American is already required to take, is insufficient to convince the operator to comply with the Act, and reduces the effectiveness of the civil penalty as an enforcement tool.

Our interest in encouraging compliance is heightened where, as here, the operator has a substantial record of prior violations. As the judge found, in the 15 months preceding the issuance of the order, AmCoal received about 160 citations/orders for alleged violations of the standard at issue in this case. 35 FMSHRC 2208, 2267 (July 2013). Further, at hearing, the Secretary submitted a history of previous violations for 361 final and non-final orders for this kind of violation during the two-year period before the issuance of the order. *Id.* at 2211. This included five allegations of unwarrantable failure within the two months prior to the issuance of the subject order. Gov’t Ex. 1. The operator has repeatedly failed to comply with the cited standard in the past. A large penalty may be necessary to ensure the operator takes actions to prevent these recurring violations.

Finally, we note that the parties’ first argument in support of the settlement is that the Secretary has “unreviewable discretion to delete the ‘flagrant’ designation.” Mot. at 4. In support of this proposition, the parties cite several cases that address different matters that the Commission has found are within the Secretary’s discretion. *See RBK Constr.*, 15 FMSHRC 2099, 2101 (1993) (Secretary’s authority to vacate a citation); *Mechanicsville Concrete*, 18 FMSHRC 877, 879-80 (Jun. 1996) (Secretary’s authority to designate, or not designate, a violation as S&S); and *Energy West Mining Co.*, 18 FMSHRC 565, 576 n.2 (Apr. 1996) (Commissioner Holen concurring in part and dissenting in part) (Secretary’s authority to delete an S&S designation). The parties assert that a flagrant designation is analogous to the situations addressed in those cases. However, all of the cases cited by the parties involve situations in which the Secretary exercised his discretion before the ALJ reached a decision on the merits. Thus, their argument that the Secretary may unilaterally vacate a flagrant violation may not be as clear-cut as the parties would have us believe.

In sum, the support provided by the parties for this proposed settlement agreement is insufficient. As noted above, Congress created section 110(k) in part because it was concerned about the issue of transparency in settlement negotiations. We conclude that the proposed settlement is not justified by the facts asserted to support it, and is not in the public interest. As a result, we would deny the parties' motion and find, in our discretion, that the proposed settlement is insufficiently supported for the reasons outlined above.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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March 5, 2018

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

v.

PRAIRIE STATE GENERATING
COMPANY, LLC

Docket No. LAKE 2017-158
A.C. No. 11-03193-418476

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On February 13, 2017, the Commission received from Prairie State Generating Company, LLC (“Prairie State”) a motion seeking to reopen a penalty assessment that appeared to have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was mailed to Prairie State on August 8, 2016. The proposed assessment became a final order of the Commission on or about September 7, 2016, when it appeared that the operator had not filed a Notice of Contest within 30 days.¹

Prairie State asserts that it timely contested the proposed assessment on September 6, 2016. Prairie State provided copies of USPS tracking documents showing that its contest was mailed on September 6, 2016 and delivered to MSHA’s Arlington, Virginia office on September 8, 2016. On December 16, 2016, the Secretary issued a delinquency notice to the operator. On December 22, 2016, the operator promptly contacted MSHA regarding the alleged delinquency. Prairie State posits that the Secretary may have misplaced the contest after receipt. The Secretary does not oppose the request to reopen nor does he challenge the assertion that the contest was misplaced.

¹ MSHA represents in its December 16, 2016 delinquency letter that proposed assessment became a final order on October 31, 2016. The Secretary has not provided the Commission with any explanation as to why MSHA considered the final order date to be more than four months after the proposed assessment was mailed to the operator. Regardless of this discrepancy in the record, the Secretary does not contest Prairie State’s assertion that it filed its contest on September 6, 2017, prior to any possible final order date.

Having reviewed Prairie State's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator timely contested the proposed assessment. Section 105(a) states that if an operator "fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission." 30 U.S.C. § 815(a). Here, Prairie State notified the Secretary of the contest. This obviates any need to invoke Rule 60(b). Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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March 5, 2018

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

v.

LISBON VALLEY MINING CO., LLC

Docket No. WEST 2017-237-M
A.C. No. 42-02406-419923

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On February 15, 2017, the Commission received from Lisbon Valley Mining Co., LLC (“Lisbon Valley”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on September 13, 2016, and became a final order of the Commission on October 13, 2016. Lisbon Valley asserts that it initially contacted its local MSHA office to contest this matter, rather than properly contesting

with the MSHA Office in Arlington, VA. The operator provided a letter sent to the MSHA's Rocky Mountain District on August 30, 2016 and a series of e-mails dated August 31 to October 24, 2016, to substantiate its assertions. Lisbon Valley claims it only learned about its mistake when it was contacted by MSHA's Office of Assessments on February 8, 2017. Lisbon Valley has not filed any other motions to reopen with the Commission in the last two years and responded immediately upon discovering its mistake. The Secretary does not oppose the request to reopen.

Having reviewed Lisbon Valley's request and the Secretary's response, we determine that the operator mistakenly failed to send its contest to the correct MSHA Office. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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March 5, 2018

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

v.

SAN BENITO SUPPLY

Docket No. WEST 2017-388-M
A.C. No. 04-05653-419793

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On May 2, 2017, the Commission received from San Benito Supply (“San Benito”) a motion seeking to reopen a penalty assessment that appeared to have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On September 19, 2016, San Benito received a proposed penalty assessment from the Secretary. On October 19, 2016, the proposed assessment was deemed a final order of the Commission, when it appeared that the operator had not filed a Notice of Contest within 30 days.¹

San Benito asserts that it timely contested the proposed assessment on October 19, 2016. The operator provided certified mail receipt from the United States Postal Service showing that a parcel was sent on that date. According to a letter dated January 17, 2017, the Secretary the initially believed the contest was untimely because it was not received by MSHA until October 25, 2016. However, on May 19, 2017, the Secretary filed a response to the request to reopen in which he stated that he does not oppose the request to reopen and now concedes that the matter was timely contested. The Secretary suggests that the reopening request be dismissed as moot.

¹ Section 105(a) states that if an operator “fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission.” 30 U.S.C. § 815(a).

We agree with the Secretary. San Benito's contest of the proposed assessment was timely filed. Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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March 5, 2018

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

v.

MARFORK COAL COMPANY

Docket No. WEVA 2016-627
A.C. No. 46-09091-414434

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 29, 2016, the Commission received from Marfork Coal Company (“Marfork”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on July 7, 2016, and became a final order of the Commission on August 8, 2016. Marfork asserts that it mailed the contest in this matter on July 22, 2016 to the appropriate address. The operator included Fed Ex tracking

information confirming this date. The employee charged with mailing the notice of contest inadvertently failed to include the final two pages of the proposed assessment. As a result, the Secretary did not learn that the operator intended to contest eight citations.

Marfork did not learn of the mistake until it received a delinquency notice on September 26, 2016. Marfork avers that employees processing contests will now double check to ensure that all pages are included. Marfork has not filed any other motions to reopen with the Commission in the last two years and responded immediately upon discovering its mistake. The Secretary does not oppose the request to reopen.

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 5, 2018

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

v.

RMS GRAVEL, INC.

Docket No. YORK 2017-36-M
A.C. No. 30-03883-416552

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On November 29, 2016, the Commission received from RMS Gravel, Inc. (“RMS”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on August 10, 2016, and became a final order of the Commission on September 9, 2016. RMS asserts that after the instant citation was issued, the MSHA inspector indicated he would be issuing a revised citation. The operator

thus says it did not challenge the citation, even though it believed that it had a meritorious defense, because it was waiting for the revised citation.

No revised citation was issued, and MSHA issued a delinquency notice on October 25, 2016. RMS did not realize that the citation and assessment were considered final until so advised by counsel following receipt of that notice. The operator also avers that it was unfamiliar with the procedure for MSHA special investigations. RMS has not filed any other motions to reopen with the Commission in the last two years and responded immediately upon discovering its mistake. The Secretary does not oppose the request to reopen, but denies that the MSHA inspector ever indicated that he intended to issue a revised citation.

Having reviewed RMS' request and the Secretary's response, we find that the operator mistakenly believed that the citation at issue would be revised and that it was not necessary to file a contest until that revision was made. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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March 7, 2018

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

v.

MILESTONE MATERIALS DIV /
MATHY CONSTRUCTION

Docket No. LAKE 2017-22-M
A.C. No. 47-03084-415348

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

ORDER

BY THE COMMISSION:

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

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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March 8, 2018

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

v.

ARMSTRONG COAL COMPANY, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. KENT 2015-125
A.C. No. 15-19358-364163

Mine: Parkway Mine

DECISION AND ORDER

Appearances: Thomas J. Motzny, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner

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

Before: Judge Rae

I. STATEMENT OF THE CASE

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor (“the Secretary”) against Armstrong Coal Company, Inc. (“Armstrong” or “Respondent”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d). The sole matter at issue in this proceeding is Order Number 8506201,¹ which was issued under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1).²

A hearing was held in Madisonville, Kentucky, at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence at length and have cited to the testimony, exhibits and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. Based upon the entire record and my observations of the demeanor of the

¹ Five violations were initially at issue in this proceeding, but the parties settled four of them prior to hearing. The settlement was approved by Order dated December 15, 2015.

² The issuance of an order under section 104(d)(1) denotes that the alleged violation was caused by the mine operator’s “unwarrantable failure” to comply with a mandatory health or safety standard and that at the time the violation occurred, the mine had already received a predicate 104(d)(1) citation in the preceding 90 days. 30 U.S.C. § 814(d)(1).

witnesses, I uphold Order Number 8506201 as written and assess a penalty of \$9,122.00 against Armstrong for the reasons set forth below.

II. STIPULATIONS

The parties have entered into the following stipulations:

1. Armstrong is subject to the Mine Act and to the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.
3. Armstrong is an “operator” as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the mine where the order contested in this matter was issued.
4. Armstrong has an effect upon commerce within the meaning of section 4 of the Mine Act, 30 U.S.C. § 803.
5. Armstrong has Mine ID 15-19358.
6. Armstrong mined 1,347,372 tons of coal in 2013 and 1,125,164 tons of coal in 2014.
7. The order in this docket was properly served on Armstrong by a duly authorized representative of the Secretary on the dates stated therein.
8. The penalty proposed in this docket would not affect Armstrong’s ability to remain in business.

Joint Ex. 1; Tr. 7.³

III. FACTUAL BACKGROUND

The one violation at issue in this proceeding was written by MSHA Inspector Matthew Stone⁴ on April 4, 2014 at the Parkway Mine, an underground coal mine operated by Armstrong in Kentucky. Ex. S-1. Inspector Stone had traveled to the mine that day with six other MSHA personnel to conduct an impact inspection, which was prompted by an incident several months earlier where MSHA had received a hazard complaint about respirable dust sampling⁵ at the mine. Tr. 44, 91-92, 134; Ex. S-5. After investigating the complaint, MSHA had issued a citation on January 24, 2014 alleging that Armstrong had knowingly allowed miners to leave their respirable dust sampling devices at a power center instead of wearing them during the shift, in

³ In this decision, the abbreviation “Tr.” refers to the transcript of the hearing. The Secretary’s exhibits are numbered S-1 through S-6 and the Respondent’s exhibits are numbered R-5 through R-8. *See* Tr. 124, 162, 177.

⁴ Stone works for MSHA as a roof control specialist. In his five years at MSHA, he has also worked as a health specialist and as a regular coal mine inspector. He worked in the coal mining industry as a continuous miner operator from 1997 to 2011 before being hired by MSHA in September 2011. Tr. 43, 64.

⁵ Operators of underground coal mines are required to minimize miners’ exposure to harmful respirable dust by, among other things, maintaining the mine’s atmospheric dust concentrations at or below certain levels and conducting dust sampling to ensure compliance. *See* 30 C.F.R. Part 70.

violation of the Secretary's mandatory respirable dust sampling procedures. Tr. 91-92; Ex. S-5. The January 24 citation was issued under section 104(d)(1) of the Mine Act, placing the mine on the "d-chain," which refers to a chain of increasingly severe sanctions the Secretary is authorized to impose on operators under 104(d). Ex. S-5; see *Lodestar Energy, Inc.*, 25 FMSHRC 343, 345-46 (July 2003).⁶ The mine was still on the d-chain at the time of the April 4, 2014 impact inspection.

Inspector Stone and his colleagues arrived at the mine that day to initiate the impact inspection at approximately 3:15 PM, just after the 3:00 production shift (the second shift) had begun. Tr. 44, 72-73, 177. The miners working the second shift had already gone underground because the mine engaged in "hot-seating," a practice in which a lapse in production is avoided by sending the incoming shift directly into the mine before the miners on the preceding shift have exited. Tr. 18-19, 84-85, 100, 113, 141, 227-28. While Stone and the other MSHA inspectors were waiting for a ride to take them underground, they reviewed the pre-shift books and mine maps and Stone issued a citation for a recordkeeping violation. Tr. 46-47, 151-52; Ex. S-6. At about 4:00 PM, the inspection party descended into the mine, joined by Armstrong safety representative Steven J. DeMoss and miner representative Brandon H. Shemwell. Tr. 47, 52, 102.

When Inspector Stone arrived on the #1 unit he traveled directly to the working face to inspect the equipment, starting with the Company No. P2 roof bolting machine, which was blowing dust out of its exhaust system. Tr. 47-49, 102-03, 115, 155. He issued three citations on the roof bolter, including one citation alleging deficiencies in the machine's dust collection system and another alleging the machine had not been subjected to an adequate dust parameter examination at the beginning of the shift to ensure compliance with the dust control requirements set forth in the mine's ventilation plan.⁷ Ex. S-6; Tr. 49-51, 115, 156. He then took air readings and inspected the Company No. M22 continuous mining machine, which revealed no deficiencies. Tr. 51-52.

At around 9:00 PM, Inspector Stone asked Shemwell to get section foreman Billie Q. Hearld. Tr. 21, 57-58, 104. When Hearld arrived, Stone requested the results of the section's fifth hour dust parameter examination. Tr. 23, 52-53, 58, 105, 163. The testimony conflicts as to whether the examination had actually been performed by then, but admittedly, Foreman Hearld did not yet have the results. Tr. 23. After speaking to Hearld and two equipment operators, Inspector Stone felt certain that the fifth hour examination had not been conducted. Tr. 59, 88. Accordingly, he halted production and issued the order that is the subject of this proceeding, Order Number 8506201, which alleges that a fifth hour dust parameter examination was not conducted on either of the mine's two mechanized mining units. Tr. 59-60, 105; Ex. S-1. Stone characterized this violation as an unwarrantable failure to comply with a mandatory safety

⁶ Armstrong had initially contested the predicate citation and associated civil penalty before Administrative Law Judge Margaret Miller in Docket No. KENT 2014-601, but the operator subsequently withdrew its contest.

⁷ Armstrong initially contested both of these violations but ultimately settled them for reduced penalties. *Armstrong Coal Co.*, No. KENT 2014-585 (Apr. 30, 2015) (unpublished ALJ order).

standard. Ex. S-1; Tr. 62-63. The violation was issued as a 104(d)(1) order because of the unwarrantable failure designation and because the mine was already on the d-chain due to the issuance of the predicate 104(d)(1) citation in January. Ex. S-1. The order was written at 9:50 PM. Ex. S-1. Afterward, Foreman Hearld personally checked the dust control parameters for each piece of equipment on the section and recorded the results at the power center. Tr. 24-25, 35-36, 105. Inspector Stone terminated the order at 10:30 PM with notation that the required examination had been conducted and no deficiencies had been found. Tr. 63-64, 76-77, 171-73; Ex. S-1.

IV. LEGAL PRINCIPLES

A. Violation

A mine operator is strictly liable for Mine Act violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The Secretary bears the burden of proving any alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 153 F.3d 1096 (D.C. Cir. 1998).

B. Gravity

Gravity is generally expressed as the degree of seriousness of a violation. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The Secretary assesses gravity in terms of the reasonable likelihood of injury, the severity of the expected injury, the number of persons affected, and whether the violation is S&S. The Commission has pointed out that the focus of the gravity inquiry “is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal*, 18 FMSHRC at 1550; *see also Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that some violations are serious notwithstanding the likelihood of injury, such as a violation of an important safety standard, a violation demonstrating recidivism or defiance on the operator’s part, or a violation that could combine with other conditions to set the stage for disaster).

C. Negligence and Unwarrantable Failure

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Secretary’s regulations, an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). The Secretary defines high negligence as having occurred in connection with a violation when “[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances.” *Id.* § 100.3, Table X. The Commission generally assesses negligence by considering what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the cited regulation would have taken under the circumstances. *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015) (explaining that Commission ALJs “may evaluate

negligence from the starting point of a traditional negligence analysis” rather than adhering to the Secretary’s Part 100 definitions); *accord Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016).

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

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors or mitigating circumstances exist. These factors often include (1) the extent of the violative condition, (2) the length of time the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator’s knowledge of the existence of the violation, (6) the operator’s efforts in abating the violative condition, and (7) whether the operator had been placed on notice prior to the issuance of the violation that greater efforts were necessary for compliance. *See CAM Mining, LLC*, 38 FMSHRC 1903, 1909 (Aug. 2016); *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001).

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

V. FINDINGS AND DISCUSSION

A. Violation of 30 C.F.R. § 75.370(a)(1)

Order Number 8506201 alleges a violation of § 75.370(a)(1), which mandates that each operator of an underground coal mine develop and follow a ventilation plan that is designed to control methane and respirable dust and is suitable to the conditions and mining system at the mine. 30 C.F.R. § 75.370(a)(1). Ventilation plan provisions are enforceable as mandatory safety standards at the mine once they have been approved by the Secretary. *Martin County Coal Corp.*, 28 FMSHRC 247, 254 (May 2006); *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989). In this

case, Armstrong is alleged to have violated a provision of the Parkway Mine's approved ventilation plan requiring dust parameter examinations to be conducted each shift.

A dust parameter examination is an examination of the working section that involves taking air readings, checking for proper placement of ventilation controls, and checking each piece of equipment on the section, including the roof bolters, continuous miners, and feeder, to ensure compliance with the respirable dust control parameters set forth in the ventilation plan. Tr. 24, 54-55, 149-50, 202, 212-13, 231-32; 30 C.F.R. § 75.362(a)(2). The section foreman must certify the results of the examination by date, time, and initials. Tr. 37, 56; 30 C.F.R. § 75.362(g)(2). At the Parkway Mine, the equipment operators are charged with performing the required dust parameter checks on their respective equipment and the results are then conveyed to the section foreman. Tr. 33-34, 172, 239-40. By regulation, a dust parameter examination must be completed during the first hour of each shift. 30 C.F.R. § 75.362(a)(2). An additional dust parameter examination must be completed "every fifth hour of production" pursuant to the mine's ventilation plan, which states, "Fifth hour dust perimeter [sic] checks will be made within the fifth hour of production and recorded on site." Ex. S-2 at 21, 22, 25. This provision was added to the ventilation plan due to the Parkway Mine's history of noncompliant respirable dust samples. Tr. 53.

According to the Secretary, the phrase "fifth hour of production" refers to the fifth hour of the production shift, meaning that the fifth hour dust examination for the 3:00 PM production shift should be conducted between 8:00 and 9:00 PM. Sec'y Br. 6-11; *see* Tr. 86. Inspector Stone testified that when he asked Foreman Hearld for the results of this exam, Hearld admitted it had not been completed even though he knew it was past time to do so. Tr. 53, 58. Stone said he also spoke to a roof bolter and miner operator who told him the fifth hour checks had not been conducted. Tr. 59, 88. In the order, he alleged:

The approved ventilation plan is not being followed on the #1 unit (MMU 001-0/002-0). The mine operator has failed to conduct the fifth hour dust parameter examination to assure compliance of the respirable dust controls specified in the mine ventilation plan. ... When ask[ed] to provide proof of the fifth hour dust parameter examination section foreman Billy Hearld admitted he did not conduct the examination.

Ex. S-1.

Armstrong argues that all the credible evidence proves the required fifth hour checks were, in fact, completed by the equipment operators before Stone asked about them, and therefore no violation occurred. Resp. Br. 11-14. Armstrong also argues that the deadline to complete the checks had not yet passed because it was not the "fifth hour of production." *Id.* at 10-11. According to Armstrong, this means five hours of *actual* production; any down time that has occurred during the shift does not count toward the five hours. *Id.* at 6-10. When Inspector Stone asked for the dust checks, five hours of actual production had not yet taken place because the shift had not begun producing coal until 3:40 PM and the equipment had been downed for at least an hour due to the inspection. Tr. 141-48; Ex. R-6; Ex. R-7.

I reject Armstrong’s interpretation of “fifth hour of production” as illogical and not supported by the evidence. DeMoss was the only witness whose testimony supported this interpretation. He stated that the equipment operators keep running their equipment until they reach five full hours of production before stopping to conduct dust parameter checks. Tr. 148. But this would require each equipment operator to independently track production and stoppage times during the shift in order to determine when to conduct his checks. DeMoss could not explain how he expected rank-and-file miners to accomplish this task given that there is no way for each individual equipment operator to know if another piece of equipment has been taken out of service during the shift and for how long. *See* Tr. 181-82. Also, if each equipment operator were individually responsible for deciding when to perform his checks, the timing of the checks would vary between different pieces of equipment and between shifts, which would be chaotic and unenforceable. Furthermore, all the other evidence reflecting the actual practice at the mine contradicts DeMoss’s account that the fifth hour is calculated by tracking production time and subtracting down time. Roof bolter Joshua Q. Divine testified he performs the fifth hour checks five hours after the first hour checks without tracking production time. Tr. 207. Miner operator Phillip W. Keeton said he performs his checks around 8:00 PM when working the 3:00 PM shift, regardless of down time or how long the miner has been running. Tr. 245-47. Unit mechanic John P. Wilson, who performs dust checks on the feeder, also said he conducts his checks between 8:00 and 9:00 PM, and Foreman Hearld agreed that the fifth hour falls “[a]round 8:00,” indicating they are simply counting the hours from the beginning of the shift. Tr. 23, 213. Bolstering this testimony, instruction cards distributed by Armstrong to equipment operators at the Parkway Mine state that dust parameter checks will be conducted on the fifth hour “of each *shift*.” Ex. S-5 (emphasis added).

The Secretary’s interpretation of “fifth hour of production” as referring to the fifth hour of the shift is consistent with the evidence discussed above reflecting the actual practice at the mine. It is also consistent with other examination regulations, which typically require examinations to be conducted within a specific, determinate time period. *See, e.g.*, 30 C.F.R. §§ 75.360(a)(1), 75.364(a), 75.512-2. Further, requiring dust checks to be completed during the fifth hour of the shift, rather than the fifth hour of actual production, promotes safety by ensuring that checks will occur at regular intervals at the beginning and middle of each production shift.

Based on the analysis above, I find that the phrase “fifth hour of production” as used in the Parkway Mine’s ventilation plan clearly refers to the fifth hour of the production shift because it would be unreasonable to interpret it any other way. Because the language is clear, it should be enforced as written. *See Hecla Ltd.*, 38 FMSHRC 2117, 2122 (Aug. 2016) (stating rule that clear regulations are usually enforced as written); *Martin County Coal*, 28 FMSHRC at 255 (applying law governing regulatory interpretation to plan provisions). Even if there were room for doubt, the Secretary’s interpretation of an ambiguous regulatory provision is entitled to deference unless it is unreasonable, plainly erroneous, inconsistent with the regulation, or does not reflect the agency’s fair and considered judgment. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, 132 S. Ct. 2156, 2166 (2012); *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997); *Hecla*, 38 FMSHRC at 2122. For the reasons discussed above, I find that the Secretary’s interpretation of “fifth hour of production” as referring to the fifth hour of the shift is reasonable and serves the overall safety-promoting purposes of the Mine Act. Accordingly, it is entitled to deference.

Because any person familiar with the mining industry and Mine Act would reach the same interpretation, I also reject Armstrong's argument that it was not on notice of this interpretation.

Because fifth hour checks must be conducted during the fifth hour of the shift, they should have been completed between 8:00 and 9:00 PM on the day of the inspection. A preponderance of the evidence shows they were not timely completed.

Although Foreman Hearld, who was called as an adverse witness by the Secretary, said that the equipment operators had conducted the checks by the time Inspector Stone asked for the results around 9:00 PM, (Tr. 33-34), his testimony on this point was unconvincing. The only reason he could provide for believing the equipment operators had performed the checks was that it was their job to do so. Tr. 34-35. He admitted he did not actually ask each equipment operator whether the checks had been performed. Tr. 24-25. Moreover, he responded to Stone's inquiry about the dust parameter examination by leaving and performing the required checks on each piece of equipment himself. Tr. 24-25, 35. There would have been no reason for him to redo these checks if the equipment operators had already completed them; his actions indicate they had not.

DeMoss's testimony was also unconvincing. Although he insisted the checks had been completed, incongruously, he also testified that it was not time to do them yet because it was not the fifth hour of production. Tr. 183-84. When pressed to explain why the equipment operators would have done the checks if it was not time yet, DeMoss at first said he did not understand the question, then said the equipment operators must have been nervous because MSHA inspectors were present, but finally admitted he did not know if the checks had actually been completed after all. Tr. 184-85, 189. His testimony struck me as self-serving and manufactured, and I decline to credit it.

Armstrong called three rank-and-file equipment operators as witnesses, but each of them stopped short of affirmatively stating that he had completed his dust checks the night of the inspection. Wilson testified, "I don't recall exactly doing that." Tr. 213. Keeton also said he did not specifically remember performing the checks. Tr. 238. Divine said he was sure he would have done them, but it was clear he was speaking generally and had no specific memory of the night in question. Tr. 204-05, 208. Overall, these witnesses' testimony was vague and seemed evasive and coached at times.

In addition, the company witnesses offered discrepant accounts of how dust parameter checks were usually recorded on the section. Divine testified that no one wrote down the results of their checks, while Keeton testified that he wrote down his results to give to the foreman, and DeMoss asserted the results were relayed to the foreman by memory but later admitted to having testified at deposition that the equipment operators were supposed to record the results on pieces of paper. Tr. 188-89, 207, 236. These discrepancies suggest the mine had no established procedure for ensuring that dust parameter checks were being completed.

The Secretary presented testimony from Justin Greenwell, a former roof bolter for Armstrong, that the checks were not being completed at all. Greenwell had been working on the cited section for about a year prior to the inspection but said he had never conducted or even

heard of dust parameter checks before Inspector Stone raised the subject. Tr. 116-17. Corroborating this assertion, Foreman Hearld invoked his Fifth Amendment right not to respond when asked whether it was his regular practice to conduct and certify fifth hour dust parameter examinations, which raises an adverse inference that it was not. Tr. 30-32, 38. The implication that Armstrong failed to regularly conduct dust parameter examinations is also consistent with the ample evidence of ongoing dust control problems at this mine. As previously noted, the requirement to perform fifth hour dust checks was added to the ventilation plan due to the mine's history of noncompliance with respirable dust standards, and the April 4 inspection was spurred by the mine's recent receipt of a citation for falsifying dust samples. Tr. 53, 91-92; Ex. S-5. Shemwell, a scoop operator on the cited section, described witnessing problems such as dusty roads and missing ventilation curtains and said that "we didn't really have any dust control" until after the inspection. Tr. 106-08. At the beginning of the inspection, Inspector Stone had observed a roof bolter blowing dust out of its exhaust system and had issued citations for a deficiency in the machine's dust collection system and an inadequate first hour dust parameter exam. Tr. 47-51; Ex. S-6. Greenwell was one of the miners operating this roof bolter and testified that when he arrived on the section that day he had raised concerns that the dust collection box was full, but Foreman Hearld had instructed him to continue bolting rather than stopping to clean it.⁸ Tr. 114. The foregoing evidence reveals a lax attitude toward dust control at this mine, and against this backdrop, I credit Greenwell's testimony that he worked at the mine for a year without ever being asked for dust parameter results.

After considering all the evidence, I find that the fifth hour dust parameter checks had not been completed by the time Inspector Stone asked for the results. I further find that the evidence indicates Armstrong regularly failed to perform these checks. This conduct violated the mine's ventilation plan and § 75.370(a)(1).

B. Gravity

Inspector Stone assessed this violation as unlikely to cause injury and non-S&S, but capable of causing permanently disabling injuries to twelve miners. Ex. S-1; Tr. 60-62. He explained that failure to conduct dust parameter examinations prevents the mine operator from knowing if any ventilation or dust control problems exist that need to be corrected. Tr. 61.

Armstrong's failure to conduct a fifth hour dust parameter examination created a hazard that miners working on the unit would be exposed to unrecognized, unaddressed dust control deficiencies. This was an active working section where coal was being drilled from rock in an enclosed underground environment, so dust control deficiencies would have exposed miners to airborne respirable rock drill dust containing coal and silica particles. These particles are harmful

⁸ Armstrong attempted to impeach Greenwell's credibility by introducing testimony that the dust collection system on the roof bolter appeared to have been "sabotaged" by a knife slit and that "it just seemed like Greenwell had it out for" Hearld. Tr. 215-16, 244. The record does not support these allegations. Greenwell came across as a credible witness whose testimony was corroborated by the other evidence. He had no motive to sabotage his own machine or concoct allegations against mine management, especially considering that he no longer worked in the mining industry at that time of the hearing. Tr. 112-13. He had voluntarily quit his job with Armstrong after discovering at age 28 that he had black lung. Tr. 118.

when inhaled, particularly silica particles, which become embedded in the lung tissue and cause scarring over time. Tr. 63. Armstrong argues that “conditions on the section were good,” noting that no actual dust control problems were identified when the fifth hour checks were finally conducted (which was the reason Inspector Stone marked the probability of injury as “unlikely”). Resp. Br. 15-16; Resp. Reply Br. 5; Ex. S-3 at 8. Armstrong also suggests that a dust parameter examination was unwarranted because so little production took place during the shift in question. Resp. Br. 15-16; Tr. 140. But, as discussed above, the evidence is clear that Armstrong habitually failed to conduct dust parameter checks regardless of production, not just on this one occasion. The fifth hour dust parameter examination requirement had been added to the mine’s ventilation plan due to its history of dust control problems, as exemplified by Inspector Stone’s issuance of two citations for dust control deficiencies on a roof bolting machine earlier in the inspection and the mine’s receipt of a predicate 104(d)(1) citation several months earlier for falsification of dust samples. Ex. S-5; Ex. S-6. If normal mining operations had continued without issuance of Order Number 8506201, any further dust control problems that arose on the cited section would not have been promptly identified and addressed due to Armstrong’s failure to conduct the fifth hour checks. I find that this failure posed a hazard that miners would develop permanently disabling injuries due to respirable dust exposure.

Armstrong disputes that the hazard would affect all twelve miners on the section because this was a split-air unit, meaning that a dust control problem on one side of the unit would not necessarily impact the other. Resp. Br. 16; *see* Tr. 62, 78, 175-76, 206. However, a fifth hour dust parameter examination was not conducted on either side of the unit, exposing the miners on both sides to the hazard. Tr. 83-84.

Because this violation exposed all the miners on the section to permanently disabling injuries from exposure to respirable dust, and because of the importance of dust control in underground coal mines, I find that this was a serious violation.

C. Negligence and Unwarrantable Failure

The Secretary asserts that this violation involved high negligence and was an unwarrantable failure to comply with the cited safety standard because Armstrong was aware of the requirement to conduct fifth hour dust parameter examinations as mandated in the ventilation plan, yet regularly failed to do so, posing a serious risk to miners’ health. Sec’y Br. 11-15. Inspector Stone testified he designated the violation as an unwarrantable failure due to “the history of this section” and “the issues encountered at the start of the shift,” namely, the fact that he had observed a roof bolting machine discharging rock drill dust from its exhaust system and cited it for an inadequate first hour dust parameter examination. Tr. 62-63.

Armstrong contests the Secretary’s allegations of high negligence and unwarrantable failure, asserting that the violation presented no danger to miners and that Inspector Stone failed to consider mitigating circumstances raised during the inspection, including that it was not Foreman Hearld’s responsibility to do the dust checks and that he obtained the results quickly after the inspector asked for them. Resp. Br. 14-17; Resp. Reply Br. 5-6.

Notice of Need for Greater Compliance Efforts

An operator's history of past similar violations or other specific warnings from MSHA is relevant to the unwarrantable failure analysis to the extent the past violations and warnings placed the operator on notice that greater efforts were necessary for compliance with the cited safety standard.

The fifth hour dust parameter examination requirement that is the subject of this proceeding was added to this mine's ventilation plan due to its history of dust control problems. Tr. 53. Less than 90 days before the inspection, Armstrong received a 104(d)(1) citation for falsifying dust samples. Ex. S-5. The mine's violation history data submitted by the Secretary reveals numerous other dust control violations received in the fifteen months preceding the inspection, including two violations of the dust parameter examination regulation. Ex. S-4. Just a few hours before Order Number 8506201 was written, Inspector Stone issued a citation for an inadequate first hour dust parameter examination. Ex. S-6. The prior violation was written on the same section during the same shift and issued to the same person, DeMoss. Ex. S-1; Ex. S-6. I find that this mine's history and the citation issued a few hours earlier served to place Armstrong on notice prior to the issuance of this violation of the need to make greater efforts to comply with the dust parameter examination requirement.

Knowledge of Violation; Obviousness; Abatement Efforts

Knowledge of a violation is established where the operator knew or reasonably should have known of the violation. *Coal River Mining, LLC*, 32 FMSHRC 82, 95 (Feb. 2010). The knowledge or negligence of an agent may be imputed to the operator. *Excel Mining, LLC*, 37 FMSHRC 459, 467-68 (Mar. 2015); *Martin Marietta Aggregates*, 22 FMSHRC 633 (May 2000).

Foreman Hearld was acting as Armstrong's agent at the time of the violation, as he was the person charged with responsibility for the operation of the cited section and for supervising the miners working there. *See* 30 U.S.C. § 802(e) (defining "agent"); *Martin Marietta*, 22 FMSHRC at 637-38. In this capacity, he was responsible for making sure that dust parameter checks were completed within the fifth hour of the shift and recorded onsite in accordance with the ventilation plan. Ex. S-2 at 25. He knew he was supposed to record the results of the checks at the power center and certify them by date, time, and initials. Tr. 37. He conceded that the checks should have been done "[a]round 8:00" and recorded by 9:00 PM, but they were not. Tr. 23-24. Hearld said "[t]here was a lot going on" the night of the inspection. Tr. 30. But it remained incumbent on him, as the foreman, to make sure the required checks were completed. It should have been obvious to him that the checks had not been done because none of the equipment operators had communicated the results to him and because he should have already attempted to collect the data so he could record and certify it. Instead, he completely ignored the fifth hour examination requirement until Inspector Stone asked about it.

Although Armstrong notes that Hearld obtained the dust parameter data quickly after being asked to do so, abatement efforts undertaken after the issuance of the violation are not relevant to the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009).

I find that Hearld had knowledge of this violation yet failed to abate it. Because he was Armstrong's agent, his knowledge and negligent conduct in failing to abate the violation are imputable to the company.

Duration of Violation; Extensiveness; Degree of Danger Posed

Although the fifth hour dust parameter checks were less than an hour overdue when Inspector Stone issued the order, the underlying violative conduct was Armstrong's failure to ensure these checks were being completed. As discussed above, the evidence shows that Armstrong regularly failed to conduct the fifth hour checks and that this conduct was part of an ongoing pattern of laxness toward dust control on the part of mine management. Thus, this violation arises out of violative conduct of longstanding duration.

This violation was also extensive in that it affected the entire section and all of the miners working there, as the required examination had not been conducted on either of the section's two mechanized mining units or on any of the equipment.

I further find that this violation posed a high degree of danger. As discussed above, failure to perform the dust parameter examination exposed miners to permanently disabling injuries from exposure to respirable dust that causes diseases such as silicosis, the prevention of which was one of Congress' fundamental goals when it passed the Mine Act. *See U.S. Steel Mining Co.*, 8 FMSHRC 1274, 1278-80 (Sept. 1986).

Conclusions

Based on the factors discussed above, particularly that a supervisor knew of this violation yet failed to abate it, that it was Armstrong's practice not to comply with the cited dust control requirement, and that Armstrong's conduct posed a high degree of danger to miners, I find that Armstrong engaged in aggravated conduct constituting more than ordinary negligence. Because a predicate 104(d)(1) citation was issued less than 90 days earlier, this violation was properly issued as a 104(d)(1) order.

Based on the same factors, I also find that Armstrong's negligence was high.

VI. PENALTY

A. Legal Principles

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:

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

30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA's Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Am. Coal Co.*, 38 FMSHRC 1987, 1992-93 (Aug. 2016); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247, 266 (May 2006).

B. Penalty Assessment

The Secretary asks me to assess a penalty of \$9,122.00 for this violation. This proposed penalty was calculated using the Secretary's "regular assessment" formula set forth in 30 C.F.R. § 100.3.

The Secretary has submitted a violation history form showing that the Parkway Mine received 470 violations from MSHA that became final during the fifteen months preceding the issuance of this order. Ex. S-4. I find Armstrong's violation history to be moderate considering the large size of its business. The parties have stipulated that the proposed penalty will not affect Armstrong's ability to remain in business. Joint Ex. 1. My findings regarding gravity and negligence are discussed at length above in the body of my decision. The evidence reflects that Armstrong demonstrated good faith in achieving rapid compliance after notification of the violation by promptly conducting the required dust parameter checks. Tr. 24-25, 105, 171; Ex. S-1.

After considering the six statutory penalty criteria, I assess a penalty of \$9,122.00 for this violation.

ORDER

Armstrong Coal Company, Inc. is hereby **ORDERED** to pay a penalty of \$9,122.00 within thirty (30) days of the date of this Decision and Order.⁹

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

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⁹ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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March 14, 2018

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

v.

TEXAS ARCHITECTURAL
AGGREGATE, INC.

Docket No. CENT 2016-406-M
A.C. No. 41-01001-410598

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 17, 2016, the Commission received from Texas Architectural Aggregate, Inc. (“TAA”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On August 15, 2016, the Chief Administrative Law Judge issued an Order to Show Cause in response to TAA’s perceived failure to answer the Secretary of Labor’s June 21, 2016 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on September 15, 2016, when it appeared that the operator had not filed an answer within 31 days.

TAA asserts that multiple citations issued during a single inspection were separated into two separate dockets. The operator believed that it had properly contested the instant matter when it filed its contest regarding the other docket. TAA claims that it never received the Show Cause Order and only learned about the default via an e-mail from Secretary’s counsel dated September 30, 2016. TAA has not filed any other motions to reopen with the Commission in the last two years and responded quickly upon discovering its mistake. The Secretary does not oppose the request to reopen.

The Judge’s jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision’s issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge’s order here has become a final decision of the Commission.

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

Having reviewed TAA’s request and the Secretary’s response, we find that the operator mistakenly believed that it had filed a contest in this matter and allowed the assessment to become final. TAA took prompt action after discovering its error. In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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March 14, 2018

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

v.

REVELATION ENERGY, LLC

Docket No. KENT 2016-310
A.C. No. 15-19437-405257

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 20, 2016, the Commission received from Revelation Energy, LLC (“Revelation”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it. The Secretary did not oppose the request.

On June 9, 2016, the Chief Administrative Law Judge issued an Order to Show Cause in response to Revelation’s perceived failure to answer the Secretary of Labor’s April 26, 2016 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on July 11, 2016, when it appeared that the operator had not filed an answer within 31 days.

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

The party seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely contest the penalty or answer the Secretary’s petition, and any delays in filing for reopening. *See Dynamic Energy, Inc.*, 39 FMSHRC ___, 2017 WL 3581088 (Aug. 3, 2017); *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010); *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3345 (Nov. 2013).

We find that Revelation has failed to meet this burden here. In this case, the Secretary issued an assessment on April 26, 2016. Revelation never responded to that petition. The only explanation that the operator provided for this failure was that “Docket # KENT 2016-0310 was overlooked by our office and the Answer and Notice were never sent. This was an oversight on our part . . .” This – without any effort to explain the operator’s serial failures or to address their root causes – is at best an admission that Revelation’s failure to timely file its response to the petition was the result of an inadequate internal processing system, which is not a basis for reopening an assessment. *See Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008).

We note that the operator has filed three other requests to reopen in the last two years. In all of those instances, the operator’s excuse for its failure to respond to the petitions was that there were problems with or oversights made by office staff. That empty excuse cannot be used repeatedly without elaboration or any effort to address what appears to be a pattern of neglect and disregard for Commission Orders. Ultimately, the operator must be accountable for the actions taken, or not taken, by its office employees.

Because of Revelation’s failure to respond to the petition, the Chief Administrative Law Judge issued a Show Cause Order on June 9, 2016, ordering the operator to explain its lack of response within 31 days or face default. The operator did not respond in time. In fact, the operator did not respond to the Show Cause Order until September 20, 2016, 103 days after it was issued and more than 10 weeks after the operator’s failure to respond to the Order had resulted in its default. Beyond the inadequate explanation for the delay in responding to the petition, Revelation provided no explanation whatsoever for why it was over two months late in responding to the Show Cause Order.

As a result, we find that Revelation failed to meet its burden of establishing good cause for failing to file a timely contest of the penalty petition or to comply with the deadline contained in the Order to Show Cause. Accordingly, we find that the operator has failed to demonstrate an entitlement to extraordinary relief, and thus we deny Revelation's motion.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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March 14, 2018

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

v.

REVELATION ENERGY, LLC

Docket No. KENT 2016-311
A.C. No. 15-19737-405260

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 20, 2016, the Commission received from Revelation Energy, LLC (“Revelation”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On July 5, 2016, the Chief Administrative Law Judge issued an Order to Show Cause in response to Revelation’s perceived failure to answer the Secretary of Labor’s May 18, 2016 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on August 5, 2016, when it appeared that the operator had not filed an answer within 31 days.

Revelation asserts that it mailed its Answer and Notice of Contest on June 16, 2016, but due to a clerical error included the docket number “KENT 2016-0331” instead of “KENT 2016-0311.” The Secretary does not oppose the request to reopen.

Having reviewed Revelation's request and the Secretary's response, we conclude that the operator was not in default under the terms of the Order to Show Cause because it filed a timely response to the penalty petition. *See Eagle Creek Mining, LLC*, 35 FMSHRC 781, 782 (Apr. 2013). This renders the Order to Show Cause and Default Order a nullity. Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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March 14, 2018

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

v.

PEABODY TWENTYMILE MINING,
LLC

Docket No. WEST 2016-696
A.C. No. 05-03836-413724

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 7, 2016, the Commission received from Peabody Twentymile Mining, LLC (“Twentymile”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment became a final order of the Commission on September 2, 2016. Twentymile asserts that the employee responsible for processing assessments sent payments for the citations the operator did not intend to contest, but inadvertently failed to

forward the contests of the other penalties to the MSHA office in Arlington, VA. The employee had previously filed contests in the proper manner and is no longer employed by Twentymile. On September 6, 2016, the operator learned from MSHA's Mine Data Retrieval Site that the citations had not been properly contested and filed the request to reopen the next day. The Secretary does not oppose the request to reopen.

Having reviewed Twentymile's request and the Secretary's response, we find that the operator mistakenly failed to file the contest with the appropriate MSHA Office. However, the operator recognized its mistake just a few days after the citations became final and quickly filed the instant request to reopen. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 14, 2018

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

v.

SA RECYCLING

Docket No. WEST 2017-466-M
A.C. No. 02-00150-422734

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On May 30, 2017, the Commission received from SA Recycling a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on December 12, 2016, and became a final order of the Commission on January 11, 2017. The Secretary mailed a delinquency letter to the operator on February 27, 2017. SA Recycling asserts that its failure to

timely respond to the assessment was “an unusual, one time and unanticipated office procedure.” SA Recycling’s facility manager failed to notify the Director of Safety following the MSHA inspection and also failed to forward the assessment. The operator has since misplaced the assessment. The operator claims that its site manager was later reprimanded for this failure and the operator made changes to its office procedures to ensure that the problem does not recur. The Safety Director claims she only received the delinquency letter on April 17, 2017 and immediately contacted MSHA regarding this matter. The operator asserts that it first attempted to receive a new copy of the assessment and underlying citations before filing the request to reopen. SA Recycling has not filed any other motions to reopen with the Commission in the last two years. The Secretary does not oppose the request to reopen.

Having reviewed SA Recycling’s request and the Secretary’s response, we find that the operator inadvertently failed to ensure that the assessment reached the Director of Safety. The responsible party has been reprimanded and the office procedures have been changed. SA Recycling has adequately explained why it did not respond to the Secretary’s delinquency letter within 30 days. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 14, 2018

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

v.

ALVIN J. COLEMAN & SONS, INC.

Docket No. YORK 2016-142-M
A.C. No. 27-00050-416819

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 20, 2016, the Commission received from Alvin J. Coleman & Sons, Inc. (“Coleman”) a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on August 24, 2016, and would have become a final order of the Commission on September 23, 2016. On September 20, 2016, before the date on which the order would become final, the operator filed a request to reopen. In that request, the operator stated that it initially contested the citation and intended to contest the assessment but the office had mistakenly paid the assessed penalty. The Secretary does not oppose the request to reopen.

Having reviewed conclude request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator timely contested the proposed assessment. Section 105(a) states that if an operator "fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission." 30 U.S.C. § 815(a). Here, Coleman notified the Secretary of the contest. This obviates any need to invoke Rule 60(b). Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 8, 2018

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

v.

ARMSTRONG COAL COMPANY, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. KENT 2015-125
A.C. No. 15-19358-364163

Mine: Parkway Mine

DECISION AND ORDER

Appearances: Thomas J. Motzny, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner

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

Before: Judge Rae

I. STATEMENT OF THE CASE

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor (“the Secretary”) against Armstrong Coal Company, Inc. (“Armstrong” or “Respondent”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d). The sole matter at issue in this proceeding is Order Number 8506201,¹ which was issued under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1).²

A hearing was held in Madisonville, Kentucky, at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence at length and have cited to the testimony, exhibits and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. Based upon the entire record and my observations of the

¹ Five violations were initially at issue in this proceeding, but the parties settled four of them prior to hearing. The settlement was approved by Order dated December 15, 2015.

² The issuance of an order under section 104(d)(1) denotes that the alleged violation was caused by the mine operator’s “unwarrantable failure” to comply with a mandatory health or safety standard and that at the time the violation occurred, the mine had already received a predicate 104(d)(1) citation in the preceding 90 days. 30 U.S.C. § 814(d)(1).

demeanor of the witnesses, I uphold Order Number 8506201 as written and assess a penalty of \$9,122.00 against Armstrong for the reasons set forth below.

II. STIPULATIONS

The parties have entered into the following stipulations:

1. Armstrong is subject to the Mine Act and to the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.
3. Armstrong is an “operator” as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the mine where the order contested in this matter was issued.
4. Armstrong has an effect upon commerce within the meaning of section 4 of the Mine Act, 30 U.S.C. § 803.
5. Armstrong has Mine ID 15-19358.
6. Armstrong mined 1,347,372 tons of coal in 2013 and 1,125,164 tons of coal in 2014.
7. The order in this docket was properly served on Armstrong by a duly authorized representative of the Secretary on the dates stated therein.
8. The penalty proposed in this docket would not affect Armstrong’s ability to remain in business.

Joint Ex. 1; Tr. 7.³

III. FACTUAL BACKGROUND

The one violation at issue in this proceeding was written by MSHA Inspector Matthew Stone⁴ on April 4, 2014 at the Parkway Mine, an underground coal mine operated by Armstrong in Kentucky. Ex. S-1. Inspector Stone had traveled to the mine that day with six other MSHA personnel to conduct an impact inspection, which was prompted by an incident several months earlier where MSHA had received a hazard complaint about respirable dust sampling⁵ at the mine. Tr. 44, 91-92, 134; Ex. S-5. After investigating the complaint, MSHA had issued a citation on January 24, 2014 alleging that Armstrong had knowingly allowed miners to leave their respirable dust sampling devices at a power center instead of wearing them during the shift,

³ In this decision, the abbreviation “Tr.” refers to the transcript of the hearing. The Secretary’s exhibits are numbered S-1 through S-6 and the Respondent’s exhibits are numbered R-5 through R-8. *See* Tr. 124, 162, 177.

⁴ Stone works for MSHA as a roof control specialist. In his five years at MSHA, he has also worked as a health specialist and as a regular coal mine inspector. He worked in the coal mining industry as a continuous miner operator from 1997 to 2011 before being hired by MSHA in September 2011. Tr. 43, 64.

⁵ Operators of underground coal mines are required to minimize miners’ exposure to harmful respirable dust by, among other things, maintaining the mine’s atmospheric dust concentrations at or below certain levels and conducting dust sampling to ensure compliance. *See* 30 C.F.R. Part 70.

in violation of the Secretary's mandatory respirable dust sampling procedures. Tr. 91-92; Ex. S-5. The January 24 citation was issued under section 104(d)(1) of the Mine Act, placing the mine on the "d-chain," which refers to a chain of increasingly severe sanctions the Secretary is authorized to impose on operators under 104(d). Ex. S-5; *see Lodestar Energy, Inc.*, 25 FMSHRC 343, 345-46 (July 2003).⁶ The mine was still on the d-chain at the time of the April 4, 2014 impact inspection.

Inspector Stone and his colleagues arrived at the mine that day to initiate the impact inspection at approximately 3:15 PM, just after the 3:00 production shift (the second shift) had begun. Tr. 44, 72-73, 177. The miners working the second shift had already gone underground because the mine engaged in "hot-seating," a practice in which a lapse in production is avoided by sending the incoming shift directly into the mine before the miners on the preceding shift have exited. Tr. 18-19, 84-85, 100, 113, 141, 227-28. While Stone and the other MSHA inspectors were waiting for a ride to take them underground, they reviewed the pre-shift books and mine maps and Stone issued a citation for a recordkeeping violation. Tr. 46-47, 151-52; Ex. S-6. At about 4:00 PM, the inspection party descended into the mine, joined by Armstrong safety representative Steven J. DeMoss and miner representative Brandon H. Shemwell. Tr. 47, 52, 102.

When Inspector Stone arrived on the #1 unit he traveled directly to the working face to inspect the equipment, starting with the Company No. P2 roof bolting machine, which was blowing dust out of its exhaust system. Tr. 47-49, 102-03, 115, 155. He issued three citations on the roof bolter, including one citation alleging deficiencies in the machine's dust collection system and another alleging the machine had not been subjected to an adequate dust parameter examination at the beginning of the shift to ensure compliance with the dust control requirements set forth in the mine's ventilation plan.⁷ Ex. S-6; Tr. 49-51, 115, 156. He then took air readings and inspected the Company No. M22 continuous mining machine, which revealed no deficiencies. Tr. 51-52.

At around 9:00 PM, Inspector Stone asked Shemwell to get section foreman Billie Q. Hearld. Tr. 21, 57-58, 104. When Hearld arrived, Stone requested the results of the section's fifth hour dust parameter examination. Tr. 23, 52-53, 58, 105, 163. The testimony conflicts as to whether the examination had actually been performed by then, but admittedly, Foreman Hearld did not yet have the results. Tr. 23. After speaking to Hearld and two equipment operators, Inspector Stone felt certain that the fifth hour examination had not been conducted. Tr. 59, 88. Accordingly, he halted production and issued the order that is the subject of this proceeding, Order Number 8506201, which alleges that a fifth hour dust parameter examination was not conducted on either of the mine's two mechanized mining units. Tr. 59-60, 105; Ex. S-1. Stone characterized this violation as an unwarrantable failure to comply with a mandatory safety

⁶ Armstrong had initially contested the predicate citation and associated civil penalty before Administrative Law Judge Margaret Miller in Docket No. KENT 2014-601, but the operator subsequently withdrew its contest.

⁷ Armstrong initially contested both of these violations but ultimately settled them for reduced penalties. *Armstrong Coal Co.*, No. KENT 2014-585 (Apr. 30, 2015) (unpublished ALJ order).

standard. Ex. S-1; Tr. 62-63. The violation was issued as a 104(d)(1) order because of the unwarrantable failure designation and because the mine was already on the d-chain due to the issuance of the predicate 104(d)(1) citation in January. Ex. S-1. The order was written at 9:50 PM. Ex. S-1. Afterward, Foreman Hearld personally checked the dust control parameters for each piece of equipment on the section and recorded the results at the power center. Tr. 24-25, 35-36, 105. Inspector Stone terminated the order at 10:30 PM with notation that the required examination had been conducted and no deficiencies had been found. Tr. 63-64, 76-77, 171-73; Ex. S-1.

IV. LEGAL PRINCIPLES

A. Violation

A mine operator is strictly liable for Mine Act violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The Secretary bears the burden of proving any alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 153 F.3d 1096 (D.C. Cir. 1998).

B. Gravity

Gravity is generally expressed as the degree of seriousness of a violation. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The Secretary assesses gravity in terms of the reasonable likelihood of injury, the severity of the expected injury, the number of persons affected, and whether the violation is S&S. The Commission has pointed out that the focus of the gravity inquiry “is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal*, 18 FMSHRC at 1550; *see also Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that some violations are serious notwithstanding the likelihood of injury, such as a violation of an important safety standard, a violation demonstrating recidivism or defiance on the operator’s part, or a violation that could combine with other conditions to set the stage for disaster).

C. Negligence and Unwarrantable Failure

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Secretary’s regulations, an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). The Secretary defines high negligence as having occurred in connection with a violation when “[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances.” *Id.* § 100.3, Table X. The Commission generally assesses negligence by considering what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the cited regulation would have taken under the circumstances. *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015) (explaining that Commission ALJs “may evaluate

negligence from the starting point of a traditional negligence analysis” rather than adhering to the Secretary’s Part 100 definitions); *accord Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016).

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

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors or mitigating circumstances exist. These factors often include (1) the extent of the violative condition, (2) the length of time the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator’s knowledge of the existence of the violation, (6) the operator’s efforts in abating the violative condition, and (7) whether the operator had been placed on notice prior to the issuance of the violation that greater efforts were necessary for compliance. *See CAM Mining, LLC*, 38 FMSHRC 1903, 1909 (Aug. 2016); *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001).

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

V. FINDINGS AND DISCUSSION

A. Violation of 30 C.F.R. § 75.370(a)(1)

Order Number 8506201 alleges a violation of § 75.370(a)(1), which mandates that each operator of an underground coal mine develop and follow a ventilation plan that is designed to control methane and respirable dust and is suitable to the conditions and mining system at the mine. 30 C.F.R. § 75.370(a)(1). Ventilation plan provisions are enforceable as mandatory safety standards at the mine once they have been approved by the Secretary. *Martin County Coal Corp.*, 28 FMSHRC 247, 254 (May 2006); *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989).

In this case, Armstrong is alleged to have violated a provision of the Parkway Mine's approved ventilation plan requiring dust parameter examinations to be conducted each shift.

A dust parameter examination is an examination of the working section that involves taking air readings, checking for proper placement of ventilation controls, and checking each piece of equipment on the section, including the roof bolters, continuous miners, and feeder, to ensure compliance with the respirable dust control parameters set forth in the ventilation plan. Tr. 24, 54-55, 149-50, 202, 212-13, 231-32; 30 C.F.R. § 75.362(a)(2). The section foreman must certify the results of the examination by date, time, and initials. Tr. 37, 56; 30 C.F.R. § 75.362(g)(2). At the Parkway Mine, the equipment operators are charged with performing the required dust parameter checks on their respective equipment and the results are then conveyed to the section foreman. Tr. 33-34, 172, 239-40. By regulation, a dust parameter examination must be completed during the first hour of each shift. 30 C.F.R. § 75.362(a)(2). An additional dust parameter examination must be completed "every fifth hour of production" pursuant to the mine's ventilation plan, which states, "Fifth hour dust perimeter [sic] checks will be made within the fifth hour of production and recorded on site." Ex. S-2 at 21, 22, 25. This provision was added to the ventilation plan due to the Parkway Mine's history of noncompliant respirable dust samples. Tr. 53.

According to the Secretary, the phrase "fifth hour of production" refers to the fifth hour of the production shift, meaning that the fifth hour dust examination for the 3:00 PM production shift should be conducted between 8:00 and 9:00 PM. Sec'y Br. 6-11; *see* Tr. 86. Inspector Stone testified that when he asked Foreman Hearld for the results of this exam, Hearld admitted it had not been completed even though he knew it was past time to do so. Tr. 53, 58. Stone said he also spoke to a roof bolter and miner operator who told him the fifth hour checks had not been conducted. Tr. 59, 88. In the order, he alleged:

The approved ventilation plan is not being followed on the #1 unit (MMU 001-0/002-0). The mine operator has failed to conduct the fifth hour dust parameter examination to assure compliance of the respirable dust controls specified in the mine ventilation plan. ... When ask[ed] to provide proof of the fifth hour dust parameter examination section foreman Billy Hearld admitted he did not conduct the examination.

Ex. S-1.

Armstrong argues that all the credible evidence proves the required fifth hour checks were, in fact, completed by the equipment operators before Stone asked about them, and therefore no violation occurred. Resp. Br. 11-14. Armstrong also argues that the deadline to complete the checks had not yet passed because it was not the "fifth hour of production." *Id.* at 10-11. According to Armstrong, this means five hours of *actual* production; any down time that has occurred during the shift does not count toward the five hours. *Id.* at 6-10. When Inspector Stone asked for the dust checks, five hours of actual production had not yet taken place because the shift had not begun producing coal until 3:40 PM and the equipment had been downed for at least an hour due to the inspection. Tr. 141-48; Ex. R-6; Ex. R-7.

I reject Armstrong’s interpretation of “fifth hour of production” as illogical and not supported by the evidence. DeMoss was the only witness whose testimony supported this interpretation. He stated that the equipment operators keep running their equipment until they reach five full hours of production before stopping to conduct dust parameter checks. Tr. 148. But this would require each equipment operator to independently track production and stoppage times during the shift in order to determine when to conduct his checks. DeMoss could not explain how he expected rank-and-file miners to accomplish this task given that there is no way for each individual equipment operator to know if another piece of equipment has been taken out of service during the shift and for how long. *See* Tr. 181-82. Also, if each equipment operator were individually responsible for deciding when to perform his checks, the timing of the checks would vary between different pieces of equipment and between shifts, which would be chaotic and unenforceable. Furthermore, all the other evidence reflecting the actual practice at the mine contradicts DeMoss’s account that the fifth hour is calculated by tracking production time and subtracting down time. Roof bolter Joshua Q. Divine testified he performs the fifth hour checks five hours after the first hour checks without tracking production time. Tr. 207. Miner operator Phillip W. Keeton said he performs his checks around 8:00 PM when working the 3:00 PM shift, regardless of down time or how long the miner has been running. Tr. 245-47. Unit mechanic John P. Wilson, who performs dust checks on the feeder, also said he conducts his checks between 8:00 and 9:00 PM, and Foreman Hearld agreed that the fifth hour falls “[a]round 8:00,” indicating they are simply counting the hours from the beginning of the shift. Tr. 23, 213. Bolstering this testimony, instruction cards distributed by Armstrong to equipment operators at the Parkway Mine state that dust parameter checks will be conducted on the fifth hour “of each *shift*.” Ex. S-5 (emphasis added).

The Secretary’s interpretation of “fifth hour of production” as referring to the fifth hour of the shift is consistent with the evidence discussed above reflecting the actual practice at the mine. It is also consistent with other examination regulations, which typically require examinations to be conducted within a specific, determinate time period. *See, e.g.*, 30 C.F.R. §§ 75.360(a)(1), 75.364(a), 75.512-2. Further, requiring dust checks to be completed during the fifth hour of the shift, rather than the fifth hour of actual production, promotes safety by ensuring that checks will occur at regular intervals at the beginning and middle of each production shift.

Based on the analysis above, I find that the phrase “fifth hour of production” as used in the Parkway Mine’s ventilation plan clearly refers to the fifth hour of the production shift because it would be unreasonable to interpret it any other way. Because the language is clear, it should be enforced as written. *See Hecla Ltd.*, 38 FMSHRC 2117, 2122 (Aug. 2016) (stating rule that clear regulations are usually enforced as written); *Martin County Coal*, 28 FMSHRC at 255 (applying law governing regulatory interpretation to plan provisions). Even if there were room for doubt, the Secretary’s interpretation of an ambiguous regulatory provision is entitled to deference unless it is unreasonable, plainly erroneous, inconsistent with the regulation, or does not reflect the agency’s fair and considered judgment. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, 132 S. Ct. 2156, 2166 (2012); *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997); *Hecla*, 38 FMSHRC at 2122. For the reasons discussed above, I find that the Secretary’s interpretation of “fifth hour of production” as referring to the fifth hour of the shift is reasonable and serves the overall safety-promoting purposes of the Mine Act. Accordingly, it is entitled to deference. Because any person familiar with the mining industry and Mine Act would reach the

same interpretation, I also reject Armstrong's argument that it was not on notice of this interpretation.

Because fifth hour checks must be conducted during the fifth hour of the shift, they should have been completed between 8:00 and 9:00 PM on the day of the inspection. A preponderance of the evidence shows they were not timely completed.

Although Foreman Herald, who was called as an adverse witness by the Secretary, said that the equipment operators had conducted the checks by the time Inspector Stone asked for the results around 9:00 PM, (Tr. 33-34), his testimony on this point was unconvincing. The only reason he could provide for believing the equipment operators had performed the checks was that it was their job to do so. Tr. 34-35. He admitted he did not actually ask each equipment operator whether the checks had been performed. Tr. 24-25. Moreover, he responded to Stone's inquiry about the dust parameter examination by leaving and performing the required checks on each piece of equipment himself. Tr. 24-25, 35. There would have been no reason for him to redo these checks if the equipment operators had already completed them; his actions indicate they had not.

DeMoss's testimony was also unconvincing. Although he insisted the checks had been completed, incongruously, he also testified that it was not time to do them yet because it was not the fifth hour of production. Tr. 183-84. When pressed to explain why the equipment operators would have done the checks if it was not time yet, DeMoss at first said he did not understand the question, then said the equipment operators must have been nervous because MSHA inspectors were present, but finally admitted he did not know if the checks had actually been completed after all. Tr. 184-85, 189. His testimony struck me as self-serving and manufactured, and I decline to credit it.

Armstrong called three rank-and-file equipment operators as witnesses, but each of them stopped short of affirmatively stating that he had completed his dust checks the night of the inspection. Wilson testified, "I don't recall exactly doing that." Tr. 213. Keeton also said he did not specifically remember performing the checks. Tr. 238. Divine said he was sure he would have done them, but it was clear he was speaking generally and had no specific memory of the night in question. Tr. 204-05, 208. Overall, these witnesses' testimony was vague and seemed evasive and coached at times.

In addition, the company witnesses offered discrepant accounts of how dust parameter checks were usually recorded on the section. Divine testified that no one wrote down the results of their checks, while Keeton testified that he wrote down his results to give to the foreman, and DeMoss asserted the results were relayed to the foreman by memory but later admitted to having testified at deposition that the equipment operators were supposed to record the results on pieces of paper. Tr. 188-89, 207, 236. These discrepancies suggest the mine had no established procedure for ensuring that dust parameter checks were being completed.

The Secretary presented testimony from Justin Greenwell, a former roof bolter for Armstrong, that the checks were not being completed at all. Greenwell had been working on the cited section for about a year prior to the inspection but said he had never conducted or even

heard of dust parameter checks before Inspector Stone raised the subject. Tr. 116-17. Corroborating this assertion, Foreman Hearld invoked his Fifth Amendment right not to respond when asked whether it was his regular practice to conduct and certify fifth hour dust parameter examinations, which raises an adverse inference that it was not. Tr. 30-32, 38. The implication that Armstrong failed to regularly conduct dust parameter examinations is also consistent with the ample evidence of ongoing dust control problems at this mine. As previously noted, the requirement to perform fifth hour dust checks was added to the ventilation plan due to the mine's history of noncompliance with respirable dust standards, and the April 4 inspection was spurred by the mine's recent receipt of a citation for falsifying dust samples. Tr. 53, 91-92; Ex. S-5. Shemwell, a scoop operator on the cited section, described witnessing problems such as dusty roads and missing ventilation curtains and said that "we didn't really have any dust control" until after the inspection. Tr. 106-08. At the beginning of the inspection, Inspector Stone had observed a roof bolter blowing dust out of its exhaust system and had issued citations for a deficiency in the machine's dust collection system and an inadequate first hour dust parameter exam. Tr. 47-51; Ex. S-6. Greenwell was one of the miners operating this roof bolter and testified that when he arrived on the section that day he had raised concerns that the dust collection box was full, but Foreman Hearld had instructed him to continue bolting rather than stopping to clean it.⁸ Tr. 114. The foregoing evidence reveals a lax attitude toward dust control at this mine, and against this backdrop, I credit Greenwell's testimony that he worked at the mine for a year without ever being asked for dust parameter results.

After considering all the evidence, I find that the fifth hour dust parameter checks had not been completed by the time Inspector Stone asked for the results. I further find that the evidence indicates Armstrong regularly failed to perform these checks. This conduct violated the mine's ventilation plan and § 75.370(a)(1).

B. Gravity

Inspector Stone assessed this violation as unlikely to cause injury and non-S&S, but capable of causing permanently disabling injuries to twelve miners. Ex. S-1; Tr. 60-62. He explained that failure to conduct dust parameter examinations prevents the mine operator from knowing if any ventilation or dust control problems exist that need to be corrected. Tr. 61.

Armstrong's failure to conduct a fifth hour dust parameter examination created a hazard that miners working on the unit would be exposed to unrecognized, unaddressed dust control deficiencies. This was an active working section where coal was being drilled from rock in an enclosed underground environment, so dust control deficiencies would have exposed miners to airborne respirable rock drill dust containing coal and silica particles. These particles are

⁸ Armstrong attempted to impeach Greenwell's credibility by introducing testimony that the dust collection system on the roof bolter appeared to have been "sabotaged" by a knife slit and that "it just seemed like Greenwell had it out for" Hearld. Tr. 215-16, 244. The record does not support these allegations. Greenwell came across as a credible witness whose testimony was corroborated by the other evidence. He had no motive to sabotage his own machine or concoct allegations against mine management, especially considering that he no longer worked in the mining industry at that time of the hearing. Tr. 112-13. He had voluntarily quit his job with Armstrong after discovering at age 28 that he had black lung. Tr. 118.

harmful when inhaled, particularly silica particles, which become embedded in the lung tissue and cause scarring over time. Tr. 63. Armstrong argues that “conditions on the section were good,” noting that no actual dust control problems were identified when the fifth hour checks were finally conducted (which was the reason Inspector Stone marked the probability of injury as “unlikely”). Resp. Br. 15-16; Resp. Reply Br. 5; Ex. S-3 at 8. Armstrong also suggests that a dust parameter examination was unwarranted because so little production took place during the shift in question. Resp. Br. 15-16; Tr. 140. But, as discussed above, the evidence is clear that Armstrong habitually failed to conduct dust parameter checks regardless of production, not just on this one occasion. The fifth hour dust parameter examination requirement had been added to the mine’s ventilation plan due to its history of dust control problems, as exemplified by Inspector Stone’s issuance of two citations for dust control deficiencies on a roof bolting machine earlier in the inspection and the mine’s receipt of a predicate 104(d)(1) citation several months earlier for falsification of dust samples. Ex. S-5; Ex. S-6. If normal mining operations had continued without issuance of Order Number 8506201, any further dust control problems that arose on the cited section would not have been promptly identified and addressed due to Armstrong’s failure to conduct the fifth hour checks. I find that this failure posed a hazard that miners would develop permanently disabling injuries due to respirable dust exposure.

Armstrong disputes that the hazard would affect all twelve miners on the section because this was a split-air unit, meaning that a dust control problem on one side of the unit would not necessarily impact the other. Resp. Br. 16; *see* Tr. 62, 78, 175-76, 206. However, a fifth hour dust parameter examination was not conducted on either side of the unit, exposing the miners on both sides to the hazard. Tr. 83-84.

Because this violation exposed all the miners on the section to permanently disabling injuries from exposure to respirable dust, and because of the importance of dust control in underground coal mines, I find that this was a serious violation.

C. Negligence and Unwarrantable Failure

The Secretary asserts that this violation involved high negligence and was an unwarrantable failure to comply with the cited safety standard because Armstrong was aware of the requirement to conduct fifth hour dust parameter examinations as mandated in the ventilation plan, yet regularly failed to do so, posing a serious risk to miners’ health. Sec’y Br. 11-15. Inspector Stone testified he designated the violation as an unwarrantable failure due to “the history of this section” and “the issues encountered at the start of the shift,” namely, the fact that he had observed a roof bolting machine discharging rock drill dust from its exhaust system and cited it for an inadequate first hour dust parameter examination. Tr. 62-63.

Armstrong contests the Secretary’s allegations of high negligence and unwarrantable failure, asserting that the violation presented no danger to miners and that Inspector Stone failed to consider mitigating circumstances raised during the inspection, including that it was not Foreman Hearld’s responsibility to do the dust checks and that he obtained the results quickly after the inspector asked for them. Resp. Br. 14-17; Resp. Reply Br. 5-6.

Notice of Need for Greater Compliance Efforts

An operator's history of past similar violations or other specific warnings from MSHA is relevant to the unwarrantable failure analysis to the extent the past violations and warnings placed the operator on notice that greater efforts were necessary for compliance with the cited safety standard.

The fifth hour dust parameter examination requirement that is the subject of this proceeding was added to this mine's ventilation plan due to its history of dust control problems. Tr. 53. Less than 90 days before the inspection, Armstrong received a 104(d)(1) citation for falsifying dust samples. Ex. S-5. The mine's violation history data submitted by the Secretary reveals numerous other dust control violations received in the fifteen months preceding the inspection, including two violations of the dust parameter examination regulation. Ex. S-4. Just a few hours before Order Number 8506201 was written, Inspector Stone issued a citation for an inadequate first hour dust parameter examination. Ex. S-6. The prior violation was written on the same section during the same shift and issued to the same person, DeMoss. Ex. S-1; Ex. S-6. I find that this mine's history and the citation issued a few hours earlier served to place Armstrong on notice prior to the issuance of this violation of the need to make greater efforts to comply with the dust parameter examination requirement.

Knowledge of Violation; Obviousness; Abatement Efforts

Knowledge of a violation is established where the operator knew or reasonably should have known of the violation. *Coal River Mining, LLC*, 32 FMSHRC 82, 95 (Feb. 2010). The knowledge or negligence of an agent may be imputed to the operator. *Excel Mining, LLC*, 37 FMSHRC 459, 467-68 (Mar. 2015); *Martin Marietta Aggregates*, 22 FMSHRC 633 (May 2000).

Foreman Hearld was acting as Armstrong's agent at the time of the violation, as he was the person charged with responsibility for the operation of the cited section and for supervising the miners working there. *See* 30 U.S.C. § 802(e) (defining "agent"); *Martin Marietta*, 22 FMSHRC at 637-38. In this capacity, he was responsible for making sure that dust parameter checks were completed within the fifth hour of the shift and recorded onsite in accordance with the ventilation plan. Ex. S-2 at 25. He knew he was supposed to record the results of the checks at the power center and certify them by date, time, and initials. Tr. 37. He conceded that the checks should have been done "[a]round 8:00" and recorded by 9:00 PM, but they were not. Tr. 23-24. Hearld said "[t]here was a lot going on" the night of the inspection. Tr. 30. But it remained incumbent on him, as the foreman, to make sure the required checks were completed. It should have been obvious to him that the checks had not been done because none of the equipment operators had communicated the results to him and because he should have already attempted to collect the data so he could record and certify it. Instead, he completely ignored the fifth hour examination requirement until Inspector Stone asked about it.

Although Armstrong notes that Hearld obtained the dust parameter data quickly after being asked to do so, abatement efforts undertaken after the issuance of the violation are not relevant to the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009).

I find that Hearld had knowledge of this violation yet failed to abate it. Because he was Armstrong's agent, his knowledge and negligent conduct in failing to abate the violation are imputable to the company.

Duration of Violation; Extensiveness; Degree of Danger Posed

Although the fifth hour dust parameter checks were less than an hour overdue when Inspector Stone issued the order, the underlying violative conduct was Armstrong's failure to ensure these checks were being completed. As discussed above, the evidence shows that Armstrong regularly failed to conduct the fifth hour checks and that this conduct was part of an ongoing pattern of laxness toward dust control on the part of mine management. Thus, this violation arises out of violative conduct of longstanding duration.

This violation was also extensive in that it affected the entire section and all of the miners working there, as the required examination had not been conducted on either of the section's two mechanized mining units or on any of the equipment.

I further find that this violation posed a high degree of danger. As discussed above, failure to perform the dust parameter examination exposed miners to permanently disabling injuries from exposure to respirable dust that causes diseases such as silicosis, the prevention of which was one of Congress' fundamental goals when it passed the Mine Act. *See U.S. Steel Mining Co.*, 8 FMSHRC 1274, 1278-80 (Sept. 1986).

Conclusions

Based on the factors discussed above, particularly that a supervisor knew of this violation yet failed to abate it, that it was Armstrong's practice not to comply with the cited dust control requirement, and that Armstrong's conduct posed a high degree of danger to miners, I find that Armstrong engaged in aggravated conduct constituting more than ordinary negligence. Because a predicate 104(d)(1) citation was issued less than 90 days earlier, this violation was properly issued as a 104(d)(1) order.

Based on the same factors, I also find that Armstrong's negligence was high.

VI. PENALTY

A. Legal Principles

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:

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

30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA's Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Am. Coal Co.*, 38 FMSHRC 1987, 1992-93 (Aug. 2016); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247, 266 (May 2006).

B. Penalty Assessment

The Secretary asks me to assess a penalty of \$9,122.00 for this violation. This proposed penalty was calculated using the Secretary's "regular assessment" formula set forth in 30 C.F.R. § 100.3.

The Secretary has submitted a violation history form showing that the Parkway Mine received 470 violations from MSHA that became final during the fifteen months preceding the issuance of this order. Ex. S-4. I find Armstrong's violation history to be moderate considering the large size of its business. The parties have stipulated that the proposed penalty will not affect Armstrong's ability to remain in business. Joint Ex. 1. My findings regarding gravity and negligence are discussed at length above in the body of my decision. The evidence reflects that Armstrong demonstrated good faith in achieving rapid compliance after notification of the violation by promptly conducting the required dust parameter checks. Tr. 24-25, 105, 171; Ex. S-1.

After considering the six statutory penalty criteria, I assess a penalty of \$9,122.00 for this violation.

ORDER

Armstrong Coal Company, Inc. is hereby **ORDERED** to pay a penalty of \$9,122.00 within thirty (30) days of the date of this Decision and Order.⁹

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

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⁹ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 9, 2018

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

v.

CONSOL PENNSYLVANIA COAL
COMPANY, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2015-0339
A.C. No. 36-07230-390481

Mine: Bailey Mine

DECISION

Appearances: Jane Hwang, Esq., Office of the Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for Petitioner.

Patrick W. Dennison, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania for
Respondent.

Before: Judge Andrews

This proceeding is before me on a petition for assessment of civil penalties filed by the Secretary of Labor (“Secretary” or “Petitioner”), acting through the Mine Safety and Health Administration (“MSHA”), against Consol Pennsylvania Coal Company, LLC, (“Consol” or “Respondent”), at its Bailey mine, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820 (“Mine Act” or “Act”). This docket involves twenty citations issued pursuant to Section 104(a) of the Act during the period from October 2, 2014 through July 29, 2015 with total proposed penalties of \$20, 166.

A hearing was held in Pittsburgh, Pennsylvania on August 14 and 15, 2017. Prior to the hearing, the parties settled sixteen of the citations, and those settlements were placed on the record. The partial settlements were approved on December 20, 2017. Testimony and documentary evidence was presented by the parties on the remaining four citations.¹

¹ References to the transcript will be “Tr.” followed by the page number(s). Joint exhibits will be “JX”, the Secretary’s exhibits will be “GX”, and Respondent’s exhibits will be “R”, each followed by the number.

After the hearing, each party submitted a post-hearing brief and Respondent filed a Reply Brief.² All of the evidence of record has been considered.³

Joint Stipulations were admitted at the hearing:

1. The Respondent was an “operator” as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Mine Act”), 30 U.S.C. § 803(d), at the Bailey Mine (Mine I.D. 36-07230) at which the citations at issue in this proceeding were issued.
2. Operations of the Respondent at the mine at which the citations were issued are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
4. The individuals whose names appear in Block 22 of the citations were acting in their official capacities and as authorized representative of the Secretary of Labor when the citations were issued.
5. True, authentic copies of the citations were served on the Respondent or its agent as required by the Mine Act.
6. The citations contained in Exhibit “A” and attached to the Secretary’s Petitions are authentic copies.
7. Payment of the total proposed penalties listed in Exhibit “A” for Docket No. PENN 2015-339 will not affect Respondent’s ability to continue in business.

² Throughout this decision the Secretary’s Post Hearing Brief will be cited as “SPHB”. Respondent’s Post Hearing Brief will be cited as “RPHB” and the reply brief as “RRB”.

³ The findings of fact in this decision are based on the record as a whole and the Administrative Law Judge’s careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the ALJ has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness’s testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the ALJ has also evaluated demeanor. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on the ALJ’s part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

8. The R-17 Certified Assessed Violation History Report (Exhibits GX1) is an authentic copy and may be admitted as a certified business record of the Mine Safety and Health Administration.
9. The citations contained in Docket No. PENN 2015-339 were each issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated in the Citations, as required by the Act.
10. In July 2015, Bailey Mine (Mine I.D. 36-07230) was subject to 5-day Methane Spot Inspections.

JX-1

Legal Principles

Strict Liability

The Commission has established that under the Mine Act an operator may be held liable for a violation of a safety standard without regard to fault. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd* 868 F.2d 1195 (10th Cir. 1989). Therefore, the Mine Act is a strict liability statute and if a violation of a mandatory safety standard occurs, an operator will be held liable regardless of the level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Ames Construction, Inc.*, 33 FMSHRC 1607, 1611-12, n.6 (July 2011).

Burden of Proof

In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). The burden imposed on the Secretary by the Mine Act is to prove alleged violations and related allegations such as gravity and negligence by a preponderance of the evidence. *Garden Creek Pocahontas Company*, 11 FMSHRC 2148, 2152 (Nov. 1989), citing *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ). Quoting the Supreme Court in *Concrete Pipe*, 508 U.S. 602, 622 (1993), the Commission observed that “[t]he burden of showing something by a ‘preponderance of the evidence,’ the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir 2001); *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

Gravity

The term “gravity” is contained in Section 110(i) of the Mine Act in the context of factors to be considered by the Commission in assessing civil monetary penalties. Among those factors

is “the gravity of the violation”. This is generally expressed as the degree of seriousness of the violation and is measured in terms of the likelihood of injury, the severity of such injury should it occur, the number of persons affected, and whether the violation is significant and substantial.

Significant and Substantial (“S&S”)

Section 104(d) (1) of the Mine Act describes an S&S violation as being “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d) (1). The Commission has established that a violation is significant and substantial if, based on the particular facts surrounding the violation, there exists a reasonable likelihood the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The four-part test long applied to establish the S&S nature of a violation examines: “(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 will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The *Mathies* test has been revised to focus on the interplay between the second and third steps. The second step addresses the contribution of the violation to a discrete safety hazard and is now primarily concerned with “the extent to which the violation increases the likelihood of occurrence of the particular hazard against which the mandatory standard is directed.” *ICG Illinois*, at 2475, *citing Newtown Energy Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) *citing Knox Creek*, at 162-63. At this step a two-part analysis is required. First, the particular hazard to which the violation contributes must be clearly described. The Commission defines “hazard” in terms of prospective danger, *i.e.*, the danger which the safety standard at issue is intended to prevent. The starting point for determining the hazard is the regulation cited by MSHA. Second, a determination is required of whether, based on 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. *ICG Illinois*, at 2475-76; *Newtown*, at 2038. The Commission has recognized that “reasonable likelihood” is not an exact standard capable of measurement in precise terms, but is a matter of the degree of risk of the occurrence of a hazard or a reasonably serious injury. *ICG Illinois*, at 2476; *Newtown*, at 2039.

At step three the focus shifts from the violation to the hazard and the analysis is concerned with gravity. The *Knox Creek* Circuit Court reasoned that at this stage of the analysis the existence of the hazard should be assumed. *Knox Creek*, at 164. The inquiry is whether, based on the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. *ICG Illinois*, at 2476, *Newtown*, at 2037, *citing Cumberland Coal Res.*, at 2365. The Commission has not equated the reasonable likelihood standard with a probability greater than fifty percent; The Secretary is not required to prove an injury was “more probable than not”. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865-66 (Jun. 1996). The step four gravity determination is essentially unchanged, whether any resultant injury would be reasonably likely to be of a reasonably serious nature. *Newtown*, at 2038.

Negligence

Section 110(i) of the Mine Act also includes “negligence” as one of the six criteria the Commission is required to consider in assessing a penalty. The term is not defined in the Act, but over 30 years ago the Commission recognized that: “[e]ach mandatory standard... carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A. H. Smith Stone Company*, 5 FMSHRC 13, 15 (Jan. 1983).

The Commission has established that its judges may “evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act.” *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). This evaluation considers “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Jim Walter Resources*, 36 FMSHRC 1972, 1975 (Aug. 2014).

The Secretary’s regulations categorize negligence into levels labeled “no”, “low”, “medium”, “high”, and “reckless disregard”. These levels are based on the degree of the operator’s knowledge of the violative condition or practice along with the existence or multiples of mitigating circumstances found to be present. The procedure used takes the level of negligence determined and applies a number of “points” from a table which are then added together with points from other factors to arrive at the calculated proposed penalty amount. *See*, 30 C.F.R. § 100.3, Tables I-XIV.

The Commission and its judges are not bound to apply the 30 C.F.R. Part 100 regulations that govern the MSHA’s determinations. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016) *citing Brody* at 1701-03. Therefore, the Commission’s judges are not limited to an evaluation of allegedly “mitigating circumstances” and instead may consider the “totality of the circumstances holistically.” *Brody*, at 1702; *Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir 2016). For example, the Commission has stated the real gravamen of high negligence is that it “suggests an aggravated lack of care that is more than ordinary negligence.” *Newtown*, at 2049, *citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) *citing Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). High negligence may be found in spite of mitigating circumstances, or, for example, moderate negligence may be found without identifying mitigating circumstances. *Brody*, at 1702-03. The Commission has described ordinary negligence as “inadvertent,” “thoughtless,” or “inattentive” conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987).

Penalty

The Mine Act delegates the duty of proposing civil monetary penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The proposed penalty is calculated by application of the Secretary’s regulations at 30 C.F.R. Part 100. By referring to each citation or order along with operator data and violation history, points are applied and totaled to arrive at a monetary penalty amount. 30

C.F.R. § 100.3 and Tables I-XIV. The Commission and its judges are not bound by the Secretary's proposed assessment, and the Part 100 regulations are in no way binding in Commission proceedings. The Commission alone is responsible for assessing the final monetary penalty. *Sec'y of Labor v. American Coal Company*, 38 FMSHRC 1987, 1990, 1993 (Aug. 2016) citing *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984); *Mach Mining, LLC, v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) If the operator challenges the proposed penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28.

The Mine act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). In assessing civil monetary penalties the six criteria to be considered are the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The principles governing the authority of Commission Administrative Law Judges to assess civil monetary penalties *de novo* are well-established. *Hidden Splendor Resources, Inc.*, 36 FMSHRC 3099, 3104 (Dec. 2014). Congress has conferred broad discretion upon the Commission and its Judges in the assessment of civil penalties under the Act. *American Coal*, at 1993 citing *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). The assessment of the Judge is entirely independent of the Secretary's penalty proposal, which is not a baseline, starting point or guidepost. *American Coal*, at 1990, 1995. However, the broad discretion accorded to the Judge is not unbounded and must reflect proper consideration of the statutory penalty criteria. *Id.*, at 1993. For each of the six statutory criteria, the Judge must make findings of fact. *Id.*; *Sellersburg Stone Company*, 5 FMSHRC 287, 292 (Mar. 1983); 29 C.F.R. § 2700.30(a). Although all six of the statutory criteria must be considered, the factors need not be assigned equal weight, and for more serious violations gravity and negligence may be weighed more heavily than the other four criteria. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2374 (Sept. 2016) citing *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001); see also *Spartan Mining company, Inc.*, 30 FMSHRC 699, 724-25 (Aug. 2008) and *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010).

Underlying the Mine Act's penalty assessment scheme is the deterrent purpose of its penalty provisions. *Black Beauty Coal Company*, 34 FMSHRC 1856, 1866-67 (Aug. 2012) citing *Sellersburg Stone* at 294. The Judge may take into account the deterrent effect of the penalty assessed. *Black Beauty* at 1168-69; see also *Coal Employment Project v. Dole*, 889 F.2d 1127, 1133 (D.C. Cir. 1989). The Commission has also stated Judges "must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge." And, "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." *American Coal*, at 1994; citing *Sellersburg*, at 293. The Judge need not make exhaustive findings. See, *Cantera Green*, 22 FMSHRC 616, 621 (May 2000).

Citation No. 7033764

This citation was issued on July 16, 2015 by Inspector Richard L. Eddy (“Inspector Eddy” or “Eddy”).⁴ The Condition or Practice was described as follows:

Based on the laboratory analysis Bag No. 0155006AA of a rock dust survey taken by M.S.H.A. on 07/08/2015 on 4J, MMU No 002-0 at 40’ outby the face of the No. 1 Entry, it was determined that the sample collected was non compliant. All underground areas of a coal mine shall be maintained in such quantities that the incombustible content of the combined coal dust, rock dust and other dust shall not be less than 80%. The sample collected was at 65.9%.

Standard 75.403 was cited 23 times in two years at mine 3607230 (23 to the operator, 0 to a contractor).

Supporting rock dust sample bag numbers: 0155006AA

Inspector Eddy designated the violation as S&S. He determined injury was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty to 4 persons. Eddy rated the negligence as moderate. The citation was terminated about 3 hours later when he found the area had been rock dusted. GX-7. The proposed penalty is \$807.

The safety standard cited provides:

Maintenance of incombustible content of rock dust.

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 80 percent. Where methane is present in any ventilating current, the percent of incombustible content of such combined dust shall be increased 0.4 percent for each 0.1 percent of methane.

30 C.F.R. § 75.403.

⁴ Inspector Eddy stated he had a little over 44 years in the coal mining industry. Tr. 164. He started in 1973 and learned to run all types of underground equipment. Tr. 162-163. He then worked as a Certified Mine Foreman and a mine Examiner. Tr. 163-165. From 1989 to 1993 he was a full-time labor representative for the United Mine Workers (UMW), then a District President until 2004, and then a District Vice-President until 2010, when he retired. He returned to the UMW for a couple of years until he started with MSHA. Tr. 164. From July 2012 until October 2015 he was certified in accident investigations such as ignitions and personal injury. Tr. 160-162. At the time of the hearing, he was a Field Office Supervisor in Craig, Colorado overseeing all functions of that office including all types of inspections and accident and injury investigations. Tr. 160.

In addition, in pertinent part:

Rock dusting.

All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter....

30 C.F.R. § 75.402.

Contentions

Respondent contends that rock dust sample bag No. 0155006AA was collected at or less than forty feet outby the face of the No. 1 Entry, where Respondent was not required to rock dust. Respondent argues that measuring the distance from the face by counting roof bolts and straps was neither accurate nor reliable because of the use of roof mesh and the spacing of roof straps less than four feet apart. As a result, the Secretary has not sustained the burden of demonstrating the fact of this violation by preponderance of the evidence. RPHB, pp. 23-32.

The Secretary contends the Inspector was required to take samples beginning at least forty feet from the face, and the sample at forty feet outby the face of the No. 1 Entry was only 65.9% incombustible content. The Secretary argues there were mining machines in the No. 1 entry and production was shut down for the sample; when machines are present the Inspector does not use a measuring tape, but the four foot spacing of the roof bolt straps. Further, the Inspector counted eleven straps back from the face, and considering that the first strap would be one to two feet from the face, this resulted in a distance of forty one to forty two feet, which is the accurate measurement rather than his notes stating the sample was at forty feet outby. SPHB, pp. 15-21.

Evidence

Inspector Eddy testified he was familiar with E01 inspections at the Bailey mine. Tr. 165. He had conducted at least two quarterly inspections at the Bailey Mine, equal to 6 months of inspection time. Tr. 166. On July 8, 2015, Eddy conducted an E01 inspection at Bailey, which was under a 103I spot inspection for methane liberation because the mine generated more than 1 million cubic feet of methane per 24 hour period. Tr. 167-168. That day Eddy traveled to the 4J MMU 002-0 section and collected rock dust samples. Tr.168-169. When he took the sample, the section had to shut down. Tr. 176-177.

Eddy testified he collected the violative sample 41 feet from the face. Eddy testified that he typically used a 25-foot measuring tape, but he did not want to use it in this instance because there was machinery in the No. 1 entry. Tr. 172. Eddy used the roof bolt metal straps to calculate the distance because he believed the straps were at 4-foot intervals and he counted 11 of them; and because the last strap was one to two feet from the face, his measurement would be 41-42 feet from the face. Tr. 173. Eddy testified that the roof straps were every 4-5 feet according to

the Bailey mine's roof control plan. Tr. 174. However, Inspector Eddy also testified that in the notes submitted to MSHA with the sample and in the citation he wrote he took the sample at 40 feet outby the face, not 41 or 42 feet outby. Tr. 193-194, 199; GX-7. He submitted the samples he collected for testing. The result for bag 0155006AA was 65.9% incombustible material with .3% of methane present. Tr. 170-171, GX-8. The location of the sample was "40' Outby Face of No 1 Entry".

Inspector Eddy testified that at .3% methane, miners were allowed to roof bolt because the explosive range of methane is between 5-15%. Tr. 207-208. Additionally, Eddy testified that a continuous miner will deenergize at 1.9% methane. Eddy noted the ventilation in the section at the time was safe at 31,323 CFM. Tr. 208. There were no permissibility violations for the mining equipment that day. Tr. 209.

When Inspector Eddy returned to the mine on July 16, 2015, with the sample results from July 8, 2015, he issued the citation for a violation of 30 C.F.R. § 75.403 for having an incombustible content less than 80%. Tr. 171. Eddy testified the regulation requires the mine to rock dust 40 feet out from the face. Tr. 180-181. Eddy further testified that this standard requires an ignition source, and the continuous miner and roof bolter machines create sparks that can be ignition sources. Tr. 171-172, 180, 182-183.

Inspector Eddy's notes for July 8, 2015, show that he did not record the name of the company representative accompanying him on the inspection. GX-10, p. 1. After traveling to the 4J, MMU 002 section and terminating two citations, he collected three rock dust samples in the No. 1 entry. The third sample was listed as: "Rock Dust Sample No 0155006AA at 40' Outby Face of No. 1 Entry". *Id.*, pp. 3, 4. Eddy then proceeded on an imminent danger run from entry No. 1 to entry No. 3. With his findings in the No. 3 entry he listed a continuous miner, a Joy loader, a Joy shuttle car, and a power center, observing no violations for any of the equipment. *Id.*, pp. 5-8.

John Opfar ("Opfar"), Dust Coordinator, testified for Respondent.⁵ Opfar was the respirable dust coordinator in July 2015, but he also helped the safety department by traveling with inspectors. Tr. 234. As the dust coordinator for Consol, Opfar helped Consol ensure it complied with all respirable dust regulations and made sure that Consol took all quarterly respirable dust samplings. He also helped the safety department often, escorting inspectors and running safety meetings. Tr. 235. Citation No. 7033764 was issued to Opfar on July 16, 2015. Tr. 236.

⁵ John Opfar worked at Mine 84 for a little over 4 years and then at Consol's Bailey mine for 12 years. Tr. 233. At Consol he worked in the safety department as a Safety Inspector and Respirable Dust Coordinator. He has a number of certifications, including dust sampling, continuous personal dust monitor (CPDM) sampling, gravimetric sampling, maintenance and calibration of the sampling devices, methane and oxygen deficiency, mine examiner, and EMT. Tr. 233-234. In 2015 he was the Respirable Dust Coordinator. He graduated in 2004 with a Bachelor's of Science Degree in Safety and Environmental Management. Tr. 234.

Opfar testified that in the 4J section, there were three entries, 1, 2, and 3. Tr. 239. No. 1 was the belt entry, and No. 2 was the track entry, with intake air. Tr. 239-240. Opfar testified that in the 4J section, the continuous mining machine cut out 12 feet, advanced the miner, then roof bolts were installed to hold the roof up, “275 feet up the return.” Tr. 240-241. After the miners moved to the track entry, they would start the same cycle again. During that time, if they mined 40 feet, they rockdusted “the whole cycle.” The miners used a loading machine with a hopper on it to rockdust. Opfar testified that the air carried the rock dust a little farther than it was being sprayed. Tr. 241.

Opfar testified that David Govan traveled with the inspector on July 8, 2015, when the sample was taken. Tr. 236-237. Govan is no longer employed by Consol due to a work force reduction. Tr. 237. After the Citation was issued, David Govan recorded his contentions regarding the violation:

1. The three other samples taken in the area were all well above the 80% standard.
2. There was not any active mining in the entry the sample was taken. The active mining was taking places (sic) two entries away from the area that was cited.

R-9.

Opfar helped Dave Govan with his notes. Tr. 246. He testified the date of July 13, 2015, on the document was not accurate, since the citation was not issued until July 16, 2015, and the notes were prepared the day the citation was issued. Tr. 247-248, 268.

Opfar testified that roof straps were always less than 4 feet at the Bailey mine because the straps held the roof mesh up, and the roof mesh was 4 feet. Thus, the straps were less than 4 feet apart to secure the mesh. Tr. 243. Opfar further testified that Consol put extra bolts in the belt entry to prevent a roof fall because it was difficult to get equipment in the area once the belt was installed. Tr. 245. Opfar testified that Bailey mine always added extra roof bolts in a belt entry even if the roof was in good condition. Tr. 276.

Opfar agreed the continuous miner and roof bolter can create sparks, and that methane was released during mining. Tr. 270. Opfar testified that ignition can occur even though there were sprays at the tip of the bits on the continuous miner. Tr. 284-285. However, Opfar testified there was no mining in the entry and no roof bolting in that area on July 8, 2015. Tr. 273. He stated there was no mining that day in the No. 1 entry, so there was no ignition source. Tr. 265.

Analysis

It is well established that the phrase “to within 40 feet of all working faces” has been accepted to mean *beyond* 40 feet of working faces or *more than* 40 feet from the face. For example, it is not required that rock dust be applied from the face to 40 feet outby the face. *Consol*, 39 FMSHRC 572, 573 (Mar. 2017) (ALJ Steele). The sample submission form location and the written citation locations were different than the testimony of the Inspector at the hearing. Inconsistencies between the Secretary’s documentary and testimonial evidence and the

contradictory testimony of an operator's witness are important factors when assessing the credibility of witnesses as well as, in this case, the location of a sample.

The sample submission form shows the collection date of July 8, 2015, and the location as "40' Outby Face of No 1 Entry". GX-8. On the citation issued on July 16, 2015, the location was "at 40' outby the face of the No. 1 Entry". Not until the hearing was there a change in the location to 41-42 feet from the face. The Secretary suggests the discrepancy is a mere 12 inches.

Inspector Eddy relied on the mine's roof control plan requiring roof bolting every 4 to 5 feet. Then, counting 11 rows out, and considering the first row only 1-2 feet from the face, he concluded the distance must have been at least 41-42 feet from the face. However, he did not actually measure the distance with a tape measure.

The reason given for not using the tape measure was that he recalled machinery, not identified, was in the entry, and also that the section had to shut down for him to collect the sample. But Eddy's own notes do not support his testimony. The imminent danger run ended at entry No. 3. In his notes from the No. 3 entry Eddy recorded the presence of three mining machines, a power center and a refuge alternative. There was no indication of shutting down production. Under his notes at entry No. 1, there is no indication of any machine.

Inspector Eddy also did not measure the distance between any of the rows of roof bolts and straps to confirm that they were at least 4-5 feet apart. There is no indication that he visually estimated any of the rows to even determine that the 4 to 5 foot distance was actually being maintained.

Respondent's witness Opfar disagreed that the sample was properly taken. He described in detail the reason the roof bolts and straps were spaced at less than 4 feet apart. Opfar testified that the roof bolts and straps also secured wire mesh to the roof, and this mesh is 4 feet wide. To secure rows of mesh, the spacing must be at less than 4 feet. This would place the sample location at or less than 40 feet from the face. Opfar's testimony, based on an objective means of determining distance, is of greater probative value than the recollections, estimates and reliance on the roof control plan by the Inspector. Further, Opfar's testimony that there was no mining taking place in the No. 1 entry is more consistent with the Inspector's notes.

It is the Secretary's burden to prove a violation by a preponderance of the evidence. Here, the evidence found credible does not show that the sample at issue was taken *more than* 40 feet from the face of the No. 1 entry. Therefore, the Secretary has not carried the burden to establish a violation of 30 C.F.R. § 75.403 occurred. Accordingly, Citation No. 7033764 should be vacated.

Citation No. 9057948

Inspector Michael D. Moten (“Inspector Moten “ or “Moten”)⁶ issued this citation on July 28, 2015 under safety standard 30 C.F.R. § 75.1722(b). The Condition or Practice was described as follows:

At the 4 West-#2 conveyor tail pulley the operator has failed to install a guard extending a sufficient distance to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. When checked, the installed guard placed the self cleaning tail pulley within 9 inches of reach.

Moten designated the violation as S&S. He determined that injury was reasonably likely and could reasonably be expected to be permanently disabling to 1 person. He rated the negligence as moderate. The citation was terminated only minutes later when:

A guard was installed and secured which extends a distance appearing adequate to prevent a miner from reaching behind and coming caught between the belt and tail pulley. GX-3.

The proposed penalty is \$807.

The safety standard provides:

Mechanical equipment guards.

- (a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.
- (b) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.
- (c) Except when testing the machinery, guards shall be securely in place while machinery is being operated.

30 C.F.R. § 75.1722

Contentions

Respondent contends the guarding at the 4 West No. 2 belt tailpiece had existed since 2008 and had been inspected by MSHA many times. The sides, back and top of the tail pulley

⁶ Inspector Moten had worked since 2002 at a number of underground and surface mines as section foreman, equipment operator, apprentice electrician, rescue team member, and mine examiner. Tr. 15-16. He holds state certifications in mine rescue and assistant mine foreman; his EMT certification has lapsed. Tr. 16. He became a Coal Mine Inspector in 2012. Tr. 13.

were completely covered and enclosed, with only a small opening for the belt to enter and wrap around the tail pulley; a miner would not be in a position to reach behind the guard. Therefore, the pinch points were entirely protected by the guarding to satisfy the standard; there was not a reasonable potential risk of contact with the tail roller or pulley by stumbling, falling, inattention, or carelessness. The additional piece of guarding installed to abate the citation only blocked access to the belt, but nothing was done to the existing guarding to the tail pulley or roller. Further, Respondent argues it did not have adequate notice that this guarding was insufficient and in violation of the cited safety standard. RPHB, pp 1-13; RRB, pp. 1-2, 4-5.

The Secretary contends there was an opening large enough to fit a hand and arm in the guarding so a person could reach behind and come between the tail pulley and the belt. The opening was on the walkway side of the belt, and putting a hand into the opening would cause contact with moving parts. It was reasonably likely, due to a water hose and hardware in the area, that a person could stumble or trip and place their hand into the tailpiece. Examiners travel through the area three times daily. SPHB, pp. 7-8.

Evidence

Inspector Moten testified he had mining experience with guarding, installing belt heads, and conducting examinations of belt heads in working and outby areas. Tr. 15-16. When he checked the tailpiece for the 4 West No. 2 conveyor belt he discovered an opening in the installed guarding that was large enough to allow a person to reach behind the opening and get caught between the belt and the tail pulley. The opening was large enough that he could fit his hand and arm in the opening. He would have easily been able to reach and touch the moving parts. The belt ran at 840-850 feet per minute. Tr. 21-24, 28; GX-3. The moving parts were accessible at a distance of 9 inches, by tape measure, to where the belt and pulley contacted each other. This was adjacent to the travel way on the walkway side of the belt. Tr. 23-24; GX-4, p. 6. The opening was obvious, an examiner should have known the condition existed because you could just stand and observe there was an opening. Tr. 28.

Inspector Moten also testified there were tripping hazards near the unguarded area, including a 1-inch washdown hose and hardware for installation of the belt head and tailpiece. Tr. 24. A miner tripping, and attempting to catch themselves, could place their hand into the tailpiece. Tr. 26. This area would be examined at least 3 times every day, and inspected at least 4 times a year. Tr. 25, 42. Belt mechanics also worked in the area. Tr. 25, 130. This citation was terminated when a large piece of guarding was attached to cover the opening, so that a hand or fingers could no longer fit through. Tr. 25-26, 53. It took nine minutes to abate this violation. Tr. 62-63. Inspector Moten testified he was told no guarding had ever been there, and no one had “an issue” with the area previously. Tr. 63.

Inspector Moten designated this violation as Significant & Substantial (“S&S”) because he believed there was a tripping hazard near the opening, which could lead to a person stumbling and putting an arm through the hole. Tr. 26. He testified that this could lead to a permanently disabling injury because a miner could lose their hand up to the middle of the forearm or be pulled into the belt. Tr. 27. Inspector Moten evaluated the negligence as moderate because this area was examined three times daily and the opening was obvious. Tr. 28. Photos taken after the

citation show the abatement guarding in place; the opening into the moving parts cited is not visible because of the mesh. R-2.

Justin Jones (“Jones”), a Consol Safety Inspector, accompanied Inspector Moten that day and testified for Respondent.⁷ He testified he believed it was impossible for a person to injure themselves by putting a hand in the cited opening unless they were actively trying to do so because of the angle. Tr. 109. He also testified this guarding had been installed by 2008 and every MSHA inspector since that time who had observed this tail pulley never had an issue with the guarding. Tr. 111. The only time work would be done on the tail pulley would be once a week when it was greased. When the pulley was being greased, the belt would be locked and the electrical switch would be thrown. Tr. 110. He testified there was guarding above the tail pulley, where the belt moves through the guarding. Tr. 50. There was 3-5 inches between the belt and this original guarding. Tr. 106-107.

Jones testified that the guarding he installed to abate the violation was a 4x8 fiberglass mesh, which he attached with a zip tie. Tr. 104-105, 113-114. Jones testified that he found this mesh approximately a couple hundred feet away because guarding was interchanged frequently. Tr. 123.

Jones recorded his contentions on the date of the inspection:

The way the guarding is shaped and where it is located would make it very difficult for someone to fall in such a way to put their hand into the roller. Yes, it was only 9 inches away, but nearly impossible to reach up and over and around the guarding to get hurt....

R-1.

Analysis

The Commission has considered the meaning of the safety standard:

We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the

⁷ At the time of the hearing Jones had worked for Consol at the Bailey mine for almost 5 years, beginning as a safety trainee, then a safety technician, and becoming a safety inspector. Tr. 93. He has three dust certifications, mine examiner’s papers, and EMT certification. Tr. 96-97. He described his No. 1 job at Bailey as escorting inspectors. Tr. 97. Prior to this employment in 2012, he had not worked in the mining industry. Tr. 93. In 2006 he graduated with a Bachelor’s Degree in Psychology, and earned a Master’s Degree in Leadership and Business Ethics in 2012. Tr. 97. After college in 2006 he began in the Air National Guard as a general aircraft mechanic, becoming commissioned in 2014 and now serving as an aircraft maintenance officer one weekend a month and two weeks of duty a year. Tr. 95-96.

construction of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct.

Thompson Brothers Coal Company, 6 FMSHRC 2094, 2097 (Sep. 1984) (citations omitted).

The standard requires that guarding must be in place and extend a sufficient distance to *prevent* a person from reaching behind and coming into contact with the pulley and belt. This has been interpreted by the Commission to mean a *reasonable possibility* of contact and injury which includes inadvertent stumbling, falling, inattention or ordinary carelessness. The moving machine parts here were accessible through a small opening from a walkway where miners would travel to wash down the area and maintain the tailpiece. The mine's examiners would travel the area three times daily.

The opening cited by Moten was adjacent to the walkway and would allow a hand to fit into the tailpiece and contact moving parts. The pinch point between belt and roller was only 9 inches from the opening; this was determined by a tape measure. The drawing in Jones' notes points to the particular intersection of the installed guarding. R-1. Photographs 2 and 3 in Exhibit R-2 show this point, but with the abatement mesh in place requiring the observer to imagine that location without the 4X8 frame and mesh. Although Jones testified he thought it impossible, because of the angle, for a person to put a hand in the opening unless they were trying to do so, his opinion is outweighed by the credible testimony of Inspector Moten that you could just stand and see the opening accessible from the walkway. The cited opening was not measured for size, but Moten testified he would easily be able to put his hand into the opening.

The evidence found credible supports a reasonable possibility of contact and injury; I find there was a violation of the safety standard requiring guarding to prevent a person from contacting a belt and pulley.

Respondent also argues a lack of fair notice. However, the safety standard is clear in its prohibition, and a reasonably prudent person familiar with the protective purposes of the standard, standing and observing the opening seen by the Inspector would have recognized that a hazard existed. The purpose of the regulation is to prevent contact with moving parts, and no prior specific notice that additional guarding was needed at this tailpiece location was required.

That an occurrence is *possible* does not mean that it is *likely* to happen. While the small opening into moving parts 9 inches away was just enough for a hand to get through, that an inadvertent circumstance would occur with a miner being in the walkway resulting in such a hazardous contact with the tailpiece parts appears unlikely. This would be the case even in the event of a slip or trip over the washdown hose or other hardware in the walkway. The *possibility* of harmful contact does not rise to the level of a *reasonable likelihood* of such occurrence under the facts and circumstances presented here. The unmeasured size of the opening would be quite small if only enough to admit the inspector's hand. Not well described on this record is the actual position, or angle, of a person standing next to the belt structure in the walkway that would allow for that person's hand to be thrust through the opening. Since access to moving machine parts existed there was a hazard, but there was not a reasonable likelihood an injury would result. Therefore, I find the violation was not S&S.

Although I find injury unlikely in this case, I also find that if contact and injury did occur, the result would be very serious, with permanently disabling injuries or worse. Inspector Moten determined the negligence of the operator to be moderate. To the extent that the operator should have known of this small unguarded opening, considering years of daily examinations and other work in the tailpiece area, I agree. However, I find the degree of negligence to be low. Under the totality of circumstances presented, not seeing the small opening was inattentive in nature. It took an Inspector who had not been in this area before, but who had experience with conveyor belt systems, to see what others had missed for years. Inspector Moten did not have a history with this tailpiece and clearly made no assumptions about such guarding as was in place. His discovery enhanced the safety of miners working in the area.

Penalty

Of the six penalty criteria, the most important for this violation are gravity and negligence. The Bailey mine is large, and the ability to pay the proposed penalties was stipulated. Compliance was within minutes. I have found the violation was not S&S, and reduced the likelihood to unlikely and the negligence to low. If injury should occur, it would be very serious. On the basis of the above analysis, I independently assess a penalty of \$150.

Citation No. 9057956

Inspector Moten was back at the mine on July 29, 2015 and issued citation No. 9057956. The Condition or Practice was written as follows:

At the 4 West-#1 Belt Drive the operator has failed to secure the guarding in place to prevent a person from entering the take-up and drive rollers. The area is surrounded to "area guard" the drive. A gate with hinges was made guarding the tight side of the belt and take-up against the mine rib. The gate was in no way secured or signed to prevent entry.

Standard 75.1722(a) was cited 8 times in two years at mine 3607230 (8 to the operator, 0 to a contractor).

Inspector Moten designated the violation as S&S. He determined injury was reasonably likely and could reasonably be expected to be fatal to 1 person. He rated the negligence as low. Moten terminated the citation minutes later when the gate was closed and secured. GX-5. The proposed penalty is \$807.

The safety standard is set forth above, under Citation # 9057948.

Contentions

Respondent contends the belt drive was completely surrounded by fencing and the cited area was on the non-walkway side of the drive. A gate was hinged to the fencing on the left and was against a rib on the right; it could not be pushed open into the drive area. Cleaning and greasing were performed from the other, walkway side of the belt, and any maintenance on the

tight side would require shut down, lock out, and tag out. Moving parts inside the gate were 5 to 50 feet from the gate. Access to the tight side of the drive area could only be accomplished by pulling the gate open and walking through the entrance, both intentional acts. A slip, stumble, trip or fall into the gate could not cause contact with moving drive parts. The guarding had been in place for many years and had been inspected by MSHA and state inspectors with no evidence of any issue taken with the guarding. The citation was abated using a piece of wire to tie the gate to the rib. RPHB, pp. 14-17; RRB, pp. 2-3.

The Secretary contends the inspector found a partially opened gate on the offside or tight side of the belt, and there was no lock or chain on the gate or other way to keep a person from entering the area. The gate was easily opened and once inside the entire side of the take-up with moving parts was open and unguarded. This was a very hazardous condition, and likely to cause a fatal injury. Further, there was a reasonable likelihood of a miner entering the unguarded take-up area if the gate remained unsecured. SPHB, pp. 12-13.

Evidence

Inspector Moten testified that on this day he traveled to the 4 West No. 1 belt accompanied by Jones. Tr. 29-30. While checking the belt drive he saw a gate partially open at the end of the take-up drive. Tr. 30-31. The gate could be easily opened by hand because there was no lock or wire holding it closed. Tr. 32-33. Moten testified there were many moving parts, at a distance of 5 to 20 feet away. Tr. 31, 72-73. The moving parts were closer when the belt starts and stops, Tr. 90-92, and on this day were 20 feet away. Tr. 72-73. Moten also testified he would not have entered the gated area if he had known the take-up drive was unguarded. Tr. 34. The condition was hazardous, and likely to cause a fatal injury because a person could enter the area and their whole body could be pulled through the belt. Tr. 34, 36. He was unable to say for certain when the gate was shut or when it was left open. Tr. 37. Mine examiners would travel the area. Tr. 35. Jones used a wire to close the gate and abate the citation. Tr. 36.

Moten's notes were not detailed or extensive, but he did record the gate was not secured to prevent entry into the area. He also wrote that if an injury were to occur from falling into the moving belts it would reasonably be expected to be fatal. GX-6, pp. 21-22.

Justin Jones also testified for Respondent regarding this citation. He stated the gate was closed during the inspection, and was on an angle preventing a miner from pushing it in. Tr. 139-140. He also testified the closest moving parts to the gate were 15 to 20 feet away, and could be as far as 50 feet away. Tr. 145.

Jones also recorded notes on this citation. He wrote "the door was pushed up against the rib-effectively blocking travel into the tight side of the belt drive area." He also wrote "a person would have to open the door and walk into the belt pulley that is roughly 50 feet away." R-3.

Analysis

The contention that a piece of wire from the gate to the rib would make a difference to the security or ease of access to the drive area is without merit. The gate itself constitutes a

significant barricade, an obstruction capable of preventing passage. Area guarding does not violate the standard, the moving parts were 5 to 20 feet away from the gate, and pulling the gate open to walk through this entrance and into the area required an intention to access the area that would not be deterred by a piece of wire. The inspector did not require a chain and lock to be installed, which would certainly be a deterrent, but was satisfied by an easily placed and removable piece of wire. The gate, without the wire, could not be pushed inward; therefore a fall into the gate would not result in a fall into the area. Even in the event of inadvertence, inattention, or carelessness in pulling open the gate, a person familiar with the protective purposes of the standard would recognize the danger, just as Inspector Moten did, and not proceed the 15-20 foot distance to make contact with moving belt parts.

It is clear from the citation and Inspector Moten's notes that the violation alleged was based on *preventing* access into the drive area. However, similar to the guarding citation discussed above, there must be a *reasonable possibility* of contact and injury. Again, this does include inadvertent stumbling, falling, inattention, or ordinary carelessness. No trip hazards were identified in the inspected area. Any stumbling or falling into the gate would not breach the entrance into the area. Inattention or carelessness would be interrupted by the need to pull the gate toward the person before walking through the entrance and then walking an additional distance to the obviously moving belt parts. Further, a trained miner, viewing the area from the gate would know the belt needed to be shut down, locked out and tagged out. While there was disagreement as to whether the gate was partially open or closed and pushed up against the rib, this would not make a difference since the gate must still be pulled open. The vagaries of human conduct are not ignored when finding the area guarding and gate used at this belt drive location to be adequate. The violation has not been proven by a preponderance of the evidence, and the citation should be vacated.

Citation No. 7033768

Inspector Eddy issued citation No. 7033768 on July 29, 2015. The Condition or Practice was described as follows:

The primary escape way, located on the No. 5 South Mains, MMU 083-0, in the No. 5 Entry is not being maintained with at least a 6 foot walkway. When inspected by this inspector, the No. 5 Stambler Ram Car is parked approximately 30' outby the No. 47 Block. The distance between the right rib (where the life line is hung) was measured to be 30 inches. This condition would not allow miners to evacuate the No 5 South Mains MMU 083-0 safely if an emergency were to occur.

Standard 30 C.F.R. § 75.380(d)(4) was cited 7 times in two years at mine 3607230 (7 to the operator, 0 to a contractor).

Eddy designated the violation as S&S. He determined that injury was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty to 2 persons. He rated the negligence as moderate. Eddy terminated the citation within minutes when the No. 5 Ram Car was removed from the affected area. GX-11. The penalty proposed is \$585.

The safety standard provides:

Escapeways; bituminous and lignite mines.

(d) Each escapeway shall be-

(4) Maintained at least 6 feet wide except-

(i) Where necessary supplemental roof support is installed, the escapeway shall not be less than 4 feet wide; or

(ii) Where the route of travel passes through doors or other permanent ventilation controls, the escapeway shall be at least 4 feet wide to enable miners to escape quickly in an emergency, or

(iii) Where the alternate escapeway passes through doors or other permanent ventilation controls or where supplemental roof support is required and sufficient width is maintained to enable miners, including disabled persons, to escape quickly in an emergency.

When there is a need to determine whether sufficient width is provided, MSHA may require a stretcher test where 4 persons carry a miner through the area in question on a stretcher, or

(iv) Where mobile equipment near working sections, and other equipment essential to the ongoing operation of longwall sections, is necessary during normal mining operations, such as material cars containing rock dust or roof control supplies, or is to be used for the evacuation of miners off the section in the event of an emergency. In any instance, escapeways shall be of sufficient width to enable miners, including disabled persons, to escape quickly in an emergency. When there is a need to determine whether sufficient width is provided, MSHA may require a stretcher test where 4 persons carry a miner through the area in question on a stretcher.

30 C.F.R. § 75.380(d)(4).

Eddy designated the violation as S&S. He determined that injury was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty to 2 persons. He rated the negligence as moderate. Eddy terminated the citation within minutes when the No. 5 Ram Car was removed from the affected area. The penalty proposed is \$585.

Contentions

Respondent contends the No. 5 entry was not a designated escapeway, it contained a power center. The ram car was parked inby the loading point and there was a clearance of 30 inches on each side of the car. A stretcher test would have been successful for the 20-foot length of the ram car. Respondent argues the designated primary escapeway was the No. 2 entry, and the designated alternate escapeway was the No. 3 entry. The refuge alternative was located in the No. 6 entry, and a branch line was routed from the No. 2 entry primary escapeway across the section to the refuge alternative. RPHB, pp. 38-43.

The Secretary contends the escapeway width requirement must be viewed in the context of an emergency situation. The No. 5 entry primary escapeway was not being maintained with at least a 6-foot walkway because a ram car was parked in the middle of the escapeway. The Secretary argues there was only 30 inches of clearance on either side of the ram car and there were huge ruts in the roadway. There was no way people could get through with a stretcher or escape on the lifeline side of the ram car. SPHB, pp. 21-26.

Evidence

Inspector Eddy testified that as he travelled to the 5 south mains MMU 083, up the No. 5 entry toward the face, he noticed a ram car parked in the middle of the roadway. Tr. 287-288. Upon further investigation, he concluded the ram car was in the primary escapeway and at least a six-foot walkway was not being maintained in violation of §75.380 (d) (4). Tr. 288. Eddy explained that primary escapeways are designed to allow miners in an emergency to safely and quickly follow the life line to travel out to the surface. Each active working section must have a primary escapeway with a minimum six-foot walkway from the working face to the surface. Tr. 288-289.

Inspector Eddy testified he found the massive ram car parked right in the middle of the entry, where there were huge massive three-foot deep ruts in the soft bottom. The clearance from the right of the ram car to the lifeline was measured and was 30 inches. Tr. 289-290, 310. He testified that because of the uneven bottom there was no way you could get through there with a stretcher. Tr. 290-291. This condition should have been known to the operator since persons arriving on the section at the beginning of the shift had to go by the ram car. Tr. 293. Eddy identified the discrete hazard as miners not able to safely and quickly exit the mine in an emergency. Tr. 292. He also testified that you depend on the lifeline to get access to the surface. 292-293.

On cross-examination, Inspector Eddy testified a working section is considered anything inby the loading point where the feeder and tailpiece are located. Tr. 299. He explained his finding that this entry was the primary escapeway on the basis that the ram car was parked underneath the lifeline, and all miners on the crew knew the No. 5 entry, via the lifeline, was the escapeway. Tr. 300-302, 314. He agreed there was no requirement for an escapeway inby the loading point, Tr. 300-302, and that the ram car was located inby the loading point. Tr. 301. He further testified that the lifeline was absolutely not a branch line running to the refuge chamber inby the loading point. Tr. 304-305. He acknowledged that a branch line breaks off the main primary escapeway lifeline and goes to a cache of self-contained rescuers and also to a refuge alternative. Tr. 305. Inspector Eddy testified that the end of the lifeline was in the No. 5 entry, and the loading point was in the No. 4 entry. Tr. 306. Eddy stated miners were not trained to gather at the loading point in an emergency. Tr. 306. The miners would have to gather at the end of the lifeline. Tr. 307. The standard he cited does not contain anything about a lifeline. Tr. 309.

Inspector Eddy's notes for July 29, 2015 are incomplete, with pages 1 and 2, and 8 through 10 missing; the Exhibit ends at page 14 without information about the inspection beyond 1100 hours. GX-12, Tr. 297, 311. There is no information regarding an imminent danger run. The notes do contain Eddy's findings and determinations that in entry No. 5 at 30' outby the No.

47 block a ram car was parked in the primary escapeway with 30” of clearance along the right, lifeline side of the entry. *Id.*, pp. 3-4. He described the mine floor as extremely uneven with ruts and determined this created slipping and tripping hazards and would cause fatigue, broken bones, strains and sprains when attempting to transport an injured miner out the obstructed primary escapeway. *Id.*, pp.4-6.

Respondent’s John Opfar was with Eddy and testified there was a ram car in the entry inby the section loading point, and a branch line lifeline ran past that ram car to take you to a refuge alternative. Tr. 320, 322. The branch line was running from the No. 2 entry primary escapeway on the other side of the section all the way over to the refuge alternative. Tr. 323. The branch line was not run past the power center⁸, because the cables there could be a tripping hazard. Tr. 330, 331. The branch line could not run directly from the lifeline across the section to the lifesaving alternatives because there was a conveyor belt entry that could not be crossed. Tr. 323. He described the loading point as where coal is dumped onto the belt at a section tailpiece at the feeder. Tr. 324. To escape, miners would congregate at the beginning of either the primary escapeway or the alternate escapeway, or at the power center. Tr. 324. On July 29, the power center was inby the loading point, and the ram car was inby the power center. Tr. 325.

Opfar recorded his contentions regarding the citation on the day it was issued. Under details of the violation he wrote “There was a ram car parked in the entry of the branch line run to the refuge alternative”. For the reason he contested the violation he wrote:

I dont think this even (sic) a citation since it is inby the feeder.

1. There was a walkway around the ram car it just was not 6’ wide. 2. This was not the actual escapeway it was a branch line run to the refuge alternative. 3. The branch line that was run to the refuge alternative was actually running inby to get to the refuge alternative. In the event of an emergency a person would most likely be trying to get out of the mine not traveling inby to the refuge alternative.

R-16.

At the request of the Court, Opfar drew a diagram showing the entries on the section. JX-2. The purpose was to clarify what he meant by “entry of the branch line”. Opfar drew five entries, numbered 1 through 5 from left to right. The drawing shows the location of the ram car in entry No. 5, the power center outby the ram car in entry No. 5, the feeder in entry No. 4, located outby the power center, and the refuge alternative to the right in entry No. 6. Opfar drew the branch line in red ink from the main lifeline in entry No. 2 across the section inby both the feeder and the power center to entry No. 5, where it turned inby running past the ram car on the right side before crossing to entry No. 6 and continuing to the refuge alternative. *Id.*; Tr. 331-333.

⁸ The terms “power center” and “load center” were both used at the hearing and refer to the same equipment. In this decision, power center will be used.

Opfar testified there were three escapeways maintained, a primary, a secondary, and a third, not required, beginning outby from the tailpiece in entry No. 5. Tr. 340. The primary escapeway was the No. 2 entry, ventilated with intake air from the nearest shaft. Tr. 341. The alternate escapeway was the No. 3 track entry, ventilated with a different source of intake air. Tr. 341-342. Opfar further testified the primary escapeway had to come up the left side because that was intake air, there were no electrical installations, no ignition sources, and it was the closest route out of the mine. Tr. 340-341, 345.

Analysis

The portion of the safety standard cited pertains only to escapeways, and how escapeways are to be maintained. However, the subsection of the standard cited should be viewed in the context of the entire regulation. Therefore, a brief discussion of escapeways is deemed useful.

At least two separate and distinct travelable passageways shall be designated as escapeways from each working section, continuous by the most direct, safe and practical route to the surface. 30 C.F.R. § 75.380 (a), (b)(1), (d)(5). One escapeway ventilated with intake air shall be designated the primary escapeway. *Id.*, at (f)(1). Equipment not permitted in the primary escapeway includes power installations such as a power center. *Id.*, at (f)(3)(iii). One escapeway shall be designated the alternate escapeway. The escapeways may be ventilated from a common intake air source. *Id.*, at (h). Each escapeway shall be maintained at least 6 feet wide; although there are a number of circumstances where the width can be less, including a location where there is a question regarding whether there is sufficient width for escape of miners and disabled persons. In such a location MSHA may require a stretcher test through the area. *Id.*, at (d)(4). Each escapeway shall be provided with a directional lifeline the entire length of the escapeway, equipped with directional indicator cones as well as a branch line leading from the lifeline to an SCSR cache and a refuge alternative. *Id.*, at (7)(i), (v-vii).

Inspector Eddy's notes do not contain information as to how he determined the No. 5 entry was the primary escapeway other than what he believed was a lifeline for escape out of the mine running beside the ram car. Absent from his notes, GX-12, is any information about an imminent danger run that morning, which could assist in a full understanding the physical layout and ventilation in the No. 5 south mains on that inspection day. Further, in his testimony, Eddy did not credibly articulate how he determined the No. 5 entry was the designated primary escapeway. What can be taken from his testimony and notes is his belief that the lifeline beside the ram car was for escape out of the mine in the event of an emergency. He also did not explain what "further investigation" he conducted or how all the miners on the crew "knew" the No. 5 entry was the primary escapeway, as he had concluded.

The condition or practice described in the citation is clear that Eddy found the No. 5 entry to be the primary escapeway. Absent is credible information about alternate escapeway(s), ventilation on the section, the location of equipment installations other than the loading point at the time of the inspection, or how in an emergency miners could find SCSRs or the refuge alternative. While the specific subsection of the standard he cited does not cover lifelines, in arriving at his determination he concluded the line running beside the ram car was "absolutely"

not a branch line. But he offered no support for this such as, for example, a description of the directional cones installed in that area, whether there was a power installation in the No. 5 entry, or confirmation that the line next to the ram car ran directly out of the mine.

Respondent's Opfar was with Eddy on the inspection and he gave detailed, consistent and specific information about the entries, escapeways and ventilation that existed on the section at the time of the inspection. Consistent with the safety standard, he testified entry No. 2 to the left of the section was the primary escapeway, because it was on intake air, had no electrical installations or ignition sources, and was the most direct route out of the mine. Entry No. 3, the track entry, was designated the alternate escapeway and was on a separate source of intake air. Although not required, the mine did maintain a third escapeway beginning outby both the power center and the loading point; this was in entry No. 5. Opfar also described in detail, and illustrated, how the branch line was run to the refuge alternative. Coming from the primary escapeway, it did run past where the ram car was parked in order to cross over to entry No. 6. He explained why this route was taken, in order to avoid cables around the power center and also avoid crossing a conveyor belt line.

I find the testimony and notes of Respondent's John Opfar to be more credible and of greater probative value in making a decision in this matter than the testimony and notes of Inspector Eddy. The Inspector did not adequately support the conclusions he made from his observations, in particular that entry No. 5 where the ram car was parked was the designated primary escapeway. It was not an escapeway out of the mine until the point outby the feeder, which was not required but was maintained as a third alternative. On this record, the evidence found credible supports the Respondent's arguments that there was a branch line in entry No. 5 to a refuge alternative and a power center located outby the ram car in entry No. 5. I do not find any discussion of the disputed evidence regarding a "stretcher test" or "ruts" to be necessary to this decision. The Secretary has not established, by a preponderance of the evidence found credible, that there was a violation of 30 C.F.R. § 75.380(d)(4).

ORDER

Citations #7033764, #9057948, and #7033768 are **VACATED**.

Citation #9057948 is **MODIFIED** to non-S&S, injury unlikely and low negligence.

The total assessed penalty is \$150.

It is further **ORDERED** that Respondent will pay the total penalty of \$150 within 30 days of this order.⁹ Upon receipt of payment, this case is **DISMISSED**.

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

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⁹ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 14, 2018

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

v.

CONSOL PENNSYLVANIA COAL
COMPANY, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2015-0339
A.C. No. 36-07230-390481

Mine: Bailey Mine

AMENDED DECISION¹

Appearances: Jane Hwang, Esq., Office of the Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for Petitioner.

Patrick W. Dennison, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania for
Respondent.

Before: Judge Andrews

This proceeding is before me on a petition for assessment of civil penalties filed by the Secretary of Labor (“Secretary” or “Petitioner”), acting through the Mine Safety and Health Administration (“MSHA”), against Consol Pennsylvania Coal Company, LLC, (“Consol” or “Respondent”), at its Bailey mine, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820 (“Mine Act” or “Act”). This docket involves twenty citations issued pursuant to Section 104(a) of the Act during the period from October 2, 2014 through July 29, 2015 with total proposed penalties of \$20, 166.

A hearing was held in Pittsburgh, Pennsylvania on August 14 and 15, 2017. Prior to the hearing, the parties settled sixteen of the citations, and those settlements were placed on the record. The partial settlements were approved on December 20, 2017. Testimony and documentary evidence was presented by the parties on the remaining four citations.²

¹ This Decision has been amended to change page 24, line 1 from 9057948 to 9057956.

² References to the transcript will be “Tr.” followed by the page number(s). Joint exhibits will be “JX”, the Secretary’s exhibits will be “GX”, and Respondent’s exhibits will be “R”, each followed by the number.

After the hearing, each party submitted a post-hearing brief and Respondent filed a Reply Brief.³ All of the evidence of record has been considered.⁴

Joint Stipulations were admitted at the hearing:

1. The Respondent was an “operator” as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Mine Act”), 30 U.S.C. § 803(d), at the Bailey Mine (Mine I.D. 36-07230) at which the citations at issue in this proceeding were issued.
2. Operations of the Respondent at the mine at which the citations were issued are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
4. The individuals whose names appear in Block 22 of the citations were acting in their official capacities and as authorized representative of the Secretary of Labor when the citations were issued.
5. True, authentic copies of the citations were served on the Respondent or its agent as required by the Mine Act.
6. The citations contained in Exhibit “A” and attached to the Secretary’s Petitions are authentic copies.
7. Payment of the total proposed penalties listed in Exhibit “A” for Docket No. PENN 2015-339 will not affect Respondent’s ability to continue in business.
8. The R-17 Certified Assessed Violation History Report (Exhibits GX1) is an authentic copy and may be admitted as a certified business record of the Mine Safety and Health Administration.

³ Throughout this decision the Secretary’s Post Hearing Brief will be cited as “SPHB”. Respondent’s Post Hearing Brief will be cited as “RPHB” and the reply brief as “RRB”.

⁴ The findings of fact in this decision are based on the record as a whole and the Administrative Law Judge’s careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the ALJ has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness’s testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the ALJ has also evaluated demeanor. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on the ALJ’s part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

9. The citations contained in Docket No. PENN 2015-339 were each issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated in the Citations, as required by the Act.
10. In July 2015, Bailey Mine (Mine I.D. 36-07230) was subject to 5-day Methane Spot Inspections.

JX-1

Legal Principles

Strict Liability

The Commission has established that under the Mine Act an operator may be held liable for a violation of a safety standard without regard to fault. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd* 868 F.2d 1195 (10th Cir. 1989). Therefore, the Mine Act is a strict liability statute and if a violation of a mandatory safety standard occurs, an operator will be held liable regardless of the level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Ames Construction, Inc.*, 33 FMSHRC 1607, 1611-12, n.6 (July 2011).

Burden of Proof

In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). The burden imposed on the Secretary by the Mine Act is to prove alleged violations and related allegations such as gravity and negligence by a preponderance of the evidence. *Garden Creek Pocahontas Company*, 11 FMSHRC 2148, 2152 (Nov. 1989), citing *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ). Quoting the Supreme Court in *Concrete Pipe*, 508 U.S. 602, 622 (1993), the Commission observed that “[t]he burden of showing something by a ‘preponderance of the evidence,’ the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir 2001); *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

Gravity

The term “gravity” is contained in Section 110(i) of the Mine Act in the context of factors to be considered by the Commission in assessing civil monetary penalties. Among those factors is “the gravity of the violation”. This is generally expressed as the degree of seriousness of the violation and is measured in terms of the likelihood of injury, the severity of such injury should it occur, the number of persons affected, and whether the violation is significant and substantial.

Significant and Substantial (“S&S”)

Section 104(d) (1) of the Mine Act describes an S&S violation as being “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d) (1). The Commission has established that a violation is significant and substantial if, based on the particular facts surrounding the violation, there exists a reasonable likelihood the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The four-part test long applied to establish the S&S nature of a violation examines: “(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 will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec’y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The *Mathies* test has been revised to focus on the interplay between the second and third steps. The second step addresses the contribution of the violation to a discrete safety hazard and is now primarily concerned with “the extent to which the violation increases the likelihood of occurrence of the particular hazard against which the mandatory standard is directed.” *ICG Illinois*, at 2475, *citing Newtown Energy Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) *citing Knox Creek*, at 162-63. At this step a two-part analysis is required. First, the particular hazard to which the violation contributes must be clearly described. The Commission defines “hazard” in terms of prospective danger, *i.e.*, the danger which the safety standard at issue is intended to prevent. The starting point for determining the hazard is the regulation cited by MSHA. Second, a determination is required of whether, based on 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. *ICG Illinois*, at 2475-76; *Newtown*, at 2038. The Commission has recognized that “reasonable likelihood” is not an exact standard capable of measurement in precise terms, but is a matter of the degree of risk of the occurrence of a hazard or a reasonably serious injury. *ICG Illinois*, at 2476; *Newtown*, at 2039.

At step three the focus shifts from the violation to the hazard and the analysis is concerned with gravity. The *Knox Creek* Circuit Court reasoned that at this stage of the analysis the existence of the hazard should be assumed. *Knox Creek*, at 164. The inquiry is whether, based on the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. *ICG Illinois*, at 2476, *Newtown*, at 2037, *citing Cumberland Coal Res.*, at 2365. The Commission has not equated the reasonable likelihood standard with a probability greater than fifty percent; The Secretary is not required to prove an injury was “more probable than not”. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865-66 (Jun. 1996). The step four gravity determination is essentially unchanged, whether any resultant injury would be reasonably likely to be of a reasonably serious nature. *Newtown*, at 2038.

Negligence

Section 110(i) of the Mine Act also includes “negligence” as one of the six criteria the Commission is required to consider in assessing a penalty. The term is not defined in the Act, but

over 30 years ago the Commission recognized that: “[e]ach mandatory standard... carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A. H. Smith Stone Company*, 5 FMSHRC 13, 15 (Jan. 1983).

The Commission has established that its judges may “evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act.” *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). This evaluation considers “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Jim Walter Resources*, 36 FMSHRC 1972, 1975 (Aug. 2014).

The Secretary’s regulations categorize negligence into levels labeled “no”, “low”, “medium”, “high”, and “reckless disregard”. These levels are based on the degree of the operator’s knowledge of the violative condition or practice along with the existence or multiples of mitigating circumstances found to be present. The procedure used takes the level of negligence determined and applies a number of “points” from a table which are then added together with points from other factors to arrive at the calculated proposed penalty amount. *See*, 30 C.F.R. § 100.3, Tables I-XIV.

The Commission and its judges are not bound to apply the 30 C.F.R. Part 100 regulations that govern the MSHA’s determinations. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016) *citing Brody* at 1701-03. Therefore, the Commission’s judges are not limited to an evaluation of allegedly “mitigating circumstances” and instead may consider the “totality of the circumstances holistically.” *Brody*, at 1702; *Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir 2016). For example, the Commission has stated the real gravamen of high negligence is that it “suggests an aggravated lack of care that is more than ordinary negligence.” *Newtown*, at 2049, *citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) *citing Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). High negligence may be found in spite of mitigating circumstances, or, for example, moderate negligence may be found without identifying mitigating circumstances. *Brody*, at 1702-03. The Commission has described ordinary negligence as “inadvertent,” “thoughtless,” or “inattentive” conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987).

Penalty

The Mine Act delegates the duty of proposing civil monetary penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The proposed penalty is calculated by application of the Secretary’s regulations at 30 C.F.R. Part 100. By referring to each citation or order along with operator data and violation history, points are applied and totaled to arrive at a monetary penalty amount. 30 C.F.R. § 100.3 and Tables I-XIV. The Commission and its judges are not bound by the Secretary’s proposed assessment, and the Part 100 regulations are in no way binding in Commission proceedings. The Commission alone is responsible for assessing the final monetary penalty. *Sec’y of Labor v. American Coal Company*, 38 FMSHRC 1987, 1990, 1993 (Aug. 2016)

citing Sellersburg Stone Co. v. FMSHRC, 736 F.2d 1147, 1151-52 (7th Cir. 1984); *Mach Mining, LLC, v. Sec’y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) If the operator challenges the proposed penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28.

The Mine act delegates to the Commission and its judges the “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). In assessing civil monetary penalties the six criteria to be considered are the operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The principles governing the authority of Commission Administrative Law Judges to assess civil monetary penalties *de novo* are well-established. *Hidden Splendor Resources, Inc.*, 36 FMSHRC 3099, 3104 (Dec. 2014). Congress has conferred broad discretion upon the Commission and its Judges in the assessment of civil penalties under the Act. *American Coal*, at 1993 *citing Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). The assessment of the Judge is entirely independent of the Secretary’s penalty proposal, which is not a baseline, starting point or guidepost. *American Coal*, at 1990, 1995. However, the broad discretion accorded to the Judge is not unbounded and must reflect proper consideration of the statutory penalty criteria. *Id.*, at 1993. For each of the six statutory criteria, the Judge must make findings of fact. *Id.*; *Sellersburg Stone Company*, 5 FMSHRC 287, 292 (Mar. 1983); 29 C.F.R. § 2700.30(a). Although all six of the statutory criteria must be considered, the factors need not be assigned equal weight, and for more serious violations gravity and negligence may be weighed more heavily than the other four criteria. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2374 (Sept. 2016) *citing Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001); *see also Spartan Mining company, Inc.*, 30 FMSHRC 699, 724-25 (Aug. 2008) and *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010).

Underlying the Mine Act’s penalty assessment scheme is the deterrent purpose of its penalty provisions. *Black Beauty Coal Company*, 34 FMSHRC 1856, 1866-67 (Aug. 2012) *citing Sellersburg Stone* at 294. The Judge may take into account the deterrent effect of the penalty assessed. *Black Beauty* at 1168-69; *see also Coal Employment Project v. Dole*, 889 F.2d 1127, 1133 (D.C. Cir. 1989). The Commission has also stated Judges “must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge.” And, “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.” *American Coal*, at 1994; *citing Sellersburg*, at 293. The Judge need not make exhaustive findings. *See, Cantera Green*, 22 FMSHRC 616, 621 (May 2000).

Citation No. 7033764

This citation was issued on July 16, 2015 by Inspector Richard L. Eddy (“Inspector Eddy” or “Eddy”).⁵ The Condition or Practice was described as follows:

Based on the laboratory analysis Bag No. 0155006AA of a rock dust survey taken by M.S.H.A. on 07/08/2015 on 4J, MMU No 002-0 at 40’ outby the face of the No. 1 Entry, it was determined that the sample collected was non compliant. All underground areas of a coal mine shall be maintained in such quantities that the incombustible content of the combined coal dust, rock dust and other dust shall not be less than 80%. The sample collected was at 65.9%.

Standard 75.403 was cited 23 times in two years at mine 3607230 (23 to the operator, 0 to a contractor).

Supporting rock dust sample bag numbers: 0155006AA

Inspector Eddy designated the violation as S&S. He determined injury was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty to 4 persons. Eddy rated the negligence as moderate. The citation was terminated about 3 hours later when he found the area had been rock dusted. GX-7. The proposed penalty is \$807.

The safety standard cited provides:

Maintenance of incombustible content of rock dust.

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 80 percent. Where methane is present in any ventilating current, the percent of incombustible content of such combined dust shall be increased 0.4 percent for each 0.1 percent of methane.

30 C.F.R. § 75.403.

⁵ Inspector Eddy stated he had a little over 44 years in the coal mining industry. Tr. 164. He started in 1973 and learned to run all types of underground equipment. Tr. 162-163. He then worked as a Certified Mine Foreman and a mine Examiner. Tr. 163-165. From 1989 to 1993 he was a full-time labor representative for the United Mine Workers (UMW), then a District President until 2004, and then a District Vice-President until 2010, when he retired. He returned to the UMW for a couple of years until he started with MSHA. Tr. 164. From July 2012 until October 2015 he was certified in accident investigations such as ignitions and personal injury. Tr. 160-162. At the time of the hearing, he was a Field Office Supervisor in Craig, Colorado overseeing all functions of that office including all types of inspections and accident and injury investigations. Tr. 160.

In addition, in pertinent part:

Rock dusting.

All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter....

30 C.F.R. § 75.402.

Contentions

Respondent contends that rock dust sample bag No. 0155006AA was collected at or less than forty feet outby the face of the No. 1 Entry, where Respondent was not required to rock dust. Respondent argues that measuring the distance from the face by counting roof bolts and straps was neither accurate nor reliable because of the use of roof mesh and the spacing of roof straps less than four feet apart. As a result, the Secretary has not sustained the burden of demonstrating the fact of this violation by preponderance of the evidence. RPHB, pp. 23-32.

The Secretary contends the Inspector was required to take samples beginning at least forty feet from the face, and the sample at forty feet outby the face of the No. 1 Entry was only 65.9% incombustible content. The Secretary argues there were mining machines in the No. 1 entry and production was shut down for the sample; when machines are present the Inspector does not use a measuring tape, but the four foot spacing of the roof bolt straps. Further, the Inspector counted eleven straps back from the face, and considering that the first strap would be one to two feet from the face, this resulted in a distance of forty one to forty two feet, which is the accurate measurement rather than his notes stating the sample was at forty feet outby. SPHB, pp. 15-21.

Evidence

Inspector Eddy testified he was familiar with E01 inspections at the Bailey mine. Tr. 165. He had conducted at least two quarterly inspections at the Bailey Mine, equal to 6 months of inspection time. Tr. 166. On July 8, 2015, Eddy conducted an E01 inspection at Bailey, which was under a 103I spot inspection for methane liberation because the mine generated more than 1 million cubic feet of methane per 24 hour period. Tr. 167-168. That day Eddy traveled to the 4J MMU 002-0 section and collected rock dust samples. Tr.168-169. When he took the sample, the section had to shut down. Tr. 176-177.

Eddy testified he collected the violative sample 41 feet from the face. Eddy testified that he typically used a 25-foot measuring tape, but he did not want to use it in this instance because there was machinery in the No. 1 entry. Tr. 172. Eddy used the roof bolt metal straps to calculate the distance because he believed the straps were at 4-foot intervals and he counted 11 of them; and because the last strap was one to two feet from the face, his measurement would be 41-42 feet from the face. Tr. 173. Eddy testified that the roof straps were every 4-5 feet according to

the Bailey mine's roof control plan. Tr. 174. However, Inspector Eddy also testified that in the notes submitted to MSHA with the sample and in the citation he wrote he took the sample at 40 feet outby the face, not 41 or 42 feet outby. Tr. 193-194, 199; GX-7. He submitted the samples he collected for testing. The result for bag 0155006AA was 65.9% incombustible material with .3% of methane present. Tr. 170-171, GX-8. The location of the sample was "40' Outby Face of No 1 Entry".

Inspector Eddy testified that at .3% methane, miners were allowed to roof bolt because the explosive range of methane is between 5-15%. Tr. 207-208. Additionally, Eddy testified that a continuous miner will deenergize at 1.9% methane. Eddy noted the ventilation in the section at the time was safe at 31,323 CFM. Tr. 208. There were no permissibility violations for the mining equipment that day. Tr. 209.

When Inspector Eddy returned to the mine on July 16, 2015, with the sample results from July 8, 2015, he issued the citation for a violation of 30 C.F.R. § 75.403 for having an incombustible content less than 80%. Tr. 171. Eddy testified the regulation requires the mine to rock dust 40 feet out from the face. Tr. 180-181. Eddy further testified that this standard requires an ignition source, and the continuous miner and roof bolter machines create sparks that can be ignition sources. Tr. 171-172, 180, 182-183.

Inspector Eddy's notes for July 8, 2015, show that he did not record the name of the company representative accompanying him on the inspection. GX-10, p. 1. After traveling to the 4J, MMU 002 section and terminating two citations, he collected three rock dust samples in the No. 1 entry. The third sample was listed as: "Rock Dust Sample No 0155006AA at 40' Outby Face of No. 1 Entry". *Id.*, pp. 3, 4. Eddy then proceeded on an imminent danger run from entry No. 1 to entry No. 3. With his findings in the No. 3 entry he listed a continuous miner, a Joy loader, a Joy shuttle car, and a power center, observing no violations for any of the equipment. *Id.*, pp. 5-8.

John Opfar ("Opfar"), Dust Coordinator, testified for Respondent.⁶ Opfar was the respirable dust coordinator in July 2015, but he also helped the safety department by traveling with inspectors. Tr. 234. As the dust coordinator for Consol, Opfar helped Consol ensure it complied with all respirable dust regulations and made sure that Consol took all quarterly respirable dust samplings. He also helped the safety department often, escorting inspectors and running safety meetings. Tr. 235. Citation No. 7033764 was issued to Opfar on July 16, 2015. Tr. 236.

⁶ John Opfar worked at Mine 84 for a little over 4 years and then at Consol's Bailey mine for 12 years. Tr. 233. At Consol he worked in the safety department as a Safety Inspector and Respirable Dust Coordinator. He has a number of certifications, including dust sampling, continuous personal dust monitor (CPDM) sampling, gravimetric sampling, maintenance and calibration of the sampling devices, methane and oxygen deficiency, mine examiner, and EMT. Tr. 233-234. In 2015 he was the Respirable Dust Coordinator. He graduated in 2004 with a Bachelor's of Science Degree in Safety and Environmental Management. Tr. 234.

Opfar testified that in the 4J section, there were three entries, 1, 2, and 3. Tr. 239. No. 1 was the belt entry, and No. 2 was the track entry, with intake air. Tr. 239-240. Opfar testified that in the 4J section, the continuous mining machine cut out 12 feet, advanced the miner, then roof bolts were installed to hold the roof up, “275 feet up the return.” Tr. 240-241. After the miners moved to the track entry, they would start the same cycle again. During that time, if they mined 40 feet, they rockdusted “the whole cycle.” The miners used a loading machine with a hopper on it to rockdust. Opfar testified that the air carried the rock dust a little farther than it was being sprayed. Tr. 241.

Opfar testified that David Govan traveled with the inspector on July 8, 2015, when the sample was taken. Tr. 236-237. Govan is no longer employed by Consol due to a work force reduction. Tr. 237. After the Citation was issued, David Govan recorded his contentions regarding the violation:

1. The three other samples taken in the area were all well above the 80% standard.
2. There was not any active mining in the entry the sample was taken. The active mining was taking places (sic) two entries away from the area that was cited.

R-9.

Opfar helped Dave Govan with his notes. Tr. 246. He testified the date of July 13, 2015, on the document was not accurate, since the citation was not issued until July 16, 2015, and the notes were prepared the day the citation was issued. Tr. 247-248, 268.

Opfar testified that roof straps were always less than 4 feet at the Bailey mine because the straps held the roof mesh up, and the roof mesh was 4 feet. Thus, the straps were less than 4 feet apart to secure the mesh. Tr. 243. Opfar further testified that Consol put extra bolts in the belt entry to prevent a roof fall because it was difficult to get equipment in the area once the belt was installed. Tr. 245. Opfar testified that Bailey mine always added extra roof bolts in a belt entry even if the roof was in good condition. Tr. 276.

Opfar agreed the continuous miner and roof bolter can create sparks, and that methane was released during mining. Tr. 270. Opfar testified that ignition can occur even though there were sprays at the tip of the bits on the continuous miner. Tr. 284-285. However, Opfar testified there was no mining in the entry and no roof bolting in that area on July 8, 2015. Tr. 273. He stated there was no mining that day in the No. 1 entry, so there was no ignition source. Tr. 265.

Analysis

It is well established that the phrase “to within 40 feet of all working faces” has been accepted to mean *beyond* 40 feet of working faces or *more than* 40 feet from the face. For example, it is not required that rock dust be applied from the face to 40 feet outby the face. *Consol*, 39 FMSHRC 572, 573 (Mar. 2017) (ALJ Steele). The sample submission form location and the written citation locations were different than the testimony of the Inspector at the hearing. Inconsistencies between the Secretary’s documentary and testimonial evidence and the

contradictory testimony of an operator's witness are important factors when assessing the credibility of witnesses as well as, in this case, the location of a sample.

The sample submission form shows the collection date of July 8, 2015, and the location as "40' Outby Face of No 1 Entry". GX-8. On the citation issued on July 16, 2015, the location was "at 40' outby the face of the No. 1 Entry". Not until the hearing was there a change in the location to 41-42 feet from the face. The Secretary suggests the discrepancy is a mere 12 inches.

Inspector Eddy relied on the mine's roof control plan requiring roof bolting every 4 to 5 feet. Then, counting 11 rows out, and considering the first row only 1-2 feet from the face, he concluded the distance must have been at least 41-42 feet from the face. However, he did not actually measure the distance with a tape measure.

The reason given for not using the tape measure was that he recalled machinery, not identified, was in the entry, and also that the section had to shut down for him to collect the sample. But Eddy's own notes do not support his testimony. The imminent danger run ended at entry No. 3. In his notes from the No. 3 entry Eddy recorded the presence of three mining machines, a power center and a refuge alternative. There was no indication of shutting down production. Under his notes at entry No. 1, there is no indication of any machine.

Inspector Eddy also did not measure the distance between any of the rows of roof bolts and straps to confirm that they were at least 4-5 feet apart. There is no indication that he visually estimated any of the rows to even determine that the 4 to 5 foot distance was actually being maintained.

Respondent's witness Opfar disagreed that the sample was properly taken. He described in detail the reason the roof bolts and straps were spaced at less than 4 feet apart. Opfar testified that the roof bolts and straps also secured wire mesh to the roof, and this mesh is 4 feet wide. To secure rows of mesh, the spacing must be at less than 4 feet. This would place the sample location at or less than 40 feet from the face. Opfar's testimony, based on an objective means of determining distance, is of greater probative value than the recollections, estimates and reliance on the roof control plan by the Inspector. Further, Opfar's testimony that there was no mining taking place in the No. 1 entry is more consistent with the Inspector's notes.

It is the Secretary's burden to prove a violation by a preponderance of the evidence. Here, the evidence found credible does not show that the sample at issue was taken *more than* 40 feet from the face of the No. 1 entry. Therefore, the Secretary has not carried the burden to establish a violation of 30 C.F.R. § 75.403 occurred. Accordingly, Citation No. 7033764 should be vacated.

Citation No. 9057948

Inspector Michael D. Moten (“Inspector Moten “ or “Moten”)⁷ issued this citation on July 28, 2015 under safety standard 30 C.F.R. § 75.1722(b). The Condition or Practice was described as follows:

At the 4 West-#2 conveyor tail pulley the operator has failed to install a guard extending a sufficient distance to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. When checked, the installed guard placed the self cleaning tail pulley within 9 inches of reach.

Moten designated the violation as S&S. He determined that injury was reasonably likely and could reasonably be expected to be permanently disabling to 1 person. He rated the negligence as moderate. The citation was terminated only minutes later when:

A guard was installed and secured which extends a distance appearing adequate to prevent a miner from reaching behind and coming caught between the belt and tail pulley. GX-3.

The proposed penalty is \$807.

The safety standard provides:

Mechanical equipment guards.

- (a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.
- (b) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.
- (c) Except when testing the machinery, guards shall be securely in place while machinery is being operated.

30 C.F.R. § 75.1722

Contentions

Respondent contends the guarding at the 4 West No. 2 belt tailpiece had existed since 2008 and had been inspected by MSHA many times. The sides, back and top of the tail pulley

⁷ Inspector Moten had worked since 2002 at a number of underground and surface mines as section foreman, equipment operator, apprentice electrician, rescue team member, and mine examiner. Tr. 15-16. He holds state certifications in mine rescue and assistant mine foreman; his EMT certification has lapsed. Tr. 16. He became a Coal Mine Inspector in 2012. Tr. 13.

were completely covered and enclosed, with only a small opening for the belt to enter and wrap around the tail pulley; a miner would not be in a position to reach behind the guard. Therefore, the pinch points were entirely protected by the guarding to satisfy the standard; there was not a reasonable potential risk of contact with the tail roller or pulley by stumbling, falling, inattention, or carelessness. The additional piece of guarding installed to abate the citation only blocked access to the belt, but nothing was done to the existing guarding to the tail pulley or roller. Further, Respondent argues it did not have adequate notice that this guarding was insufficient and in violation of the cited safety standard. RPHB, pp 1-13; RRB, pp. 1-2, 4-5.

The Secretary contends there was an opening large enough to fit a hand and arm in the guarding so a person could reach behind and come between the tail pulley and the belt. The opening was on the walkway side of the belt, and putting a hand into the opening would cause contact with moving parts. It was reasonably likely, due to a water hose and hardware in the area, that a person could stumble or trip and place their hand into the tailpiece. Examiners travel through the area three times daily. SPHB, pp. 7-8.

Evidence

Inspector Moten testified he had mining experience with guarding, installing belt heads, and conducting examinations of belt heads in working and outby areas. Tr. 15-16. When he checked the tailpiece for the 4 West No. 2 conveyor belt he discovered an opening in the installed guarding that was large enough to allow a person to reach behind the opening and get caught between the belt and the tail pulley. The opening was large enough that he could fit his hand and arm in the opening. He would have easily been able to reach and touch the moving parts. The belt ran at 840-850 feet per minute. Tr. 21-24, 28; GX-3. The moving parts were accessible at a distance of 9 inches, by tape measure, to where the belt and pulley contacted each other. This was adjacent to the travel way on the walkway side of the belt. Tr. 23-24; GX-4, p. 6. The opening was obvious, an examiner should have known the condition existed because you could just stand and observe there was an opening. Tr. 28.

Inspector Moten also testified there were tripping hazards near the unguarded area, including a 1-inch washdown hose and hardware for installation of the belt head and tailpiece. Tr. 24. A miner tripping, and attempting to catch themselves, could place their hand into the tailpiece. Tr. 26. This area would be examined at least 3 times every day, and inspected at least 4 times a year. Tr. 25, 42. Belt mechanics also worked in the area. Tr. 25, 130. This citation was terminated when a large piece of guarding was attached to cover the opening, so that a hand or fingers could no longer fit through. Tr. 25-26, 53. It took nine minutes to abate this violation. Tr. 62-63. Inspector Moten testified he was told no guarding had ever been there, and no one had “an issue” with the area previously. Tr. 63.

Inspector Moten designated this violation as Significant & Substantial (“S&S”) because he believed there was a tripping hazard near the opening, which could lead to a person stumbling and putting an arm through the hole. Tr. 26. He testified that this could lead to a permanently disabling injury because a miner could lose their hand up to the middle of the forearm or be pulled into the belt. Tr. 27. Inspector Moten evaluated the negligence as moderate because this area was examined three times daily and the opening was obvious. Tr. 28. Photos taken after the

citation show the abatement guarding in place; the opening into the moving parts cited is not visible because of the mesh. R-2.

Justin Jones (“Jones”), a Consol Safety Inspector, accompanied Inspector Moten that day and testified for Respondent.⁸ He testified he believed it was impossible for a person to injure themselves by putting a hand in the cited opening unless they were actively trying to do so because of the angle. Tr. 109. He also testified this guarding had been installed by 2008 and every MSHA inspector since that time who had observed this tail pulley never had an issue with the guarding. Tr. 111. The only time work would be done on the tail pulley would be once a week when it was greased. When the pulley was being greased, the belt would be locked and the electrical switch would be thrown. Tr. 110. He testified there was guarding above the tail pulley, where the belt moves through the guarding. Tr. 50. There was 3-5 inches between the belt and this original guarding. Tr. 106-107.

Jones testified that the guarding he installed to abate the violation was a 4x8 fiberglass mesh, which he attached with a zip tie. Tr. 104-105, 113-114. Jones testified that he found this mesh approximately a couple hundred feet away because guarding was interchanged frequently. Tr. 123.

Jones recorded his contentions on the date of the inspection:

The way the guarding is shaped and where it is located would make it very difficult for someone to fall in such a way to put their hand into the roller. Yes, it was only 9 inches away, but nearly impossible to reach up and over and around the guarding to get hurt....

R-1.

Analysis

The Commission has considered the meaning of the safety standard:

We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the

⁸ At the time of the hearing Jones had worked for Consol at the Bailey mine for almost 5 years, beginning as a safety trainee, then a safety technician, and becoming a safety inspector. Tr. 93. He has three dust certifications, mine examiner’s papers, and EMT certification. Tr. 96-97. He described his No. 1 job at Bailey as escorting inspectors. Tr. 97. Prior to this employment in 2012, he had not worked in the mining industry. Tr. 93. In 2006 he graduated with a Bachelor’s Degree in Psychology, and earned a Master’s Degree in Leadership and Business Ethics in 2012. Tr. 97. After college in 2006 he began in the Air National Guard as a general aircraft mechanic, becoming commissioned in 2014 and now serving as an aircraft maintenance officer one weekend a month and two weeks of duty a year. Tr. 95-96.

construction of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct.

Thompson Brothers Coal Company, 6 FMSHRC 2094, 2097 (Sep. 1984) (citations omitted).

The standard requires that guarding must be in place and extend a sufficient distance to *prevent* a person from reaching behind and coming into contact with the pulley and belt. This has been interpreted by the Commission to mean a *reasonable possibility* of contact and injury which includes inadvertent stumbling, falling, inattention or ordinary carelessness. The moving machine parts here were accessible through a small opening from a walkway where miners would travel to wash down the area and maintain the tailpiece. The mine's examiners would travel the area three times daily.

The opening cited by Moten was adjacent to the walkway and would allow a hand to fit into the tailpiece and contact moving parts. The pinch point between belt and roller was only 9 inches from the opening; this was determined by a tape measure. The drawing in Jones' notes points to the particular intersection of the installed guarding. R-1. Photographs 2 and 3 in Exhibit R-2 show this point, but with the abatement mesh in place requiring the observer to imagine that location without the 4X8 frame and mesh. Although Jones testified he thought it impossible, because of the angle, for a person to put a hand in the opening unless they were trying to do so, his opinion is outweighed by the credible testimony of Inspector Moten that you could just stand and see the opening accessible from the walkway. The cited opening was not measured for size, but Moten testified he would easily be able to put his hand into the opening.

The evidence found credible supports a reasonable possibility of contact and injury; I find there was a violation of the safety standard requiring guarding to prevent a person from contacting a belt and pulley.

Respondent also argues a lack of fair notice. However, the safety standard is clear in its prohibition, and a reasonably prudent person familiar with the protective purposes of the standard, standing and observing the opening seen by the Inspector would have recognized that a hazard existed. The purpose of the regulation is to prevent contact with moving parts, and no prior specific notice that additional guarding was needed at this tailpiece location was required.

That an occurrence is *possible* does not mean that it is *likely* to happen. While the small opening into moving parts 9 inches away was just enough for a hand to get through, that an inadvertent circumstance would occur with a miner being in the walkway resulting in such a hazardous contact with the tailpiece parts appears unlikely. This would be the case even in the event of a slip or trip over the washdown hose or other hardware in the walkway. The *possibility* of harmful contact does not rise to the level of a *reasonable likelihood* of such occurrence under the facts and circumstances presented here. The unmeasured size of the opening would be quite small if only enough to admit the inspector's hand. Not well described on this record is the actual position, or angle, of a person standing next to the belt structure in the walkway that would allow for that person's hand to be thrust through the opening. Since access to moving machine parts existed there was a hazard, but there was not a reasonable likelihood an injury would result. Therefore, I find the violation was not S&S.

Although I find injury unlikely in this case, I also find that if contact and injury did occur, the result would be very serious, with permanently disabling injuries or worse. Inspector Moten determined the negligence of the operator to be moderate. To the extent that the operator should have known of this small unguarded opening, considering years of daily examinations and other work in the tailpiece area, I agree. However, I find the degree of negligence to be low. Under the totality of circumstances presented, not seeing the small opening was inattentive in nature. It took an Inspector who had not been in this area before, but who had experience with conveyor belt systems, to see what others had missed for years. Inspector Moten did not have a history with this tailpiece and clearly made no assumptions about such guarding as was in place. His discovery enhanced the safety of miners working in the area.

Penalty

Of the six penalty criteria, the most important for this violation are gravity and negligence. The Bailey mine is large, and the ability to pay the proposed penalties was stipulated. Compliance was within minutes. I have found the violation was not S&S, and reduced the likelihood to unlikely and the negligence to low. If injury should occur, it would be very serious. On the basis of the above analysis, I independently assess a penalty of \$150.

Citation No. 9057956

Inspector Moten was back at the mine on July 29, 2015 and issued citation No. 9057956. The Condition or Practice was written as follows:

At the 4 West-#1 Belt Drive the operator has failed to secure the guarding in place to prevent a person from entering the take-up and drive rollers. The area is surrounded to "area guard" the drive. A gate with hinges was made guarding the tight side of the belt and take-up against the mine rib. The gate was in no way secured or signed to prevent entry.

Standard 75.1722(a) was cited 8 times in two years at mine 3607230 (8 to the operator, 0 to a contractor).

Inspector Moten designated the violation as S&S. He determined injury was reasonably likely and could reasonably be expected to be fatal to 1 person. He rated the negligence as low. Moten terminated the citation minutes later when the gate was closed and secured. GX-5. The proposed penalty is \$807.

The safety standard is set forth above, under Citation # 9057948.

Contentions

Respondent contends the belt drive was completely surrounded by fencing and the cited area was on the non-walkway side of the drive. A gate was hinged to the fencing on the left and was against a rib on the right; it could not be pushed open into the drive area. Cleaning and greasing were performed from the other, walkway side of the belt, and any maintenance on the

tight side would require shut down, lock out, and tag out. Moving parts inside the gate were 5 to 50 feet from the gate. Access to the tight side of the drive area could only be accomplished by pulling the gate open and walking through the entrance, both intentional acts. A slip, stumble, trip or fall into the gate could not cause contact with moving drive parts. The guarding had been in place for many years and had been inspected by MSHA and state inspectors with no evidence of any issue taken with the guarding. The citation was abated using a piece of wire to tie the gate to the rib. RPHB, pp. 14-17; RRB, pp. 2-3.

The Secretary contends the inspector found a partially opened gate on the offside or tight side of the belt, and there was no lock or chain on the gate or other way to keep a person from entering the area. The gate was easily opened and once inside the entire side of the take-up with moving parts was open and unguarded. This was a very hazardous condition, and likely to cause a fatal injury. Further, there was a reasonable likelihood of a miner entering the unguarded take-up area if the gate remained unsecured. SPHB, pp. 12-13.

Evidence

Inspector Moten testified that on this day he traveled to the 4 West No. 1 belt accompanied by Jones. Tr. 29-30. While checking the belt drive he saw a gate partially open at the end of the take-up drive. Tr. 30-31. The gate could be easily opened by hand because there was no lock or wire holding it closed. Tr. 32-33. Moten testified there were many moving parts, at a distance of 5 to 20 feet away. Tr. 31, 72-73. The moving parts were closer when the belt starts and stops, Tr. 90-92, and on this day were 20 feet away. Tr. 72-73. Moten also testified he would not have entered the gated area if he had known the take-up drive was unguarded. Tr. 34. The condition was hazardous, and likely to cause a fatal injury because a person could enter the area and their whole body could be pulled through the belt. Tr. 34, 36. He was unable to say for certain when the gate was shut or when it was left open. Tr. 37. Mine examiners would travel the area. Tr. 35. Jones used a wire to close the gate and abate the citation. Tr. 36.

Moten's notes were not detailed or extensive, but he did record the gate was not secured to prevent entry into the area. He also wrote that if an injury were to occur from falling into the moving belts it would reasonably be expected to be fatal. GX-6, pp. 21-22.

Justin Jones also testified for Respondent regarding this citation. He stated the gate was closed during the inspection, and was on an angle preventing a miner from pushing it in. Tr. 139-140. He also testified the closest moving parts to the gate were 15 to 20 feet away, and could be as far as 50 feet away. Tr. 145.

Jones also recorded notes on this citation. He wrote "the door was pushed up against the rib-effectively blocking travel into the tight side of the belt drive area." He also wrote "a person would have to open the door and walk into the belt pulley that is roughly 50 feet away." R-3.

Analysis

The contention that a piece of wire from the gate to the rib would make a difference to the security or ease of access to the drive area is without merit. The gate itself constitutes a

significant barricade, an obstruction capable of preventing passage. Area guarding does not violate the standard, the moving parts were 5 to 20 feet away from the gate, and pulling the gate open to walk through this entrance and into the area required an intention to access the area that would not be deterred by a piece of wire. The inspector did not require a chain and lock to be installed, which would certainly be a deterrent, but was satisfied by an easily placed and removable piece of wire. The gate, without the wire, could not be pushed inward; therefore a fall into the gate would not result in a fall into the area. Even in the event of inadvertence, inattention, or carelessness in pulling open the gate, a person familiar with the protective purposes of the standard would recognize the danger, just as Inspector Moten did, and not proceed the 15-20 foot distance to make contact with moving belt parts.

It is clear from the citation and Inspector Moten's notes that the violation alleged was based on *preventing* access into the drive area. However, similar to the guarding citation discussed above, there must be a *reasonable possibility* of contact and injury. Again, this does include inadvertent stumbling, falling, inattention, or ordinary carelessness. No trip hazards were identified in the inspected area. Any stumbling or falling into the gate would not breach the entrance into the area. Inattention or carelessness would be interrupted by the need to pull the gate toward the person before walking through the entrance and then walking an additional distance to the obviously moving belt parts. Further, a trained miner, viewing the area from the gate would know the belt needed to be shut down, locked out and tagged out. While there was disagreement as to whether the gate was partially open or closed and pushed up against the rib, this would not make a difference since the gate must still be pulled open. The vagaries of human conduct are not ignored when finding the area guarding and gate used at this belt drive location to be adequate. The violation has not been proven by a preponderance of the evidence, and the citation should be vacated.

Citation No. 7033768

Inspector Eddy issued citation No. 7033768 on July 29, 2015. The Condition or Practice was described as follows:

The primary escape way, located on the No. 5 South Mains, MMU 083-0, in the No. 5 Entry is not being maintained with at least a 6 foot walkway. When inspected by this inspector, the No. 5 Stambler Ram Car is parked approximately 30' outby the No. 47 Block. The distance between the right rib (where the life line is hung) was measured to be 30 inches. This condition would not allow miners to evacuate the No 5 South Mains MMU 083-0 safely if an emergency were to occur.

Standard 30 C.F.R. § 75.380(d)(4) was cited 7 times in two years at mine 3607230 (7 to the operator, 0 to a contractor).

Eddy designated the violation as S&S. He determined that injury was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty to 2 persons. He rated the negligence as moderate. Eddy terminated the citation within minutes when the No. 5 Ram Car was removed from the affected area. GX-11. The penalty proposed is \$585.

The safety standard provides:

Escapeways; bituminous and lignite mines.

(d) Each escapeway shall be-

(4) Maintained at least 6 feet wide except-

(i) Where necessary supplemental roof support is installed, the escapeway shall not be less than 4 feet wide; or

(ii) Where the route of travel passes through doors or other permanent ventilation controls, the escapeway shall be at least 4 feet wide to enable miners to escape quickly in an emergency, or

(iii) Where the alternate escapeway passes through doors or other permanent ventilation controls or where supplemental roof support is required and sufficient width is maintained to enable miners, including disabled persons, to escape quickly in an emergency.

When there is a need to determine whether sufficient width is provided, MSHA may require a stretcher test where 4 persons carry a miner through the area in question on a stretcher, or

(iv) Where mobile equipment near working sections, and other equipment essential to the ongoing operation of longwall sections, is necessary during normal mining operations, such as material cars containing rock dust or roof control supplies, or is to be used for the evacuation of miners off the section in the event of an emergency. In any instance, escapeways shall be of sufficient width to enable miners, including disabled persons, to escape quickly in an emergency. When there is a need to determine whether sufficient width is provided, MSHA may require a stretcher test where 4 persons carry a miner through the area in question on a stretcher.

30 C.F.R. § 75.380(d)(4).

Eddy designated the violation as S&S. He determined that injury was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty to 2 persons. He rated the negligence as moderate. Eddy terminated the citation within minutes when the No. 5 Ram Car was removed from the affected area. The penalty proposed is \$585.

Contentions

Respondent contends the No. 5 entry was not a designated escapeway, it contained a power center. The ram car was parked in by the loading point and there was a clearance of 30 inches on each side of the car. A stretcher test would have been successful for the 20-foot length of the ram car. Respondent argues the designated primary escapeway was the No. 2 entry, and the designated alternate escapeway was the No. 3 entry. The refuge alternative was located in the No. 6 entry, and a branch line was routed from the No. 2 entry primary escapeway across the section to the refuge alternative. RPHB, pp. 38-43.

The Secretary contends the escapeway width requirement must be viewed in the context of an emergency situation. The No. 5 entry primary escapeway was not being maintained with at least a 6-foot walkway because a ram car was parked in the middle of the escapeway. The Secretary argues there was only 30 inches of clearance on either side of the ram car and there were huge ruts in the roadway. There was no way people could get through with a stretcher or escape on the lifeline side of the ram car. SPHB, pp. 21-26.

Evidence

Inspector Eddy testified that as he travelled to the 5 south mains MMU 083, up the No. 5 entry toward the face, he noticed a ram car parked in the middle of the roadway. Tr. 287-288. Upon further investigation, he concluded the ram car was in the primary escapeway and at least a six-foot walkway was not being maintained in violation of §75.380 (d) (4). Tr. 288. Eddy explained that primary escapeways are designed to allow miners in an emergency to safely and quickly follow the life line to travel out to the surface. Each active working section must have a primary escapeway with a minimum six-foot walkway from the working face to the surface. Tr. 288-289.

Inspector Eddy testified he found the massive ram car parked right in the middle of the entry, where there were huge massive three-foot deep ruts in the soft bottom. The clearance from the right of the ram car to the lifeline was measured and was 30 inches. Tr. 289-290, 310. He testified that because of the uneven bottom there was no way you could get through there with a stretcher. Tr. 290-291. This condition should have been known to the operator since persons arriving on the section at the beginning of the shift had to go by the ram car. Tr. 293. Eddy identified the discrete hazard as miners not able to safely and quickly exit the mine in an emergency. Tr. 292. He also testified that you depend on the lifeline to get access to the surface. 292-293.

On cross-examination, Inspector Eddy testified a working section is considered anything inby the loading point where the feeder and tailpiece are located. Tr. 299. He explained his finding that this entry was the primary escapeway on the basis that the ram car was parked underneath the lifeline, and all miners on the crew knew the No. 5 entry, via the lifeline, was the escapeway. Tr. 300-302, 314. He agreed there was no requirement for an escapeway inby the loading point, Tr. 300-302, and that the ram car was located inby the loading point. Tr. 301. He further testified that the lifeline was absolutely not a branch line running to the refuge chamber inby the loading point. Tr. 304-305. He acknowledged that a branch line breaks off the main primary escapeway lifeline and goes to a cache of self-contained rescuers and also to a refuge alternative. Tr. 305. Inspector Eddy testified that the end of the lifeline was in the No. 5 entry, and the loading point was in the No. 4 entry. Tr. 306. Eddy stated miners were not trained to gather at the loading point in an emergency. Tr. 306. The miners would have to gather at the end of the lifeline. Tr. 307. The standard he cited does not contain anything about a lifeline. Tr. 309.

Inspector Eddy's notes for July 29, 2015 are incomplete, with pages 1 and 2, and 8 through 10 missing; the Exhibit ends at page 14 without information about the inspection beyond 1100 hours. GX-12, Tr. 297, 311. There is no information regarding an imminent danger run. The notes do contain Eddy's findings and determinations that in entry No. 5 at 30' outby the No.

47 block a ram car was parked in the primary escapeway with 30” of clearance along the right, lifeline side of the entry. *Id.*, pp. 3-4. He described the mine floor as extremely uneven with ruts and determined this created slipping and tripping hazards and would cause fatigue, broken bones, strains and sprains when attempting to transport an injured miner out the obstructed primary escapeway. *Id.*, pp.4-6.

Respondent’s John Opfar was with Eddy and testified there was a ram car in the entry inby the section loading point, and a branch line lifeline ran past that ram car to take you to a refuge alternative. Tr. 320, 322. The branch line was running from the No. 2 entry primary escapeway on the other side of the section all the way over to the refuge alternative. Tr. 323. The branch line was not run past the power center⁹, because the cables there could be a tripping hazard. Tr. 330, 331. The branch line could not run directly from the lifeline across the section to the lifesaving alternatives because there was a conveyor belt entry that could not be crossed. Tr. 323. He described the loading point as where coal is dumped onto the belt at a section tailpiece at the feeder. Tr. 324. To escape, miners would congregate at the beginning of either the primary escapeway or the alternate escapeway, or at the power center. Tr. 324. On July 29, the power center was inby the loading point, and the ram car was inby the power center. Tr. 325.

Opfar recorded his contentions regarding the citation on the day it was issued. Under details of the violation he wrote “There was a ram car parked in the entry of the branch line run to the refuge alternative”. For the reason he contested the violation he wrote:

I dont think this even (sic) a citation since it is inby the feeder.

1. There was a walkway around the ram car it just was not 6’ wide. 2. This was not the actual escapeway it was a branch line run to the refuge alternative. 3. The branch line that was run to the refuge alternative was actually running inby to get to the refuge alternative. In the event of an emergency a person would most likely be trying to get out of the mine not traveling inby to the refuge alternative.

R-16.

At the request of the Court, Opfar drew a diagram showing the entries on the section. JX-2. The purpose was to clarify what he meant by “entry of the branch line”. Opfar drew five entries, numbered 1 through 5 from left to right. The drawing shows the location of the ram car in entry No. 5, the power center outby the ram car in entry No. 5, the feeder in entry No. 4, located outby the power center, and the refuge alternative to the right in entry No. 6. Opfar drew the branch line in red ink from the main lifeline in entry No. 2 across the section inby both the feeder and the power center to entry No. 5, where it turned inby running past the ram car on the right side before crossing to entry No. 6 and continuing to the refuge alternative. *Id.*; Tr. 331-333.

⁹ The terms “power center” and “load center” were both used at the hearing and refer to the same equipment. In this decision, power center will be used.

Opfar testified there were three escapeways maintained, a primary, a secondary, and a third, not required, beginning outby from the tailpiece in entry No. 5. Tr. 340. The primary escapeway was the No. 2 entry, ventilated with intake air from the nearest shaft. Tr. 341. The alternate escapeway was the No. 3 track entry, ventilated with a different source of intake air. Tr. 341-342. Opfar further testified the primary escapeway had to come up the left side because that was intake air, there were no electrical installations, no ignition sources, and it was the closest route out of the mine. Tr. 340-341, 345.

Analysis

The portion of the safety standard cited pertains only to escapeways, and how escapeways are to be maintained. However, the subsection of the standard cited should be viewed in the context of the entire regulation. Therefore, a brief discussion of escapeways is deemed useful.

At least two separate and distinct travelable passageways shall be designated as escapeways from each working section, continuous by the most direct, safe and practical route to the surface. 30 C.F.R. § 75.380 (a), (b)(1), (d)(5). One escapeway ventilated with intake air shall be designated the primary escapeway. *Id.*, at (f)(1). Equipment not permitted in the primary escapeway includes power installations such as a power center. *Id.*, at (f)(3)(iii). One escapeway shall be designated the alternate escapeway. The escapeways may be ventilated from a common intake air source. *Id.*, at (h). Each escapeway shall be maintained at least 6 feet wide; although there are a number of circumstances where the width can be less, including a location where there is a question regarding whether there is sufficient width for escape of miners and disabled persons. In such a location MSHA may require a stretcher test through the area. *Id.*, at (d)(4). Each escapeway shall be provided with a directional lifeline the entire length of the escapeway, equipped with directional indicator cones as well as a branch line leading from the lifeline to an SCSR cache and a refuge alternative. *Id.*, at (7)(i), (v-vii).

Inspector Eddy's notes do not contain information as to how he determined the No. 5 entry was the primary escapeway other than what he believed was a lifeline for escape out of the mine running beside the ram car. Absent from his notes, GX-12, is any information about an imminent danger run that morning, which could assist in a full understanding the physical layout and ventilation in the No. 5 south mains on that inspection day. Further, in his testimony, Eddy did not credibly articulate how he determined the No. 5 entry was the designated primary escapeway. What can be taken from his testimony and notes is his belief that the lifeline beside the ram car was for escape out of the mine in the event of an emergency. He also did not explain what "further investigation" he conducted or how all the miners on the crew "knew" the No. 5 entry was the primary escapeway, as he had concluded.

The condition or practice described in the citation is clear that Eddy found the No. 5 entry to be the primary escapeway. Absent is credible information about alternate escapeway(s), ventilation on the section, the location of equipment installations other than the loading point at the time of the inspection, or how in an emergency miners could find SCSRs or the refuge alternative. While the specific subsection of the standard he cited does not cover lifelines, in arriving at his determination he concluded the line running beside the ram car was "absolutely"

not a branch line. But he offered no support for this such as, for example, a description of the directional cones installed in that area, whether there was a power installation in the No. 5 entry, or confirmation that the line next to the ram car ran directly out of the mine.

Respondent's Opfar was with Eddy on the inspection and he gave detailed, consistent and specific information about the entries, escapeways and ventilation that existed on the section at the time of the inspection. Consistent with the safety standard, he testified entry No. 2 to the left of the section was the primary escapeway, because it was on intake air, had no electrical installations or ignition sources, and was the most direct route out of the mine. Entry No. 3, the track entry, was designated the alternate escapeway and was on a separate source of intake air. Although not required, the mine did maintain a third escapeway beginning outby both the power center and the loading point; this was in entry No. 5. Opfar also described in detail, and illustrated, how the branch line was run to the refuge alternative. Coming from the primary escapeway, it did run past where the ram car was parked in order to cross over to entry No. 6. He explained why this route was taken, in order to avoid cables around the power center and also avoid crossing a conveyor belt line.

I find the testimony and notes of Respondent's John Opfar to be more credible and of greater probative value in making a decision in this matter than the testimony and notes of Inspector Eddy. The Inspector did not adequately support the conclusions he made from his observations, in particular that entry No. 5 where the ram car was parked was the designated primary escapeway. It was not an escapeway out of the mine until the point outby the feeder, which was not required but was maintained as a third alternative. On this record, the evidence found credible supports the Respondent's arguments that there was a branch line in entry No. 5 to a refuge alternative and a power center located outby the ram car in entry No. 5. I do not find any discussion of the disputed evidence regarding a "stretcher test" or "ruts" to be necessary to this decision. The Secretary has not established, by a preponderance of the evidence found credible, that there was a violation of 30 C.F.R. § 75.380(d)(4).

ORDER

Citations #7033764, #9057956, and #7033768 are **VACATED**.

Citation #9057948 is **MODIFIED** to non-S&S, injury unlikely and low negligence.

The total assessed penalty is \$150.

It is further **ORDERED** that Respondent will pay the total penalty of \$150 within 30 days of this order.¹⁰ Upon receipt of payment, this case is **DISMISSED**.

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

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¹⁰ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 29, 2018

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

Petitioner,

v.

THE KRAEMER COMPANY LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2017-222-M

A.C. No. 47-01724-433690

Mine: Plant #2

DECISION

Appearances: Dan Venier, Conference and Litigation Representative, and Jason Patterson, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;

Tristan Gardner, The Kraemer Company LLC, Plain, Wisconsin, for Respondent.

Before: Judge Paez

This Simplified Proceedings docket is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815.¹ In dispute is one section 104(a) citation issued to The Kraemer Company LLC (“Kraemer” or “Respondent”).² To prevail, the Secretary must prove any cited violation “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom.*, *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

On November 15, 2016, the Secretary issued Citation No. 8944483 alleging Kraemer violated 30 C.F.R. § 56.3200 by failing to take down or support hazardous ground conditions.

¹ In this decision, the hearing transcript, the joint exhibit, the Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Tr.,” “Joint Ex. #,” “Ex. S-#,” and “Ex. R-#,” respectively.

² On October 18, 2017, the Secretary filed a motion to approve partial settlement, which I approved in an order issued October 26, 2017. Two of the three violations at issue in this docket were resolved in the partial settlement with only Citation No. 8944483 remaining to be heard.

The Secretary proposed a penalty of \$330.00, which Kraemer timely contested. Chief Administrative Law Judge Robert J. Lesnick assigned me this matter on July 12, 2017. Upon proper notice to the parties, I held a hearing on January 30, 2018, in La Crosse, Wisconsin.

At the hearing, the parties stipulated to the following items verbatim in a joint exhibit:

1. The Kraemer Company LLC is engaged in mining operations in the United States, and its mining operations affect interstate commerce.
2. The Kraemer Company LLC is the operator of the mine, MSHA I.D. No. 47-01724.
3. The Kraemer Company LLC is an “operator” as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 803(d).
4. The Kraemer Company LLC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.
5. The Administrative Law Judge has jurisdiction in this matter.
6. The subject citations and orders were properly served by a duly authorized representative of the Secretary upon an agent of The Kraemer Company LLC on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.
7. The exhibits to be offered by The Kraemer Company LLC and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.
8. The assessed penalties, if affirmed, will not impair The Kraemer Company LLC’s ability to remain in business.
9. Mine Safety and Health Administration (MSHA) Inspector Peter P. Ackley was acting in his official capacity and as authorized representatives [sic] of the Secretary of Labor when aforesaid citations and orders were issued.
10. On November 15, 2016, MSHA Inspector Peter P. Ackley issued Citation Number 8944483 for a violation of 30 C.F.R. § 56.3200, which requires:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

(Joint Ex. 1; Tr. 9:1–4.) The Secretary presented testimony from MSHA Inspector Peter Ackley. Kraemer presented testimony from Safety and Human Resources Manager Tristan Gardner. The parties made closing arguments at the hearing in lieu of submitting post-hearing briefs.

II. ISSUES

For Citation No. 8944483, the Secretary asserts that Kraemer violated 30 C.F.R. § 56.3200³ by failing to take down or support hazardous ground conditions as required by the standard. (Tr. 10:6–25; Ex. S–1.) The Secretary asserts that the violation should be upheld as significant and substantial (“S&S”),⁴ inasmuch as it was reasonably likely to result in a fatality, and resulted from the operator’s moderate negligence. (Tr. 11:14–23.) Kraemer contests the fact of the violation and challenges the Secretary’s negligence determination on the grounds that there are mitigating factors. (Tr. 12:9–16, 73:6–13.)

Accordingly, the following issues are before me: (1) whether Kraemer violated 30 C.F.R. § 56.3200 as alleged in Citation No. 8944483; (2) if so, whether the violation was S&S and reasonably likely to lead to a fatal injury; (3) whether Kraemer’s negligence in committing the violation was “moderate;” and (4) whether the Secretary’s proposed penalty against Kraemer is appropriate under section 110(i) of the Mine Act.

For the reasons set forth below, Citation No. 8944483 is **AFFIRMED** as written.

III. FINDINGS OF FACT

A. Operations at Kraemer’s Plant #2

Kraemer has been operating the stone quarry at Plant #2 for over 20 years in Sauk County, Wisconsin. (Tr. 51:9–19.) The quarry is a large open pit, with a main road that enters the mine site near the top of the 40-foot highwall at issue, on a very large bench up to 1,000 feet wide. (Tr. 52:8–23, 53:12–54:15; Ex. S–6.) The quarry access road slopes down towards the opposite side of the pit where the miners work at a mobile plant that began operation around September 2016, near a second highwall not presently at issue. (Tr. 52:8–23, 54:9–12; Ex. S–6.) The mine’s operations involve quarrying and crushing limestone to smaller sizes for use in highway construction and other construction work. (Tr. 22:12–18, 51:12–19, 54:21–25.) Although the quarrying and crushing take place on the pit floor, Kraemer occasionally stores finish material on the wide bench at the top of the 40-foot highwall at issue. (*Id.*) Workers at the mine site routinely use heavy machinery, including multiple types of loaders. (Tr. 32:1–4; Ex. S–7.) Although all of the quarrying and crushing operations were occurring elsewhere at the time of the inspection, miners habitually parked their personal vehicles about 20 feet from the highwall at issue. (Tr. 24:12–14, 32:15–25, 56:4–20; Ex. S–6.)

³ Section 56.3200 provides: “Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.” 30 C.F.R. § 56.3200.

⁴ The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

B. Inspection on November 15, 2016

On November 15, 2016, MSHA Inspector Peter Ackley began a routine inspection of Plant #2, accompanied by a Kraemer foreman, Dan Mick.⁵ (Tr. 15:4–15; Ex. S–1.) Ackley noticed and photographed conditions on the 40-foot highwall that he believed to be hazardous. (Tr. 23:19–32; Exs. S–2, S–3, S–4, S–5, S–6.) Ackley photographed a pile of material, approximately three feet by five feet, and a boulder, approximately one foot in diameter, located at the base of the highwall. (Tr. 20:2–8, Exs. S–2, S–4.) Ackley believed the material had fallen from the highwall. (Tr. 18:22–24, 21:19–25, 23:24–24:1, 35:6–12.) Ackley also observed tire tracks indicating vehicles had traveled within two feet of the highwall’s base. (Tr. 32:15–25.) Consequently, Ackley issued Citation No. 8944483, which alleged:

Hazardous ground conditions were not taken down or supported before travel was permitted by the base of the north highwall located by the boulder pile. There was approximately 100 foot of highwall with no barrier to impede access to the base of the highwall. The highwall was about 40 feet high and composed of loose unconsolidated material. There were sections of rock cracked and gaped, both horizontally and vertically at the section of the highwall above where the loader has been traveling. This condition exposed the miners to fatal impact or crushing injuries from falling rock. Loader had traveled the [sic] next to the base under the loose material. Front end loader tracks were observed running parallel to the high wall for about 60 feet and as close as 1.5 feet to the toe.⁶

(Ex. S–1 at 1; Ex. R–2 at 2.)

Ackley designated the citation as S&S and reasonably likely to lead to a fatal injury, and he characterized the violation as the result of moderate negligence. (Tr. 64:4–15; Ex. S–1.) Ackley based his gravity determination partially on the fact that the cited standard was one of MSHA’s “rules to live by” due to the number of fatal incidents MSHA had reviewed in the past five years at different mines. (Tr. 33:2–10; Exs. S–10, S–11, S–12, S–13, S–14, S–15.) To abate the citation, Ackley had Kraemer install a berm 20 feet away from the base of the highwall to act as a barrier while Ackley completed his inspection of the mine. (Ex. S–1.) Kraemer had no history of documented falls or failures from the cited highwall, and prior to the citation, in September 2016, Kraemer conducted scaling to remove loose material from the highwall. (Tr. 58:21–60:5.)

⁵ Mick did not testify at the hearing. However, Kraemer’s Safety and Human Resources Manager, Tristan Gardner, testified to his general knowledge of Respondent’s inspection practices and records of the highwall’s condition. (Tr. 48:7–65:12.) Gardner was not present during the inspection. (Tr. 49:13–15.)

⁶ At the hearing, Ackley explained that the tracks depicted in Exhibit S–7 match a Caterpillar loader and the tracks in Exhibit S–8 match a Komatsu loader, both of which were on-site at the time of his inspection. (Tr. 31:25–32:10; *see also* Ex. S–4.) Kraemer did not dispute Ackley’s explanation.

IV. PRINCIPLES OF LAW

A. Elements for S&S Violation

A violation is S&S “if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish a S&S violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has recently explained that in analyzing the second *Mathies* element, Commission Judges must 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). In evaluating the third *Mathies* element, the Commission assumes the hazard identified in the second *Mathies* element has been realized and determines whether that hazard is reasonably likely to cause injury. *Id.* at 2045 (citing *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 161–62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

B. Negligence

The Commission evaluates the degree of negligence using “a traditional negligence analysis.” *The American Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017) (quoting *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted)). Because the Commission is not bound by the Secretary’s regulations addressing the proposal of civil penalties set forth in 30 C.F.R. part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Id.* (citing *Mach Mining, LLC*, 809 F.3d at 1263–64). Under a traditional negligence analysis, an operator is negligent if it fails to meet the requisite standard of care. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). In determining whether an operator met its duty of care, the Commission considers what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *Id.* at 1702 (citation omitted). In making a negligence determination, a Commission Judge is not limited to an evaluation of allegedly “mitigating” circumstances, but may consider the totality of the circumstances holistically. *Id.*

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Citation No. 8944483: Hazardous Ground Conditions

Kraemer denies that it violated section 56.3200 and challenges the Secretary's gravity and negligence determinations. (Tr. 12:9–16, 73:6–13.) Kraemer contends that the level of negligence was mitigated through their past proactive maintenance, repeated examinations of the highwall's condition, and commitment to maintaining a good safety record. (Tr. 58:14–60:13.)

1. Violation of Section 56.3200

To prove a violation of section 56.3200, the Secretary must demonstrate that Kraemer allowed hazardous ground conditions to exist while miners traveled by its 40-foot highwall, with no barrier or warning against entry to the area. Here, when Ackley issued Citation No. 8944483, he observed a number of potentially hazardous conditions on the highwall—no recent scaling of the highwall; cracked, gapping, and broken material on the highwall; and material on the top ledge of the highwall that could fall. (Tr. 17:1–21:25; Exs. S–2, S–3, S–4, S–5, S–6.) In addition, Ackley took photographs of tire tracks running parallel to the highwall's base for approximately 60 feet and coming as close as 1.5 feet to the highwall. (Tr. 18:4–20:21; Exs. S–1, S–3, S–4, S–5.) Miners' personal vehicles were also parked approximately 20 feet from the highwall. (Tr. 42:23–43:11, 61:18–20; Ex. S–6.) Kraemer does not dispute that there was no barrier or warning against entry to the area cited near the highwall. Based on the facts above, I therefore determine that Kraemer violated section 56.3200 by allowing hazardous ground conditions to exist while miners traveled by the highwall with no barrier or warning signs.

2. S&S and Gravity

To establish the first element of the *Mathies* test for an S&S violation, the Secretary must prove a violation of a mandatory safety standard. My determination that Kraemer violated section 56.3200 establishes the first element of an S&S violation.

Regarding the second *Mathies* element, the Secretary must show that the violation created a reasonable likelihood the hazard that section 56.3200 aims to prevent would occur. Section 56.3200 requires that operators take down or support hazardous ground conditions before permitting work or travel in the area. 30 C.F.R. § 56.3200. The purpose of this standard is to prevent the hazard of ground material striking miners or their equipment, in this case from a highwall fall or failure. Here, the highwall had loose and unsecured material present on the highwall which could have fallen from the surface of the wall.⁷ (Tr. 17:1–21:25.) Ackley testified he was concerned that during “continued mining operations, [miners] would be continually exposed to that area.” (Tr. 34:12–14.) Ackley testified in detail about seven separate hazards that he observed on the highwall. (Tr. 27:1–31:25; Exs. S–5, S–6.) Although Kraemer

⁷ This material is distinguished from the conical pile of processed material Ackley observed at the base of the highwall, which Gardner explained was material likely pushed off from the stockpile located at the top of the highwall. (Tr. 54:21–55:4; Exs. S–5, S–6.)

had conducted scaling on the highwall in September 2016, no maintenance had been conducted since to remove loose material during the seasonal rains or changes in temperature between September and November 15. (Tr. 67:6–9.) I note that Kraemer presented no witnesses with direct knowledge of the conditions in the pit or highwall on the date of the inspection. I therefore credit Ackley’s testimony based on his years of experience⁸ and his direct observations of the highwall at the time of the inspection. Based on the facts above, I determine that the hazard of falling material was reasonably likely to occur, thus satisfying the second element of *Mathies*.

Regarding the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood the hazard will result in an injury. In analyzing the third element, I must assume the hazard identified in the second *Mathies* element has been realized. *Newtown Energy, Inc.*, 58 FMSHRC at 2045. With regard to this element, Kraemer argues there was a lower likelihood of injury due to the fact that miners did not park their personal vehicles within 20 feet of the highwall, and all work was being done some distance away from the wall itself. (Tr. 42:12–20.) However, the Secretary presented photographs demonstrating that two loaders passed within 1.5 feet of the wall at some point shortly before the inspection. (Tr. 18:4–20:21, 32:15–19; Exs. S–1, S–3, S–4, S–5.) Moreover, although Kraemer parked vehicles 20 feet away from the highwall, there was no barrier to prevent miners getting out of their vehicles after they parked from walking close to the highwall. (Tr. 42:23–43:11, 61:18–20; Ex. S–6.) If loose material fell from the highwall, a miner in the area might be struck by rock. Ackley photographed material at the highwall’s base that he suggested had fallen from the highwall, including an approximately one foot in diameter boulder. (Tr. 18:22–24, 20:2–8, 21:19–25, 23:24–24:1, 35:6–12, Exs. S–2, S–4.) Given the highwall’s condition and the size of material that could have fallen, I conclude that the hazard of falling material from the highwall could reasonably likely result in an injury, thus satisfying the third *Mathies* element.

Finally, for the fourth *Mathies* element, the Secretary must prove a reasonable likelihood that the resulting injury will be of a reasonably serious nature. In this regard, Respondent argues that there was no immediate risk of a catastrophic highwall failure based on MSHA’s guidance on ground condition and Respondent’s examination. (Tr. 58:1–59:25; Exs. R–1, R–3 at 44.) Nevertheless, Ackley observed multiple concerning indicators, such as broken and loose material, an unsecured boulder one foot in diameter, and the presence of multiple cracks in the wall running vertically and horizontally. (Tr. 17:1–18:25; Exs. S–1, S–3.) Should larger pieces of rock or other material come loose from the 40-foot highwall, a severe or fatal injury could result from the impact. Given these facts, I determine that the injuries resulting from material falling from the highwall would be reasonably serious, satisfying the fourth *Mathies* element.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I therefore conclude that Citation No. 8944483 was appropriately designated as S&S. For the same reasons,

⁸ Ackley has been employed by MSHA for over eight years, received formal training at the mine academy in Beckley, West Virginia, and inspects between thirty and forty mines yearly, including limestone, sand and gravel, and silica plants. (Tr. 13:20–14:14.) Prior to working with MSHA, he worked at a cement plant under MSHA’s jurisdiction for fifteen years after serving for fifteen years as a heavy equipment operator in the United States Navy. (Tr. 14:24–15:3.)

I affirm the citation's gravity designation as reasonably likely to result in a fatal injury to one miner.

3. Negligence

The Secretary argues that Kraemer's actions constitute moderate negligence. (Tr. 33:14–21.) In support, the Secretary asserts that Kraemer was aware of the conditions on the highwall and that the violative condition was easily visible and had existed for weeks or months. (Tr. 41:10–18.) In contrast, Kraemer argues that it diligently examined the highwall for signs of hazards and did not believe the conditions to be dangerous. (Tr. 58:1–59:25; Ex. R–1.) Further, Kraemer contends that their scaling of the highwall in September 2016, before beginning operations nearby, should be considered as proof of their commitment to ensuring safe conditions while miners worked and traveled in the area. (Tr. 60:1–5.)

In evaluating the operator's level of negligence, I must consider the actions that a reasonably prudent operator would have taken under the circumstances presented that are relevant to the operator's obligation to comply with a standard. *See Brody Mining, LLC*, 37 FMSHRC at 1703. Respondent had no history of highwall falls or failures within the quarry. (Tr. 39:2, 59:10–12; Ex. S–9.) Kraemer asserts that it examined the highwall and that its examination on the day of the inspection did not indicate that a hazard existed on the highwall. (Tr. 58:1–59:25; Ex. R–1.) However, photographs of the wall demonstrate that there was unsupported material and the presence of both horizontal and vertical cracks. (Exs. S–5, S–6.) The conditions were obvious, as Ackley immediately noticed loose material and gapping on the highwall. (Tr. 16:5–8, 17:8–15.) Further, the photographs demonstrate that the condition was extensive. (Exs. S–5, S–6.) Respondent also admitted that it had not removed loose material from the highwall for approximately two months before the inspection, and it did not have equipment on site to test the stability of the wall. (Tr. 31:23–24, 60:8–13.) Moreover, Kraemer failed to call any witnesses, including its foreman Dan Mick, who could testify to the conditions observed on the date of Ackley's inspection. Thus, I am left with the credible testimony of Inspector Ackley, his notes, and his photographs. Lastly, the violation posed a high degree of danger because it was reasonably likely to cause a serious or potentially fatal injury as discussed above. *See* discussion, *supra* Part V.A.2.

After considering all of the factors, including obviousness and extent of the violation, I conclude that the violation was the result of the operator's moderate negligence.

B. Penalty

Under Section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary has proposed that Kraemer pay a penalty of \$330.00 for Citation No. 8944483. Kraemer has stipulated that the proposed penalty will not affect its ability to remain in business. (Joint Ex. 1.) I note that the operator did proactively remove loose material from the highwall before moving its portable unit near the highwall. Additionally, Kraemer had no history of violations that became final orders during the 15 months prior to the inspection. Kraemer made a good faith effort in attempting to achieve rapid compliance after the citation was issued and installed a berm to prevent access to the base of the highwall before the inspector left the mine site. The size of the Respondent's business is relatively small, with the quarry producing less than 10,000 hours in 2016. Nevertheless, I have upheld the Secretary's S&S, gravity, and negligence designations based on consideration of all the evidence submitted at hearing.

Taking into account all of the facts and circumstances set forth above, I hereby determine that the Secretary's proposed civil penalty of \$330.00 is appropriate.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8944483 is **AFFIRMED**. Kraemer Company LLC is **ORDERED** to **PAY** a civil penalty of \$330.00 within 40 days of the date of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 29, 2018

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

v.

SOLAR SOURCES, INC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2017-0099
A.C. No. 12-02374-424654

Mine: Shamrock Mine

DECISION AND ORDER

Appearances: Ms. Emelda Medrano, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner

Mr. Mark Heath, Esq., Spilman Thomas & Battle, PLLC, Charleston, West Virginia, for Respondent

Before: Judge Moran

Introduction

This case is before the Court upon a petition for the 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) (“Mine Act” or “Act”). On June 29, 2016, while backing in, a dump haul truck overtraveled the berm at a dumping location, going over the embankment to the slurry pit some 47.75 feet below, landing upside down. The driver jumped from the haul truck before it went over the embankment but received significant injuries from his escape.

Two matters arose from this accident: a section 104(d)(1) citation alleging a violation of 30 C.F.R. §1605(l), pertaining to berms; and a section 104(d)(1) order, alleging a violation of 30 C.F.R. §77.1713(a), pertaining to the requirement for an onshift examination. A hearing was held in Owensboro, Kentucky, commencing on December 12, 2017. For the reasons which follow, the onshift examination was dismissed at the conclusion of the hearing upon a motion for a directed verdict, while the berm violation, per this decision, is upheld. A civil penalty in the amount of \$68,300.00 is imposed for the berm violation.

The cited standards.

30 C.F.R. §77.1713(a), titled, “Daily inspection of surface coal mine; certified person; reports of inspection,” provides at subsection (a) “At least once during each working shift, or

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

30 C.F.R. §1605, titled, “Loading and haulage equipment, provides; installations,” provides at subsection (l) “Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.”

Citation No. 9102704:

Citation No. 9102704, a section 104(d)(1) citation, alleged a violation of 30 C.F.R. § 77.1605(l). The MSHA inspector assessed the gravity as highly likely, the injury or illness that could reasonably be expected to be fatal, and the negligence as high, and the violation as S&S, with one person affected. The condition or practice alleged is:

Berms, bumper blocks or similar means were not provided or of substantial construction to prevent overtravel and overturning at the West End gob dump located in the 001 pit. An accident occurred where an end dump over traveled and went over the embankment and over turned on 6/29/2016. The berm where the overtravel occurred was constructed of the slurry material. This material would not compact enough to create a substantial means of stopping overtravel. The mine operator has engaged in aggravated conduct by failure to ensure adequate berms were in place in an area known to have constant problems with maintaining berms. This violation is an unwarrantable failure to comply with a mandatory standard.

Citation No. 9102704.

As a subsequent action, the operator amended its ground control plan and implemented training on the new approved plan. *Id.* The Secretary proposed a specially assessed civil penalty of \$68,300.00.

Order No. 9102705:

Order No. 9102705, a section 104(d)(1) order, alleged a violation of 30 C.F.R. § 77.1713(a). The MSHA inspector assessed the gravity as highly likely, the injury or illness that could reasonably be expected to be fatal, and the negligence as high, and the violation as S&S, with one person affected. The condition or practice alleged is:

The operator failed to conduct an adequate examination on 6/29/2016 day shift for the 001 gob dump on the West end of the pit. The certified person conducting the exam drove by the gob dump and only glanced at the area. The certified person did not identify an inadequate berm which allowed a haul truck to overtravel the dump and overturn shortly after the examination was conducted. Hazardous conditions were allowed to exist and were not reported and not corrected by the operator which contributed to the accident. The mine operator engaged in aggravated conduct constituting more than

ordinary negligence in that the inadequate examination allowed a hazardous condition to exist of inadequate berms on the gob dump. This violation is an unwarrantable failure to comply with a mandatory standard.

Citation No. 9102705.

As a subsequent action, the operator conducted an onshift examination of all areas in the 001 pit. *Id.* The Secretary proposed a specially assessed civil penalty of \$68,300.00.

Findings of Fact

The parties stipulated to certain matters. Gov. Exhibit P 1. The certified history of violations was also admitted. Ex. P 2. It is uncontested that the Respondent, Solar Sources, Inc., owns and operates the Shamrock Mine, a surface bituminous mine in Ireland, Indiana. Tr. 404.

Testimony began with MSHA Inspector Jason Noel. Before becoming an inspector, in 2013, he had eight years of mining experience. All of that was with the Air Quality Mine for Peabody, where he did work on the surface. Tr. 40-42. That prior experience included inspecting berms. Tr. 42, 45. His experience included examining the entire berm, including its base.¹ This included looking for cracks, slips and any sign of movement. Tr. 46-47. Examining the base of the berm would be included if there were signs of problems on the berm itself. Tr. 48. On June 29, 2016, Noel conducted an E07, non-fatal accident investigation. He arrived, after the accident, the same day of its occurrence. Tr. 44.

Upon arriving at the mine, Inspector Noel met with the mine's pit foreman, Keith Lutgring. Noel viewed the truck, which had over traveled the berm and landed some 47.75 feet below in the slurry pit, and was upside down. Tr. 55, 67, Ex. P 5. The slurry pit is also referred to as the "gob dump." Tr. 86. No berm remained where the truck had backed through it. Noel took photographs of the site. Tr. 56. Photo A0089, within Ex. P 6, shows the area with the then missing berm, although on the left side of the picture one can see part of the berm that remained. Tr. 57. At page 90 of the same exhibit, Noel identified rubber tire tread marks at the area of the former berm. However, he could not say that those tire marks were from the truck that went over the berm. Tr. 63-64.

Based on what remained of the berm, Noel stated that it was "mostly mud. It was a muddy consistency throughout the entire berm, like, kind of like slicing a Twinkie in -- with a knife, and once you slice the Twinkie, you can see the inside of the Twinkie. Kind of like the

¹ Initially there was some lack of clarity, at least on the part of the Court's understanding, when referring to the "base" of the berm. In this instance, the truck was dumping material. In doing so, it would back up to the berm, stop, and the dump the load over the edge. One might be referring to the base in the sense of the bottom of the slurry pit, where the truck came to rest, but the Respondent's reference, as well as the Secretary's, was to the base of the berm itself, that is, the surface ground on which the berm physically rested. Tr. 50-51. Thus, the "base" of the berm refers to the area directly under the berm. Tr. 376. Again, the R's central theme is that there was a base failure as opposed to a berm failure.

same thing with the berm here.” Tr. 64. Noel informed that, using his hands, he examined the consistency of the berm material, confirming its muddy makeup. Tr. 70. He added to that description that it was a “consistency [that] really reminds me of similar to cottage cheese. The texture of it, it's kind of -- it's got a little bit of lumpy mud in it, but it's -- it's heavily saturated with water. ... it's just real gooey, mushy. ... it was just a -- a real fine mud.” Tr. 71-72. Upon consideration of all the evidence, the Court finds that in fact the berm material was as described by the inspector.

Noel took some measurements as part of his investigation at the site. Tr. 67. Referring to , Ex. P 5, he described a diagram which was included within his notes, reflecting the dimensions of the dumping area, from an overview, that is, an aerial, perspective. Per the diagram, it begins with a 45 foot entrance to the dumping area, then reflects the 16 foot 7 inch width where the now missing part of the berm used to be located. The total width of the berm is approximately 30 feet. The 47.75 figure in the diagram is the measurement taken from the berm to the truck's left rear tire, as it sat upside down at the bottom of the slope. A square, representing the truck and where it came to rest, is also in the diagram. Tr. 67-69.

Speaking to photograph 91, within Exhibit P 6, Noel stated that it illustrates “that the berm was saturated with this mud and that it was significantly darker, visually, you could see that, and that the berm was missing from where the truck went through.” Tr. 73. The same photo, at the center left, shows part of the berm that remained. *Id.* In Noel's opinion, that remaining portion was still inadequate, as it was “mostly mud,” but as one continued to move to the left it became more stable. Tr. 74-75. Noel expressed his view that when the berm was initially constructed it was made of substantial material but that

[a]fter hauling this slurry material that they were hauling to this dump, it landed -- they would have spillage onto the berm, and that spillage would cause, you know, the -- the water that's in that slurry would leach down into the -- the berm and weaken the berm. It would saturate the berm. So the berm really wasn't at the consistency of the slurry, but it was a -- of a muddy consistency and -- and it weakened the berm, as a result.

Tr. 75-76.²

² As will be discussed later, the Court notes here that, after hearing all the testimony at the hearing, it concluded that Noel's explanation is found to be the most reasonable and best supported explanation for the berm's failure.

It was slurry that was being dumped at the site where the berm failed. Tr. 77. Noel stated that “[t]he slurry material comes from the wash plant and comes from belt presses.”³ *Id.* Thus, the slurry represents the material left after the saleable coal is removed. It is also referred to as the gob. Tr. 78-79. The material is loaded into the end dump truck which then dumps it into the slurry pit. It was at that dumping point where the berm in issue was located. Noel stated that the material which is hauled and then dumped into the pit is “real soupy. ... if the [truck] operator would slam on the breaks real hard, it would slosh out.” Tr. 80. This description is not in dispute.

A berm, Noel stated, has to “ensure that it’s still strong and compacted substantial material that’s wide enough, tall enough, there’s no cracks or anything on the dump or just make sure that it would warn or redirect a truck before it over-traveled.” *Id.* Referring to photograph 90, Noel stated that the dark color indicates it is “still real wet and soupy.” Tr. 81. He expressed this was an indication of a potentially weak berm that is getting saturated with water. *Id.* Still referring to picture 90, within Exhibit P 6, Noel identified the presence of “rubber tire marks from a rubber-tired machine.” Tr. 82. Those marks, he stated, would not be made by a bulldozer. Tr. 82-83. Photo 92 shows “the berm to the left of where the truck went through. ... Just to [the inspector’s] right would be where there would be no berm when [he] was standing taking the photograph. So the berm, you can kind of see how it’s dark and muddy consistency throughout the -- the inside of the berm and then along with the tire marks going across the -- across the face of the berm there.” Tr. 83. Noel also identified markings in the material from “a rubber tire machine, probably the back wheels of the dump truck, where it spun out or spun against the berm.” Tr. 84. Noel interpreted this as indicating “that they were possibly hitting the berm and causing damage to the berm.” Tr. 84-85. This action, hitting the berm with the dump truck’s wheels, in Noel’s opinion, “weakens the berm. ... if you spin against it, you could be pulling the material away from the berm that’s supposed to be part of the berm. You’re ... damaging the integrity of it.” Tr. 85.

In his experience, Noel has seen truck wheels go up on berms. Tr. 87. This has the effect of weakening the berm, “because you’re -- you’re losing that cohesion in the material. Once you impact the berm, that cohesion of the -- the material, you start losing that, and then it starts going away. It gets weaker and weaker.” Tr. 86. The remedy is to retrain the truck drivers not to slam into the berms and to rebuild the berms, adding material to it. Tr. 87. As for the tire track he observed, Noel did not know when it was made. *Id.*

Regarding photograph 93, Ex. P 6, near where A0093 appears on the photo itself, the inspector identified that “there is a triangle wedge there where the -- the back wheels would’ve went off and there’s a bar in front of the back wheels that would’ve -- where the truck sat down at and then would’ve, as it was going over, taken that material out.” Tr. 88-89. Noel marked on

³ Noel described that belt presses “basically are -- ... a machine that it has a bunch of rollers and a really finely mesh screen that travels those rollers, and ... material falls on it and it’s a mud material, it’s a waste product from the plant that they can’t mechanically separate. It’s kind of getting too fine, so what they’ll do is they’ll put it on the belt, and then ... it kind of goes through those rollers and squeezes it and tries to get a lot of the moisture out of it. [and eventually] ... a cake would fall off the end of the belt press and go into either a hopper or into the end dump and out to wherever they’re disposing of that [waste] material.” Tr. 77-78.

Photo 93 the number 1 and a circle denoting the triangular shape “that the bar in front of the rear tires would've taken out as the truck went over.” Tr. 90. Then he circled and marked with the number 2 “what was left of the berm after the truck had went through the -- over-traveled through the berm.” *Id.* Photo 93 depicts the right side of area where the over-travel occurred. Photo 92 depicts the left side. *Id.*

Noel stated that the consistency of the berm was the same on both sides of the breached area; both were a muddy mixture. Tr. 92. He concluded that the berm had been insufficiently maintained. *Id.* The Court also finds this to be a fact.⁴ Noel confirmed that on both sides of the area where the berm was penetrated, the remaining berm consisted of an inadequately composed mushy material. Thus, Noel agreed with the Court’s summary of the scene of the accident that it was his testimony if one were to look “at the area where the berm collapsed, where it went away, that both to the left and to the right of it, there was at least some number of feet of this inadequately composed, mushy material, cottage cheese, existed to the left and to the right of where the berm collapsed; is that true or not true.” Tr. 102. Noel answered, “[t]hat is true.” *Id.*

Noel stated, that if the berm had been maintained with substantial material,

it would've warned the driver that he was into the berm. It would've helped redirect him, but the main thing is that the -- there would be the berm -- the berm would still be there. Instead of going through the berm and nothing being left, the truck would've went up and over the berm, and if you can -- I mean, you can look on the ground, there's nothing left of it. It -- it wasn't there. You know, if it was substantial – of substantial material, it would've went up and over. It kind of just drove over the top of it.

Tr. 104.

Noel also remarked that, looking at the bottom right quarter of Photo 96, it shows “[t]hat the berm was not of substantial construction.” Tr. 104-105. Thus, he confirmed that if there had been a substantial berm in that area, there would have been, “a berm or a hump -- large hump of material with tire tracks going right over the top of it.” Tr. 105. Testifying with regard to his Photos 91 and 103, with the latter being a close-up of the former, Noel stated that the berm height was running at about 38 inches, with the mid-axle height of the truck that went through it being 39 inches. Tr. 114.

Regarding the inspector’s earlier testimony referencing tire tracks, he was asked by the Secretary about the “tire tracks going up the side at the right-hand of the berm, and ... then tire tracks going up on the left-hand side of the berm.” Asked what that indicated to him, in terms of its effect on the berm, Noel responded, “That it -- it was damaged or compromised. ...there was evidence of that.” Tr. 120-121. If truck wheels are up on the side of the berm, as opposed to having trucks moving straight back, perpendicular to the berm, Noel stated that “the straighter the better. You have less spillage, less chance of driving one tire through the berm versus not the

⁴ **Note: Throughout this decision, whenever the Court notes that it finds something to be a fact, such a finding has been made upon consideration of the entire record.**

other.” Tr. 121. Elaborating, when asked if it made any difference, he added, “if a tire goes up on the side of the berm, if it doesn't go in square,” and therefore his answer was, “[y]es ... [because] ... you're putting a lot of pressure on one spot in that berm, but you can drive one tire through the berm and, you know, it -- it'd already be through the berm, but the other one may be right there on the edge or close to going through the berm as well.” *Id.* In sum, ideally a truck should go straight back, that is to say, perpendicular into the berm to dump its load and have its rear wheels stop before those wheels start riding up on the berm. Tr. 121-122.

Noel's view, referring to his Photo 105, and whether it reflects a collapse of the berm, was that it shows “more of a truck drive through the berm. The berm didn't -- I mean, collapsing, there's no evidence of that.” Ex. P 7, Tr. 123. If the berm had collapsed, Noel stated he would've seen “[t]hat the ground would have broke apart, been below it, or there would be parts of the berm left, ... [it] would be jagged .. [because] ... when ground breaks apart, it's -- it's -- doesn't break straight off like a knife cut through it. It leaves little jagged rocks and pebbles and different things. It's never straight. It -- it breaks at the weakest point.” *Id.* Thus, Noel reaffirmed that there was no indication from his photos showing evidence of a collapse of the base. *Id.*

Inspector Noel did not do any testing of the berm site, such as compaction or density tests. However, he did not feel that it was necessary because “it was clear that the truck had traveled through the berm and over-traveled through it, and that the berm was insufficient by its - - in the photographs and what I've seen at the scene.” Tr. 125. He saw no evidence of sloughing of material, as he did not see “undercut material and -- and piles of loose material underneath of whatever was sloughing off, but it usually would undercut itself or you'd have loose overhanging material somewhere. It [d]idn't have any overhanging material.” Tr. 125-126.

Noel thus reasserted his primary view, that he had no reason to doubt that the berm had been initially constructed adequately, but that it was “just not maintained that way.” Tr. 125.

As part of his investigation, Noel looked at the onshift exams. Those onshift exams did not record any hazards for dumps or berms. *Preshift* exams are not required on the surface. Tr. 126-127, and Part 77, Safety standards for surface coal mines and surface areas of underground coal mines. There were notations in the onshift exams of “push dumps,” meaning a dozer had been used to push on a berm and thereby add some new material to it, but as no specific location was identified, it was not useful information. Tr. 127. Noel stated that an examiner could look for certain characteristics in assessing berm stability, such as “some different cracks. You know, material being washed away or different color mud. You know, different color of the -- the material, you know. If it's not a dry, suitable material, that would indicate some issues going on. The ground moving, that'd be something you would see.” Tr. 128.

After spending time at the accident site, Noel went to the hospital, where he first met with Phillip Lutgring, pit foreman, and then Shawn Standish, the truck driver. Tr. 129-130. The only eyewitness to the event was the truck driver. Tr. 130. Lutgring, who also directs the workforce, told Noel that he conducts the onshift exam. According to Noel, Lutgring informed that “he drove by the area and kind of glanced at it, thought the berm was okay, or it was at axle height and that it appeared to be okay.” Tr. 131. Noel stated that it was his “impression” that Lutgring had described this as his onshift. Tr. 132. Noel then restated his view that Lutgring was referring

to his onshift for that day, although he added that he would need to check his notes to confirm that. Tr. 133. Noel continued that Lutgring told him that “the berm was mid-axle height, and that it appeared to be okay. He didn't indicate any – any reason for [Noel] not to believe that he didn't conduct the onshift exam.” Tr. 133-134.

Thus, according to Noel, Lutgring indicated [to him] that he had already drove by that area to do the onshift.” Tr. 134. Directed to page 11 of his inspector notes, Ex. P 5, Noel then stated that Lutgring “told [him] that he conducts the onshift examinations. He told me he *hadn't drove by that area yet*, but he did -- now, *he hadn't made it to the area yet, but that he did drive by. He glanced at it*, and then he also told me that that area is constant problems. They have problems with those berms often.” Tr. 135. (emphasis added). Noel also stated that Lutgring “drove by looking out his truck window. That he had a good -- good view of it. He was able to identify that it was mid-axle height. That it was [a] good berm.” Tr. 135. However, Noel reiterated that Lutgring “said the words that *he hadn't made it to that area*. ... and then he says that he drove by but he didn't get out. He just thought it looked okay, yes.” Tr. 137 (emphasis added). The Court revisited that Lutgring had told the inspector Noel that “[h]e hadn't made it to the area.” The inspector agreed that was what his notes reflect. Tr. 136. The Court then inquired if it was fair to state that Lutgring never expressly told him that he did an onshift but “[i]nstead, he told you some other things and from that, you concluded that essentially, he had made an onshift, even though he hadn't used those words?” Tr. 137. Noel responded to the Court, “That is correct.” *Id.*

Noel also had a conversation with the truck driver, Standish, who was then in the hospital. The driver related what happened, telling Noel, “that he had backed into the dump. As he backed in, he kind of felt the tires start to sink, so he tried to pull out of it. When he did, he -- he couldn't pull out of it.” Tr. 139-140. Noel continued, that the driver “felt his truck start to sink, so he tried to pull out, and he was unable to pull the truck back out. So at that time, the truck was starting to ease back over the edge. He decided that he didn't want to end up down there with the slurry, so he jumped from the truck, received his injuries, and he was able to watch the truck go over [while he was] laying there on the ground.” Tr. 140.

Referring to the Citation he wrote, No. 9102704,⁵ citing 30 C.F.R. §77.1605(l), Noel stated that he wrote it because “the berm was inadequate ... it didn't have a substantial means of stopping the truck or warning or redirecting the driver that he was too close to the edge.” Tr. 142. Reiterating his earlier testimony, Noel stated that he determined the berm to be inadequate because “the berm that was left there, it was made of that mud material that wouldn't hold the weight of the -- you know, wouldn't stop a truck or warn him that he was too close to the edge.” *Id.* He added that he cited that standard because “the truck over-traveled through the berm.” *Id.* Noel evaluated the likelihood of injury as “highly likely,” and to cause fatal injuries and as

⁵ In what was ultimately determined to be a small matter, the Citation inaccurately described the area where the incident occurred as the “west end gob dump,” but it was actually *the east end gob dump*. Tr. 140-141. There was only one gob dump at that time. *Id.*

S&S.⁶ *Id.* He considered the negligence to be high, because “the mine operator knew about the condition and had no mitigating circumstances.” Tr. 143. This was based on the remark of the mine’s pit foreman, Phillip Lutgring, that “these berms were a constant problem.” Tr. 143-144. Noel also informed that Lutgring told him that the mine would fix, i.e. maintain, the berm with a dozer. As Noel knew what Lutgring meant, there was no need for elaboration about the nature of the fix.

Noel added that another reason for marking the negligence as high was that “the berm material was significantly darker in color and should've been easily identified by ... the most casual observer.” Tr. 146. Also, he noted that in the mine’s onshift book they never indicated a specific hazard, yet Lutgring had informed him that these were “constant problems.” *Id.* The fact that no hazard had been identified also caused Noel to conclude that the onshift exam had not been adequate. *Id.* As for his unwarrantable failure designation, Noel based that determination on the berm material being “definitely darker and different in colors from what it was supposed to be [and that this condition] had existed for more than one shift.” Tr. 147. His determination that the condition had been present for more than one shift was based “[b]ecause it -- it doesn't -- mud doesn't soak into a good berm material overnight. It doesn't happen within hours. It takes time for this to -- to happen and to occur. So it wouldn't happen in one -- matter of couple hours.” *Id.* He could not be more precise about the duration of the problematic condition because that depends on a lot of factors. *Id.* Noel also expressed that he had issues with the prior onshift exam too, on the basis that he concluded that the problem had existed for more than one shift. *Id.* Thus, he concluded that the condition should have been identified earlier. Tr. 148.

His unwarrantable failure conclusion was also based upon the high degree of danger presented. Noel believed that with a truck going 40 feet down an embankment into a 30 foot deep slurry pit was quite dangerous and that it was “something that the -- the operator should've been able to identify and known about, and then they didn't have any corrective action prior to that.” *Id.* Thus, he concluded that, as Lutgring knew this was a problem, the berms should’ve been examined more frequently. Tr. 148-149. To adequately assess the berm, the person conducting the onshift should have “got out, looked at it, made sure there was not cracks in the ground or on the berm, made sure the berm was good and substantial height and a good, dry, solid material, not wet and muddy ... [and this should’ve been] indicated that on the onshift book ...” Tr. 149.

As part of his investigation, Noel learned that it had been about a week since they last worked on the berm. *Id.* Noel also learned that the berm had been constructed about a month earlier and, as noted, that they last worked on it about a week prior to its failure. Tr.150. The inspector also expressed that the unwarrantable failure was justified because “if there was a substantial berm built in that location, it --, there would've been a berm left the truck would've went over -- you know, there would be tire tracks over the top of it, but there wasn't

⁶ Noel expressed that the injury could have been worse, “[h]ad the truck maybe stayed up on its wheels instead of flipping over upside down, it would've continued further on down the embankment, went deeper into the slurry, you know, fully engulfing the truck with whatever would be in it.” Tr. 143.

any evidence of that, so that was also part of that consideration.” Tr. 150-151. The Court agrees with the Inspector’s analysis of the unwarrantable failure factor.

Testimony then turned to Order No. 9102705. Tr. 151, Gov. Ex. P 4. This was the section 104(d)(1) order issued for an alleged violation of the onshift exam duty, per 30 C.F.R. §77.1713(a). *Id.* It alleged an inadequate examination had been made in that there was a hazard on the gob dump, but that the foreman conducting that exam failed to identify the hazard. Tr. 152. The essence of the Order was the assertion that the onshift examination on the same day and the same shift on the day of the haul truck overtravel was not properly performed in that, as Noel expressed it, the “hazardous condition hadn't been identified. The ... area was glanced at and looked at, but it wasn't -- an inadequate berm wasn't identified.” *Id.*

The Court notes that before one can assess if an onshift exam was inadequate, it must first be determined that an onshift exam had occurred for the shift in issue. It was the inspector’s claim that Phillip Lutgring had conducted an onshift examination that day. However, the inspector’s response revealed a fundamental flaw with that claim, as he stated, “Well, in speaking with [Lutgring], I mean, he -- *the impression that I got from talking with him* [was] that he had been -- he had been through the area, he did say that, the day that I initially talked to him, and he didn't give me any reason to doubt that he hadn't not conducted the examination, but afterwards also through the conference process, *there was a document that said that he had conducted the onshift exam.*” *Id.* (emphasis added).

The Court inquired about that document and the Secretary’s Counsel addressed it. Tr. 153. Gov. Ex. P 7, P 8. The Secretary tried to use the exhibit by eliciting testimony from the inspector that the exhibit reinforced the basis for his issuance of the citation. The Secretary believed that the exhibit, which is a letter from the Respondent requesting a conference on this citation, effectively admits that the onshift was done that day. Tr. 153-155. At least it was the inspector’s *belief* that the Respondent had admitted doing an onshift on the day of the incident. Tr. 156. Exhibit 7, a letter from the Respondent requesting a safety conference with MSHA regarding the alleged *berm violation* does include a remark that the foreman observed the berm “in place on his onshift examination.” However, Ex. P 8, seeking a similar safety conference for the alleged *onshift exam*, notes that the inspector states that the foreman only glanced at the area. It is important to note that the words with Ex. P 8 do not represent Lutgring’s claim, but rather the assertion of the mine’s safety and health director, Troy Fields. Ultimately, Noel stated that his basis for concluding that an onshift had been done rested upon Lutgring’s remark to him that an onshift had been done. Tr. 157.

Continuing with Order No. 9102705, involving the claim of an inadequate onshift exam, Noel issued that order because he determined that a hazardous condition had been allowed to exist at the gob dump. Tr. 158-159. The cited failure was not meeting the requirement “to conduct an onshift examination and adequately identify hazards and record them in a -- in an onshift book.” Tr. 159. Noel, based upon his conversations with the pit foreman, concluded that the foreman “knew that there was issues with these dumps and that, you know, he didn't closely examine it and closely look at it to identify any potential problems.” Tr. 160. As will be explained *infra*, apart from the competing versions of what words were actually exchanged between Lutgring and Noel, the Secretary’s claim of an inadequate onshift fails as a matter of

law for the simple reason that an onshift exam must occur *during the course of the work shift, not before the shift begins.*

Subsequently, as part of the continuation of his investigation, Noel met again with the truck driver, Standish. Tr. 179. In the course of that second meeting with him, which occurred at the employee's home, Standish examined some photos of the site of the accident. Tr. 182. Standish remarked about photo 90 that the "berm wasn't that high," by which he meant that the "berm that [the driver] was backing up to was about a foot lower." Tr. 182-183. The inspector had Standish mark on the photo depicting that the height of the berm was about a foot lower. Tr. 183-184.

Standish stated that the berm was lower in that area "[t]o allow mud below to the -- that was in the bed of the truck to flow out and go over the berm." Tr. 184. Standish also told the inspector that he did not feel the berm in the back of the truck. Rather, "all that he felt was the truck sink. He didn't feel the berm. He didn't feel -- he didn't -- anything, he just felt it sink." Tr. 184. This added to the inspector's conclusion that the berm was not of substantial construction, "because [Standish], you know, would've felt it. An adequate berm, you would feel. That's the -- the whole point of the berm is -- not the whole point, but it's a good piece of the puzzle, that you feel that berm when you -- when you hit it." Tr. 184. A second photo added to the inspector's conclusion that the berm was inadequate because Standish told him the color of the berm was "maybe even a little bit darker," informing Noel about the berm's muddy characteristic.⁷ Tr. 185.

Upon cross-examination, Noel stated that in his prior experience when examining berms he would get out of his vehicle and walk the berms and not simply look at them from the vehicle. Tr. 192. In examining berms, he would look for cracks and things like that. *Id.* He informed there are signs one looks for. *Id.* He added that they "also maintained a machine up there, and we were constantly rebuilding the berms all the time. We would have a dozer or a compactor machine that would typically be up there with the trucks dumping, and usually would spot them as well." Tr. 192-193. Asked how Solar's practices were any different than when he examined berms, Noel informed, "[b]ecause we provided that, that constant attention. ... we had a dozer there, and every time, if the berm was found to be bad, we fixed it." Tr. 193. In contrast, Noel also informed, Lutgring told him the berms "hadn't been touched for a week." Tr. 194.

Turning to the onshift violation, Noel, was reminded that in his deposition, he had stated that he found no problem with the other exams, asserted that he had misspoke during his

⁷ One remark by Standish suggested to the inspector that the driver may have backed up to the berm at an angle. Standish "stated at one point [to the inspector] that he looked in one mirror and couldn't see it and that the other mirror -- couldn't see the berm. ... And then in the other mirror that he had seen it crumbling away, but, ...he never felt a berm, and he was clear of that." Tr. 185. That led Noel to consider that Standish "could've been in there at an angle. You know, if -- if you were at an angle to the berm, you know, one tire would've went through, and the other one was almost through and -- and he was done past -- over-traveled the berm at that point. Because if he hit it an angle, you know, one side of the truck would go through, and the other side would be on its way through." Tr. 186. None of this refutes that the berm was insubstantial.

deposition and that his reconsidered view was that there were issues that should've been identified. Tr. 195. Noel agreed that he cited the onshift *done on the morning of the 29th* for that alleged violation. Tr. 195-196. Noel also agreed that, because the berm is literally sitting on the base, one can't see what is below it. Tr. 196.

There was much back and forth between Respondent's Counsel and Noel on the issue of the rubber tire truck track identified by the inspector. Tr. 196- 197, Photo 90, Ex. P 6 and Respondent's Ex. R 15.⁸ The dispute was whether the track was created by a truck tire or by a

⁸ Noel stated that the track was catching only the edge of the tire and therefore just grazing the berm. Tr. 198. Noel agreed the photo reflected the truck tire running up on the berm. *Id.* Referring to Ex. R 19, Respondent asked of Noel if the lines in that photo run at an angle or straight across. Noel responded that the photo makes it appear that they go straight across. Tr. 201. Noel believed that it shows a "tire spinning, and the -- there -- there's a berm, and it's just grazing that. It's not -- it's not actually driving on it. It's grazing that, and so it's just a continuous -- the mud squishing out of the tread pattern." Tr. 201. Noel was challenged about his tread pattern conclusions. Asked about R 19 to show a gap anywhere in that tread pattern that's in this berm, Noel responded that it was "down the right rear tire on A-76. If you see how the -- on the rear tire there, the tread pattern wraps around the outer edge of that tire." Tr. 202. Then asked about A 73, if the tire tread in A 76 goes partly onto the sidewall, Noel affirmed that was true, pointing to A 73. Tr. 203. The Court commented that it observed this in the photo as well. Noel continued that "as that tire is grazing the side of this berm here, it's just squishing the mud out is what it's doing. It's a -- that's a continuous line there. As the tire spins, it's just going to leave a continuous line of mud as it grazes the side of that berm." *Id.* While Respondent's Counsel tried to sum up Noel's view, stating that, by his testimony, "this wraps around the tire maybe four or five inches, and that leaves us this straight pattern that looks to be a foot-and-a-half, two feet wide on the ground," Noel added, "[a]s it's smearing across the berm." *Id.* By "smearing," the inspector meant "it's not hitting that berm directly straight on, it's grazing the side of it." Tr. 204. Noel confirmed that he believed the side of the tire made that mark, adding, referring to R 19, "[i]f you look on the ground, you know, there is -- it's only -- the only part you see left of the tread in this picture is the -- it would be the right-side outer -- outer edge of the tire, the outer tread pattern, not the left inner side." *Id.* The exchange continued, with Noel being asked if "all of this area that is to the right of the smooth part, you believe is the side of the tire making this mark." Noel explained further, "[n]ot the side. It's the outer edge of the tread. The -- the last little bit on the -- on the tread part of the tire and then the outer edge." *Id.* Asked if he took measurements of the treads to compare, Noel answered there was no need to do that as it was clearly a rubber tire mark. *Id.*

The questioning then moved to photo A 88 and R 6. Noel agreed the tracks in that photo are those of a dozer. Noel stated that in R 19, that is not an indentation, but rather a raised clump of mud. By comparison in A 88, he asserted, it shows an indentation into the ground from the tracks. Tracks, he advised, leave an indentation because they have cleats. Tr. 205. Rubber tires, on the other hand, don't leave indentations. They leave clumps of mud. Tr. 206. Noel agreed that there is a gap between cleats on a dozer. *Id.* The Court had the inspector mark on R 19 near the center of the photo on the left upper quadrant, the smooth area that was being disputed. Tr. 210. The Court concludes both that Noel held his own on the dozer/truck cleat dispute and that the issue is not determinative of the outcome in any event.

bulldozer, but the Court concludes that the correct identification of the track is not critical to determining the berm violation. That said, it was quite clear to the Court based on his testimony and work experience, that Noel was very knowledgeable on the subject of berms.

Turning to a different subject, the inspector was then asked about R's Ex 14, a photograph. Tr. 217. He agreed it showed the berm on the right side. As directed by Respondent's counsel, Noel marked his initials on the exhibit the areas he believed depicted rocks on the left side of the crack, adding the comment that the rocks were mixed with mud. Tr. 219-220. Noel agreed that the crack appeared to be a gap in the berm while including his explanation about the crack's origin, "[a]fter the truck traveled through the berm, you're placing an excess amount of weight on the outer edge of that -- that slope there, and when you place a -- that much weight on the slope, you're going to have cracks and things that appear, because it's where weight shouldn't be. It's -- it's -- you're beyond past where the berm was, and that -- you know, that's not where the weight's supposed to be. So the berm is supposed to keep you from going that far, and -- and that's where I believe that crack came from." Tr. 221-222.

Respondent's Counsel continued on the issue of the crack. He directed Noel to photo 95, within R 8 and to photo 99, within R 9. Tr. 225. Noel agreed that he saw surface cracks located on the bottom few inches of Photo 95. *Id.* For Photo 99, Noel again asserted it shows "a tire mark going through there." Tr. 226. Asked if, on JN 1, the flat area in that photo is "the original base that all these berms are built on," Noel agreed that was the ground and that to the right of the area he circled are tire prints. Tr. 227. Directed then to A100, Noel affirmed that wedge he circled on an earlier exhibit was caused by the bar that's ... in front of the rear wheels, as present on R10 as well as on A 100. Tr. 228. Noel also affirmed his opinion that regarding Exhibit P 6, photo number 75, that photo shows the bar he believed made the wedge, in front of the rear wheels. *Id.* Noel had previously marked the bar he was referring to on Ex. A 76 and that the bar is down by the wheels.

Upon the Court's inquiry about the significance of the tread origin dispute, Respondent's Counsel did reveal the purpose behind all those questions, asserting that the inspector "assigned, as part of this break through the berm, that this part here is the one that made this mark, but I'm asking how it could do it since the bar angles out..." Tr. 231. The Court then responded, "[l]et's assume that you're correct. That [the inspector] is wrong. That ... this bar didn't create that. Is that really -- is that going to cause the case to turn on that? Isn't my focus on the case more accurately focused or should be focused on not whether this mark or that mark is right, but whether the berm was substantially constructed and whether there was -- you know, the onshift exam, whenever it occurred, should or should not have recognized it?" Tr.231-232. The Court was therefore asking if this line of questioning would produce an "aha" moment. Tr. 232. Respondent's Counsel advised that the line of questioning would not be so momentous. *Id.*

Resuming his questioning of the inspector, and referring to the crack shown on Ex. R10, Noel was asked if that photo "g[a]ve [him] further indication that what has happened here is that the base has cracked away, taking the berm down the hill?" Tr. 232. Noel answered that he couldn't say at what point the base cracked. For instance, it could've happened four weeks earlier. Tr. 233.

The accident occurred during Standish's second load dump that morning. Tr. 233. Standish told the inspector that the berm looked okay up to that point. *Id.* Based on Standish's recounting, Counsel for the Respondent asked the inspector if that didn't "indicate to [him] that that's when the base is collapsing and the berm is going with it?" Noel did not agree, responding that he

had explained that when we talked about that earlier, that if he [the truck driver] would've been in there at a[n] angle of any way, ... let's say he was at an angle to where the right rear tire contacted the berm first. So if he continues backing up, he didn't feel the berm, as indicated by ... what he had told me. That [] tire would proceed on through the berm and then the left tire would be then coming into contact with the berm second. So the right rear would touch first. The left rear would not be touching yet. As it progresses through, then the left rear would start touching the berm, so when he looked in his mirrors in -- at any time during that, he could've seen -- you know, if you're at an angle like that, you look in that mirror, he's already done potentially passed through the berm, and then he looks in this mirror. He's not quite through it yet, but he's on his way through it. At that point, the truck's starting to sink.

Tr. 234-235. Noel agreed that was his view, and that the driver did not admit to him that he went in at an angle. Tr. 235. Noel was not willing to agree that his view that the driver went in an angle was merely his "theory." Instead, he viewed it as a logical explanation of the event. Tr. 236.

The Respondent laid bare its own theory, namely that the driver backed up "and as soon as he gets near the berm the entire area collapses just as plausible? You got major cracks in these berms, as you pointed out." Tr. 236. However, Noel held to his view, responding, "Well, after traveling through the berm, it could've collapsed because of the excess weight that's placed on that part that's -- he's already done rode past. He shouldn't have been out that far. The berm is supposed to prevent you from over-traveling and placing excess weight on the outer edge." Tr. 237. Supporting his view, he added, was that the berm was missing, posing back his own question, "where'd the berm go?" *Id.* Noel also rejected the assertion that the berm simply collapsed as the driver got "right near it, and it goes away," noting that the driver saw the berm as he was driving into it. *Id.* Noel added, the dump was not collapsing "until the point he placed a loaded truck in that area, and once the -- the loaded truck, as you say, would've collapsed, I mean, he's done -- *the berm allowed him to go too far and placed excess weight on an area that shouldn't have been.* I mean, things don't fall down by themselves." Tr. 238 (emphasis added).

Turning to the issue of the alleged onshift violation, Noel was asked if he inquired of Phillip Lutgring about the time he drove past the area of the berm in issue. Tr. 245. Based on the inspector's notes, Lutgring informed that, although he does the onshift exam, he "hadn't made it to that area" yet. Tr. 246. Also, Noel's notes record that he drove by the area but did not get out of his vehicle but thought that it looked okay. Noel agreed that he took Lutgring's answers as *implying* that he had done his onshift. Tr. 247. Supporting his view, Noel added that Lutgring "was able to give me details of what he seen and what he looked at. He was able to tell me that

the berm was at axle height. He was able to tell me that it -- that he thought it looked okay, and I mean, that's what things you look for in examination. So he looked at it that morning." Tr. 247.

During Noel's deposition there was discussion about what an onshift means. Noel was asked if in this instance the onshift was from 6 a.m. to 4:30 p.m. Instead, Noel tried to distinguish between what an onshift means for an hourly employee as compared to management. Tr. 249. That aside, Noel agreed that one has the entire span of the hours in the shift in which to complete the onshift. Tr. 250-251. Further, he agreed there is no preshift requirement at the mine, for Part 77, which applies to surface areas of coal mines. Tr. 251. Noel also conceded that there is no requirement to do an onshift *prior* to the shift beginning. Thus, he agreed that an onshift is done *during the shift*. Tr. 252. However, as just mentioned, Noel tried to thread the needle so to speak, distinguishing when the shift would start for a foreman, as opposed to a laborer. Tr. 253. Noel then added, that for the foreman, the onshift would be "[w]henever he feels like he is conducting his examination, that would be an onshift examination." Tr. 254. Asked if he "is driving a shuttle van to drop him off 15 minutes before the shift begins, and it's just -- it is 50, 100 feet away, how does that make it an onshift," Noel answered, "[t]hat's up to him to define. If he defines that he is doing his onshift examination at that time." *Id.* The Court, seeking clarification of Noel's position, asked, "is it fair to state that [Noel] believe[d] that such a person, this management person, ...has to at least say something about what his activities were related to the berm for you to conclude that an onshift was done." Noel answered, "[t]hat would be correct." Tr. 255. Again, Noel's conclusion that an onshift had been done was based on Lutgring's answer identifying that the berm was mid-axle and appeared to be okay. Tr. 256.

Noel was evasive however, when asked if a foreman signs in at 5:45 a.m., and starts doing an onshift, whether he would count that as an onshift, answering, "I don't know. I mean, I'd have to see the situation." Tr. 259. In contrast, during his deposition, when asked if one "could [] fill out the book in advance of the starting of the shift and whether [Noel] would count that as an onshift," he answered, "*No. That would be a preshift.*" Tr. 259 (emphasis added). Noel confirmed at the hearing that was his position. *Id.* Noel also tried to distinguish the act of filling out the onshift book from the act of conducting the onshift. When asked if was acceptable if "the foreman ... 15 minutes *before the work begins* [informs] ... I'm going to fill the book out at the end of the day, but I've already done my onshift. I've been to all the areas. I'm done. I'm not going to do any other exams during this shift. I'll sign it at the end of the day," Noel answered that was okay, if the foreman signs the book at the end of the day. Tr. 259-260 (emphasis added). Pressed whether it is acceptable to MSHA for the foreman to do the onshift before the shift begins, again Noel responded that it's acceptable "whenever [the foreman] considers he'd done his onshift." *Id.* The Court does not accept Noel's rationalization because it contradicts the plain meaning of an *onshift* exam.

Perplexed by the inspector's answers, the Court asked if Noel knew whether the foreman's drive-by occurred "when he drove by when the shift actually began or before that." Tr. 261. Noel responded that he did not know. *Id.* Noel also did not know, when Lutgring drove by the dump site, whether that occurred before the first load to the berm had been made. Tr. 262. In fact, during his deposition, when Noel was asked, "[s]o if he's driving people by at 5:40 or 5:45 to go to the shuttle, even if he drives by that area, that's *not* part of his onshift, is it, he responded, "[t]hat would be correct." *Id.* (emphasis added).

Counsel for the Secretary tried to make the same argument, that the onshift exam's start would begin when *the foreman's day started*, not the start of the workers' shift. Tr. 264. The Court then advised that the Secretary had a problem, because onshift means "from the point in time that the shift begins. It doesn't mean when the management person arrives." *Id.* The Court noted that by the Secretary's logic, "if you carry it to its extreme, the inspector – the management person comes -- he has insomnia, or he had an argument with his wife. Both things can happen. He arrives at the mine at 3:00, because he needs to get out of the house, and he drives by there and says, 'Oh, the axle looks okay.' That's not an onshift. That's not an onshift." Tr. 265. In that regard, Counsel for the Respondent then noted again that Lutgring's first told Noell that he, Lutgring, hadn't made it to that dumping area yet. Tr. 267.

Returning to the unwarrantable failure finding made by Noel, and noting that the mine referenced that they were pushing berms or pushing dumps, in the reports, Respondent inquired how that squared with unwarrantability. Noel responded that no specific locations were identified in those reports, nor was any specific hazard identified. In short, the reports were quite vague. Tr. 268-269. Noel then repeated that his determination of unwarrantability was based on the obviousness of the conditions, reminding that, per his earlier testimony, the berm was saturated in mud. In addition, his conclusion was based on his speaking with Phillip Lutgring, and the evidence at the scene. Tr. 270. As the questioning about that determination continued, the inspector replied further "it's unwarrantable because of the length of time that it existed, the obvious, the danger that it presented itself with, the onshift examination. You know, he told me that he had drove through the area and that he was able to identify the mid-axle height of the -- that the berm was, and that ... it appeared to be okay. So based on all of the evidence, not just -- it's a -- it's a piece of the puzzle." Tr.270-271. Thus, Noel's point was that his determination relied on more than one thing.⁹ Tr.271. Respondent's Counsel suggested that there needs to be evidence that a mine had previous berm violations for a matter to be unwarrantable. Tr. 278. The Court disagreed, expressing "if [the court] rob[bed] a bank and you show that I never robbed a bank before, I'm going to focus on whether -- probably, first, whether I robbed the bank, not whether I was attending church every Sunday in the decade before that." Respondent agreed with the remark, but still believed there should be some evidence that the violation occurred before. Tr. 279.

The Secretary having rested, Respondent called Matthew Atkinson. Tr. 299. He is the Respondent's Vice-President for mining and is responsible for the entire mining operations of Solar's surface operations. Tr. 300. He has a degree in geology, and is a licensed and certified geologist in Indiana. Tr. 299-300. Atkinson described the events at the scene on the day of the accident. He related, "we were trying to come up with a plan, first of all, first priority was to make sure the area's safe. The second priority is to make sure that we can continue dumping gob in the west part of the pit and -- and isolate these -- this -- isolate these operations so we can continue mining." Tr. 306.

⁹ The inspector *did not buy into* Respondent's Counsel's characterization that, *for both violations*, he applied the same factors in making his unwarrantable failure determinations, nor that chief factor he applied was that an onshift was done and it was inadequate. For example, Noel distinguished that the berm violation existed for more than one shift. Tr. 274.

Atkinson also took photos at the time. Directed to Exhibits R 5 and 6, he described berm construction, stating that a berm is to be made of common material, shot rock over material, "hailed in from the excavating material of the coal mine." Tr. 310. Atkinson also described the dumping process, stating the driver is to "swing by and the observe the area ... [a]nd turn the vehicle so they can observe from the -- the cab is on the left-hand side of the vehicle, so if they approach from that side, from the left side, they can see the area. If they approach from the other direction, then they make a -- a u-turn, basically, or make a semi-circle so they can observe the dump area, and they pull out. And they do that observing, looking for cracks, making sure the berm is there, making sure there's no soft areas. They're -- they're trained to do that." Tr. 311. He continued with his description of the process, stating "They'll -- they'll swing out and then pull up perpendicular to and then back up, and they're instructed to back up watching the mirrors until they touch the berm, the[y] call "feeling the berm." It's barely just touching the berm. ...[and in this process they are backing] [v]ery, very slow. I mean, the -- the -- that berm's not a back stop. The berm's just there to let them know how far to come back before they start dumping." Tr. 312.

The Court, upon hearing this description, is of the view that Atkinson's description of the practice may be the theory, but is unlikely in practice because, if applied, the driver would be performing a de facto on shift exam with each dump.

Atkinson's take on the cause of the berm collapse was very different from that of the inspector. He stated,

[t]he berm was not there when we got there, so we had to look at what was left on each side of the berm, and I looked to see if the berm -- the sides that were left, the exposed cross-section showed competent rock and shot rock, make sure there was a berm there, and on both sides, that was present. You also look down over this ledge at the truck, and you see the shot rock on top of the material is full there, berm was, that had to be the berm material itself that was left over. It's grey compared to the black if you saw the change. So I knew that the berm had been there. There's no way that rock could've been there, because the -- the truck could not haul that material, did not come from the wash plant, so the only place it could've come from is the berm.

Tr. 313.

Atkinson informed that there were cracks in this area, indicating a movement and failure of material. Tr. 313-314. By this movement, Atkinson was referring to movement of the base upon which the berm sits, which is distinct from the berm. Repeating his earlier assertion, he stated that "[t]he drivers are to be "looking for cracks around -- away from the berm to see if that's -- there's settlement behind the berm." Tr. 314. By "settlement behind the berm," Atkinson explained "[t]hat means that there's possible movement, and the slopes have become unstable on the backside of the berm." Tr. 314. Atkinson acknowledged that there was some black material on top of the berm that's left on the left and right, which he stated was to be expected "because when the material's being dumped, it splashes all over the place." Tr. 314.

When asked whether, in his experience, “a couple inches of slurry on top of a rock berm cause it to collapse,” Atkinson answered, “Theoretically, no. *I mean, it could – it could cause the top to get soft*, but it's -- that's not what I saw when I was out there.” Tr. 315. (emphasis added). Instead, he stated that he saw, “the base was giving way and there's -- there -- you could see the propagation of cracks away from the where the slip occurred as it proceeded back, and this is typical of what we see from movement on the slope. We observe this all the time during an examination.” *Id.*

Atkinson's conclusion was that the berm did not collapse because of slurry on it, but rather due to slope failure in the backside of the berm. *Id.* Tr. 315. He explained further that it was due to “the slope failing, the material that -- that the berm was sitting on, the whole thing gave away.” Tr. 316. By “backside” Atkinson meant “[t]he side opposite where the material's getting dumped. The side towards the pit,” with the “front side” referring to where the truck would back up to it. *Id.*

Atkinson commented on some of the photos that were taken at the accident scene. He described Ex. R 8 as the “apparent shot rock down the slope on top of the slurry, and that's ... the berm material itself, and it also shows the propagation cracks.” Tr. 319. He identified cracks in the lower right of that photo with one crack labeled in that photo as “number 1.” Tr. 319-320. Atkinson also identified other cracks in that photo, labeled as number 2. *Id.* Several cracks were also identified in photo R 18 and he marked those on that exhibit, drawing seven circles to indicate them. Tr. 322. He added that there was a crack “immediately on the berm adjacent to the base area.” Tr. 323-324, R 14. Atkinson summed up his assessment of the condition, stating “[t]he base material and the material on the pit side or backside of the slope has failed, and there's movement down the slope, and the cracks have propagated all the way through, all the way into the failing berm, because you can see -- the crack indicates that that space is moving down the slope, so that berm is failing going down the slope, because the slope is failing. And if you follow that crack, you can see it matches up where the failure was before, where the end dump went over.” Tr. 324. Thus, again, it was his view that “[t]he base of the berm had to give away to allow movement to the curve to create that space for that crack to grow.” Tr. 325.

However, in effect supporting the inspector's assessment of the genesis of the problem, Atkinson identified, from R 14, “that's the shot rock interspersed *with the slurry that's been splashing on them*.” Tr. 327 (emphasis added). From photo R 15 and R 19, Atkinson identified the marks as dozer tracks where the dozer is pushing the berm, not from the rock truck's rear tires. Tr. 328, 329. Atkinson stated that in the process of the bulldozer creating the berm, it is “pushing material ahead of it, it's lifting the blade up and letting material slide off the blade to deposit for the berm [and the curled part in the top of Ex R 19 is from] the curved part of the [dozer's] track.” Tr. 331. Ex. R 23. The cracks Atkinson identified in R 9 were, he asserted, due to movement of material down the slope. Tr. 333.

The Court questioned Atkinson regarding photo R 17. He agreed that the bottom left quadrant of the photo shows tire tracks and in the left side about one-third of the way on the bottom left quadrant, and there are tire tracks and another set of tire tracks appear in the same photo as one moves from left to right. Tr. 335-336. The Court expressed that it appeared from that photo that the berm failure was much wider, almost double the size of the two tire tracks in

it. Atkinson agreed, “[y]es, ... the crack on the far right upper corner that we looked at earlier, that shows that the failure was across that area you're talking about.” Tr. 337. However, Atkinson did not agree that meant two dump trucks could've fit side-by-side within the scope of the berm failure, because the tracks in the photo reflected different times that trucks dumped at that location.

Thus, Atkinson did not agree with the Court's perception of the width of the berm failure. Tr. 338. Given his response, the Court had Atkinson mark on Ex. R 17 where the berm used to be located. *He also stated that just one dump truck would fit within that area.* Tr. 339-340. Ultimately, Atkinson's view was that it was the base, not the berm it sat on, which failed. Tr. 342.

Regarding the alleged onshift violation, Atkinson related that he spoke with the day shift foreman (Lutgring) that day, who informed that he drove by the berm that morning, observed that it was there, but that he did not inspect it at that time. Tr. 342. Asked for more detail about the time Lutgring drove by the berm that morning, Atkinson responded, the foreman “would be doing that approximately ten until 6:00, quarter until 6:00, adding that “[e]quipment starts up at 6:00 a.m. and [the foreman's] taking the personnel to the shovel so they can be ready to get started at 6:00 a.m.” Tr. 343. The shift, Atkinson affirmed, begins at 6:00 a.m. Tr. 344.

Upon cross-examination Atkinson agreed that, when deposed, he admitted that the berm had slurry on top. Tr.358. He also recalled that, per some of the photos, there were tire tracks on one of the berms and that it appeared that someone had been up in the berm. Tr. 359. Atkinson also remembered that, during his deposition, and asked “when slurry comes down on the berm, what [e]ffect does it have on the berm,” his answer was that “[i]t cools it, and then you just can't tell, you know, the original -- where the original berm is.”¹⁰ Tr. 359.

Atkinson repeated his opinion that the slope failed. Tr. 361. Asked what a mine operator can do “to address this process of slope failure prior to it fail[ing], he answered, “[w]e inspect the base ... for failure cracks. We look for the differences in height of the berm in relation to the other berm to show that the berm is starting to slope down the slope. ... Just comparing the berms and seeing if there's any anomalies in the berms as something to indicate as possible slope failure.” Tr. 361-362. However, when asked if that what was done in this particular situation

¹⁰ However, Atkinson disputed the Secretary's characterization of his deposition answer as to why the berm failed, that he “believed that the slurry had gone through the spoiler and into the berm.” Tr. 359. Atkinson countered that “[w]e were talking about the backside of the berm,” [adding, during his hearing testimony] “[y]ou and I are going back and forth, and I think we were getting our signals crossed. But I had said that it's the slurry left on the backside of the berm, [that] yes, it can weaken it.” Tr. 359-360. Atkinson also disputed part of the Secretary's recounting of his deposition explanation for the berm failure and the presence of cracks. Presented with his deposition answer that “[o]n the backside could be that, you know, the slurry rolling down through the spoil and stuff had weakened it. So it could be that they got up on the berm, laid those tire tracks, and they pushed it off. You know it's a slope, you know.” Atkinson's response was that he only didn't recall saying “he pushed it off.” Tr. 360.

where the dump truck was dumping slurry into the pit, Atkinson's response was that he "can't -- I can't comment, because I wasn't there and didn't see -- didn't inspect it." Tr. 362.

Atkinson admitted that it was his deposition testimony that cracks on the base of the berm indicated slope failure caused by constant dumping of slurry, but added that the berm slid down due to slurry being dumped on the backside of it. Tr. 362. He was then asked whether slurry being dumped also weakens the berm itself, not just the backside. Atkinson admitted that was true, theoretically, but he stated he did not see evidence of that. Instead, he maintained that cracks in the base and a crack in the adjacent berm showed that there was slope failure behind the berm. *Id.* Such cracks, he stated, can happen over a period of time or very quickly, though he didn't know which scenario applied in this instance, as he was not present when the failure occurred. Tr. 363.

Atkinson did not maintain that he was an expert in slope failure. He distinguished his area of knowledge, noting that he is not an engineer, but rather is a certified geologist. Tr. 363. His view that the slope base, not the berm itself failed, stemmed from seeing cracks at the base. Tr. 364.

The Court concludes that, given the several changes in Atkinson's hearing testimony when compared with his deposition, this diminished his overall credibility.

Philip Lutgring, pit supervisor at the mine, testified. Tr. 381-382. As noted earlier, Lutgring is the person MSHA claims to have done an inadequate onshift exam, as reflected in its (d) Order, No. 9102705. His shift begins at 6:00 a.m. and ends at 4:30 p.m. Tr. 384. However his work day begins at 4:45 a.m. After dealing with paperwork and discussing with the night foreman what happened that night, he "head[s] down to the -- the pit and pick up the shovel men [i.e. the hydraulic excavator/backhoe operators] and deliver[s] them around to their machines and explain to them what they're going to do for the day." Tr. 384. Usually, he picks those men up around 5:30 and transporting them to their work location takes about 30 minutes to accomplish. Tr. 385.

Speaking to the onshift exam, Lutgring noted that it can be done during the whole shift. The Court notes that there is no dispute about this – the onshift exam can be done at any time during the shift and there is no preshift exam requirement under 30 C.F.R. Part 77. The shift starts at 6:00 a.m. Tr. 386. In the process of dropping off the shovel men, Lutgring does drive by the pit area, which is where the berm failure occurred. Tr. 386-387. Referring to a photo of the scene of the failure, Lutgring stated that, on the day of incident, when driving by that area on his way to drop off the shovel men, he was about 50 feet from the berm area and at that time it was still dark. Tr. 388-389. His truck headlights were sufficient for him to see that there was a berm present at the site, but he did not consider driving by the berm location to be an onshift exam. Tr. 389.

He then described what he does when performing his onshift exam, "in that particular area, I would have pulled in there in my pickup and looked at the height of the berm. And if I -- I usually get out and walk up to it, look over it, and make sure it's a substantial berm. You know, nothing has moved, you know, pushed away, or the height, you know, was [sic] been lowered or

anything like that, something briefly shifted.” Tr. 389. This process, the onshift exam, takes about five or ten minutes. Tr. 390.

Lutgring stated that an onshift means, “[f]rom the time the production with your equipment is running until the end of the day whenever they shut down.” Tr. 392. To the Court, this is the only definition that makes sense for that term as the underlying purpose is to inspect operations when production is underway. Consistent with that commonsense application, Lutgring also stated that he is not allowed to do an onshift before 6:00 a.m., and (obviously) he is not permitted to fill out his books regarding that exam until after that time. Tr. 392. When interviewed by Inspector Noel, Lutgring told him, upon being asked if he had looked at the berm site earlier that day, that he “had glanced over there that morning, you know, taking the shovel man down.” Tr. 394. Lutgring denied that he had ever told Noel that he had done his onshift exam that day. *Id.* In fact, he claimed that he told the inspector he had *not* done an onshift yet that day. Tr.395.

According to Lutgring, while at the hospital with the injured driver, Standish, the driver told him that it “was his second or third load of the day, and when he backed up there, everything seemed fine. Then, when he started to raise his bed, he felt the truck was sinking. And the longer he sat there, the more he felt the truck was going over the edge, so he decided to jump out of it.” Tr. 395.

In terms of determining just what caused the failure, the Court considers it of significance that Lutgring did agree with inspector Noel’s description that the “gob,” which refers to the material dumped at the berm site, is “more, like, just soupy mud that will slop out of the truck, if he stops suddenly, it will just slush over the side like water.” Tr. 392. He also admitted that berms need maintenance after they are constructed. Tr. 396. Further, he agreed that he told the inspector that “[b]erms are a constant problem with these dumps.” Tr. 397. Elaborating, he stated that they had to be maintained because of “what they’re hauling in their truck slops out. When them trucks come in there and turn their steering wheel to the right, the stuff will spill out of the bed on the ground, and that makes it slick. So you’ll take a dozer and scrape it up, and then carry it up over the existing berm area to get rid of it.” Tr. 397. As discussed further, *infra*, the Court concludes that Inspector Noel’s assessment of the cause of the failure, together with Lutgring’s concessions about the material being dumped, constitute the most reasonable explanation for the berm failure and this is the Court’s finding of fact on that issue.

Lutgring reaffirmed, upon cross-examination, that he arrived at the mine around 4:45 a.m. on the day of the accident and that his shift is from 6:00 a.m. to 4:30 p.m. Tr. 405. He is paid starting at 5:00 a.m. Tr. 406. On that morning, while customarily there are lighting devices, described as “light plants,” at the berm site, they were not turned on when he drove the men to their work locations. Tr. 407. He could not be sure if the lights were simply not on or whether they weren’t there that day. Tr. 407-408. Lutgring stated that, when he spoke to Inspector Noel later that day at the hospital, he told him both that he had “glanced” at the berm *and* that he “[h]adn’t made it to that area.” Tr. 408. Lutgring did not dispute that he told the inspector on that day that he thought the berm looked okay and that he thought it was mid-axle height. Tr. 409. Asked whether he noticed “any dark color to the berm,” he answered, “[n]o, couldn’t say. It was dark. And like I said, a light shined a little bit over there. It was just, you know, a dark shadow.

And everything is black around there where they're dumping. Because *that stuff splashes everywhere, and it's black.*” Tr. 409-410 (emphasis added).

He also admitted that he told the inspector that berms are a constant problem on these jobs, and agreed that the purpose of the slurry pit berm at a dump site is to prevent the dump truck from over-traveling into the pit and that the idea is that the dump truck driver will feel the berm upon backing up and then dump the load. Tr. 410.

Lutgring did not retreat from his deposition testimony in which he expressed that the berm failed because the truck driver's back up and hit it hard upon backing up. Tr. 411. At the hearing it was his claim that the photos presented at the proceeding were clearer than those shown to him at his deposition, and therefore his opinion changed and he now believed that the tracks in the photos were from a bulldozer. *Id.* However, it is noted that his new view was not merely a nuanced change. When asked if he recalled that during his deposition and asked to look at a photo where there was a dark berm, and there were some tire tracks on the berm, he answered then was, “[i]t looks like the shale with gob dripped over it, and then I see spin marks, you know, like where the *tires*, you know, was sliding, because the grooves, just like the lugs on the *tires*, made the marks on that berm there.” Tr. 412. (emphasis added). Accordingly, he admitted that at his deposition, he believed that the marks on the berm were *tire* marks. *Id.* Despite that admission, Lutgring continued to assert that the better photos caused him to change his opinion. *Id.* Similarly, relying on the sharper photos, despite his answer at deposition, when he was asked, if he had any evidence ... or any reason to believe that Mr. Standish was hitting the berm really hard, and if he had “any reason to believe that Mr. Standish would have been hitting [the berm] really hard, he answered, “Well, I don't see no -- you know, other than that slide mark, you know.” Tr. 412.

It is fair to state that Lutgring's views about the cause of the failure and the role of the haul truck driver in that accident were subject to change. Perhaps his own words at the conclusion of his testimony best sum up his opinion, with his remark that he was “not sure why it failed, really.” Tr. 418.

Travis Kendall, Solar Services also employee, testified for the Respondent. He is the head equipment operator at the mine. At times he is also a backup foreman and he was acting in that backup capacity on the shift immediately *prior* to the date of the June 29th accident. Tr. 429-431. That prior shift ran from 6:00 p.m. until 4:30 a.m. *Id.* When acting as the backup foreman, he does the onshift. *Id.* Kendall stated that notation in the book that “berms were pushed” reflects the performance of maintenance and routine work. Tr. 433. If a hazard is detected which requires a berm to be pushed, it may or may not be recorded in the onshift book, depending upon if was taken care of or not. *Id.* Kendall described how he does an onshift exam of a berm, stating “before we start dumping in an area, I'll make sure the area is safe, and I'll go up, check the berms. If I can't get close enough to drive up to them, I'll get out and walk to them. And I'll look at the berm, I'll look on the other side of the berm, make sure I know where I've been to.” Tr. 435-436.

Focusing on the onshift he performed on the evening of June 28th, Kendall stated “[t]hat was a particularly easier one to check, because it's right there up the edge of the road and easy to

see. So you know, obviously it looked like a good berm.” Tr. 436. He did not walk the berm; he drove by for his exam. *Id.* He stated that he saw no signs of cracks or any other problems for this onshift and saw no signs of the berm slumping, stating the berm was “uniform all the way across.” Tr. 436-437. He could not recall if the berm was used for dumping that night nor if the light plants were used then. Tr. 437. Based on his testimony, and remembering that Kendall’s onshift was done during the evening, the Court finds that his onshift that night was, at best, a cursory exam of the berm.

Testimony returned to the subject of whether the exhibit photos displayed truck tire or dozer tread marks, with Kendall’s view being that the marks were made by a dozer. Tr. 439. At his deposition, he expressed that “when a truck bumps a berm it makes it tighter and it makes it better.” He also believed that if the dump truck driver had backed into the berm properly, the berm would not have failed. Tr. 444. However, he skirted naming Standish as engaging in aggressive driving, stating that “maybe it was someone else.” Tr. 445. His view that aggressive driving was the source of the problem stemmed from the fact that the berm failed. *Id.*

The driver of the truck involved with the berm failure, Shawn Standish, testified. On that day, June 29, 2016 he was operating a Caterpillar 775 haul truck, carrying slurry, that is to say, “gob,” back to the pit. Tr. 452. The accident occurred on his second trip to the dump that day. He described the dumping process he employed, stating that he “came to the dump, ...and passed the end dump berm. And [he] could visually see the berm in that dumping area. On the left side, if you hold up and just stay safely out of the way of any path that was about 150 foot to the south of you, you would back in at a 90.” Tr. 455. When backing up, he is looking out his driver’s side window. *Id.* Standish contended that the berm looked solid with nothing out of the ordinary. Tr. 455-456. Continuing with his description of the dumping process, he stated “you start backing up and make sure that you're square with the berm and then proceed on back, [at a speed that is] really slow ... very slow.” Tr. 456. In terms of the truck contacting the berm, Standish stated, “[s]ometimes it might go back to where you feel a little nudge ... [b]ut you're never going to ram all the way back. You can get wrote up for that.” *Id.* The “nudge” informs him that “you're definitely seated up against the berm, and your slurry is going to go all the way over the edge and not make a mess of the dump.” *Id.*

Standish maintained that he made sure he was completely square with the berm and that the berm looked normal. Tr. 458-459. Although he didn’t feel the “nudge” indicating contact with the berm, he “could tell [he] was close enough that [he] was going to be in the berm. And [he] sat [his] dump brakes. ... [a]nd then proceeded to grab the dump lever. When [he] did, before [he] even pulled up, [he] felt the truck kind of sink. And it scared [him] a little bit, so [he] looked to the right, and [he] didn't see the berm. [He] looked to the left, and [the berm] dropped out of sight. [He then] saw the top literally drop out of sight [and] kind of got -- got scared. And [he] put the truck back in low gear, and [was] thinking [he] need[ed] to pull forward, because it's -- material is going off. [He] just watched that berm drop. Something is definitely wrong. [He] tried putting the accelerator to the floor, and there were tire brakes on then, that's where our set brake and tried to release that, and when the truck – [he] was trying to pull forward a little bit. It needed something a little bit more. And then, [he] ... was very, very scared and thinking [he] need[ed] to get out of this truck, because behind [him], [he] looked down into the pit pretty much like a black gob. It's like a quicksand material, and [he] was worried that [he] would get stuck

underneath that and suffocate, you know, [his] worst fear [was] this truck's going to end up landing, going over down into the pit.” Tr. 459-460.

Standish then “made a decision to set the blade back down, throw it in neutral, and grab [his] seat belt off at the same time and grabbed the door handle. [He] had a quick thought to jump off, but [he] knew [he] couldn't – [he] didn't think [he] could get off the chain, so [he] thought, no, [he] had to go off the front. And it's a real quick thinking, -- so straight out the door. And then the seat belt kind of – [he] remember[ed] feeling it on [his] shoulder kind of catch. ... and then [he] ... ran completely off the end of the catwalk.” Tr. 460. Once he landed, he “turned [his] head and looked back, and then [] saw the front of the truck going on over down the pit,” and he saw it flip over as well. Tr. 461.

Subsequently, Standish was interviewed by MSHA about the accident and he admitted that he did get upset during that interview process. He explained that he was upset because the MSHA inspector seemed to think that he was dumping in an area where there was no berm at all. Tr. 464. Standish was adamant that there was a berm present that day, adding that dumping in an area with no berm is “definite no-no. You can lose your job or definitely get wrote up if something that you were not trained to do ever.” *Id.* Standish reaffirmed that on his left side he definitely saw the berm drop away. Tr. 464-465.

Cross-examination of Standish noted that he was previously deposed by the Secretary. Tr. 470. He agreed that when he met with Inspector Noel, he told him that he didn't feel the truck hit the berm on that second load that day. Tr. 472. He also agreed that he felt the back of the truck start to sink and was trying to figure out what was going on, expressing to the inspector that perhaps he has hit a soft spot. Tr. 473.

Directed to photo exhibit P 5, Standish reluctantly agreed that he had drawn a line on the photo, indicating where the berm had been. Tr. 476. Asked if he told the inspector that the berm was approximately a foot lower than these side berms, Standish responded that he didn't know if he gave an increment but admitted stating that the berm had “rolled back.”¹¹ *Id.* Standish did not agree with the suggestion of some Solar Sources representatives who believed that he had been pushing on the berm, and thereby causing the slope to fail. Tr. 481-482.

Solar Source Mining safety director Steven Troy Fields testified. Included within his background, from 2006 to 2008, he was an MSHA inspector. Tr. 485-486. He was involved with the accident investigation for this matter but on the day of the accident he was not at the mine. Tr. 486. He arrived at the mine the day after the accident. Tr. 487. Directed to photographic Exhibits R 9 and R 14, he stated that the berms showed the presence of shot rock. Tr. 489. Fields stated he visualized shot rock in Exhibit R 14 as well and that this was consistent with what he saw the day after the accident. *Id.*

Asked his opinion for the cause of the berm failure, Fields answered, “[i]t appears that it got to the edge of that slope and gave away.” Tr. 490-491, Exhibit R 8. Regarding the cracks

¹¹ In taking issue with some aspects of his July 7, 2016 interview with the inspector, Standish remarked that he was “very, very heavily medicated” at that time. Tr. 478.

shown in Exhibit R 14, it was Fields' view that it "[l]ook[ed] like the material below it has a giveaway" and that "the spoil had sloped off underneath." Tr. 491-492.

On the subject of the time an onshift begins, Fields stated it is "[a]t whatever your designated times are. Like ours for production, it would be 6:00 a.m. to 4:30 p.m." Asked from his experience as an inspector if one could "show up at 3:00 in the morning, drive all around the mine, fill out their book, and sign it," Fields answered, "[n]o." Tr. 492-493. Asked if one could call such an early exam on onshift, he replied, "[t]hey could, but they could get in trouble." Tr. 493. This is so, he stated, because an onshift "is from the time the shift starts until the end of the shift." *Id.* He added that the one has the entire shift in which to complete the onshift exam, a fact as noted earlier which is not in dispute. Tr. 493. Though already clear, Fields was asked, "if a foreman drives past an area 5:30, 5:00, pick a time, or dropping a crew member off at a shovel, is that legally an onshift examination." He responded, "[n]o, it's not, ... [because] the MSHA requirement or law says it's -- the onshift is during the entire shift. Once a shift begins, then it's the -- you have the entire shift to complete that." Tr. 494.

Fields was also asked about either violation being designated as an unwarrantable failure. He did not find any information indicating that the condition was obvious or extensive, nor that it had existed for a time period. Tr. 497-498. He also expressed that there had not been similar violations in the recent past, advising that, as best he could recall, there had been two previous such violations, one in 2008 and 2010. Tr. 498. He was also not aware of any agent of the operator knowing of the condition or allowing it to exist for a period of time. Referring to Ex. R 15, Fields informed that he told the Secretary's attorney during his deposition that he believed the tracks in that photo represented "tire tracks from the truck backing up." Tr. 499. As with other witnesses for the Respondent, he changed his opinion. In his case, the change occurred after speaking with Travis Kendall, a person who had more experience in such matters, that the tracks were from a bulldozer. Tr. 500.

Fields maintained that he was not going to change his testimony as to why the berm failed, expressing, "I felt like after I had looked at the area that the -- the truck had backed -- you know, had pushed on the berm and it got -- got to that -- that soil edge there or spoil edge and then gave away." Tr. 503. At the hearing he stated that, after considering all the information, including the depositions and photographs, that one "can look at the cracks, that that spoil edge did give away." Tr. 503. Thus, Fields' view was that the spoil edge gave away underneath the berm. Tr. 504.

On cross-examination, Fields agreed that the purpose of a berm at the slurry pit dump site is to prevent dump trucks from over-traveling the dump site and that the assumption in the MSHA regulation is that the material the berm is made of will be strong enough to prevent such over-travel at the dumping location. Tr. 508. To that end, the purpose of the berm is for the dump truck driver to feel the berm before dumping its load and that for berms to be effective, they have to sit on solid material. *Id.* Fields agreed that if the area underneath that berm is weak or soft, it would defeat the purpose of having the berm, *but he added that the mine would not put a berm in such a location.* Tr. 509. Fields admitted that he didn't know what the material was at the top of the berm. Tr. 510.

Reminded of the position he took during his deposition, he affirmed his view that the haul truck operators had been pushing on the berm when they backed up and with that constant pressure on the berm it gave away. Tr. 512. Fields added that when he was talking about pressure being created on the berm, and whether this would occur over one shift or over a period of time, he responded, “[i]t could be over a couple of shifts.” Tr. 512. However, despite that remark, because he wasn’t there, he couldn’t say that an examiner should have noted this problem. Tr. 513.

Fields did not have an answer when asked, “[i]f the berm is made out of a substantial material, why wouldn't this dump truck have gone up over it as opposed to clearing the way as it did,” responding “I can't answer that.” Tr. 515. He agreed that “the point of a substantial berm at that height is to stop the truck from going over. *Id.*”

Respondent’s 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. 347-348. The Court does not agree. In fact the remedial measures, if considered, could work against the mine. Efforts at correcting a problem after an accident are generally not considered because if they were to be it could be an admission that the Respondent’s prior practices were inadequate. Further, while Respondent touted the efforts it made post the berm accident to make matters safer for dumping, Fields indicated that the mine *had* to do it per MSHA requiring it. Tr. 516-517.

The post-hearing briefs.¹²

The Secretary contends that the “Respondent violated § 77.1605(l) when it failed to maintain the berm in a condition where it would restrain a vehicle from overtravel and falling into the pit.” Sec. Br. at 14.

The Secretary notes that “The test for determining whether a berm is sufficient to meet the requirements of 30 C.F.R. § 77.1605(l) is the reasonably prudent person standard [and that] the adequacy of an operator’s berms or guards should thus be evaluated in each case by reference to an objective standard of a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute.” Sec. Br. at 15, citing *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan.1983). Applying that standard, the Secretary asserts that the “Respondent was negligent when it failed to provide a berm capable of preventing Mr. Standish’s truck from going over the berm [and that the] Respondent’s berm maintenance was such that a reasonably prudent person should have known of the need to maintain its berm in a condition to prevent “overtravel and overturning” at its dump locations. *Id.* Solar Sources failed in that regard by not “[adding] new material to it to restrengthen the berm, or cut down the mud and get rid of the mud, and then add new berm material there.” *Id.* at 16, citing Tr. 92. The Court agrees and, as discussed above, finds as a fact that Solar Sources failed in that regard.

¹² The Court fully considered the parties’ initial and response briefs, but did not feel the need to expressly discuss points raised in the responses. The decision itself addresses matters from the responses.

The Secretary also contends that the Respondent was highly negligent in its failure to maintain the condition of the berm, an assertion based on the claim that the mine knew or should have known about the violative condition or practice and for which no mitigating circumstances were present. The Secretary asserts this amounts to an aggravated lack of care that is more than ordinary negligence, due to the berm's insufficient consistency and its failure to maintain the berm so that it would "deter a truck from overtravel or would redirect a truck or warn the driver of the likelihood of overtravel." *Id.* at 17. The Court agrees that the Respondent was highly negligent, noting that the inspector credibly testified that such conditions could not have developed overnight, that the wet slurry mix had a deleterious effect on the berm, and that Lutgring admitted to him that the berms needed constant attention.

Speaking to the significant and substantial claim, the Secretary essentially repeats the contentions it raised for the negligence issue, stating that the "inadequately maintained berm was hazardous, did not prevent overtravel, and resulted in a serious injury," and therefore was S&S. *Id.* at 18. Adding detail to that assertion, to the violation, the Secretary identifies the safety hazard was the "inadequate berm did not allow the truck to stop or to warn the driver of getting too close to the edge." *Id.* at 19. This failure "contributed to the hazard of serious injury due to the high likelihood any fall from that height into the slurry pit would cause fatal injuries of severe trauma and/or engulfment causing drowning." *Id.* As for the third prong of *Mathies*, the reasonable likelihood the hazard contributed to will result in an injury, the Secretary makes note that the muddy consistency of the berm deprived it of substantial material and such a condition was "not only highly likely to injure a miner and cause a fatality, but it actually did injure a miner and caused him to break both heels and an ankle." *Id.* at 19-20. Speaking to the fourth prong, the Secretary states that Solar's failure to maintain the berm to prevent overtravel and overturning was not only likely to result in fatal injuries, the event did occur and resulted in serious injuries to the driver. *Id.* at 20. Speaking more broadly to all the *Mathies* elements, the Secretary notes that an inspector's testimony is an important consideration in determining that a violation is S&S where such testimony is "reasonable, logical, and credible." *Id.* As discussed more fully *infra*, the Court agrees with the Secretary's S&S analysis.

Addressing the unwarrantable failure allegation, the Secretary notes that designation is to be measured "by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist." *Id.* at 22, citing *Jim Walter Resources, Inc.*, 28 FMSHRC 579, 605 (Aug. 2006). Applying that test, the 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.

Respondent notes that the burden of proof is on the Secretary and with that in mind asserts that the standard was not violated. R's Br. at 22. Respondent notes that "[n]othing in the standard addresses the base the berm is built on or what happens if the base collapses." *Id.* at 23. The Court notes that this is literally true, nothing in the standard expressly addresses the base, but that as explained *infra*, that is an incomplete and illogical ground to defeat the berm citation.

Respondent, continuing with its base, not the berm, failure contention, points to the truck driver in the accident and his testimony that the berm was of sufficient height, although he stated that “the area where he dumped was lower than the berm on either side.” *Id.* 24. Respondent asserts that the MSHA inspector had no direct information about the berm’s condition prior to the accident, that there “was clear evidence of [a] crack in the base and in the left and right sides of the berm remaining,” and that the clear photographic evidence showed the shot rock, not slurry material, was used to build the berm *Id.*

Respondent also challenges the claim that there was high negligence involved. Looking to Part 100, the Respondent maintains that such a designation is appropriate only “if *no* mitigating factors exist.” *Id.* at 25. Assuming that a violation is found, Respondent contends there were “mitigating circumstances.” In using that term, Respondent looks to section 100.3(d) within Part 100, which provides that “[m]itigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct, or limit exposure to mine hazards.” *Id.* at 27. It points to steps it has taken to prevent *another such accident* from happening, in that “Solar Sources completely redesigned how it dumped gob and slurry into the pit after this accident and submitted a modified ground control plan. There is now a chute with a berm and area just below it that is also “bermed off” [and that] [o]nce material accumulates, a dozer pushes the material into the pit. [] This keeps the truck operator behind two berms, some 20 feet away from the edge of the bank, and also leave a much larger and more stable base that will not collapse as occurred here.” *Id.* As noted, *supra*, Solar Sources’ witness Fields testified MSHA required the mine to take these steps.

The Court has considered the Respondent’s arguments. Although the Court finds that the Respondent’s post-incident action was laudable, and reflective of the serious attitude Respondent takes towards safety, there is evidence that MSHA required that action. In any event, it is not the type of action that is considered to be a mitigating circumstance. The Court remarks that the Respondent has misconstrued the mitigation element, as that factor looks to steps taken *before* the violation occurred, *not after*. The Court has determined that there were no cognizable mitigating factors.

In support of its contention that there was no unwarrantable failure, the Respondent asserts “[t]here is no evidence to support that the violation ... existed for any length of time.” *Id.* at 28. On this point it asserts that Inspector Noel “admitted that that he did not know when any problem developed,” and that those who did view the berm prior to the accident stated that it looked fine. *Id.*, citing the hearing testimony of Kendall and Fields. The Respondent also points out that the operator had not been placed on notice that greater efforts were necessary for compliance. In that regard, it notes that “[t]here is no evidence of any berm violations in this operator’s history, at least since 2010 or 2011 [and that] Inspector Noel admitted he found no other berm citations in the mine’s recent violation history.” *Id.* at 29. Respondent adds that “Inspector Noel also admitted that in his deposition he testified that he marked the berm citation an unwarrantable based on his belief there had not been a proper on-shift examination that morning, which was incorrect (and the citation alleging this was dismissed).” *Id.* at 30, parenthesis in brief.

The Respondent concludes its argument that no unwarrantable failure existed by contending that “the Secretary presented no evidence that the violation was obvious or posed a high degree of danger,” that “[t]here was no evidence or testimony that the operator knew of the violative condition of the berm prior to the accident,” and that “there is no evidence that MSHA put Solar Sources on notice that greater efforts were needed for compliance.” *Id.* at 30-31.

Having considered the Respondent’s contentions, the Court concludes, based on the findings of fact and the discussion within, that the failure was unwarrantable.

Discussion

The Court’s granting of the Respondent’s motion for a directed verdict regarding the alleged onshift violation, 30 C.F.R. §77.1713(a).

At the conclusion of the testimony, Respondent renewed its motion for a directed verdict on the alleged inadequate onshift violation. Respondent pointed out that there was testimony that the alleged onshift exam occurred at 5:40 a.m. and that, as the work shift began at 6 a.m. whatever the nature of the exam, it was too early to qualify as an onshift exam. Respondent also contended that there is no evidence in the record that could support the notion that driving by the bermed dumping site 20 minutes before a shift begins can constitute an onshift and on that basis the Order must be vacated. Tr. 525-526. The Secretary responded that “there’s testimony that there was work that began prior to the official 6:00 a.m. shift. ... Mr. Fields made representations from the company that an onshift had been performed. ... [and] with [those] representations that it is reasonable to believe that MSHA would have understood that ... an onshift had occurred.” Tr. 526.

The Court then ruled, “to use that worn out phrase, if the shoe were on the other foot, MSHA would never be claiming that an onshift exam can occur before the shift began. [If there was a situation] ... where there’s a challenge to an onshift, and the only thing that the operator says is, ‘Well, 15 minutes, an hour before the shift, I did an exam,’ I can’t imagine MSHA would say, you know, ‘That’s close enough. We’ll take that. We’ll take that as proof that you did an onshift.’ ... [The Court remarked that it could never imagine that MSHA “would ever take such a lenient approach. [Instead MSHA] would be saying what the respondent has been [asserting here, that] [t]he shift begins at the time the shift begins. And therefore, the onshift is at some point after that shift begins, not before.” Tr. 528. On that basis the Court granted the Respondent’s motion for a directed verdict on Order No. 9102705. It is noted that the Secretary did not preserve an appeal on this ruling and its post-hearing brief makes no mention of the alleged onshift violation.

Accordingly because an onshift exam necessarily requires an exam made during the work shift, not at some time before or after that shift and because, rather obviously, the shift refers to the work shift, not some time before operations have started, **the directed verdict dismissing Order No. 9102705 is affirmed.**

The Section 104(d)(1) Citation berm violation.

As noted at the outset of this decision, the cited standard provides that “[b]erms, bumper blocks, safety hooks, or similar means shall be provided **to prevent overtravel and overturning at dumping locations.**” 30 C.F.R. §77.1605(l) (emphasis added). The Secretary also points out that “berm” is a defined term, defined as “a pile or mound of material capable of restraining a vehicle.” Sec. Br. at 14, citing 30 C.F.R. § 77.2.

Preliminarily, it is observed that there is no dispute that this matter involved a dumping location and that a dumping truck overtraveled the berm at that location. The operator’s central contention is that it was *the base on which the berm sat that collapsed*, not the berm itself, which caused the accident to occur and therefore the standard was not violated. The Court does not agree. As discussed below, the Court finds that the berm itself collapsed, taking with it some of the base on which it sat. Independent of that finding, the Court also finds that the berm and its base work in synchrony and cannot be divorced from one another – thus, the berm must meet the requirements of the standard and the base must be capable of supporting the berm. To view the berm and the base as totally distinct would emasculate the berm standard, rather like asserting that a house was structurally sound but the foundation on which it was built was inadequate. Both must be sound and maintained as such under the standard. Further, the Respondent’s suggestion to the contrary would imply that there was nothing the mine could’ve done to prevent this accident. The credible evidence, chiefly, but not exclusively, from Inspector Noel, leads to a different conclusion.

Focusing on the berm itself, and noting that there were conflicting accounts about the condition of the berm, this decision necessarily involves some credibility determinations. As set forth in the findings of fact, above, the Court finds that Inspector Noel’s testimony and his explanation for the berm failure constitutes the more credible accounting of the cause of the failure. Too much of the testimony from the Respondent’s witnesses came across to the Court as rehearsed and displaying revisionism from their deposition testimony. More fundamentally, Lutgring agreed that the nature of the slurry being dumped was wet and, as Inspector Noel pointed out, this watery material would have the effect of diminishing, that is to say weakening, the integrity of the berm. The diminishment of the berm integrity, as the Inspector testified, could not have developed overnight; certainly more than a shift was involved for an accident of this magnitude to occur.

Further, as Respondent’s witness Atkinson acknowledged, there was some black material on top of the berm that’s left on the left and right, which he stated was to be expected “because when the material’s being dumped, it splashes all over the place.” Tr. 314. Atkinson conceded that slurry on top of a rock berm could cause it to collapse, although he contended that he did not see evidence of that at the site. Despite this attempt to deny that there was such a slurry related cause of the berm collapse, the Court finds that this admission by Atkinson supports the inspector’s explanation as to how a berm can deteriorate from the wet material being dumped upon it. Lutgring’s statement tacitly conceded this, with his remark that the berms needed constant attention.

As noted, the Court has concluded that the resolution of the alleged berm violation does not turn on whether the tracks displayed in several photos involve bulldozer or truck treads. Neither side has contended that determining the actual source of tracks controls the outcome of the decision for this matter. Accordingly, the Court concludes that the issue and debates over the source of the creation of the bar and the triangle wedge perceived in exhibit photos and whether the tracks in the photos were from a truck or a bulldozer are not essential determinations at all and that they serve to unnecessarily distract from the central matters to be decided.

There 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. Although the Respondent attempted to make the debate over whether the berm failed or, as the Respondent contends, the base on which the berm sat unexpectedly and without warning gave away, the failure need not be ascribed completely to one or the other. Both failed.¹³ It is also worth noting that the issue is not whether the berm originally was made of shot rock; the Secretary agrees that, as originally constructed, it was likely substantial and made from shot rock. Rather, it's a question of whether it was properly maintained or allowed to deteriorate, with the Court finding that the latter occurred.

Unwarrantable Failure violations

As the Commission has noted, “The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test). Whether the conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the

¹³ As noted earlier there were some opinions presented suggesting that improper dump truck backing practices, while not the cause of the berm failure, could have contributed to it. That may be true, but it is noted that Lutgring was not critical about Standish’s dumping practices when dumping loads into the pit, stating “[h]e always did a real good job, you know, following instructions,” nor did he ever see Standish hitting berms hard or slamming into berms. Tr. 400. Further, the berm gave away and therefore the berm did not prevent overtravel, and in this instance overturning as well, at the dumping location. In addition, as noted earlier, while Fields, at the hearing and during his deposition, took the view that the haul truck operators had been pushing on the berm when they backed up and with that constant pressure on the berm it gave away, whether this could occur over one shift or over a period of time, he admitted, it could be over a couple of shifts. However, despite that concession, he was unable to say whether remark an examiner should have noted this problem. In the Court’s view, Fields testimony supports the inspector’s point about the importance of continued berm maintenance.

violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013), citing *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999); see also *Consol Buchanan Mining Co. v. Sec'y of Labor*, 841 F.3d 642, 654 (4th Cir. 2016). These factors must be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 22 FMSRHC 340, 353 (Mar. 2000).” *American Coal*, 39 FMSHRC 8, *9, (Jan. 2017).

Related to that is the subject of negligence, the Commission has noted that it “evaluates the degree of negligence using ‘a traditional negligence analysis.’ *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted). Because the Commission is not bound by the Secretary's regulations addressing the proposal of civil penalties set forth in 30 C.F.R. Part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Id.* at 1263-64.” *Id.* at *14.

In support of its claim that the violation was an unwarrantable failure, the Secretary named, among other factors, that “the condition existed for a period of time as evidenced by the muddy berm saturated with slurry material [and that the] Respondent had knowledge that berms were a constant problem requiring attention.” Sec. Br. at 14.

As detailed in the findings of fact, the Court considered all of the facts and circumstances of this case, and finds that the violation was an unwarrantable failure.

“Significant and substantial” violations

As the Commission has stated, “[a] violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained: In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a 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 *Id.* at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). *Consol Pennsylvania Coal Co.*, 39 FMSHRC 1893, *1899 (Oct. 2017). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The Court finds the Commission's analyses in *Black Beauty*, 34 FMSHRC 1733 (Aug. 2012) useful.¹⁴ There, the Commission determined that under the second *Mathies* element, "the judge accurately articulated the relevant hazard as "the danger of a vehicle veering off the elevated roadway and rolling, or falling, down the spoil incline." *Id.* at 1741. That hazard clearly was present here and rather obviously, also under the second *Mathies* element, the Court finds substantial evidence that the lack of berms contributed to the hazard in this case.

In addition, the Commission upheld the judge's conclusion that if a truck were to veer off the edge of the road, it is reasonably likely that the driver would receive an injury, and there noted that the relevant inquiry "is whether the hazard in question - a vehicle veering off the road because of a lack of berms - would be reasonably likely to cause injury." It added that in *Musser Engineering, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, (Oct. 2010) ("*PBS*"), it stated "[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., the danger of breakthrough and resulting inundation, will cause injury." We specifically instructed that the 'Secretary need not prove a reasonable likelihood that the violation itself will cause injury.'" *Id.* at 1742. The Commission concluded in *Black Beauty* that "substantial evidence supports the judge's conclusion that if a vehicle veered off the road, it is reasonably likely to result in injury. The evidence clearly shows that the road was steeply inclined and that a truck overtraveling the side of the road would fall 50 feet." *Id.* at 1743.

This Court has observed that the *Mathies*' S&S formulation is, at its heart, a tool of prognostication. In the infrequent occasions where the injury occurs, as happened here, it makes little sense to speak exclusively about applying such a forecast. Put another way, if the weather records show that it rained on a Tuesday, and it is now Wednesday, need we inquire whether, on that Monday, there was a reasonable likelihood of rain occurring on Tuesday? And even if the answer is yes, is it reasonable to ignore what occurred?

Determination of an appropriate penalty where there has been a special assessment.

Respondent notes that special assessments are governed by 30 C.F.R. §100.5, but that as the section does not does not state the "conditions warranting a special assessment ... the decision to issue a special assessment rather than a regular penalty is wholly within MSHA's discretion. R's Br. at 32. From that observation, Respondent, citing *The American Coal Company*, 38 FMSHRC 1987, 1993 (August 2016), then notes that when a matter is before the Commission, penalties for violations are to be assessed upon consideration of the six statutory factors under Section 110(i) of the Mine Act. *Id.* Respondent notes that in that decision the Commission expressed that "the Secretary's proposal is not a baseline from which the Judge's consideration of the appropriate penalty must start," rather, "[t]he Judge's assessment is made

¹⁴ *Black Beauty* involved a related berm standard, 30 C.F.R. §77.1605(k), which provides "[b]erms or guards shall be provided on the outer bank of elevated roadways." However, §77.1605(l) was also involved, as the judge allowed the Secretary to plead that standard in the alternative and the Commission did not take issue with that ruling. The berm standard at issue in this case, §77.1605(l), is even more precise in setting forth the berm requirements for dumping locations. Therefore, the Commission's analysis is fully applicable here.

independently and, regardless of the Secretary's proposal, the Judge must support the assessment based on the penalty criteria and the record." *Id.* at 33, citing *American Coal* at 1995.

To support its contention that the use of a special assessment was inappropriate, Respondent returns to its argument that the violation did not reflect a high degree of negligence, that it was not unwarrantable and that there was no "extraordinarily high gravity or other unique aggravating circumstances on the part of the mine operator [nor was there an] excessive history of violations or repeated noncompliance with the cited standard." *Id.* at 34. Respondent then adds that the Secretary's theory for the increased assessment was not supported, as it was not established that "the berm was made of gob material, that it was 26 inches high and that there was an improper on-shift inspection of the berm prior to the accident." *Id.* For those reasons, Respondent contends that, if a violation is found, any penalty should be based on low negligence and under a regular assessment only. *Id.* at 35.

The Secretary, in support of MSHA's determination to apply a special assessment, points to the narrative in that assessment that it was "based on the high negligence, the serious gravity, and the fact Respondent knew or should have known the berm construction was inadequate, yet it made no efforts to correct the hazardous condition." Sec. Br. at 27. Though not a Commissioners' level decision, and therefore not binding on the Court, the Secretary cites to an administrative law judge's rationale that inquired whether the "Secretary's special assessment rationale, as contained in the narrative findings, is consistent with the record and the evidence introduced at hearing." *Id.* at 28, citing *Rock N Roll Coal Company*, 38 FMSHRC 2831, 2865 (ALJ McCarthy, Nov. 2016). The Court is of the view that the judge's rationale makes sense and applies the same test here, finding that the special assessment in this matter is consistent with the record and the evidence introduced at hearing. To be clear, the Court's penalty determination has been determined by evaluation of the six statutory criteria.

Summary

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.¹⁵

¹⁵ The other statutory factors were duly considered. From the parties' stipulations, it is noted that the factors of good faith and 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. The Secretary is required to prove all elements of the alleged violations by a preponderance of the evidence, which 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) (internal citations omitted). The Secretary met this burden.

ORDER

It is hereby **ORDERED** that the Citation No. 9102704 in this decision is **AFFIRMED** as written. Respondent is **ORDERED** to pay the civil penalty in the total amount of \$68,300.00 within 30 days of this decision.

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.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 29, 2018

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

v.

CONSOL PENNSYLVANIA COAL
COMPANY, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2015-0341
A.C. No. 36-10045-390490

Mine: Harvey Mine

DECISION

Appearances: Jane Hwang, Esq., Office of the Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for Petitioner.

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

Before: Judge Andrews

This proceeding is before me on a petition for assessment of civil penalties filed by the Secretary of Labor (“Secretary” or “Petitioner”), acting through the Mine Safety and Health Administration (“MSHA”), against Consol Pennsylvania Coal Company, LLC, (“Consol” or “Respondent”), at its Harvey mine, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820 (“Mine Act” or “Act”). This docket involves eight citations issued pursuant to Section 104(a) of the Act during the period from January 12, 2015 through July 20, 2015, with total proposed penalties of \$4,734.

A hearing was held in Pittsburgh, Pennsylvania on August 1 and 2, 2017. Prior to the hearing the parties settled four of the citations. The partial settlements were placed on the record, and on December 20, 2017, were approved¹. Testimony and documentary evidence was presented by the parties on the remaining four citations.² After the hearing, each party submitted

¹ An amended partial settlement was issued to correct several clerical errors.

² References to the transcript will be “Tr.” followed by the page number(s). Joint exhibits will be “JX”, the Secretary’s exhibits will be “GX”, and Respondent’s exhibits will be “RX” each followed by the number.

a post-hearing brief and Respondent submitted a response brief.³ All of the evidence of record has been considered.⁴ Joint Stipulations were admitted at the hearing:

1. The Respondent was an “operator” as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Mine Act”), 30 U.S.C. § 803(d), at the mine at which the citations and orders at issue in this proceeding were issued.
2. Operations of the Respondent at the mine at which the citations and orders were issued are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission pursuant to Sections 105 and 113 of the Mine Act.
4. The individuals whose names appear in Block 22 of the citations and orders were acting in their official capacities and as authorized representative of the Secretary of Labor when the citations were issued.
5. True, authentic copies of the citations and orders, were served on the Respondent or its agent as required by the Mine Act.
6. The citations and orders contained in Exhibit “A” attached to the Secretary’s Petitions are authentic copies with all appropriate modifications or abatements, if any.
7. Payment of the total proposed penalties listed in Exhibit “A” for Docket No. PENN 2015-341 will not affect Respondent’s ability to continue in business.

³ Throughout this decision the Secretary’s Post Hearing Brief will be cited as “SPHB”. Respondent’s Post Hearing Brief will be cited as “RPHB” and the response brief as “RRB”.

⁴ The findings of fact in this decision are based on the record as a whole and the Administrative Law Judge’s careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the ALJ has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness’s testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the ALJ has also evaluated demeanor. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on the ALJ’s part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

8. The R-17 Certified Assessed Violation History Report (GX1) is an authentic copy and may be admitted as a certified business record of the Mine Safety and Health Administration.

JX-1.

Legal Principles

Strict Liability

The Commission has established that under the Mine Act an operator may be held liable for a violation of a safety standard without regard to fault. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd* 868 F.2d 1195 (10th Cir. 1989). Therefore, the Mine Act is a strict liability statute and if a violation of a mandatory safety standard occurs, an operator will be held liable regardless of the level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Ames Construction, Inc.*, 33 FMSHRC 1607, 1611-12, n.6 (July 2011).

Burden of Proof

In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). The burden imposed on the Secretary by the Mine Act is to prove alleged violations and related allegations such as gravity and negligence by a preponderance of the evidence. *Garden Creek Pocahontas Company*, 11 FMSHRC 2148, 2152 (Nov. 1989), citing *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ). Quoting the Supreme Court in *Concrete Pipe*, 508 U.S. 602, 622 (1993), the Commission observed that “[t]he burden of showing something by a ‘preponderance of the evidence,’ the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir 2001); *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

Gravity

The term “gravity” is contained in Section 110(i) of the Mine Act in the context of factors to be considered by the Commission in assessing civil monetary penalties. Among those factors is “the gravity of the violation.” This is generally expressed as the degree of seriousness of the violation and is measured in terms of the likelihood of injury, the severity of such injury should it occur, the number of persons affected, and whether the violation is significant and substantial.

Significant and Substantial (“S&S”)

Section 104(d) (1) of the Mine Act describes an S&S violation as being “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine

safety or health hazard.” 30 U.S.C. § 814(d) (1). The Commission has established that a violation is significant and substantial if, based on the particular facts surrounding the violation, there exists a reasonable likelihood the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The four-part test long applied to establish the S&S nature of a violation examines: “(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 will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec’y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The Commission has clarified that “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury,” and “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (October 5, 2011), *citing Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). The determination ought to be made at the time the citation is issued without any assumptions being made regarding abatement activities by the mine operator. *Knox Creek Coal Corp.*, 811 F.3d 148, 165-66 (4th Cir. 2016), *citing U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (Jul. 1984). The determination is made assuming continued normal mining operations, and the operative time frame includes the time a violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal*, at 905, *citing Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989), *citing United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1130 (Aug. 1985). It has also been well established by Circuit Courts and the Commission that redundant or additional safety measures are irrelevant to all elements of the S&S analysis. *ICG Illinois, LLC*, 38 FMSHRC 2473, 2481 (Oct. 2016); *Black Beauty Coal Company*, 38 FMSHRC 1307, 1312-13 (Jun. 2016); *Knox Creek Coal Corp.*, 811 F.3d 148, 162 (4th Cir. 2016); *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011) *aff’d* 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Buck Creek*, at 136.

The *Mathies* test has been revised to focus on the interplay between the second and third steps. The second step addresses the contribution of the violation to a discrete safety hazard and is now primarily concerned with “the extent to which the violation increases the likelihood of occurrence of the particular hazard against which the mandatory standard is directed.” *ICG Illinois*, at 2475, *citing Newtown Energy Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) *citing Knox Creek*, at 162-63. At this step a two-part analysis is required. First, the particular hazard to which the violation contributes must be clearly described. The Commission defines “hazard” in terms of prospective danger, *i.e.*, the danger which the safety standard at issue is intended to prevent. The starting point for determining the hazard is the regulation cited by MSHA. Second, a determination is required of whether, based on 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. *ICG Illinois*, at 2475-76; *Newtown* at 2038. The Commission has recognized that “reasonable likelihood” is not an exact standard capable of measurement in precise terms, but

is a matter of the degree of risk of the occurrence of a hazard or a reasonably serious injury. *ICG Illinois*, at 2476; *Newtown*, at 2039.

At step three the focus shifts from the violation to the hazard, and the analysis is concerned with gravity. The *Knox Creek* Circuit Court reasoned that at this stage of the analysis the existence of the hazard should be assumed. *Knox Creek*, at 164. The inquiry is whether, based on the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. *ICG Illinois*, at 2476, *Newtown* at 2037, citing *Cumberland Coal Res.*, at 2365. The Commission has not equated the reasonable likelihood standard with a probability greater than fifty percent; The Secretary is not required to prove an injury was “more probable than not.” *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865-66 (Jun. 1996).

The step four gravity determination is essentially unchanged, whether any resultant injury would be reasonably likely to be of a reasonably serious nature. *Newtown*, at 2038.

Negligence

Section 110(i) of the Mine Act also includes “negligence” as one of the six criteria the Commission is required to consider in assessing a penalty. The term is not defined in the Act, but over 30 years ago the Commission recognized that: “[e]ach mandatory standard... carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A. H. Smith Stone Company*, 5 FMSHRC 13, 15 (Jan. 1983).

The Commission has established that its judges may “evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act.” *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). This evaluation considers “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Jim Walter Resources*, 36 FMSHRC 1972, 1975 (Aug. 2014).

The Secretary’s regulations categorize negligence into levels labeled “no,” “low,” “medium,” “high,” and “reckless disregard.” These levels are based on the degree of the operator’s knowledge of the violative condition or practice along with the existence or multiples of mitigating circumstances found to be present. The procedure used takes the level of negligence determined and applies a number of “points” from a table which are then added together with points from other factors to arrive at the calculated proposed penalty amount. See 30 C.F.R. § 100.3, Tables I-XIV.

The Commission and its judges are not bound to apply the 30 C.F.R. Part 100 regulations that govern the MSHA’s determinations. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016) citing *Brody* at 1701-03. Therefore, the Commission’s judges are not limited to an evaluation of allegedly “mitigating circumstances” and instead may consider the “totality of the

circumstances holistically.” *Brody*, at 1702; *Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir 2016). For example, the Commission has stated the real gravamen of high negligence is that it “suggests an aggravated lack of care that is more than ordinary negligence.” *Newtown*, at 2049, citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) citing *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). High negligence may be found in spite of mitigating circumstances, or, for example, moderate negligence may be found without identifying mitigating circumstances. *Brody*, at 1702-03. The Commission has described ordinary negligence as “inadvertent,” “thoughtless,” or “inattentive” conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987).

Penalty

The Mine Act delegates the duty of proposing civil monetary penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The proposed penalty is calculated by application of the Secretary’s regulations at 30 C.F.R. Part 100. By referring to each citation or order along with operator data and violation history, points are applied and totaled to arrive at a monetary penalty amount. 30 C.F.R. § 100.3 and Tables I-XIV. The Commission and its judges are not bound by the Secretary’s proposed assessment, and the Part 100 regulations are in no way binding in Commission proceedings. The Commission alone is responsible for assessing the final monetary penalty. *Sec’y of Labor v. American Coal Company*, 38 FMSHRC 1987, 1990, 1993 (Aug. 2016) citing *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984); *Mach Mining, LLC, v. Sec’y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) If the operator challenges the proposed penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28.

The Mine Act delegates to the Commission and its judges the “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). In assessing civil monetary penalties the six criteria to be considered are the operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The principles governing the authority of Commission Administrative Law Judges to assess civil monetary penalties *de novo* are well-established. *Hidden Splendor Resources, Inc.*, 36 FMSHRC 3099, 3104 (Dec. 2014). Congress has conferred broad discretion upon the Commission and its Judges in the assessment of civil penalties under the Act. *American Coal*, at 1993 citing *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). The assessment of the Judge is entirely independent of the Secretary’s penalty proposal, which is not a baseline, starting point or guidepost. *American Coal*, at 1990, 1995. However, the broad discretion accorded to the Judge is not unbounded and must reflect proper consideration of the statutory penalty criteria. *Id.* at 1993. For each of the six statutory criteria, the Judge must make findings of fact. *Id.*; *Sellersburg Stone Company*, 5 FMSHRC 287, 292 (Mar. 1983); 29 C.F.R. § 2700.30(a). Although all six of the statutory criteria must be considered, the factors need not be assigned equal weight, and for more serious violations gravity and negligence may be weighed more heavily than the other four criteria. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2374 (Sept.

2016) citing *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001); see also *Spartan Mining company, Inc.*, 30 FMSHRC 699, 724-25 (Aug. 2008) and *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010).

Underlying the Mine Act's penalty assessment scheme is the deterrent purpose of its penalty provisions. *Black Beauty Coal Company*, 34 FMSHRC 1856, 1866-67 (Aug. 2012) citing *Sellersburg Stone* at 294. The Judge may take into account the deterrent effect of the penalty assessed. *Black Beauty* at 1168-69; see also *Coal Employment Project v. Dole*, 889 F.2d 1127, 1133 (D.C. Cir. 1989). The Commission has also stated Judges "must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge." And, "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." *American Coal*, at 1994; citing *Sellersburg*, at 293. The Judge need not make exhaustive findings. See *Cantera Green*, 22 FMSHRC 616, 621 (May 2000).

Citations 7030768 and 7030777

Citation No. 7030768 was issued on January 28, 2015, by Inspector Richard L. Eddy ("Inspector Eddy" or "Eddy").⁵ The condition or practice was described as follows:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts. When examined by this inspector, the ribs along the No 7 North Mains, MMU 061-0 and MMU 079-0 located at the No 22 Block, between the No 2 and No 3 Entry was not adequately supported. The unsupported area measured approximately 22' in length by 6 ½' in height and approximately 6" to 18" in depth. Visible cracks measuring approximately 4' in height and 6' to 8' in length was observed with loose material hanging.

⁵ Inspector Eddy started in coal mining in 1973, operating load machines, shuttle cars, ram cars, continuous miners and just about every piece of equipment. Tr. 78-79, 123. He also worked as a section supervisor and mine examiner. During the period from 1989 to 2012 he held several positions with the United Mine Workers of America. Tr. 79-80. From 1989 to 2010 he was a full time labor representative on investigation teams in accidents and fatalities, but did not work underground. Tr. 123. He calculated 44 ½ years of underground coal mining experience, and was a certified mine foreman and EMT. Tr. 80. Eddy has been employed by MSHA since 2012, and was a Coal Mine Inspector from July 2012 to October 2015 conducting inspections and accident investigations. Tr. 76-77. He was familiar with the Harvey Mine, having conducted various inspections there for about 6 months. Tr. 80-81. He had investigated a face ignition at the Harvey Mine. Tr. 81.

Standard 75.202(a) was cited 6 times in two years at mine 3610045 (6 to the operator, 0 to a contractor).

Inspector Eddy designated the violation as S&S. He determined that injury was reasonably likely and could be reasonably expected to result in lost workdays or restricted duty to 1 person. Eddy rated the negligence as moderate. The citation was terminated on February 2, 2015, by a different Inspector who found the area at that time adequately supported. GX-7. The proposed penalty is \$540.

Inspector Eddy was at the Harvey mine on February 12, 2015, when he issued Citation No. 7030777, also under safety standard 75.202(a). The Condition or Practice described a different area of the mine, but was otherwise similar to Citation No.7030768, discussed above:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts. When examined by this inspector, the ribs at the entrance of the No 2A track along the Bleeder Track haulageway was not adequately supported. The unsupported area measured approximately 19' in length by 8' in height and approximately 6" to 36" in depth. Visible cracks measuring approximately 3' in height and 4" to 36" in length was observed with loose material hanging.

Standard 75.202(a) was cited 7 times in two years at mine 3610045 (7 to the operator, 0 to a contractor).

As with the previous citation, Eddy designated the violation as S&S. He again determined that injury was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty to 1 person. And he again rated the negligence as moderate. The citation was terminated on February 15, 2015, by a different Inspector who found the area at that time adequately supported. GX-12. The proposed penalty was the same at \$540.

The safety standard provides:

Protection from falls of roof, face and ribs.

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

30 C.F.R. § 75.202(a).

Contentions

Respondent contends that both of the cited rib areas were where miners did not often work or travel. RPHB, p. 1. Both rib areas were solid, had no loose or hanging material, and there was no sloughage. *Id.*, pp. 8-9. In one rib area a few bolts had been struck by equipment,

and in the other area the rib had been struck, but neither rib was unsupported or unstable. Respondent argues nothing was scaled down, and the cracks were not actually measured. *Id.* Further, the citations should not be S&S because the areas did not constitute a hazard and injury was unlikely. *Id.*, pp. 11-13; RRB, p. 7.

The Secretary contends that the operator failed to support the ribs in areas where persons work or travel. SPHB, pp. 7, 11-12. The Inspector found visible cracks and loose coal and rock hanging from the rib. *Id.* at pp. 8, 10. The Inspector found a rib fall reasonably likely and reasonably likely to cause severe injury. *Id.*

Citation No. 7030768

Inspector Eddy was accompanied by safety inspector Al Sturgeon, (“Sturgeon”) on the January 28, 2015, inspection.⁶ Tr. 84. Eddy described the mine as large, with 5 Mechanized Mining Units (“MMUs”). Tr. 81-82. It was on a 5-day spot inspection, meaning the mine generated more than a million cubic feet of methane in a 24-hour period. Tr. 82. Eddy testified there was an area at the 22 block, 7 north mains, between the No. 2 and No. 3 entries where he observed the ribs were unsupported. Tr. 85, 131. He described an area with a length of 22 feet where there were places with visible cracks, but not for the entire length. Tr. 85-86. He testified he saw loose material that day, both coal and rock. Tr. 86. From a minimum of five to seven feet away, he and Sturgeon used a 25-foot tape measure to measure the 22-foot length. Tr. 86-87, 139. Eddy felt the cracks could fall out at any time, and did not want to put himself or anyone else in harm’s way. Tr. 87. The cracks were observed to be four feet in height, and six to eight feet in length, with loose hanging material. Tr. 85. He did not measure the width or depth of any cracks on the rib, but approximated these measurements using visual observations. Tr. 140-141, 160, 220.

Eddy testified he did not scale or pry anything down because there was not any type of temporary support in the area. Tr. 91. Though he had on him a 36-inch sounding device walking stick with a brass handle on the end, he did not use it to test to see if the visible cracks were loose because he believed it was too dangerous Tr. 143-144. Eddy did not recall any sloughage on the ground or, material that had fallen, and testified that was not the issue. Eddy testified that the issue for him was the evident lack of support. Tr. 142-143. He did not danger off the area because he knew no one would travel the area until the problem was corrected. Tr. 92. He told the operator that no miners could travel the area until the problem had been corrected. Tr. 92, 146.

Inspector Eddy also testified about the activity in the area. There was a large scoop in the No. 2 to No. 3 crosscut. Tr. 88, 129. There were contractors in the No. 2 entry and a supply crew

⁶ For a little over 5 years Sturgeon had worked in the mining industry, first for Murray Energy and then at Consol Energy. Tr. 213-214. At Murray he did face work, general maintenance and operating shuttle cars, miners and bolters. At Consol, he did the same work and also became an outby supervisor and then a safety inspector. Tr. 214. He holds a 4-year collage degree in business. Tr. 215. For about the last two years, he has worked as a superintendent for a company in Pittsburgh, Pennsylvania. Tr. 213.

moving supplies between the No. 2 and No. 3 entries. Tr. 88. There were miners taking supplies off cars in by the No. 22 block. Tr. 128-129. The area was preshifted by mine examiners three times each day. Tr. 89, 96. Exhibits RX-1A, RX-1B, RX-19 and RX-20 were maps showing the location of the citation. Tr. 126-127.

Inspector Eddy was shown photographs taken by Sturgeon but he did not seem to recognize these as the area he cited. RX-2, RX-3; Tr. 156-159. Eddy testified that no photographs were taken at the time the citation was issued. Tr. 96. He did not recall if there were rib straps present. Tr. 159. He was also shown Sturgeon's notes. RX-4. He testified that the notes incorrectly detailed the conditions as no loose rock or coal that needed to be scaled down, and that no one was in the area. Tr. 160. Eddy stated there was no violation of the mine's roof control plan, and no improper examination cited. Tr. 162-163.

Inspector Eddy issued this citation as S&S because he believed there was a risk of the rib line possibly falling at any time. Tr. 94. He evaluated the citation as reasonably likely to cause injury because it was reasonably likely that this condition would fall and cause a serious injury. Inspector Eddy designated the injury as lost work days/restricted duty because broken bones, lacerations, and concussions could occur. Tr. 95. Additionally, Eddy designated the negligence as moderate because he believed the operator should have known of the condition from the preshift examination. He determined one person would be affected because one person would travel through the area at a time. Tr. 96.

Safety Inspector Sturgeon testified for Respondent. He disagreed with this citation because the area was controlled, it was not a travelway, and a scoop was very rarely brought through. Tr. 219. There was no scoop and no people in the crosscut or anywhere near where Inspector Eddy issued the citation. He testified that the rib and roof were adequately supported, with no falling material, loose material, or dislodged material. Tr. 219. He further testified that Eddy hit the rib all over with his sounding device trying to dislodge whatever he thought was loose. Tr. 220. Inspector Eddy tried to use his walking stick to dislodge a small crack that Eddy argued was loose material that would fall; when he tried to dislodge it nothing happened. Tr. 217. There was no obvious condition, no loose material, nothing that was ajar from or falling off or threatening falling from the rib. Tr. 229-230. The 22-foot area was supported. Tr. 219. The measurement with the tape was from approximately 2 to 3 feet away. Tr. 220-221. Bolts were dislodged, but this did not mean the ribs were loosened. Tr. 219, 240. Sturgeon did not believe the condition was dangerous because there was no loose material and the area was not a walkway. Tr. 221. He said Inspector Eddy did not state that people could not travel into the crosscut. Tr. 221. Sturgeon further testified he did not observe any equipment near the corner or in the crosscut between the No. 2 and No. 3 entries at the 22 block, and there were no supplies in the crosscut that day. Tr. 222. He took notes and photographs when the area was being inspected. Tr. 234-235.

Sturgeon testified that his notes also contain photographs he took of the corner where the citation was issued. Tr. 216. The photographs in Exhibit RX-2 depict the corner of block 22 between the No. 2 and No. 3 entries with the dislodged bolts, and reflected the condition of the

straps and bolts and rib as existed on January 28, 2015. Tr. 225-226.⁷ The photograph in Exhibit RX-3 shows the aftermath, the extra bolts, straps and pan on the rib. Tr. 227.

Sturgeon wrote in his notes that day:

Mr Eddy observed a corner where bolts were loose. A distance spanning 22' was measured where bolts were loose. The corner was 2 walls outby the tailpiece in the 7N mains. There was no loose rock or coal that needed to be scaled down. I asked him if the citation would be non S&S, he stated it has to be because of the way it has to be entered. The Inspector at no time measured Cracks for length or depth. There was no equipment or personnel in the area. We then contacted the 7NL mains section boss and he sent a bolter to bolt the corner.

RX-4.

Respondent's Day Shift Foreman Terry Arthur Long⁸ ("Long") and Respondent's Safety Inspector Albert Stein⁹ ("Stein") also testified on this citation. Stein was present on February 2, 2015, when the citation was terminated. Tr. 311. He testified that the photograph in RX-3 was taken a couple of weeks before the hearing. Tr. 312. Long was the Section Foreman on January 28, 2015. Tr. 248. He testified when there was a request, he would send a bolter to fix conditions. Tr. 251. There was often no damage from a scoop hitting a rib. Tr. 255-256.

Citation No. 7030777

On February 12, 2015, Inspector Eddy traveled to the 2A belt line accompanied by Bob Clark ("Clark").¹⁰ Tr. 98-99. At the 2A switch, the No. 2 and No. 3 entries of the bleeder system, he observed ribs with cracks and loose rock and coal material hanging, and issued this citation. Tr. 99-101; GX-12. Eddy and Clark used a 25-foot tape to measure the rib from approximately 5 feet away. Tr. 100-101. The length was approximately 19 feet and the height 8 feet but the entire area was not loose. Tr. 101. Eddy testified this was near a track that miners traveled on, and examiners, belt workers, pipe layers, and others would be in the area. The area would be preshifted once each shift. Tr. 101-102. There was a man door and stopping, and motors could

⁷ The three images in RX-2 appear to be those from the notes, but enlarged with better brightness and contrast.

⁸ Long has been a section foreman since 2004, the last 5 years in the 7 North mains at the Harvey mine. He holds a Mining Engineering Degree from West Virginia University. Tr. 247.

⁹ Stein had been with Consol a little over 5 years, the first year as an industrial engineer and since then as a safety inspector. His duties include traveling with and escorting federal and state inspectors. Tr. 310. He holds an Associate Degree in Specialized Technologies and Maintenance Electricity. Tr. 310-311.

¹⁰ Bob Clark no longer worked for Respondent at the time of hearing, and he did not testify at hearing. Tr. 284.

not drive through the area. Tr. 173-174. Eddy did not scale anything because he believed it was dangerous. Tr. 104. The crack widths were not measured. He testified there was no sloughage on the ground. Tr. 177. He dangled off the entries to 2A but not the main line, and miners could still travel to the bleeder. Tr.104. A close-up map at RX-7 looked like the area cited. Tr. 172. Eddy believed the photographs RX-9A and 9B did not depict the area described in the citation. Tr. 182. He was not aware of any photographs taken at the time the citation was issued. Tr.106.

Inspector Eddy did not believe the condition was from equipment hitting the rib, and did not recall anything being parked there. Tr. 181. He also disagreed with Clark's notes about the cited condition. Tr. 179-180. There was no roof control plan violation, and no improper examination citation was issued. Tr. 182-183.

The citation was designated S&S by Inspector Eddy because the rib could have failed at any time, and it was designated reasonably likely to cause an injury. Tr. 105. Eddy found lost workdays or restricted duty could reasonably be expected because lacerations, broken bones, and concussions could result from the condition. Tr. 105. He determined there was moderate negligence because the area should have been examined; he also found one person would be affected. Tr. 105-106.

Albert Stein and Bill Hockenberry ("Hockenberry")¹¹, testified for Respondent on Citation No. 7030777. Stein and Hockenberry were working on a lifeline in the area when the citation was issued. Tr. 313-314. Stein testified the citation was issued because equipment hit a few bolts, which were knocked out and ugly; he believed this drew attention to them. Tr. 315-316. He did not believe the bolts were a safety issue. Tr. 315. He further testified no one tried to scale the rib and no measurements were taken. Tr. 316. The ribs were supported and there were no cracks or anything hanging when the Inspector came through. Tr. 318-319. There was no sloughage or pieces of coal on the ground indicating the rib was giving out. Tr. 320. Stein believed the RX-9 photographs taken by Clark were of the area because there was a water line and a track at the bottom of the entry where it turns into 2A. Tr. 329. He was involved in terminating the condition on February 15, 2015, with another MSHA Inspector.

Hockenberry also saw no hazardous condition when Inspector Eddy issued Citation No. 7030777. Hockenberry observed the inspection area for five to ten minutes. Tr. 337-338. He identified RX-9 as photographs of this violation. Tr. 338. Hockenberry saw nothing loose in the rib and no sloughage. There were some dislodged bolts, which he testified could be common in older areas. Tr. 339. Hockenberry believed the rib was adequately supported, and saw no cracks in the rib. Tr. 340. He testified that miners were rarely in the area, and never in the area next to the rib. Tr. 340. Hockenberry saw nothing wrong with the rib, did not believe it was S&S, and he believed there was no negligence. Tr. 341-342.

¹¹ Hockenberry has worked for 6 years as a safety inspector, 2 years at Patriot Coal and 4 years at Consol Energy. Tr. 335-336. He has a Bachelor's Degree from Marshall University in Safety. Tr. 336.

Clark's notes, dated February 12, 2015, contain the following:¹²

- The 2A crew does not use that track to access the section. They come through at 7 North Mains
- I or the inspector never scaled down any of these alleged 3' x 36" hanging pieces; condition did not exist
- The roof control plan does not require replacement bolts on out by areas
- The area was smooth with no flakes or major cracks visible
- If there was loose material hanging we would have cautioned that area off or scaled the hanging material
- I put caution tape just along the 19 feet of rib. I did not caution entry off because the inspector had not mentioned caution the entry off
- There was no big pieces of coal laying along the ground where affected area was
- This area was on the tight side
- There was no mantrips parked in the switch

RX-8.

Inspector Eddy's notes for each of the inspections were essentially the same as the written citations. GX-8. On January 28, 2015, the hazard was described as the potential of falling rocks and other material. *Id.*, pp. 4-5. The observed cracks were 2 feet to 4 feet in length in different areas for a total distance of 22 feet. *Id.*, p. 6. On February 12, 2015, Eddy traveled to the Patterson Creek Portal. GX-13. He again wrote that a rib area was not adequately supported with visible cracks present, indicating a hazard. *Id.*, pp. 18-19.

Analysis

The safety standard requires, in pertinent part, that the ribs where persons work or travel must be supported or controlled to protect them from falls or bursts of coal or rock from the ribs. The existence of compromised but unsupported ribs gives rise to operator liability. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989).

There are three elements required in the evaluation of this safety standard. First, it must be determined if the cited area is one where persons work or travel; second, the area must be supported or otherwise controlled; and third, such support must be adequate to protect persons from falls or bursts of rib. *Oxbow Mining, LLC*, 35 FMSHRC 932, 944 (Apr. 2013)(ALJ).

Although Respondent contends both of the rib areas were where miners did not often work or travel, there is evidence that the areas would be traveled by mine examiners. Sturgeon testified there were no people near the area when Citation No. 7030768 was issued but that does not mean there would not be miners in the area at other times, as Inspector Eddy testified regarding activity there. Both Stein and Hockenberry were working in the 2A area at the time Citation No. 7030777 was issued. Therefore, persons would work or travel in the cited areas.

¹² Grammatical errors are in original.

There is evidence that both of the areas had been supported or controlled. As to the rib in the 7 North Mains, the photographs taken by Stein of the corner where the citation was issued as it existed on January 28, 2015, do show bolts and straps installed. RX-2, #1 and #2. As to the 2A area rib on February 12, 2015, Clark's photographs in RX-9 also show bolts and straps installed. Eddy did not recognize the rib areas in the photographs as those he cited and did not recall rib straps present in one of the cited areas. His testimony was essentially that he was not aware of any photographs being taken and did not believe they depicted the rib areas cited. Sturgeon testified his photographs were of the area as it existed on January 28, 2015, and Stein was able to identify details in Clark's photographs as being present in the other rib area. None of these photographs are of good quality, and they are not accepted as showing the support was adequate; however, the photographs do show that both areas had been bolted. There is also testimony that bolts had been knocked loose.

The question presented is whether the conclusions drawn by Inspector Eddy of inadequate support are correct, or whether the rib areas were solid and not unstable as contended by Respondent.

When assessing rib conditions pursuant to an alleged violation, it is important that the observations and descriptions of the Inspector are adequately supported by sufficiently detailed and specific information regarding the rib conditions existing at the time of the inspection. In the instant case, both citations alleged unsupported ribs with visible cracks and with loose material hanging.

Adverse rib conditions can be clearly described in sufficient detail to provide credible evidence that there was dangerously loose material on a rib. In addition to cracks, obvious indications can be rib material that is overhanging and apparently ready to fall, or material flaked off from the rib or falling out from the rib causing the sloughage to fall onto the mine floor. The expectation would be pieces of rock or coal found on the floor at or near the rib. Also observable are loose rib materials that are "pulled" away or "gapped" away from the underlying rib by one or more inches. Rib material thought to be loose may be able to be pulled off or scaled down by walking stick or pry bar, showing that it was *in fact* loose. See, *Warrior Coal*, 39 FMSHRC 509, 531-534 (Mar. 2017)(ALJ Andrews); See also, *Sec'y of Labor v. Peabody Midwest Mining, LLC*, LAKE 2016-0120, 0140, pp. 2-3 (Feb. 2018)(ALJ Moran).

Missing from the citations, notes, and testimony of Inspector Eddy was sufficient detail about the cracks. The only actual measurements taken were the lengths along the ribs cited. All other descriptions of the cracks recorded by Eddy were made visually, and he did estimate how long the cracks were and the height at each of the rib areas. However, the widths of the cracks were not estimated and the depth of the cracks was not made clear. Also, the number of such cracks in each rib area was not reported.

Inspector Eddy also did not write or testify about any estimate of any material actually observed to be pulling away or gapping from the underlying rib. This type of condition is observable and visually measureable. Also important is that according to Eddy nothing was done to test any part of either rib area by scaling to determine if material was actually loose. Eddy testified this would be too dangerous, but he did not explain *why* these rib areas were so

dangerous they could not be checked. Similarly, that there was hanging material was not adequately explained. Hanging rock or coal is readily observable, especially where the material has little or nothing underneath to keep it from becoming unattached from the rib and falling. Eddy dismissed the importance of sloughage from the ribs on the mine floor, Tr. 141-142, 180, but I do not because this would be clear evidence that coal and/or rock was loose and had fallen off.

Respondent's witnesses who were in the cited areas did not see the conditions the Inspector reported. Sturgeon saw Eddy test a small crack with his walking stick with no material being dislodged, but otherwise saw no loose material ajar from or threatening to fall off of the rib. Stein saw no cracks or anything hanging from the other rib, and Hockenberry observed the same rib area as Stein and saw nothing loose and no cracks. As to both areas it is uncontroverted there was no sloughage on the mine floor.

I understand, of course, that the observations of an experienced Inspector are entitled to significant weight. Since Sturgeon saw a crack, and Clark wrote there were no *major* cracks, it is clear there were cracks in each of the rib areas. But the argument that the ribs were unsupported with loose material hanging is not persuasive on the basis of some cracks alone, without an adequate description of just how such cracks caused rib material to be loose at either of the locations. In fact, on the record before me, little is known about the actual condition of the cited ribs. It is not established that either was unsupported or uncontrolled; it is more likely than not the areas had been bolted. There is no description, with even a minimal amount of detail, of the "loose material hanging" said to be in both ribs. The evidence is insufficient to establish the fact of either alleged violation by a preponderance of the evidence. These two citations should be vacated.

Citation No. 7033146

Inspector Eddy was back at the Harvey mine on February 23, 2015, and issued Citation No. 7033146. The Condition or Practice was entered as follows:

The No 5 Joy loading machine, located on the No 1 A Longwall, MMU 001-0 at the No 10 Block along the beltline is not being maintained in a safe operating condition. When examined, the self centering on-off switch was not functioning properly. This hazardous condition would not shut off the machine when the emergency shut off (panic bar) was activated. The Mine Operator immediately tagged and locked out this machine and removed it from service.

Standard 75.1725(a) was cited 17 times in two years at mine 3610045 (17 to the operator, 0 to a contractor).

Inspector Eddy designated the violation as S&S. He determined injury was reasonably likely and could reasonably result in lost workdays or restricted duty to 1 person. He rated the negligence as moderate. Eddy terminated the citation about an hour later when the machine was repaired. GX-16. The proposed penalty was \$540.

The safety standard provides:

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.

30 C.F.R. § 75.1725(a).

Contentions

Respondent does not dispute the pump motor self-leveling switch was broken and did not self-level, allowing the pump motor to come back on when the panic bar was released. Respondent argues that the panic bar disrupts power to the loader machine when it is depressed, causing both the pump motor and the conveyor/gathering arms to cease functioning because both the pump and the gathering arms switches will normally self-level. The conveyor/gathering arms switch was not broken and self-leveled independent of the broken pump motor switch. After power is interrupted by the panic bar, the conveyor/gathering arms switch will self-level and the conveyor/gathering arms will not start back up on their own. It was the case that when the panic bar was released, the pump motor did come back on. Respondent contends the loader was set up on blocks and used as a stationary feeder. Normally there would not be any miners near the gathering arms of the loader, and the citation should be unlikely to cause injury, non-S&S, and low negligence. RPHB, pp.1, 14-16; RRB, pp. 8-9.

The Secretary contends it was obvious the on-off pump switch was not self-centering and the panic bar would malfunction and not shut off the machine. When the panic bar was pushed the machine shut down, but when the panic bar was released the conveyor chain, gathering arms, and pump motor all started up again. Because of miners working in a confined area around the machine, a miner could be seriously injured when the panic bar failed to function as the emergency shut off switch. The violation should be affirmed as issued. SPHB, pp. 13-16.

Evidence

Inspector Eddy went to the No. 1A longwall, MMU 001-0 accompanied by Bob Clark. Tr. 107. At Block 10 there was a Joy 14BU load machine. Tr. 108; GX-16. He testified the load machine was not powered on, not moving or dumping, and was set up on blocks against motion. It was used more like a feeder. Tr. 111-113. When the load machine was operating, it would not tram. Tr. 114, 116.

Inspector Eddy explained the mining activity in the area. There was a longwall miner machine retreating back. Tr. 110. Behind the miner machine there was a shuttle car used to transport material from the miner back to the stationary load machine. Tr. 111-112. The shuttle car would drop at the load machine gathering arms. Tr. 195. Eddy drew a picture of the layout of the loader, shuttle car, and the miner machine. Tr. 197-198; RX-21. He described the area as a 16-foot wide entry with a 60-inch belt line, an extremely tight area for miners to work in. Tr.

112. In the confined area were an 8-inch pipeline, rockdust, hoses, and a fire suppression system. Tr. 113, 198. There were miners working in close proximity to the equipment, the miner operator, the shuttle car operator, the load machine operator, a utility man, and mechanics. Tr. 113, 119-120. The load machine was up on blocks, but a miner walking by could fall into the loader. Tr. 118-119.

Inspector Eddy testified a load machine is operated by a pump motor, which in turn would operate the gathering/digging arms and the conveyor chain. Tr. 108. The gathering arms dump the material onto the conveyor chain, and the 60-inch belt line. Tr. 108, 114. There were two switches, one that starts the pump motors, and beside it another switch that turns on the gathering/digging arms. Tr. 108-109. Referring to Exhibit RX-11, photograph #3 shows the two switches, the main pump motor switch is on the right. Tr. 187. To get the pump motor to run, the operator pulls the small bar on the switch from the bottom position all the way to the up position. Tr. 108-109, 116, 187. At that point, both electric and hydraulic functions are going to the entire machine. Tr. 187. On release of this switch, it comes down to the center position, but the pump motor remains on. Tr. 109-110. To then start the gathering/digging arms and conveyor chain you also have to flip the second switch right beside the pump motor switch. Tr. 109, 116. The gathering/digging arms and conveyor chain would not do anything until you have the pump motor. Tr. 116. The two switches function in the same manner, they are self-centering. Tr. 109-110.

For the inspection, Eddy asked the operator to start up the machine. Tr. 108, 115. The pump motor was started, and then the gathering/digging arms and conveyor were started. Tr. 115. Eddy then asked for the panic bar, which is designed to shut down the machine, to be pushed in. Tr. 115, 117. This did shut the machine and gathering arms down. Tr. 118, 185. Another way to shut the machine down is by pulling down an on-off switch near the tram levers. Tr. 117, 188, 193, 208.

Inspector Eddy testified that when the panic bar was released, the pump motor, gathering arms and conveyor chain started up again. Tr. 115-116, 208. He found the main pump motor switch had not self-centered, but the gathering arms and conveyor switch did properly self-center. Tr. 108-110, 115, 184-185. On cross-examination, he testified, with some prompting, that on release of the panic bar he saw the machine, and the gathering arms, start back up. Tr. 189-191. He was questioned regarding his responses at his deposition on June 20, 2017; about what happened on release of the panic bar. When asked at that time if the gathering arms did actually start moving, his answer was “yes, they will do that”. Questioned further:

Q. Did you see that happen here?

A. I actually showed them when I met with the guys, I showed them how dangerous of a situation it is. You know, I met with the load machine operator, I said listen, its your job to make – when you’re doing your pre-op exams, to make sure that the lever self-centers. Explained to him the importance and what could happen as result if you fail to make sure they’re functioning properly.

RX-22, p. 91.

Inspector Eddy designated the citation as S&S because he believed a miner could very easily fall into the machine, the machine could have hit a big rock, and the panic bar was not working. Eddy testified that this condition was reasonably likely to cause injuries of broken bones, lacerations, and concussions, which could result in lost workdays/restricted duty. Tr. 119. He assessed the negligence as moderate because a foreman was in the area frequently and could have easily observed that the pump motor lever was in the “up position” indicating it was not self-centered and therefore should have known of the condition. Tr. 120.

Inspector Eddy’s notes are somewhat contradictory and not helpful in understanding the violation. At page 9:

The No 5 Joy loading machine is not being maintained in a safe operating condition. When examined the self centering shut off switch was not functioning properly.

At page 11:

Lost workdays/restricted duty-broken bones, lacerations, bruises, contusions could result should a miner fall into the conveyor while in operation, and the machine not able to shut off with the use of the installed panic bar.

GX-17.

Jeremy Smith (“Smith” or “Electrical Engineer Smith”), testified for Respondent.¹³ He was not present when the citation was issued. Tr. 296. Referring to Exhibit RX-11, he testified the photographs depicted the operator’s compartment of the Joy load machine showing all of the controls. Tr. 265. Photograph #3 shows the two start switches, the closest to the tram levers¹⁴ would be the pump start switch, and the one to the left would activate the digging arms and conveyor chain. The two switches are identical, three-position switches. Tr. 266. In the photograph both are in the down, off position. Smith explained you raise the switch all the way up to start and it will self-center to the middle position, staying there during operation. This allows for hands-free operation; the operator does not have to hold it up to keep the machine running. Tr. 267. In photograph #4, to the right of the tram levers is the main breaker disconnect that will deenergize the machine at the incoming trailing cable.¹⁵ Tr. 267. The panic bar is to the

¹³ Smith had been the general maintenance supervisor at the Harvey mine running the entire maintenance department since February of 2015. Tr. 263. After graduating from Penn State with a degree in electrical engineering in 2004, he worked in the maintenance department at the Enlow Fork mine and then transferred to the Harvey mine. Tr. 263-264. He is a state and MSHA certified electrician. Tr. 264.

¹⁴ The tram levers are shown with a readable label in photographs #1 and #2, RX-11.

¹⁵ The main breaker is also shown with a barely readable label in photographs #6 and #7, RX-11.

right of the main breaker disconnect, in a red housing in the bottom right hand corner of the photograph. Tr. 268.

Smith further explained the panic bar is a safety device; it shuts down all operating functions of the machine. Tr. 268. It shuts down all power to the pump motor and conveyor motors or anything running. Tr. 269. The gathering arms and conveyor would stop. Tr. 269. Under normal operating the conveyor switch would be in the middle position Tr. 269. To power back up, the switching has to be restarted. Tr. 269-270. The two switches are wired separately, and have to be in the up, start position to reinitiate the start function. Tr. 270. When the panic bar is released, the gathering arms would not come on because that switch was not defective and was not stuck in the up position. Tr. 270.

Electrical Engineer Smith referred to Exhibit RX-10, the electrical schematic diagram for the 14BU loader. Tr. 271. He also marked up this diagram, Exhibit RX-24.¹⁶ Smith identified and marked motors, switches, and other components. Tr. 271-281. He testified the pump control switch is first, you are not able to start other functions, or activate conveyors, without the pump running. Tr. 271-272. If shut down through the panic bar, each function has to be restarted individually. Tr. 272. The 3-position switch with the lever all the way down is the off position, the middle position is the run position and the top position, all the way up, is the start position. The switches are spring loaded to return to the middle position. Tr. 274-275. When the panic bar is hit the machine will shut down, but if the pump switch is stuck all the way up in the start position the pump will start back up. But the conveyors will not. Tr. 278.

Smith testified that after the single switch was repaired, the machine functioned as it was supposed to function. Tr. 283-284. Smith was not aware of the pump switch needing to be repaired before the citation was issued. Tr. 294. Smith testified that the problem with the pump switch on this loader was a broken spring, which is a mechanical failure. Tr. 295. Only the pump switch was replaced. Tr. 283. This abated the citation. Tr. 268.

Analysis

The Condition or Practice described in the citation was misleading and even confusing as written. The on-off switch was not the broken switch. The on-off was a separate switch located near the tram levers, also described as a main breaker disconnect, that deenergizes the machine at the incoming trailing cable. Also misleading is the allegation that the machine would not shut off when the panic bar was “activated.” In Inspector Eddy’s notes, at page 11, he wrote the machine was not able to shut off with the use of the installed panic bar. But Eddy testified that when the panic bar was pushed in the machine did shut down, meaning the entire machine. The testimony of Smith was that it shuts down all power to the pump motor, conveyor motors, or anything running.

¹⁶ This electrical schematic is of no value to lay persons. However, witness Smith would have the knowledge to “read” and explain the functioning of the electrical components. The schematic was useful to assist in testimony explaining how the defective pump motor switch affected operation of the load machine.

It was not the panic bar or the on-off breaker disconnect switch that was broken. The only broken component of the load machine was the pump motor self-centering switch. The record does not support that any other part of this machine was broken or defective.

The controversy surrounds what happened after the panic bar was pushed and the machine shut down; specifically, what happened when the panic bar was *released*. To consider this, the function of the two identical pump and gathering arms switches must be understood. See, photograph #3, RX-11. They are 3-position switches. The full bottom position of the bar on the switch is the “off” position. The full up position of that bar is the “start” position. Upon pushing the bar up to start the function, when released the spring-loaded bar goes to the center position, but the particular function continues to operate. This allows hands-free operation of the machine. The pump motor must be started first; the gathering arms switch will do nothing until the pump motors are operating.

At the time of the inspection, the pump motor switch was broken. The bar, upon release from the start position, would not self-center but stayed in the start position due to a broken spring. The gathering arms switch did self-center. The Secretary argues that when the panic bar was released, both the pump motor and the gathering arms all started up again. Respondent’s position is that only the pump switch was stuck in the up, start position and the gathering arms and conveyor did not come on because that switch was not stuck in start. Electrical Engineer Smith was able to clearly explain how this was the case. Although the two switches were identical in how they work, they were wired separately and if the machine was shut down by the panic bar each switch having self-centered to the middle position would have to be restarted individually. Since the pump switch was stuck in start, when the panic bar was released the pump motor started, but the gathering arms and conveyor did not. I find the testimony of Smith to be clear, detailed and credible.

The testimony of Inspector Eddy was not clear and convincing. It was brought forward that at his deposition his answer to a direct question about whether he saw the gathering arms start moving was unresponsive and evasive. With prompting, at the hearing he did finally say that he saw the gathering arms start back up. However, I credit the explanations of Electrical Engineer Smith about how the machine and its switches function, particularly the response of the machine to both push *and* release of the panic bar. The testimony of Smith is more credible and of more probative value. I note that when the pump switch only was replaced, the machine functioned properly.

The pump switch was broken, and the safety standard does require the machine to be maintained in safe operating condition. The broken switch was one of a number of safety components on the load machine. Therefore, there was a violation of 75.1725(a).

The S&S determination was based on miners working in a tight, confined area near the loader and the possibility of a fall into the gathering arms and/or conveyor chain. The machine was up on blocks and could not tram. I have credited the testimony of Smith that the gathering arms and conveyor would not come back on when the panic bar was released. Considering that the panic bar would be activated in an emergency situation, if the gathering arms and conveyor chain remain off, injury to a miner working in the confined area would be unlikely. Since injury

was unlikely due to the broken switch, I find the violation was not S&S. However, should an injury occur, it would result in lost workdays or restricted duty, if not considerably worse.

The negligence was determined to be moderate. I agree that both the machine operator and the foreman should have known of the defective switch. Smith testified he was not aware the switch needed to be repaired. However, the failure of the duty of care here was that the machine was available for use with the broken switch. Therefore, I agree the negligence was moderate.

Penalty

I have found this violation was not S&S, and injury was unlikely but could be reasonably serious. The negligence of the operator was moderate. The violation was abated rapidly. It was stipulated the proposed penalties would not affect the Respondent's ability to remain in business. In the context of this large mine, the history of 17 violations over a two-year period does not support an enhanced penalty. On consideration of all of the facts and circumstances, and the six penalty criteria, I independently assess a penalty of \$150.

Citation No. 7030454

Inspector Joseph Pelehac ("Inspector Pelehac" or "Pelehac") issued this citation on July 20, 2015.¹⁷ The Condition or Practice was described as follows:

The Trailing cable supplying 480 volts AC to the energized No.2 Fletcher Angle Bolter, S/N 2011044 on the 3-A, MMU 080-0, advancing section was not being protected from strain in the cable reel. The strain clamp was there, however it was not attached to the reel.

Inspector Pelehac designated the violation as S&S. He determined that injury was reasonably likely and could be reasonably expected to result in lost workdays or restricted duty to 1 person. He rated the negligence as moderate. Pelehac terminated the citation the next day since the strain clamp had been securely attached to the reel. GX-3. The penalty proposed was \$540.

¹⁷ Inspector Pelehac has been a Coal Mine Inspector since 2007, and is qualified for underground electrical low, medium and high voltage feeds for equipment such as breaker boxes, miner machines and bolting machines. Tr. 21-23. He holds an Associate Degree in Mining Engineering Technology. Tr. 23. He started in mining in 1971, was a mechanic and mechanic electrician for most of his career, with a total of 46 years of experience both underground and on the surface. Tr. 23-24. He was familiar with the Harvey Mine, having been a lead inspector there for 6 to 8 quarters conducting both spot and quarterly inspections. Tr. 25, 27. He described the mine as large, with approximately 4 to 5 MMUs and two active portals. Tr. 25-26.

The safety standard cited provides:

Clamping of trailing cables to equipment.

Trailing cables shall be clamped to machines in a manner to protect the cables from damage and to prevent strain on the electrical connections. 30 C.F.R. § 75.605.

Contentions

Respondent contends this citation should be “unlikely and non-S&S” due to the lack of a confluence of several factors thus making the occurrence of a potential hazard unlikely. The packing gland would have to come loose at a time when 5% methane and inadequate ventilation were present, or the instantaneous breaker would have to fail. The bolter machine was equipped with an automatic tensioning cable reel that spools the cable and keeps several wraps of cable on the reel, which would secure the cable in place. The mine was authorized to use 900 feet of cable on the bolter, and the machine would never be more than 780-800 feet from the power center, leaving excess wraps on the reel to secure the cable. The cable is never completely paid out, the packing gland is never under tension, and there was no damage to the packing gland. Even if the tension clamp on the packing gland is not loose, it is not strong enough to keep the cable from being pulled out of the enclosure because of the horsepower of the slowly tramping bolter machine. RPHB, pp. 14, 16-17; RRB, pp. 9-10.

The Secretary contends the strain clamp on the trailing cable of the bolter was not properly attached to protect the cable from damage and prevent strain on the electrical connections. Even with extra feet of cable, the trailing cable could still be pulled out of the reel. The strain clamp was not attached to the reel to protect the packing gland and the power connections, or to protect the energized trailing cable from possible damage from the bolter’s movements. This should have been obvious on weekly examination upon taking all the cable off the reel and removing insulating material. There was no slack in the cable to protect the explosion-proof enclosure and over time the cable would be degraded. Methane can be released in the mine at any time, and the violation was likely to cause an explosion or electrocution. SPHB, pp. 17-20.

Evidence

Inspector Pelehac testified the Harvey mine was producing coal and was on a five day spot inspection for liberation of methane in excess of one million cubic feet in a 24-hour period. Tr. 25-26. On this inspection, he traveled with Bill Hockenberry from the safety department to the 3A MMU. Tr. 28. He took notes while performing his inspection. Tr. 29. Pelehac found the violation after the angle bolter was powered down by the operator. Tr. 38. The angle bolter had a trailing cable that supplied voltage to operate the machine from the power center to the bolting machine. Tr. 30-31. The cable reel, attached to the bolter, spooled the cable off and on as the machine tramped forward and in reverse. Tr. 31, 35. Pelehac testified that on the cable reel there should have been a strain clamp that protects a flame path into the explosion-proof enclosure. Tr.

32. The strain clamp protects a cable from moving where the leads are joined together preventing an electrocution or explosion hazard. Tr. 32.

Inspector Pelehac testified the strain clamp at issue became visible when the cable was unrolled from the reel and insulating material was removed. Tr. 33-34, 42. There was no slack on the cable because the strain clamp was loose; slack on the cable is necessary to protect the explosion-proof enclosure. Tr. 33. There was a shock hazard from the cable degrading over time from movement, from wiggling, not being protected from strain, and from “the leads being worked loose a little at a time.” This was reasonably likely to cause death or severe injury. Tr. 37-38. Also, if the packing gland were degraded, as it was pulled out, this would cause a possible explosion or electrocution. Tr. 38. The machine was examined the Thursday before the Monday the citation was issued, and it was unlikely a bolt would fall off in that time span, two shifts or 16 hours. Tr. 36, 39. The strain clamp was on the cable, but the bolt that attached it to the reel was not there and was not able to be found. Tr. 34. During the previous weekly examination, the strain clamp condition would have been obvious since the examiner is required to pull the cable off the reel and take the insulating jacket off. Tr. 36.

Inspector Pelehac testified that a rib bolter does vibrate when it installs rib bolts, but not as much as a shear or miner. Tr. 61. Pelehac testified that there were circumstances under which a bolt could “back off.” Tr. 43. However, he had never seen a bolt “back off” with lock washers on them on a Fletcher cable reel bolt. Tr. 44. In his experience he did not believe that on a Fletcher a tight lock washer would come loose. Tr. 44. He had never seen a situation where bolts dislodge. Tr. 47. He found no defects with the packing gland or deterioration of the flame path. Tr. 47-48.

Inspector Pelehac testified a strain clamp should not be able to slip or it could create a dangerous situation. Tr. 62. It is possible, but difficult to damage a cable with a strain clamp because there is a rubber insulator between the clamp flanges. Tr. 62-63. The safety standard requires a strain clamp to be on the machine for the protection of the packing gland, cable, and power connectors. Tr. 69. The strain clamp is on a reel that is made of metal and fiberglass. Tr. 64-65. Less than three wraps of cable around a reel could be dangerous. Tr. 70. The Harvey mine was a gassy mine and the angle bolter could have been exposed to methane at any time which contributed to the risk of the strain clamp condition. Tr. 70.

Inspector Pelehac did not detect any methane in the 3A section where the bolter was located, but he testified that the faces had a “couple tents.”¹⁸ Tr. 34. He further testified the angle bolter operated where methane is released. Tr. 34-35. Methane could be released in an explosive amount at any time. Tr. 35. There was one ignition in the mains at Harvey mine, adjacent to the 3A section, either prior to or after this inspection. Tr. 35.

¹⁸ Inspector Pelehac testified that there was .05% methane at the tailpiece. Tr. 40. The gas at the No. 1 face was .3%, the No.2 face was .4%, and the last crosscut was 0%. Tr.40-41. The explosive range of methane is 5-15%. Tr. 41. Inspector Pelehac testified that he had not come across 5% methane at the Harvey mine when he inspected it. Tr. 41.

Inspector Pelehac testified that for an explosion to occur, the packing gland would have to be compromised, the methane would have to be at an explosive level, and ventilation would have to be inadequate; none of these conditions were present at the time of the citation. Tr. 55-57. He also testified a “bleeder” could be hit at any time and the methane could increase. Tr. 56-57. Another factor that would have to coincide is that the operator would have to miss the tape (fluorescent tape markers at 20 and 30 feet towards the end of the cable), which Pelehac believed was present on the cable at issue. Tr. 57. Pelehac also stated the angle bolter comes with a sealed and locked instantaneous trip breaker, set at 500 amps. Tr. 60. It is tamper proof, and there was no indication that it was not working. *Id.* The instantaneous trip breaker would “kick” if the leads came off a bolt. Tr. 60-61.

Respondent submitted exhibit RX-17, which concerned Respondent’s petition for modification for 900 foot cables. Tr. 50. This MSHA document authorized 900 feet of trailing cable on face equipment with trailing cables supplied by 480 volts. *Id.* Also submitted was RX-14, a partial map of the 3A section. Tr. 66. Pelehac testified the blocks were probably 270 feet and two blocks to the face from the power center would be approximately 600 feet. Tr. 51-52; RX-14. He also testified that there is cable hung behind the load center or on the rib, because you could only fit so much on the cable reel. Tr. 58. He stated it can happen that cable could be pulled out on tramming up to the last spot from the shift or day before. Tr. 58-59. This could also happen if a mechanic cut 50 to 100 feet out to repair the cable, and the bolter operator was not informed. Tr. 58.

Inspector Pelehac’s notes for July 20, 2015, contain the notation that no violations were observed except for the instant citation. GX-4, p. 1. He checked the weekly electrical examination and attached a copy showing no dangerous condition on the No. 2 angle bolter on the 3A section. *Id.*, pp. 2, 9-10. He inspected the angle bolter and found the strain clamp was there, however it was not attached to the cable reel. *Id.*, p. 5. This condition would allow the cable to pull out of the packing gland and ignite methane as it was pulling out. *Id.*, p. 6. Persons could be exposed to burns from an ignition and an electrical shock as the cable was disconnecting from terminals in the reel from being pulled. *Id.*, pp. 6-7.

The weekly examinations on July 15, 2015 for the No. 2 angle bolter on the 3A section found only a “panic strip hanging” but no indication of an unattached strain clamp. GX-4; RX-18.

Jeremy Smith testified for Respondent regarding this citation also. He was the general maintenance supervisor for more than two and a half years at Consol. Tr. 263. Smith testified the machines needed 900 feet of cable to reach the face and complete the cycle. Tr. 287-288. He testified that a cable could be damaged, cut and spliced together, shortening the length of the cable. Tr. 301-302. The bolter operator may not be aware that the cable was shortened. Tr. 302. Smith testified that he works to maintain these cables at 900 feet. Tr. 308. Furthermore, he testified that he never saw the No.2 angle bolter completely “paid out” during the course of operations. Tr. 303.

Smith measured the 3A development section and found that at the furthest face there would always be excess cable on the angle bolters. Tr. 288-289. Further, he testified that there

are warning signals at the end of the cable when the reels get close to the end; approximately 50 feet from the end of the cable there is reflective tape around the cable. Tr. 290. At this point, tension on the cable would still be on the drum, the wraps on the cable reel would be the anchor, not the clamp. Tr. 290. Smith testified that the 900 feet of cable did not sit on the reel. Tr. 299. The modification in cable length to 900 feet was granted to Harvey mine because they needed the extra length for operation. Tr. 303. The cable was hung on insulated hooks up to the start of the cycle. Tr. 299. In cases of rerouting or obstructions, the excess cable length would shrink. Tr. 300.

Smith testified that the clamp was not going to stop the machine from ripping the cable in two or ripping it clean out of the machine. He testified that vibration can loosen bolts even when there is a lock washer on them, and the Fletcher Angle Bolter has vibration on it, "all the time." Tr. 291. The wraps of cable on the reel would be loaded all the way up the side walls, all the way filled up, if you are all the way back. Tr. 292. Smith testified that if a foreman gets down to a few wraps on any piece of face equipment he notifies his CM coordinator or he will call Smith directly. Tr. 308.

Bill Hockenberry testified for Respondent. When he and Inspector Pelehac walked up the section they saw the bolter being trammed. Tr. 343. The cable was then pulled off and a loose clamp was found; he recalled seeing bolts. Tr. 343, 345, 354-355. Referring to RX-27, he testified that the clamp is bolted right to the reel, but the restraining clamp of the angle bolter was not attached Tr. 346. Hockenberry did not recall if there was safety tape on the cable, but it was common practice to have it mark an area close to the end of the cable. Tr. 347.

Referring to RX-26, a section map, Hockenberry testified to the location of the angle bolter when the citation was issued. Tr. 343-344. This was around 720 feet to the farthest face, but less than 200 feet from the working faces. Tr. 344. Hockenberry testified that there were no permissibility violations that day. Tr. 356. Hockenberry further testified that he would consider a cable reel pulling out of the box as a permissibility violation. Tr. 356. He testified the condition he saw was the clamp being loose, the bolts needed tightened up. Tr. 357-358. Hockenberry acknowledged that a cable reel is not supposed to pull out of the permissibility box. Tr. 358-359.

Hockenberry recorded his notes the day the citation was issued:¹⁹

The #2 Fletcher Angle Bolter had a trailing cable that had a restraining clamp that was on the cable but however the clamp was not attached to the reel.

If the trailing cable would pull out of the reel it would knock the breaker.

The Bolter trams at a very slow rate of speed unlike a shuttle car.

Power was on the bolter at the time of inspection.

¹⁹ Hockenberry testified that it was company policy to take handwritten notes when a safety department employee traveled with a federal or state inspector. Tr. 352. All notes were typed up after being written by hand during the inspection. Tr. 353.

There was extra cable on the reel but however when the inspector checked the cable and once we pulled the remaining cable off the reel it was then detected that the clamp was not secured to the reel.

RX-25.

Analysis

Respondent contends the bolter machine would never be more than 780-800 feet from the power center, the cable would never be completely paid out, and the packing gland would never be under tension. However, Graduate Engineer Smith testified the machines needed 900 feet of cable to reach the face and complete the mining cycle. The modification for extra cable length was needed for operation. Smith also testified he never saw the No. 2 angle bolter completely paid out during operation, but in cases of rerouting the machine or obstructions the extra cable length would “shrink”. Respondent’s Hockenberry testified the bolter was around 720 feet from the farthest face at the time of the inspection. Inspector Pelehac estimated from the power center in entry No. 2 and counting two blocks to the face would be approximately 600 feet. Considering that there could be reasons for rerouting the machine during mining operations, and that a damaged cable might need to be repaired by cutting out the damaged section and splicing the cable back together, the allegation the trailing cable would *never* be paid out is unsupported.

Respondent also argues the packing gland is never under tension. However, when the strain clamp is not attached to the reel, the slack between the clamp and the packing gland protecting the permissibility enclosure would not be present. Inspector Pelehac testified that when the loose strain clamp became visible, there was no slack on the cable to protect the explosion-proof enclosure. He also pointed out that movement of the cable, “wiggling,” over time would degrade the cable and the leads would be worked loose “a little at a time.”

Hockenberry recalled the strain clamp was loose, and he saw “bolts”. But Inspector Pelehac’s testimony was clear and detailed; he found the strain clamp was not attached to the reel and the bolt that attached it to the reel was not there and could not be found. While the angle bolter did vibrate Pelehac testified he did not believe a cable reel bolt with a tight lock washer would come loose, and he had never seen this.

The safety standard requires a strain clamp to be on the machine for the protection of the packing gland, cable and power connections. Inspector Pelehac did not find any defects with the packing gland or deterioration of the flame path. There appears no dispute that an angle bolter machine, continuing to tram after the trailing cable had paid out would pull the cable clean out of the machine or rip the cable in two. While there was an instantaneous electrical breaker on the machine, this does not address the torn exposed leads of the energized high voltage cable pulled out of the explosion-proof enclosure and coming into contact with metal parts and the mine atmosphere. The notes he recorded at the time of the inspection explain that as the cable is pulled out of the packing gland and the terminals are disconnecting methane could be ignited, and electrical shock could occur.

Inspector Pelehac did testify that for an explosion to occur, the packing gland would have to be compromised, methane would have to be present at an explosive level, and the ventilation would have to be inadequate. At the time of the inspection, Pelehac found low levels of methane on the section. However, Harvey was a gassy mine, and he knew of one ignition that had occurred. Further, the methane level could increase at any time during mining. The packing gland would not remain intact if the machine trammed beyond the length of cable available. Ventilation, also, can change in the dynamic mining environment. Pelehac testified the violation was likely to cause electrocution or an explosion. The preponderance of the evidence found credible establishes a violation of safety standard § 75.605.

The violation was designated S&S, and step one of the analysis, the fact of the violation, is established.

The hazards were clearly identified by Inspector Pelehac and are supported by his credible testimony and contemporaneous notes. It is not difficult to understand that energized high voltage leads pulled off of their connecting bolts or terminals in the permissible enclosure and out of that box would create a flame path with the surrounding mine atmosphere and an electrical shock hazard upon contacting metal machine parts and/or any person near the trailing cable. In the presence of a dangerous mine atmosphere, including hazardous levels of methane, ignition could occur. Hence, there was a discrete safety hazard contributed to by the violation of an unattached strain clamp. The safety standard is directed against the prospective danger presented by an unsecured strain clamp.

Respondent argues there was no “confluence of factors,” and occurrence of a potential hazard was unlikely. At the time and place of the violation, ventilation was adequate and methane was not at explosive levels. However, in the context of continued normal mining operations, ventilation can be variable as mining proceeds and ventilation controls are adjusted to address the changing environment. Explosive levels of methane can be encountered in a gassy mine such as Harvey. The packing gland would not be intact if the angle bolter trammed too far, and could not protect persons from electrical shock due to exposed wires.

The violation of the unattached strain clamp does increase the likelihood of electrical shock or explosion. While the angle bolter is operating the unattached strain clamp causes the protective slack in the cable to be lost, increasing the tension on the packing gland and allowing movement of the cable, “wiggling,” at the point where the cable should be secure and immobile. Inspector Pelehac testified this could cause degradation of the cable and its connections over time. Further, without a secure strain clamp the cable would be more easily torn from the explosion-proof enclosure. Based on the facts and circumstances surrounding this violation there was a reasonable likelihood of the hazards of electrical shock and explosion.

Step three of the analysis is concerned with gravity. Should the hazards identified occur, injury would be reasonably likely to result. Inspector Pelehac determined that injury could reasonably be expected to result in lost workdays or restricted duty, but he also testified that electrocution could be fatal. He determined one person, the bolter operator, would be affected. Either electric shock or explosion would be reasonably likely to result in injury; thus step three is

established. Step four is also established since these types of injuries would be reasonably likely to be of a reasonably serious nature.

Redundant safety measures are not for consideration. Before the trailing cable is fully paid out, there is usually a reflective warning tape on the cable. Of course, inattention could cause this to be missed. Respondent's Smith testified that if the machine gets down to a few wraps of cable on a reel the foreman notifies a coordinator, or Smith directly. There was an instantaneous electrical breaker that would shut the machine down. But these are all examples of redundant safety measures and they are irrelevant to the S&S determination. I find the violation was S&S, and the gravity determinations are affirmed.

The operator has a duty of care to avoid violations of the safety regulations; under the Mine Act that standard of care is high. The question presented is whether an aggravated lack of care is suggested that is more than ordinary negligence. Ordinary negligence is considered inadvertent, thoughtless or inattentive conduct.

The failure of the requisite standard of care here began with the incomplete weekly examination of the No. 2 angle bolter in the 3A section on July 15, 2015. The testimony and documentary evidence on this record reveals that the strain clamp condition was not found. The requirement of this examination is to unroll any trailing cable on the reel and take off some insulation to expose the strain clamp, and then visually examine the clamp, cable and packing gland. The mine's examination had been 5 days before the MSHA inspection, and Inspector Pelehac testified that a clamp bolt and tight lock washer would not vibrate loose; he had never seen this happen. Yet the attaching bolt was gone and could not be found. If the weekly examiner had visually checked the strain relief parts, even if the bolt was only loose at that time, the condition would have been obvious. The operator's duty of care in this context was to insure the strain clamp securing the trailing cable energized at 480 volts AC was properly clamped to the machine to prevent strain on the electrical connections.

Inspector Pelehac determined the negligence to be moderate. Because the condition would become visible only upon unwrapping the cable from the reel and removing insulation, I do not find the negligence to be high. However, the negligence here is not merely inattentive because of the examination requirements. The contention that the negligence was low is rejected; more is expected to meet the operator's duty of care to miners. I find moderate negligence to be correct.

Penalty

Of the penalty criteria to be considered, gravity and negligence are most important for this violation. It was stipulated the proposed penalties would not affect Respondent's ability to continue in business. The Harvey mine was large, the violation history in the context of mine size is not a factor, and the proposed penalty was appropriate. Compliance by the operator was rapid. However, the violation was S&S, and any injury would be very serious. I have affirmed the negligence was moderate. Considering all six of the penalty criteria, I assess a penalty of \$540.

ORDER

Citations #7030768 and #7030777 are **vacated**.

Citation #7033146 is **modified** to non-S&S and injury unlikely, the penalty assessed is \$150.

Citation #7030454 is **affirmed** as written, the penalty assessed is \$540.

It is further **ORDERED** that Respondent will pay the total penalties of \$690 within 30 days of this order.²⁰ Upon receipt of payment, this case is **DISMISSED**.

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

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²⁰ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 13, 2018

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

v.

BRAND ENERGY &
INFRASTRUCTURE SERVICES,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2016-0302
A.C. No. 08-00051-415720

Mine: Pennsuco Cement Plant

DECISION

Appearances: Latasha T. Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner

Randy R. Dow, Esq., Boyd & Jenerette, Coconut Creek, Florida for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This case is before me upon a Petition for Assessment of a Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the Mine Act or the Act). At issue is a single 104(a) Citation No. 8907617 charging Respondent, Brand Energy & Infrastructure Services (Respondent or Brand), a scaffold erection contractor, with an alleged violation of 30 C.F.R. § 56.11027 after a scaffold collapsed while contractor K&G Industrial Services, Inc. (K&G) was performing refractory removal inside a calciner at mine operator Titan Florida, LLC's (Titan) Pennsuco Cement Plant.¹ Section 56.11027 provides as follows:

Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid

¹ Order No. 8907620, issued under section 104(b) of the Act, is no longer contested by Respondent. Tr. 13.

properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

30 C.F.R. § 56.11027. The Secretary alleges that the violation was significant and substantial (S&S), reasonably likely to cause a fatal injury to one miner, and the result of Respondent's moderate negligence. P. Ex. 1. The Secretary has proposed a civil penalty of \$971.

A hearing was held in Miami, Florida on March 28-29, 2017. During the hearing, the parties offered lay and expert witness testimony and expert reports, and other documentary evidence.² Witnesses were sequestered. On June 12, 2017, the parties submitted post-hearing briefs.

The Secretary presents two alternative arguments to support a violation. First, the scaffold collapsed because it was not substantially constructed. More specifically, the Secretary alleges that Brand's scaffold collapsed because (1) it was inappropriate for the scope of work performed inside the calciner, and (2) its design contained defects, which compromised structural integrity and caused collapse when it was allegedly loaded at less than its safety-rated capacity. Sec'y's Post-Hrg. Br. at 9-12. Alternatively, even if the scaffold was substantially constructed and collapsed because it was overloaded by K&G, the Secretary argues that Respondent had sufficient supervision and control over the scaffold to prevent the overloading. Sec'y's Post-Hrg. Br. at 11. The Secretary further argues that Respondent should have taken the scaffold out of service and prevented anyone from working on it, and Respondent's failure to do so violated section 56.11027. Sec'y's Resp. to Respt's Bench Memo. at 1-5. Apart from arguments regarding substantial construction and liability for overloading, the Secretary has made no allegations concerning any other requirements of section 56.11027.

The Respondent argues that the scaffold's design and as-built specifications satisfy MSHA's definition of "substantial construction" within the meaning of 30 C.F.R. § 56.2.³ In particular, Respondent challenges the testimony of the Secretary's expert that the scaffold had design defects and collapsed when loaded at an estimated 162-180 pounds per square foot (psf), i.e., less than 4 times its safety-rated capacity. Respt's Post-Hrg. Br. at 15. In addition, despite acknowledging strict liability principles, Respondent denies liability for the scaffold's overloading and eventual collapse, which allegedly occurred outside its supervision or control. Respt's Bench Memo. at 2-6 (citing *Secretary of Labor v. Nat'l Cement Co.*, 573 F.3d 788 (D.C. Cir. 2009)).

For the reasons set forth herein, I find that the Secretary failed to establish a violation of the cited standard. Specifically, the Secretary failed to establish that the scaffold was not

² In this decision, "Tr. #" refers to the hearing transcript. "Jt. Ex. 1" refers to the joint exhibit, "P. Ex. #" refers to the Petitioner's exhibits, and "R. Ex. #" refers to the Respondent's exhibits. Jt. Ex. 1, P. Exs. 1-7, and R. Exs. 1-38, were received into evidence at hearing.

³ MSHA's regulations define "substantial construction" as "construction of such strength, material, and workmanship that the object will withstand all *reasonable* shock, wear, and usage, to which it will be subjected." 30 C.F.R. § 56.2 (emphasis added).

substantially constructed for the refractory removal work contemplated, or that it contained design defects that compromised its structural integrity and caused collapse at an estimated load of 162-180 psf. Furthermore, I credit the testimony of Respondent's expert witnesses that the scaffold was substantially constructed. I find that Brand's scaffold was constructed of such strength, material, and workmanship that it would withstand all reasonable shock, wear, and usage, but it was unreasonably and substantially overloaded by K&G during refractory removal, and collapsed because of such overloading. I further conclude that Respondent did not have sufficient supervision or control over the scaffold's use during the refractory work to permit liability for the overloading under the Act. Accordingly, I vacate Citation No. 8906717.

II. FINDINGS OF FACT

A. Stipulations of Fact and Law

The parties have stipulated to the following:⁴

- (1) Titan Florida, LLC ("Titan") is the mine owner and operator for the Pennsuco Cement Plant, Mine Id. 0800051, which is located in Medley, Florida (the "Mine").
- (2) Brand is subject to the Federal Mine Safety and Health Act of 1977.
- (3) Brand has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.
- (4) Brand is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.
- (5) Brand was a mine contractor with Contractor ID No. D405.
- (6) Brand was contracted to conduct work at the Pennsuco Cement Plant operated by Titan.
- (7) Without the Respondent stipulating to the truth of the matters asserted therein, a true copy of the citations and orders at issue were served on the Respondent as required by law.
- (8) Brand is in the business of designing and erecting scaffolding in the United States and other countries.
- (9) At all materials times, Brand functioned as an independent contractor and was not an owner, lessee, or other person who operated, controlled or otherwise supervised a coal or

⁴ At hearing, stipulations a through l from Section 2 of Respondent's Pre-Hearing Statement, and stipulations a, d, e, and k from Section 3 of that document were adopted by the parties. Tr. 15-16; *see* Jt. Ex. 1. Those stipulations are enumerated as stipulations 1-12 and 13-16, respectively.

other mine as contemplated within the meaning of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq.

- (10) Titan decided to perform maintenance on its calciner by engaging a refractory contractor to perform this work. In order to perform this refractory work, Titan needed scaffolding in the calciner.
- (11) Titan entered into a separate contract with K&G Industrial Services, Inc. (“K&G”) to perform the refractory work inside of the calciner. Brand was not a party to the K&G contract. Titan and Brand entered into a written Purchase Order on May 9, 2016 (the “Calciner P.O.”) for the erection of a scaffold inside the calciner.
- (12) On May 21, 2016, the calciner scaffold located at the Mine collapsed. There were no injuries.
- (13) Prior to entering into a contract with Brand, Titan and Brand exchanged multiple emails and had discussions about the calciner design.
- (14) Titan decided to procure the higher capacity scaffold that is reflected in the as-built drawings, with a 25/25 lbs. per square foot rating (50 lbs. per square foot total) inside the calciner. Ryan January, P.E., was the principal scaffold designer with Brand.
- (15) The Calciner P.O. did not require Brand to perform any inspections, nor did it require Brand to perform any refractory work. However, Brand’s inspections were limited to an inspection once per shift per ANSI standards.
- (16) Following the collapse of the calciner scaffold, Titan did not allow Brand to participate in the recovery process. Titan hired a third party to develop a removal plan to clear the scaffold of debris. Titan’s counsel also warned Brand to not interfere with the process. On or about May 27, 2016, the Petitioner issued Citation No. 8907620 concerning Brand’s lack of effort in submitting a removal plan for the calciner and debris. However, this citation was terminated on June 2, 2016 since Titan hired another vendor to remove the scaffold and there was no reason for Brand to enter the calciner going forward.

Jt. Ex. 1.

B. Citation and Investigation

On May 25, 2016, Citation No. 8907617 was issued to Respondent Brand by MSHA inspector Jason Wakefield⁵ for a violation of 30 C.F.R. § 56.11027⁶ based on the following:

On May 21st the scaffolding that was being used inside the calciner to replace the refractory failed and collapse. [sic] Two (2) contract miners were working on the 7th floor of the scaffolding as it began to fail and were able to get to the 9th floor and escape the calciner before the scaffold collapse. *Photos taken prior to the collapse show material build up that was estimated to weigh well over what the scaffold was designed to hold.* Should the scaffold fail while miners are present it would likely result in fatal injuries.

P. Ex. 1 (emphasis added). Wakefield issued the citation to Respondent for overloading the working platforms and failing to ensure substantial construction of the scaffold. Tr. 58. As noted, Wakefield designated the violation as S&S and reasonably likely to result in fatal injury to one person as a result of Respondent's moderate negligence. P. Ex. 1. The proposed civil penalty is \$971.

Respondent was hired by Titan Florida to construct several scaffolds at the Pennsuco Cement Plant in early 2016. Tr. 354. The scaffold at issue was constructed inside of a calciner to provide access to its interior surfaces. Tr. 42, 358; *see* P. Ex. 5q. Titan hired K&G under a separate contract to remove and replace the refractory brick that lined the inside surface of the calciner, using Respondent's scaffold. Stip. 11; Tr. 42-43.

The calciner is a tall, metal cylinder that is approximately 115 feet tall. It has an inside diameter of 26 feet, which narrows at the waist. P. Ex. 4 at 4. There is a cone at the bottom where the vessel narrows to less than 12 feet across and opens into a smaller cylinder that provides ground-level access. R. Ex. 25 at 3. The outside of the calciner is surrounded by a metal frame with platforms at several elevations that are connected by stairs and an elevator. P. Ex. 5q. Hatches provide access from the outside platforms to the interior of the calciner. Tr. 66. The

⁵ Jason Wakefield has worked with MSHA for four years as an inspector. Tr. 37-38. Previously, he worked for nine years in an underground salt mine. *Id.* Prior to the instant accident, Wakefield had inspected scaffolding "a few dozen times." None of those inspections occurred inside a calciner or involved a scaffold collapse. Tr. 67-69.

⁶ As noted above, section 56.11027 provides:

Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

30 C.F.R. § 56.11027.

inside surfaces of the calciner are lined with refractory material consisting of heat-insulating brick coated with “monolith,” a concrete-like material. Tr. 277-78, 307; *see* Tr. 544.

Respondent finalized the scaffold specifications with Jose (“Joe”) Cardoso, a Titan supervisor, without the involvement of K&G. R. Exs. 1-24; Tr. 360. Brand and Titan initially discussed using a light-duty scaffold rated for a storage capacity of 15 psf and a live load of 12 workers. R. Exs. 1-13. Cardoso subsequently indicated that a 15 psf storage load was insufficient. Tr. 368. Brand then proposed, and Titan accepted, plans for a 50 psf, medium-duty scaffold rated for a 25 psf storage load and a 25 psf live load, and which further provided that debris material would not be stored on the working platforms, but would instead be passed out of the calciner through a “chain line” of men working together. R. Exs. 14-18; R. Ex. 15 at 2; Tr. 372.⁷ Respondent was aware that the scaffold would be used to remove and replace the refractory brick that lined the inside of the calciner. Tr. 370. The final Purchase Order (P.O.) between Titan and Respondent provided that Respondent would erect and dismantle a scaffold with 50-psf capacity. R. Exs. 25, 28.

Brand’s design plans utilized a Cuplok systems scaffold.⁸ The center of the calciner scaffold rested on metal beams running across the bottom of the calciner’s cone. Tr. 213; P. Ex. 4 at 5. Six central legs, plus another eight legs that rested on the inclined surface of the calciner cone, extended the entire 95-foot height of the scaffold and through the narrowed waist of the calciner. P. Ex. 4 at 4-5; R. Ex. 21 at 1. An additional 12 peripheral legs, closest to the walls of the calciner, also rested on inclined surfaces, but did not extend continuously through the waist

⁷ Scaffolds rated for 25 psf loads are considered “light duty,” and are appropriate for workers and minimal storage of materials. Scaffolds rated for 50 psf load are considered “medium duty” and are appropriate for workers and some storage of materials. Scaffolds rated for at least 75 psf are “heavy duty,” and are appropriate for workers plus considerable storage of material. R. Ex. 34 at 3; *see also* Tr. 204.

⁸ A systems scaffold is a set of reusable, modular, pre-fabricated components with fixed connection locations. Vertical posts are connected by horizontal “runner” and “bearer” beams and diagonal bracing. Bearer beams support the steel-plank flooring. *See* 29 C.F.R. § 1926.450(b) (OSHA regulatory definitions of scaffolds and scaffold components). Cuplok is Respondent’s proprietary brand of systems scaffold, and is primarily distinguished from other systems scaffolds by its unique connection devices. Tr. 435; R. Ex. 34 at 5, Fig. 1. One of Respondent’s expert witnesses, David Glabe, described the Cuplok connection devices in his expert witness report, as follows:

[T]he connection device on the leg consists of cups permanently welded to the leg at intervals of 0.5 meters. . . . Cup covers are installed on the leg above the cups; the covers are allowed to slide up and down the leg so horizontal and diagonal members can be easily installed and secured. The horizontal and diagonal members have blades that fit into the cup and are secured by closing the cover.

R. Ex. 34 at 4-5; *see also* R. Ex. 34 at 5, Fig. 1 (Cuplok Connection).

section. *Id.* Butt joints were installed around the periphery of the scaffold at seven different elevations to brace against horizontal movement. R. Ex. 25 at 2-3.

Brand installed flooring on the top nine levels of the scaffold to provide access to the top section of the calciner. The bottom three working platforms were inside and just below the waist. R. Ex. 25 at 2; Tr. 111, 176. Central stairs connected the nine floors. An access hatch in the wall of the calciner allowed passage from the scaffold's lowest working platform to the seventh floor of the outside structure.⁹ R. Ex. 25 at 2; Tr. 379, 406.

On May 19, 2016 at 7:26 p.m., Brand's project manager, Russel Carlson,¹⁰ sent a text message to Titan supervisor Cardoso, and asked Cardoso to warn K&G not to overload the scaffold by storing too much refractory debris on it:

“Pleas [sic] have a meeting with KG about not loading all decks full[.] I know in the past Safeway [sic] did only a 4’ deck around the perimeter and now we have full decks on every level so they might want to stock them all full[.]”

Tr. 371-72; R. Ex. 30. Cardoso responded that, “They [K&G] have already been told[.]” *Id.*

Brand completed construction of the scaffolding on the evening of May 19, 2016. Tr. 294. David Smith, Brand's project superintendent, was responsible for the night-shift examinations of the scaffold that were conducted between 6 and 7 p.m.¹¹ Ramiro Godines, another Brand superintendent, was responsible for the day-shift inspections of the scaffold that were conducted between 6 and 7 a.m. Tr. 295, 322.¹²

After scaffold construction was completed, Smith immediately conducted a walkthrough inspection of the nine working platforms with Cesar, Titan's night-shift supervisor, and an unidentified employee of K&G. Tr. 289-96. Smith testified that both Titan and K&G were satisfied with the scaffold, although neither had any relevant experience erecting scaffolds. Tr.

⁹ During testimony from Respondent's project manager, Russel Carlson, this access hatch was alternatively referred to as located on the sixth or seventh floor of the outside structure. *See, e.g.*, Tr. 406.

¹⁰ Carlson has worked for Brand as project manager for nine years. Tr. 352. Almost all of his work as project manager involved erecting or dismantling scaffolds. Tr. 353. For seven years before that, Carlson worked as general foreman, foreman, journeyman, carpenter, or laborer at Brand. Tr. 352.

¹¹ Smith has worked for Brand with industrial scaffolding for nine years. At the time of the hearing, he was a project superintendent. Tr. 286-87. Smith testified that he has constructed “probably hundreds” of scaffolds in confined spaces like a calciner. Tr. 308.

¹² At the time of the hearing, Godines had worked for Brand for two years as a superintendent. Godines has 24 years of experience erecting industrial scaffolds. Tr. 318.

290-93. Smith put up and signed an inspection tag, which indicated that the scaffold was safe for use. Tr. 294-95.

“[E]arly in the morning” on Friday, May 20, 2016, prior to Godine’s inspection, K&G employees started working on the calciner scaffold. Tr. 338-39. Godines described the condition of the scaffold Friday morning as “clean,” and signed the inspection tag. Tr. 339-40. Smith described the condition of the scaffold on Friday evening as having “a little bit of debris” that created a “housekeeping issue,” but signed the inspection tag. Tr. 293-94, 313.

On Saturday, May 21, 2016, Godines conducted an inspection between 6 and 7 a.m. Tr. 330. Godines red-tagged the scaffold due to “a lot of material” on the scaffold that created a “trip hazard.” Tr. 325-26.¹³ Godines described three piles of debris approximately four feet high on the “north, west, and south side[s]” of the first (lowest) working platform. Tr. 337-38. Godines credibly testified that fixed connection points on the vertical scaffold posts allowed for reasonably accurate estimates regarding the height of the debris. Tr. 331-32. Godines described conditions on the second floor working platform as “almost the same” as on the first floor working platform because there were three piles of debris about three and a half to four feet tall around the perimeter. Tr. 337-38.

After red-tagging the scaffold on the morning of May 21, 2016, Godines told the K&G workers present that they “have to do housekeeping,” but he was ignored. Tr. 327, 414. Godines looked for, but could not locate the K&G supervisor. Tr. 333. Godines proceeded to Titan’s control room, but could not locate Cardoso or reach him by phone. Tr. 327-29. Godines then called his manager, Russel Carlson, around 9 a.m. and informed Carlson that the scaffold did not pass inspection due to “housekeeping” issues and that Carlson was needed to resolve the situation. Tr. 413. Godines requested Carlson’s presence on site because he “wasn’t getting anywhere” with K&G. Tr. 414.

Carlson was located in West Palm Beach, Florida, about an hour-and-a-half drive to the Titan Pennsucco plant in Miami. Tr. 413-14. After receiving the call from Godines, Carlson left for the Titan plant and arrived on site between 11:00 and 11:30 a.m. Tr. 413.

When Carlson arrived, he noticed very similar conditions to those described by Godines on the first and second floor working platforms. In addition, Carlson observed that the entire first floor “was covered at least close to a foot high, I’d say. The stairs were covered. You couldn’t really see the scaffold deck itself at all anywhere.” Tr. 379-80. Carlson credibly testified that the remaining working floors had “considerable piles and messes” but were not comparable in scope to the first two floors. Tr. 416-17.

Carlson photographed the debris that he observed on the first working floor of the scaffold. Tr. 379; R. Ex. 29. Carlson told the K&G workers in the calciner that “they needed to get down there and clean that stuff up now.” Tr. 381, 416. They responded, “go to hell, gringo, go talk to my boss.” Tr. 381, 416.

¹³ A red-tagged scaffold indicates that the scaffold has failed inspection and is not safe for use. Tr. 412-13; Tr. 572-73.

Carlson was unable to locate Titan supervisor Cardoso, or any other Titan representative in the plant's administrative suite of offices. Tr. 387. After failing to reach Cardoso by phone, Carlson texted him at 12:30 p.m. and attached a picture of the pile of debris with the message: "Joe they have to do a cleanup in the calciner[.] Some areas the block is piled up 4' high....a ton of weight[.]" R. Ex. 29. Carlson then located Derrick Givens, K&G's regional manager, and told him that an immediate cleanup was required before any further work could be done. Tr. 383. Carlson testified that Given's response was "[w]ell, that's what the guys are in there for. We just finished up everything else so they're cleaning up." Tr. 383.

Despite Given's assurances that the K&G workers were cleaning up, Carlson observed that the workers were not proceeding to the levels where the debris piles were located. Tr. 384. I credit Carlson's un rebutted testimony that the K&G workers were not working on or near the levels where the debris was located, and therefore conclude that they were not engaged in housekeeping activities to clear the scaffold of overloaded debris on the first and second working platforms.

The scaffold collapsed several hours later at approximately 3:30 p.m. on May 21, 2016. Tr. 41. The bottom two working floors, just below the waist of the calciner, along with the attached stairs and all scaffolding below that point, collapsed into the bottom of the calciner. Tr. 444-46. The top section of the scaffold remained wedged in place, supported by the waist of the calciner. Tr. 51; *see* R. Ex. 37 at 3, 8.

Two days later, on Monday, May 23, 2016, in response to an anonymous hazard complaint, MSHA inspector Wakefield arrived on site to conduct an accident investigation. Tr. 70. Wakefield met with Titan's safety inspector, Dave Brader, and K&G's supervisor Derrick Givens, and then inspected the calciner and took photographs. Tr. 70, 88; P. Ex. 3 at 11-17. Wakefield testified about a narrative that was relayed to Brader from the two unidentified K&G workers who were present when the scaffold collapsed: "[T]hey stated to [Brader] that they started to hear banging at the bottom of the scaffolding and had ran up two levels to escape out a[n] inspection portal on the ninth level of the vessel of the preheater tower." Tr. 47. The K&G workers escaped without injury. The workers told Brader, who told Wakefield, that they had entered the calciner to "continue cleaning" after lunch. After approximately 15 minutes, they heard noises from the lower section of the scaffold and felt "side to side" movement before they escaped out a calciner access hatch. *Id.* Wakefield recorded the translated narrative from the two K&G workers to Brader as bullet points in his notes. P. Ex. 4 at 5.

On Tuesday, May 24, 2016, Wakefield met with Brand representatives and its engineer, Ryan January. Tr. 103.¹⁴ Wakefield then met separately with Titan and its engineer, John Pepper. *Id.* At that second meeting, Pepper had a bucket of debris material brought in from the accident. According to Wakefield, Pepper "did some weighing and calculating" and determined that there

¹⁴ Ryan January has worked for Brand for three years as a scaffolding engineer. Ryan estimates that his team designs 500-700 scaffolds each year. Tr. 423. Previously, Ryan worked six years as a design engineer for scaffolding at Brand. *Id.* January is a licensed engineer in 36 states. Tr. 424. He earned a Bachelor of Science in civil structural engineering from the University of Missouri. *Id.*

was an estimated load of 180 psf based on Brand's pre-collapse photograph. Tr. 105-106. On May 25, 2016, Wakefield issued the instant citation to Brand, and additional citations to Titan and K&G. Tr. 60; P. Ex. 1.¹⁵

Shortly after the collapse, Titan and K&G inspected all Brand-erected scaffolds at the cement plant. Tr. 209. In an adjacent vessel, they found that "one of the legs on the scaffolding was bending prior to having received any material loading other than the weight of the scaffold itself." Tr. 209-210.¹⁶ Titan ordered all remaining Brand scaffolds to be disassembled and removed from the cement plant. Tr. 410. Titan excluded Brand from participating in the abatement process. Stip. 16; Jt. Ex. 1.

C. Expert Witness Testimony

Terrence Taylor provided expert witness testimony and a report (P. Ex. 4) for the Secretary. Douglas Bishop provided expert witness testimony and a report (R. Ex. 33) for the Respondent. David Glabe also provided expert witness testimony and a report (R. Ex. 34) for the Respondent on the suitability of the scaffold for refractory work.

1. Summary of Terrence Taylor's Expert Report

Terrence Taylor testified as an expert witness for the Secretary. Taylor is a civil engineer in the Mine, Waste and Geotechnical Engineering division of MSHA's technical support group in Pittsburgh, Pennsylvania. Tr. 166-67. He earned a Bachelor of Science degree in Civil Engineering at Penn State University and a Masters from the University of Colorado, with a specialization in structural engineering. Tr. 167. He is a licensed Professional Engineer and has worked with MSHA as a civil engineer in the mining industry for 29 years. P. Ex. 4 at 4. Taylor has completed 720 projects for MSHA, including "numerous forensic investigations of structural failures and collapses." Tr. 168; P. Ex. 4 at 4. Apart from the instant investigation, Taylor has been involved in three scaffold-related projects. Tr. 169. None of them involved a scaffold collapse or a Cuplok scaffold. Tr. 226.

¹⁵ Citation No. 8907615 was issued to Titan. The Commission's records show that Citation No. 8907615 was contested and assigned to Docket No. SE 2016-0293. The Chief Judge assigned it to the undersigned on October 13, 2016. Order of Assignment, Docket No. SE 2016-0293 (Oct. 13, 2016) (ALJ). Titan later withdrew its contest and agreed to pay the full penalty proposed by the Secretary. Decision Approving Settlement & Order to Pay, Docket No. SE 2016-0293 (Oct. 31, 2016) (ALJ).

Citation No. 8907616 was issued to K&G. MSHA's records indicate that Citation No. 8907616 was not contested and was paid in full. Citations, Orders, and Safeguards for Contractor ID No. v589, MSHA Mine Data Retrieval System, *available at* <https://arlweb.msha.gov/drs/ASP/CntctrAction.asp> (last accessed Apr. 13, 2018).

¹⁶ The component that was bending was alternatively described as "one of the legs," a "swivel jack," a "screw jack," or a "scaffold post." Tr. 210, 212, 215, 223; Tr. 410.

Taylor’s expert witness report evaluates whether Brand’s scaffold was “substantially constructed” within the meaning of section 56.11027. Section 56.11027 requires, in relevant part, that “scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition.” 30 C.F.R. § 56.11027. As noted, MSHA’s regulations define “substantial construction” as “construction of such strength, material, and workmanship that the object will withstand all *reasonable* shock, wear, and usage, to which it will be subjected.” 30 C.F.R. § 56.2 (emphasis added).

Given the general nature of MSHA’s regulations and its definition of substantial construction, Taylor also evaluated the scaffold under the American National Standard for Construction and Demolition Operations Scaffolding Safety Requirements,¹⁷ and the Occupational Health and Safety Administration’s (OSHA’s) regulations governing scaffolds, published at 29 C.F.R. Subpart L-Scaffolds. P. Ex. 4 at 3. Although not formally enforced by MSHA, both the ANSI Scaffolding Safety Requirements and the OSHA scaffold regulations are generally-accepted industry standards that serve as “guidance when considering whether scaffolding is substantially designed and constructed.” *See* P. Ex. 4 at 3.

In particular, Taylor relied on ANSI Standard A10.8, section 9.1, and OSHA section 1926.451(a)(1). ANSI’s Standard A10.8, section 9.1, requires that “the erected scaffold assembly shall be designed to support without failure its own weight and at least four times the maximum intended load.” National Standard for Construction and Demolition Operations Scaffolding Safety Requirements, ANSI A10.8, § 9.1 (2011); R. Ex. 32 at 47. Carlson testified that Respondent’s standard policy was to comply with ANSI requirements by conducting daily shift inspections of its scaffolds. Tr. 377. OSHA’s section 1926.451(a)(1) contains more specific requirements for each component part: “[E]ach scaffold *and* scaffold component shall be capable of supporting, without failure, its own weight and at least 4 times the maximum intended load applied or transmitted to it.” 29 C.F.R. 1926.451(a)(1) (emphasis added).¹⁸ Thus, OSHA section 1926.451(a)(1) is more stringent than ANSI Standard A10.8, section 9.1. OSHA section 1926.451(a)(1) requires that each individual component of the scaffold satisfy the four-times safety factor, whereas ANSI Standard A10.8, section 9.1 only requires that the scaffold as a whole satisfy the four-times safety factor.

¹⁷ American National Standard for Construction and Demolition Operations Scaffolding Safety Requirements contain industry-consensus guidance developed by the American Society of Safety Engineers and accredited by the American National Standards Institute (ANSI), a private, not-for-profit organization that “oversees the creation, promulgation, and use of thousands of norms and guidelines that directly impact businesses in nearly every sector” ANSI, https://www.ansi.org/about_ansi/overview/overview?menuid=1 (last accessed Apr. 13, 2018).

¹⁸ Although section 1926.451(a)(1) provides exceptions to its requirements in certain instances, the parties have raised no arguments regarding such exceptions and I find that such exceptions are not applicable to the facts of this case. Moreover, the four-times safety factor represents a minimum safety rating: the enumerated exceptions to section 1926.451(a)(1) require safety factors greater than four. *See* 29 C.F.R. § 1926.451(a)(1)—(5); (g).

The purchase order (P.O.) executed between Titan and Respondent warranted compliance with applicable OSHA standards, rules, and regulations. R. Ex. 28 at 3. In short, in order to satisfy both ANSI and OSHA guidelines, Respondent's 50-psf scaffold and each component part should have been able to support at least 200 psf without failure.

Taylor's expert witness report contained three general conclusions that supported his expert opinion that Brand's scaffold was not substantially constructed. First, Taylor concluded that the medium-duty scaffold that Brand provided to Titan, was only rated for 50 psf, which was not sufficient for the scope of work involved. In particular, Taylor found that

[d]ue to the need to scale, perform demolition of the existing brick lining, and reline the Calciner [sic] vessel with replacement bricks, it should have been obvious to Brand that the scaffolding would need to hold considerable materials in addition to men and tools, as they did not have a convenient means to remove the accumulated materials as the work progressed. Brand should have provided a heavy duty tube scaffolding system.

P. Ex. 4 at 7 (internal citation omitted). Second, based on the estimated weight of debris on the scaffold at the time of its collapse, Taylor concluded that Brand's "failure to brace and tie against sway from the lateral, eccentric, and unsymmetrical loadings, and/or lack of substantial support at the bearing plates and butt locations caused a premature collapse of the scaffolding system." P. Ex. 4 at 8. Taylor based this conclusion on his opinion that the scaffold collapsed under a load that was estimated to weigh somewhere between 162 and 180 psf, although the scaffold should have been able to support a load of at least 200 psf, i.e., 4 times 50 psf. P. Ex. 4 at 4. Finally, Taylor determined that Brand should have taken the scaffold out of service after Godines red-tagged the scaffold during his morning inspection on May 21, 2016. P. Ex. 4 at 8. These three findings supported Taylor's "professional opinion that the scaffold in the Calciner [sic] vessel was not substantially designed and constructed by Brand and that Brand did not take the scaffold out of service when Brand discovered the scaffold was substantially overloaded." P. Ex. 4 at 8.

2. Summary of Douglas Bishop's Expert Report

Respondent tendered Douglas Bishop as an expert witness in structural failure analysis. Tr. 492. Bishop is a mechanical engineer employed by CED Technologies, Inc., located in Jacksonville, Florida. Tr. 489; R. Ex. 35. Bishop currently performs forensic failure investigations and specializes in forensic structural analysis and machinery design. Tr. 490. Bishop earned a Bachelor of Science in aerospace engineering from the University of Florida in 1990. He has extensive employment experience in the aerospace industry. Tr. 490; R. Ex. 35.

Bishop's expert witness report addressed whether Brand's scaffold was designed appropriately. P. Ex. 33 at 2. Bishop specifically investigated whether Respondent's 50 psf, medium-duty scaffold complied with OSHA section 1926.451(a)(1)'s four-times safety factor requirement. R. Ex. 33 at 19. Bishop calculated how much each individual scaffold component (e.g., a particular leg) could hold before buckling and failing, using data from tests conducted by an independent third party and provided to him by Respondent. Tr. 495. Bishop described a "critical buckling failure" as "a sudden instability in a vertical column caused by an excess load."

Tr. 510. Bishop referred to the results of his calculations as the “allowable load,” i.e. exactly how many pounds per square foot of weight would cause a particular leg of the scaffold to buckle and collapse. Tr. 504.

Next, Bishop examined the scaffold’s as-built specifications and drawings, which contained details such as the shape, assembly configuration, and duty rating of the calciner scaffold, to identify the components that were subject to the heaviest loads, i.e., “the critical loading areas.” Tr. 496-498; 500-03; *see, e.g.*, P. Ex. 33 at Appdx. B at 3 (results of tributary load calculations for leg AA). Bishop calculated the critical loading areas by identifying how the scaffold’s design allowed the transfer of weight between different components, which he referred to as calculating the tributary area for each scaffold leg. Tr. 497. The areas that Bishop identified as “critical” were the scaffold elements that “ha[d] more load on them.” Tr. 503. For example, Bishop identified two of the six longest vertical legs near the center of the scaffold, which were labeled AA and BB in his diagrams, as the legs which carried the most tributary weight and were subject to the heaviest actual loads. P. Ex. 33 at Appdx. B at 9 (Fig. 45: Upper Leg Calculation Nomenclature); *see, e.g.*, P. Ex. 33 at Appdx. B at 4 (Fig. 40: Brand Drawing #2015-381 Section A-A Column Live Loads and Storage Loads).

Relying again on the scaffold’s as-built specifications, Bishop then calculated how much tributary weight (in pounds per square foot) each critical loading area component, i.e. each leg of the scaffold, would support if the scaffold was uniformly loaded to a 50 psf capacity. His calculations adjusted for the effects of both the 25 psf live load rating and the 25 psf dead load rating. Tr. 500-01. Bishop concluded that legs AA and BB (the two center legs with the greatest combined tributary load) would be supporting an actual load of 2,000 psf if the scaffold were loaded at its maximum capacity of 50 psf. R. Ex. 33 at Appdx. B at 8.

Bishop next compared the results of the allowable load calculations. i.e., how many pounds per square foot would cause leg AA to buckle and fail, with the tributary load data, i.e., how many pounds per square foot leg AA would be supporting if the scaffold were loaded to the maximum 50 psf capacity, to determine the actual safety factor, i.e. how many times each component could support its own weight before it buckled and failed. Tr. 504. The lowest safety factor for any of the components that Bishop evaluated was 4.3, which exceeded the four-times safety factor minimum required under both ANSI Standard A10.8, section 9.1 and OSHA section 1926.251(a)(1). Tr. 509.

Based on his analysis, Bishop concluded that Respondent’s calciner scaffold satisfied both ANSI’s and OSHA’s four-times safety factor requirements, and MSHA’s more general requirement that the scaffolds be “substantially constructed.” Bishop found “no evidence to suggest that Brand design, equipment, or erection of the equipment caused the structure to fail.” R. Ex. 33 at 1.

3. Summary of David Henry Glabe's Expert Report

Respondent tendered and qualified David Glabe as an expert witness in scaffolds and scaffold usage. Tr. 543. Glabe is a civil engineer and owner of Glabe Consulting Services. Tr. 540. Glabe earned a Bachelor of Science degree in civil engineering from Valparaiso University in 1973. He is a licensed professional engineer in 11 states. R. Ex. 36 at 1; Tr. 542. Glabe has 44 years of experience working with scaffolds. Glabe is also a scaffolding instructor and has performed training for OSHA certified training centers in Ohio, Colorado, and California, and for the federal OSHA Training Institute in Illinois. Tr. 540. He also serves as the Scaffold & Access Industry Association's representative to the ANSI A10 committee, which is charged with revising the 2011 ANSI standards. R. Ex. 36 at 1; Tr. 572. Glabe has provided forensic assistance in approximately 100 scaffold-related projects and has testified in approximately 50 cases. Tr. 541.

Glabe's expert witness report examined whether Respondent's scaffold was appropriate and suitable for the refractory work that was planned inside the calciner. R. Ex. 34 at 2; Tr. 539. Glabe testified that there is no regulatory or industry requirement to design scaffolds for a particular minimum load based on the type of work being performed. Tr. 545; R. Ex. 34 at 3. Glabe concluded that the Cuplok scaffold system was an excellent choice for the work that was to be performed. R. Ex. 34 at 3, 6.

III. ANALYSIS, DISPOSITION, AND CONCLUSIONS OF LAW

The Secretary requests that I affirm Citation No. 8907617, as written, and assess the proposed penalty of \$971. Sec'y's Post-Hr'g Brief at 16. Respondent denies that the cited standard was violated because the the scaffold was not of substantial construction. Respondent also argues that is not liable for K&G's overloading of the scaffold because Respondent lacked sufficient supervision or control over such overloading. Respt's Post-Hrg. Br. at 2-3, 14, 19-20; Tr. 29-31. Respondent does not dispute the Secretary's gravity, S&S, and negligence designations. Tr. 62.

Significantly, six of the seven witnesses at the hearing testified that the scaffold collapsed due to overloading, including all three expert witnesses. Tr. 95 (Wakefield), Tr. 170 (Taylor), 312-13 (Smith), Tr. 418 (Carlson), Tr. 475 (January), Tr. 510 (Bishop), and Tr. 582 (Glabe).¹⁹ This testimony was corroborated by Respondent's Exhibit 29, which shows substantial, asymmetrical overloading on the first floor working platform of the scaffold, and by Carlson's testimony that the second floor working platform was similarly overloaded. Tr. 379; R. Ex. 29. Based on such substantial evidence, I find that the scaffold collapsed as a result of being overloaded by K&G refractory workers.

¹⁹ The sole exception was Godines. When asked on cross-examination whether he red-tagged the scaffold because it was overloaded, Godines responded that "he didn't want to say that" because he "didn't know." He stated that he red-tagged the scaffold because the large piles of debris on the working platforms created tripping hazards. Tr. 340.

The Secretary must prove his allegations by a preponderance of the evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). This requires the Secretary to show “that the existence of a fact is more probable than its nonexistence.” *Id.* (internal citations omitted). For the reasons set forth below, I find that the Secretary has failed to establish by a preponderance of the evidence that Respondent had supervision or control over K&G’s overloading or use of the scaffold or that the scaffold was not substantially constructed for K&G’s reasonable usage.

A. Supervision or Control

The parties stipulated that Respondent was an “independent contractor” subject to jurisdiction under the Mine Act. Respondent, however, disputes that it had sufficient supervision or control over the use or overloading of the scaffold after its construction to qualify it as a production-operator subject to strict liability for K&G’s overloading of the scaffold under Commission precedent. Resp’t Bench Memo. at 6; Resp’t’s Post-Hrg. Br. at 20; *see also* 30 U.S.C. § 802(d). The Secretary argues that Respondent’s ownership, construction, and maintenance of the scaffold and Respondent’s daily workplace inspections of the scaffold establish that Respondent maintained sufficient supervision and control over the scaffold and its use to subject Respondent to strict liability under the Act. Sec’y’s Resp. to Resp’t’s Bench Memo. at 4; Sec’y’s Post-Hrg. Br. at 14-15. For the reasons discussed below, I find that Respondent did not have sufficient supervision or control over the scaffold after its completion to subject it to liability for K&G’s overloading under the Act.

The parties stipulated that “[a]t all material times, [Respondent] functioned as an independent contractor and was not an owner, lessee, or other person who operated, controlled, or otherwise supervised a coal or other mine as contemplated within the meaning of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.” Jt. Ex. 1, ¶ 9. However, the Commission has recognized that independent contractors may also qualify as production-operators within the meaning of the Act when they exercise supervision over a mining process or control over certain areas within the mine. *Ames Constr., Inc.*, 33 FMSHRC 1607, 1611 n. 5 (July 2011) *aff’d sub nom. Ames Constr., Inc. v. FMSHRC*, 676 F.3d 1109 (D.C. Cir. 2012).

Both the Secretary and Respondent rely on the Commission’s decision in *Ames Construction*. In that case, the Administrative Law Judge found that Ames Construction, an independent contractor charged with constructing tailings dams at the Kennecott Tailing Facility, was liable for an accident that fatally injured William Kay, a miner employed by another independent contractor, Bob Orton Trucking, Inc. (Orton), during the process of unloading pipes from a truck. *Id.* at 1609.²⁰ Orton’s employee Kay had arrived at Kennecott to deliver a load of pipe used in the tailings dam construction. Kay stopped at the mine office, and was escorted to the delivery location by three Ames employees, Greg Davis, James Hilton, and Juan Florez. Davis told Kay to “stay right there” and went with Hilton to go get a forklift to unload the pipes. While waiting for the forklift, Kay removed the top layer of straps on the pipes, causing a pipe to roll off the truck and crush him. 32 FMSHRC 347, 348-50 (Mar. 2010) (ALJ). Although the

²⁰ Ames was cited under 30 C.F.R. § 56.9201, which requires that “equipment and supplies shall be . . . transported, and unloaded in a manner which does not create a hazard.”

Commission recognized that the judge erred in finding that the Kay was Ames' subcontractor, rather than an independent contractor with no contractual relationship to Ames, the Commission found that Ames had supervisory responsibility for unloading the pipes and upheld the judge's finding of a violation. *Ames Constr., Inc.*, 33 FMSHRC at 1610 (July 2011).

The Commission agreed with the judge's finding that Ames exercised supervision over the pipe-unloading process during which the accident occurred. The Commission emphasized that the parties had stipulated that

Orton drivers are instructed to follow the policies and procedures of the recipient [Ames] regarding safety and the unloading process. Orton drivers are instructed to follow the instructions of the supervisor of the unloading process.

Id. at 1612. In addition, mine operator Kennecott also imposed on Ames a Safety, Health, and Environmental Action Plan (SHEAP) that granted Ames' supervisors, foremen, and safety supervisors the authority to stop work "that would place employees, equipment, or property in immediate dangers, and to ensure that all unsafe conditions are corrected." Ames also controlled access to the tailings work site, and was required to meet the Orton truck drivers and their deliveries at the entrance to the mine property and escort them to the work site. 32 FMSHRC at 347, 349-50 (Mar. 2010) (ALJ). The Commission found that these facts supported the conclusion that Ames had supervisory authority over the unloading process. 33 FMSHRC at 1612-13. That supervisory authority rendered Ames subject to liability without fault under the Mine Act. *Id.* at 1614.²¹

²¹ In *Ames*, the Secretary argued two bases for Ames' liability as an independent contractor: Ames supervised the unloading process, and Ames had control over the pipe unloading area. *Ames*, 33 FMSHRC at 1610. The Commission based its legal holding on a factual determination that Ames exercised supervision over the particular process of unloading pipes that occurred at the mine. 33 FMSHRC at 1614. Although the Commission majority acknowledged "that a contractor may also be liable under the Mine Act for violations which occur within an area of the mine which the contractor controls," the Commission noted that it "need not reach that issue in this case, because Ames is liable on the basis of its supervision of the unloading process." *Id.* at 1611, n.5. The Secretary's theory of the instant case, as presented at hearing, failed to make clear whether the Secretary was pursuing liability on the basis of Brand's alleged supervision over a process (the refractory work), or Brand's alleged control over an area of the mine (the interior of Titan's calincer where the scaffold was constructed). I conclude, however, that Godines' and Carlson's failed attempts to stop K&G's refractory work on the scaffold support the reasonable inference that Respondent did not control the interior area of the calincer or supervise the process of removing and replacing the refractory brick. See discussion *infra* Section III.A.

The United States Court of Appeals for the District of Columbia Circuit affirmed. *Ames Constr., Inc. v. FMSHRC*, 676 F.3d 1109 (D.C. Cir. 2012). In doing so, the court stated:

We assume that Ames is correct in its argument that no-fault liability under § 110(a) would be unreasonably expansive if it made *all* independent contractors—including those who were “operators” solely by virtue of “performing services” at a mine—liable for *all* safety violations, even violations completely outside the scope of a given independent contractor's work. But the argument doesn't get Ames anywhere, given the Secretary's resting on the proposition, adopted by the Commission, that Ames is liable simply for “an unsafe condition that occurred in connection with an activity for which it had supervisory responsibility.”

676 F.3d at 1109 (internal citations omitted). The court found that four uncontested propositions easily supported the conclusion that Ames supervised the unloading process: (1) Kay was escorted to the delivery drop-off location by Ames' crew per agreement with MSHA; (2) Kay was left with an Ames employee (Florez) and told to “wait right here” while the other Ames crew members retrieved a forklift; (3) truck drivers like Kay typically loosen the straps on the truck but “the remainder of the process is left to the contractor who is in charge of the site”; and (4) Ames had the authority to stop work that created a danger to employees or property and to ensure unsafe conditions were corrected. *Id.* (quoting *Ames*, 32 FMSHRC at 349).

In this case, the Secretary argues that just as Ames was responsible for supervising the unloading process at issue in *Ames*, “[Respondent] was responsible for supervising the scaffold.” Specifically, the Secretary asserts that Respondent owned the scaffold, was responsible for daily shift inspections, and had stop-work authority over use of the scaffold. Sec'y's Resp. to Respt's Bench Memo at 4.

Although Brand's retention of ownership of the scaffold may be indicative of supervision or control, ownership alone is neither necessary nor sufficient to establish strict liability under the Mine Act. As the D.C. Circuit has found, “strict liability means liability without fault. It does not mean liability for things that occur outside one's control or supervision.” *Secretary of Labor v. Nat'l Cement Co.*, 573 F.3d at 795.

Brand's April 19, 2016 proposal only references the construction and dismantling of the scaffold, not its maintenance or use. The proposal defines the scope of work as follows:

[Respondent] will erect and dismantle systems scaffold at the above project.
[Respondent] will build systems scaffold inside the Calincer [sic], approximately 28' Diameter [sic] by 95' high with 15 working elevations and a stair for access.
[Respondent] will also build a systems scaffold approximately 6' by 6' by 30' high from the Kiln [sic] rider to access the lower part of the Calciner [sic] cone.

R. Ex. 21 at 1. Brand's proposal also stipulates that

Brand shall provide services as outlined in the attached proposal. In the performance of these services, Brand shall supervise the work of its own employees and agents, only. Brand shall not supervise, direct, or control the work of others or have a right to controls the means, methods, techniques, or sequences of engineering, design, or construction by others.

Id. at 4.

Carlson, Respondent's project manager, confirmed the scope of work outlined in Brand's project proposal: once construction is finished and the initial inspections are complete, Respondent "hand[s] it over [to] the client." Tr. 412. Smith, Respondent's project superintendent, confirmed that he conducted an inspection with representatives of both Titan and K&G immediately prior to the completion of the scaffold's construction and before surrendering possession to Titan.²² Tr. 290. Carlson testified that although Respondent continues to conduct inspections of the scaffold's components to ensure that "if anyone pulls anything out, we [] replace it," the client is renting the scaffold and "basically owns it." *Id.*²³ I find Carlson's testimony to be consistent with the plain language of the proposal:

[Titan] is responsible for all loss or damage to all materials and equipment in its possession or control. The materials and equipment shall be deemed to be in the possession of [Titan] for all purposes of this Agreement from the time it is received by [Titan] until the time that the materials or equipment has been returned to Brand's yard.

Id. Although Carlson generally admitted that Brand was responsible for replacing missing parts on the as-built scaffold, nothing in the record indicates that Respondent was responsible for any additional maintenance activities, such as housekeeping or debris removal. Thus, while Respondent retained ownership of the scaffold, the record indicates that Titan took possession of the scaffold after its construction and contracted with K&G so that K&G would use the scaffold in its refractory work. The plain language of Brand's proposal itself and the fact that Brand retained ownership of the scaffold do not support the Secretary's argument that Respondent also supervised or controlled the use of the scaffold during K&G's refractory removal.

²² The May 9, 2016 purchase order agreement executed by Respondent and Titan imposes a \$5,000 fee for Titan's "28 day equipment rental" of the scaffold. R. Ex. 28 at 1; *see also* Jt. Ex. 1.

²³ Wakefield testified that Titan's safety director David Brader told him that it was Brand's job to erect, *maintain*, and tear down the scaffold. Tr. 48 (emphasis added). As Wakefield admitted that it was a Titan agent that made the statement, rather than Brand personnel, I decline to credit Wakefield's testimony suggesting that Brand agreed to maintain the scaffold after it was erected and turned over to Titan, particularly in light of the contrary language in Brand's proposal.

The Secretary also argues that Respondent “had control over taking the scaffold out of service, and had control over halting any use of the scaffold by Titan, which would prevent K&G from working while on the scaffold.” Sec’y’s Post-Hrg. Br. at 15. The record does not support the Secretary’s arguments. Unlike the SHEAP at issue in *Ames*, the Secretary fails to point to any document or testimony establishing that Brand had stop-work authority over the use or overloading of the scaffold by K&G. In fact, the record shows the opposite. Although Brand had no stop-work authority, two of Respondent’s supervisory personnel nevertheless attempted, without success, to stop work on the red-tagged scaffold because of safety hazards evident during Godine’s inspection. Godines red-tagged the scaffold on the morning of the collapse after he noted “a lot of material” and “too much debris” on the first two working platforms and on the scaffold’s stairs. Tr. 326-28; 414. As noted, a red-tagged scaffold indicates that the scaffold has failed inspection and is not safe for use. Tr. 412-13; Tr. 572-73. Despite the fact that Godines red-tagged the scaffold during his inspection, K&G employees worked on the scaffold after it had been red-tagged. Carlson, Respondent’s project manager, told K&G’s employees to stop working on the scaffold until the debris was cleaned up. He was ignored. Tr. 381, 416. The K&G employees told Carlson, “Go to hell gringo, go talk to my boss.” *Id.*

Brand and K&G had no contractual relationship, and Brand was not a party to the contract entered into by Titan and K&G for the performance of refractory work inside the calincer. Jt. Ex. 1; Tr. 400. Although Carlson testified that past projects have been structured so that the contractors using the scaffold report to Brand, Titan chose to structure this situation differently and Titan never indicated to Brand that it had supervisory authority over K&G’s use of the scaffold. Tr. 400. Carlson testified that Titan never gave him any indication that he had the ability to oversee K&G’s employees or to “tell them what to do.” Tr. 378. Furthermore, Titan never conducted any pre-shutdown meetings with both Brand and K&G to discuss the use of the scaffold after its construction, or the relative scope of each contractor’s authority, despite Brand’s requests that Titan do so. Tr. 260-61.

In sum, on this record, I find that Respondent Brand did not have authority to stop K&G’s work on the scaffold, as demonstrated by Godines’ and Carlson’s failed attempts to actually do so. By contrast, in *Ames*, the Kennecott SHEAP granted Ames the explicit authority to supervise the unloading process and stop unsafe work. 32 FMSHRC at 347, 349-50 (Mar. 2010) (ALJ). No such stop-work authority existed here. The lack of stop-work authority over K&G strongly supports my finding that Respondent Brand did not have supervisory authority or control over the scaffold’s use or overloading by K&G during the refractory removal process.

The Secretary also argues that Respondent’s inspection responsibilities indicate that Respondent had supervision and control over the scaffold. I reject this argument because the violation resulted from K&G’s overloading of the scaffold, which was completely outside the scope of Brand’s work. *See, e.g., Secretary of Labor v. Nat’l Cement Co.*, 573 F.3d at 795 (strict liability does not mean liability for things that occur outside one’s control or supervision); *cf., Ames Constr., Inc. v. FMSHRC*, 676 F.3d at 1109 (assuming without deciding that no-fault liability would be unreasonably expansive if it made all independent contractors performing services at a mine liable for all safety violations, even those completely outside the scope of a given independent contractor’s work). Furthermore, while inspection responsibilities may support an inference that an operator or contractor exercises supervision over a process or control of an

area of the mine inspected, this argument would only support strict liability in my view if the violation resulted from the failure to inspect or an inadequate inspection.

In this case, the record indicates that K&G, not Brand, conducted the daily safety-related inspections required by MSHA. In this regard, Wakefield testified that Keith Diffenderfer, K&G supervisor, told him that the “workplace exams were being done by K&G, and [K&G] depend[ed] on [Brand] to do the technical inspection.” Tr. 50; *see also* P. Ex. 3 at 6. This testimony is consistent with the parties’ stipulation that “the Calciner P.O. did not require Respondent to perform any inspections [Respondent’s] inspections were limited to an inspection once per shift per ANSI standards.” Jt. Ex. 1. In addition, the engineering plans for the as-built 50 psf scaffold indicate that “[u]nless otherwise contracted for, [the] installation, initial inspection after the installation, and subsequent inspections and maintenance of the equipment is the responsibility of the customer.” R. Ex. 25. The Secretary has not alleged that Respondent failed to fulfill its contractual inspection responsibilities related to ANSI and OSHA requirements. In fact, Respondent did inspect the scaffold and red-tagged the scaffold before the accident. Respondent, however, had no supervisory responsibility or control over the scaffold’s misuse through K&G’s overloading, as illustrated by the terms of the proposal stating that “Brand shall not supervise, direct, or control the work of others or have a right to control the means, methods, techniques, or sequences of engineering, design, or construction by others,” and by the fact that Titan “possessed” the scaffold after the post-construction handover. R. Ex. 21 at 4. I find that Respondent’s actual and unsuccessful attempts to stop work on the scaffold after it was red-tagged by Respondent show that Respondent could not exercise supervision or control over the use or overloading of the scaffold by K&G, although Respondent made repeated requests to Titan and K&G to exercise their supervision or control.

I further note that in *Ames*, Ames argued that its employee Florez did not have the power or authority to stop Orton’s employee Kay from beginning to loosen the straps securing the pipes on the delivery truck. *Ames*, 33 FMSHRC at 1613. The Commission rejected that argument based on contrary evidence in the record, but did briefly note that “whether Kay would have refused to obey instructions from Ames’ agents is beside the point, because no attempt was made to prevent him from beginning the unloading process, or from encountering any other hazards.” *Id.* Here, by contrast, Respondent’s agents *did* attempt to prevent K&G’s employees from creating a hazard by asking Titan to instruct K&G not to overload the scaffold by storing too much refractory brick on it. R. Ex. 30. Titan responded that K&G had been instructed not to overload the scaffold. *Id.* In addition, after Brand red-tagged the scaffold on the morning of the accident and Brand foreman Godines and project manager Carlson each told the K&G workers to immediately clean up the overloaded piles of brick on the first and second level working platforms, they were rebuffed by K&G workers in no uncertain terms. Tr. 327, 381, 414, 416. When Carlson eventually contacted K&G’s regional manager Givens and told him that an immediate cleanup was required before any further work could be done, Givens replied that K&G had “just finished up everything else so they’re cleaning up.” Tr. 383. Despite Givens’ assurances that the K&G workers were cleaning up, I have credited Carlson’s testimony that the K&G workers were not proceeding to the levels where the debris piles were located and were not engaged in housekeeping activities to clear the overloaded debris on the working platforms. The scaffold collapsed several hours later. Tr. 41. The bottom two working platforms, which were overloaded by K&G, along with the attached stairs and all scaffolding below, collapsed into the

bottom of the calciner. Tr. 444-46. These distinguishable and significant facts undermine the Secretary's argument that Brand, like Ames, exercised supervision or control over use of the scaffolding after its construction.

Based on the foregoing discussion, I find that Respondent did not have sufficient supervision or control over the scaffold's use during K&G's refractory work to subject Respondent to liability under the Act. The record indicates that Respondent's agents repeatedly attempted to exercise supervision or control over K&G's use of the scaffold, but were unable to do so. I therefore find that Respondent is not liable for the overloading and collapse of the scaffold after it surrendered supervision and control over post-construction use of the scaffold to Titan and K&G.

B. Substantial Construction

Having determined that Respondent did not have sufficient supervision or control over the scaffold's use after its construction to render Respondent liable for the overloading, I now turn to whether Respondent's scaffold was substantially constructed. In relevant part, section 56.11027 states that "scaffolds and working platforms shall be of substantial construction." 30 C.F.R. § 56.11027. The Secretary's regulations define substantial construction as "construction of such strength, material, and workmanship that the object will withstand all *reasonable* shock, wear, and usage, to which it will be subjected." 30 C.F.R. § 56.2 (emphasis added).

The Secretary argues that the scaffold was not substantially constructed because (1) it was not appropriate for the type of work for which it was employed, and (2) the scaffold's design contained defects that compromised its structural integrity and caused it to collapse at an estimated load of 162-180 psf, less than the required safety factor capacity of 200 psf. P. Ex. 4 at 7, 9-10; Sec'y's Post-Hrg. Br. at 11. Respondent disputes both of these assertions. Respt's Post-Hrg. Br. at 14-19.

1. Appropriateness of Scaffold for Refractory Removal and Replacement

The Secretary argues that Respondent's medium-duty, 50-psf-capacity scaffold was not sufficient for the type of refractory work conducted inside the calincer. P. Ex. 4 at 7. In other words, the 50-psf scaffold was not sufficient to withstand the reasonable shock, wear, and usage associated with the refractory work conducted inside the calincer. The work inside the calincer involved removing the refractory brick that was lining the inside of the calciner and replacing it with new brick. Tr. 42-43; *see also* Jt. Ex. 1, Stip. 11.

Inspector Wakefield testified that for "the scaffolding that was being used and the type of work that was being done, it was too much for that particular scaffolding which ultimately resulted in its collapse." Tr. 97. The Secretary's expert Taylor was also concerned that a scaffold rated for only a 50-psf load would be insufficient to support the weight of the workers, tools, old

refractory debris, and new refractory brick that would be placed on the scaffold as the work progressed. Tr. 201-04. Taylor concluded that:

Work at the calciner involved the removal of build-up, refractory brick, and mortar material. Brand only provided a medium duty scaffold, rated to 50 psf. Due to the need to scale, perform demolition of the existing brick lining, and reline the Calciner [sic] vessel with replacement bricks, it should have been obvious to Brand that the scaffolding would need to hold considerable materials in addition to men and tools, as they did not have a convenient means to remove the accumulated materials as the work progressed. Brand should have provided a heavy duty tube scaffolding system. Heavy duty scaffolding has a larger diameter tubing and is therefore rated for heavier loading equal to 75 psf.

P. Ex. 4 at 7 (internal citation omitted).

By contrast, David Glabe, Respondent's expert witness on the appropriateness of the scaffold's design capacity, testified that a scaffold can be designed for any loading capacity so long as the workers using the scaffold understand its loading limitations: "any . . . craft can choose [its] own method for managing materials. . . . in this specific situation, the employees easily could have [used] a Light Duty [sic] scaffold, or even less, just by limiting the amount of load that is placed on the platform." R. Ex. 34 at 3; *see also* Tr. 545. Glabe rejected Taylor's assertion that Brand should have known that a higher capacity scaffold was needed and rebutted Taylor's argument that Brand should have known that significant amounts of debris would be stored on the working platform. Glabe emphasized that Respondent and Titan had communicated regarding debris removal several times prior to the execution of the purchase order. R. Ex. 34; Tr. 562.; *see also* R. Ex. 15 at 2; Tr. 298 (superintendent Smith's testimony regarding communications with Titan about debris removal), 363-65 (project manager Carlson's testimony regarding communications with Titan about debris removal). Taylor admitted on cross examination that he had not reviewed the communications between Respondent and Titan regarding how materials would be removed from the calciner. Tr. 263. Accordingly, Taylor did not account for the chain method of debris removal that had been agreed upon. In addition, Respondent's employees, on at least two occasions, explicitly requested that Titan caution K&G against allowing debris to accumulate on the scaffold. P. Ex. 7 at 1; R. Exs. 9, 11, 13, 17, 19, 29, and 30. Glabe concluded that "the Brand Cuplok system scaffold was an excellent choice for this project." R Ex. 34 at 6. I credit Glabe's significant experience in the scaffolding industry, and concur that the Brand Cuplok system, medium-duty, 50-psf-capacity scaffold was appropriate to withstand reasonable shock, wear and usage during the refractory work that Titan and Brand contemplated K&G would perform inside the calciner.

2. Whether Design Defects Caused the Scaffold to Collapse Under a Load Weighing an Estimated 162-180 psf

As noted above, both ANSI Section 9.1 and OSHA section 1926.451(a)(1) require a minimum safety rating of four, meaning that Brand's 50-psf-rated scaffold should have been able to support a minimum load of 200 psf. ANSI A10.8, § 9.1; R Ex. 32 at 47; 29 C.F.R. 1926.451(a)(1). The Secretary argues that the scaffold collapsed under an actual of

load of 162-180 psf due to “design and construction deficiencies.” Sec’y’s Post-Hrg. Br. at 11. The Secretary further argues that these alleged facts support a reasonable inference that the scaffold was not constructed to be of “such strength, material, and workmanship [as to] withstand all reasonable shock, wear, and usage, to which it will be subjected.” *Id.*; Tr. 204. I first address the Secretary’s argument that the scaffold collapsed at an estimated load of 162-180 psf, and then the Secretary’s arguments regarding design and construction defects.

a. *Estimated Load at the Time of Collapse*

The Secretary’s expert witness Taylor opined that the scaffold “failed when subjected to loads in the range of 162 to 180 pounds per square foot.” Taylor concluded that “[t]he scaffolding was designed for 50 psf and therefore should have been able to support up to 200 psf. However, the scaffolding failed when subjected to a smaller load of 162-180 psf.” P. Ex. 4 at 7-9; *see also* Tr. 204.

Respondent argues that Taylor’s “assumption that the scaffold failed at 162-180 psf was based on unreliable information and verifiably incorrect data.” Respt’s Post-Hrg. Br. at 15. Respondent points out that Taylor’s 162-psf figure was based on double-hearsay statements from investigatory witnesses recorded in Wakefield’s notes. *Id.* at 15. Respondent also emphasizes that the 180-psf figure was based on Taylor’s assumption that the debris was uniformly distributed, while the photographic and testimonial evidence establishes that the debris was not evenly distributed over the working platforms. Respt’s Post-Hrg. Br. at 10, 15; *see also* Tr. 239-41; P. Ex. 3 at 6.

I agree with Respondent’s arguments regarding the unreliability of Taylor’s estimate. Taylor drew the upper limit of his estimated actual load range (180 psf) from inspector Wakefield’s notes memorializing his post-accident investigation. P. Ex. 4 at 4; *see also* P. Ex. 3 at 7-8. Wakefield identified the source of this information as Titan’s engineer Pepper and Respondent’s engineer January. Tr. 236, 226. According to Wakefield, when Wakefield met with Titan and Pepper, Pepper used a five-gallon mop bucket of debris from inside the calciner and a photo of debris on one level of the scaffold pre-collapse to do “some weighing and sampling” based on the “the density and the type of brick and some information off the internet” to estimate that the load on the scaffold at the time of its collapse was 180 psf. Tr. 104-108. The Secretary never called Pepper as a witness, and Taylor never tested Pepper’s methodology to ascertain its reliability. I find on this record that Taylor’s expert testimony based on Pepper’s purported single-bucket analysis was grounded on insufficient facts and data and did not apply generally accepted scientific principles or methods to arrive at a reliable estimate of the load at the time of collapse. Rather, Taylor unjustifiably extrapolated from Pepper’s untested and dubious methods, guesswork, and speculation to reach an unfounded conclusion. *Cf., General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that a trial court “may conclude that there is simply too great an analytical gap between the data and the opinion proffered”) (internal citations omitted).

In addition, January, the original declarant, refuted Wakefield’s hearsay testimony. January testified that he “never once gave an exact number of what the scaffold failed at, at what pounds per square foot.” Tr. 425-26. January also testified that his lack of access to the accident site prevented him from being able to make such an estimate. *Id.* I credit January’s direct rebuttal

over Wakefield's testimony and find that Taylor's 180-psf calculation, based on Wakefield's notes, to be unreliable. In addition, the record evidence overwhelmingly establishes that the refractory brick and debris was not uniformly distributed over the scaffold's working platforms. P. Ex. 3 at 6. Because Taylor based his 162-psf calculation on an erroneous assumption that the load was evenly distributed, I decline to credit the 162-psf figure as well. Taylor did not adequately account for the alternative explanation (supported by the expert testimony of January, Glabe, and Bishop) that the scaffold collapsed because the asymmetrical overloading caused one of the lower legs to buckle and fail. Tr. 446-47, 498, 510, 568; *see also* P. Ex. 3 at 6; R. Ex. 29. I decline to credit Taylor's opinion, based on double hearsay and unreliable methodology, that Brand's scaffold collapsed at an estimated load of 162-180 psf, and was therefore not substantially constructed.

b. Design and Construction Deficiencies

The Secretary argues that Brand's scaffold was not substantially constructed because design and construction defects caused the scaffold to collapse at an estimated load of 162-180 psf, less than the required 4.0 safety rating of 200 psf. Sec'y's Post-Hrg. Br. at 11. In support of that argument, the Secretary offered Taylor's opinion countering Bishop's calculation that 4.3 was the lowest safety factor of any scaffold component. As noted, Bishop's investigation did not uncover any deficiencies in the scaffold's design, and Bishop concluded that the scaffold was substantially constructed because it was rated to carry the 200-psf minimum required by ANSI section 9.1 and OSHA section 1926.451(a). R. Ex. 33 at 19; Tr. 509-10. Taylor reviewed Bishop's report and concluded the following:

[Bishop's] report found adequate factors of safety in excess of four on each of the individual scaffold components . . . for a 50 psf loading, but failed to evaluate the overall effect of the lateral, eccentric, and unsymmetrical loading unique to the configuration of the Calcliner [sic] vessel. Therefore, failure to brace and tie against sway from the lateral, eccentric, and unsymmetrical loadings, and/or lack of substantial support at the bearing plates and butt locations caused a premature collapse of the scaffolding system.

P. Ex. 4 at 7-8. Taylor's expert report and testimony generally concluded, in laymen's terms, that Brand's scaffold was insufficiently braced and insufficiently anchored to the inside of the calincer to support its minimum load capacity of 200 psf. P. Ex. 4 at 5-6. Taylor generally argued that Bishop's investigation failed to recognize deficient bracing and anchoring and therefore failed to account for how such deficiencies affected the transmission of loads through the structure. Tr. 108, 198, 200.

Taylor admitted on cross examination that his opinion regarding additional bracing relied on comparisons between Cuplok systems scaffolding and a competing brand of systems scaffolding called Safway. Taylor also admitted that he was unfamiliar with Brand's Cuplok scaffolding prior to these proceedings. Tr. 226, 272-274. Respondent argues that Taylor's opinions failed to consider the unique qualities of the Cuplok system. Respt's Post-Hrg. Br. at 16-17. Glabe and January, who are both familiar with Safway, each agreed that the three-dimensional, geometric design of the Cuplock scaffold and the rigidity of the Cuplok

connections added stability to the as-built scaffold, and that Cuplock scaffolds required less bracing than the Safway systems scaffolding relied on by Taylor. Tr. 437 (January), 548-49, 554-55, 570 (Glabe). I find Respondent's arguments persuasive and credit Glabe's and January's opinions that additional bracing was not required for Brand's Cuplok systems scaffolding.

Taylor also expressed concern about the locations where Brand's scaffold was anchored to the inside of the calciner. Taylor was concerned that the design contained too few anchor points to support the intended load, and that the integrity of the butts, plates, and ties used to anchor the scaffold were compromised by the irregular surface of the existing refractory liner. P. Ex. 4 at 6; Tr. 108, 175, 177-79, 185-89. Bishop testified that his calculations specifically accounted for how the scaffold structure transmitted loads to the anchoring butts, plates, and ties. Tr. 518. Bishop also accounted for the effect of the uneven surface underneath the anchoring points. Tr. 517. In addition, Glabe testified that system scaffolds are "pretty stable structure[s]" designed to "shift loads around." Tr. 571. Both January and Glabe agreed that the anchor points supporting the upper portion of the scaffold above the calciner waist were adequate, as evidenced by the fact that the upper portion of the scaffold survived the collapse. Tr. 439-41, 446-47, 568, 571.²⁴ Having examined all the record evidence, I credit January's, Bishop's, and Glabe's concurring opinions that the scaffold was securely anchored inside the calciner and was capable of supporting the minimum required load of 200 psf.

3. Conclusion Regarding Substantial Construction

Having reviewed the record evidence and considered the expert witness testimony and reports, I find that the Secretary has not established, by a preponderance of the evidence, that the scaffold collapsed at an estimated load of 162-180 psf. I likewise find unpersuasive the Secretary's argument that design and construction defects compromised the scaffold's structural integrity. I therefore conclude that the Secretary has failed to show that the scaffold was not substantially constructed as required under section 56.11027.

²⁴ As noted, January, Glabe, and Bishop agreed that the failure occurred when the overloading caused one of the lower legs to buckle and fail. Tr. 446-47, 498, 510, 568.

V. CONCLUSION

In summary, I have found that Respondent Brand did not have sufficient supervision or control over the scaffold's use during the refractory removal and replacement process to permit liability for K&G's overloading of the scaffold under the Act. I conclude that the Secretary has not met his burden of proof to establish that the scaffold was not substantially constructed. Having so determined, I need not address the alleged violation's gravity, negligence, or proposed civil penalties.

VI. ORDER

For the reasons set forth above, Citation No. 8907617 is **VACATED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 17, 2018

SECRETARY OF LABOR, MSHA on
behalf of LOUIS SILVA JR.,
Complainant

v.

AGGREGATE INDUSTRIES WRC, INC.,
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEST 2017-0482-DM
RM-MD-17-05

Morrison Plant
Mine ID: 05-00864

DECISION

Appearances: Karen W. Bobela, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, CO for Complainant;
Matthew M. Linton, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, Denver, Colorado for Respondent.

Before: Judge Manning

This case is before me upon a complaint of discrimination brought by the Secretary of Labor on behalf of Louis Silva Jr. under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (the “Mine Act”) and on a complaint seeking the assessment of a civil penalty filed by the Secretary against Aggregate Industries WRC, Inc. (“Aggregate”) pursuant to sections 105 and 110 of the Mine Act. 30 U.S.C. §§ 815 and 820. A hearing in the case was held in Denver, Colorado. The parties presented testimony and documentary evidence and filed post-hearing briefs.¹

I. STATEMENT OF THE CASE

On February 6, 2017, Silva filed a complaint of discrimination under section 105(c) of the Mine Act. The Department of Labor’s Mine Safety and Health Administration (“MSHA”) conducted an investigation and, following that investigation, the Secretary filed a complaint before the Commission on Silva’s behalf. This case was assigned to me on July 7, 2017, after Aggregate filed an answer to the complaint.

¹ Citations to “CX” indicate exhibits introduced by Complainant, while citations to “RX” indicate citations introduced by Respondent.

On February 28, 2017 the Secretary filed an application for temporary reinstatement on Silva's behalf pursuant to section 105(c)(2) of the Mine Act. On March 20, 2017, I granted the parties' joint motion to approve the settlement in that case and ordered Aggregate to provide temporary economic reinstatement in Docket No. WEST 2017-265-DM. As of this date, my order of temporary reinstatement is still in effect.

Silva alleges that Aggregate discriminated against him on January 19, 2017 when he was terminated from his employment at the Morrison Plant "for exercising his statutory rights under the Act." Complaint of Discrimination at 1. While the complaint is short on specifics, Silva essentially argues that he was retaliated against for making safety complaints regarding traffic at the mine and ultimately for reporting an injury stemming from a collision between the pickup truck he was driving and a front-end loader. Aggregate asserts that the termination was "made for legitimate, nondiscriminatory reasons, and not because of any alleged protected activity." Answer to Complaint of Discrimination at 2. Moreover, it denies that Silva engaged in protected activity and asserts that, even if he did, there is no causal nexus between that activity and his termination. *Id.* For the reasons below, I find that Aggregate did not discriminate against Silva when it terminated his employment. Although I have not included a detailed summary of all evidence or each argument raised, I have fully considered all the evidence and arguments.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Statement of Facts

Aggregate operates the Morrison Plant (the "mine"), a surface crushed and broken granite mine in Jefferson County, Colorado. Loaders, haul trucks, other mine equipment, as well as customer trucks, travel throughout the mine. Tr. 35. In recent years the mine has significantly increased production, which in turn has resulted in an increase in traffic. Tr. 35, 202, 332.

Aggregate's "Vehicle and Traffic Safety Standards" state that the mine's traffic rules shall be documented in a traffic control plan. Tr. 226; CX-5. While the mine does not have a specific traffic control plan, it does have a traffic control book that inventories the size of the equipment on site, the traffic patterns, and whether traffic controls are in place. Tr. 226. In addition, the mine maintains a site specific map that provides, among other things, the direction of travel.² Tr. 226; CX-22.

According to Al Quist,³ the mine's safety coordinator, the map, along with the training the operator provides, complies with Aggregate's internal Vehicle and Traffic Safety Standards.

² The subject area of the mine is accessed via the pond road, which is a one-way road that loops around the area outside the stockpiles. Tr. 87, 254-255; CX-2

³ Quist has been in the mining industry for close to 48 years and been the safety coordinator at Aggregate since 1982. Tr. 222, 511. He is responsible for coordinating safety at three different Aggregate operations, including the Morrison Plant. Tr. 222, 511-512. He does not oversee the Quality Control employees, which is John Cheever's duty, as discussed below. Tr. 222.

Tr. 228-229. In addition, the mine also requires that light-duty vehicles, such as pickup trucks, yield the right of way to, and maintain a minimum distance from, all heavy equipment, including loaders.⁴ Tr. 33-34, 124, 328-329, 333, 338-339, 444. If a miner needs to encroach upon that minimum distance, they must make positive contact with the equipment operator and get acknowledgement from that operator that they can then encroach within the minimum distance. Tr. 124, 328-329, 334-335, 337-339, 520-521.

The mine produces eight different rock products, all of which must be sampled and tested daily by a Quality Control Technician (“QC Tech”) to ensure that product specifications are met. Tr. 27-29. If oversize material is found, adjustments are made in order to get the material “back in spec.” Tr. 28-29. John Cheever,⁵ Aggregate’s quality control manager, supervised all of Aggregate’s QC Techs. Tr. 35, 298, 472. Louis Silva was the Morrison Plant’s sole QC Tech at the time in question and had been an employee of Aggregate since 2000.⁶ Tr. 26, 224, 299.

Silva explained that the normal sampling process required him to use his radio to call a loader operator, who would then respond and drive the loader to the stockpile from which the sample was needed, retrieve a bucket of material, set the material on the ground, and backdrag the material to create a pad. Tr. 29, 33, 62, 153-154. The QC Tech would observe the pad being made in order to ensure that the loader did not dig into the dirt and contaminate the sample while grabbing its bucket of material. Tr. 29-30. Once the pad was built, the QC Tech would drive his pickup closer to the pad and get a sample using a shovel and buckets. Tr. 29. After retrieving the sample, the QC Tech would take the material to the lab for testing. Tr. 30. Silva testified, and other witnesses confirmed, that at the time in question there were no formal traffic rules or procedures that specifically controlled the sampling process.⁷ Tr. 31-32, 301, 333.

⁴ While Silva testified that he thought the minimum distance required to be maintained from heavy equipment was either 50 or 75 feet, all other testimony indicates that the minimum distance was 75 feet/25 yards. Tr. 33-34, 43, 333.

⁵ Cheever has overseen quality control at the Morrison Plant for over 20 years and had supervised Silva for approximately seven years prior to Silva’s termination. Tr. 299, 472.

⁶ Since his hiring, Silva routinely received high performance reviews, as well as performance based raises. Tr. 36-37. Silva testified that he got along well with John Cheever, his supervisor. Tr. 123. During his employment with Aggregate he has been disciplined twice. While the first incident is not relevant to this matter, the second involved Silva’s failure to wear a seatbelt while operating his pickup truck in December 2016, approximately one month before the accident at issue. Tr. 37-38, 123-124, 473-473. Although Silva was issued a warning, Cheever later told Silva he was going to tear up the paperwork because Silva was improving and he wanted to help him out. Tr. 38, 123, 473-474

⁷ Following the subject incident Cheever prepared a written safe operating procedure. Tr. 301-302; CX-13. He agreed that under the old procedure in place at the time of the accident it was part of the QC Tech’s job to watch while the pad was built. The new procedure did not allow the QC Tech to enter the area until the pad was built and the loader had left the area. Tr. 304-307.

Silva testified that on Friday, January 13, 2017, after being instructed to get a sample from the “3/4 washed rock” stockpile,⁸ he contacted Talmadge Milan,⁹ a loader operator, over the radio and asked for a pad to be built. Tr. 66-67, 208. This was the last radio contact made between Silva and Milan. Tr. 455. Silva then drove his pickup truck south down the pond road toward the face of the stockpile to see if there was oversized rock. Tr. 66-65. Milan followed behind Silva in the loader. Tr. 66-67, 210, 449. After checking for oversize rock Silva turned off to the right and gradually back to the north at which point, according to him, he made eye contact with Milan while they were roughly parallel to each other, then turned to the east and went behind the loader and drove back toward the south where he was roughly parallel to the loader on its left side.¹⁰ Tr. 66-68, 150-151.

⁸ Silva testified that, generally, when he took samples from the “3/4 washed rock” stockpile, after he made his initial call to the loader operator, he would head south along the pond road towards the stockpile so that he could see the face of the pile as he approached in order to ensure there was no oversize material. Tr. 62-63. Once he checked the face of the stockpile for oversize material, Silva testified he would turn off to the right (i.e., west) and circle back around to the north, then east before eventually turning south again at which point he would park his pickup truck next to the pond road so that that he was not in the way of equipment traveling the road. Tr. 63-65; CX-2. He would, in other words, drive from the right side of the loader to its left side by driving behind the loader.

While Silva initially stated that he normally “parked” the vehicle, he later indicated that he didn’t “really park[.]” and instead would just wait for the loader to get out of the way after building the pad. Tr. 64, 84. Usually the loader would follow behind Silva as he approached the stockpile in his pickup and the loader would continue into the pile to grab his bucket before building the pad. Tr. 64. Silva testified that, given the configuration of the plant, it was impossible for him not to breach the 75 foot minimum distance from the loader while observing the pad being built. Tr. 33-34. As a result, he stated that he has to “just pick the safest distance[.]” which was usually near the road because he believed the loader should not back up into the road where there will be traffic. Tr. 34. Once the pad was built Silva could then back his truck up to it and take his samples. Tr. 64. According to Silva the stockpile size fluctuated and he may not have parked his truck in the exact same spot each time. Tr. 34-35, 64, 153-154.

⁹ Milan has worked for Aggregate as a loader operator for approximately two and a half years, and has been in the mining industry since 1995. Tr. 191-192, 434-435. Milan agreed that, as a loader operator, he builds pads for the quality control department to collect material samples from. Tr. 192. Milan had worked with Silva multiple times in the past to pull samples. Tr. 196-197, 339-340. Milan testified that he has in the past corrected others, including customers and QC Techs, who have driven behind him. Tr. 204, 444. While operating the loader he is constantly trying to make eye contact with persons in vehicles around him in order to let them know that they need to pay attention to him. Tr. 443

¹⁰ Silva marked an “X” on CX-2 where he claims he made eye contact with Milan. Tr. 68. The exhibit, a photograph, shows Silva’s route of travel in yellow highlighter.

Milan testified that the last time he saw Silva before he started making the pad was when Silva went off to the right, which he believes is where Silva should have stayed while Milan was building the pad. Tr. 210-212, 214, 450, 452. Milan was not sure if Silva looked him in the eyes at that point. Tr. 206, 210-211. After dumping his bucket and backdragging the pad a first time, Milan noticed that the pad was too tall and went in to backdrag it a second time to make it easier for Silva to take his sample. Tr. 206, 450.

While Silva looped back around to the south in his truck by driving behind the loader, Milan articulated the loader toward the pond road and, according to Silva, backed up at a high rate of speed toward the east and away from the pad, at which point the loader struck the front of Silva's pickup. Tr. 70, 76-77, 82. Milan agreed that he articulated his loader toward the left and backed up until he saw Silva as the vehicles collided, at which point he stopped. Tr. 207, 451. Silva acknowledged at hearing that his truck was not stationary at the time of the collision and that he did not have time to react when the loader backed up because it happened in such a short period of time. Tr. 83, 171. Milan, at hearing, explained that the reason he backed out to the left was because when he went into the pile to grab a bucket there was no one to the left and he had seen Silva go off to the right. Tr. 454-455. Milan testified that after the accident he saw Silva standing outside of his truck, which was minimally damaged, and Silva did not appear to be injured. Tr. 459-460.

When Todd Prather,¹¹ the quarry supervisor at the time, learned of the accident he contacted Quist, who was offsite. Tr. 230, 331, 465, 512. Prather, who was charged with leading the investigation before Quist arrived, traveled to the accident scene and took photos so that the scene could be restaged later. Tr. 340, 465. He testified that when he arrived at the scene Silva was frustrated, but did not appear to be hurt or injured, denied being injured when asked, and showed no signs of any issues with balance or speech. Tr. 467. At some point following the accident Silva drove his pickup truck from the accident site to the mine office. Prather testified that nothing about the truck or Silva concerned him at the time and that Silva raised no issues about driving the truck. Tr. 467-468.

At the mine office Silva gave a statement to Cheever regarding the incident in which he said he did not know if he was stopped at the time of the collision, but that he could have been stopped for "a second, a minute." Tr. 96-97. Cheever testified that, based on that statement he thought that Silva and Milan had made positive contact like they were supposed to and Silva had been properly stopped and was waiting for Milan to complete the pad at the time of the collision. Tr. 475.

When Quist arrived he met Silva, Cheever and Prather at the mine office and took over control of the investigation. Tr. 229, 513, 515-516. While at the office Silva described the accident, drew a diagram of the accident on a whiteboard, and told Quist that he was okay.¹² Tr.

¹¹ Prather supervised the equipment operators including Milan. Tr. 94, 331, 466.

¹² Quist at some point drew a rendition of Silva's whiteboard drawing, CX-6, in which he depicted a puddle where Milan told Quist he believed Silva stopped after turning off to the right. Tr. 231-233. Quist could not recall whether Silva had told him he stopped at the puddle. Tr. 234.

97, 231, 260, 513. Quist testified that at that point he had not made up his mind about anything with regard to the accident. Tr. 515-516, 279. The four of them then traveled back to the scene of the accident. Tr. 514-515, 234.

Quist had a discussion with Silva about what happened, during which he noted that nothing about Silva's appearance or behavior seemed to be abnormal. Tr. 260, 516. As a result, while Quist testified that he did look Silva over, no formal medical or physical examination was conducted at that time. Tr. 260-262.

The group then reconstructed the accident by staging a different truck and loader where Silva's truck and Milan's loader had been at the time of the accident. Tr. 97, 516-517. Quist, after getting in the cab of the loader and examining the visibility that Milan would have had, determined that, as staged, the loader operator could definitely see where the truck was stopped. Tr. 235-236, 516-517. The reconstruction revealed that, at the time of the collision Silva was approximately 40 feet from the pad that Milan had built.¹³ Tr. 313, 243; CX-7 Bates 145.

While Quist took photographs and collected interview statements of witnesses, he withheld judgement as to fault because he didn't know if Silva's truck was stationary at the time and wanted to review the Dashcam video. Tr. 236-237, 517-518. Silva returned to work after assisting with the reconstruction. Tr. 94, 98.

Silva testified that there was nothing different about how he performed his work at the stockpile that day, but that Milan, who normally goes "back and out to the west[,] " had instead articulated the loader and backed out to the east toward the road. Tr. 67, 78. According to Silva loader operators never pull out on to the road. Tr. 79. Silva later testified that that when Milan finished building the pad in this instance he anticipated that Milan would back straight up to the north and go out toward the haul road, which was to the east. Tr. 81-82. He further testified that the location of his truck at the time of impact was the only place where he could have parked and observed the pad being built to ensure that the loader did not dig too deep. Tr. 77, 79. However, Milan contradicted Silva and said it was not uncommon for him to back out toward and onto the road and, had Silva not been there that day, he probably would have kept going out onto the road. Tr. 456. He explained that it is situational as to which direction he will back out and there is no standard pattern he follows. Tr. 463. While Milan acknowledged that he had a responsibility to not run over Silva, he opined that Silva should not have encroached upon the loader's working space. Tr. 457-458.

On cross-examination Silva agreed that he had been trained to keep a safe distance from working loaders, to make positive eye contact with the loader operator before approaching the loader, and that he had attended multiple traffic safety trainings provided by the mine. Tr. 124-135.

¹³ Cheever testified that, while he agreed that there are places in the mine where it is not possible to maintain the 75 foot distance, here Silva should have been parked further away or been stationary and not within 40 feet of the pad that was being built by the loader. Tr. 309-313.

Silva testified that at some point later in the day he experienced dizziness and vomited while working in the lab. Tr. 95, 98. He agreed that he had been trained to report all incidents and notify Aggregate, via its health service, as soon as he suffered an injury. Tr. 136-137. Silva acknowledged that he never told management that he was injured or had vomited that day, nor did he ask for medical attention. Tr. 90, 95, 143-144. However, he testified that while in the lab he told Cheever that he wasn't feeling well and his neck and back hurt.¹⁴ Tr. 90, 139-140, 143. Cheever, at hearing, expressed skepticism as to whether Silva vomited since Cheever was also in the lab and smelled nothing and denied that Silva told him that he had vomited. Tr. 323-324. While in the lab, Cheever told Silva that Milan was likely more at fault and Silva would only get a small part of the fault because he did not have a high visibility flag on his vehicle. Tr. 98-99, 308-309. Silva then asked Cheever if he could go home because he wasn't feeling well. Tr. 99. Cheever said Silva could leave as soon as he took a drug test, which he did before leaving for the day. Tr. 99-100.¹⁵ Cheever testified that Silva did not complain of any injuries the day of the accident, nor did he display unusual behavior or speech. Tr. 480-481

Silva went to the mine the morning of Saturday, January 14 to run a test on some material. Tr. 100-101, 179. Silva testified that he felt "terrible." Tr. 101. After attempting, but failing, to get in contact with multiple members of management, Silva contacted Cheever to say he was not feeling well and was going to go home, which he did. Tr. 101-102, 144-145.

¹⁴ Silva claims that he did not ask for medical attention due to fear of losing his job. Tr. 90, 143. He testified that when he worked at a different Aggregate facility earlier in his career a miner was fired after he was injured. Tr. 91-92. I afford very little weight to Silva's testimony on this issue for a number of reasons. First, the alleged retaliation occurred at a different facility. Second, it's unclear when this occurred and what management personnel may have been involved. Third, very little context was provided and Silva's reasoning for why that miner may have been terminated was pure speculation. Fourth, no evidence which could possibly corroborate Silva's account was introduced. Finally, Silva testified that he told Cheever his symptoms. If Silva truly intended to conceal an injury due to fear of retaliation, I find it unlikely he would have discussed his symptoms with Cheever.

¹⁵ Silva's wife Veronica testified that when Silva picked her up from work the night of the accident she noticed that the truck was damaged, her husband appeared to be confused, and he told her that he had been vomiting. Tr. 174-177. According to her, he complained of a headache that evening and said he did not want to seek medical care. Tr. 178. Veronica, after failing to convince Silva to see a doctor, enlisted the help of their daughter, Valerie, who ultimately was able to convince her father to see a physician, as discussed below. Tr. 179-180, 185. Valerie testified that when she went to see her father the following Tuesday he was sitting in a dark room and seemed dazed. Tr. 185. According to her, he was resisting medical treatment because he said Aggregate would fire him since he was old and had a preexisting liver condition. Tr. 186.

Cheever came into possession of the “Dashcam” video (the “video”) later that Saturday.¹⁶ Tr. 477. Cheever testified that, after reviewing the video, in which Silva’s truck was clearly in motion at the time of collision, he began to change his mind with regard to fault. Tr. 476-477. According to Cheever, miners are trained to be nowhere near the loader when it is in operation. Tr. 477. He was surprised that Silva was not stationary so as to give the loader operator a fixed position to know where the truck was. Tr. 478. At some point after viewing the video Cheever called Silva and told him to come in on Monday to review the video. Tr. 102, 479-480. According to Silva, Cheever said there was nothing to worry about. Tr. 102. Cheever also called Quist and relayed his impressions of the video and told Quist that Silva was moving in the video. Tr. 479. According to Cheever, Silva made no mention of any injuries on Saturday, January 14. Tr. 480

Silva testified that on Sunday, January 15 he spent most of the day sleeping and that his headache, neck and back pain, as well as his balance were worse. Tr. 103.

On Monday, January 16, Silva went into Cheever’s office and reviewed the video. Tr. 103, 180, 316, 481. Silva testified that he said to Cheever that he thought he had a concussion, to which Cheever responded that he could not have a concussion since the video showed that Silva did not hit his head. Tr. 103. Cheever, on the other hand, testified that they discussed the possibility of getting a concussion without hitting one’s head, but stated that Silva said he did not have a concussion when Cheever asked him if he did. Tr. 483. Following their review of the video the two of them took Silva’s damaged truck to a body shop and then came back to the mine where Cheever gave Silva a different truck to drive. Tr. 103, 316, 481-482. The mine was not running that day due to weather and Cheever told Silva he would contact him and let Silva know where to go on Tuesday. Tr. 104, 316. Cheever noticed nothing unusual about Silva’s behavior that day besides Silva generally being shaken up as a result of the accident. Tr. 483-484. Had Cheever noticed signs of a concussion like confusion, dizziness or anything out of the ordinary he would not have let Silva drive a vehicle. Tr. 327, 484. Cheever testified that, following his meeting with Silva, mine management made the decision to form a Safety

¹⁶ At hearing both parties relied heavily on the “Dashcam” video. RX-49. The video, a split screen, shows two different views from inside Silva’s pickup truck. The left side of the screen shows a rear facing view of the inside of the cab with Silva seated in the driver’s seat, while the right side shows a forward facing view out the truck’s windshield. Tr. 72. The video camera system is activated by impact, hard braking or turning, fast acceleration, and even bumps. Tr. 281-282. Once the system is triggered it saves the eight seconds recorded just prior to the triggering, as well the four seconds immediately afterwards. Tr. 281-282. In the video, which is quite clear and self-evident, Silva can be seen driving his vehicle at 5 mph on a road while turning to the right and decelerating before colliding with the loader. Tr. 282-283. The video also shows the front end of Milan’s loader leaving the frame traveling in reverse with its bucket down, before the back end of the loader comes back into the frame as Silva turns his truck to the right and collides with the rear of the loader. During the collision Silva’s hardhat can be seen falling off of his head.

Recognition, Reward and Consequences Policy (“SRRCP”) Committee for the incident.¹⁷ Tr. 317.

Quist testified that he first viewed the Dashcam video the morning of Monday, January 16. Tr. 278, 518. While he had started to form an opinion as to fault after talking to Cheever on Saturday, it was not until Quist actually saw the video on January 16 that he determined Silva was 100% at fault since he pulled within 75 feet of a working loader and was actually turning toward the loader without having any idea what direction the loader was going to turn. Tr. 279-283, 518.

On Tuesday, January 17, the SRRCP Committee (the “Committee”) met to determine whether Silva should be disciplined as a result of the accident. Tr. 267- 268. Quist, as lead investigator, was a member of the committee, along with Cheever, David Patrick Lane,¹⁸ the mine’s HR manager, and one other corporate Committee member. Tr. 267, 277. The Committee met, via teleconference, for approximately one hour between noon and 1:00 PM. Tr. 267-268, 276-277, 286, 351, 490.¹⁹ Based on their discussion during the call, the entire Committee decided to terminate Silva after it determined that Silva was entirely at fault and had been grossly negligent by not paying attention and failing to make radio or eye contact with Milan before driving his truck within 75 feet of the operating loader, which could have resulted in a fatality.²⁰ Tr. 269, 309, 317, 352, 356, 365-366, 376, 485. Cheever opined that although the Committee discussed that Silva had been with Aggregate for a long time, there was no way to get around the fact that he had been involved in a potentially fatal accident. Tr. 485-486. Two members of the Committee were unable to view the Dashcam video at the time of the call and asked to see the video before they gave their final confirmation. Tr. 320, 352, 357. Lane testified that he

¹⁷ SRRCP Committees are formed to, among other things, determine appropriate consequences following violations of the SRRCP. Tr. 503. The Committee generally consists of both corporate members and members from the local operation where the violation occurred. Tr. 503.

¹⁸ Lane is the Human Resources Director for LaFarge Holcim’s aggregates division, which includes Aggregate and the Morrison Plant. Tr. 348-350. He is one of the corporate members of the SRRCP Committee. Tr. 351. He was first contacted about the incident on the day it occurred so as to put him on notice that it would fall under the SRRCP. Tr. 350-351. Lane testified regarding other Committee decisions involving mobile equipment accidents in which miners were terminated. Tr. 503-504. In his experience, miners who are terminated for mobile equipment violations have previous offenses, but not always.

¹⁹ Although the Committee discussed that Silva’s truck was not equipped with a required high visibility flag at the time of the collision, that omission did not form a basis for the termination. Tr. 269, 351-352, 365.

²⁰ Quist agreed that Silva’s actions qualified as a Category 1 offense under the mine’s SRRCP because driving towards the loader was a grossly negligent, willful action. Tr. 272; CX-10 Bates 82. Lane explained that the reckless operation of mobile equipment, while listed under Category 2, can become a Category 1 offense depending on the circumstances. Tr. 366-367.

eventually reviewed the video and then called the local HR person that evening or the next morning to confirm the decision. Tr. 356-358.

Quist and Cheever testified that at the time of the meeting they were unaware that Silva had been injured. Tr. 272-273, 327, 486, 526.²¹ Quist testified that he only became aware of the injury later that day after the meeting. Tr. 276, 286, 526. Lane testified that he could not recall whether it had been communicated during the meeting whether Silva had sought medical treatment. Tr. 365. However, he stated that had he known about any injury it may have impacted the timing of the termination, but it would not have affected the decision to terminate. Tr. 509

Cheever agreed that at the conclusion of the Committee meeting, he spoke with HR personnel to get the paperwork ready for a meeting he planned to schedule with Silva for Wednesday morning at 8:00 AM, during which he intended to terminate Silva. Tr. 318-319, 489.

Silva testified that on Tuesday, January 17, his condition was even worse. Tr. 105. The weather was still bad on Tuesday and Cheever had not called, so Silva assumed the plant was not running. Tr. 105. During the afternoon, Silva's daughter Valerie talked Silva into going to the emergency room. Tr. 105-106, 180, 187. Cheever called Silva while he was at the emergency room and told Silva to call back after he had been examined. Tr. 106, 188, 318. According to Cheever, this was the first he had learned that Silva was injured and seeking medical attention. Tr. 327, 486. On cross-examination Silva conceded that this was the first time anyone at Aggregate knew he was seeking medical care. Tr. 145. Cheever was "shocked" and immediately called the mine's HR and safety personnel. Tr. 490. Shortly thereafter Cheever called again and told Silva that Quist wanted Silva to go to Concentra, the company's medical provider, so that the injury would be addressed through workers compensation and Silva would not be stuck with the bill. Tr. 106, 187, 487-488. Silva's daughter drove him to Concentra, whose medical personnel in turn told Silva to go to a hospital, which he did. Tr. 106-107. Silva testified that he received an MRI at the hospital and the doctor confirmed that he had a concussion. Tr. 107, 120.

On Wednesday, January 18, Silva, at the direction of the hospital doctor, went to see his primary care physician to have his liver checked given that he had had a transplant in 2011. Tr. 88, 108. His primary care physician noticed no issues with the liver but confirmed that Silva had a concussion. Tr. 108, 112. While Silva did not talk to anyone from the mine that day, his wife Veronica did talk to Cheever. Tr. 108.

²¹ The Secretary questioned Quist, Cheever, and Lane about a possible second SRRCP meeting on January 18. Tr. 276, 320, 352. However, each of those witnesses denied that a second meeting ever occurred. Tr. 276, 320, 352, 355, 356, 489. The Secretary took issue with what he viewed as Lane's inconsistent testimony on this issue as compared to his deposition testimony and questioned him at length regarding an errata sheet that he submitted after his deposition. The errata sheet, along with his trial testimony indicate that the inconsistency was due to confusion on Lane's part over a date he mentioned during his deposition, which he then sought to correct after reviewing his calendar. Tr. 352-355, 359-364. I note that Lane's deposition occurred almost a year after the events at issue in this matter and he sought to correct the record as soon as he referred to his calendar after the deposition.

On Thursday, January 19, Silva, at the direction of his wife, went to see a workers compensation attorney. Tr. 108, 181. While Silva was at the attorney's office he received a call from Cheever informing him that the SRRCPC Committee had decided Silva was at fault and that he was terminated. Tr. 26, 109, 320. Silva testified that he was surprised given that Cheever had never led Silva to think he would be fired. Tr. 110. Milan was not disciplined as a result of the accident. Tr. 219.

Cheever testified that the delay between the decision to terminate on January 17 and the actual termination on January 19 was simply a matter of finding time, trying to allow Silva a chance to meet with doctors, and HR personnel's desire to not terminate Silver over the phone due to the all of the paperwork and personal belongings that would need to be returned to Silva. Tr. 488-489, 492-494. However, after a number of days passed, Cheever eventually decided to do it over the phone so it would not drag on. Tr. 492-494.

At hearing Silva testified that he believes he was terminated for reporting the injury and due to safety complaints that he had previously raised regarding traffic at the mine. Tr. 112. Silva testified that he previously made multiple safety complaints regarding traffic at the mine. In particular, he testified that he raised the issue of traffic safety with both Cheever and Quist during the mine's annual safety meetings in 2015 and 2016 and again with Cheever at the mine's Christmas meeting in December 2016, roughly a month before the accident. Tr. 47-48. Silva also testified regarding a series of meetings in 2012 and 2013 with Cheever and the loader operators where they talked about eye contact and verbal communication. Tr. 40-41, 44. According to Silva, during those meetings they discussed how the QC Techs and the loader operators could work together to ensure that Silva could obtain his samples more safely given that it was impossible for Silva to perform his job without encroaching within the minimum distance vehicles were supposed to maintain from equipment. Tr. 42-43. They also discussed the need for a new sampling procedure that, according to Silva, Cheever was supposed to develop. Tr. 43-44. At some point the meetings ceased to occur. Tr. 44-45. Silva testified that one of the objectives on his 2013 performance standards was to hold a quarterly meeting with the loader operators to discuss issues, but these meetings never occurred due to time constraints. Tr. 45-47; CX-1. Silva agreed that his performance rating was not impacted by the inability to hold the meetings. Tr. 47. Cheever, Prather, and Quist each testified that Silva had never raised safety complaints with them. Tr. 327, 468-469, 484, 524.

Steve Sands, a QC Tech for Aggregate at a different operation, occasionally performed these functions at the Morrison Plant. He testified that he attended multiple safety meetings and has never felt like he could not raise safety concerns or report an injury, and in fact did raise an issue regarding traffic at the Morrison Plant during an August 2016 meeting and a December 2016 meeting. Tr. 427-430. RX-8, RX-13. According to Sands, no one else raised safety concerns during those meetings and he recalled Silva saying that traffic was not that bad at the Morrison Plant. Tr. 430-431.

At hearing, Quist described Silva as a good employee and testified that, prior to the accident, he never had a reason to question Silva's credibility. Tr. 224. Cheever, likewise, described Silva as a very good, dependable worker with whom he had a good relationship, and someone he would not expect to fabricate injuries. Tr. 300, 322, 472. While Cheever did not

believe Silva lied during the investigation, he was adamant that Silva never said he was hurt or described symptoms that would have indicated to Cheever that Silva needed medical attention. Tr. 322, 326-327.

B. Analysis of the Issues

i. *Prima Facie Case*

Section 105(c) of the Mine Act prohibits discrimination against a miner for exercising a right established under the Mine Act. Pursuant to Commission case law, a prima facie case for a violation of section 105(c) is established if the complainant proves by a preponderance of the evidence that (1) he was engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). Once a prima facie case is established, the mine operator is given an opportunity to rebut by showing that either there was no protected activity or the adverse action was not motivated in any way by the protected activity. *Robinette* at 818 n. 20. I address these issues below.

a. ***Did Silva Engage in Protected Activity?***

Complainant argues that Silva engaged in two types of protected activity; making safety complaints and reporting an injury. I address these activities separately.

The Secretary first argues that Silva engaged in protected activity when he made safety complaints about traffic at the mine. Specifically, Silva, who “found that dangerous traffic conditions made it difficult for him to get around the plant to collect samples and do his job[.]” engaged in protected activity when he routinely complained to Cheever and Quist about the issue. Sec’y Br. 3, 12. Although Cheever denied that Silva ever made safety complaints, Respondent did not rebut Silva’s testimony that Silva and Cheever set up meetings with the loader operators to address safety issues, which was a direct response to Silva’s complaints. Sec’y Br. 3. Silva also raised safety concerns about the increased traffic at the mine approximately a month before he was terminated and asked for additional training on how to get around the mine safely. Sec’y Br. 4.

Respondent disputes that Silva made safety complaints, either formally or informally, and asserts that Silva presented no credible evidence to suggest that any safety concerns he may have raised amounted to protected activity. Aggregate Br. 4-5. Cheever and Quist both testified that that Silva never raised any safety concerns. Their testimonies were supported by Sand’s testimony that Silva never raised concerns during the two safety meetings that Silva claims to have raised concerns. Rather, it was Sands who raised those concerns about traffic safety, to which Silva said “it wasn’t that bad[.]” Aggregate Br. 5. Respondent argues that while traffic levels had increased at the mine, the issue was constantly discussed and Aggregate had worked to ensure the safety of vehicle traffic as evidenced by safety meetings during which miners were given every opportunity to raise safety concerns, written procedures, as well as rules regarding

deference to heavy duty vehicles and minimum distances that needed to be maintained, and the presence of stop signs and speed limits. Aggregate Br. 5-6.

Whether Silva engaged in protected activity by making “safety complaints” is questionable. I accept Silva’s testimony that he raised questions about traffic safety, but this was a constant topic at the mine that many people discussed. Silva testified that he routinely raised questions regarding his ability to safely perform his job given the increasing traffic at the mine. I credit his testimony that he brought up this topic during safety meetings at the mine in 2015 and 2016. I note that a few years before the accident, Cheever asked Silva to meet with loader operators to discuss issues regarding the best way for QC Techs and loader operators to work safety together. At one point, Cheever charged Silva with running such meetings and included this objective as one of his performance standards. A few meetings were held, but they did not continue beyond 2013 due time constraints. Silva continued to raise traffic issues in 2015 and 2016. I would not characterize the concerns raised by Silva as “complaints” and Aggregate clearly did not see them as specific complaints but rather as the types of issues that are typically discussed in a mining environment.²² Nevertheless, for purposes of this decision, I will assume that Silva engaged in protected activity when he discussed traffic safety with management.

The Secretary also argues that Silva engaged in protected activity when he reported his injury, specifically a concussion, to management. I agree that reporting an injury can be a protected activity. See *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994). An important issue in this case is whether Aggregate management was aware of the concussion at the time the decision was made to terminate him. The Secretary contends that management was aware of Silva’s injury, but Aggregate maintains that it did not learn of his injury until after the decision to terminate was made.²³ This disputed issue of fact is discussed below. Thus, although I agree that Silva’s act of reporting his injury is protected, the key issue is whether there is a nexus between the reporting of his concussion and the decision to terminate.

b. Was Silva’s Termination Motivated in any Part by the Protected Activity?

The Commission has recognized that although direct evidence of discriminatory intent or motivation is rarely available, a nexus between the protected activity and adverse action may be inferred where indicia of discriminatory intent exists, including (1) knowledge of protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the Applicant. *Sec’y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009); see also *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I analyze each of these factors in turn.

²² For example, Sands testified the he raised safety issues regarding QC Tech sampling procedures and traffic at the Morrison Plant in August and December 2016.

²³ Aggregate does not dispute that Silva reported his injury to Cheever over the phone the afternoon of Tuesday, January 17 when Silva was in the emergency room. Aggregate maintains that the decision to terminate had already been made earlier that day.

Knowledge of Protected Activity

The Secretary argues that Aggregate had knowledge of Silva's safety complaints to Cheever and Quist, and avers that Silva's work with Cheever to address safety concerns directly with loader operators was a direct response to those complaints. Sec'y Br. 13. Further, the mine had knowledge of Silva's injury because he complained of symptoms to management immediately after the accident on Friday, told Cheever on Monday that he thought he had a concussion, and notified Cheever that he was seeking emergency care. Sec'y Br. 13.

Respondent argues that the SRRCP Committee members, which included Cheever, Quist, and Lane among others, had no knowledge of any protected activity when they unanimously decided to terminate Silva during their midday SRRCP meeting on Tuesday, January 17. Aggregate Br. 8. The Committee discussed only Silva's violative actions related to the January 13 accident and did not consider Silva's alleged past safety complaints because none existed. Aggregate Br. 9. Moreover, there was no discussion of Silva's injuries because there was no knowledge of injuries at that point. Aggregate Br. 9. Even if Cheever or Quist had knowledge of safety complaints or injuries, there is no evidence that either of those issues were discussed with the rest of the Committee or influenced the termination decision. Aggregate Br. 9.

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." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999) (quoting *Chacon*, 3 FMSHRC at 2510).

I find that Aggregate had at least constructive knowledge of the safety concerns raised by Silva. Silva testified that he regularly made complaints about traffic safety as it relates to the duties of QC Techs to Cheever and occasionally to Quist. Cheever and Quist could not recall any specific complaints made by Silva and, more importantly, they considered any discussions about traffic safety that did occur to be ongoing conversations about safety improvements rather than specific complaints. Nevertheless, I give Silva the benefit of the doubt and find that Aggregate was aware of the traffic safety concerns raised by Silva.

Whether Aggregate had knowledge of Silva's injury is a more complicated issue. The Secretary, in his brief, does not pinpoint a particular time when Silva reported his injury. Rather, he lists a number of events, including that Silva informed Cheever that his neck, back and head hurt the day of the accident, that on Saturday Silva told Cheever he felt terrible, that on Monday Silva told Cheever he thought he had a concussion, and that on Tuesday afternoon Silva told Cheever he was at the emergency room seeking medical attention. Conversely, Respondent again argues that the Committee had no knowledge of any protected activity when it decided to terminate him mid-day on Tuesday, January 17.

There is no dispute that Silva reported his concussion to Cheever over the phone while he was at the emergency room Tuesday afternoon and told Cheever he was seeking medical attention. The issue that must be resolved is whether Silva's earlier actions on Friday, Saturday and Monday amounted to reporting an injury. I find that they did not.

This case presents a somewhat unusual issue in that the injury for which Silva ultimately sought medical treatment, a concussion, does not necessarily manifest in an easily recognizable manner, at least as compared to other injuries that may be sustained in a vehicle collision, i.e., cuts, scrapes, contusions, broken bones, etc. Here, there is no dispute that Silva did not immediately report an injury following the accident. Silva, in the immediate aftermath, was interviewed, provided a statement, participated in the accident reconstruction, and voluntarily drove his pickup truck. I credit the testimonies of Respondent's witnesses that Silva, by all accounts, did not appear to be injured immediately after the accident.²⁴

Later the same day, Friday, Silva allegedly vomited and informed Cheever that his head, neck and back hurt before heading home. Silva acknowledged that he did not tell Cheever that he vomited and Cheever testified that he never smelled vomit in the lab when he was with Silva. While Silva may have informed Cheever that his head, neck and back hurt, I find his statement was at most a recitation of short term symptoms that are quite common for those involved in a vehicle accident as a result of the impact and jostling that the body endures, and did not amount to reporting an injury. The same can be said for Silva's interaction with Cheever on Saturday where he simply told Cheever he was not feeling well.

While both parties agree that there was some discussion regarding concussions at the meeting between Silva and Cheever on Monday, a dispute exists regarding what exactly was said. Silva claims that he told Cheever he had a concussion and Cheever responded by saying that that Silva could not have a concussion because he did not hit his head, as could be seen in the video. Tr. 103. Conversely, Cheever claims that on Monday he asked Silva, just as he had on Friday and Saturday, whether Silva was hurt, to which Silva responded that he was not. Tr. 326-327. I find it unlikely that Silva stated to Cheever on Monday that he had a concussion. Silva testified that he drove his pickup to the meeting, and then drove again to the body shop. According to Silva, he was familiar with the signs of concussions as a result of his boxing background and would probably know if he had a concussion. Tr. 159-160. Cheever testified that he also was familiar with the signs of concussions and had received concussion training as a result of his involvement in soccer. Tr. 483. If Silva believed he had a concussion at that point and stated such to Cheever I find it unlikely he would have elected to drive to the mine or body shop, and even less likely that Cheever would have allowed him to continue to drive a company vehicle. As a result, I find that Silva did not report his concussion on Monday, January 16. Accordingly, I find that the first time Aggregate had knowledge of Silva's protected activity of reporting his injury was when Cheever spoke with him over the phone on Tuesday afternoon while Silva was at the emergency room. Silva agrees that this was the first time Aggregate would have known that he was seeking medical treatment.

²⁴ While the Secretary takes issue with the fact that no physical examination was conducted at that point, I find that there was no reason to do so. Silva was understandably frustrated and shaken as a result of the events which had just unfolded. However, no injuries were visible and Silva did not state that he was hurt. The Dashcam video subsequently reviewed by management would not lead one to believe Silva had been injured.

Given that the first time Aggregate became aware of Silva's injury was Tuesday afternoon, the question that now must be answered is whether that knowledge played a role in the decision to terminate. I find that it did not.

Quist, Cheever, and Lane all testified that the decision to terminate Silva was made during the Tuesday meeting of the SRRCP Committee that convened at noon and lasted for approximately an hour. While the Secretary takes issue with their testimonies and asserts that a decision was not made during that meeting, I disagree. I credit Aggregate's witnesses on this point. The Secretary spent much of his examinations of Quist, Cheever and Lane attempting to point out discrepancies between their deposition and hearing testimonies. Having observed each of these witnesses at hearing, evaluated their demeanor, and reviewed their testimonies, I find that each of them credibly testified as to having rendered the decision to terminate Silva during Tuesday meeting of the Committee. While I acknowledge that an inconsistency exists between Lane's deposition and trial testimonies, I accept his explanation. Because Cheever's conversation with Silva on Tuesday occurred after the Committee had rendered its decision, I find that knowledge of the report of the injury played no role in the decision to terminate. Up until that point Aggregate, at most, had knowledge that Silva was experiencing normal aches and pains that accompany a vehicle accident.

Animus or Hostility Toward the Protected Activity

The Secretary argues that Aggregate demonstrated hostility and animus towards Silva's report of an injury. Sec'y Br. 13. Aggregate management did not believe that Silva was actually hurt during the accident and Quist testified that he believed Silva was attempting to defraud the worker's compensation system. Sec'y Br. 13. As evidence of this animus towards Silva's report of an injury the Secretary points to an email sent by Quist to Aggregate personnel and statements made by Quist to the SRRCP Committee prior to the decision to terminate. Sec'y Br. 14.

Respondent argues that the Committee exhibited no animus or hostility toward Silva's alleged protected activity. Aggregate Br. 9. The frustration expressed in Quist's email was a reaction, not to protected activity, but rather toward the accusation of discrimination based upon what Quist believed were baseless claims. Aggregate Br. 10. Further, any suggestion that Aggregate retaliated against Silva for reporting an injury or "perpetrating a fraud" is undercut by the fact that the Committee had met and decided to terminate Silva before he notified a supervisor that he was injured, which he was required to do under company policy. Aggregate Br. 10.

I find that the Secretary's argument with regard to the email is without merit.²⁵ The email was sent by Quist to other Aggregate personnel in March, roughly two months after the accident and termination. CX-9. The message is quite clearly a frustrated response to Silva's discrimination claim and application for temporary reinstatement. While Quist's statement in the email that Silva "lie[d] about the event and is trying to defraud the workers compensation system[,]” may facially appear to demonstrate animus or hostility towards Silva's protected

²⁵ The Secretary's arguments on this point are directed only at alleged hostility or animus towards Silva's reporting of his injury and not his alleged safety complaints.

activity or reporting the injury, I agree with Respondent that the timing and circumstances surrounding the sending of the email are not evidence of hostility or animus that Quist, or others, harbored towards Silva's protected activities when they occurred or when the decision to terminate was made.

With regard to the Secretary's argument that Quist made statements to the SRRCP Committee regarding skepticism of the timing of Silva's reporting of the injury, I note that the testimony cited by the Secretary in her brief was actually Quist's deposition testimony that counsel for the Secretary read into the record and asked Quist to confirm. At hearing, Quist testified that he may have been confused at the deposition because the Committee could not have considered the injury since none of them were aware of the injury at the time of the meeting. Tr. 272-277. While a conflict between Quist's deposition testimony and his trial testimony is apparent, I credit his trial testimony, during which he was adamant that he had no knowledge of the injury until after the SRRCP Committee met and decided to terminate Silva. In reaching this conclusion I am mindful that Cheever and Lane also testified that they were not aware of the injury at the time of the meeting.

Finally, I note that at no time when Silva brought up traffic safety with Cheever or Quist did he receive any pushback or disagreement. Although Aggregate did not quickly put into place more formal procedures for the taking of samples by QC Techs, it did not demonstrate any animus towards employees who raised the subject. Indeed, Sands, another QC Tech, credibly testified that he brought the subject up several times in 2016 and he never suffered any adverse consequences.

Coincidence in Time

The Secretary argues that a coincidence in time exists because Silva complained about unsafe traffic conditions less than one month before he was terminated and reported his injury just days before he was terminated. Sec'y Br. 13. Respondent argues that there is a "rational, independent, and non-discriminatory reason for Silva's termination that arose closer in time to the termination than any alleged protected activity regarding raising safety concerns."²⁶ Aggregate Br. 11. For purposes of this decision, I agree with the Secretary that a coincidence in time exists between Silva's protected activity and his termination.

Disparate Treatment

The Secretary argues that Silva was subject to disparate treatment and points to a similar accident at a Lafarge Holcim facility in Michigan in which both parties to the accident were given only three day suspensions. Sec'y Br. 14; CX-17. In contrast, Silva was terminated while Milan was not disciplined. Sec'y Br. 14. Respondent argues that Silva's situation differed from that described by the Secretary, where the matter was not reviewed by an SRRCP Committee and was not subject to the same policies as the Morrison plant. Moreover, Aggregate has terminated several other similarly situated employees. Aggregate Br. 13.

²⁶ Respondent's argument is more fully addressed below in the discussion of its affirmative defense.

I find that Silva was not subject to disparate treatment. I accept Lane's testimony that the other Lafarge Holcim facility was subject to a different disciplinary policy, which did not include an SRRCP Committee. Tr. 370. Lane explained that the Lafarge Holcim merger presented challenges as the two companies attempted to integrate their policies. Tr. 350. The fact the disciplinary policies differed between the two facilities for a period of time after the merger is unsurprising. It is impossible to tell what discipline would have been handed down to those individuals at the other facility had a SRRCP Committee been formed. In addition, while the accident at the other facility also involved a loader colliding with a pickup truck, the factual circumstances surrounding the two collisions differ significantly. Whereas Silva's truck was moving at the time of the collision, the pickup truck involved in the other collision was stationary and the driver was not even in the vehicle. CX-17 p. 2. Accordingly, I find that the Secretary has not shown that Silva was subject to disparate treatment.

c. Did Silva establish a Prima Facie Case?

I find that Complainant did not establish a prima facie case of discrimination. The Secretary was unable to establish a nexus between Silva's alleged protected activity and his termination. Although Aggregate had knowledge of Silva's reporting of his injury prior to his ultimate termination on Thursday January 19, the decision to terminate Silva was actually made on Tuesday, January 17 during the SRRCP Committee meeting, which occurred before Silva notified Cheever of his injury. As a result, I find that the decision to terminate was not motivated by Silva's report of injury. It bears noting that the two key members of the Committee, Cheever and Quist, came to the conclusion that Silva was at fault by Monday morning after studying the Dashcam video. Moreover, I credit Respondent's witnesses that the issue of any safety complaints Silva may have made in the months and years leading up to the time in question were not discussed and had no bearing on the Committee's decision. Finally, the Secretary did not establish that Silva suffered disparate treatment or that Aggregate demonstrated hostility or animus toward his protected activity. Accordingly I find that Silva's protected activity in no way motivated his termination and, as a result, Complainant did not establish a prima facie case of discrimination.

ii. Affirmative Defense

The Commission has explained that an operator may establish an affirmative defense by proving that the adverse action was motivated by unprotected activity and it would have taken the action based solely on the unprotected activity. *Pasula* at 2799-2800. The 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 the defense, the judge should determine whether the justification is credible and, if so, whether the operator would have been motivated as claimed. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Complainant may demonstrate that the alleged non-discriminatory reason is mere pretext for the adverse action by showing that the "asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

Respondent argues that Silva was terminated for “grave safety violations.” Aggregate Br. 13. Namely, it asserts that Silva failed to keep a minimum distance from operating heavy equipment and failed to make positive contact with the equipment operator when he breached that distance after he moved his pickup. Aggregate Br. 13. Silva’s unsafe and unprotected activity, which could have had a tragic result, was the sole cause of his termination, which was administered in compliance with the mine’s safety policy. Aggregate Br. 13. This justification was “highly credible and plausible[,]” and consistent with Aggregate’s disciplinary policy and past treatment of similarly situated employees. Aggregate Br. 14.

The Secretary argues that discrepancies in Respondent’s claimed basis for terminating Silva, as well as the timeline of the termination, establish pretext. Sec’y Br. 15. Specifically, the Secretary takes issue with what information the SRRCP Committee did, and did not, consider when deciding to terminate Silva, and argues that Cheever, Quist and Lane offered conflicting testimony as to the justification for the termination and the application of the SRRCP. Sec’y Br. 15. Further, the Secretary again raises issues, which have already been addressed above, regarding alleged inconsistencies in testimony about whether the Committee had knowledge that Silva was injured when deciding to terminate him, as well as the timing of the actual termination two days later. Sec’y Br. 19-21. Finally, the Secretary argues that other facts demonstrate pretext, including that Milan was not disciplined despite evidence establishing fault on his part, and the fact that Silva’s job required him to be within proximity to the loader. Sec’y Br. 21.

Assuming arguendo that Complainant established a prima facie case of discrimination, I nevertheless find that Respondent has provided a valid affirmative defense. At the outset, I find that it is quite clear based on the testimony and evidence introduced that Silva’s act of driving behind and then toward the loader while it was operating was unsafe.. Although the Secretary takes issue with whether or not the “75 foot rule” was actually a rule, see Sec’y Br. 16 n. 20, it is quite clear that Silva understood it to be a rule as indicated by his testimony that he was aware the a rule existed and had been trained on such.²⁷ Tr. 33, 42-43. Moreover, while the Secretary’s brief, as well as Silva’s testimony, constantly make mention that the rule was impossible to follow given the layout of the mine, I disagree. The rule, as explained at hearing, allowed smaller vehicle operators to breach the minimum distance by making positive contact with the larger equipment operator and receiving confirmation from the larger equipment operator that it was okay to breach the minimum distance. Silva agreed that he was aware of this exception to the

²⁷ Silva testified that at one point the rule had been to maintain 50 feet from loaders, but that he thought it was 75 feet at the time in question. Even if the distance was 50 feet, the reconstruction revealed that at the time of the collision Silva was approximately 40 feet from the edge of pad that Milan constructed, which would have put him even closer than 40 feet from the loader.

rule, yet chose not to follow the policy when he approached within the minimum distance just prior to the collision.²⁸ Tr. 124.

I find that Cheever's post-accident reaction prior to his viewing of the Dashcam video, and his subsequent change in opinion following his viewing of the video, lends credibility to Aggregate's justification for terminating Silva. There is no dispute that Cheever, prior to viewing the video, had a discussion with Silva in which he stated that Silva would be assigned little fault for the accident. Cheever explained that he made the statement based upon his understanding that Silva was too close to the loader and did not have a high visibility flag, but was stationary when the collision occurred. Tr. 308. Quist, likewise, while not assigning fault at the time, testified that based on the reconstruction Milan should have seen Silva in the loader's mirrors and backup camera. Tr. 516-517. However, like Cheever, he had not viewed the video at the time and his statement was made assuming that Silva was stationary. As stated above, I find that the video clearly shows that Silva was moving at the time of the collision and he was not paying close attention to his surroundings. Silva, by moving south and roughly parallel to the loader while the loader began to back up, would have been moving in roughly the same direction as the loader's rear field of view that the mirrors and backup camera provided as that field of view swung around from the north and towards the east.²⁹ While the Secretary takes issue with the fact that Milan received no discipline as a result of the accident, I find it entirely possible that, even using his back up camera and mirrors, Milan did not see Silva as he backed up because Silva's vehicle was just outside of the rear field of vision and only came into view at the last second. Cheever's explanation for why he changed his opinion with regard to fault and Quist's explanation for why he determined fault after viewing the video are very credible and provide a strong justification for disciplining Silva.

Although the Secretary takes issue with alleged inconsistencies in the testimonies of Cheever, Quist and Lane regarding the reason for the termination and the section of the SRRCPC under which the action was taken, I find that their testimony quite clearly establishes that Silva was terminated for his unsafe act of staying in motion while driving too close to operating heavy equipment, which in turn resulted in a collision that very well could have been fatal. As the loader operator was working to create a pad, Silva drove his truck from a position to the right of

²⁸ There is no dispute that the last verbal contact between Silva and Milan was over the radio when Silva asked Milan to make the pad, which was before the two of them drove to the stockpile. Although Silva testified that he made eye contact with Milan as he drove his pickup truck off to the right, this was before he headed away from the loader back to the north and then turned to the east behind the loader and eventually south, which placed him on the opposite side of the loader from where he allegedly made that eye contact with Milan.

²⁹ I credit Milan's testimony that the direction he reverses the loader after making a pad is situational and that there is no set pattern as to how he backed up the loader. Tr. 463. Given that no formal written traffic procedures were in place at the time addressing the specific process of taking a sample, I find that Milan's explanation is far more believable than Silva's assertion that Milan had always backed up in a straight path. Milan reasonably assumed that Silva's truck was to the right of the loader on the day of the accident because that was where Silva was the last time Milan saw him and where Silva alleged he made eye contact with him.

the loader, where he would have been visible to the loader operator, to the left of the loader where the loader operator was unable to see him. Silva did not communicate his intentions to the loader operator and he was moving towards the left side of the loader when it backed up.

I find that the business justification offered by Aggregate was not pretextual. Silva engaged in a dangerous act by improperly driving too close to an operating piece of heavy equipment. Given the significant size difference between the pickup and the loader, Silva is fortunate that Milan noticed him at the last second and stopped the loader as it collided with Silva's truck. Collisions between large pieces of mobile equipment and smaller vehicles often result in fatalities. Tr. 531. Aggregate's desire to prevent a fatality from occurring is certainly a reasonable one. While terminating Silva was arguably the most extreme disciplinary option and other options may have been available, the Commission has stated that its judges should not substitute their views of what is good business practice for that of the operator with regard to whether the adverse action was "'just' or 'wise.'" *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2517 (Nov. 1981).

III. ORDER

For the reasons set forth above, the complaint of discrimination brought by the Secretary of Labor on behalf of Louis Silva is **DENIED** and this proceeding is **DISMISSED**.³⁰

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

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³⁰ My order granting the parties' Joint Motion to Approve Terms of Economic Reinstatement in WEST 2017-265-DM must remain in place until further notice because my decision in the present case is potentially not the final decision of the Commission. *See Sec'y on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947 (Sept. 1999); *Sec'y on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 323 (Feb. 2013); 30 U.S.C. § 823(d)(1).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 27, 2018

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: Willow E. Fort, Esq., Office of the Solicitor, U.S. Department of Labor,
Nashville, Tennessee, for Petitioner

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

Before: Judge McCarthy

I. Statement of the Case

This case is before me after 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 Mine 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, section 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 issues presented are whether Sunbelt violated 30 C.F.R. § 56.18002(a); whether the violation was properly designated as significant and substantial (S&S) and contributed to a hazard that was reasonably likely to result in a fatal injury; whether the violation resulted from Sunbelt’s high negligence; and whether the specially-assessed penalty proposal of \$51,900 is appropriate.

II. Procedural Background

Roanoke Cement Company, LLC (Roanoke) operates a preheat tower at its facility in Troutville, Virginia. The preheat tower processes limestone material used to make concrete. Tr. 97-98. In January 2013, Roanoke contracted with LVR, Inc. (LVR) to perform annual refractory maintenance in the tower. Tr. 130, 250, 274, 460. LVR subcontracted with Sunbelt to erect scaffolding so LVR could perform the refractory work. Tr. 130, 250, 274, 460.

During the morning shift on January 8, 2013, Sunbelt employee Brian Tyler was struck by falling material while erecting scaffolding within Roanoke's preheat tower. Tr. 74, 374. Following an investigation, MSHA Inspector David Nichols issued 104(a) citations against Roanoke, LVR, and Sunbelt, and charged each with a violation of 30 C.F.R. § 56.18002(a). Based on the 104(a) citations issued by Nichols, the Secretary filed Petitions for the Assessment of Civil Penalties against Roanoke, LVR, and Sunbelt. All three dockets were assigned to me for disposition.

In August 2013, the Secretary moved for partial summary decision and alleged that Roanoke, LVR, and Sunbelt failed "to perform a workplace examination 'adequate' to discover latent defects" in violation of section 56.18002(a), and that "a mine operator and its contractors have a duty to either perform an adequate workplace examination or ensure that one is performed." *Sunbelt Rentals, Inc., et al.*, 35 FMSHRC 3208, 3209 (Sept. 2013) (ALJ). Roanoke and LVR filed a Joint Opposition and Cross-Motion for Summary Decision and argued that section 56.18002(a) neither contains an "adequacy" requirement, nor requires Roanoke or LVR "to perform separate or additional workplace examinations of the same working place that was examined by a competent person designated by Sunbelt." Roanoke's and LVR's Jt. Opp. and Cross-Mot. at 3. Sunbelt filed a separate Opposition and Cross-Motion for Summary Decision and argued that section 56.18002(a) does not contain an adequacy requirement, and even if it did, Sunbelt's examination was adequate. Sunbelt's Opp. and Cross-Mot. 2. Alternatively, Sunbelt argued that if section 56.18002(a) did contain an adequacy requirement, MSHA failed to provide fair notice of its interpretation. *Id.*

On September 24, 2013, I denied the Secretary's Motion for Partial Summary Decision, and granted Respondents' Cross-Motions for Summary Decision. I found that the plain language of the standard did not include an adequacy requirement (unlike numerous other standards that had been cited by Respondents), an adequacy requirement was not contained in MSHA's program policy guidance regarding the requirements of section 56.18002, and no adequacy requirement was present in erstwhile Commission case law interpreting the requirements of section 56.18002(a). *Sunbelt Rentals*, 35 FMSHRC at 3214.¹ Additionally, I concluded that Sunbelt construction manager Kendrick Lavon Davis "acted as examination agent for Roanoke, LVR, and Sunbelt on January 8, 2013," and I rejected the contention that section 56.18002 "imposes a duty on multiple operators to perform multiple examinations of the same working place when the examination has already been done by a competent person." *Id.* Finally, I

¹ I noted that that while section 56.18002(a) did not contain an "adequacy" requirement, "[t]his does not mean that an examiner can turn a blind eye toward numerous, obvious or egregious hazards, which may equate to failure to perform the requisite examination." *Sunbelt Rentals*, 35 FMSHRC at 3215 n.7.

determined, in the alternative, that Respondents lacked “fair notice of the Secretary’s interpretation that the cited regulation included an adequacy requirement.” *Id.* at 3215.

The Secretary filed a Petition for Discretionary Review (PDR), which the Commission granted on October 31, 2013. On November 26, 2013, Roanoke and LVR moved to be dismissed from these proceedings.

On July 12, 2016, the Commission denied Roanoke’s and LVR’s joint motion to be dismissed, vacated my summary decision in favor of all Respondents, and remanded all three dockets. *Sunbelt Rentals, Inc., et al.*, 38 FMSHRC 1619 (July 2016). Notwithstanding the express language of the standard, the Commission held that section 56.18002(a) must contain an implicit adequacy requirement and the “reasonably prudent” miner test is appropriate for determining whether a workplace examination was conducted adequately:

We do not agree that the operator must only examine the workplace to a standard of care slightly surpassing not conducting the examination at all The requirement that the operator designate a “competent person” to conduct the examination must mean that there will be substance to the examination. Many miners could detect “obvious” or “egregious” hazards. The requirement that a competent person examine the working place certainly raises the substantive requirement for the examination to the level of a meaningful examination Having determined that under the standard, the examination must be adequate, *we must articulate the appropriate test for such an examination.* We conclude that the application of the “reasonably prudent” miner test is appropriate here. *U.S. Steel Mining Co., LLC*, 27 FMSHRC 435, 439 (May 2005).

Sunbelt Rentals, 38 FMSHRC at 1625-26 (emphasis added). The Commission stated:

The Secretary did not define the term “adequate” before the Judge or in his PDR. During oral argument before the Commission, the Secretary sought to rectify this omission and stated that a workplace exam under the standard is ‘adequate’ ‘if it is reasonably likely to identify conditions which may adversely affect safety and health.’

Id. at 1622.

Notwithstanding the Secretary's first articulation of the adequacy standard on appeal, the Commission found that Respondents did not lack fair notice that section 56.18002(a) contained an "adequacy" standard at the time of the citation:

In light of the protective purposes of the Act and our extensive case-law [sic] regarding the reasonably prudent person test, we hold that the Respondents should have been aware that broadly-worded standards requiring examinations by competent persons must meet a standard of adequacy under the reasonably prudent person test. Respondents cannot claim to be surprised that the examination required under section 56.18002(a) must be adequate to uncover workplace hazards. This is, obviously, the purpose of the examination.

Id. at 1627. Finally, the Commission specifically instructed that consideration be given on remand to "whether the seventh level of the pre-heat tower was a 'working place,' and whether Davis' workplace examination was adequately conducted, *as defined by this decision.*" *Id.* at 1628 (emphasis added).

After issuance of the Commission's decision, I held a conference call with the parties and set this matter for hearing in May 2017. Thereafter, in November 2016 and January 2017, I approved a settlement agreement disposing of the citations against LVR and Roanoke, respectively.

In April 2017, Sunbelt again moved for summary decision and argued that the seventh floor of the preheat tower was not a "working place" as defined in section 56.18002(a), and that the Secretary was unable to establish a violation. Sunbelt's Mot. for Summ. Decision at 13. By Order dated May 18, 2017, I denied Sunbelt's motion and found that "issues of material fact still remain regarding the adequacy of Sunbelt's January 8, 2013 workplace examination and whether the seventh level of the preheat tower constituted a 'working place' within the meaning of section 56.18002(a)."

During pre-trial discovery in this matter, Sunbelt asserted that Davis conducted Sunbelt's January 8, 2013 workplace examination. *See* Sunbelt's Answer to the Secretary's Fourth Interrogatory, Ex. A (identifying Davis as the person who performed Sunbelt's workplace examination); *see also* Ex. B, ¶ 12 to Davis' affidavit, submitted by Sunbelt in support of its August 26, 2013 Motion for Summary Decision, (identifying Davis' January 8, 2013 examination as Sunbelt's workplace examination).

A hearing was held in Roanoke, Virginia on May 23-24, 2017. The parties stipulated to jurisdictional issues, the exclusion of certain testimony, and the fact that Sunbelt abated the

alleged violation in a timely and good-faith manner. Tr. 11-12, 25-26. The parties offered testimony and documentary evidence.² Witnesses were sequestered.

At the outset of the hearing, Respondent proffered Respondent's Exhibit 10, a two-page Job Safety Analysis (JSA) on a Sunbelt Rentals form that was completed by Sunbelt foreman Douglas Redmond on January 8, 2013. Respondent represented that Redmond's JSA reflected the last two pages of Davis' January 8, 2013 workplace examination, recorded in a pre-shift hazard assessment form received into evidence as Government Exhibit 6. The Secretary objected to that representation, but did not object to the document being received into evidence as a January 8, 2013 JSA prepared by Redmond. Tr. 28-32.

Subsequently, when I inquired whether Sunbelt was going to argue that it did a second examination after Davis' examination during the January 8, 2013 shift, Respondent's counsel stated that Respondent did a workplace examination, continued to look for hazards throughout the shift, and would have removed and corrected any hazards found as scaffolding was being erected toward the seventh floor. Tr. 234-35. When the undersigned asked the Secretary about his position on the "*at least once each shift*" language, the Secretary averred that Respondent had contended up until hearing that Davis had conducted its workplace examination as evidenced by Davis' pre-shift hazard assessment form. Tr. 243-44; Gov. Ex. 6.

At the conclusion of the Secretary's case in chief, Sunbelt moved for judgment on partial findings under Rule 52(c) of the Federal Rules of Civil Procedure and moved to strike the proposed special assessment. After extended discussion, I denied Respondent's motions. Tr. 220-234.

By the close of the hearing, Respondent was indeed arguing that two workplace examinations were conducted on January 8, 2013, before Sunbelt miners entered the tower and the accident occurred. Therefore, Sunbelt argues that its compliance with the workplace examination requirement was met twice over. Tr. 440; *see* Gov. Ex. 6 (Davis examination) and R. Ex. 10 (Redmond JSA). At the close of the hearing, Respondent also renewed its motions and asked that I take judicial notice of MSHA's January 23, 2017 final rule, which amended 30 C.F.R. § 56.18002(a), with respect to examinations of working places in metal and nonmetal

² In this decision, "Tr.-#" refers to the hearing transcript followed by the page number(s); "Jt. Ex. #" refers to joint exhibits; "Gov. Ex. #" refers to the Secretary's exhibits; and "R. Ex. #" refers to the Respondent's exhibits. Jt. Ex. 1, Gov. Exs. 1-8, 10-12, and R. Exs. 8-11, 14, 19-20, and 34 were received into evidence.

mines. Tr. 438-441. I have taken such judicial notice.³ Otherwise, however, I denied Sunbelt's motions and requested briefing on the following issues: the adequacy of the examination or examinations at issue, i.e., whether the falling material that struck Tyler was capable of being discovered by a reasonably prudent and competent person conducting an adequate workplace examination; whether the portion of preheat tower vessel number four, located on the seventh level above the heads of where the Sunbelt miners were erecting scaffolding, was a "working place;" how the potentially latent defect, if any, affects whether there was a violation of the standard; and whether the specially-assessed penalty proposal was appropriate. Tr. 439, 450-51.

After careful review of the record, and the parties' post-hearing briefs, and accepting the Commission's remand as the law of the case, I find 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. I find that the seventh level, located directly above the heads

³ On January 23, 2017, MSHA issued a final rule amending its standards in Parts 56 and 57 of Title 30 of the Code of Federal Regulations for "Examinations of Working Places in Metal and Nonmetal Mines." 82 Fed. Reg. 7680, 7695 (Jan. 23, 2017) (to be codified at 30 C.F.R. § 56.18002). The proposed final rule was stayed. Following the expiration of the stay, MSHA proposed further changes to the proposed final rule. The additional changes, scheduled to effective June 2, 2018, amend section 56.18002(a) to provide as follows:

(a) A competent person designated by the operator shall examine each working place at least once each shift *before work or as miners begin work in that place*, for conditions that may adversely affect safety or health.

(1) *The operator shall promptly notify miners in any affected areas of any conditions found that may adversely affect safety or health and promptly initiate appropriate action to correct such conditions.*

(2) *Conditions noted by the person conducting the examination that may present an imminent danger shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.*

Examinations of Working Places in Metal and Nonmetal Mines, 83 Fed. Reg. 15055-2, 15064 (Apr. 9, 2018) (to be codified at 30 C.F.R. § 56.18002) (emphasis added to illustrate revisions). On April 24, 2018, the National Stone, Sand, & Gravel Association announced that MSHA would not issue citations under the new rule until October 1, 2018, although the agency may issue citations in the case of extremely dangerous hazards. News Release, Nat'l Stone, Sand, & Gravel Ass'n, MSHA Adding Time to Comply With Exams Rule (Apr. 24, 2018), <https://www.nssga.org/msha-adding-time-to-comply-with-exams-rule/>.

of the miners erecting scaffolding below, was a “working place.”⁴ I find that the violation was properly designated as S&S because it contributed to a hazard that was reasonably likely to result in a fatal injury to one person, and did, in fact, knock Tyler unconscious and leave him dangling from the scaffold. I further find that the violation resulted from Sunbelt’s high negligence because Sunbelt’s examiner(s) ignored site-specific training to inspect the vessel overhead and remove any potential loose material prior to entering the vessel. I assess a penalty of \$23,750 based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act. The reduction in penalty from the Secretary’s proposed special assessment is the result of Respondent’s small size and diminutive history of prior violations, and my determination that the Secretary’s non-binding, specially-assessed penalty points for the statutory criteria of gravity and negligence are duplicative, somewhat overstated, and excessive based on the record evidence.

III. Findings of Fact and Credibility Determinations

A. Roanoke’s Preheat Tower

Roanoke operates a cement plant, including a preheat tower that uses raw-mix limestone to make concrete. Tr. 97-98. During production, the top of the tower operates at around 600 degrees Fahrenheit, and the bottom of the tower, nearest the kiln, operates at approximately 2800 degrees Fahrenheit. Tr. 257. Jason Oedel, Roanoke’s pyro supervisor, is responsible for the preheat tower and kiln system. Tr. 247-48, 252-253.

Roanoke’s preheat tower is comprised of six stages, called vessels (or cyclones). Tr. 95-97, 254. The six vessels protrude through the center of the tower. Tr. 93, 251, 268. The vessels are chamber-like structures, about fifty feet tall. Tr. 268. The vessels are vertically stacked, but offset, and not perfectly aligned. Tr. 256-57, 301.

An exterior elevator provides access to the floors of the preheat tower. Tr. 252. There are nine floors, approximately 50 feet apart. Tr. 268. The floors are numbered in ascending order from the ground level up, while the vessels are numbered in descending order from the top down.

⁴ The Secretary argues on post-hearing brief that because Sunbelt failed to identify Redmond as a person who performed a workplace examination on January 8, 2013 at any time during the three years in which this case was pending before trial, it should be barred by the Federal Rules of Civil Procedure from successfully arguing that Redmond, as a undisclosed competent person, somehow satisfied Sunbelt’s obligation to examine each working place at least once during the January 8, 2013 shift for conditions which may adversely affect miner safety or health. *See* Sec’y Br. at 22-23. As further explained herein, I agree with the Secretary, essentially for the reasons he articulates, that Sunbelt is barred from pursuing this theory of compliance with the cited standard. *See infra* section IV, A, 1. Alternatively, as further explained herein, even assuming that Redmond was a competent person as Davis testified, I find that it would not make any material difference in the circumstances of this case. I find that both of Sunbelt’s examiners (Davis and Redmond) failed to conduct an adequate examination of the working place from the seventh floor portholes because they failed to identify extensive and obvious buildup of material that may fall on miners working below, and because they failed to promptly initiate appropriate action to correct the hazard.

Thus, the stage-six vessel is accessed at the first floor, and the stage-one vessel is accessed at the ninth floor. Tr. 251-254.

Limestone is fed into the first vessel at the top of the tower. It is then heated at increasingly higher temperatures as it flows downward through each vessel. Tr. 257. Each vessel comprises one stage of the preheat process. The first vessel at the top of the tower is stage one. The last vessel at the bottom of the tower is stage six. Tr. 251-254.

The interior walls of each vessel are lined with refractory brick. Tr. 107, 115. Over time, the raw-mix limestone adheres to the refractory, resulting in buildup. Tr. 105-09, 113-18; Gov. Ex. 4, at 31-32, 34-38, 41, 43.

There are three two-foot by two-foot portholes (man doors) surrounding the circumference of each vessel at various heights. Tr. 255. The inside of the tower can be viewed and accessed through the portholes. Tr. 258, 262-63. Some of the vessels are situated between multiple floors. Accordingly, some portholes are accessible at certain floors, but not at others. Tr. 253, 255-256. Each vessel also has a much smaller one-inch by one-inch porthole, which enables a miner operating an air lance to clear buildup of material. Tr. 259.

During normal production, the portholes are closed and the tower is sealed to prevent entry. Tr. 98-99. Once the tower has cooled, the larger portholes are used to access the interior of each vessel to inspect for damaged refractory and buildup of loose material, and to perform maintenance. Tr. 95-97, 187-88, 258.

There is no lighting on the inside of the preheat tower. Tr. 392. The only natural light comes into the tower through the small portholes when they are opened, so portable lights are necessary. Tr. 101-102.

B. Roanoke's Annual Shutdown and Workplace Examination Procedure

Roanoke shuts down the preheat tower each January for maintenance. Tr. 248-249. A scheduled maintenance outage was held between late December 2012 and early January 2013 so that the tower could cool before maintenance work was performed. Tr. 248-49, 257-58.

Roanoke contracted with LVR to perform annual refractory maintenance on the preheat tower in January 2013. LVR subcontracted with Sunbelt to erect scaffolding inside the tower so LVR could perform the maintenance work. Tr. 130, 240, 274, 416. Both Sunbelt and LVR had years of experience as contractors at the Roanoke Cement plant. Tr. 351-52, 382, 417.

LVR was scheduled to perform maintenance in the stage-four vessel, which has three accessible portholes on the sixth floor, and two on the seventh floor. Tr. 255-256. Specifically, LVR was going to replace the thimble, which extended at the top center of the tower from the sixth to the seventh floor of the stage-four vessel, and to replace any refractory brick that had disintegrated or cracked. Tr. 107, 129-130, 191; Gov. Ex 4 at 31.

On or about December 30, 2012, Roanoke shut down the preheat tower and conducted its last workplace examination of the area as part of shutdown activities. Tr. 121-23. Once the tower began cooling, Roanoke employees performed an initial cleaning of the tower by opening the one-inch by one-inch portholes and using 20-foot long air lances to try to blow down any buildup material. Tr. 108, 123-25, 259-260. The Roanoke employees performing the air lancing did not enter the tower because of the intense heat. Tr. 122. Consequently, they did not do visual examinations inside the tower, other than what they could see through the tiny portholes used during air lancing. Tr. 285.⁵

Oedel testified that the Roanoke employees performed air lancing “all the way through the tower.” Tr. 259-60. Oedel further testified that he saw documentation indicating that Roanoke performed a “Preheater Shutdown Cleaning Checkoff List” (R. Ex. 8), and that nothing unusual was noted, but the document is silent as to areas air lanced. Oedel did not personally observe the Roanoke employees perform the air lancing from top to bottom, although he testified that “they said they had did that.” Tr. 260-261.

By contrast, Nichols testified that Roanoke employees air lanced the tower from the sixth floor down, but not from the seventh floor down. Tr. 118, 124.

THE COURT: And you testified it was from the sixth level down?

THE WITNESS: Yes, sir.

THE COURT: How did they clean it from the sixth level up?

THE WITNESS: They didn't.

Tr. 124. Nichols subsequently testified:

THE WITNESS: The seventh level could have been cleaned, but it was not.

THE COURT: And how could it have been cleaned?

THE WITNESS: By lancing the sides of it. Now, that would not have been Sunbelt's responsibility to do the cleaning. That should have been Roanoke's. They did all of the cleaning on it, but that should have been done. Sunbelt should have recognized that hazard, had they done their proper workplace exam. It was very obvious to me and to Andy, when we went up on the seventh level, that there was a problem.

Tr. 126.

⁵ Contrary to Oedel's testimony that the Roanoke employees who air lanced through the 1-inch by 1-inch portholes did not do a visual examination inside the tower, Davis testified that the persons wanding the vessels must have looked inside because it was “kind of hard not to look inside when you are wanding. You have to look in there to wand something.” Tr. 285, 398. I credit Davis, but find that the Roanoke air lancers' range of vision was very limited by the 1-inch size of the portholes.

After the initial shutdown cleaning, Roanoke allowed the tower to cool and used fans over several days. Thereafter, Roanoke opened the two-foot by two-foot portholes on each vessel. Tr. 257-58. Oedel initially testified that there was no way to inspect the inside of the vessel without scaffolding in place. Tr. 267. Upon subsequent questioning, however, Oedel conceded that prior to the erection of scaffolding, the only way to check for potentially loose material was to go to each of the floors and look into the tower through the portholes. Tr. 305.

Once the tower was cooled, Oedel testified that he used a big light to inspect every open porthole throughout the tower. Tr. 263. Oedel testified that this initial walkthrough was conducted in early January, prior to LVR's arrival. Tr. 263. Oedel acknowledged that he was not performing or documenting any workplace examination at that time. Tr. 286. Oedel testified that he was looking "for any damage that [he] didn't know about, or work that needs to be replaced, and any type of buildup that we need to remove before contractors showed up on site." Tr. 264.

After his initial walkthrough, Oedel testified that he conducted an additional walkthrough of each floor of the tower with construction supervisor Gary Snyder from LVR. Tr. 250, 273, 298. Oedel also testified that Roanoke and LVR inspected each level of the preheat tower, including the seventh floor, by looking through the exterior doors for loose refractory and buildup. Tr. 262, 264-266, 268. Oedel further testified that the conditions of the tower remained the same during both pre-accident walkthroughs. Neither Oedel nor Snyder noticed any potential hazard, such as loose material, "because we thought that it was all part of the monolithic." Tr. 267, 298.

C. The Early January Arrival of Contractors

On January 2, 2013, Sunbelt arrived on site and started preparing to construct the scaffold in the preheat tower. Gov. Ex. 3 at 4. Roanoke provided site-specific hazard awareness training to Sunbelt (and LVR) at that time. Gov. Ex. 3 at 4; 290. Specifically, Roanoke provided Sunbelt supervisor Kendrick Davis and his crew with site-specific training prior to allowing them to perform work at the mine. Tr. 146-147, 386-87; Gov. Ex. 7. The training instructed contractors to remain alert and check for overhead hazards when entering any building other than an office building. Tr. 149, Gov. Ex. 7 at 1, ¶ 9. More specifically, Roanoke instructed Davis, as well as all contractors performing work inside the preheat tower, that "[p]rior to vessel entry inspect vessel overhead and remove any potential loose material." Gov. Ex. 7 at 3; Tr. 149-150; 288-292.

Davis had been trained as a "competent person" to perform workplace examinations for Sunbelt and had done so inside vessels at the Roanoke Cement plant since 2000. Tr. 330-31, 335. Furthermore, Davis had 26 years of experience working with scaffolding, safety supervision, and workplace examinations. Tr. 324-25. Davis had never received any reports of material falling inside the preheat tower, and never had an injury or accident on his crew. Tr. 335-37. Davis was trained to recognize potential hazards related to scaffold erection. Tr. 326-27, 329; R. Ex. 9. Davis testified that he and two other persons were designated as competent persons to perform Sunbelt's workplace examinations on January 8, 2013. Tr. 395-96. Davis subsequently testified that Douglas Redmond was a competent person. Tr. 426. Davis did not identify the other purported competent person.

Davis testified that Sunbelt began erecting scaffolding sometime prior to January 8, 2013. Tr. 345. Nichols testified that Sunbelt arrived to do setup work on January 5, 2013. Tr. 130. Each morning from January 5 through January 8, Davis conducted a workplace examination prior to the commencement of Sunbelt's work. Tr. 345-46, 353-56.

D. Sunbelt's January 8, 2013 Workplace Examination(s)

On January 8, 2013, Sunbelt was preparing to erect scaffolding on the sixth floor of the tower so that LVR could do refractory repair work. Tr. 336. Sunbelt was working in the designated work area of stage 4 of the pre-heat tower, accessed at the sixth floor, and Sunbelt was erecting the scaffolding towards the seventh floor. Tr. 250, 413; Gov. Ex. 6.

Davis spoke with LVR foreman Snyder at about 7 a.m. on January 8, 2013, before Sunbelt began work. Tr. 343. Snyder told Davis to begin erecting the scaffolding at stage 4, and also told Davis that that the tower had been prepped by Roanoke and was safe to begin work. Tr. 343-44. Davis testified that he did not know who had done this prep work, when they had done it, or what they had done, other than "they wanded it and did a visual inspection to look for loose material," although Davis did not know what areas of the tower had been wanded and visually inspected. Tr. 398-99. Despite Snyder's assurances that the preheat tower was safe to begin work, Davis knew that he had the responsibility to conduct Sunbelt's workplace examination and that this duty was not dependent upon being told by LVR that the area was safe for work. Tr. 346-347.

Davis' pre-shift hazard assessment form for January 8, 2013 indicates that he conducted a pre-shift examination at 7:00 a.m. Gov. Ex. 6 at 1; Tr. 396. Davis testified, however, that he first met with Snyder at 7 a.m. for approximately 20-30 minutes. Tr. 347-348. Thereafter, Davis testified that he took the elevator to the sixth floor of the preheat tower and walked around the floor looking for tripping hazards or other objects on the floor, because that was the area that Sunbelt was going to be working. Davis then visually inspected the interior of the vessel through the three portholes on the sixth floor, "looking for loose material, missing refractory, loose brick, loose thimbles—anything out of the ordinary." Tr. 348-49.

Davis testified that there was daylight when he performed his workplace examination and he could see inside the cyclone. Tr. 363. By contrast, inspector Nichols testified that he arrives at the Staunton Field Office every Monday morning at 7:00 a.m., and that in January, it is still dark when he gets to work. Tr. 144.⁶ I credit Davis and find that by the time he arrived at the sixth floor to conduct his workplace examination after meeting with Snyder, there was first light at daybreak.

Davis testified that from the sixth floor portholes, he could see all the way up to the ceiling of the seventh floor: "You can see all the way through the top of the ceiling of the

⁶ I take judicial notice of the fact that the sun rose at 7:34 a.m. in Troutville, Virginia on January 8, 2013. U.S. Naval Observatory Astronomical Applications Department, Complete Sun and Moon Data for One Day, http://aa.usno.navy.mil/data/docs/RS_OneDay.php (follow hyperlink; then use "Form A: U.S. Cities or Towns" to search for January 8, 2013 in Troutville, Virginia).

seventh, and you can also see the light shining in on the portholes from the seventh floor also.” Tr. 349-50. When asked whether he could see the entire seventh floor, Davis testified that he “could see the roof from the sixth floor up to the seventh.” Tr. 350. Davis was then asked the following leading question from Respondent’s counsel: “[D]id you think that the sixth floor port holes gave you a better vantage point to examine the seventh?” Davis replied, “I did, because from the sixth floor, you can see the under-roof of the sixth floor, and you can see the top roof of the seventh floor from the sixth.” *Id.*

Davis admitted that during his workplace examination, he did not go to the seventh floor to look through the portholes there. Tr. 350, 413-14. When asked why he did not go to the seventh floor, Davis testified, “[w]e was [sic] actually not working on the seventh floor. And my thoughts was [sic], looking from the sixth up through the seventh, I can see any loose material hanging from there, and also I could see the thimbles from the inside and outside and the brick on the outside of the thimble.” Tr. 350-51. On cross examination, Davis testified that he did not go to the seventh floor because “you can only see straight across. I have a better vantage point looking from the sixth floor up, because you can see the outside of the thimble and the brick from—you can’t see the brick from the side of the thimble from the seventh floor.” Tr. 421. Davis further testified that Sunbelt had no employees working on the seventh floor on January 8, 2013. Tr. 382.

I do not credit Davis’ testimony that he could see any loose material hanging from the sixth floor and that he could only see straight across from the portholes on the seventh floor. Rather, as further set forth below, accident investigator Nichols credibly testified and explained how pictures he took with his camera from a seventh floor porthole just after the accident scene was preserved under the 103(j) and (k) orders, show rough, gray buildup on top of reddish brick refractory in the “elbow” above the scaffold where Tyler was working. Gov. Ex. 4 at 31-32; Tr. 105-110. At the same porthole location on the seventh floor, Nichols also took close-up pictures of extensive buildup on the walls of the elbow and around the door, and a clear differentiation in color between gray buildup and reddish refractory is visible in some of the pictures. Gov. Ex. 4 at 34-38, 41; Tr. 113-18.

After Davis looked through the sixth floor portholes, but not the seventh floor portholes, Davis and his crew beat the sides of the vessel with hammers and four-foot tubing for 20 to 30 minutes in an effort to “vibrate this thing as much as possible” and cause loose rock and refractory to fall out. Tr. 353-354, 357-358. After Davis’ crew beat the vessel, they “wait[ed] for the dust to settle” and then looked to see whether any buildup fell to the bottom of the vessel, “[a]nd if we don’t see any buildup down through the small cylinder, we go ahead and proceed with the work.” Tr. 354. Davis testified that he came up with the idea to beat on the outside of the tower back in 2000, without any input from Roanoke, although Snyder at LVR thought it was a good idea. Tr. 355-56, 406.

Davis testified that he had conducted his workplace examination the same way for the previous thirteen years, and that Oedel at Roanoke, and Snyder at LVR, never told him to do it a different way. Tr. 351. Davis further testified that he saw no hazards, buildup, or hanging material during his workplace examination; that the conditions he viewed on January 8, 2013

were no different than he had observed in previous years; and that he had never seen anything other than dust fall in the vessel. Tr. 351-52, 382.

When the undersigned expressed skepticism that the mining conditions observed were static and no different over the course of thirteen years of workplace examinations, Davis testified as follows:

Well, this is a cement plant, so it is all dust and dirt in this thing, because they make powder concrete.

So we expect to see dust and dirt off the sides when we go in there.

So, you know, when we do our initial inspection—when I do my initial inspection, I also have another gentleman come up and do another initial inspection behind me.

We also didn't bring the crew members up, and do a visual inspection, and then we also have them--I also have them take hammers and four-foot tubing, and beat around the sides of the cyclone.

Because what we want to do, is we want—we want to vibrate this thing as much as possible to get—if any loose rock or loose refractory or loose brick were to fall, we don't want it to fall while we are inside of it.

So we vibrate this thing and beat and bang for about twenty to thirty minutes to try to vibrate, because we are putting in tons and tons of scaffolding inside this unit, which is a massive amount of weight.

So before I send these guys in, I want to try to vibrate and beat on this thing as much as possible.

And, yes, when we beat and bang, it is dusty.

Sometimes we can't even see in there, because that is how much dust comes down.

So we wait for the dust to settle. We might do it again. And if we don't see any buildup down through the small cylinder, we go ahead and proceed with the work.

Tr. 353.

Davis' workplace examination lasted about 15-20 minutes. Tr. 356. Davis did not observe any hazards, including any hazards above where Sunbelt miners would be erecting scaffolding, during his workplace examination on January 8, 2013. Tr. 382; Gov. Ex. 6. Davis' pre-shift hazard assessment form listed "poor lighting, loose objects falling, and dust" as potential hazards. Gov. Ex. 6. When confronted with his pre-trial deposition, Davis confirmed that falling objects could be scaffolding and refractory brick falling from the sides and up above. Tr. 411-13. When asked what he meant when he listed potential falling objects in his workplace examination, Davis testified, "[w]ell, like I said earlier, there is always potential for loose brick or debris, so I wanted the guys to stay aware to keep their eyes and ears open." Tr. 413. Davis

also testified that he noted potential falling objects as a workplace hazard because “loose material” such as “dust” was always falling within the tower and he “had seen dust fall before from working inside the tower, prior to the accident.” Tr. 370, 418. Despite noting that lack of lighting was a workplace hazard, Davis did not use supplementary lighting when conducting his workplace examination, and no lighting had been installed within the vessel until Sunbelt installed swing lights while erecting the scaffolding. Tr. 371-372.

After his visual inspection, Davis testified that he sent another foreman, Douglas Redmond, to conduct another inspection to see if there was anything that Davis had missed. Tr. 357. As noted, Davis testified that Redmond was a competent person. Tr. 426. Davis testified that Redmond’s inspection also lasted 15-20 minutes. Tr. 357. On cross examination, Davis testified that he did not go with Redmond when Redmond conducted his examination. Davis was then asked, “So you don’t know where he went?” Davis testified, “I know he went to the floor that I went to.” Tr. 425. I infer from Davis’ testimony that Redmond, like Davis, also did not conduct his examination from any seventh floor portholes. In any event, there is no evidence that Redmond went to the seventh floor to conduct his examination from the portholes there. Following Redmond’s inspection and before Sunbelt began performing work on January 8, 2013, Davis and Redmond discussed their “notes” with the crew and the crew members signed off on both Davis’ workplace examination form and Redmond’s JSA. Tr. 357; Gov. Ex. 6; R. Ex. 10.

Inspector Nichols testified that during his investigation, he asked Davis if he had done a workplace examination on January 8, 2013 and Davis provided him with “a couple of forms,” more specifically, Gov. Ex. 6, consisting of two, unstapled pages, and no other document. Tr. 130-31. As further explained below, Davis testified that he also gave Nichols the two-page JSA performed by Redmond at the same time that Davis gave Nichols his own pre-shift hazard assessment. R. Ex. 10; Gov. Ex. 6; Tr. 427. I credit Davis. I asked Davis early on during his direct examination, “What type of written document do you use for those workplace exams?” Davis testified that, “Roanoke Cement has a document that they would like us to fill out also for their workplace examination. So we fill that out. And we also have in-house, called ‘JSA’ that we fill out for Sunbelt.” Tr. 335-36.

Thereafter, on direct examination, Davis identified Government’s Exhibit 6, entitled “Pre-Shift Hazard Assessment,” as two pages of Roanoke Cement’s inspections sheets (comprising a single document) which Roanoke requested that Davis complete prior to work each morning. Tr. 362, 369; Gov. Ex. 6. Davis testified that he filled out the pre-shift hazard assessment form after he met with LVR supervisor Snyder, conducted his examination, and directed his crew to beat the vessel. Tr. 362-63; Gov. Ex. 6.

By contrast, Respondent's Exhibit 10 is a two-page JSA on a Sunbelt Rentals form that was completed by Douglas Redmond on January 8, 2013, and was received into evidence at the outset of the hearing. Tr. 28-32.⁷ Redmond did not testify at the hearing. Rather, Davis testified about Respondent's Exhibit 10, the JSA that Redmond completed. Tr. 364-69. On cross examination, Davis testified that he gave Nichols a copy of Respondent's Exhibit 10 when he spoke with him on the day of the accident. Tr. 420-21. Davis further testified on cross examination, as follows:

Q Did you go with Mr. Redmond when he conducted his examination?

A No.

Q So you don't know where he went?

A I know he went to the floor that I went to. Did I supervise him when he did his inspections? No.

Q Okay. And when asked for a copy of your workplace examination, you provided Mr. Nichols with a copy of your workplace examination; correct?

A Yes.

Q And you were a competent person when you did this work?

A I was one of them, yes.

Q And you did one on January the 8th?

A Yes.

...

FURTHER REDIRECT EXAMINATION

BY MR. VANCE:

Q Mr. Davis, is Mr. Redmond a competent person?

A Yes.

Tr. 424-26. The undersigned then asked Davis the following:

Q And when I asked you whether you gave Douglas Redmond's job safety analysis to the inspector, what was your testimony?

⁷ The first column on the first page of the JSA indicates that Sunbelt reviewed with the crew a sequence of basic job steps: review job survey, tool box talk, [illegible] the day; flex and stretch, and start erecting. The second column on the first page enumerates potential hazards as noise, hand and power tools, hand hazards, material handling, ladders, falls, slips and trips, pinch points, confined space, and emergency plan, although page two of the document contains check marks indicating that the foregoing are hazards on the job. The third column on the first page lists additional potential hazards and steps to correct or eliminate the hazard[s], i.e., "check all PPE, 100% fall protection, use twist method in chain line, overhead protection at all time falling rocks and dust, make sure everybody know[s] the location of the eyewash, communication is the key." The second page of the JSA contains checkmarks for the enumerated hazards on the job, a corresponding safety plan for each hazard, and checkmarks for required personal protective equipment (PPE) for each checked hazard. R. Ex. 10; Tr. 364-369.

A Yes.

Q Did you give it to him at the same time that you gave your workplace exam—the first two pages?

A Yes.

Q Did he ask you any questions about Mr. Redmond doing a separate exam or anything of that nature?

A He did not.

Tr. 427. An extensive colloquy then ensued between the undersigned and counsel for the parties as their respective positions about the import of Redmond's JSA. Tr. 427-33.

E. The January 8, 2013 Non-Fatal Accident and MSHA's Investigation

1. MSHA's Arrival at the Scene

On January 8, 2013, the non-fatal accident that injured Tyler occurred at about 10:30 a.m. Gov. Ex. 1; Tr. 171. The MSHA emergency hotline was notified of the accident at about 10:47 a.m. Gov. Ex. 1.

At the time of the accident, Nichols was inspecting the Castlewood Sand Plant, owned by Roanoke Cement, with safety director Andy Howell. Tr. 65. Howell received a call before MSHA was notified that there had been an accident at Roanoke Cement and a miner had been hit and knocked unconscious off a scaffold. Howell informed Nichols. Tr. 65-67. Nichols called his supervisor and received approval to investigate. Tr. 65, 67. At 11 a.m., Nichols issued a verbal 103(j) order to Howell directing him to preserve the accident site and shutdown the area around the preheat tower until they arrived. Tr. 68; Gov. Ex. 2, Gov. Ex. 3 at 1.⁸ Nichols and Howell then drove to the nearby Roanoke Cement plant. Tr. 67.

When Nichols and Howell arrived at the accident site, the injured miner, Brian Tyler, had just been loaded into an ambulance. Nichols attempted to speak with Tyler, but he "really wasn't responding" to any of the questions that Nichols asked. Tr. 67. Rescue personnel told Nichols that Tyler was "a little out of it" and "really wasn't able to answer questions." Tr. 73-74. They also stated that Tyler "had complained about neck and arm pain and was bruised on his left side." Gov. Ex. 3 at 1-2.

Roanoke personnel on site informed Nichols that the accident occurred while Tyler was erecting scaffolding within the stage-four vessel on the sixth floor of the tower; that Tyler was working inside with his personal protective (PPE) equipment donned; and that some material had fallen, hit him in the head, knocked him unconscious for approximately one minute, and left him swinging from the scaffolding. Tr. 71-72, 74, 119-20; Gov. Ex. 3 at 3. Three of the four straps that held the headband to Tyler's hardhat were broken. Tr. 119-120.

⁸ Following his investigation after arriving on site, Nichols modified the 103(j) order to a 103(k) order at about 1 p.m., and confined the order to the stage-four vessel. Gov. Ex. 3 at 6. The 103(k) order was not terminated until January 10, 2013. Gov. Ex. 2 at 3.

At the time of the accident, Tyler had been receiving scaffolding material from another Sunbelt miner through the porthole on the sixth floor and handing it down to four Sunbelt miners working beneath him. Gov. Ex. 3 at 2. No one saw the material that hit Tyler. *Id.* Davis opined that Tyler was struck by dust. Tr. 395, 418. “From what I can tell, after the accident, it was all just dust. It could have been a big ball of dust that was clunkered up.” Tr. 395. When I asked Davis how he knew that Tyler was not struck by dust on a brick that hit Tyler’s hardhat and then fell down below, Davis testified, “It’s really hard for me to say. I am just looking at the material that was on the landing platform itself.” Tr. 418. The material on the landing platform after the accident was comprised of dust. Tr. 419; Gov. Ex. 4 at 3.

Tyler’s extraction from the vessel was complicated due to the confined nature of the space and the request from rescue personnel that a “headache board” for overhead protection be installed for safety before rescue personnel entered the vessel. Tr. 81. Davis testified that a headache deck, designed to protect miners from falling objects, could be installed only after the initial frame of the scaffolding was completed, and the accident occurred before the scaffolding frame was completed. Tr. 361. Sunbelt was not cited for failure to erect overhead protection. Gov. Ex. 8.

2. Respondent’s and MSHA’s Post Accident Discovery of Buildup of Material Overhead at the Seventh Floor Level

After the accident, Oedel from Roanoke, and Snyder from LVR, went to the seventh floor to look at the area above where the miners had been working. Tr. 271. When they looked through the seventh floor portholes, they saw buildup. Tr. 272-273, 283, 306-309; Gov. Ex. 4 at 4, 11, 23. Oedel testified that “you could see that there was actual buildup, which was not noticed before when I did my walk-through twice.” Tr. 272. Oedel opined that the buildup could have become loose and fractured due to vibration, tower movement, or the fact that the material had cooled since the last time he saw it. Tr. 276. Oedel noted that the tower takes up to eight days to cool and he had “seen stuff stick to a wall for a whole month and never move [but] [t]he same type of stuff could fall off three days later after cooling off.” Tr. 276-77.

When asked why he had not noticed the buildup during his previous walk-throughs, Oedel testified:

A The material—the way the air flow runs through there in this type of material, it will lay stuff in this crossover. And the buildup actually looked like it was part of the monolithic.

So we went through the first couple of times, and there was no fractures, there were no cracks. To me it looked like: Hey, this is all good and fine. The first time it was okay, and the second time, myself and Gary Snyder went through. We saw nothing until the incident happened, and that was when we noticed it.

Q Would you consider that to be a latent issue?

A Yes.

Q Would it be a true or false statement to leave one with the impression that all the refractory was brick type?

A Not all the refractory is brick type.

Q Was the buildup you saw when you went back out there the same color as the buildup or the same color as refractory brick or some other color?

A It is all gray. It all looks the same, especially in those type of areas.

Tr. 272.

Oedel went on to testify that at the time of his pre-accident walk-throughs, the buildup “all looked the same. It looked like it was our refractory in there. It didn’t look like buildup, until, obviously, after the fact when we saw that. I mean, it was—we can’t notice—I mean we can’t say anything if we don’t notice it.” Tr. 275. After the accident, Oedel testified that “it was definitely different.” *Id.* The only reason it looked different “is because of the small piece that came off, and that allowed us to see that there was buildup there. But you know, what made it fall or what made it change—it could be anything—vibration, the tower moving, because the whole tower is 400-plus feet tall. It can move a little bit when the wind blows.” Tr. 276; *see also* Gov. Ex 4 at 40 (showing a small piece of buildup that had broken off).

Nichols testified that the brick was a reddish color. Tr. 115. Oedel testified it was the same gray color as the limestone buildup on the brick. Tr. 273. I credit Nichols. Oedel’s testimony is clearly belied by the photographs in evidence. *See e.g.*, Gov. Ex. 4 at 31, 35-38. Furthermore, the extent of the buildup around the porthole door and adjacent walls that Nichols and Oedel observed from the seventh level directly after the accident (*see, e.g.*, Gov. Ex. 4 at 28, 29, 31, 34-38) far exceeded “the small piece that came off,” (*see* Gov. Ex. 4 at 40), which Oedel testified about. *See* Tr. 276.

When I asked Oedel whether LVR or Sunbelt should have gone to the seventh level and looked through the portholes, Oedel testified:

A Yeah. Anywhere they are working they should. LVR does their workplace exams and all that before they send people in. But nobody goes in until the scaffolding is built, so you have to have the scaffolding in there first. And it would be up to Sunbelt to go in and check. I know I have witnessed Von [Davis] doing that before.
THE COURT: What do you mean you have witnessed him doing that before?

THE WITNESS: I have witnessed him walk through the tower and check his areas before he allows guys to go in—a workplace exam or a job site, JSA, or whatever. I have seen him do it.

THE COURT: And when you have seen him do it before, is that prior to the scaffolding being built?

THE WITNESS: Yes.

THE COURT: Okay. Would he walk to each of the levels?

THE WITNESS: Yeah, where they are working at. We try to disconnect the levels, from where people are working. And what I

mean by that is, we will remove sections of feed pipe, block things off. So let's say something at the top of the tower pulls off—if the material does come down, it will go out and hit the floor, and it doesn't go into the vessel where people are working at. So we really try to eliminate anything like that happening.

Tr. 277-79.

Meanwhile, after receiving a brief overview of the accident, Nichols and Roanoke safety director Howell proceeded to the preheat tower to perform an inspection. Gov. Ex. 3 at 4; Tr. 64, 66. They took the elevator to the sixth floor, put on fall protection, and entered the stage-four vessel through a sixth-floor porthole to assess where Tyler had been standing at the time of the accident. Tr. 91, 94. Nichols observed “a lot of small broken material” on the scaffolding where Tyler had been standing and took photographs of the scene. Tr. 84-86, 89-90; Gov. Ex. 4 at 6, 22.

Nichols took pictures shortly after the accident occurred, which indicate that the vessel was a large, confined, open space, accessible from the sixth and seventh floors. Tr. 100, 102-103; Gov. Ex. 4 at 11, 30. A large circular metal structure or “thimble” ran between the floors and narrowed the vessel’s width. Tr. 100-101; Gov. Ex. 4 at 11, 31. Nichols noticed that the thimble was located directly above the area of debris where Tyler had been working and extended up into the seventh floor of the tower. Tr. 102, 190-191. From within the vessel on the sixth floor, Nichols could see light shining in from a porthole on the seventh floor. Nichols and Howell then went to the seventh floor to observe the area of the vessel above the thimble. Tr. 105.

On the seventh floor, Nichols observed through the open porthole that there was obvious buildup material covering the walls and ceiling. Tr. 105-106, 111, 117; Gov. Ex. 4 at 31, 32, 34, 37. Nichols testified that he did not need to peer inside the porthole to see the buildup, because it was evident even from the outside. Tr. 117-118. As noted, Nichols credibly testified that most of the refractory brick was reddish in color, and the buildup was gray. Tr. 115. Nichols described the buildup as “pretty obvious, even when you look at the door and all the buildup on the door, on page number 43 [photo], even just standing on the outside looking in the door, you could see the buildup on the wall.” Tr. 118; Gov. Ex. 4 at 37-38, 43. Given the obvious nature and amount of buildup on the seventh floor, Nichols concluded that the tower had only been cleaned from the sixth floor down, which posed a danger to the workers erecting scaffolding directly underneath:

Q And standing outside the door on the seventh level, and seeing the buildup just inside the door, what did that tell you?

A It told me we had a problem.

Q What was the problem?

A That it hadn't been cleaned or removed or anything on the seventh level.

Q And why is buildup on the seventh level relevant to this case?

A Because what was on the seventh level elbow could possibly fall right down through the holes that we looked at, onto the sixth level.

Q Okay. And that hole we looked at, that is called what?

A The thimble.

Q And directly below the thimble is?

A The sixth floor.

Q The area where they were working?

A Right.

Tr. 118-19. Based on the buildup that Nichols, Oedel, and Snyder all observed from the seventh level portholes directly after the accident, I find Nichols' testimony that the tower had not been air lanced from the seventh floor down to be more credible and probative than Oedel's general and unsubstantiated hearsay testimony set forth above that Roanoke employees air lanced "all the way through the tower." Tr. 259-60.

During his investigation, Nichols interviewed several Sunbelt employees, who told him that they had observed small amounts of material falling during their work. Tr. 150. A Roanoke employee alerted Nichols to a bend in the scaffolding that purportedly resulted from the falling material that injured Tyler. Tr. 79-81; Gov. Ex. 4 at 5.

Davis told Nichols that he had performed a workplace examination, but did not think about going to the seventh floor, and never went to the seventh floor to look through any portholes located there. Tr. 131-132, 158, 189. Davis testified that Nichols never asked him if he had examined the seventh floor from the sixth floor. Tr. 379. As noted, Nichols testified that Davis presented Nichols with a two-page pre-shift hazard assessment and told Nichols that this was his pre-shift inspection. Tr. 131-32, 199; Gov. Ex 6. Nichols also testified that Davis did not give him a copy of any other "inspections," but I have credited Davis' testimony that he also gave Nichols a copy of Redmond's JSA (Respondent's Exhibit 10). Tr. 132, 427.

The pre-shift hazard assessment form documenting Davis' workplace examination appears to have been generated by Roanoke for its contractors. Tr. 131-32; Gov. Ex. 6. Nichols testified that the document looked more like a "toolbox talk" form than a workplace examination form. Tr. 133-137; Gov. Ex. 6; *cf.* R. Ex. 8 (Roanoke's "Pre-heater Shutdown Cleaning Checkoff List," Dec. 30, 2012). The assessment form indicated that Davis conducted a workplace examination of designated work area stage 4 on January 8, 2013 at 7 a.m., where Sunbelt employees were working to erect a scaffold inside of the cyclone for (LVR's) refractory workers. The assessment form listed job specific hazards as dust, fall protection, heat/cold stress and lack of lighting. The form also listed the personal protective equipment (PPE) required. With regard

to work area preparation, the form indicated that barricades/signs were posted, lockout was complete, and the work area (stage 4) was defined.⁹

3. The Issuance of Citation No. 8723677 to Sunbelt After Investigation

After conducting his accident investigation, Nichols concluded that Sunbelt should have traveled to the seventh floor during its workplace examination to visually inspect the area above its miners' heads and check for hazards. Tr. 152-155. More specifically, when asked why he issued a citation to Sunbelt for failure to perform an adequate workplace examination, Nichols testified:

After surveying the area, and looking at the seventh floor, sixth floor, I determined that it would have been very easy for them to have went [sic] to the seventh floor as part of their inspection, since it was overhead of the sixth level.

And had they done that, I think they would have very easily seen the material in there, and probably would have had Roanoke to remove it before they went into work.

Tr. 152-53.

Nichols testified that it is customary for a miner performing a workplace examination to look overhead “[b]ecause of the hazards, and you just don’t know—like low hanging fruit, the hazards can be anywhere. Anytime you are in that area, if there could possibly be a hazard overhead, then you should examine that.” Tr. 154. Nichols further testified that it did not matter how far overhead the hazard existed. Tr. 155. When asked how one examines the area if the hazard is very far overhead, Nichols testified, “[t]here are--where there is lighting, there is a light situation, such as here, if they just went up to the next level, they could have seen the hazard that was on that level.” Tr. 155.

⁹ The assessment form listed potential hazards as pinch points, falls, trip hazards, poor lighting, loose objects falling, dust, and hand crushing. It listed solutions for potential hazards as gloves and a [illegible] for pinch points and crushing, full body harness & lanyard for fall protection and full decks with guardrails, good housekeeping to help with trip hazards, dust mask for dust, light strings added to increase light, and overhead protection for possible falling objects.

Thirteen Sunbelt miners, including Davis, signed the form indicating that they fully understood the job scope, the nature of the hazards involved, the PPE, the designated work area, and the procedures necessary to work safely on this job assignment. They further agreed to comply with safety procedures and stay within the designated work area. Further, if hazards changed during the course of their work days, they agreed to stop work, make note of the hazard, and inform their supervisor (Davis), who agreed to correct the hazard immediately. Finally, Davis certified that the 13 miners were an all-inclusive list “of contractor employees assigned to work this job during this shift.” Gov. Ex. 6.

Davis testified that after Nichols came out of the tower, the inspection party went back to Howell's office for discussion, and just before they sat down, Nichols received a phone call. Davis testified that it was "quiet as a whistle," and the man on the other end was "real loud through the phone, and I could hear the conversation." Tr. 380. Davis testified as follows:

And he was asking how things were going.

And Mr. Nichols said, "Well, I didn't find anything that Sunbelt did wrong." And the guy on the other end said, "Well, I need you to cite Sunbelt on something." And I thought that was odd.

And then Mr. Nichols said, "Well, let me call you back because I have Sunbelt in here with me now."

Q How far away from Mr. Nichols were you during that conversation?

A One to two feet. We were sitting right beside each other.

Q Did he say—did the gentleman on the phone say anything to the extent about whether or not Mr. Nichols could leave without issuing a citation?

A Say that one more time.

Q Did the gentleman on the phone say anything about whether Mr. Nichols could leave without issuing a citation?

A No. I heard him say, "You are going to have to cite somebody on something."

Tr. 380-81.

On cross examination, Davis opined that Sunbelt would not have received a citation had Nichols not been told to issue one. Davis testified that his examination was thorough, and that Howell explained [to Nichols] that Roanoke took all responsibility for the preheat tower and Sunbelt had no responsibility. Tr. 403-04.

After his accident investigation, Nichols issued Citation No. 8723677, which alleged that Sunbelt

did not do an adequate work place exam in the area they were working as there [was] hanging material overhead that had not been noted on the workplace exam. The area above was never checked. This condition could result in serious injury or death. Exposure would be high as employees were working in the area at the time.

Tr. 151, 288; Gov. Exs. 8, 10. Nichols designated the gravity as reasonably likely to result in a fatal injury because miners were working in the area when the material fell and hit Tyler, and death could occur if a miner was struck by falling material. Tr. 155; Gov. Ex. 8 at 2. Nichols designated Respondent's negligence as high because Sunbelt never thought of checking the overhead wall conditions for falling material because it never had anything but dust fall from there, and "Davis said he never thought of the area on the 7th level." Gov. Ex. 8 at 2. MSHA's

Narrative Findings for a Special Assessment of \$51,900 indicate that the gravity of the violation was serious and contributed to the cause of a nonfatal, fall-of-material accident that resulted from Sunbelt's high negligence. Gov. Ex. 10.

IV. Legal Analysis

A. Sunbelt violated 30 C.F.R. § 56.18002(a)

1. Section 56.18002(a), related definitions of “working place” and competent person,” and the Respondent’s failure to identify Redmond during discovery as a “competent person”

At the time of Citation No. 8723677, section 56.18002(a), entitled “Examination of working places,” provided: “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).

Section 56.2 defines “competent person” as “a person having abilities and experience that fully qualify him to perform the duty to which he is assigned.” 30 C.F.R. § 56.2. MSHA’s Program Policy further clarifies that “[t]his definition includes any person who, in the judgment of the operator, is fully qualified to perform the assigned task. MSHA does not require that a competent person be a mine foreman, mine superintendent, or other person associated with mine management.” Mine Safety and Health Administration, Program Policy Manual Volume IV at 64 [hereinafter PPM]. The Commission has specified that “the term ‘competent person’ must contemplate a person capable of recognizing hazards that are known by the operator to be present in a work area or the presence of which is predictable in the view of a reasonably prudent person familiar with the mining industry.” *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1629 (Sept. 1989).

Section 56.2 defines “working place” as “any place in or about a mine where work is being performed.” 30 C.F.R. § 56.2. MSHA’s PPM further clarifies that “the phrase [working place] applies to those locations at a mine site where persons work during a shift in the mining or milling processes.” PPM at 64.

As fully set forth above, on appeal of my original decision granting summary decision for Respondent(s), the Commission held that section 56.18002(a) contains not only a “competent person” requirement, but also requires that a workplace examination be conducted “adequately,” i.e. conducted “to the level of a meaningful examination” as opposed to “only examin[ing] the workplace to standard of care slightly surpassing not conducting the examination at all.” *Sunbelt Rentals, Inc.*, 38 FMSHRC at 1625-26. The Commission further held that Respondent had fair notice that the broadly-worded standard required that an examination by a competent person must be adequate to uncover workplace hazards under the reasonably prudent person test, first articulated by the Secretary and applied by the Commission on appeal. *Id.* at 1625-27. Under that test, a workplace examination under the standard is adequate if it is reasonably likely to identify conditions which may adversely affect safety and health. *Id.* at 1622.

I apply the Commission's decision as the law of the case. As instructed, I consider on remand "whether the seventh level of the pre-heat tower was a "working place," and whether Davis' workplace examination was adequate because it identified conditions which a reasonably prudent examiner would recognize as adversely affecting safety and health. *Id.* at 1627-28.

Before doing so, I find that Davis was a competent person under the standard. As noted, Davis had been trained as a "competent person" to perform workplace examinations for Sunbelt and had done so inside vessels at the Roanoke Cement plant since 2000. Tr. 330-31, 335. Davis had 26 years of experience working with scaffolding, safety supervision, and workplace examinations. Tr. 324-25. Davis was trained to recognize potential hazards related to scaffold erection. Tr. 326-27, 329; R. Ex. 9. I find that Davis was qualified as a "competent person" under the standard at issue, 30 C.F.R. § 56.18002(a). Tr. 326-27, 331; R. Ex. 9.

With regard to the Secretary's argument on post hearing brief that Sunbelt should be barred by the Federal Rules of Civil Procedure from successfully arguing that Redmond, as an undisclosed competent person, somehow satisfied Sunbelt's obligation to examine each working place at least once each shift for conditions which may adversely affect safety or health, I agree with the Secretary essentially for the reasons he articulates. *See* Sec'y Br. at 22-23. "On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act . . . the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure . . ." 29 C.F.R. § 2700.1(b). Rule 26 of the Federal Rules of Civil Procedure sets forth the duty to disclose information. Specifically, Rule 26(a)(1)(A)(i) requires a party to provide to the other party "the name and, if known, the address and telephone number of each individual likely to have discoverable information -- along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A)(i); *see also* *Ebewo v. Martinez*, 309 F.Supp.2d 600, 607 (S.D.N.Y. 2004) (noting that the purpose of Rule 26(a) "is to prevent the practice of 'sandbagging' an opposing party with new evidence"). Rule 37(c)(1) of the Federal Rules of Civil Procedure provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Finally, Rule 26(e)(1)(A) provides that a party who has responded to an interrogatory "must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A); *see also* *Sender v. Mann*, 225 F.R.D. 645, 653 (D. Colo. 2004) (noting "the objectives underlying Rule 26(a)(1) suggest that information 'is incomplete or incorrect' in 'some material respect' if there is an objectively reasonable likelihood that the additional or corrective information could substantially affect or alter the opposing party's discovery plan or trial preparation").

Applying these principles, I find that because Sunbelt failed to identify Redmond as a competent person who performed a workplace examination on January 8, 2013 at any time during the three years in which this case was pending trial, Sunbelt is barred from successfully

making this argument for the first time at trial. *See* Fed. R. Civ. P. 37(c) (a party is disallowed from relying upon information that should have been disclosed pursuant to Rule 26(a)). When asked to provide the identity of the person who conducted Sunbelt's January 8, 2013 workplace examination, Sunbelt had a duty to provide a complete response and identify Redmond as well as Davis. *See* Fed. R. Civ. P. 37(a)(4) (incomplete response should be treated as a failure to respond). Because Sunbelt did not do so, I preclude Sunbelt from sandbagging the Secretary and now arguing that Sunbelt designated Redmond as a competent person who satisfied its obligation to examine each working place at least once each shift for conditions which may adversely affect safety or health.

Alternatively, even assuming that Redmond was a competent person as Davis testified, I find that it would not make any material difference in the circumstances of this case. As noted, Redmond did not testify. His training is not in evidence. On cross examination, Davis testified that he did not go with Redmond when Redmond conducted his examination. Davis was then asked, "So you don't know where he went?" Davis testified, "I know he went to the floor that I went to." Tr. 425. I have inferred from this testimony that Redmond, like Davis, also did not conduct his examination from any seventh floor portholes. In any event, there is no evidence that Redmond went to the seventh floor to conduct his examination from the portholes there.

As shown below, I find that the seventh level of the preheat tower was a "working place." As further shown below, because Sunbelt did not send any competent person, including examiner Davis or Redmond, to look through the seventh level portholes where one was reasonably likely to identify extensive and obvious buildup of material, which adversely affected the safety and health of miners working directly below, Sunbelt failed to conduct an adequate workplace examination, and failed to initiate prompt corrective action, thereby violating section 56.18002(a), as interpreted by the Commission. Furthermore, for the reasons explained below, even assuming that Redmond, unlike Davis, did go to the seventh level and peer through the portholes, I find that both Davis and Redmond failed to conduct an adequate workplace examination because they failed to identify obvious buildup of hanging material as conditions adversely affecting the safety and health of miners working directly below, and failed to initiate prompt corrective action.

2. The seventh level of the preheat tower was a "working place"

On January 8, 2013, when the accident occurred, the Sunbelt miners were erecting scaffolding from the sixth floor towards the seventh floor within the fourth vessel of Roanoke's preheat tower. Tr. 250, 413. The scaffolding was being built by Sunbelt so that LVR could replace the thimble, which extended from the sixth to seventh floor of the stage-four vessel, and replace any refractory brick that had disintegrated or cracked. Tr. 107, 129-130,191; Gov. Ex 4 at 31.

The fourth vessel is a single, open chamber accessed from both the sixth and seventh floors through two-foot by two-foot, inspection portholes. Tr. 253, 255-56, 301-02; Gov. Exs. 11, 23, 25 and 31-33. The main portion of vessel four is accessed through three portholes located at the sixth floor, and the top portion of vessel four is accessed via two portholes located at the seventh floor. Tr. 253, 255-256.

I find that on January 8, 2013, Sunbelt’s “designated work area” was stage four, which includes both the sixth and seventh floor of the preheat tower. Gov. Ex. 6; Tr. 253-54. The Sunbelt miners were erecting scaffolding upward from the sixth floor of the designated work area toward the seventh floor of the designated work area. Tr. 413. I find that the seventh floor was a “place in or about a mine” in a designated active working area inside stage four of the tower. Accordingly, I find that the seventh level was a working place within the meaning of section 56.18002(a) because it was place in or about a mine directly above the heads of miners performing work below. *Cf., Hecla Limited*, 38 FMSHRC 2117, 2122 (Aug. 2016) (where the Commission majority found under a different standard set forth in section 57.3401 that “[i]t is consistent with the policy goals of the Mine Act to require in a highly unusual mining situation the type of examination or testing that is necessary to discover latent hazards that cannot readily be observed, such as rock fractures above a roof, before miners are exposed to the hazards in their working area.”) (internal citations omitted).¹⁰

3. Sunbelt failed to conduct an adequate workplace examination of the seventh level working place at least once during the January 8, 2013 shift, under the Commission’s reasonably prudent miner test

As explained above, because Sunbelt failed to identify Redmond, or anyone other than Davis, as a competent person who performed a workplace examination on January 8, 2013 at any time during the three years in which this case was pending before trial, I have rejected its attempt to do so at trial. Furthermore, even assuming that Redmond was a competent person as Davis testified, I have found that it would not make any material difference here because I have inferred from Davis’ testimony that Redmond, like Davis, also did not conduct his examination from any seventh floor portholes and there is no evidence that he did so. Furthermore, as further explained below, I have found that even assuming that Redmond, unlike Davis, did go the seventh level and peer through the portholes, an assumption that is not supported by any record evidence, both Davis and Redmond failed to conduct an adequate workplace examination because they failed to identify obvious buildup of hanging material as conditions that adversely affected the safety and health of miners working directly below, and failed to initiate prompt corrective action.

Davis admitted that during his workplace examination on January 8, 2013, he did not go the seventh floor to look through the portholes there. Tr. 350, 413-14. By contrast, right after the accident, Oedel and Snyder went to the seventh floor to look at the area above where the miners had been working. Tr. 271. When they looked through the seventh floor portholes, they saw buildup. Tr. 272-273, 283, 306-309; Gov. Ex. 4 at 4, 11, and 23. Accident investigator Nichols also peered through a seventh floor porthole shortly after the accident had been preserved by his 103(j) order. On the seventh floor, Nichols observed obvious buildup material covering the walls and ceiling through the open porthole. Tr. 105-106, 111, 117; Gov. Ex. 4 at 31, 32, 34, and 37. Nichols credibly testified that he did not need to peer inside the porthole to see the buildup, because it was evident even from the outside. Tr. 117-118. As noted, Nichols credibly testified

¹⁰ Concurring in part and dissenting in part, Commissioners Young and Althen found that “[b]ecause miners must visually examine and physically test a working place for loose ground in order to scale it down, the portion of the roof that could contain scalable ground is part of the working place.” 38 FMSHRC at 2122.

that most of the refractory brick was reddish in color, and the buildup was gray. Tr. 115. Nichols described the buildup as “pretty obvious, even when you look at the door and all the buildup on the door, on page number 43 [photo], even just standing on the outside looking in the door, you could see the buildup on the wall.” Tr. 118; Gov. Ex. 4 at 37-38 and 43.¹¹ Given the amount and obviousness of the buildup on the seventh floor level, Nichols credibly concluded that the tower had only been cleaned from the sixth floor down, which posed a danger to the workers erecting scaffolding directly underneath. Tr. 118-119.

Based on these facts, even assuming that the hazard was latent during Oedel’s and Snyder’s walkthroughs of the preheat tower in early January, and notwithstanding the Secretary’s initial admission on Motion for Partial Summary Decision that the hazard was latent, I find that shortly after the accident, the buildup of the hanging material hazard was extensive and obvious. Given the relatively brief amount of time between Davis’ workplace examination at about 7:30 a.m., the occurrence of the accident at 10:30 a.m., and Oedel’s, Snyder’s and Nichol’s observation of buildup shortly after the accident while the conditions in the tower were preserved under the 103(j) order, I find that if Davis or another Sunbelt examiner had gone to the seventh floor working place during his examination and looked through the portholes *at least once during the January 8, 2103 shift*, he would have noticed extensive and obvious buildup on the tower walls and ceiling. This buildup created a hanging material hazard that adversely affected the safety of miners erecting scaffolding below and should have prompted immediate corrective action. Sunbelt’s examiner(s) failed to identify conditions which a reasonably prudent and competent examiner would recognize as hazardous and adversely affecting the safety and health of miners working below, and they failed to take immediate corrective action. Therefore, I find that Sunbelt violated section 56.18002(a).

I have considered the fact that under the January 23, 2017 proposed rule, which amended the existing standard in effect at the time of the accident, MSHA stated:

The existing standards for metal and nonmetal (MNM) mines requiring that workplace examinations be conducted at least once each shift potentially expose miners to adverse conditions during the shift because mine operators can perform the workplace examination anytime during the shift, which exposes miners to adverse conditions during the shift before any corrective action is taken. The final rule, like the proposed rule, amends this provision to require that each working place be examined before miners or other employees begin work in that place. The new requirement that mine operators notify miners of adverse conditions in their

¹¹ I have discredited Davis’ testimony that one can only see straight across from the portholes on the seventh floor. Rather, I have credited Nichols testimony, as corroborated by photographs taken from a seventh floor porthole shortly after the accident, that there was rough, gray buildup on top of reddish brick refractory in the “elbow” above the scaffold where Tyler was working. Gov. Ex. 4 at 31-32; Tr. 105-09. At the same porthole location on the seventh floor, Nichols also took close-up pictures of extensive buildup on the walls of the elbow and around the door, and a clear differentiation in color between gray buildup and reddish refractory is visible in some of the pictures. Gov. Ex. 4 at 34-38, 41, and 43; Tr. 113-18.

working places will make miners aware of such conditions and allow them to take appropriate protective measures or avoid the adverse conditions altogether until such conditions are corrected.

Examinations of Working Places in Metal and Nonmetal Mines, 82 Fed. Reg. 7680, 7681 (Jan. 23, 2017).¹²

When I asked Respondent's counsel whether Respondent could have done a workplace examination and found the hazard after the injury occurred under the existing regulation, Respondent demurred and argued that the scaffolding was being erected toward the seventh floor, and if the seventh floor was a working place, there was no requirement under the extant regulation to examine the seventh floor before the shift began, just at any point during the shift. Tr. 238-39; *but see* Tr. 171-172 (cross-examination of Nichols about the difference between the new regulatory language requiring that a competent person examine each working place at least once each shift *before miners begin work in that place*, and the extant regulation requiring the examination at least once each shift). Nichols essentially conceded on cross examination that under the regulation in effect at the time of the accident, Respondent could have performed its workplace examination(s) at any time before the end of the shift that day. Tr. 171-72. Respondent argues that the accident happened three hours into the shift, and there was no requirement to go back and do another workplace examination after Respondent had been removed by the 103(j) and 103(k) orders. Tr. 236-38. When asked by the undersigned whether Respondent assumed the risk of noncompliance if it did not go to the seventh floor to perform an adequate examination before the injury occurred, Respondent was unsure. Tr. 238.

I conclude that under the regulation extant at the time of the accident, the Secretary has shown that a competent person designated by Sunbelt did not adequately examine each working place, i.e., the seventh floor walls and ceiling from the seventh floor portholes directly above where miners were erecting scaffolding, *at least once during the January 8, 2013 shift*, for conditions which may adversely affect safety or health, and Sunbelt did not promptly initiate appropriate action to correct such conditions. I agree with the Secretary that the fall of material hazard was "very easily seen, very easily discoverable, very obvious, if one were to bother to look" from the seventh floor portholes before the shift was cut short by the accident and subsequent 103(j) and (k) orders.¹³ Tr. 226. Although Respondent argues that under the extant regulation it had until the end of the shift to make the requisite examination, I find that Respondent assumed the risk of a violation by failing to conduct the requisite examination before

¹² As noted above, *supra* note 3, MSHA made an initial proposal to amend section 56.18002 on January 23, 2017. 82 Fed. Reg. 7680. MSHA proposed additional amendments to that initial proposal on April 9, 2018. 83 Fed. Reg. 15055-2. Although the effective date of the new rule is June 2, 2018, the National Stone, Sand, and Gravel Association has indicated that MSHA will not issue citations under the new rule (except in cases of extremely dangerous hazards) until October 1, 2018. News Release, Nat'l Stone, Sand, & Gravel Ass'n, MSHA Adding Time to Comply With Exams Rule (Apr. 24, 2018), <https://www.nssga.org/msha-adding-time-to-comply-with-exams-rule/>.

¹³ The record reflects that the 103(k) order was not terminated until January 10, 2013. Gov. Ex. 2 at 3.

the accident and subsequent 103(j) and (k) orders terminated the shift. This interpretation is consistent with the language and purpose of the standard to protect miner safety and health, and with Congress' declaration that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner." 30 U.S.C. § 801(a).

B. The Violation was S&S and of High Gravity

To establish an S&S violation, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984).¹⁴ The S&S determination should be made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation considers the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued, without any assumptions regarding abatement. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).¹⁵ An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis "centers on the interplay between the second and third steps." *ICG Illinois*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the "particular hazard to which the violation allegedly contributes[.]" and then determine whether "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id.* at 2475-2476. This determination must be made "based on the particular facts surrounding the violation[.]" *Id.* The third step then requires the judge to assume the existence of a hazard and assess whether the hazard "was reasonably likely to result in serious injury." *Newtown* at 2038; *ICG Illinois* at 2476.

¹⁴ The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. See *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of the test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

¹⁵ See also *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (discussing the operative timeframe for violations in the context of S&S analyses).

The “reasonably likely” provision does not require the Secretary to prove that an injury was “more probable than not.” *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury” but, rather, that the hazard *contributed to* by the violation is reasonably likely to cause an injury. *Musser Engineering, Inc. and PBS Coals Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (emphasis added); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011).

The fourth *Mathies* factor requires the Secretary to show a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. As a practical matter, the last two *Mathies* factors are often combined in a single showing. *Id.* Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria for S&S by the likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* factors.¹⁶

In applying the Commission’s *Mathies* factors, I already determined that Sunbelt’s failure to conduct an adequate workplace examination of the seventh level working place at least once during the January 8, 2013 shift, and to initiate prompt corrective action of the extensive and obvious buildup-of-material hazard present there, constitutes a violation of section 56.18002(a). Accordingly, I find that the first *Mathies* factor is satisfied.

Step two of the *Mathies* analysis focuses on “the extent to which the violation contributes to a particular hazard.” The Commission has found that this step is “primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) (citing *Knox Creek Coal Corp.*, 811 F.3d at 163). Thus, step two of the *Mathies* test involves a two-part analysis: 1) identification of the hazard created by the violation of the safety standard; and 2) “a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed.” *Newtown Energy*, 38 FMSHRC at 2038.

Here, the violation, i.e., the failure to conduct an adequate workplace examination of the seventh level working place at least once during the January 8, 2013 shift, and to initiate prompt corrective action of the extensive and obvious buildup-of-material hazard present there, contributed to the hazard that buildup material covering the walls and ceiling at the seventh floor porthole level would and fall and strike miners erecting scaffolding from the sixth to seventh floor below. Furthermore, based on the extensiveness and obviousness of the hazardous buildup, and the fact that the seventh level working place was not adequately examined by Sunbelt at least once during the January 8, 2013 shift, particularly after the vessel had been beaten with hammers and steel tubing for 20-30 minutes, I find a reasonable likelihood that the buildup material would, and indeed did, fall and strike a miner erecting scaffolding directly below. Accordingly, I find that the second *Mathies* factor is satisfied.

¹⁶ Per training, MSHA inspectors do not designate a violation as S&S unless item 10.A on the citation form is marked “reasonably likely,” “highly likely,” or “occurred,” and item 10.B is marked “lost workdays or restricted duty,” “permanently disabling,” or “fatal.” See MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

The third step of the *Mathies* analysis is “primarily concerned with gravity,” and whether the hazard identified in step two “would be reasonably likely to result in injury.” *Id.* at 2037 (internal citations omitted). As noted, the fourth *Mathies* factor requires the Secretary to show a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. Thus, the relevant inquiry “is not whether it is likely that the hazard . . . would have occurred[,]” but “whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result.” *Peabody Midwest Mining, LLC v. Fed. Mine Safety & Health Rev. Comm’n*, 762 F.3d 611, 616 (7th Cir. 2014).

Here, if the extensive and obvious buildup of refractory material did fall, it was reasonably likely to result in serious injury. The Sunbelt miners were erecting scaffolding directly below the hazard. Nichols designated the gravity as reasonably likely to result in a fatal injury because miners were working in the area when the material fell hitting Tyler, and death could occur if a miner was struck by falling material. Tr. 155; Gov. Ex. 8 at 2. I agree and find that it was reasonably likely that if the buildup of material or refractory brick fell from above, it would strike a miner working below and the miner was reasonably likely to suffer a serious or fatal injury. In fact, the record establishes that Sunbelt miner Tyler was erecting scaffolding while wearing his PPE, when some dust fell, hit him in the head, knocked him unconscious for approximately one minute, and left him swinging from the scaffolding. Tr. 71-72, 74, 119-20; Gov. Ex. 3 at 3. Three of the four straps that held Tyler’s headband to his hardhat were broken. Tr. 119-120. The Secretary has met his burden of proof for the third and fourth *Mathies* factors. Consequently, I find that the violation was S&S and the gravity was high.

In conclusion, I find that the violation of section 56.18002(a) occurred as alleged by the Secretary, satisfying the first prong of the *Mathies* test. I have found that that the hazard contributed to by the violation was reasonably likely to result in a fatal injury and actually did result in a reasonably serious injury. I therefore find that the violation of was S&S and reasonably likely to result in a fatal injury for one person.

C. The Violation Resulted from Sunbelt’s High Degree of Negligence

Negligence is not defined in the Mine Act. The Commission has found that “[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC at 708 (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is “an aggravated lack of care that is more than ordinary negligence.” *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and may evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining*, 37 FMSHRC at 1701; *accord Mach Mining*, 809 F.3d at 1263-64. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

Considering the totality of circumstances in this case holistically, I affirm MSHA's high negligence designation. As noted, LVR subcontracted with Sunbelt to erect scaffolding inside the tower so LVR could replace the thimble, which extended at the top center of the tower from the sixth to the seventh floor of the stage-four vessel, and to replace any refractory brick that had disintegrated or cracked. Tr. 107, 129-130, 191, 240, 274, 416; Gov. Ex 4 at 31. Roanoke provided Sunbelt supervisor Davis and his crew, including Redmond, with site-specific training prior to allowing them to perform work at the mine. Tr. 146-147, 386-87; Gov. Ex. 7. The training instructed Sunbelt contractors to remain alert and check for overhead hazards when entering any building other than an office building. Tr. 149, Gov. Ex. 7 at 1, ¶ 9. More specifically, Roanoke instructed Davis, as well as all contractors performing work inside the preheat tower, that "[p]rior to vessel entry inspect vessel overhead and remove any potential loose material." Gov. Ex. 7 at 3; Tr. 149-150; 288-292.

Sunbelt knew that the nature of the work exposed miners to falling material hazards in the stage 4 work area. The pre-shift hazard assessment documenting Davis' workplace examination listed potential hazards of loose objects falling and dust, and Redmond's JSA noted potential hazards as falling rocks and dust. Gov. Ex. 6; R. Ex. 10. Davis testified that he noted potential falling objects as a workplace hazard because "loose material" such as "dust" was always falling within the tower and he "had seen dust fall before from working inside the tower, prior to the accident." Tr. 370, 418. Further, during Nichols' investigatory interviews, several Sunbelt employees told Nichols that they had observed small amounts of material falling during their work. Tr. 150.

Although Davis visually inspected the interior of the vessel through the three portholes on the sixth floor, "looking for loose material, missing refractory, loose brick, loose thimbles-- anything out of the ordinary," Davis never went to the seventh floor portholes at any time during the January 8 shift to look for loose material and buildup. Tr. 348-49, 350, 413-14. There is no evidence that Redmond went to the seventh level to perform his examination and I have inferred that he did not. Nichols designated Sunbelt's negligence as high because Sunbelt never thought of checking the overhead wall conditions for falling material because it never had anything but dust fall from there, and "Davis said he never thought of the area on the 7th level." Gov. Ex. 8 at 2. I have rejected Davis' testimony that the seventh level was not a working place that needed to be examined at least once during the January 8 shift, and I have discredited Davis' testimony that he could see any loose material hanging from the sixth floor and that he could only see straight across from the portholes on the seventh floor. When asked whether Sunbelt should have gone to the seventh level and looked through the portholes, Oedel testified, "Yeah. Anywhere they are working they should." Tr. 277.

I have found that if Davis or another Sunbelt examiner had gone to the seventh floor working place during his examination and looked through the portholes *at least once during the January 8 shift*, he would have noticed extensive and obvious buildup on the tower walls and ceiling. Since Sunbelt failed to adequately examine the working space from the seventh floor portholes directly above where miners were erecting or scheduled to erect scaffolding from the sixth to seventh floor, I find that Sunbelt breached its duty to conduct an adequate workplace examination under section 56.18002(a), breached its duty to identify conditions which a reasonably prudent and competent examiner would recognize as adversely affecting the safety of miners working below, and breached its duty to initiate prompt corrective action. I have also found that even assuming that Redmond, unlike Davis, did go to the seventh level and peer through the portholes, both Davis and Redmond failed to identify the obvious buildup of hanging material as a condition that adversely affected the safety and health of miners working directly below, and failed to initiate prompt corrective action. Finally, because Sunbelt ignored site-specific training that before entering a vessel, “inspect vessel overhead and remove any potential loose material,” and because Sunbelt failed to identify extensive and obvious buildup on the seventh level and initiate prompt corrective action to remove such material, which did fall and seriously injure Tyler erecting scaffolding below, I affirm Nichols’ high-negligence designation.

D. Penalty Assessment

It is well established that the Commission Administrative Law Judges assess civil penalties de novo for violations of the Mine Act. Section 110(i) of the Mine Act delegates to the Commission the “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 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 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 (March 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). However, the Commission and its judges must provide a sufficient explanation of the bases underlying the penalties assessed when they

substantially diverge from those originally proposed by the Secretary. *Sellersburg Stone Co.*, 5 FMSHRC at 293. Without an explanation for the divergence, the Commission has found that the “credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.” *Id.*

The Secretary proposed a specially-assessed penalty of \$51,900 for Citation No. 8723677. Gov. Ex. 10 at 2. A regular assessment of the penalty amount by the Secretary would have resulted in a proposed penalty of \$1,530. Gov. Ex. 10 at 3. The Respondent argued at hearing that the Secretary provided no evidence regarding the rationale supporting a special assessment. The Secretary responded that he did not have any obligation to support MSHA’s special-assessment determination. Rather, the Secretary argued that he had shown that the six penalty criteria weighed in favor of upholding the specially-assessed penalty proposal. I denied Respondent’s motion to strike the special assessment. I found that the Secretary made a minimal showing that I should consider the special assessment as an initial proposal. Tr. 233-34.

In its August 2016 *American Coal* decision, the Commission majority (Commissioners Young, Cohen and Althen) observed that

[f]or either regular or special assessments, the Secretary’s proposal is not a baseline from which the Judge’s consideration of the appropriate penalty must start. 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.

38 FMSHRC 1987, 1995 (Aug. 2016). In *American Coal*, MSHA issued a special assessment without explaining the basis in its Narrative Findings. *Id.* at 1996. The *American Coal* majority noted that the Secretary bears the burden of “providing evidence sufficient in the Judge’s discretionary opinion to support the proposed assessment under the penalty criteria.” *Id.* at 1993. “When a violation is specially assessed, that obligation may be considerable.” *Id.* While the Secretary may provide an explanatory narrative to support the special assessment sought, Judges must “be attentive to the rationale and facts and circumstances supporting the decision to seek a special assessment, so that the ultimate assessed penalty conforms to the Judge’s findings and conclusions.” *Id.*

Because the Secretary has proposed a penalty substantially higher than the \$1,530 that would have been proposed under the regular assessment system, I look to the record to determine whether the Secretary introduced evidence to support the proposed elevated assessment. I then assess the penalty independently based on the record evidence of Section 110(i) criteria and the deterrent purposes of the Act.

The Secretary’s narrative findings for the special assessment of Citation No. 8723677 indicate that “[t]he gravity of the violation was considered serious, and the violation contributed to the cause of nonfatal fall of material accident.” Such findings also state that “[t]he violation resulted from the operator’s high degree of negligence” and “was abated within a reasonable period of time.” Gov. Ex. 10 at 2.

I have affirmed the Secretary's gravity, S&S, and high negligence findings, and find that the Secretary's rather limited special-assessment rationale, as contained in the narrative findings, is consistent with the record and the evidence introduced at hearing. Otherwise, however, the evidence provided by the Secretary in this case does not support the large, specially-assessed penalty proposal. I emphasize that I am not bound by the Secretary's Part 100 penalty regulations or special assessment penalty guidelines, but I must account for or explain any substantial divergence between the proposed penalty and the assessed penalty based on the record evidence and statutory penalty criteria. In this regard, I emphasize that the Secretary's regular assessment point system already accounts for gravity and negligence findings, but the Secretary's proposal added a total of 34 additional penalty points to account for gravity and negligence findings in his special assessment calculation. Gov. Ex. 10 at 3. In the exercise of my discretion when considering the statutory penalty criteria, I conclude that many of the Secretary's 34 additional, non-binding penalty points for gravity and negligence appear overstated or excessive when viewed against the record evidence, which in addition to Respondent's small size and diminutive history of prior violations, largely account for the divergence between the Secretary's proposed penalty and my assessed penalty.¹⁷

With regard to Respondent's history of previous violations, the record establishes that Respondent had only three violations of the Act during the 15 months prior to the accident, none of which involved the same standard at issue here. Two of these violations were non-S&S and one was S&S, which resulted in total penalties paid of \$338. Gov. Ex. 11. With regard to Respondent's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation, the parties stipulated that the abatement was timely and made in good faith. Tr. 11. With regard to the appropriateness of the specially-assessed penalty to the size of the Respondent's business, I find that Respondent was a small contractor who worked only 26,667 hours in mines in 2012. *See* Contractor Overview, Mine Data Retrieval System, Mine Safety and Health Administration, <https://arlweb.msha.gov/drs/drshome.htm> (Contractor ID No.

¹⁷ By way of example, the record reflects that fifteen of the Secretary's non-binding and additional 34 penalty points in his special assessment calculation were added to gravity for severity of injury or illness. Gov. Ex. 10 at 3. The citation was appropriately written as reasonably expected to result in a fatality. Gov. Ex. 8. The non-fatal accident resulted in lost workdays or restricted duty. On this record, the Secretary's non-binding additional 15-point assessment calculation appears to be overstated, particularly since the Secretary added 5 additional points for the violation's contribution to a lost-time accident. Gov. Ex. 10 at 3. Nine of the Secretary's non-binding 34 additional penalty points were added to gravity to raise the persons affected from one person affected to 10 persons affected. Gov. Ex. 10 at 3. The citation was written as one person affected (Gov. Ex. 8) and the record reflects that the non-fatal accident resulted in one person affected, Tyler. Tr. 74, 374. The record also establishes, however, that one miner was working with Tyler outside the vessel at the time of the accident and four miners were working beneath him. Gov. Ex. 3 at 2. The Secretary failed to establish how ten crew members would be affected as opposed to potentially six miners. On this record, the Secretary's additional nine-point assessment calculation appears slightly overstated. Ten of the Secretary's non-binding and additional 34 penalty points were added to negligence. Gov. Ex. 10 at 3. I have found that the citation was appropriately written as high negligence. Gov. Ex. 8. On this record, the Secretary's additional 10-point assessment for high negligence, which was already accounted for in the regular assessment, appears arguably somewhat overstated.

4IN). With regard to effect of the specially-assessed penalty on the Respondent's ability to continue in business, Respondent failed to introduce any financial information or other specific evidence to support or substantiate its inability to pay or any adverse impact on its ability to remain in business. "[I]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) (citing *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sept. 1973)); *accord Spurlock Mining Co.*, 16 FMSHRC 697, 700 (April 1994).

Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of \$23,750. The reduction in penalty from the Secretary's proposed assessment is the result of Respondent's small size and diminutive history of prior violations and my determination that the Secretary's non-binding, specially-assessed, penalty points for gravity and negligence are somewhat overstated and excessive on this record.

IV. ORDER

For the reasons set forth above, Citation No. 8723677 is **AFFIRMED**, as written. Respondent, Sunbelt Rentals, Inc., is **ORDERED** to pay a total civil penalty of \$23,750 within thirty days of the date of this Decision and Order.¹⁸

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

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¹⁸ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 19, 2017

R. ALEXANDER ACOSTA,
SECRETARY OF LABOR, MINE
SAFETY AND HEALTH
ADMINISTRATION (MSHA),

Petitioner

v.

KENAMERICAN RESOURCES, INC.,

Respondent

CIVIL PENALTY PROCEEDING

Docket No. KENT 2017-0183

A.C. No. 15-17741-433281

Mine: Paradise #9

**ORDER DENYING MOTION FOR RECONSIDERATION AND LIMITED
DISCOVERY**
ORDER DENYING CERTIFICATION FOR INTERLOCUTORY REVIEW

Before: Judge McCarthy

This case is before me upon a 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) (1994). This matter arises from three alleged violations issued under section 104(d)(1) of the Mine Act. Citation No. 9044780 alleges a violation of 30 C.F.R. § 75.400.¹ Order No. 9044781 alleges that the mine examiner performed an inadequate on-shift examination of a head drive and tailpiece in violation of 30 C.F.R. § 75.362(b).² Order No. 9049726 alleges that the pre-shift examinations

¹ Section 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.” 30 C.F.R. § 75.400.

² Section 75.362(b) requires, in relevant part, that, “[a] person designated by the operator shall conduct an examination and record the results and the corrective actions taken to assure compliance with the respirable dust control parameters specified in the approved mine ventilation plan.” 30 C.F.R. § 75.362(b).

of the No. 9 entry were not accurately recorded for two days in violation of 30 C.F.R. § 75.360(g).³ Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. KENT 2017-0183.

I. Statement of the Case

On May 23, 2017, the Secretary filed his Petition for the Assessment of Civil Penalties. The Secretary proposed the following civil penalties: \$4,623 for Citation No. 9044780; \$12,300 for Order No. 9044781; and \$55,200 for Order No. 9049726. The proposed civil penalty for Citation No. 9444780 was calculated according to the Secretary's Criteria and Procedures for Proposed Assessment of Civil Penalties. *See* 30 C.F.R. Part 100. Pursuant to section 100.5, however, the Secretary elected to waive the regular penalty assessments in favor of special assessments for Order Nos. 9044781 and 9049726.⁴ *Id.* Both Orders were specially assessed using the Secretary's General Procedures for Special Assessments ("General Procedures"), which have not been published in the Code of Federal Regulations. Secy's Response at 2; *see* U.S. Dep't of Labor, Mine Safety and Health Administration, General Procedures, <https://arlweb.msha.gov/PROGRAMS/assess/SpecialAssess/assessment%20procedures.PDF> (last accessed Dec. 15, 2017).

On June 20, 2017, Respondent filed its Answer, along with a Motion to Remand for Reassessment. Respondent contested the special assessment process and sought an Order remanding the two proposed special assessments for reassessment without reference to or reliance upon the Secretary's General Procedures. Respondent argued that the General Procedures remove all meaningful discretion, and as a result, the General Procedures are substantive or legislative rules under the Administrative Procedure Act's (APA's) formal notice and comment rulemaking requirements. *See* 5 U.S.C. §§ 551-584; Mot. to Remand at 2. Respondent did not, however, challenge the Secretary's discretion under section 100.5 to decide whether to regularly assess or specially assess a particular, alleged violation. Mot. to Remand at 2.

On July 19, 2017, the Secretary filed a Response. On July 31, 2016, Respondent filed a Reply in Support of its Motion to Remand for Reassessment.

³ Section 75.360(g) provides, in relevant part:

A record of the results of each preshift examination, including a record of hazardous conditions and violations of the nine mandatory health or safety standards and their locations found by the examiner during each examination, and of the results and locations of air and methane measurements, shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine.

30 C.F.R. § 75.360(g).

⁴ Section 100.5 deals with determinations of penalty amounts and special assessments. 30 C.F.R. § 100.5.

On August 28, 2017, the undersigned issued an Ordering Denying Respondent's Motion to Remand for Reassessment because the General Procedures permit the Secretary "significant discretion in proposing special assessment penalties" and are not legislative or substantive rules subject to notice and comment under the APA. Order Denying Motion to Remand for Reassessment at 6 (Aug. 28, 2017) (ALJ) (Order Denying Remand). On September 20, 2017, Respondent filed a Motion for Reconsideration and Limited Discovery, or, Alternatively, to Certify for Interlocutory Review the August 28, 2017 Order Denying Motion to Remand for Reassessment (Motion for Reconsideration). On October 12, 2017, the Secretary filed a Response in Opposition (Response).

II. Analysis Regarding Respondent's Motion for Reconsideration and Limited Discovery

Respondent's Motion for Reconsideration requests that the undersigned reconsider my August 28, 2017 Order Denying Respondent's Motion to Remand for Reassessment. Respondent argues that "while special assessments *are supposed to* be inherently discretionary . . . as actually applied, the special assessment program in very large part is *not* inherently discretionary." Mot. for Reconsideration at 2 (emphasis in original). Respondent argues that the special assessment program, as usually applied by the Secretary, "sets "target penalties" and ultimate assessment amounts using mechanical, mandatory, and detailed tables, charts, points, and guidelines, which resemble the tables, charts, points and guidelines in the regular assessment mechanism found in 30 C.F.R. 100.3." Mot. for Reconsideration at 2.

In my August 28 Order, I distinguished the instant case from the D.C. Circuit's decision in *U.S. Telephone Association*, 400 F.3d 29 (D.C. Cir. 2004), which Respondent relied on for guiding precedent. My Order noted:

While the penalty schedule at issue in *U.S. Telephone Association* has some similarities to the General Procedures, the FCC abandoned its traditional case-by-case approach for assessing forfeitures and adopted a base forfeiture schedule as a percentage of maximum fines for each category of licensee that violated the Communications Act. The instant case, by contrast, involves special assessments, which are inherently discretionary and assessed on a case-by-case basis. Further, the court in *U.S. Tel. Ass'n* went to great lengths to show that the FCC had rigidly applied their allegedly discretionary penalty schedule in 299 out of 300 instances. There is no such evidence here.

Order Denying Mot. to Remand, at 6 (internal citations omitted). My Order declined to make any broad conclusions based on the two special assessments at issue here. *Id.* at 6, n.5.

Subsequent to my August 28 Order, Respondent's counsel "reviewed every 2015, 2016, and 2017 docket in which [he] or [his] law firm represented the mine operator" and identified 71 violations (including the two alleged violations at issue in this docket) for which the penalties were specially assessed. Decl. of Jason Hardin in Support of Resp't's Mot. for Reconsideration at 1 (Hardin Decl.); *see also* Ex A. (Excel spreadsheet summarizing penalties for 71 specially-assessed violations), Ex. B (Special Assessment Narrative Forms (SANFs) for 71 specially-assessed violations). Based on that review, Respondent's counsel drew the following

conclusions: (1) that the penalty amounts for 54 of the 71 violations (76%) were effectively the same as the target penalties contained in the guidelines for General Procedures;⁵ (2) that the penalty amounts for 17 of the 71 violations (24%) were the same as the “Minus 25%” penalty amounts in the General Procedures (and SANFs);⁶ (3) that none of the 71 specially-assessed penalties equaled the “Plus 25%” penalties from the General Procedures (and SANFs); and (4) that none of the 71 specially-assessed penalty amounts fell outside of the “±25%” adjustment range. *See* General Procedures, at 2. Respondent’s counsel argues that the conclusions drawn from his review of the 71 specially-assessed violations establish the following:

[i]n all 71 instances, the Secretary appears to have mechanically and automatically applied the tables, charts, point increases[,] and guidelines in the General Procedures to arrive at target penalties (called the “Special Assessment Calculation from Table(s)” in the various SANFs). In no instance[] does it appear that MSHA deviated from the General Procedures to arrive at the target penalty, either in awarding the number of points for each designation (e.g. gravity, negligence) or in mechanically converting the total number of points into a corresponding dollar amount.

Mot. for Reconsideration at 4; Hardin Decl. at 3. Respondent specifically argues that this sample of 71 specially-assessed penalties demonstrates that the Secretary “*always* rigidly and automatically applies the tables, charts, point increases, and guidelines in the General Procedures to generate the special assessment target penalties. Mot. for Reconsideration at 5 (emphasis in original).

As noted above, my August 28 Order found that the General Procedures permit the Secretary “significant discretion in proposing special assessment penalties” and are therefore not legislative or substantive rules subject to notice and comment under the APA. Order Denying

⁵ Respondent’s counsel represents that the Proposed Special Assessments for these 54 violations were within \$100 of the target penalty amounts, and he attributes the differences to rounding off the penalty amounts. Hardin Decl. at 3.

⁶ The General Procedures provide that:

[t]he assessor may adjust the computed target penalty amount of ±25 % or ±\$200, whichever is greater, within the penalty range of \$200 minimum and \$70,000 maximum (\$242,000 maximum for flagrant violations). This flexibility is necessary to account for the unique facts and circumstances surrounding a violation. The assessor must base the adjustment on specific information provided by enforcement personnel in the citation/order, in the special assessment review form, or in other documents or phone conversations. In rare cases, the assessor may propose penalties outside the ±25% range. In these cases, the assessor must document the facts and circumstances supporting a penalty outside the normal range in the “Narrative Findings for a Special Assessment” provided to the operator.

General Procedures, at 2.

Remand at 6. My August 28 Order Denying Remand is incorporated by reference herein. I additionally disagree with Respondent's characterization of the results of its counsel's review of the 71 specially-assessed penalties. Respondent argues that the sampling (presumably the 17 "Minus 25% penalties and the lack of any "Plus 25%" penalties) confirms that the "±25%" reductions or increases are calculated without discretion. Mot. for Reconsideration at 6. Although I agree with Respondent that the sample, although small, seems to indicate that such reductions or increases are *always* calculated in reference to 25% of the proposed specially-assessed penalty, I recognize that the Secretary's decision to adjust the penalty at all (regardless of percentage) is inherently discretionary. Mot. for Reconsideration at 4; Hardin Decl. at 3. Rather than illustrating that the Secretary rigidly applies the General Procedures guidelines, I find that the fact that 17 out of 71 special assessment penalties were adjusted to reduce the target penalty by 25% indicates that the Secretary exercised his discretion to adjust the target penalty in some instances, but not others.

Moreover, under the Mine Act's bifurcated penalty assessment scheme, the Commission and its judges assess penalties *de novo* based on the statutory criteria in section 110(i) of the Act. 30 U.S.C. § 820(i). An Administrative Law Judge is not bound by the Secretary's proposed penalty or Part 100 regulations. *Sellersburg Stone Co.*, 736 F.2d 1147, 1151-52 (7th Cir. 1984). The Commission has recognized that where "the Secretary has proposed a penalty that may be substantially higher than would have been proposed under the regular system, the Secretary will presumably introduce evidence to support what is essentially an elevated assessment" *American Coal*, 38 FMSHRC 1987, 1994-95 (Aug. 2016). Finally, the Commission has also recognized that "[i]f an operator ultimately disagrees with an assessment, the remedy is a hearing before the Commission." *Id.* at 1992.

Having considered Respondent's additional evidence, I find that the sample of 71 special assessments does not support the conclusion that the Secretary's General Procedures, as applied, constitute legislative or substantive rules subject to notice and comment under the APA. I therefore reaffirm my August 28 Order, and decline to order additional discovery on this issue.

III. Analysis Regarding Respondent's Motion to Certify for Interlocutory Review

In the event that the undersigned denies Respondent's request for reconsideration and limited discovery, Respondent has requested that I certify my August 28 Order for interlocutory review. Mot. for Reconsideration at 8. Respondent requests that I certify the following legal question: Whether the Secretary acted arbitrarily and illegally in proposing civil penalties based upon his Special Assessment General Procedures, because the General Procedures, in whole or in part, are legislative or substantive rules that should have undergone formal notice-and-comment rulemaking pursuant to the APA. Mot. for Reconsideration at 9. The Secretary opposes Respondent's motion. Response at 6-7.

Commission Procedural Rule 76 provides that an Administrative Law Judge cannot certify an interlocutory ruling for review unless that ruling involves (1) a controlling question of law, and (2) immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76. I find that the issue for which Respondent seeks interlocutory review is a mixed question of fact and law. Respondent's argument, in essence, is that the Secretary's

Special Assessment General Procedures, *as-applied*, are legislative or substantive rules and therefore must undergo notice and comment as required by the APA. Accordingly, Respondent's request does not involve a controlling question of law.

In any event, I also find that the Commission's review of Respondent's formulated question will not materially advance the final disposition of this proceeding. As noted above, Commission judges assess penalties *de novo* and are not bound by the Secretary's proposed assessments, whether specially-assessed or calculated using Part 100. Should this matter proceed to hearing, both the Secretary and Respondent will have the opportunity to present evidence regarding gravity, negligence, and the section 110(i) penalty criteria for the alleged violations set forth in Order Nos. 9044781 and 9049726. 30 U.S.C. § 820(i). As the Commission has recognized, the Secretary's burden to provide evidence to support the special assessment may be "considerable." *American Coal*, 38 FMSHRC at 1993.

IV. Order

For the reasons discussed above, Respondent's Motion for Reconsideration and Limited Discovery, or, Alternatively, to Certify for Interlocutory Review my August 28, 2017 Order Denying Motion to Remand for Reassessment is **DENIED**.

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

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/ccc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 9, 2018

SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR
on behalf of HOLLY A COFFEY
Applicant

v.

TXOMA MINING, LLC,
Respondent

APPLICATION FOR TEMPORARY
REINSTATEMENT

Docket No. CENT 2018-0149-D
DENV-CD-2018-02

Mine : P8 North Mine
Mine ID: 34-02080

ORDER GRANTING TEMPORARY REINSTATEMENT

Appearances: John M. Bradley, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Applicant;
Kwame T. Mumina, Esq., Green, Johnson, Mumina & D'Antonio, Oklahoma City, Oklahoma, for Respondent.

Before: Judge Manning

This case is before me on an application for temporary reinstatement brought by the Secretary of Labor on behalf of Holly A. Coffey (“Coffey”) against Txoma Mining LLC (“Txoma”) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (the “Mine Act”). The application was filed by the Secretary on or about February 6, 2018, and Txoma requested a hearing within 10 days of receipt of the application. The application alleges that Txoma discriminated against Coffey when she was terminated from her position as an administrative clerk on September 27, 2017 “because she engaged in protected activities by voicing her right to contact MSHA for Respondent’s violations of the Act.” The application states that the Secretary has determined that the underlying discrimination complaint filed by Coffey was not frivolously brought. The parties presented testimony and documentary evidence at a hearing held in Oklahoma City, Oklahoma. For the reasons set forth below, I find that the application for temporary reinstatement must be granted.

I. SUMMARY OF THE EVIDENCE

Txoma operates the P8 North Mine, an underground coal mine in Le Flore County, Oklahoma. L. Keller Smith is the owner and president of Txoma.

Coffey testified that she has worked in the mining industry for about six years. When she first started working at the P8 North Mine, it was operated by South Central Coal and then by Heat-X-Change, LLC. Txoma became the operator on February 6, 2017. Coffey, who described her position as the records and compliance clerk, testified that at some point in April 2017, she

quit her job and was going to start a new job at another mine. She said that Txoma owner and president L. Keller Smith asked her to stay and she was given a raise of one dollar an hour. (Tr. 13-15). She testified that one of the reasons why Smith asked her to stay was because she had “such a good rapport with MSHA.” (Tr. 15). Coffey testified that a significant part of her job was keeping MSHA mandated records and ensuring that Txoma complied with these record-keeping requirements. One type of record she maintained were records concerning testing for respirable dust (“dust”). Much of her work involved making sure that the dust pumps were accurately calibrated and that the required information was gathered for records and reports to MSHA. (Tr. 16-17). The records were all computerized. Another record she maintained was the record showing the results of self-rescue device testing. Coffey did not ordinarily conduct this testing, but she maintained the records of such testing on Txoma’s computer system.

Coffey stated that she had developed a good working relationship with MSHA. (Tr. 19). MSHA inspectors would check in with her when they first arrived at the mine and she would show them the various record-keeping books for their review before they proceeded underground. (Tr. 55-56, 92). Coffey testified that MSHA inspectors trusted her and she trusted them. She further stated that, although Txoma’s employee handbook stressed safety, she did not feel that safety was a top priority of mine management. (Tr. 20, 49-52, 106-07). She also testified that it was obvious that Keller Smith did not know much about coal mining. (Tr. 20-21).

Coffey’s normal work day started at 8:00 am on weekdays and she stayed until the miners brought out the dust pumps. Txoma allowed her to come in a little late on Fridays so she could have breakfast with her mother and sisters. (Tr. 58). She testified that she only worked on Saturdays if something came up that made it necessary, which usually occurred when the mine was producing coal that day. (Tr. 59). She came to the mine about twice a month on Sundays to calibrate the MX4 gas monitors because the monitors were not in use on Sundays. Until sometime in April 2017, Coffey performed many of the human resources functions. In April, Smith hired Ms. Shelly Smedley to be the human resources (“HR”) manager at the mine. Smedley and Coffey shared an office.

Coffey testified that she and her husband raised “performance horses.” (Tr. 18). These horses participated in shows and Coffey also bought and sold these types of horses. Much of her weekends were devoted to these performance horses.

At some point in the spring of 2017, Smith fired Nick Chavez, who was the mine manager. (Tr. 23). This concerned Coffey because she worked well with Chavez. Coffey exchanged text messages with Smith on this subject and Coffey testified that Smith told her that changes are coming but not to worry because she is “part of the plan.” (Tr. 25). Smith told Coffey during a subsequent meeting that he would be giving her additional responsibilities in the future including “tak[ing] over the mine rescue team by the first of the year [2018].” (Tr. 26).

On or about August 28, 2017, as the miners for the second shift were coming in, Coffey noticed that a self-rescuer had been crushed on one corner. She asked a miner to go get another self-rescuer to use underground. The indicator lights were bad on the second self-rescuer that the miner brought but the third one appeared to be working. (Tr. 27, 100-01). Coffey kept both defective self-rescuers in her office. Coffey testified that she grabbed a “purchase order request

form” to order ten new self-rescuers.¹ She testified that she ordered ten because it was her understanding that the mine did not have enough self-rescuers at that time and some miners were sharing them. (Tr. 27-28). She took the form to the warehouse and gave it to Paula Cash, the warehouse manager. (Tr. 28).

About a week or two later, Coffey went to the warehouse to ask about the status of the self-rescuer order. Cash told her that the self-rescuers were not ordered because Melissa Craig would not give her approval. (Tr. 29). Ms. Craig acted as a purchasing agent for Txoma. Coffey stressed how important self-rescuers are to the safety of miners, but Cash did not give her a reason why the order was not approved.

Upon hearing that the self-rescuers had not been ordered Coffey threw a fit. She told Cash and others who were standing next to Cash that this was “BS” and that “I bet [Craig] will [order them] when F-ing MSHA finds out.” (Tr. 29). Coffey returned to her office and told Smedley and another employee the same thing. *Id.* Smedley suggested that perhaps they would be ordered after pillaring was completed. *Id.* Coffey replied, “[n]o, she will buy some now.” (Tr. 30). Coffey never called or emailed Craig to ask why the self-rescuers had not been purchased and she did not ask anyone else with Txoma for an explanation. (Tr. 42, 82-83). Coffey testified that, based on past experience, she is sure that Keller Smith found out about these events from Smedley. (Tr. 31). She testified that she feared for her job. She admitted that since Txoma became the operator, she had not previously requested that self-rescuers be purchased. (Tr. 81).

Applicant did not present any evidence at the hearing to show that she contacted MSHA about Txoma’s failure to order more self-rescuers.² Section 75.1714-8(b) of the Secretary’s safety standards requires mine operators to report self-rescuers that are not functioning properly to MSHA.³ 30 C.F.R. § 75.1714-8(b). Coffey testified that one of her job duties required her to file such reports to MSHA, which she did using MSHA online reporting system. She admitted that she never reported the two defective self-rescuers to MSHA because she “just hadn’t got around to it yet.” (Tr. 184).

Coffey admitted that her job did not involve checking the self-rescuers to make sure they were working properly; the fire bosses usually performed the actual safety checks. (Tr. 59-62; see also 132). She kept the records of the safety examinations of the self-rescuers and printed out

¹ Coffey testified that she filled out a “purchase order request” for the ten self-rescuers. It is not clear whether the term “purchase order” is the correct term because Coffey did not have the authority to issue purchase orders. As described below, purchase orders originated in the warehouse and were computer generated. In any event, Coffey testified that she requested that ten self-rescuers be ordered so the terminology used is not important.

² Applicant offered vague testimony to the effect that Coffey did call MSHA about a safety problem at some point in time, but she did not say that the call had anything to do with the self-rescuers. (Tr. 110-112).

³ See also instructions at MSHA’s website: <https://www.msha.gov/support-resources/forms-online-filing/2015/04/15/self-contained-self-rescuer-scsr-inventory-and>

copies so that MSHA inspectors could review them when they came to the mine for inspections. (Tr. 60). She referred to these records as the 90-day checklist. (Tr. 66; Ex. 20).⁴ If a miner or a fire boss told her that there was a problem with a self-rescuer, she would take it “out of the system” so it would not be used by mistake. (Tr. 65).

In the meantime, on August 1, 2017, President Keller Smith sent an email to key managers telling them that, given the “cash strapped” condition of the company, there would be a hiring freeze, workforce reductions, and other changes made. (Tr. 153; Ex. 16). Coffey testified that at that time she was not aware that Txoma was having financial problems. (Tr. 84). Sometime later in August or early September, Smith asked Coffey to make a list of all her job duties and told her that he wanted to meet with her. A meeting was scheduled for September 26 after an earlier meeting date had to be canceled due to a conflict in Coffey’s schedule. At the meeting, which was also attended by Smedley, Smith presented Coffey with a new work schedule for her. (Tr. 33-34, 86-87; Ex. 15). It required her to work in the warehouse for a 12 hour shift on Saturday and a 12 hour shift on Sunday and two 8-hour shifts during the weekdays.⁵ *Id.* Most of the work she would do in the warehouse would be clerical. (Tr. 104-05). Coffey testified that she was told that her schedule was changed due to restructuring but her first thought was that Smith wanted to get her “out of sight and sound of MSHA.” (Tr. 34, 86).

Coffey told Smith that the new work schedule would not work for her. She testified that she said, “[t]his won’t work. I can’t work every weekend. I have other obligations. I can’t run the dust on Saturday and Sunday. It has to be when they’re running coal.” (Tr. 34). Coffey testified that Smith handed the schedule to Smedley and told her that she and Craig would need to “redo the schedule.” (Tr. 34, 88-90). Coffey took Smith’s instruction to redo the schedule as a positive sign.

The next day, Coffey sent Smith an email with the list of her job duties attached. (Tr. 35-37; Ex. 22). In the email, Coffey stated, in part, “I am sorry but I can not work in the warehouse on the weekends.” She gave several reasons. She stated that she has “Performance Horses (Farm Business) that I work around my job at Txoma.” She then listed some other factors to justify her reasoning:

Running Dust is a full time job in itself. If we are running coal, I need to be running dust. I understand we have other people certified in dust but know nothing about it. My Relationship with

⁴ The parties relied upon the same set of exhibits at the hearing. Although I admitted Exhibit 20 at the hearing, Coffey disputed the accuracy of any entries in the exhibit that showed her inspecting self-rescuers in September 2017. (Tr. 67-75). As a consequence, I have only used the exhibit to illustrate what information the 90-day checklist contained and I have not relied on any September entries.

⁵ There is a conflict in the testimony as to what the new schedule was to be. Coffey testified that she was told that she would be working in the warehouse on Saturdays and Sundays from 6:00 pm until 6:00 am. (Tr. 33-34, 86-87). Smith testified that Coffey was told that her weekend hours would be from 6:00 am to 6:00 pm. This conflict does not affect my conclusions.

MSHA should alone be enough to keep me where I am. I come in on Sunday's when I can whatever time I can to Calibrate MX4's and I do this twice a month. . . . I have worked at P8 for at least 3 years with no citations for any of the posting or records. I have helped in lowering citations and talked MSHA out of writing them for a high or more. MSHA wants to see me when they get here.

(Ex. 22). Nobody mentioned the issues surrounding Coffey's request to order new self-rescuers at the meeting and she did not mention it in her email to Smith. (Tr. 96). Coffey testified that her objection to the schedule change was mostly about the dust: "It's all on the dust. I mean that – this . . . email's about dust and how it cannot be done [with] me working two [week] days on my regular job." (Tr. 91). Coffey stated that she did not intend her email to be construed as an attempt to resign from her position. (Tr. 37). She testified that she was not refusing to comply with the new work schedule because she thought she would be presented with another more acceptable work schedule and that she was simply explaining why the schedule presented to her at the meeting would not work. (Tr. 38). She said that she did not intend her objection to the new schedule to be insubordinate. (Tr. 38).

Within 15 minutes of sending this email, she received a text message from Smith. The text message stated, in part:

I have thought about our visit yesterday and your response to my request to change your job description and schedule to help Txoma weather these tough times. I understand that everybody has to look at these situations through their own eyes and make decisions and you did that. At the same time, I have [to] make calls on what is best for Txoma going forward and who is willing to sacrifice when needed.

(Tr. 38-39; Ex. 23). The text then states "Given the circumstances, I believe it is best for you to provide me with your resignation immediately and go ahead and get your things together and leave the property." *Id.* Coffey believes she was terminated because, in late August, she told Cash and Smedley that she was going to call MSHA to complain about Txoma's failure to order self-rescuers. (Tr. 38). Coffey testified that her daughter Cheyenne was terminated from her employment about two weeks later and about the same time Txoma fired her son-in-law. Coffey testified that at some point after she was terminated Mr. Mumina, counsel for Txoma, sent her a letter telling her not to contact MSHA. (Tr. 39-40). She thought the letter was threatening.⁶

Coffey believes that that there was a connection between her statements regarding the self-rescuers and MSHA and her termination "[b]ecause of the time frame." (Tr. 40). "It was too close together from when I said it. I didn't have any problems with Txoma Mining. I did a good job. I didn't get citations on my stuff ever." (Tr. 40-41).

⁶ This letter was not introduced at the hearing and there was no further testimony about it. The letter is referenced in the report prepared by MSHA's special investigator. (Ex. 2 ¶ 2(d)). I have not considered this evidence in rendering my opinion in this case.

Coffey testified that although others were certified to run respirable dust samples, she was the only person who knew how to keep the records on Txoma's computers. (Tr. 78). She did not normally go underground to take the samples but she was responsible for taking care of all the administrative duties surrounding the taking of dust samples.

Melissa Craig testified that she is the president of South Central Coal Company. She testified that South Central Coal has "an administration and consulting agreement to provide various functions for the mine as needed for the company." (Tr. 115). She testified that the warehouse has the authority to purchase most items but that purchases greater than \$5,000 would typically be forwarded to her for approval. (Tr. 116). As the warehouse manager, Paula Cash was the person who ordered supplies for the mine. (Tr. 120). Other employees would generally have to ask Cash if they need anything. (Tr. 120-21).

Craig testified that she communicated with Coffey via email with some frequency. She testified that Coffey does not have any purchasing authority but she could directly request office supplies and dust sampling supplies from her. (Tr. 123). Official purchase orders are written on a computer and have an identifying number associated with it; there is no such thing as paper purchase orders. (Tr. 123-24). Craig also testified that the cost of ten self-rescuers would range between \$6,000 and \$8,000. (Tr. 127). Such a request would generate discussion with the warehouse about the "immediate need [and] prioritization." (Tr. 126). For example, can we reduce the order to five self-rescuers? *Id.* If there were not enough self-rescuers for employees to take underground, then there would be an immediate need to order more. Craig testified that she never received a request from Coffey or Cash to order self-rescuers in late August or early September 2017. (Tr. 128, 138). Craig also testified that she did have a conversation with Coffey in "mid-summer" about whether the expiration date of any self-rescuers were coming up so that, if so, new ones could be ordered. *Id.* Craig testified that Coffey never reported back to her with that information. *Id.*

Keller Smith also testified for Txoma. He does not work at the mine but works in Dallas, Texas. He travels to the mine at least once a month and communicates with mine personnel via email and telephone on a regular basis. He testified that he never received any safety complaints from Coffey. (Tr. 149). He said that Coffey had a wide range of duties but her duties did not include making purchase orders. *Id.* He also testified that, although one of Coffey's duties involved dust sampling, there were other employees who were certified to perform that task. (Tr. 150; Ex. 10). Smith testified that at the time he terminated Coffey he did not have any knowledge that she had asked to purchase self-rescuers. (Tr. 149-50).

Smith testified that by early August 2017, Txoma was having production problems and that he was going to have to get "aggressive about cost control, cost maintenance." (Tr. 153). Labor is one of the largest costs. His email of August 1 was widely distributed. (Tr. 154; Ex. 16). He instituted a hiring freeze and changed the work schedule of many employees.⁷ (Tr. 157).

⁷ Information at MSHA's website shows that in 2017 Txoma employed an average of 93 people during the second quarter, an average of 81 people during the third quarter, and an average of 78 people during the fourth quarter.

At the meeting on September 26, he advised Coffey that Txoma was restructuring the work schedules of its employees and that her job duties and schedule would be changing. (Tr. 159). The change in her schedule “represented a much heavier involvement and assignment for her in the warehouse area on Saturday and Sunday and . . . accommodated her Friday request.” (Tr. 160; Ex 15). He said he knew that she had family obligations on Fridays so he was not going to schedule her on that day. He said he was flexible as to what other days she could work. *Id.* Craig and Smedley helped him develop the schedule. (Tr. 161). He said that when he described the change at the meeting, Coffey’s reaction was “pretty chilly” and she quickly ended the meeting. (Tr. 162). He concluded that she did not have a positive “attitude about making changes and sacrificing and helping us push forward.” (Tr. 165). Smith testified that he had asked Coffey for a list of her job duties several weeks before the meeting because she had a broad job description and he “wanted to try to see if there was a better way that we could move some of the things she was doing around or if there was an opportunity to free up some time, some money[.]” (Tr. 164).

Smith testified that he met personally with Coffey because her job duties were “changing more radically” than most employees. (Tr. 179-82). He also noted, however, that some employees were terminated and others had their work hours reduced. (Tr. 181).

Smith testified that he received an email from Coffey the next day that he believed confirmed her inflexible attitude. The first sentence read “I’m sorry that I cannot work in the warehouse on weekends.” (Tr. 165; Ex. 22). Given that Coffey was already putting in some weekend hours, he regarded her statement to present a bit of a “conflict.” (Tr. 166). Smith believes that weekend work is part of coal mining and she did not present any alternate proposals. Her reference to her performance horses communicated to him that she has “priorities that trump what the business needs.” (Tr. 167). The fact that she works well with MSHA was a “bit of a head scratcher” for him because he has worked in regulated industries for many years and makes sure that all of his employees are trained to be “civil and courteous” to regulators. (Tr. 168). She did not mention any safety concerns or issues surrounding self-rescuers at the meeting or in the email. (Tr. 169).

Smith said he texted her soon after he received her email to inform her that she was being terminated from her employment. (Tr. 170; Ex. 23). Before he sent the text, Smedley apparently told Smith that Coffey told her that she was not going to resign. *Id.* Smith testified that he chose to terminate her because he “was looking for change, for tightening of the belts, people who were willing to sacrifice and do what was needed to make the business work.” (Tr. 171). He stated that the changes “covered a host of people out of 85 folks that we had working for us.” *Id.* Smith testified that his decision to terminate her had nothing to do with any safety complaints Coffey might have made. He alone made the decision. *Id.* He further testified that he had no knowledge of Coffey’s request to purchase self-rescuers until she filed her discrimination complaint with MSHA. (Tr. 172).

In the official termination form, Smith set forth the following as the reason for Coffey's termination:

Previous job description was changed due to general workforce restructuring. Employee was offered position with amended job duties and hours. She rejected & chose not to resign & was then terminated. After her leaving & existing staff follow up, it was discovered that several assigned work duties were not being properly performed.

(Tr. 173; Ex. 24).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Each party presented evidence to support its version of what happened in August and September 2017. The Secretary sought to establish that Coffey was terminated because, after she learned that Txoma had not ordered new self-rescuers, she told several people in the company, including the HR director, that the company will be required to order self-rescuers when "MSHA finds out." She contends that she was given an unacceptable work schedule so as to minimize her opportunity to interact with MSHA. She believes this change in the terms and conditions of her employment was in retaliation for her protected activity and ultimately resulted in her termination.

Txoma, on the other hand, sought to establish that Coffey was asked to resign after she told Txoma's president that she would not work weekends because it would interfere with her performance horse business and it would prevent her from doing some of her job duties, especially her work in "running dust." Txoma argues that her claim that she was the only person who was qualified to perform the respirable dust work was clearly not true. Txoma also presented evidence that the work schedules of other employees were changed at the same time due to production problems and that some employees were terminated. It presented evidence that there was no animus toward her alleged protected activity and no nexus between her alleged protected activity and her termination.

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

Section 105(c)(2) provides, in pertinent part, that the Secretary shall investigate each complaint of discrimination "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission's

procedural rules and case law are clear that the scope of a hearing on an application for temporary reinstatement is narrow and “limited to a determination as to whether the miner’s complaint was frivolously brought.” 29 C.F.R. § 2700.45(d); *Sec’y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d sub nom. Jim Walter Resources Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

The “not frivolously brought” standard does not require a judge to determine whether sufficient evidence of discrimination exists to justify permanent reinstatement. *Jim Walter Resources*, 920 F.2d at 744. Rather, the courts and the Commission have equated the “not frivolously brought” standard with the “reasonable cause to believe” standard at issue in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), as well as the “not insubstantial” standard in *Jim Walter Resources*, 920 F.2d at 747. Congress indicated that a complaint is not frivolously brought if it “appears to have merit.” Legis. Hist. at 624-25. When applying the standard the judge should not undertake to resolve disputes of fact or credibility. *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717,719 (July 1999).

In order to establish a prima facie case of discrimination a miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 19080), *rev’d on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

While an applicant for temporary reinstatement need not prove a prima facie case of discrimination at this stage, she may satisfy the “not frivolously brought” standard by establishing that there is “reasonable cause to believe” that she engaged in protected activity, suffered an adverse action, and that there is a nexus between the alleged protected activity and the adverse action. The Commission has recognized that although direct evidence of discriminatory intent is rarely available, a nexus between the protected activity and adverse action may be inferred where indicia of discriminatory intent exist, including (1) knowledge of protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the Applicant. *Sec’y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009); *see also Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The Commission’s recent decision in *Sec’y on behalf of Kevin Shaffer v. The Marion County Coal Company* is instructive, 40 FMSHRC ____, No. WEVA 2018-117-D (February 8, 2018). The Commission affirmed the administrative law judge’s decision that granted temporary reinstatement to the complaining miner, but issued two separate opinions that highlighted different aspects of the analysis used in temporary reinstatement cases. Commissioners Jordan and Cohen emphasized that “[r]eqiring the Judge to resolve conflicts in testimony . . . when the parties have not yet completed discovery would improperly transform the temporary reinstatement hearing into a hearing on the merits.” Slip op. at 6 (citation omitted). That opinion stated that the “not frivolously brought standard” reflects the intent of Congress that “employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary

reinstatement proceeding.” Slip op. at 3 (quoting *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990). It further emphasized that the scope of any hearing is whether the complaint is “nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.” Slip. Op. at 4. This opinion relied upon the black letter law used in temporary reinstatement cases, as cited above.

The opinion of the Acting Chairman Althen and Commissioner Young emphasize that there is “no presumptive right to temporary reinstatement.” Slip op. at 8. If the operator requests a hearing in a temporary reinstatement case, “the hearing is a full judicial proceeding.” Slip op. at 8. Their opinion stated that the employer in a temporary reinstatement proceeding “has the opportunity to test the credibility of any witnesses supporting the miner’s complaint through cross-examination and may present his own testimony and documentary evidence contesting the temporary reinstatement[.]” Slip op. at 9 (quoting *Sec’y on behalf of Gray v. North Fork Coal Corp.* 33 FMSHRC 27, 42 (Jan 2011). The opinion goes on to state that the statute grants the operator “the right to seek an adjudication from a neutral tribunal, prior to a deprivation of its property interest, with all the regalia of a full evidentiary hearing at its disposal.” *Id.* Most importantly, this opinion states:

If versions of events diverge without dispositive proof of either, the outcome at the reinstatement stage may not rest upon a choice between the versions, and the miner must be reinstated. However, a Judge need not accept testimony if it is demonstrably false, patently incredible, or obviously erroneous, because such evidence fails to qualify as “substantial evidence” upon which a reasonable person might rely.

Slip op. at 9. The opinion concludes by stating that “[w]e agree that the Judge should not make credibility and value determinations of the operator’s rebuttal or affirmative defense, if the totality of the evidence or testimony admits of only one conclusion, there is no conflict to resolve.” *Id.* However, “it is the Judge’s duty to determine whether the claim is frivolous, in light of undisputed or conclusively-established facts and inescapable inferences.” *Id.*

III. ANALYSIS

Looking only at the evidence presented by the Applicant, the following is of note:

- Coffey started working for Txoma in February 2017. A significant part of her work involved MSHA compliance. She decided to quit sometime around April 2017 but was talked out of it by Smith because, in part, she had a good relationship with MSHA.
- On August 28, Coffey noticed that two self-rescuers were defective and pulled them aside. She asked Paula Cash to order ten new self-rescuers.
- About a week later when she asked Cash about the self-rescue order, she was told that the self-rescuers had not been ordered.
- Coffey testified that she told Cash, Smedley and others that the self-rescuers would be ordered when MSHA finds out.
- Coffey never asked Melissa Craig or anyone else why self-rescuers had not been ordered.

- No evidence was presented to show that Coffey contacted MSHA about any issues surrounding self-rescuers in the weeks that followed. She removed the two defective self-rescuers from service but she admitted that she did not report the problem with the two self-rescuers to MSHA as required by the Secretary's regulations.

The following uncontested evidence presented by Txoma is of note:

- Ordering ten new self-rescuers would cost Txoma between \$6,000 and \$8,000 and such a large order would require a thorough analysis.
- On August 1, Txoma announced that, because it had been unable to meet its production goals, it would be implementing cost controls. These controls included a hiring freeze, workforce reductions, and overtime management.
- Many of the employees working at the P8 North mine had their work schedules changed in September 2017 or shortly thereafter. Other employees were terminated or had their hours reduced. Coffey's job duties and her shift schedule were to be significantly changed.

I agree with Acting Chairman Althen and Commissioner Young that there is no presumptive right to temporary reinstatement and that improvidently granting temporary reinstatement amounts to a deprivation of the operator's property interest. Indeed, I have denied temporary reinstatement following a hearing in at least two cases since I became an administrative law judge with the Commission.

Here, Coffey protested the failure to order self-rescuers by telling Cash and Smedley that Txoma would be forced to order them when MSHA finds out. She testified that she made it clear to them that the failure to order self-rescuers created a serious safety issue, yet there is no evidence that she actually notified MSHA and she admitted that she did not report the defective self-rescuers to MSHA. Txoma presented evidence that the terms and conditions of Coffey's employment were changed for reasons unrelated to her threat to call MSHA and that her subsequent termination was also unrelated to her threat to call MSHA. There is no dispute that Txoma was experiencing production and cost control problems in the summer of 2017.

I find Coffey's threat to call MSHA because Txoma refused to purchase more self-rescuers to be protected activity. She testified that there was a shortage of self-rescuers at the mine at that time and Txoma did not offer any evidence to refute her testimony. Her failure to actually contact MSHA about this problem likely arose from her fear of being terminated. She suffered an adverse action when the terms and conditions of her employment were changed by scheduling her to mostly work on the weekends so that she would not be able to perform many of her MSHA related duties that she previously performed, such as handling the respirable dust functions. She also suffered an adverse action when she was terminated from her employment on September 27, 2017. These two adverse actions are linked because if her work schedule and work duties had not been so drastically changed, it is unlikely that she would have resisted the changes that led to her termination.

The issue here is whether there is reasonable cause to believe that there was a nexus between her protected activity and the adverse actions. There was clearly a coincidence in time

between the protected activity and the adverse actions. There was also, however, a coincidence in time between Smith's decision to restructure the staff at the mine as evidenced by his August 1 memo and the adverse actions. There is some showing of disparate treatment because Smith acknowledged that Coffey's job duties were being changed more radically than most employees. On the other hand, the proposed reorganization resulted in other employees being terminated or having their hours reduced.

The next factor is knowledge of the protected activity. Smith testified that he had no knowledge of Coffey's threat to call MSHA when Txoma did not order new self-rescuers. Indeed, he testified that he did not know that Coffey had requested that self-rescuers be ordered. I am not required to resolve conflicts in testimony in this temporary reinstatement case. Coffey testified that Smedley knew about these events and, as a consequence, Smith would have as well. Coffey testified that Smedley was, in essence, Smith's spy at the mine, although she did not use that word. Smith testified that his primary contact at the mine was Smedley. (Tr. 144). Smith testified that Smedley and Craig were involved in developing the new schedule for employees in the warehouse and other surface areas. (Tr. 161). Even if I credit Smith's testimony that he had no knowledge of Coffey's actions with respect to self-rescuers, it is quite possible that Coffey's protected activity contributed to the adverse actions in any event. Smedley and Coffey worked in a very small office. Smedley would have known that Coffey would not be willing to accept a schedule that required her to work in the warehouse for two 12 hour shifts every weekend with radically different job duties and that Coffey would raise a stink about it. Smedley was the human resources manager at the mine and it is possible that she used her knowledge of the protected activity and Coffey's predilections to suggest this work schedule to Smith. Smedley could have been motivated to do so, at least in part, by Coffey's protected activity. Smedley could have taken these steps without Smith's knowledge. Smedley did not testify at the hearing. If the Secretary files a discrimination complaint on behalf of Coffey, the Secretary would be required to establish knowledge of the protected activity by a preponderance of the evidence.

The final element is hostility toward the protected activity. There is no specific evidence showing hostility toward the protected activity involved here. It was a rather unusual situation because Coffey was not responsible for ordering new self-rescuers so she had never done so since Txoma because the operator. Txoma had not shown any hostility towards Coffey's close relationship with MSHA. Indeed, Coffey testified that Smith asked her to stay with Txoma when she was going to quit because, in part, of her "good rapport" with MSHA. (Tr. 15). Applicant did not produce any evidence that anyone said anything negative to Coffey about her threat to call MSHA or that anyone commented about it at all. It appears that her threat to call MSHA was ignored at least until September 26. Coffey testified that Txoma discouraged its employees from making safety complaints to MSHA or anyone else. In her opinion, despite the language in the employee manual, Txoma stressed production over safety. I find that there is some evidence to support hostility toward the protected activity.

The opinion of Acting Chairman Althen and Commissioner Young in *Kevin Shaffer* states that if two versions of the events are presented at a hearing without dispositive proof of either, "the outcome at the reinstatement stage may not rest upon a choice between the versions and the miner must be reinstated." Slip op. at 9. I find that this case presents two versions of the events

and that the Secretary met the minimal burden of proof necessary to require temporary reinstatement of Holly Coffey.

Based on the evidence, as summarized above, I conclude that the discrimination case involved here was not frivolously brought. In reaching this conclusion I am influenced by the fact that many if not most of Coffey's job duties involved safety and MSHA matters. The most significant aspect of her reassignment is that she would no longer be able to devote much time, if any time, to safety and MSHA issues. It is not clear from the record exactly what she would have been doing in the warehouse during the weekends if she had accepted the reassignment or who would have taken over many of the safety related duties during the week. Coffey testified that Txoma wanted get her out of "sight and sound of MSHA." (Tr. 34, 86). I am not making any findings of fact in this regard but I do find that her concerns are not frivolous. I have determined that there is reasonable cause to believe that Coffey's termination was, at least in part, related to her safety activities including her threat to report Txoma's failure to order self-rescuers to MSHA.

Smith testified that the mine is not fully operational but is currently on an inactive status. Txoma hopes to get the mine back into production in two to three weeks from February 27. (Tr. 142-43, 175-76). Many employees are on furlough but others are still working, including Ms. Smedley. It is not clear whether Coffey would be working if she had not been terminated from her position. The Commission recognizes "that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation or the time for which an operator is required to pay back pay to a discriminatee." *Sec'y on behalf of Anderson v. A&G Coal Corp. et al*, 39 FMSHRC 315, 319 (Feb. 2017) (citations omitted). In such an instance, the mine operator must "establish that temporary reinstatement should be tolled based on a . . . layoff [and] . . . that 'the layoff properly included' the miner who filed the complaint of discrimination." *Sec'y on behalf of Ratliff v. Cobra Natural Resources, LLC*, 35 FMSHRC 394, 397 (Feb. 2013) (citation omitted). The operator must "affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence." *Id.* Although Txoma presented some evidence on this issue at the hearing, I find that Txoma did not meet its burden of proof on the tolling issue.

IV. ORDER

The Secretary's application for temporary reinstatement is **GRANTED** and it is **ORDERED** that Holly A. Coffey be immediately temporarily reinstated to her former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits she was receiving at the time of her discharge. If Txoma believes that temporary reinstatement should be tolled for a period of time, it must either file a motion with this court seeking such tolling accompanied by supporting affidavits or it must reach agreement with the Secretary as to a mutually acceptable date for the commencement of temporary reinstatement. The filing of a motion seeking to toll temporary reinstatement does not act to postpone reinstatement. Reinstatement will only be postponed upon an order of this court. In the alternative, the parties may agree upon temporary economic reinstatement but any agreement between the parties with respect to temporary economic reinstatement must be approved by this court.

The court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall complete the investigation of the underlying discrimination complaint **as soon as possible**. Immediately upon completion of the investigation, the Secretary **SHALL** notify counsel for Txoma and this court, in writing, whether a violation of Section 105(c) of the Mine Act has occurred. Counsel for the Secretary **SHALL** also immediately notify my office of any settlement or of any determination that Txoma Mining did not violate Section 105(c) of the Act.

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

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March 16, 2018

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

v.

FRED THOMPSON, formerly employed
by, FORTUNE REVENUE SILVER
MINES, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2018-51-M
A.C. No. 05-03528-450246 A

Revenue Mine

ORDER DENYING MOTION TO DISMISS

Before: Judge Manning

This case is before me under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820 (the “Mine Act”). The Secretary proposed civil penalties against Fred Thompson, the former mine manager of the Revenue Mine, and Thompson timely contested the penalties. The Secretary proposed a civil penalty of \$3,000 for the alleged violation set forth in section 104(d)(1) citation No. 8831660 and a civil penalty of \$3,400 for the alleged violation set forth in section 104(d)(1) order No. 8831661.¹ The citation and order were issued on July 12, 2015 and the Secretary proposed the penalties in this case on October 10, 2017.

The underlying citation and order were issued to Fortune Revenue Silver Mines, Inc., the operator of the Revenue Mine in July 2015. In August 2015 or shortly thereafter, as a result of Fortune Revenue’s default on obligations to its creditors, Ouray Silver Mines, Inc. (“OSM”), assumed operator status and contested the citation and order. By order dated March 14, 2018, I approved the motion to approve settlement filed by the Secretary in OSM Docket No. WEST 2016-43-M. In the settlement, OSM agreed to pay a reduced penalty for the citation and order. The Revenue Mine has not been operating (i.e. not producing ore) since OSM assumed ownership of the mine.

¹ The citation alleges a violation of section 57.8529. The citation states, in part, that the operator failed to ensure that the auxiliary ventilation fan in the Virginius South Decline was moving clean air into the active workings. The order alleges a violation of section 57.5002. It states, in part, that the operator failed to determine the adequacy of its ventilation control measures in the underground workings.

On or about February 21, Thompson filed a motion for summary decision in this case. I construe the motion as a motion to dismiss. In the motion, Thompson maintains that the Secretary's delay in prosecuting this case has prejudiced his ability to defend himself.

Specifically, since Fortune Minerals is no longer the owner or the operator of the mine and other managers/operators have become involved with the operation of the mine, essential documents that were in the possession of Fortune Minerals at the time of the writing of the citations such as written company policies, gas meter logs (both electronic and paper), mine maps, safety documentation, safety meeting sign in sheets, shift logs, shift instructions to the miners, meeting minutes and engineering calculation sheets are no longer available or have been otherwise irretrievably lost or disposed of making them unavailable for the preparation of an adequate defense. In addition to the physical documents that would be essential to the preparation of Respondent's defense, e-mails, e-mails with attachments or other electronically transmitted documents that are of equal importance have similarly been irretrievably lost, deleted or have become inaccessible. Also of equal importance to the preparation for trial is that of the interviews of potential witnesses.

The net of the Fortune default has resulted in all of the miners in the employ of Fortune Minerals being laid off and have scattered in pursuit of other employment opportunities. This scattering of potential witnesses combined with the lengthy delay created by MSHA's handling of the investigation following the lay-off has precluded Respondent from finding any such witness that has direct knowledge of with this matter. In an attempt to locate any such witness, the respondent has utilized methods such as social media and "Google" searches or telephone calls to numbers that the Respondent had following his departure from the employ of Fortune Minerals. These methods have proved fruitless in the location of potential witnesses thus impeding the Respondent from assembling an adequate defense.

Motion at 2. Thompson recognizes that the passage of time alone is not sufficient to warrant the dismissal of a case against the agent of a mine operator, but he argues that the combination of a lengthy delay and a showing of actual prejudice against the agent should result in a dismissal of the case.

The Secretary maintains that the penalty petition in this case was filed within a reasonable time. The penalty assessment was filed about two years and three months after the subject citation and order were issued. The Secretary argues that "Congress did not intend to authorize the Commission to vacate penalties for failure to propose a penalty within a *reasonable time* as determined by the Commission." Sec'y Opposition at 4 (emphasis in original). The Mine

Act does not “prescribe any consequence if the Secretary fails to propose a penalty ‘within a reasonable time.’” *Id* at 5. Because the assessment of a penalty for a violation of the Secretary’s health and safety standards is mandatory, the Commission is “not authorized to refuse to assess” a penalty for a violation. *Id*.

The Secretary further argues that his delay in assessing a penalty was not unreasonable in this case. In July 2015, MSHA started its investigation into a possible agent violation against Thompson. Respondent and other witnesses were interviewed by MSHA in September 2015 and Thompson submitted a written response to questions posed by MSHA in October 2015. In December 2015, MSHA notified Thompson that it intended to bring a civil penalty case against him under section 110(c) of the Mine Act. Thompson requested a conference, which was granted, and he submitted a second written position statement to MSHA in January 2016. In October 2017, MSHA’s Office of Assessments issued a Proposed Assessment against Thompson proposing a civil penalty of \$6,400.

“Dismissal of cases . . . is strongly disfavored and, ‘regardless of how important procedural regularity may be, it is subservient to the substantive purpose of the Mine Act in protecting miners’ health and safety.’” Sec’y Opposition at 6 quoting *Long Branch Energy*, 34 FMSHRC 1984, 1991 (Aug 2012). Commission judges have denied motions to dismiss where the section 110(c) assessments were issued for even longer time periods than is present in this case.

The Secretary also argues that Thompson has not demonstrated that it has been prejudiced by the delay. He maintains Thompson “only speculates as to the possibility of prejudice.” Sec’y Opposition at 7. The Secretary argues that Thompson has not specified why the information he believes to be lost is necessary for his defense with respect to the specific allegations contained in the citation and order. In addition, the Secretary believes that MSHA may have much of the information he needs. At the Secretary’s request, the safety manager for OSM searched for and located documents from 2015 that directly relate to the citation and order at issue. Finally, Thompson has not identified the witnesses he is unable to locate and how the failure to find them is prejudicial to his defense. This case is in the preliminary stages and it would be premature to grant a motion to dismiss.

I permitted Thompson to reply to the Secretary’s opposition. He presented several facts that he believes demonstrate that he has been prejudiced by the Secretary’s delay in bringing this case. Specifically he points out that: (1) all miners that were working at the mine were laid off some time ago and he has been unable to locate them; (2) two miners that worked in the area of the mine cited by MSHA have passed away; and (3) because Fortune Revenue is no longer the owner or operator of the mine, essential documents have been destroyed making them unavailable for the preparation of an adequate defense. Although the Secretary asserts that MSHA may be in possession of critical documents, the Secretary has not produced them to Respondent and has not even represented that MSHA actually has the documents in question.

ANALYSIS

I find that I must deny Thompson's motion at the present time but, as this case progresses, the issue whether the Secretary's delay in prosecuting this case has prejudiced Thompson's ability to defend himself may need to be revisited. As the Secretary states, this proceeding is in a preliminary stage.

Some of the Secretary's arguments can be dismissed quite easily. The Secretary, citing a case under the jurisdiction of the Securities and Exchange Commission, asserts that he has five years to prosecute cases under the Mine Act. *See Gabelli v. SEC*, 133 S. Ct. 1216, 1219 (2013) (citing 28 U.S.C. § 2462). I reject this argument without further discussion, in part because the Commission has developed its own jurisprudence in analyzing the timeliness of the Secretary's actions under the Mine Act.

I also reject the Secretary's argument that the Commission does not have the authority to dismiss a penalty case upon a motion of the respondent because the Mine Act requires that a penalty be assessed for every violation of the Secretary's health and safety standards. The Secretary asserts that had Congress intended the Commission to have the authority to dismiss cases that are not prosecuted within a reasonable time "it would have clearly indicated such result." Sec'y Opposition at 5. I believe that it is clear that Congress did not contemplate that the Secretary would take years or even a half a decade to assess penalties under the Mine Act. The legislative history of the Mine Act is instructive on this issue. It stresses the need to adjudicate and collect penalties as quickly as possible. "To be effective and to induce compliance, 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). "[A] long delay in assessment and collection of civil penalties does not encourage operator compliance with the Act and its standards." *Id.* at 632. Thus, Congress did not include a specific provision authorizing the Commission to dismiss a case if the Secretary unreasonably delays filing a penalty petition because it made clear that encouraging compliance with safety standards requires that the penalty be assessed promptly.

In this instance, the Secretary provided a reasonable explanation for its actions between July 12, 2015, the date the citation and order were issued, and January 2016, when Thompson submitted additional information. The Secretary did not provide an explanation for the time between January 2016 and October 11, 2017, the date MSHA issued the proposed penalty assessment. I expect that during much of that time the case was being reviewed by MSHA's Technical Compliance and Investigation Office (TCIO), which is the black hole of MSHA. TCIO typically takes an extraordinarily long time to review the recommendations of the applicable MSHA district office in cases brought under section 110(c) of the Mine Act.

Nevertheless, I find that adequate cause existed for the delay. The 110(c) investigation was commenced less than one month after the citation and order were issued and a proposed penalty was assessed a little over two years after that. That is relatively quick for MSHA. It appears that as soon as the investigation was completed, the penalty was promptly proposed.

I also find that Thompson has not demonstrated that he was prejudiced by the delay in this matter. I have previously explained that “Respondent's showing of prejudice must be ‘real or substantial’ and ‘mere allegations of potential prejudice or inherent prejudice should be rejected.’” *Dino Trujillo*, 35 FMSHRC 1485, 1487 (May 2013) (ALJ) (quoting *Long Branch Energy*, 34 FMSHRC 1984, 1991-93 (Aug. 2012)). As noted by the Secretary, discovery has not begun and neither party has yet exchanged any records. I agree with the Secretary that, given the preliminary stage of this case and the fact that discovery has not yet commenced, Respondent has alleged only potential prejudice and has not demonstrated actual prejudice. Discovery will facilitate the exchange of information which may allow Thompson to secure records needed for his defense and the location of individuals he has not yet been able to find. Dismissal is an extreme remedy and is disfavored without a strong showing of actual prejudice.

I recognize that Thompson is in a difficult position given that Fortune Revenue is no longer the mine operator, critical documents may no longer be readily available to him, and key witnesses may have passed away or may not be found. I am denying the motion to dismiss at the present time because it is not entirely clear whether Thompson will be able to overcome these obstacles during the discovery phase of the case. In his opposition to Thompson’s motion, the Secretary stated that, as part of its investigation, MSHA gathered documents that are relevant to this case including “manager meeting minutes, emails, shift reports, and 5-point cards submitted by miners.” Sec’y Opposition at 7. In addition, counsel stated that, at the Secretary’s request, OSM located documents “from 2015 that include such items as air sample records, pre-shift reports, daily safety meeting reports, mobile equipment inspection records, policies and procedures, ‘SLAM’ workplace inspection reports, etc.” *Id.* at 8. The Secretary represents that these records “may very well exist in the files of MSHA and/or OSM.” *Id.*

Given that Thompson is not represented by counsel, I hereby **ORDER** the Secretary to search for the documents described above and all other documents related to this case and to provide them to Mr. Thompson by no later than **April 26, 2018**. The Secretary shall provide a privilege log for any documents or parts of documents he is withholding due to an asserted privilege. If the Secretary believes that OSM is in possession of relevant documents not in the possession of MSHA, he shall so state in his response to this order. Finally, if the Secretary has information regarding the location of former Revenue Mine miners, he shall provide that information to Thompson as well.

ORDER

For the reasons set forth above, Respondent's motion to dismiss this case is **DENIED** but Respondent is free to renew the motion after discovery has been completed. The Secretary is **ORDERED** to provide the documents and information described in the above paragraph to Mr. Thompson by no later than **April 26, 2018**.

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

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March 19, 2018

SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR on
behalf of DANIEL K. MULLINS,
Complainant,

v.

D&H MINING, INC.,
Respondent.

TEMPORARY REINSTATEMENT

Docket No. VA 2018-0068-D
MSHA Case No. NORT-CD-2018-04

Mine: D&H No. 3
Mine ID 44-07268

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge Miller

This matter is before me on an application for temporary reinstatement filed by the Secretary of Labor on behalf of Daniel Mullins pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (“the Act”). The application seeks reinstatement of Complainant to his former position as a roof-bolting machine operator at the D&H No. 3 mine pending final disposition of a discrimination complaint he has filed against Respondent.

The Secretary filed the application for temporary reinstatement with the Commission on February 16, 2018, and served a copy on Respondent by first class mail. On February 28, 2018, Respondent filed a request for a hearing.¹ A hearing was held on March 14, 2018, in Abingdon, Virginia.

For the reasons that follow, the application is granted.

I. SUMMARY OF THE EVIDENCE

The following is based on the allegations contained in the application and the exhibits appended to it, and on the testimony at hearing of Daniel Mullins. Mullins was the only witness for the Secretary and I find that his testimony was not demonstrable false. I have also considered the testimony and arguments provided at hearing by the mine operator, but note that the question before me is whether the complaint of Mullins was frivolously brought. While the operator

¹ Commission rules require that a respondent must request a hearing on an application for temporary reinstatement within 10 calendar days following receipt of the application, but allow five additional calendar days when the application is served by mail. 30 C.F.R. §§ 2700.8(b), 2700.45(c).

presented a differing account from that of Mullins, the conflict in testimony will be resolved at a later stage if the Secretary files a complaint of discrimination.

Mullins was employed by D&H Mining as a scoop operator and then as a roof-bolting machine operator at the Lower Mill Blair No. 3 mine. He worked as a full-time employee at the mine from mid-October 2017 until January 10, 2018. Mullins testified that he frequently worked in excessive amounts of dust while operating the roof-bolting machine because he had to work in return air while the continuous miner was operating. He testified that he complained about the dust frequently and believes that the Section Foreman, Gerald Ball, overheard his complaints. He also complained directly to Foreman Ball about the curtains for the continuous miner not being hung correctly. According to Mullins, Ball acknowledged the complaint regarding the curtains and indicated that he would take care of the issue. On one occasion, Mullins believes he overheard Ball telling other miners that the company would do whatever it took to run coal.

Mullins explained that on January 9, 2018, he complained to Foreman Ball about tramming the roof-bolting machine from the section No. 1 entry to the No. 7 entry in dusty conditions. The dust was the result of rock dusting, and Mullins told Ball that the dust was so thick that he could not see well enough to tram the roof-bolting machine. Mullins stated loudly that the dust was so thick, he could not see the T-bar on the roof-bolting machine. Ball became angry and grabbed the curtain, removing it from the T-bar. Mullins returned to the bolting machine after this. He alleges that Ball was angry with him after this incident and did not speak with him for the remainder of the shift. He believes Ball gave him an angry look when he was leaving work that day. Mullins believes that others working in the area observed the scene between him and Ball in the mine and heard Mullins make complaints about the dust. Ball denies that he heard Mullins complain about the dust. He testified that there was no issue with dust in the mine on that day or on any other.

Mullins was fired on January 10, 2018, through a telephone call from a co-worker. He then called Ball and was told that he was being terminated because he had missed too many days of work. Mullins testified that he missed work on January 10 for personal reasons, but that he had received prior permission from Ball to miss work that day. Ball denies that he knew about the absence in advance. Mullins believes he was terminated for complaining about working in excessive dust. Ball testified that Mullins was terminated for missing work.

II. DISCUSSION

Section 105(c) of the Act, 30 U.S.C. § 815(c), prohibits discrimination against miners for exercising any right afforded by the Act. Under Section 105(c)(2) of the Act, “if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.” 30 U.S.C. § 815(c)(2). The Commission has stated that the scope of a temporary reinstatement hearing is therefore “narrow, being limited to a determination by the judge as to whether a miner’s discrimination complaint is frivolously brought.” *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738 (11th Cir. 1990). This standard reflects a Congressional intent that “employers should bear a proportionately greater burden of the risk of an erroneous decision

in a temporary reinstatement proceeding.” *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990).

The Commission has explained that “it is not the judge’s duty ... to resolve [any] conflict in testimony at this preliminary stage of proceedings.” *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999); *see also Sec’y of Labor on behalf of Shaffer v. Marion County Coal Co.*, No. WEVA 2018-117-D, 40 FMSHRC ___, slip op. at 4, 9 (Feb. 8, 2018). Nevertheless, the Judge “need not accept testimony if it is demonstrably false, patently incredible, or obviously erroneous.” *Shaffer*, slip op. at 9 (Althen, Chairman, and Young, Comm’r).

The issues raised in a temporary reinstatement hearing are “conceptually different from those implicated by the underlying merits” of the miner’s discrimination claim. *JWR*, 920 F.2d at 744. The temporary reinstatement proceeding addresses “whether the evidence mustered by the miner[] to date establishe[s] that [his] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *Id.*

While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, the elements of a discrimination claim are relevant to the analysis of whether the evidence presented satisfies the non-frivolous test. *Sec’y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). In order to establish a prima facie case of discrimination under the Act, a complaining miner must present evidence sufficient to support a conclusion that he engaged in protected activity, that he suffered an adverse employment action, and that the adverse action was motivated at least in part by that activity. *Turner v. Nat’l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev’d on other grounds*, 663 F.2d 1211 (3d Cir. 1981). The Commission has acknowledged that evidence of motivation is frequently indirect, and has identified several “circumstantial indicia of discriminatory intent: (i) hostility or animus toward the protected activity; (ii) knowledge of the protected activity, and (iii) coincidence in time between the protected activity and adverse action.” *Williamson*, 31 FMSHRC at 1089; *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The question for the judge at this stage is whether there is a non-frivolous question as to the elements of the case. *Williamson*, 31 FMSHRC at 1091.

I find that Mullins’s application for temporary reinstatement was not frivolously brought. Mullins testified that he made several safety complaints to the section foreman on his shift, including a complaint about working in excessive dust on January 9, 2018. This constitutes protected activity under Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1). While Ball testified that he had no knowledge of any complaints by Mullins and denied that there were problems with excessive dust at the mine, at this stage it is inappropriate to weigh the conflicting testimony of the mine’s witnesses. *Albu*, 21 FMSHRC at 719. The testimony of Mullins that he was concerned about dusty working conditions and complained of those conditions to management is sufficient to meet the requirement of protected activity.

Mullins testified that his employment was terminated on January 10, 2018. While there is some dispute as to who made the decision to fire Mullins, the mine does not dispute that he was terminated. The action constitutes an adverse action under the Act.

Further, there is a sufficient nexus between the protected activity and the adverse action to support temporary reinstatement. Mullins alleges that he complained about working conditions to his supervisor the day before he was terminated. The coincidence in time between the adverse action and the alleged protected activity is evidence of an illicit motive. *Sec'y on behalf of Stahl v. A&K Earth Movers, Inc.*, 22 FMSHRC 323, 325 (Mar. 2000); *Chacon*, 3 FMSHRC at 2510. Mullins also testified that the person making the termination decision had knowledge of his safety complaints, which is relevant to discriminatory intent under Commission case law. *Chacon*, 3 FMSHRC at 2510. Additionally, Mullins testified that his section supervisor was angry at him for making a safety complaint and told miners the company would do whatever it took to run coal, suggesting hostility towards protected activity. *See id.* While Respondent's witnesses disputed each of these points, it is not necessary to resolve conflicts in testimony at this stage. *Albu*, 21 FMSHRC at 719.

At hearing, Respondent sought to present four additional witnesses that would have testified, as Ball did, that Mullins made no complaints about dust and there were no dusty conditions at the mine. I excluded this testimony on the basis that it would have been needlessly cumulative and would have called for a discussion of credibility, which is more appropriate after discovery and when and if a discrimination petition is ultimately filed. A trial judge has the discretion to "place reasonable limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence." *Johnson v. Ashby*, 808 F.2d 676, 678 (8th Cir. 1987); *see also* Fed. R. Evid. 403; *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1171 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983). Respondent had the opportunity to question Mullins through cross-examination and to present its defense through the testimony of Ball. The additional testimony offered would not have changed my conclusion that the testimony of Mullins was not demonstrably false. The Commission has explained that resolving conflicts in testimony between the complainant and the operator's witnesses at this stage, "when the parties have not yet completed discovery, would improperly transform the temporary reinstatement hearing into a hearing on the merits." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1879 (Aug. 2012).

I find that Complainant has raised a non-frivolous issue as to each element of the prima facie case. I conclude that the discrimination complaint was not frivolously brought and Complainant is entitled to temporary reinstatement.

III. ORDER

The Application for Temporary Reinstatement is hereby **GRANTED**. Respondent is **ORDERED** to, immediately upon receipt of this decision, reinstate Complainant to his former position at the mine, or a comparable position within the same commuting area at the same rate of pay and benefits he received prior to his discharge, pending a final Commission order on the discrimination complaint.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 2, 2018

LEDCOR CMI, INC.,
Contestant,

v.

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

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

v.

LEDCOR CMI, INC.,
Respondent

CONTEST PROCEEDING

Docket No. WEST 2017-0231-RM
Order No. 8989354; 10/06/2016

Cemex – Sierra Stone Quarry
Mine ID: 26-02082 R810

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2017-270-M
A.C. No. 26-02082-430548 R810

Docket No. WEST 2017-290-M
A.C. No. 26-02082-424968 R810

Cemex-Sierra Stone Quarry

**ORDER GRANTING, IN PART, THE SECRETARY’S
MOTION TO COMPEL**

Before: Judge Manning

These cases are before me upon a notice of contest filed by Ledcor CMI, Inc. (“Ledcor”) and two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Ledcor pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The cases involve a citation issued under section 104(d)(1) of the Mine Act, two orders issued under that same section, and a section 104(b) order. These enforcement actions were issued in early October 2016. The cases involve issues surrounding the condition of highwalls at the quarry. Ledcor was an independent contractor at the mine.

During the course of discovery, the Secretary filed a motion entitled “Secretary’s Motion to Compel Respondent’s Further Responses to the Secretary’s Interrogatories and Requests for Admissions.” Ledcor filed an opposition to the Secretary’s motion and, with permission of this court, the Secretary filed a reply. The Secretary’s motion seeks further responses with respect to four categories of discovery requests. The arguments of the parties set forth below are very brief summaries of the more detailed arguments that are set forth in the motion and responses. The headings below are taken directly from the Secretary’s motion.

A. Respondent Must Identify Which of the More than 1250 Pages of Documents It Produced Are Responsive to Interrogatories 4 and 25.

Interrogatory 4 asked Ledcor to provide information about internal communications regarding the status of ground conditions at the highwalls, removing blasted rock from the highwalls, hauling rock from the highwalls, addressing ground conditions and/or erecting barricades to block access to the highwalls. Interrogatory 25 requests that Ledcor provide a description of the work it contracted with Cemex to perform at the 99 Pit, including the dates the work began and ended.

The Secretary states that Ledcor responded to these interrogatories by referring to documents produced in response to the Secretary's requests for the production of documents. He states that Ledcor produced 1250 pages of documents and has refused to specify which of these documents are responsive to the two interrogatories. The Secretary argues that this court should compel Ledcor to designate the specific documents that respond to the interrogatories and, in the case of longer documents, the specific pages within the designated documents that respond to the interrogatories. He relies on the Federal Rules of Civil Procedure for guidance ("Federal Rules"). Rule 33 provides, in part, that if the answer to an interrogatory may be determined by examining a party's records and if the burden of ascertaining the answer will be substantially the same for either party, the responding party may answer an interrogatory by "specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could[.]" Fed. R. Civ. P. 33(d)(1). The Secretary maintains that a responding party ordinarily complies with this rule by specifying the Bates numbers of the documents that the responding party considers responsive to the interrogatory. Although Rule 33(d) relieves a party from the burden of compiling information from the documents to answer the interrogatory, the rule "does not relieve the responding party from pointing out the documents from which the answer can be discovered." Sec'y Mot. 5, quoting *In re Ethicon Inc. Pelvic Repair Systems Product Liability Litigation*, No. MDL 2327, 2013 WL 8744561 (S. D. W. Va. July 26, 2015) (citations omitted).

In response, Ledcor states that it provided indices for its document productions. Its first production of documents contains an index in the electronic file that allows the Secretary to find and navigate directly to specific documents. In its second production, the electronic documents contain a "corresponding index of the files containing their metadata, e.g., the information for the date, to, from, copied to, and subject line or title of each electronic file produced with a reference to its production number." Ledcor Response 3. In addition, both production responses were provided electronically so they are "full-text searchable as well." *Id.* Ledcor goes on to state:

While it is true that federal courts handling complex litigation have required that responding parties identify the Bates numbers of documents in very large document productions, where, as here, the production of records is largely confined to the issue of ground control safety at the mine, Ledcor's production of indices to its document production is not only sufficient, but contains more

identifying information about the particular documents than a mere recitation of Bates numbers.

Id. at 6. Ledcor also argues that it provided other information to the Secretary that answers the subject interrogatories. For example, Ledcor provided a copy of the contract between it and Cemex that contains provisions describing the scope of Ledcor's work at the mine.

In his reply, the Secretary argues that the pdf bookmarks Ledcor included in its document production do not contain any information identifying that the produced documents are responsive to Interrogatories 4 or 25, nor do they identify whether the produced documents have any relevance to the issues in this matter. The bookmarks in the pdf documents provide some information relevant to Ledcor's document tracking system, but do not contain any information stating that any of the documents are responsive to the interrogatories. In addition, Commission Procedural Rule 58(a) requires a party to "answer each interrogatory separately and fully in writing." 29 C.F.R. § 2700.58(a). This rule essentially negates Ledcor's reliance on Federal Rule 33(d) because the Commission has a specific rule on the subject. The Secretary states that he is willing to accept Ledcor's response to the interrogatories rather than a written response so long as Ledcor specifically identifies those pages of the documents provided that respond to the specific interrogatories.

The Commission's procedural rules apply to all proceedings before Commission administrative law judges. They are designed to "secure the just, speedy and inexpensive determination of all proceedings[.]" 29 C.F.R. § 2700.1(c). To keep the rules simple, they do not cover every situation that may arise before a judge. The rules provide that on any procedural question not regulated by the Mine Act, the Commission's procedural rules, or the Administrative Procedure Act, the "Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure[.]" 29 C.F.R. § 2700.1(b).

Commission Procedural Rule 58(a) clearly provides that a "party served with interrogatories shall answer each interrogatory separately and fully in writing under oath[.]" 29 C.F.R. § 2700.58(a). The Secretary, in this instance, is willing to waive this requirement and to accept documents provided in response to his request for production of documents so long as Ledcor specifically designates the particular pages that provide information in response to the interrogatories. Although Ledcor provided bookmarks (indices) with the electronic documents, it did not indicate which documents or pages of documents answer the two interrogatories. A portion of these bookmarks were provided at pages 4 and 5 of its opposition to the Secretary's motion to compel. These indices do not in any fashion indicate what documents or pages of documents answer Interrogatories 4 and 25. I find that Ledcor has not complied with Commission Procedural Rule 58(a) or Fed. R. Civ. P. 33(d)(1). The Secretary's motion to compel further responses to Interrogatories 4 and 25 is **GRANTED**. Ledcor is **ORDERED** to either (a) answer these two interrogatories "separately and fully in writing under oath" or; (2) identify the documents and the pages within lengthy documents that answer each interrogatory.

B. Respondent Must Respond to Interrogatories 26 through 49 as the Commission Has Held the FRCP 33(a)'s "25 Limit" Does Not Apply to Commission Matters.

The Secretary states that he propounded Interrogatories 26 through 49 in order to obtain specified material facts that relate to the enforcement actions taken in these cases and Ledcor's defenses to them. Ledcor objected to these interrogatories based on its position that a party can propound no more than 25 interrogatories in matters before the Commission. The Secretary disagrees with Ledcor's position on this issue based on an order issued by this court. In its response, Ledcor cited to orders issued by Judge William Moran. In the cases before Judge Moran, it was the Secretary that sought to limit the number of interrogatories he had to answer. Ledcor argues that the Secretary cannot have it both ways.

The Commission has not ruled on the issue in question. The only orders issued by administrative law judges discussing this issue are the three discussed by the parties. The Commission has held that Procedural Rule 1(b):

does not dictate that any particular Federal Rule of Civil Procedure be reflexively applied in Commission proceedings on procedural questions not regulated by the Mine Act, the Administrative Procedure Act, or our own procedural rules. Rather Procedural Rule 1(b) merely states that in such circumstances, the Commission and Commission judges are to be "guided so far as practicable" by the Federal Rules of Civil Procedure "as appropriate." Plainly, Procedural Rule 1(b) reserves to the Commission [and its judges] considerable discretion in deciding whether and to what extent it is to be "guided" by a particular Federal Rule of Civil Procedure.

Rushton Mining Co., 11 FMSHRC 759, 765 (May 1989). In *GTI Capital Holdings LLC d/b/a Rockland Materials*, I held that Federal Rule 33's provision limiting the number of interrogatories to 25 does not apply to Commission proceedings because our procedural rules provide that a party "may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appear likely to lead to the discovery of admissible evidence." 23 FMSHRC 555, 557 (May 2001) (ALJ); Comm. Rule 56(b)). There is no limitation of the number of interrogatories that a party may serve. I also stated that a party may file a motion to limit discovery to protect a party from "oppression or undue burden or expense." *Id.*; Comm. Rule 56(c).

In one of his cases, Judge Moran noted that the "Commission's Procedural Rules do not speak to the number of interrogatories and, because of that silence, consultation with section 2700.1(b) is entirely appropriate." *Kirk Fenoff & Son Excavating*, 36 FMSHRC 3339 (Dec. 2014)(ALJ). In reaching his conclusions, he cited the history of Fed. R. Civ. P 33, particularly the Advisory Committee Notes for the rule. These Notes indicate that the Committee was concerned that interrogatories "may be used as a means of harassment" and the 25 interrogatory limit was included to "provide judicial scrutiny before parties make potentially excessive use of this discovery device." *Id.* (citations omitted). Judge Moran held that in cases before his court a

“party seeking to present more than 25 interrogatories bears the burden of demonstrating a particularized need for each additional interrogatory beyond the maximum of 25.” *Id.* In *Bing Materials*, Judge Moran determined that the numerical limitation should be “presumptive” absent a showing of a “particularized need” for additional interrogatories. 39 FMSHRC 419 (Feb. 2017)(ALJ).

I do not need to reach the issue whether there should be a presumptive numerical limitation because I can resolve the issue on very practical grounds. I conclude that if I apply the principles that have developed under the Federal Rules, Ledcor should be required to respond to all 49 interrogatories. The Federal Rule limits the number of interrogatories to 25 “including all discreet subparts.” Fed. R. Civ. P. 33(a)(1) (emphasis added). “Although the term ‘discrete subparts’ does not have a precise meaning, courts generally agree that ‘interrogatory subparts are to be counted as one interrogatory ... if they are logically or factually subsumed within and necessarily related to the primary question.’” *Trevino v. ACB Am., Inc.*, 232 F.R.D. 612, 614 (N.D. Cal. 2006) (citations omitted); *see also Swackhammer v. Sprint Corp. PCS*, 225 F.R.D. 658, 664–65 (D. Kan. 2004) (“[A]n interrogatory containing subparts directed at eliciting details concerning a ‘common theme’ should generally be considered a single question.”). Thus, a skilled attorney can often organize his or her interrogatory questions under the Federal Rules to obtain the needed information in 25 interrogatories by carefully including related requests in a single interrogatory.

In reviewing the interrogatories propounded by the Secretary in these cases, I find that a large number of them could have been combined. Exhibit A to Sec’y Mot. For example, Interrogatory 25 asks about the scope of Ledcor’s work as a contractor at the mine, Interrogatory 26 asks for the identification of persons with knowledge of the facts relied upon to respond to Interrogatory 25, and Interrogatory 27 asks for the identification of any documents relied upon in the response to Interrogatory 25. These interrogatories could have been written as one interrogatory or the second two interrogatories could have been included as subparts of the first under the Federal Rules. A great number of the Secretary’s interrogatories are organized in the same three-part manner. If the Secretary’s counsel had been specifically required by the Commission’s rules to limit the number of interrogatories in these cases, she could have propounded 25 interrogatories asking for the same information as she did in 49 interrogatories.¹ Thus, Ledcor’s objection stresses form over substance.

I have reviewed Interrogatories 26 through 49 and I conclude that they relate to the Secretary’s enforcement actions and Ledcor’s defenses to them. Ledcor’s objection to the interrogatories is based solely on the number propounded and not on the subject matter of Interrogatories 26-49. As discussed above, a large number of the interrogatories propounded are interrelated and could have been combined so that only 25 interrogatories would have been necessary. There has been no showing that the interrogatories were propounded for the purpose of harassment, oppression, or to unduly burden Ledcor. For the reasons set forth above, the Secretary’s motion is **GRANTED** with respect to this issue. Ledcor is **ORDERED** to answer Interrogatories 26 through 49.

¹ By my count, if the Secretary had combined the related interrogatories, the total number would have been about 20.

C. Respondent Did Not Provide a Complete Response to Interrogatories 7, 10, and 16 As It Unilaterally Limited its Response to a Particular Day.

Interrogatory 7 requests information regarding specific mining activities that took place at the Mid-Level bench during the six-month period before the subject inspection. The Secretary is seeking this information because Ledcor contends that there was no mining being conducted at the Mid-Level Bench at the time of or prior to the subject inspection. Interrogatories 10 and 16 asked for the same information as Interrogatory 7 except they cover the Upper Level Bench and the Lower Level Bench respectively. Ledcor objects to these interrogatories because they are overbroad and unduly burdensome.

The Secretary stated that counsel met in person on February 1, 2018 to discuss the cases and the topics discussed included discovery issues. Counsel for the Secretary states that during this “meet and confer process,” she agreed to narrow the scope of these interrogatories only to activities related to blasting, scaling, and barricading, but Ledcor did not provide further information. The Secretary argues that when a party maintains that an interrogatory is unduly burdensome, that party has the burden of demonstrating the nature of the burden involved. He contends that Ledcor has not provided sufficient evidence to demonstrate an undue burden or expense.

In response, Ledcor states that it detailed the significant events that occurred at each bench of the mine, including the dates of last known mining operations, the most recent dates of blasting, and the safety precautions taken at the end of mining the particular bench. Ledcor stated in its objections that it was limiting its responses to “the subject matter of the relevant citations, namely ground control hazard avoidance activities at the mine.” Ledcor Response at 10 (citation omitted).

In the his reply, the Secretary states that, during the “meet and confer process,” Ledcor attempted to direct the Secretary’s method of discovery by suggesting that any further information on the subject issues can be obtained during depositions. Counsel for the Secretary stated that she explained to counsel for Ledcor her reasons for seeking the requested information and documents prior to taking any depositions. She argues that “depositions are expensive and, as a result, are not the most efficient way to obtain basic information” and “parties typically propound written discovery to provide them with not only the basic facts underpinning the citations and orders at issue, but also knowledge of the universe of persons with knowledge of those facts and the documents that contain information relevant to the Secretary’s allegations and the responding party’s defences.” Sec’y Reply at 4.

In addition to raising the objections discussed above, Ledcor provided information regarding its most recent activities on all three benches. With respect to the Mid-Level Bench, Ledcor stated that it “most recently conducted active mining operations . . . from September 12 through September 23, 2016.” Sec’y Mot., Ex. C, p. 8. “The most recent blasting took place . . . on September 1, 2016. Following the end of mining operations in the Mid-Level bench on September 23, 2016, a berm was placed at the entry point of the access road leading from the Lower-Level bench to the Mid and Upper Level benches.” *Id.* Ledcor provided similar information with respect to the Lower Level Bench and the Upper Level Bench. *Id.* at pp. 10, 15.

I find that Ledcor did not provide any evidence to demonstrate an undue burden or expense. The Secretary asked for a history of all blasting, scaling, and barricading activity on the benches going back about six months prior to the issuance of the citation and orders in early October 2016. As a contractor at the mine, Ledcor's work was limited in scope and had been going on, at most, for that six month period. The citation and orders allege that Ledcor was highly negligent with respect to the alleged violations and one of the orders alleges that the "mining methods being used in the 99 Pit do not ensure the stability of the high walls." Order No. 8989355, Docket No. WEST 2017-270-M. As a consequence, the parties are likely to seek to introduce evidence at the hearing about mining methods and highwall stability for a period of time before the date of the issuance of the citation and orders. I find that a six month history of the activities at the highwalls is relevant to the issues in the case.

"A party objecting to a discovery request on the basis of burden or expense must demonstrate such a burden or expense." *Greyeagle Coal Co.*, 35 FMSHRC 3321, 3324 (Oct. 2013) (ALJ) (citing *Rail Link, Inc.*, 20 FMSHRC 181, 182–83 (Feb. 1998) (ALJ)). Ledcor has not demonstrated how or why obtaining and providing the information requested would be burdensome or expensive. I also agree with the Secretary, that Ledcor cannot tell the Secretary that it should obtain the information in a deposition. For the reasons set forth above, the Secretary's motion is **GRANTED** with respect to this issue. Ledcor is **ORDERED** to provide more complete answers to Interrogatories 7, 10 and 16.

D. Respondent Provided Improper and Internally Inconsistent Responses to Requests for Admissions 5 through 14.

The Secretary states that he propounded Requests for Admissions 5 through 14 in order to verify the accuracy of statements that the MSHA inspector recorded in her notes at the closeout conference on October 13, 2016. The MSHA inspector attributed the statements set forth in the Requests for Admissions to specified Ledcor management officials who discussed the merits of the subject citation and orders at the closeout conference. For example, Request 5 asks Ledcor to admit that during the closeout conference, Ledcor's project manager stated that the hazardous conditions at the Mid-Level Bench "shouldn't have been allowed to exist." Sec'y Mot., Ex. D p. 4. Ledcor's response to that request for an admission is as follows:

Denied. After making a reasonable and diligent inquiry, Ledcor lacks knowledge or information sufficient to confirm that the quoted statement taken from the inspector's notes is true or accurately reported.

Id. Ledcor's responses to the other requests for admission are the same. The Secretary maintains that under the guidance provided by Fed. R. Civ. P. 36(a)(3) and (4), Ledcor's responses are insufficient.

Ledcor first argues that requests for admissions should be used to establish admissions of facts there are not in dispute rather than to elicit facts and information from the opposing party. Admissions should be framed to narrow the range of issues for trial. The subject requests for admissions do not seek to conclusively establish the truth of the matters asserted for the purpose

of narrowing the issues at the hearing, but only to establish that certain oral statements were made. These alleged statements were made a year before the request for admissions were propounded and were recorded only in the notes of the inspector. Ledcor complied with the requirements of the Federal Rules because, after making a reasonable inquiry, it could not admit that the alleged statements were made. Fed. R. Civ. P. 36(a)(4).

In his reply, the Secretary argues that the contents of the statements allegedly made by Ledcor's employees are relevant to the factual and legal issues in the cases. He observes that these individuals also took notes during the closeout conference. Mine operators regularly keep records of the discussions in closeout conferences so Ledcor should have referred to these notes to respond to the requests for admissions.

Ledcor represents that it made reasonable and diligent inquiries in responding to the admission requests. Ledcor's response was signed by its attorney Nicholas W. Scala, who is an officer of this court. Commission Procedural Rule 6(b) requires that Mr. Scala certify that he has read the document and "to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact[.]" 29 C.F.R. § 2700.6(b). Thus, I accept Mr. Scala's representation that Ledcor made a reasonable and diligent inquiry into each admission request and it is unable to admit that the subject statements were made.

The requests for admission are quite specific and are in quotes. For example, Request 8 asks Ledcor to admit that its safety manager and its project manager stated at the closeout conference that they agreed with the inspector's statement that "[m]anagement has failed to correct hazardous condition that they have known about for approximately five months." Sec'y Mot., Ex. D, p. 5. This is a very specific admission request and it is unlikely that any attendee from management would have included such a statement in his notes. Using the Federal Rules as a guide, I find that Ledcor complied with the Secretary's request for admissions. Fed. R. Civ. P. 36(a)(4). Consequently, the motion to compel is **DENIED** with respect to this issue.

ORDER

Ledcor CMI, Inc. is **ORDERED** to comply with this order to compel, as set forth in Parts A, B, and C of this Order by no later than **April 23, 2018**. The parties are reminded that the hearing in these cases is scheduled to commence on May 30, 2018.

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

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April 17, 2018

WILL WILLIS,
Complainant

v.

JEFFREY TYLER for HEART OF
NATURE (NV), LLC,
Respondents

DISCRIMINATION PROCEEDING

Docket No. WEST 2018-0218-DM
MSHA No. WE-MD-2017-10

Mine: Silver Peak Mine
Mine ID: 26-02599

ORDER

In this discrimination proceeding brought under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3), (“Mine Act” or “Act”), the Court is endeavoring to obtain essential information relating to the four corners of the complaint brought by the Complainant, Will Willis. For the reasons which follow, it is **ordered** that by **Friday, April 20, 2018**, the Secretary inform the Court whether she will provide **to the Complainant** a copy of the complaint filed by Willis and the interview which MSHA conducted in connection Complainant’s discrimination complaint filed during August 2017. An email from the Secretary’s counsel regarding this matter, dated April 11, 2018, advises “[i]f the Complainant, or any party, files a FOIA or Privacy Act request, MSHA will take prompt action on it and respond appropriately.” Sec’y Email of April 11, 2018. This response is equivocal about whether the Secretary *will* provide a copy of the complaint and the interview to the Complainant, assuming that a FOIA or Privacy Act request is made by the Complainant. If the Secretary refuses to supply the Complainant a copy of the complaint and the interview, the Secretary is directed to explain all reasons for such refusal, together with the authority for such refusal.

By **Friday, April 27, 2018**, the Secretary is also **ordered**, as expressed by the Secretary’s Counsel, to “formally lay[] out the FOIA, Privacy Act, and Touhy requirements and legal barriers,” which the Secretary asserts make her unable to comply with the Court’s direction to provide a copy of the interview to it. Indirectly, Counsel for the Secretary acknowledges that this refusal to provide the MSHA interview is a new approach, as she states, “[t]o the extent that this sort of thing has ever been provided, it was an error.” Sec’y Email of April 9, 2018.

Subject to considering the Secretary’s Response to the Court’s Order, the Court is presently of the view that the Secretary is obligated to provide a copy of the interview conducted by MSHA in connection with the Complainant discrimination complaint, which is also identified

as “WE-MD-2017-10.” As most recently noted by Administrative Law Judge Alan Paez in *Justice v. Rockwell Mining*, No. WEVA 2018-48-D, 2018 WL 816284 (Jan. 31, 2018) (ALJ):

Section 105(c)(3) of the Mine Act provides that if the Secretary determines that no discriminatory violation occurred, “the complainant shall have the right, within 30 days of notice of the Secretary’s determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)].” 30 U.S.C. § 815(c)(3). Thus, the statutory scheme provides to miners an administrative investigation and evaluation of an allegation of discrimination, as well as the right to private action in the event that the administrative evaluation results in a determination that no discrimination occurred. *Hatfield v. Colquest Energy*, 13 FMSHRC 544, 545 (Apr. 1991).

Justice, 2018 WL 816284, at *3.

This is the nature of Complaint brought by Mr. Willis, a proceeding under section 105(c)(3). Upon being assigned this case, the Court held a conference call with the parties, whereupon it was learned that Mr. Willis does not have a copy of the Complaint he filed with MSHA and that he also does not have a copy of the interview he gave to the MSHA investigator.

Judge Paez’s decision in *Justice* also speaks to this issue, as he noted:

In order for the statutory prerequisites for a section 105(c)(3) complaint to be met, the written discrimination complaint filed with MSHA must contain specific allegations that are investigated by MSHA and considered in the Secretary’s determination of whether the Mine Act has been violated. *See Hatfield*, 13 FMSHRC at 546 (vacating order denying dismissal and remanding for consideration of whether alleged protected activities were part of Secretary’s investigation). However, the Commission has recognized that it is the scope of the Secretary’s investigation, rather than the initiating complaint, that governs the permissible ambit of the complaint filed with the Commission. *Sec’y of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997).

Justice, 2018 WL 816284, at *4.

This Court made similar observations about section 105(c)(3) discrimination proceedings, noting that:

In *Hatfield*, the Commission recognized that a miner cannot expand his *pro se* claim by alleging matters not within the scope of the initial complaint and never investigated by MSHA. 13 FMSHRC at 546. In *Sec. v. Hopkins County Coal, LLC*, 38 FMSHRC 1317, June 24, 2016, the Commission expounded upon its *Hatfield* decision, stating that “the miner’s complaint establishes the contours for subsequent action.” *Hopkins* at 1340. It noted in *Hopkins* that “*Hatfield*’s original complaint was general in nature and contained no indication of the new matters apparently alleged for the first time in the amended complaint.” *Id.* at 1341 (citing *Hatfield* at 546). The Commission held that the initial complaint formed the basis of MSHA’s investigation. *Id.* After MSHA refused to act on that initial complaint, the miner *could not expand his pro se claim by alleging matters not within the*

scope of the initial complaint and never investigated by MSHA. Hopkins at 1342 (emphasis added). The key element in these matters is that the determination of the scope of the complaint is not constrained entirely by the four corners of the miner's complaint, *but is also informed by MSHA's ensuing investigation*:

“The Commission has previously held that ‘the Secretary’s decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on the Secretary’s investigation of the initiating complaint to [him], and not merely on the initiating complaint itself.’ *Sec’y o/b/o Callahan v. Hubb Corp.*, 20 FMSHRC 832, 837 (Aug. 1998); see *Sec’y o/b/o Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997); *Hatfield*, 13 FMSHRC at 546. If the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary’s investigation, then it follows that the Secretary’s authority to investigate in the first instance cannot be circumscribed by the early and often uninformed statements made by a miner in his charging complaint. [*Hopkins*], at 1326, n. 15.”

Mulford v. Robinson Nevada Mining, 39 FMSHRC 1957, 1959-1960, (Oct. 2017) (second emphasis added).

Accordingly, because of the centrality of the Complainant’s complaint and the interview conducted by MSHA in its investigation of that complaint, it is the Court’s present position that this information may not be withheld.

SO ORDERED.

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

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April 24, 2018

WILL WILLIS,
Complainant

v.

JEFFREY TYLER for HEART OF
NATURE (NV), LLC,
Respondents

DISCRIMINATION PROCEEDING

Docket No. WEST 2018-0218-DM
MSHA No. WE-MD2017-10

Mine: Silver Peak Mine
Mine ID: 26-02599

**ORDER REGARDING SECRETARY’S MOTION FOR EXTENSION
TO RESPOND TO THE COURT’S ORDER**

The Court’s April 17, 2018 Order required the Secretary to “inform the Court [by April 20, 2018] whether [he] will provide to the Complainant a copy of the complaint filed by [Complainant Will] Willis and the interview which MSHA conducted in connection Complainant’s discrimination complaint filed during August 2017.” Order at 1. On the day the Secretary was required to so inform the Court, the Secretary filed a Motion for Extension of Time to Respond to Order to Provide Documents of 17 April 2018, seeking until April 27, 2018 to comply with the Order. (“Motion”). Although the Secretary noted that he is not a party in this section 105(c)(3) discrimination proceeding, he is MSHA’s attorney. The Secretary asserted that he needed additional time for its client, MSHA, to contact the Complainant, so as to not run afoul of 5 U.S.C. §552a(b), a provision of the Privacy Act.

Counsel for the Secretary has misapprehended the first part of the Court’s Order, which was due by Friday April 20, 2018, mixing a procedural issue with a substantive issue. The Order required the Secretary to advise “[i]f the Complainant, or any party, files a FOIA or Privacy Act request, [whether] MSHA will take prompt action on it and respond appropriately.” Order at 1, quoting the Sec’y Email of April 11, 2018. Noting that the Secretary’s response was equivocal as to whether the Secretary, acting through its client, MSHA, the Court required the Secretary to advise if he “will provide a copy of the complaint and the interview to the Complainant, *assuming* that a FOIA or Privacy Act request is made by the Complainant. If the Secretary refuses to supply the Complainant with a copy of the complaint and the interview, the Secretary is directed to explain all reasons for such refusal, together with the authority for such refusal.” *Id.*(emphasis added). The Court was plainly inquiring whether the Secretary, as MSHA’s attorney, ultimately will provide a copy of the complaint filed by Willis and the interview which MSHA conducted in connection Complainant’s discrimination complaint, filed during August 2017. This is a substantive issue, which can be answered independent of the procedural process which may need to be followed to obtain those documents. Thus, the Court was requiring the Secretary to respond, apart from procedural hurdles, real or imagined, if he had some substantive basis to refuse delivery of those documents to the Complainant. As the Order then noted, “[i]f the

Secretary refuses to supply the Complainant a copy of the complaint and the interview, the Secretary is directed to explain all reasons for such refusal, together with the authority for such refusal.” *Id.* The Court believes that the Secretary could have answered that question in a timely manner, either by conceding that, substantively, the Complainant would be entitled to those documents or by interposing non-procedural grounds for refusing to provide them.

Given that, substantively, the Court believes the Secretary could have answered the first question in a timely manner, but that he did not do so, and now with the time for compliance having passed, the Court directs that *both* aspects of the Court’s Order now be complied with by Friday, April 27, 2018. Accordingly, it is **ORDERED** that the Secretary now fully comply with the Court’s Order by April 27, 2018.

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

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