NOVEMBER 2012

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ADMINISTRATIVE LAW JUDGE ORDERS

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COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 5, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2010-903-M
ADMINISTRATION (MSHA)	:	A.C. No. 20-02909-208139
	:	
v.	:	Docket No. LAKE 2010-904-M
	:	A.C. No. 20-02909-211111
BYHOLT, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 17, 2010, the Commission received from Byholt, Inc. ("Byholt") two motions seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2010-903-M and LAKE 2010-904-M, both captioned *Byholt, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

MSHA's record indicates that proposed assessment No. 000208139 was delivered on or about January 13, 2010, signed for by M. Cindrena, and became a final order of the Commission on February 12, 2010. A notice of delinquency was mailed on March 31, 2010, and the case was referred to the U.S. Department of Treasury for collection on July 29, 2010. Proposed assessment No. 000211111 was delivered on February 19, 2010, signed for by M. Andrews, and became a final order of the Commission on March 22, 2010. A notice of delinquency was mailed on May 6, 2010, and the case was referred to the U.S. Department of Treasury for collection.

Byholt asserted that although it routinely paid the penalties, it had been advised that it should contest 104(d) orders if it had a legitimate defense. Byholt stated that upon receiving assessment No. 000208139 it mistakenly believed it had to wait to contest all the orders together, and upon receiving assessment No. 000211111 it was unsure how to proceed. Byholt further contended that by the time it was able to retain counsel the contest deadline had passed.

The Secretary opposed the requests to reopen, noting that the operator identified no exceptional circumstances warranting reopening. The Secretary stated that the operator's professed misunderstanding of MSHA's contest procedures was particularly inexcusable because the contest instructions are on the proposed assessment. Moreover, the Secretary asserted that Byholt failed to explain why it waited over four and three months, respectively, to request reopening after it received the delinquency notices.

On September 9, 2011 the Commission issued an order denying without prejudice Byholt's motions to reopen, since they lacked sufficient detail and did not provide adequate grounds for reopening. The Commission found it significant that Byholt also failed to explain why it delayed over four and three months in responding to the delinquency notices. We encouraged Byholt to include a full description of the facts supporting its claim, and provide documents detailing the problem preventing it from timely contesting the proposed assessment. Moreover, we emphasized that we would specifically expect Byholt to provide verified and detailed affidavits and documentation substantiating what it did after receiving the delinquency notices and why it delayed in seeking reopening.

In its amended motion to reopen, counsel for Byholt submitted an identical copy of its original motion, adding only one new paragraph. In the new paragraph, Byholt admits it received the delinquency notices, but avers that they did not provide instructions to file motions to reopen. Byholt further states that after receiving the delinquency notices it delayed paying the debt while searching for counsel. As additional documentation, the amended motion included the affidavit of Byholt's president, who added – beyond his original affidavit – that after receiving the delinquency notices he hesitated to pay, since he did not know whether there were any other steps he could take. The Secretary notified the Commission that she stands by her opposition.

Despite being given a second chance, Byholt and its counsel failed to answer the Commission's specific questions. It remains unclear why Byholt did not contest the proposed assessments once it received all the section 104(d) orders, i.e. after receiving proposed assessment No. 000211111 on February 19, 2010. Byholt asserted that it had been advised that it should contest section 104(d) orders if it had a legitimate defense, and as the Secretary notes, the contest procedures are included in the proposed assessments. If Byholt was still unsure how to proceed, it should have begun searching for a counsel as soon as it received proposed assessment No. 000208139 in January 2010. Byholt's amended motions fail to explain why it waited an additional three to four months after receiving the proposed assessments before it began searching for counsel. Therefore, it appears that Byholt took six to seven months to search for counsel.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011). In this case, we conclude that the lack of any procedure to properly assess MSHA correspondence and communicate with MSHA in a timely manner, represents an inadequate or unreliable internal processing system.

Additionally, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See*, e.g., *Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC at 1316-17 (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the delays in responding to MSHA's delinquency notices amounted to over three and four months. Byholt's contention that it was searching for counsel does not provide adequate grounds for reopening, especially considering that the delay amounted to six or seven months after receiving the proposed assessments.

Having reviewed Byholt's requests and the Secretary's responses, we conclude that Byholt has failed to establish good cause for reopening the proposed penalty assessments. Accordingly, we deny its motions with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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November 13, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2012-262-M
ADMINISTRATION (MSHA)	:	A.C. No. 38-00157-267929
	:	
v.	:	Docket No. SE 2012-285-M
	:	A.C. No. 38-00157-261966
ACTIVE MINERALS	:	
INTERNATIONAL, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On February 21 and 29, 2012, the Commission received from Active Minerals International, LLC ("Active") two motions seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2012-262-M and SE 2012-285-M, both captioned *Active Minerals International, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

Active asserts that it paid the proposed penalties in the erroneous belief that payment would end any litigation arising from the alleged violations. In her affidavit, Active's safety director contends that a significant factor in her decision to pay the citations was that the Department of Labor's Mine Safety and Health Administration ("MSHA") had not opened special investigations under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). Since MSHA had initiated a section 110(c) investigation in February 2012, Active seeks to reopen these matters to ensure that payment will not constitute an admission of wrongdoing on the part of the company or its agents.

The Secretary opposes the requests to reopen, noting that the operator's concerns are unfounded. The Secretary assures the operator that if section 110(c) proceedings are initiated in these matters, she will not argue that Active's payment estops its agents from litigating any aspect of the underlying violations.

Having reviewed Active's requests and the Secretary's responses, we conclude that the outcome of the matters before us will not prejudice any future section 110(c) proceedings. Accordingly, the motions to reopen are denied.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 14, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2011-858
ADMINISTRATION (MSHA)	:	A.C. No. 15-12564-250419
	:	
v.	:	Docket No. KENT 2011-1377
	:	A.C. No. 15-12564-261700
LEFT FORK MINING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 21, 2012, the Commission received from Left Fork Mining Company, Inc. ("Left Fork") two motions seeking to reopen two penalty assessment proceedings and relieve it from the orders of default entered against it.[1]

On August 17, 2011, and March 6, 2012, Chief Administrative Law Judge Lesnick issued two Orders to Show Cause which by their terms became Orders of Default if the operator did not file its answers within 30 days. These Show Cause Orders were issued in response to Left Fork's failure to answer the Secretary of Labor's May 18 and September 7, 2011, Petitions for Assessment of Civil Penalty.

Left Fork asserts that it timely answered the assessment petitions on May 23, and September 15, 2011. It submits U.S. Postal Service tracking notifications to that effect. Left Fork further states that it did not receive the show cause order in Docket No. KENT 2011-858, and timely answered the show cause order in Docket No. KENT 2011-1377 on April 5, 2012. The Secretary does not oppose the requests to reopen, and notes that she received Left Fork's answers.

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2011-858 and KENT 2011-1377, both captioned *Left Fork Mining Company, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

Having reviewed Left Fork's requests and the Secretary's responses, we conclude that the Default Orders have not become final orders of the Commission because the operator filed timely responses to the assessment petitions. Accordingly, these cases are 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/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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November 14, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 2012-1340
	:	A.C. No. 15-17834-281361 B294
TWIN RIDGE DEVELOPMENT, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 24, 2012, the Commission received from Twin Ridge Development, Inc. ("Twin Ridge") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

In its petition, Twin Ridge alleges that it had not received the proposed assessment due to an address change in November 2010, and that the case was omitted from a previous request for reopening which Twin Ridge submitted on September 29, 2011. The record indicates that the proposed assessment was issued on February 22, 2012, and delivered on February 29, 2012, signed for by D. Preece, and became a final order of the Commission on March 30, 2012. A notice of delinquency was mailed on May 15, 2012.

The Secretary opposes the request to reopen and asserts that the operator identified no exceptional circumstances warranting reopening. The Secretary states that the Contractor ID mailing address was updated on September 16, 2011, and the proposed assessment was mailed to the updated mailing address. Twin Ridge's president, Edsel Preece, filed four motions to reopen on September 29, 2011, which the Secretary did not oppose because the proposed assessments were addressed to the outdated mailing address. The Commission issued an order reopening the previous four cases on February 27, 2012. *Twin Ridge Dev., Inc.*, 34 FMSHRC 369 (Feb. 2012). Therefore, the Secretary maintains that the operator was well aware of the thirty-day time frame to contest the proposed assessment, and should have been more careful in handling it. Moreover, Twin Ridge's request to reopen includes a copy of the delinquency notice mailed to it on May 15, 2012, but it makes no attempt to explain why it waited two months to request reopening. In response to the Secretary's opposition, Twin Ridge maintains that it attempted to contest this citation by meeting with a representative from the Department of Labor's Mine Safety and Health Administration ("MSHA").

Twin Ridge's sole ground for making this motion is that the proposed assessment was not delivered to it. In light of the Secretary's unrebutted evidence that the assessment was delivered and signed for, we conclude that Twin Ridge has failed to prove that the assessment was not properly delivered. The operator's response to the Secretary's opposition failed to address any of the Secretary's arguments or evidence.

Additionally, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See*, *e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the unexplained delay in responding to MSHA's delinquency notice amounted to two months. Twin Ridge has not provided an explanation for filing its motion to reopen more than 30 days after receiving the delinquency notice.

Having reviewed Twin Ridge's request and the Secretary's response, we conclude that Twin Ridge has failed to establish good cause for reopening the proposed penalty assessment. Accordingly, we deny its motion with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Patrick K. Nakamura
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November 15, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-789
v.	:	A.C. No. 34-01618-218955
PHOENIX MINING COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On February 6, 2012, the Commission received from Phoenix Mining Company ("Phoenix") a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On May 2, 2011, Chief Administrative Law Judge Robert J. Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Phoenix's failure to answer the Secretary's October 6, 2010 Petition for Assessment of Civil Penalty. The Commission did not receive Phoenix's answer within 30 days, so the default order became effective on June 1, 2011.

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, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as

practicable by the Federal Rules of Civil Procedure"); *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 permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Phoenix's representative asserts that the last communication Phoenix received from the Department of Labor's Mine Safety and Health Administration ("MSHA") or the Commission was the Secretary's request for a 90-day extension in July 2010. Phoenix encloses a copy of a collection letter it received from the Department of Treasury, dated January 6, 2012.

The Secretary opposes the request to reopen and contends that the operator fails to establish exceptional circumstances that warrant reopening. The Secretary states that MSHA's record shows that the penalty petition was delivered to Phoenix's representative, Gary Geralds, on October 8, 2010, and signed for by J. Geralds. Commission records show that the Show Cause Order was delivered to the representative's address on May 11, 2011. MSHA mailed a delinquency notice to Phoenix's address of record, on October 3, 2011, and the case was referred to the Department of Treasury for collection on January 2, 2012. The Secretary notes that Phoenix contacted MSHA only after collection actions were taken in this case.

Phoenix has not replied to the Secretary's opposition to its motion. We encourage parties provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008); *Highland Mining Co*., 31 FMSHRC 1313, 1316 n.3 (Nov. 2009). We would expect that in a case where an operator has claimed that it did not receive the penalty petition, and the Secretary submits evidence that the penalty petition was delivered, the operator would respond to the Secretary's evidence.

Phoenix's sole ground for making this motion is that the penalty petition, Show Cause Order, and delinquency notice were not delivered to it. In light of the unrebutted evidence that the penalty petition and the Show Cause Order were delivered and signed for, we conclude that Phoenix has failed to prove that the communications were not properly delivered.

Having reviewed Phoenix's request and the Secretary's response, we conclude that Phoenix has failed to establish good cause for reopening the penalty assessment proceeding and vacating the Default Order. Accordingly, we deny its motion with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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November 15, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 2012-411-M
ADMINISTRATION (MSHA)	:	A.C. No. 13-02129-247055
	:	
v.	:	Docket No. CENT 2012-412-M
	:	A.C. No. 13-02129-249599
KUHLMAN CONSTRUCTION	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 2, 2012, the Commission received from Kuhlman Construction ("Kuhlman") two motions seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2012-411-M and CENT 2012-412-M, both captioned *Kuhlman Construction*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

The Department of Labor's Mine Safety and Health Administration's ("MSHA") record indicates that proposed assessment No. 000247055 was delivered on February 24, 2011, and became a final order of the Commission on March 28, 2011. Proposed assessment No. 000249599 was delivered on March 23, 2011, and became a final order of the Commission on April 22, 2011. Kuhlman states that it had timely contested the underlying citations in July 2010. It asserts that it had inadvertently paid the penalties instead of sending the assessments to its counsel for contest. Kuhlman's corporate secretary states in her affidavit that she has no recollection of receiving the assessments, but does not dispute that she likely signed the checks. Kuhlman's secretary further states that in the future all MSHA checks will be accompanied by the corresponding paperwork to ensure that she knows which penalties the company is paying.

The Secretary opposes the requests to reopen, noting that MSHA received payment for the proposed assessments, by checks dated March 2 and April 6, 2011. The Secretary contends that Kuhlman's conclusory statements do not explain why it failed to timely contest the proposed assessments. The Secretary states that since Kuhlman's secretary signed the checks one month apart without knowing which penalties she was paying, it is clear that Kuhlman did not have an adequate system for reviewing assessments. Moreover, the Secretary asserts that Kuhlman failed to explain why it waited almost a year to request reopening after the assessments became final Commission orders. The Secretary argues that this delay is particularly inexcusable considering that Kuhlman's counsel received the Order of Assignment and Pre-Hearing Order, dated April 11, 2011, in the contest proceedings and participated in settlement negotiations during May through September 2011, for the remaining penalties issued during the same inspection.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011). In this case, we conclude that the lack of any procedure in reviewing proposed assessments and ensuring that they are timely contested, represents an inadequate or unreliable internal processing system.

Additionally, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See*, e.g., *Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC at 1316-17 (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, Kuhlman's counsel filed these motions to reopen eleven months after receiving the orders dated April 11, 2011.

Having reviewed Kuhlman's requests and the Secretary's responses, we conclude that Kuhlman has failed to establish good cause for reopening the proposed penalty assessments. Accordingly, we deny its motions with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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November 15, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. VA 2012-234-M
ADMINISTRATION (MSHA)	:	A.C. No. 44-00101-229221
	:	
v.	:	Docket No. VA 2012-235-M
	:	A.C. No. 44-00101-232377
RIVERTON INVESTMENT CORPORATION	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On February 10, 2012, the Commission received from Riverton Investment Corporation ("Riverton") two motions seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers VA 2012-234-M and VA 2012-235-M, both captioned *Riverton Investment Corp.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

The record indicates that proposed assessment No. 000229221 was delivered on August 24, 2010, signed for by D. Snider, and became a final order of the Commission on September 23, 2010. Proposed assessment No. 000232377 was delivered on September 15, 2010, signed for by D. Snider, and became a final order of the Commission on October 15, 2010. Both notices of delinquency were mailed on February 15, 2011, and the cases were referred to the U.S. Department of Treasury for collection on April 14, 2011.

Under Rule 60(b), a motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect under subsections (1), (2), and (3) of the rule, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(b). These motions to reopen were filed more than one year after becoming final orders. Therefore, Riverton's motions are untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Accordingly, we deny its motions with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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November 16, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2008-773
v.	:	A.C. No. 15-27497-143885
LEECO, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION APPROVING SETTLEMENT

BY THE COMMISSION:

This case is before the Commission on review of the Administrative Law Judge's June 22, 2012 decision holding that "the Secretary has not established that the violation [cited in Citation No. 7504580 (the "Citation")] was significant and substantial." 34 FMSHRC 1488, 1496 (June 2012) (ALJ). The Administrative Law Judge also lowered the level of negligence. *Id.* at 1497. With regard to the penalty, the judge concluded that

> although the level of gravity was relatively high, the level of negligence was less than that initially found by the Secretary in proposing a penalty. Considering the good faith of the operator, the neutral effect of the remaining factors set forth in Section 110(i) of the Act, and placing significant weight on the lower level of Leeco's negligence as contrasted with that initially found by the Secretary, I find that a penalty of $10,000.00 is appropriate.

Id. at 1498. The Commission, acting sua sponte, directed review of the judge's decision. Specifically, "review [was] limited to the issue of whether the judge erred in finding that the Secretary failed to establish that the violation of 30 C.F.R. § 75.220(a)(1) was significant and substantial." Unpublished Order dated July 23, 2012.

The parties have filed a Joint Motion to Approve Settlement. The original assessment for the Citation was $45,000. The parties propose to settle for a modification of the Citation as significant and substantial and a penalty of $10,000.

We have considered the representations and documentation submitted in this case, and we conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i).

Wherefore, the motion for approval of the settlement is granted. It is ordered that the operator pay a penalty of $10,000 within 30 days of the date of this order.[1] Upon receipt of payment, this case is dismissed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

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November 26, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2010-1421
v.	:	A.C. No. 46-09217-207483
INR-WV OPERATING, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 2, 2010 and October 28, 2011, the Commission received motions by counsel to reopen a penalty assessment issued to INR-WV Operating, LLC ("INR-WV") that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On September 28, 2011, the Commission issued an order denying without prejudice INR-WV's first request to reopen on the basis that the operator had failed to provide a sufficient basis for the Commission to reopen the penalty assessment. *INR-WV Operating, LLC*, 33 FMSHRC 2197 (Sept. 2011) (Jordan and Cohen dissenting). In addition, the Commission ruled that INR-WV had failed to adequately explain why it delayed approximately three and a half months in responding to the delinquency notice sent by MSHA.[1] *Id*. at 2198. The Commission further instructed that any renewed request by the operator to reopen this assessment must be filed within 30 days of this order. *Id*. at 2198-99.

On October 27, 2011, INR-WV filed a renewed request seeking to reopen Order No. 8084861, and dropping its former request to reopen the penalties for 16 other citations contained in the penalty assessment. INR-WV points out that it had timely filed a notice of contest for the order at issue, thus placing the Secretary on notice of its intention to contest. Additionally, the operator explains that its contest form was lost during a "personnel transition." Renewed Mot. at 2. In an affidavit attached to the renewed motion, INR-WV states that the delinquency notice appears to have been lost and that there is no evidence in its records that the notice was ever received. Aff. at 3. The operator then asserts that it first noticed the failure to contest when it received a letter from the U.S. Department of Treasury, and the motion to reopen was filed promptly thereafter. The operator's safety director notes that the company has adopted a new process for contesting penalties so as to avoid future mishandling confusion. Aff. at 2.

Although the Secretary submitted an opposition to the first motion to reopen, she has not filed an opposition to the renewed motion to reopen. Based on the expanded explanation of INR-WV and the narrowing of the request to the section 104(d)(2) order, we conclude that INR-WV has established a sufficient basis for reopening.

[1] In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining* Co., 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion).

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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November 26, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2012-9-M
v.	:	A.C. No. 08-01282-264052
MID COAST AGGREGATES, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 14, 2011, the Commission received from Mid Coast Aggregates, LLC ("Mid Coast") a motion submitted by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on August 24, 2011, and became a final order of the Commission on September 23, 2011. Mid Coast asserted that it filed a pre-penalty notice of contest, but due to an oversight, it paid the penalty and did not contest the proposed assessment. Upon realizing the error, Mid Coast promptly filed this motion to reopen.

The Secretary opposes the request to reopen and contends that the operator failed to establish exceptional circumstances that warrant reopening. Moreover, the Secretary notes that MSHA has no record of receiving a payment in this case.

On December 1, 2011, the Commission sent Mid Coast a letter asking it to explain why it did not timely contest the proposed assessment, what office procedures were implemented to prevent such failures in the future, and to provide proof of timely payment. In response, Mid Coast asserts that its plant manager instructed the office manager to pay the proposed penalty, but after a review of the files, has discovered that it was never paid. The plant manager states that in making his decision as to whether to contest or pay the penalty, he was only reviewing the penalty amounts, and he became aware that this assessment should have been contested when he discovered that it had a section 104(d) designation. The plant manager asserts that he will double-check all the citations with the office manager in order to prevent a similar failure in the future.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

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November 1, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 2009-1153 A.C. No. 48-01078-190903
v.	:	
FOUNDATION COAL WEST, INC., Respondent	: :	Mine: Eagle Butte Mine

DECISION

Appearances: Alicia A. W. Truman, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner

Page H. Jackson, Esq., and Karen L. Johnson, Esq., Jackson Kelly PPLC, Denver, Colorado, for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The case involves one unsettled Citation No. 8463059,[1] alleging that an unbermed section of a drill bench[2] at Respondent's Eagle Butte Mine in Campbell County, Wyoming, constituted a violation of 30 C.F.R. § 77.1605(k). Section 77.1605(k) states that "berms or guards shall be provided on the outer bank of elevated roadways."

An evidentiary hearing was held in Gillette, Wyoming. The parties introduced testimony

[1] Citation No. 8463058, which alleges a failure to adequately shield welding operations, was settled prior to hearing. *See* Section V, Partial Settlement, below.

[2] A bench is "[a] ledge that, in open-pit mine[s] and quarries, forms a single level of operation above which mineral or waste materials are excavated from a contiguous bank or bench face. The mineral or waste is removed in successive layers, each of which is a bench, several of which may be in operation simultaneously in different parts of, and at different elevations in, an open-pit mine or quarry." *See Black Beauty Coal Co.*, 2012 WL 3255590, at *2, n. 2 (Aug. 2012) (Commissioner Duffy dissenting), *citing* American Geological Institute, Dictionary of Mining, Mineral and Related Terms 47 (2d ed. 1997) ("Dictionary of Mining").

and documentary evidence,[3] and witnesses were sequestered. After this case was briefed and my decision was being drafted, the Commission issued its decision in *Black Beauty, supra,* which found that an elevated bench is a roadway where a vehicle commonly travels its surface during the normal mining routine. 2012 WL 3255590, at *2.

As explained herein, I find that at the time that Citation No. 8463059 was written, Respondent used the elevated 21 Bench as a roadway for a number of vehicles during the normal drilling and blasting process and did not provide berms. Accordingly, I find a violation of 30 C.F.R. § 77.1605(k). On the instant record, I further find the violation to be significant and substantial, and I affirm the inspector's findings of moderate negligence, with one person affected. Accordingly, Citation No. 8463059 is affirmed, as written, and the proposed penalty of $1,203 is assessed after consideration of the criteria set forth in section 110(i) of the Act.

Based on the entire record, including the parties' post hearing briefs and my observation of the demeanor of the witnesses,[4] I make the following:

II. Stipulated Facts

1. This docket involves a surface coal mine known as the Eagle Butte Mine (the "Mine"), which, at the time the Citation was issued was owned and operated by Foundation Coal West ("Foundation Coal").

2. The Mine is currently owned and operated by Alpha Coal West, Inc. ("Alpha Coal").

3. The Mine, located in Gillette, Wyoming, MSHA ID No. 48-01078, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. §§ 801-965.

4. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Mine Act.

5. Foundation Coal was an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), of the coal mine at which the Citation at issue in these proceedings was issued.

---

[3] P. Exs. 1-7, R. Exs. 1-21, and Joint Exhibit 1, which reflected the stipulated facts as set forth in the pre-hearing reports, were received into evidence. (Tr. 11, 30-32, 164, 339, 405). Joint Exhibit 1, however, apparently did not make it into the record prepared by the court reporter, although the stipulated facts are set forth in the pre-hearing reports.

[4] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses.

6. Alpha Coal is an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d).

7. Alpha Coal is engaged in mining operations in the United States, and its mining operations affect interstate commerce.

8. David Hamilton is an authorized representative of the United States Secretary of Labor, assigned to the Gillette, WY field office of the Mine Safety and Health Administration's Coal division, and was acting in an official capacity when the citations were issued.

9. Foundation Coal demonstrated good faith in abating the violation at issue in this case.

10. The proposed penalty will not affect Alpha Coal's ability to remain in business.

11. The certified copy of the MSHA Assessed Violations History reflects the history of the mine for fifteen months prior to the date of the issuance of the Citations at issue and may be admitted into evidence without objection by Alpha Coal.

12. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

III. Additional Findings of Fact

A. Background

On May 13, 2009, the date of the instant inspection, Respondent, Foundation Coal West, Inc., owned and operated the Eagle Butte Mine, an open-pit surface coal mine located just north of Gillette in northeast Wyoming. The mine was acquired by Alpha Coal West, Inc. (Alpha), on July 31, 2009. (Tr. 14-15, 29-30, 109; R. Br at n. 1).[5] Alpha also operated the Belle Ayr Mine located about 30-35 miles away. (Tr. 105-06, 236-37). The mining process used at the Eagle Butte Mine is truck/shovel overburden and coal removal after drilling and blasting, which are integral steps of the mining cycle.

On May 13, 2009, MSHA inspector David Hamilton, a surface specialist, and supervisory inspector Todd Jaqua, who were both from the Gillette, Wyoming field office, began an EO-1
semi-annual inspection of the Eagle Butte Mine. (Tr. 29). Hamilton testified on the Secretary's case in chief. Jaqua testified on rebuttal. (Tr. 22-136, 383-410).

The two inspectors were accompanied by Scott Lindblom, a former pit production

[5] In this Decision and Order, citations to the transcript are designated as Tr. followed by page number(s), the Secretary's exhibits or post-hearing brief are designated as P. Ex. # or P. Br. at #, Foundation Coal's exhibits or post-hearing brief are designated as R. Ex. # or R. Br. at #.

technician, who had been employed as a safety representative at the Bell Ayr Mine since February 2009, and shared safety responsibilities at the Eagle Butte Mine. (Tr. 29, 234-36). Lindblom had never accompanied an MSHA inspector before. (Tr. 237). Lindblom reported to then safety manager, Jim Oster, who retired in August 2001, and was replaced by Christine Rhoades, both of whom testified for Respondent. (Tr. 236, 361, 365). Respondent also called the following witnesses: pit planner and drilling and blasting coordinator, Jon Crawford (Tr. 139-232), who was qualified as an expert witness in the use of explosives at surface coal mines; driller and blaster, Alan Kline (Tr. 244-56); and maintenance supervisor, Joseph Case. (Tr. 259-66).

There is no dispute that berms were not present on the 21 Bench on May 13, 2009. Respondent's witnesses admit this. (Tr. 206-07, 242). In addition, there is no dispute that the 21 Bench was elevated. Inspector Hamilton and Crawford agreed that the bench was approximately 60 feet above the pit below. (Tr. 52, 207). Therefore, the primary issue in this case is whether the drill bench (21 Bench) was an elevated roadway for purposes of 30 C.F.R. § 77.1605(k).

Hamilton testified on direct examination that MSHA does not have any specific policy on whether drill benches are elevated roadways for purposes of C.F.R. § 77.l605(k). (Tr. 34).[6] By contrast, supervisory inspector Jaqua testified that after Judge Manning's decision in *Arch of Wyoming, LLC,* 32 FMSHRC 568 (May 2010), MSHA's Gillette, Wyoming field office began enforcing an unwritten policy that berms must be built on drill benches because surface coal mines owned by Alpha Coal West were the only ones in the district that were not building berms on drill benches. (Tr. 394, 396). Jaqua conceded, however, that MSHA's Gillette field office has never received a written policy from either the Administrator for Coal Mine Safety & Health or the District 9 manager stating that vehicular traffic on active drilling or blasting areas requires that those areas be bermed in accordance with 30 C.F.R. § 77.l605(k). (Tr. 396-397).

B. The 21 Drill Bench Changes From Service Road to Haulage Road to Active Blasting Area

The record establishes that during March 2009, the area of the mine known as the 21 Bench was predominantly a flat service road approximately forty to sixty feet wide. It was accessed by pickup trucks, service trucks and light-duty vehicles, and provided with berms at mid-axle height of those vehicles. (Tr. 156-57; R. Ex. 15). During April 2009, the service road had been widened and converted to a haul road that was approximately one hundred and forty

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[6] 30 C.F.R. § 77.l605(k) became effective in 1978. (30 C.F.R. § 77.1). The term "roadway," which appears in 30 C.F.R. § 77.l605(k), is not defined in 30 C.F.R. Part 77. The terms "roadway" and "road" are not defined in MSHA' s Program Policy Manual's discussion of section 77.1605(k). (P. Ex. 6). The terms "roadway" and "road" are not defined in MSHA's Haul Road Inspection Handbook. (P. Ex. 7). The terms "roadway" and "road" are not defined in MSHA's Coal General Inspection Procedures Handbook, PH95-V-I, Release 3, (Apr. 1, 1997). (P. Ex. 7, p. 7).

feet wide. It was accessed by haul trucks and all other vehicles, and provided with berms at least six feet tall. (Tr. 157). Thereafter, sometime prior to the inspection on March 13, 2009, the area of the mine known as the 21 Bench became an active blasting area and was no longer a haul road. (Tr. 161; R. Ex. 17).

Vehicles could enter the 21 Bench from the main haulage road by means of two entrances located at each end of the bench. (Tr. 38). Both sides of the entrances had large earthen berms at least six feet tall. (Tr. 36). Signs reading "Danger, Hazardous Area, Authorized Personnel Only," were located at both entry points to indicate that the area was an active drilling and blasting site. (Tr. 36, 38, 55-56, and 381; P. Ex. 5, p. 3). Inspector Hamilton testified, however, that even authorized personnel driving on an unbermed drill bench would be exposed to the unbermed edge. (Tr. 134). The "authorized personnel only" signs restricted access to State-licensed blasters, members of the drilling and blasting crew, and individuals working under the direct supervision of an authorized person. (Tr. 159, 162-163).

Respondent's policy of restricting access in active blasting areas was covered in training provided to all contractors and personnel authorized to work in the pit and in annual refresher training given to all miners. (Tr. 263, 369-70). Maintenance and electrical personnel were allowed to enter active blasting areas only when requested by drilling and blasting crew personnel, and only after stopping at the entrance and making further radio contact with the blaster in charge of the active blasting area. (Tr. 263-64). Maintenance supervisor Case testified that he is unaware of any instance where a maintenance crew member violated the policy restricting access to active blasting areas, but any such violation would result in strict discipline, including suspension without pay. (Tr. 264-65). Active blasting areas were discussed and identified during communications meetings between out-going and in-coming shift supervisors. The information discussed was passed on to crews, including equipment operators, who were given a copy of a line-up sheet identifying such areas. (Tr. 368-69).

The day shift for the drilling and blasting crew began about 5:15 a.m. About four or five times per quarter, the crew operates a night shift. (Tr. 147-48). The Eagle Butte Mine blasts three to five times a day, two to three of which occur in the East Pit where the 21 Bench was located. (Tr. 166). A shot pattern is commonly drilled, loaded, and shot in a single shift. (Tr. 167). The average shot pattern in the East Pit involved the use of about 36,000 pounds of explosives. (Tr. 167).

The drilling and blasting crew uses specialized equipment including track-mounted drills, a bulk truck carrying explosive agents, a de-watering truck, and a Bobcat stemmer. (Tr. 171). None of the specialized equipment used in the active blasting areas is utilized elsewhere in the active mining areas of the mine. (Tr. 191-193). According to Crawford, the equipment operated by the drilling and blasting crew does not exceed a speed of one to two miles per hour (Tr. 172, 189), and is operated on the inside of the outer most roll of drill holes, except for the drill itself, which is located at least 25 or more feet from the edge of the highwall. (Tr. 188-89, R. Ex. 7).

C. The Instant Inspection and Citation of the 21 Bench on May 13, 2009

As the inspection party drove into the East Pit of the Eagle Butte Mine in a small sports utility vehicle on May 13, 2009, Hamilton noticed the "white drill" on the 21 Bench about 100 feet from the highwall, and requested that Lindblom drive him over to the drill so that Hamilton could inspect the equipment. (Tr. 35-37, 56, 132). Lindblom drove into the active blasting area without stopping or calling the blaster in charge for permission to enter the area because he did not want to provide advance notice of an MSHA inspection. (Tr. 241). As the inspection party vehicle came through the entrance at the beginning of the pit and into the open bench area, Hamilton observed that along the highwall side "there was no berm on the outer edge of the road that went all the way across Bench 21." (Tr. 33). Approximately 1,000 feet of this curved bench did not have berms along the length of its outer bank on the highwall side. (Tr. 47, 51; P. Ex. 4 (unbermed area designated between X and Y)).

Hamilton testified that the bench was between 100 and 70 feet wide, but only about 40 feet of bench directly adjacent to the unbermed bank, was suitable for vehicular traffic due to the rutted and muddy condition of much of the road. (Tr. 49-51). Hamilton testified that "[t]he heavy equipment, track dozers, loaders, by looking at the tire tracks, scrapers, blades, were driving more towards the berm" located at the bench entrance in rougher road, whereas pickups and light duty vehicles have their own smoother road closer to the edge. (Tr. 50-51). The drop-off from the edge of the bench to the ground below was approximately 60 feet. (Tr. 52, 207).

Hamilton testified that in order to access the raised area where the white drill was located on May 13, 2009, vehicles entering from the west side of the 21 Bench would be driven onto the unbermed area of the bench and then make a U-turn away from the unbermed area to access the ramp leading to the drill. (Tr. 37, 63; *see, e.g.*, P. Ex. 4 (path marked with red pen 2)). Vehicles leaving the area where the drill was located would also need to turn around on the bench heading toward the unbermed area and exit the way they entered through the west entrance, or proceed across the entire unbermed roadway to exit on the east side of the bench. (Tr. 76).

Hamilton issued Citation No. 8463059 at about 9:00 a.m. on May 13, 2009 for a violation of 30 C.F.R. 77.1605(k), which provides that "[b]erms or guards shall be provided on the outer bank of elevated roadways." (Tr. 32-33; P. Exs. 2 and 3).[7] The citation alleges verbatim that:

> Approximately 1000 feet of elevated roadway was not guarded or have [sic] a berm on the outer bank, on the 21 bench, the roadway was used to access and maintain

[7] There were no violations of 30 C.F.R. § 77.1605(k) issued at the Eagle Butte Mine in the two years prior to May 13, 2009. (Tr. 119-120; P. Ex. 2).

> Drillteck 55 SB c/n 107 that was drilling the rib next to the road. 301 Marion shovel c/n 1 had removed overburden next to the roadway creating a sixty foot high wall. Posing hazards of over travel into the pit below.

(P. Ex. 2).

Hamilton determined that the alleged violation was the result of moderate negligence and was reasonably likely to cause permanently disabling injuries to one person. The citation was designated as significant and substantial. *Id*. In this regard, Hamilton's inspection notes state that it was reasonably likely that a permanently disabling injury would result from overtravel at the unbermed edge of the highwall into the pit 60 feet below as the roadway narrowed while the shovel progressed with each pass. (P. Ex. 3, p. 1).

Hamilton observed "back break" cracks along the edge of the 21 Bench, which he measured to be six to ten feet from the highwall edge. (Tr. 90-91; Sec'y Ex. 3 at 1-2). Hamilton testified that "back break" are cracks or unstable top in the virgin ground that typically run parallel to the edge of the shot, which are caused by the energy from the shots traveling back into the virgin ground. (Tr. 90-91). Both Hamilton and Crawford testified that back break is evidence of unstable ground and should not be covered up. (Tr. 127, 182-84). Hamilton testified that "all mines build [berms] outside of the back break so you don't drive there," because the "ground could crumble." (Tr. 91-92).

The alleged violation was abated when a 24 Caterpillar blade built a berm a safe distance from the edge of the highwall and back break, which took approximately fifteen minutes. (Tr. 91, 100-02; P. Ex. 2). Thereafter, Alpha Coal West began building safety berms along the edges of the highwalls in active blasting areas at both the Eagle Butte Mine and the Belle Ayr Mine. (Tr. 293).

D. The Record Evidence that Vehicles Commonly Used the 21 Bench As a Roadway During Drilling and Blasting Operations

On direct examination, Hamilton testified that a given area in a coal mine could be a roadway and a workplace. (Tr. 34). On cross examination, it was established that Hamilton determined a violation based solely upon the entrance of the inspection vehicle. (Tr. 120-121). He opined that a single entry by a rubber-tired vehicle would make the drill bench a roadway. (Tr. 126).[8] Hamilton testified that one would have to travel a roadway to get to a workplace, and that a workplace is not necessarily a roadway unless you are building a roadway, and then it is both. (Tr. 126). Hamilton acknowledged that when miners are performing work that is a part of the mining cycle, that area is a workplace. (Tr. 127). Crawford testified that drilling and blasting of overburden and coal are integral steps in the mining cycle. (Tr. 150-51).

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[8] *Cf. Black Beauty, supra,* 2012 WL 3255590, at *3, where this position was rejected by the Commission.

At the time that Hamilton determined that there was a violation of 30 C.F.R. § 77.1605(k), the vehicle in which he was riding had not passed the unbermed area because Hamilton had instructed Lindblom to stop the vehicle before it reached the "hazardous area." (Tr. 121-22, 133). Thus, Lindblom had not driven on an alleged elevated roadway that was unprotected by a berm. However, Hamilton asked Lindblom, "Is this the way you come in? Lindblom replied, "Yes." (Tr. 45, 122, 133). Hamilton saw tracks of equipment and pickups that had been using the "road." (Tr. 133).

The record establishes that Hamilton determined that there was a violation prior to interviewing the white drill operator (Alan Cline) or observing any other vehicles present on the 21 Bench. With the exception of the vehicle operated by Lindblom, all of the vehicles that Hamilton observed on the 21 Bench that day entered the area *after* the safety berm had been installed and the citation had been terminated. (Tr. 121). Hamilton did not witness any vehicles cross the 21 Bench during the inspection. (Tr. 38).

While the berm citation was being terminated, Hamilton inspected the white drill. (Tr. 62). He spoke to Alan Kline, the white drill operator and asked him, "How did you get here?" Kline told Hamilton that the red drill operator (Sam Mullins) dropped him off and then drove across the bench and out the other entrance/exit to the red drill. In essence, Kline told Hamilton, after the citation had issued, that the red drill operator had entered the 21 Bench on one end to drop Kline off, and then exited on the other end to get to his workplace on a higher drill bench. (*See* Tr. 40-41, 62, 207-209; P. Ex. 3, p. 2). Kline also told Hamilton that the bench was being used as a "shortcut still before it was all mined out so people didn't have to drive all the way around the mine to reach this other side. . ." (Tr. 80).[9]

Hamilton issued two citations at the white drill, one for an electrical violation and one for a mechanical violation. Said violations, which are not at issue here, required an electrician and a mechanic to abate the violative conditions. (Tr. 63). Hamilton observed both the electrician and mechanic enter the 21 Bench and drive to the drill area in rubber-tired trucks after the berm had been erected to abate Citation 8463059. (Tr. 65; Sec'y Ex. 3, p. 3).[10] Drilling and blasting supervisor Crawford also drove to the white drill in a rubber-tired pickup after the drill citations were written to discuss them with Hamilton and Lindblom. (Tr. 67-68). The inspection party then drove across the 21 Bench and through the opposite entrance/exit, observed the posted signs, and then turned around and drove back across the 21 Bench. (Tr. 38-39).

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[9] Kline did not testify about this conversation with Hamilton. (Tr. 244-56). Crawford confirmed his awareness of this conversation. (Tr. 207). Mullins did not testify.

[10] Hamilton did not hear these miners ask for permission to enter the blasting area over the radio. (Tr. 134, 136).

Based on his experience, Hamilton testified about the types of vehicle that would drive onto the drill bench during the normal mining process of drilling and blasting. (Tr. 70).[11] As previously noted, the white drill operator told Hamilton that he had been dropped off that morning by the red drill operator, who entered the 21 Bench from one side and drove all the way across the bench to exit on the other side. (Tr. 40-41, 62, 207; P. Ex. 3, p. 2). This occurred at approximately 5:15 a.m., when it was still dark outside. (Tr. 207-08). Hamilton also testified that if the drill needed fuel, a rubber-tired fuel truck would be driven onto the bench about once a shift to fuel the drill. (Tr. 75). Crawford confirmed this. (Tr. 212). Similarly, if the drill needed cleaning, a three-quarter ton, rubber-tired pickup truck would be driven onto the bench towing a trailer and pressure washer so that the pressure washer could be used to wash away accumulations, such as oil on the drill. (Tr. 66-67). In fact, Hamilton witnessed this in order to abate another citation that had been written at the drill. (Tr. 66).

Based on his experience, Hamilton also testified that once the drill had completed making holes in the overburden, a powder or bulk truck would be driven out onto the bench to fill the holes with explosives (powder). (Tr. 70). Crawford confirmed this and further acknowledged that powder truck operators have some blind spots when driving on the bench. (Tr. 209). Hamilton testified that if any of the drill holes are filled with water, a rubber-tired pump truck is driven onto the bench to pump out the water, before the holes are filled with powder. (Tr. 71-72). Crawford confirmed this. (Tr. 211). Hamilton also testified that a pickup truck would tow a rubber-tired skid steer loader (Bobcat stemmer) out onto the bench, and then the skid steer would be driven off the trailer and onto the bench so it could backfill and pack the drill holes with dirt, after they were filled with powder. (Tr. 72). Crawford confirmed this. (Tr. 211). Hamilton also testified that a blaster would drive onto the bench in a pickup truck to tie the charges. (Tr. 73). Crawford confirmed this. (Tr. 211). In fact, the record establishes that a number of these vehicles may be present on the bench at the same time. (Tr. 73, 211; R. Exs. 4-7).

Furthermore, after a blast was fired, a blaster would drive back out to the bench in a pickup truck to verify that all the shots had cleared and no live boosters were left in the holes. (Tr. 73-74). The record also establishes that at least once every shift, a certified examiner must perform a workplace examination of the whole bench, and additional examinations are required

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[11] Although Respondent established on cross examination that Hamilton had never worked with a drilling and blasting crew at any of the mines where he had been employed as a miner (Tr. 125), the Secretary established a sufficient foundation that Hamilton did "some work on truck shovel drill benches" for the Powder River Coal Company at the North Antelope Rochelle Mine in Gillette, Wyoming. (Tr. 25, 70). The Secretary also established that Hamilton received MSHA training concerning, and had MSHA experience witnessing, the types of vehicles that would access a drill bench, such as the 21 Bench, during the normal drilling and blasting process. (Tr. 70). Crawford's testimony confirmed Hamilton's experiences. Accordingly, I find that the Secretary established that during the normal mining process of drilling and blasting, a large number of different vehicles would be driven out onto the 21 Bench.

after every rain, freeze or thaw. (Tr. 74). In fact, Crawford testified that he personally examines all working areas of the mine at least once per day, and he would drive onto the drill bench in a pickup truck to do so. (Tr. 214).

E. Respondent's Testimony and Evidence About Alleged Hazards Associated With Building Berms on Drill Benches and Alleged Inconsistent Enforcement of 77.1605(k) by MSHA

Crawford also testified about the hazards of building a berm on an active drill bench. Essentially, he testified that the very act of building a safety berm along a highwall in an active blasting area masks evidence of "back break" and hinders the drilling and blasting crew in determining whether they will be working on unsafe ground. (Tr. 196, 199). In this regard, he testified that it is impracticable to build a safety berm along the edge of a highwall in an active blasting area without utilizing heavy equipment, which must work in close proximity to the highwall. (Tr. 200-201). Respondent typically uses a blade to erect a safety berm along the edge of the highwall to minimize the amount of time that a miner is exposed to the highwall. (Tr. 198-199, 200). Both Hamilton and Crawford testified that when a blade, loader, scraper, or dozer is used to erect a berm along a drill bench highwall, the "back break" can be covered up and hidden from observation. (Tr. 128-129, 184-185). Crawford also testified that hiding "back break" prevents the drilling and blasting crew from knowing whether the ground where they place the drill is a safe or unsafe area. (Tr. 185). Hamilton testified, however, that if you see back break and you know where it is, you stay on the other side of it, so that you don't cover it up after you know where it is. (Tr. 127-28).

On cross-examination, Crawford conceded that other equipment besides a blade, such as a dozer or front-end loader, could be used to create a berm, and such equipment would run perpendicular and not parallel to the edge, and therefore not travel as close to the edge as the blade. (Tr. 223). He also conceded that although the blade would smooth material across the bench to build the berm, the mine could deposit overburden from another area of the mine to build the berm (Tr. 223), which could minimize the effect of covering back break. He further testified that the access road to the drill bench could have built so that service vehicles did not have to be driven onto the drill bench, (Tr. 224-25), although the drilling and blasting crew vehicles would still need to drive onto the drill bench. (Tr. 225). In addition, Crawford recognized that the decision to use blades to construct the berms was a deliberate choice made by Respondent, which was unconstrained by any MSHA directive about how the berm should be constructed. (Tr. 198, 223).

In an effort to show that MSHA's interpretation of the word roadway to cover an active drilling and blasting workplace is unreasonable because miners risk serious injury when building the berm, Respondent provided testimonial and photographic evidence of ground failure resulting in near miss incidents and other hazards. For example, former safety manager Oster testified that on May 18, 2009, five days after the instant citation, a 24 H Caterpillar blade almost went over a highwall while erecting a windrow at the edge of a highwall in an active blasting area at Belle Ayr Mine. (Tr. 293-300; R. Ex. 8). Oster testified that as the experienced operator

was backing up to make a second pass to build the windrow, he came too close to the edge of the highwall and the ground gave way. (Tr. 297-299). Although Oster testified that the operator covered up back break with the first pass and did not realize where the highwall edge was located, I give this testimony little weight because Respondent did not call the operator of that blade as a witness even though he was still employed by the mine. (Tr. 300). In addition, I find that had the operator built the windrow outside the back break as inspector Hamilton testified should be done, the operator error could have been avoided because the blade would not have been operated so close to the edge of the highwall.

Oster testified about another incident about January 2010 at the Belle Ayr Mine. A DM-45 Drilltrech drill was operating in an active blasting area where back break from the previous shot had created instability at the highwall face. Oster testified that no cracks were visible, and he could not say for certain whether they had been concealed because of blade work used to create a berm. In any event, after several holes were drilled, there was a loss of ground support and the drill and its operator dropped five to ten feet vertically and slid approximately five feet outward toward the highwall face. (Tr. 315-322, R. Ex. 19).

Oster also testified about R. Ex. 18, a section 77.1605(k) citation that Alpha received on January 19, 2010 at the Eagle Butte Mine. (Tr. 300-311; R. Ex. 18). According to that citation, which issued about six months after the instant citation, a berm was not provided on a 55-foot highwall where material was being pushed away from the edge by a miner, who was operating a rubber-tired dozer. The dozer operator over traveled the high wall and overturned the dozer into the base of the pit causing injury and entrapment. (R. Ex. 18). Oster testified that the operator had overrun a safety windrow late in the evening because she was texting on her cell phone. (Tr. 303-06).

Crawford also testified that building a safety windrow or berm can result in having to drill shot holes more than twenty-five feet away from the highwall. Such a result requires each shot to pull increased burden. (Tr. 201). The increased burden placed on each shot enhances the risk of "fly rock," which can travel a half mile from the site of the explosion and is the number one cause of injuries resulting from the use of explosives. (Tr. 201-202). Crawford further testified that increased burden can result in inadequate fragmentation of the shot material, which creates hazards to the shovel operators and truck drivers involved in loading out the material. (Tr. 202-203).

Respondent also offered testimony regarding MSHA's alleged inconsistent enforcement of 30 C.F.R. § 77.1605(k). Crawford testified that none of the mines that he was familiar with in the basin area utilized safety windrows or berms on active drill benches when he was visiting them prior to 2000. (*See* Tr. 145, 204-05). Similarly, Oster testified that none of the mines where he worked prior to 2005 as a blaster or safety director built safety windrows or berms in active blasting areas. (Tr. 288-89). Oster discussed the instant May 13, 2009 citation with other safety managers from different mines at a safety committee meeting of the Wyoming Mining Association about mid to late summer of 2009, and he learned that none of the other mines had received similar notification or citation at that point in time. (Tr. 290-92).

Rhoades also addressed the issue. She operated a blade at the Eagle Butte Mine prior to 2004, but was never asked to build a safety windrow or berm in an active blasting area. Rhoades confirmed that neither Eagle Butte Mine nor Belle Ayr Mine ever received a section 77.l605(k) citation regarding active blasting area prior to May 13, 2009. (Tr. 371-72).

III. The Parties' Positions

A. Respondent's Arguments

Respondent makes two principal arguments. First, that the active blasting areas at the Eagle Butte Mine are not subject to the berm requirement in 30 C.F.R. § 77.1605(k) because those areas are not elevated roadways. Second, that if a violation of 30 C.F.R. § 77.1605(k) occurred, it was not significant and substantial.

With regard to the first argument, Respondent notes that Hamilton determined that the 21 Bench was an elevated roadway because of the rubber-tired vehicular traffic using the road from one end to another, although he never saw a vehicle transit the 21 Bench. (R. Br. at 12, *citing* Tr. 34, 38-39, 66-67, 71-72). Further, Respondent faults Hamilton's opinion that if anyone travels in an area even once, then that area becomes a roadway (Tr. 126), and notes that the Secretary failed to produce any evidence suggesting that MSHA has adopted the "rubber-tired" or "one-time entry" criteria as agency policy. (R. Br. at 12). In fact, Respondent relies on record testimony that MSHA does not have a specific policy as to whether drill benches (active blasting areas) are elevated roadways for purposes of 30 C.F.R. § 77.l605(k). (R. Br. at 12-13, *citing* Tr. 34, 394-97).

Respondent argues that the active blasting area in this case is a working place isolated from other portions of the mine by barricades of earth and posted signs that read: "DANGER, Hazardous Area, Authorized Personnel Only." (R. Br. at 16). Respondent argues that vehicles do not drive through active blasting areas to travel from one point of the mine to another, nor do vehicles transport material through or out of the area. Moreover, Respondent contends that each vehicle's entry is an integral part of the drilling and blasting cycle, and thus the 21 Bench is properly designated a work place, not an elevated roadway. (R. Br. at 17-18). In addition, Respondent asserts that the active blasting areas are not unattended areas likely to be used as a path from one portion of the mine to another. Respondent says this is because a shot pattern is commonly drilled, loaded, and shot in a single shift, and the blasts utilize 36,000 pounds of explosives, and they occur two to three times daily in the east pit, where unauthorized personnel are denied access and authorized personnel are trained in the uniqueness of blasting hazards, with updates communicated each shift. (R. Br. at 16-17). Accordingly, Respondent argues that 30 C.F.R. § 77.1605(k) does not apply to the 21 Bench as it existed on May 13, 2009. (*Id*. at 18).

Finally, Respondent argues that the regulation should not be construed so expansively as to expose miners to unnecessary risk of death or serious injury. Respondent highlights its evidence of two instances where large machines and their operators were endangered because

they were building the berm which MSHA insisted upon, or because the berm building process obscured evidence of unsafe ground. (R. Br. at 18; R. Exs. 8 and 19). By contrast, Respondent notes that MSHA presented no evidence of instances where a vehicle being used by a drilling and blasting crew went over a highwall because of the lack of a berm. (R. Br. at 18). Thus, Respondent says that MSHA's interpretation of § 77.l605(k) is unreasonable and unworthy of deference because it requires "elevated roadways" to encompass any area of a mine that has the potential for over travel or overturning of equipment, regardless of use of that area. (R. Br. at 18-19) (citations omitted).

With regard to its second argument, that even if a violation of 30 C.F.R. § 77.1605(k) occurred, it was not significant and substantial, Respondent claims that the Secretary failed to prove that the violation was reasonably likely to contribute to an injury. (R. Br. at 20). Respondent notes that when inspector Hamilton was driven onto the 21 Bench, the only other vehicle present was the white drill, located about 100 feet from the edge of the highwall. (R. Br. at 20-21, *citing* Tr. 132; P. Ex. 4). Respondent states that Hamilton never mentioned the drill in his testimony about why an injury was reasonably likely to occur. Respondent argues that Hamilton testified about a confluence of factors which "could" impact the likelihood of an injury occurring such as mechanical or brake failure or operator error on rough roads in inclement weather with impaired visibility. (R. Br. at 21, *citing* Tr. 84, 96).[12] Respondent points out that Hamilton's notes do not mention these factors when he determined the violation to be significant and substantial. (*Id.*, *citing* P. Ex. 3, l; Tr. 129).

Respondent argues that the cited condition was unlikely to lead to an injury because Eagle Butte Mine had never erected berms along highwalls in active blasting areas and MSHA could not identify a single miner injured by that practice. In addition, access to such areas is limited to state-licensed blasters, members of the drilling and blasting crew, or other authorized personnel, who have received extensive training in how to work safely in such areas. Finally, Respondent argues that Crawford gave the only credible, first-hand testimony about vehicles operating on the 21 Bench at one to two miles per hour and a minimum of twenty-five feet away from the highwall. (R. Br at 21).

In sum, Respondent asserts that the Secretary failed to prove by a preponderance of the evidence that the alleged violation was reasonably likely to contribute to an injury because all the testimony offered was speculative, unsubstantiated, and post-hoc rationalization by the issuing inspector. Respondent concludes that when this speculation and conjecture is weighed against the testimony of Crawford and the historical absence of any injuries from lack of berms in active blasting areas at the mine, the violation was not significant and substantial. (R. Br. at 22).

[12] Hamilton actually testified that the confluence of such factors made it reasonably likely that an accident would happen. (Tr. 95-96).

B. The Secretary's Arguments

The Secretary argues that Respondent violated 30 C.F.R. § 77.1605(k) by failing to provide berms on an elevated roadway and a penalty of $1,203 is appropriate. (P. Br. at 3). The Secretary cites previous cases in which the Commission and numerous judges have held that benches can constitute elevated roadways. (P. Br. at 6-7). The Secretary emphasizes that nothing about the elevated 21 Bench exempts it from the berm requirement, and she emphasizes that there are no exceptions from the standard for restricted access, short duration, or authorized personnel with specific training. (P. Br. at 8, *citing* Tr. 107). The Secretary further argues that if vehicles are driven on an elevated bench without berms, the risk of over travel is present whether the roadway is permanent or temporary, or accessed by authorized or unauthorized personnel. *Id*. Moreover, authorized personnel do not give instructions to unauthorized personnel about how fast or close to the edge to drive [or which way to exit]. (P. Br. at 8, *citing* Tr. 257). The Secretary notes that despite the authorized-personnel-only signs, physical access to the bench was not prohibited, and the signs provided no notice that the bench lacked berms. (*Id*., *citing* Tr.36, 218, 267). *See, e.g.*, *Arch of Wyoming, supra*, 32 FMSHRC at 576 (signs limiting access to authorized personnel only did not affect the status of the drill bench as elevated roadway); *cf*., *Manalapan Mining Company*, 16 FMSHRC 1727, 1733 (Aug. 1994) (ALJ) (§ 77. 1605(k) violation found where miners drove on elevated roadway, which was blocked from use by wire ropes and company policy, and was not wide enough for building berms and providing needed access). The Secretary argues that miners such as fuel truck drivers, mechanics, and power washers drive onto the bench without receiving special drilling and blasting training related to explosives, and that Respondent offered no evidence that training was given for special hazards that arise when driving on unbermed roads. Moreover, the Secretary notes that even if such helpful training had been provided, it would not necessarily prevent over travel, which is why berms are required on elevated roadways. (P. Br. at 8-10).

The Secretary also challenges Respondent's argument that because the 21 Bench was an active drilling and blasting workplace, it could not also be a roadway, noting that there is nothing in Commission case law or MSHA regulations or policy that so provides. The Secretary notes that the judge's decision in *Higman Sand & Gravel, Inc.*, 24 FMSHRC 87, 106 (Jan. 2002) (ALJ), finding that the area along a pond used by a loader and excavator was a working place and not a roadway, did not state that a single place could not be both a working place and a roadway under different circumstances. In fact, Inspector Hamilton testified that an area can be both a roadway and a workplace. (P. Br. at 10, citing Tr.34-35).

The Secretary further notes that nothing in MSHA regulations or policy provides that a roadway must be used to get from one place to another, but regardless, the 21 Bench was used as a roadway to get from one area of the mine to another since the "red drill" operator did so after dropping off the "white drill" operator. The Secretary emphasizes Hamilton's testimony that some miners referred to the bench as a "shortcut," and his observation that there would be no need for openings and signs at both ends of the bench if vehicle use at both ends was unintended. (*Id., citing* Tr. 80, 96).

The Secretary argues that the regulation requiring that berms be provided on elevated roadways is clear and unambiguous; therefore, the issue of deference need not be reached. Even if § 77. 1605(k)'s application to drill benches is determined to be ambiguous, however, the Secretary argues that her interpretation that drill benches on which vehicles travel are roadways is reasonable and entitled to deference because it comports with MSHA's regulatory mission of protecting the safety and health of miners that drive on drill benches. (P. Br. at 10-11). Moreover, the Secretary argues that she has publically and consistently expressed her interpretation that drill benches are elevated roadways when vehicles are driven on them. Additionally, she notes that MSHA set forth a broad definition of "roadway" in the Program Policy Manual provision for § 77.1605(k) that incorporates benches used as roadways, and this definition has been published in MSHA's Haul Road Inspection Handbook since 1999. (*See* P. Ex. 6 and 7).

The Secretary argues that R. Ex. 20, offered to show inconsistent enforcement, is irrelevant as that Program Information Bulletin relates only to excavators, which were not used on the 21 Bench. Although the bulletin is silent about berms, the Secretary argues that it is mere speculation to conclude that this silence means that MSHA would not require berms on elevated roadways where excavators work. Similarly, although the bulletin refers to workplaces, the Secretary notes that it does not state that an excavator workplace cannot also be a roadway. (P. Br. at 12, n. 6).

Similarly, the Secretary discounts Respondent's reliance on R. Ex. 18, and MSHA's abatement of that § 77.1605(k) citation without requiring a berm, as evidence of inconsistent interpretation of the standard. The Secretary emphasizes that R. Ex. 18 was issued by a different inspector six months after the instant citation for a violation at a coal bench where vehicles were not intended to be driven near the edge of the bench, so a different form of abatement was permitted. Further, Gillette Field Office Supervisor Jaqua testified that this was an isolated instance in which the citation was terminated in error without requiring berms to be built. (P. Br. at 12, n. 7, *citing* Tr. 387, 403). In any event, the Secretary notes that "[t]he Commission has long held that an inconsistent enforcement pattern by MSHA inspectors does not prevent MSHA from proceeding under an application of the standard that it concludes is correct." (P. Br. at 13, *citing Austin Powder Co.*, 29 FMSHRC 909, 920 (2007)).

The Secretary further argues that Respondent's evidence (R. Exs. 8 and 19) regarding the alleged hazards involved in building berms on drill benches is irrelevant and merely a veiled effort to advance a "greater hazard" defense, which is not available in MSHA proceedings, unless Respondent has first petitioned MSHA for a modification of the standard. (P. Br. at 13-14 and n. 8, *citing Sewell Coal Co.*, 5 FMSHRC 2026, 2029 (1983); *RS&W Coal Co.*, 29 FMSHRC 828, 231 (Sept. 2007) (ALJ). And, says the Secretary, Respondent has not petitioned MSHA for a modification from the standard, instead opting to "see where this [case] went first." (*Id., citing* Tr. 225, 350, 381-82).

Even if relevant, however, the Secretary faults Respondent for failing to establish that it was more dangerous to build berms on drill benches than to forego them, and emphasizes

Hamilton's contrary testimony that berms be built a safe distance from the edge of drill benches to keep vehicles away from the edge and avoid covering back break. (P. Br. at 14, citing Tr. 92-102). The Secretary also enumerates record evidence of less hazardous options for building berms. For example, in lieu of using blades, which run parallel to the edge, Respondent could dozers or loaders, which approach perpendicular to the edge, do not travel as close, and can retreat more quickly. (P. Br. at 14, *citing* Tr. 101, 178, 223, 349-50). Or, Respondent could bring in material used elsewhere to construct the berm so as to avoid obscuring back break. *(Id., citing* Tr. 224). Moreover, the Secretary notes Hamilton's testimony that he was unaware of accidents that occurred at other mines when building berms on drill benches. (*Id., citing* Tr. 105-07).

Next, the Secretary argues that the failure to provide berms on the elevated roadway constituted a significant and substantial violation. As explained above, she determines that the violation of a mandatory safety standard, 30 C.F.R. § 77.l605(k), contributed to the discrete safety hazard of overtraveling the unbermed roadway and falling into the pit 60 feet below. (P. Br. at 14-15, *citing* Tr.82 and *Black Beauty Coal Comp*., 32 FMSHRC at 360. The Secretary highlights record evidence establishing that the failure to berm the elevated roadway created a reasonable likelihood that the hazard would result in an injury. She notes that back break was present along the edge of the bench, a condition caused by blasting that makes the bench more likely to give out if heavy vehicles travel on it. (P. Br at 16, *citing* Tr. 90-92, 217). In addition, the width of the bench was always changing as a mechanized shovel removed material below, making it more likely that a vehicle operator would overtravel, not realizing that the edge had moved. (*Id.*, *citing* Tr. 83, 216). She notes that the day shift began before sunrise, when vehicle operators were more likely to fail to see the unbermed edge and overtravel in dark or dim light. (Tr. 87-88). The Secretary further notes that weather conditions at times made the road wet and muddy, resulting in slippery road conditions and wear and tear on vehicles. Similarly, the bench may freeze or become covered with ice or snow, and windy conditions kick up dust in the air, which obscures visibility, as does rain or snow. (*Id., citing* Tr. 83-85, 217). The record also establishes that the condition of the roadway on the bench was bumpy and irregular, making mechanical failure of a vehicle driving on the bench more likely. (*Id., citing* Tr. 53, 85-86; P. Ex. 5 (photographs showing rough condition of road). The Secretary argues that there is always a risk of mechanical failure or driver error for vehicles traveling on elevated roadways. (*Id., citing* Tr. 86).

The Secretary concludes that all of the foregoing factors make it reasonably likely that a vehicle operating on the bench would go over the edge of the unbermed roadway. (*Id.,* at 16-17, *citing* Tr. 344-45 and R. Ex. 18 (where a dozer operator, familiar with the bench and properly trained against cell phone usage, became distracted while texting and backed the dozer off the edge of an unbermed bench)). In other words, even with restricted access, proper training, and policies directed at safety, driving on unbermed drill benches presents a serious safety hazard that is reasonably likely to result in an injury, says the Secretary. (*Id*. at 17).

The Secretary further argues that the failure to provide berms on the elevated roadway created a reasonable likelihood that any resulting injury would be at least permanently disabling.

She argues that if any of the vehicles that traveled on the 21 Bench were to go over the edge and fall 60 feet to the pit below, the operator would be fortunate to sustain only permanently disabling injuries. (*Id*. at 17, *citing* Tr. 94).

Finally, the Secretary argues that the violation was the result of Respondent's moderate degree of negligence, i.e., a scenario where the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances. (*Id.* at 18, *citing* 30 C.F.R. § 100.3(d), Table X, and Tr. 96).[13] The Secretary reiterates that MSHA has enforced a policy of requiring berms on elevated drill benches used as roadways for many years, and the Program Policy Manual makes clear that section 77.1605(k) "is applicable to all elevated roadways on mine property, including roads used to transport coal, equipment, or personnel, and regardless of the size, location or characterization of the roadway." (*Id.* at 18, *citing* P. Ex. 6; Tr. 97-99; *see also* MSHA's Haul Road Inspection Handbook (P. Ex. 7)). The Secretary also relies on Hamilton's testimony that MSHA inspectors discussed the importance of berms at dumping locations and on elevated roadways during opening conferences at previous inspections. (*Id.* at 18, *citing* Tr. 97). Finally, the Secretary cites testimony from Hamilton and Jaqua that all the other non-Alpha-owned mines in the area had berms on their drill benches. (*Id.* at 18, *citing* Tr. 105, 396). Therefore, she argues that Respondent should have realized that berms were necessary on the 21 Bench.

The Secretary requests that a civil money penalty be assessed at or above the proposed amount of $1,203.

IV. Conclusions of Law and Legal Analysis

A. Violation of 30 C.F.R. § 77.1605(k) --The Drill Bench was a Roadway at the Time of the Citation Because Vehicles Commonly Traveled its Surface During the Normal Mining Routine, Including During Drilling and Blasting Operations

There is no dispute that the 21 Bench was elevated to a height of sixty feet and that no berms were present in the drilling and blasting area. Consequently, the primary issue is whether the area in question was a roadway for the purposes of section 77.1605(k).

The Commission recently addressed the issue of whether a bench was a roadway for purposes of section 77.1605(k) in *Black Beauty, supra,* 2012 WL 3255590, at *2-3. That case involved, inter alia, the failure to provide sufficient protection against overtravel on a dragline bench. The threshold legal issue for disposition of the dragline bench citation was whether that bench was a roadway pursuant to section 77.1605(k). Chairman Jordan and Commissioners Cohen and Nakamura found that the dragline bench was a roadway. Commissioner Young joined in the result. Commissioner Duffy dissented.

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[13] Hamilton determined that the signage at both bermed openings of the 21 Bench constituted "mitigating information." (Tr. 96).

The dragline bench at issue in *Black Beauty* was 180 feet to 200 feet wide and was elevated about 50 feet above the pit floor. At the time of the inspection, Black Beauty was in the process of moving a dragline, which weighed ten million pounds. During the move, the dragline suffered electrical problems, which caused it to come to a stop on the bench. The berms on the bench had been lowered in order to accommodate the dragline's boom. The dragline was not a rubber-tired vehicle. Rather, "shoes" would lift and move the machine in increments of eight feet up to 450-500 feet per hour. (2012 WL 3255590, at *2).

The issuing inspector in *Black Beauty* observed a service truck near the dragline after two miners had driven the truck along the bench to the dragline so that welding maintenance could be performed while the dragline was idled. The inspector issued Citation No. 6671134 under section 104(d)(1), alleging that the operator failed to provide berms or guards on the outer bank of an elevated roadway as required by 30 C.F.R. § 77.1605(k). The citation noted that the dragline bench travel road did not have a berm for a distance of approximately 2/10 of a mile where a service truck had traveled within 18 feet of the outer banks of the bench. (*Id).*

The judge determined that once rubber-tired equipment begins operating on the bench, especially within close proximity to the edge, the bench becomes a roadway. (32 FMSHRC at 359, *citing El Paso Rock Quarries, Inc*., 3 FMSHRC 35, 36 (Jan. 1981)). The judge affirmed the citation, concluding that the elevated roadway did not contain adequate berms as required by section 77.1605(k). *(Id.* at 358-59). The judge further concluded that the violation was S&S and attributable to the operator's unwarrantable failure to comply with the cited standard. *(Id*. at 361-62).

The Commission majority concluded that the judge did not use the proper inquiry in finding that the bench was a roadway simply because a rubber-tired vehicle began operating on it. They relied on precedent finding that an elevated area, such as a bench, is a roadway where a vehicle commonly travels its surface during the normal mining routine. (2012 WL 3255590, at *3, citing by way of example *Capitol Aggregates, Inc*., 4 FMSHRC 846, 847 (May 1982)(ramp which was commonly traveled by a front end loader was found to be a roadway)); *Burgess Mining and Constr. Corp*., 3 FMSHRC 296 (Feb. 1981)(bridge which was commonly traveled by trucks during the normal mining routine was a roadway governed by section 77.1605(k); *El Paso Rock Quarries, Inc*., 3 FMSHRC 35, 36 (Jan 1981). Consequently, the presence of a rubber-tired vehicle on the bench, by itself, did not mean that the bench was a roadway. (2012 WL 3255590, at *3).

Nevertheless, the Commission majority concluded that the bench at issue was a roadway at the time that the inspector issued the citation and the judge's error was harmless. The majority relied on record evidence demonstrating that vehicles commonly traveled over the surface of the bench during the normal mining routine, including during a routine dragline move. Black Beauty acknowledged that haulage trucks traveled the area before the dragline move and that after the move the operator planned to resume regular traffic. Further, dragline moves were common at the mine, occurring every seven to ten days, and it was routine for a rubber-tired backhoe to accompany the dragline and carry its cable. Therefore, the majority found that the

dragline move did not alter the bench's status as a roadway for rubber-tired vehicles. Additionally, it was common for a truck to travel on the bench if the dragline required service during a move. The majority concluded that such record evidence demonstrated that the character of the bench was unchanged and it remained a roadway during the dragline move. Accordingly adequate berms were required. (2012 WL 3255590, at *4).

Judge Manning decision in *Arch of Wyoming, LLC* is also particularly instructive here. *(See* 32 FMSHRC 568 (May 2010) (ALJ)). In that case, the parties filed cross-motions for summary decision on the issue of whether drill benches were roadways for purposes of section 77.1605(k). (*Id.).* The judge found a violation of section 77.1605(k) because the operator failed to maintain berms along two elevated drill benches. *(Id*. at 576). The evidence established that during normal drilling and blasting operations, a drill, ANFO truck, skidder, and pickup truck traveled along 35-to-45 foot-wide elevated benches to drill holes and load ANFO. (*Id.* at 575). The judge concluded that the drill benches were used as elevated roadways. The fact that vehicles did not transport material out of the area was not determinative. (*Id.).* Nor was the safety standard limited to roadways used by haulage vehicles that transport coal, equipment and personnel. *(Id.* at 575-76, *citing El Paso Rock Quarries*, 3 FMSHRC 36 (Jan. 1981) (hauling explosive materials is the kind of haulage contemplated by the safety standard)). The record in *Arch of Wyoming* established that the vehicles used in drilling and blasting entered the benches when drilling commenced, traveled along the benches as holes were loaded, and were removed from the benches before detonation of the explosives. Although the vehicles traveled at a low rate of speed and access to the benches was limited, these factors did not affect the status of the benches as elevated roadways. (*Id.* at 576).

Applying the foregoing precedent to the facts in this case, I find that the Secretary established by a preponderance of the evidence that at the time of the May 13, 2009 citation, the 21 Bench was used as a roadway during routine drilling and blasting operations at Respondent's Eagle Butte Mine. Consequently, Respondent was required to maintain berms of mid-axle height in accordance with the mandatory safety standard set forth in section 77.1605.[14]

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[14] I reject Respondent's argument regarding inconsistent enforcement of the standard. Most of Respondent's testimony in this regard was focused well before 2005. Even assuming periods of lax enforcement of the standard to drill benches after the Commission's 1981 *El Paso* decision, I credit supervisory inspector Jaqua's testimony that after Judge Manning's May 2010 decision in *Arch of Wyoming, supra,* MSHA's Gillette, Wyoming field office began enforcing its policy that berms must be built on drill benches because surface coal mines owned by Alpha Coal West were the only ones in the district that were not building berms on drill benches. (Tr. 394, 396). In these circumstances, I give little weight to Oster's testimony that he discussed the instant citation with other safety managers from different mines at the safety committee meeting of the Wyoming Mining Association about mid to late summer of 2009, and learned that none of the other mines had received any similar citation at that point in time. (Tr. 290-92). In any event, as the Secretary points out, an inconsistent enforcement pattern by MSHA inspectors does

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Initially, I credit Inspector Hamilton's un-rebutted testimony that the white drill operator (Alan Kline) told him that he had been dropped off at the drill location by another miner, who had driven his vehicle across the length of the 21 Bench. (Tr. 40; P. Ex. 3, p. 2). I recognize that *Black Beauty*, *supra*, 2012 WL 3255590, at *3, expressly rejects the notion that the operation of a single rubber-tired vehicle in a bench area makes it a roadway for purposes of section 77.1605(k). Similarly, the fact that the inspection vehicle nearly drove onto an unbermed section of the bench, is insufficient itself to establish the bench as a roadway. Respondent, however, concedes that other vehicles enter the active blasting area as an integral part of the drilling and blasting mining cycle, which occurs two to three times daily in the east pit where the 21 Bench is located. (*See* R. Br. at 16-17). Although some of these vehicles remain on site for the duration of the drilling and blasting process, the normal mining routine requires that rubber-tired vehicles travel along the bench in order to transport people and supplies to the drill. If the drill is in need of repair, mechanics and electricians must travel along the unbermed section of the bench to access the drill. (Tr. 65-66). If the drill needs fuel or needs to be cleaned, a vehicle carrying fuel or a pressure washer must travel through the same unbermed area. (Tr. 66-67, 75). Furthermore, I also credit Hamilton's unrebutted testimony that Kline told him that the bench "was being used a shortcut still before it was all mined out so people didn't have to drive all the way around the mine to reach this other side of the map." (Tr. 80).[15]

I reject Respondent's argument that because this was an active blasting area, which was isolated from other portions of the mine by large berms and signs warning, "DANGER, Hazardous Area, Authorized Personnel Only,"it was a working place and not a roadway. It was both. Active drilling and blasting operations occurred on the bench, which was also used as a roadway by the drilling and blasting crew, who would operate vehicles on the bench, including a de-watering truck, bulk truck, pickup truck, and Bobcat stemmer. Accordingly, Respondent had to comply with mandatory standards governing both working places and roadways. Moreover, Respondent cites no persuasive authority that because access to the 21 Bench was restricted to miners participating in, or overseeing, the drilling and blasting operations, it was exempt from

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[14](...continued)
not prevent MSHA from proceeding under an application of the standard that it concludes is correct. *(See, e.g., Austin Powder Co.*, 29 FMSHRC 909, 920 (2007)).

[15] Concededly, this case is different from *Black Beauty* in that the dragline bench there was used as a haulage road before the dragline move, and the operator planned to resume regular traffic after the move. Thus, the dragline move did not alter the bench's status as a roadway for rubber-tired vehicles. Here, there is insufficient evidence that the operator planned to continue to use the 21 Bench for vehicular traffic after the drilling and blasting, and the destructive nature of the blasting likely would render the affected areas of the 21 Bench less suitable for use as a roadway, absent further development. Nevertheless, as in *Black Beauty,* during the normal mining routine*,* which included a routine dragline move there, and routine drilling and blasting operations here, it was common for rubber-tired vehicles to travel on the bench for service and operational purposes.

the governing berm standard.[16] More importantly, however, I find that the drilling and blasting crew, while performing their work, and those driving vehicles servicing them, are precisely the miners to be protected by application of the standard in the circumstances herein, an active drill bench on which vehicles commonly travel during the normal drilling and blasting routine.

Finally, I note that after Inspector Hamilton issued the citation, it took only about fifteen minutes for the berm to be put in place on the 21 Bench. (Tr. 100). Therefore, no unreasonable burden was placed on Respondent to construct berms on its drill benches.[17]

Based on the foregoing, I find substantial evidence to establish that at the time of the citation, the 21 Bench was used in a manner consistent with the Commission's long-standing

[16] Although there is an limited exception to the berm requirement under 30 C.F.R. Section 56.9300(d) where elevated roadways are infrequently traveled and used only by service and maintenance vehicles, this regulation only pertains to surface metal/non-metal mines, not the open-pit surface coal mine at issue here.

[17] Respondent's evidence regarding the alleged hazards involved in building berms on drill benches does not persuade me otherwise. (R. Exs. 8 and 19)**.** I credit Respondent's assertion that such evidence was offered, not to advance a "greater hazard" defense, but to demonstrate that the Secretary's interpretation of the regulation may lead to an absurd result contrary to the purposes of the Act. *Compare Sewell Coal Co.*, 5 FMSHRC 2026, 2029 (1983); *RS&W Coal Co.*, 29 FMSHRC 828, 231 (Sept. 2007) (ALJ)(greater hazard defense may only be raised after Respondent has first petitioned MSHA for a modification of the standard). Respondent has not convinced me, however, that the Secretary's interpretation is so inflexible that it is more dangerous to build berms on drill benches than to forego them. Hamilton credibly testified that berms could be built a safe distance from the edge of drill benches to keep vehicles away from the edge and avoid covering back break. (Tr. 92-102). In fact, Hamilton testified that the berm built to abate the citation was not near the edge of the highwall. (Tr. 102). The record also contains evidence of less hazardous options for building berms than using a blade, which runs parallel to the edge. For example, Respondent could use dozers or loaders, which approach perpendicular to the edge, do not travel as close, and can retreat more quickly. (Tr. 101, 178, 223, 349-50). Alternatively, Respondent could bring in material used elsewhere to construct the berm so as to avoid obscuring back break. (Tr. 224).

definition of a bench as a roadway, as most recently clarified in *Black Beauty*.[18] Therefore, Respondent's failure to maintain berms along the 21 Bench violated 30 C.F.R. § 77.1605(k).

B. The Secretary Established by a Preponderance of the Evidence that the Violation of Section 77.1605(k) Was Significant and Substantial

The Mine Act defines a significant and substantial (S&S) violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the *Mathies* test: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal v. MSHA*, 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). An evaluation of the reasonable likelihood of injury is made assuming continued normal mining operations. *U.S. Steel Mining Co.* (*U.S. Steel III*), 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.* (*U.S. Steel I*), 6 FMSHRC 1573, 1574 (July 1984)).

The third element of *Mathies*, which requires "a reasonable likelihood that the hazard contributed to will result in an injury," is often the most difficult element for the Secretary to establish under the *Mathies* test. *See U.S. Steel Mining Co.* (*U.S. Steel IV*), 18 FMSHRC 862, 870 (June 1996) (Marks, Comm'r, concurring in result) (observing that during the 12-year period immediately following *Mathies,* over 93% of the Commission's 47 decisions involving an S&S issue concerned the third element). In *U.S. Steel IV*, the Commission held that "the third element of the *Mathies* test does not require the Secretary to prove it was 'more probable than not' an injury would result." 18 FMSHRC at 865 (citation omitted).

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[18] The present case is distinguishable from my decision in *Knife River Corporation*, 34 FMSHRC 1109 (May 10, 2012)(ALJ). In *Knife River*, I found as a matter of fact and law that a truck scale was not a roadway for the purpose of section 56.9300(b). The fact that neither the regulatory history nor the clear meaning of the regulation supported the Secretary's unreasonable expansion of the term "roadways" to include a piece of equipment were important factors in my analysis. Furthermore, the citation at issue in *Knife River* alleged a violation of the more permissive berm standard, section 56.9300(b), which applies exclusively to metal/non-metal mines. *See id.* at 1128; *see also* note 16, *supra*. In the present case, the nature and use of the 21 Bench comfortably comports with the plain meaning of the term "elevated roadways" as contemplated in section 77.1605(k).

At the same time, the Commission has long held that "[t]he fact that injury [or a condition likely to cause injury] has been avoided in the past or in connection with a particular violation may be 'fortunate, but not determinative.'" *U.S. Steel IV*, 18 FMSHRC at 867 (*quoting Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986)). *See Elk Run Coal Co.*, 27 FMSHRC 899, 906-07 (Dec. 2005) (holding that absence of adverse roof conditions at time of or prior to violation does not preclude establishing S&S violation); *Blue Bayou Sand & Gravel, Inc*., 18 FMSHRC 853, 857 (June 1996) (noting that absence of accidents involving violative equipment does not preclude S&S finding).

The Commission recently reiterated these principles in *Cumberland Coal Resources, LP*, 2011 WL 5517385 (Oct. 5, 2011), and *Musser Engineering, Inc*., 32 FMSHRC 1257 (Oct. 2010). The Commission emphasized that the test under the third prong of *Mathies* is whether the hazard fostered by the violation is reasonably likely to cause injury, not whether the violation itself is reasonably likely to cause injury. *Cumberland Coal Res*., 2011 WL 5517385, at *5; *Musser*, 32 FMSHRC at 1280–81, citing *Elk Run Coal* and *Blue Bayou Sand & Gravel*, *supra*.

Applying these S&S principles, I have found the underlying violation of a mandatory safety standard. I found above that the failure to erect berms along the length of the 21 Bench constituted a violation of section 77.1605(k), a mandatory safety standard under the Act. As to the second *Mathies* element, it is clear that the lack or berms contributed to a discrete safety hazard, i.e., a vehicle over-traveling the edge of the 21 Bench because of the absence of berms.

With regard to the third *Mathies* element, I find a reasonable likelihood that the hazard contributed to by the violation will result in an injury. That is, the hazard contributed to by the violation, a vehicle over traveling the edge of the bench because of lack of berms - would be reasonably likely to cause injury. *Black Beauty, supra,* 2012 WL 3255590, at *9.
The Commission interprets mandatory safety standards to take into consideration ordinary human carelessness. *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Consequently, the construction of mandatory safety standards, which involve miner behavior cannot ignore the vagaries of human conduct. *See, e.g.*, *Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc*., 3 FMSHRC 2526, 2531 (November 1981). This analysis requires consideration of all relevant exposure and injury variables.

Respondent argues that the testimony proffered on this issue was speculative, unsubstantiated, and post-hoc rationalization by the issuing inspector. (R. Br. at 22). While there is some evidence that the inspector may have issued the citation prematurely before gathering all the evidence, it is clear that the inspector's initial determination is supported by the entirety of the record evidence. Although the bench was between 70 and 100 feet wide, I credit Hamilton's testimony that only 40 feet of the bench, adjacent to the edge, was suitable for vehicular traffic. While the risk of injury from the unbermed drop-off hazard may have been significantly diminished if traffic had been contained to the side of the bench opposite the highwall, the close proximity in which the vehicles traveled to the edge of the unbermed drop-off of the bench greatly enhanced the necessity for berms, and the likelihood that in their absence a

vehicle would overtravel the edge and fall sixty feet resulting in injury to its occupant.[19] In addition, the width of the bench was always changing as a mechanized shovel removed material below, making it more likely that a vehicle operator would over travel the edge, not realizing that the edge had moved. (*See* Tr. 83, 216). Even skilled vehicle operators driving close to the edge may suffer a momentary lapse of attentiveness from fatigue or environmental distractions. Should such occur, there is a reasonable likelihood that a vehicle would over travel the unbermed edge and injury would result from a 60-foot drop to the pit below.

The record also establishes that the visibility of drivers may be impaired by darkness and inclement weather, which further makes the hazard of over traveling the unbermed edge of the bench reasonably likely during continuous mining operations. The day shift began before sunrise, when vehicle operators were more likely to overlook the unbermed edge and over travel in dark or dim light. (Tr. 87-88). Crawford testified that miners in the drilling and blasting crew arrived on site at 5:15 a.m., and the mine periodically conducted drilling and blasting operations during the night shift when visibility was reduced. (Tr. 147-48). Similarly, windy conditions would kick up dust in the air, which obscures visibility, as does rain or snow. (Tr. 83-85, 217). Given the fact that miners worked shifts at the Eagle Butte Mine in which visibility was impaired by darkness and weather, the visual and tactile warning that the berms would provide was especially important in reducing the likelihood of driving over the edge.

The record also establishes rough road conditions on the 21 Bench. The condition of the roadway on the bench was bumpy and irregular, making mechanical failure of a vehicle traveling on the bench more likely. (Tr. 53, 85-86; P. Ex. 5, R. Ex. 4-7). As noted, weather conditions at times made the road wet and muddy, resulting in slippery road conditions and wear and tear on vehicles. (Tr. 84-85, 217). In fact, Respondent's own evidence in this case established that a dozer operator, familiar with the bench and properly trained against cell phone usage, became distracted while texting, and backed the dozer off the edge of an unbermed bench during an evening shift. (Tr. 344-45 and R. Ex. 18).[20]

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[19] I note that berms are not intended to be of sufficient dimensions to stop the direct impact of a vehicle. Rather, they provide an important visual cue to drivers and they impede the forward movement of a vehicle for a sufficient amount of time to enable the driver to apply corrective measures. *See* Walter W. Kaufman & James C. Ault, Bureau of Mines, Information Circular No. 8758, DESIGN OF SURFACE MINE HAULAGE ROADS - A MANUAL (1977).

[20] While not dispositive, I also note the fact that unlike most elevated roadways, the unbermed portion of the drill bench posed a risk not only of a vehicle over traveling the edge, but also a risk that back break along the edge of the unbermed bench would give way. The record establishes that back break caused by blasting was present along the edge of the bench and made the bench more likely to give out if heavy vehicles traveled on it. (Tr. 90-92, 217). As noted at n. 16, *supra*, the record also establishes that Respondent could bring in material used elsewhere to construct the berms so as to avoid obscuring back break. (Tr. 224). The presence

(continued...)

In sum, based on the foregoing record evidence and the confluence of factors present, I find that the Secretary established that the hazard in question, a vehicle over traveling the edge of the elevated Bench 21 because of lack of berms - was reasonably likely to cause injury during continuous mining operations. *Black Beauty, supra,* 2012 WL 3255590, at *9; *see also Arch of Wyoming*, 32 FMSHRC at 577-78.

With regard to the final *Mathies* element, I find that the Secretary established a reasonable likelihood that the injury in question would be of a reasonably serious nature. In this regard, if any of the vehicles that traveled on the Bench 21 were to go over the edge of the bench and fall 60 feet to the pit below, an injury could well be fatal and the operator would be fortunate to sustain only crushing type or permanently disabling injuries. (Tr. 94). Likely injuries would reasonably include blunt force and penetrating trauma of a serious or even fatal nature. Accordingly, I conclude that the fourth element of *Mathies* was satisfied and the violation was S&S.[21]

C. Civil Penalty Assessment

Section 110(i) of the Mine Act establishes six criteria to be considered in determining the appropriateness of a civil penalty. 30 U.S.C. § 820(i). The Eagle Butte is one of the largest coal mines in the United States[22] and is owned and operated by Alpha Natural Resources and its

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[20](...continued)
of berms on the drill bench would go a long way towards warning drivers of the drop-off hazard and the presence of back break. By contrast the absence of berms made it reasonably likely that a vehicle would over travel the edge of the bench when visibility was impaired, or during inclement weather.

[21] The inspector determined that Respondent was moderately negligent with respect to the violation, with one person affected. Respondent did not raise the issue of negligence or the number of persons affected by the violation during the hearing or in its post-hearing brief. Moderate negligence exists where "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). In limiting the access to the 21 Bench and posting warning signs at the bench's entrance, I find that Respondent attempted in good faith to minimize miner exposure to the unbermed roadway. In addition, I credit, but reject, Respondent's good-faith belief that berms were not required on active drill benches. As there is sufficient evidence of mitigating factors to support the inspector's negligence determination, and no challenge by Respondent that one person would be affected by the violation, I affirm the inspector's findings and conclude that Respondent was moderately negligent in failing to provide berms along the elevated drill bench, and that one person was affected.

[22] A survey of U.S. coal mines by the Department of Energy, ranked the Eagle Butte mine ninth in terms of production with over 21 million short tons of coal produced in 2009. OFFICE OF
(continued...)

subsidiary, Alpha Coal West. There is no factual dispute regarding Respondent's ability to pay the proposed penalty or Respondent's good-faith abatement of the citation shortly after the citation was issued. The parties stipulated to the fact that there have been no violations of the section 77.1605(k) standard in the two years prior to issuance of the instant citation on May 13, 2009. (Tr. 119-120; P. Ex. 1). The Respondent paid all 30 other section 104(a) violations during this time period. I have found that the gravity of the violation was S&S and the negligence was moderate. Accordingly, applying the section 110(i) criteria, I conclude that the Secretary's proposed penalty is appropriate and I assess a civil penalty of $1,203.00.

V. Partial Settlement

Prior to the issuance of the citation discussed above, Hamilton cited Respondent for an alleged violation of 30 C.F.R. § 77.408. Citation No. 8463058 alleges that Respondent was moderately negligent in failing to maintain adequate shielding for welding operations in shop bay number seven. Hamilton further alleged that the hazard was reasonably likely to cause "flash burn and/or skin burn injuries" that would result in lost workdays or restricted duty for one miner.

During the hearing, the parties read into the record a settlement agreement involving Citation No. 8463058. (Tr. 279-81). The parties proposed that the penalty be reduced from $807 to $181 and that the citation be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation. I have considered the representations made at the hearing, and I conclude that the proffered settlement is appropriate under the penalty criteria discussed above and set forth in section 110(i) of the Act. Accordingly, I approve the settlement agreement.

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[22](...continued)
OIL, GAS, AND COAL SUPPLY STATISTICS, DEP'T OF ENERGY, ANNUAL COAL REPORT, p. 24 (2009), http://www.eia.gov/coal/annual/archive/05842009.pdf.

VI. Order

The 21 Bench at the Eagle Butte Mine is a roadway for the purpose of 30 C.F.R. § 77.1605(k). The Secretary has shown by a preponderance of the evidence that the Respondent's failure to maintain berms along the 21 Bench violated 30 C.F.R. § 77.1605(k), that the violation was significant and substantial in nature, and that Respondent's negligence was moderate, with one person affected. Having duly considered the six criteria set forth in Section 110(i) of the Act, I find that the Secretary's proposed penalty of $1,203 for Citation No. 8463059 is appropriate.

The parties' Motion to Approve Settlement of Citation No. 8463058 is **GRANTED**. It is **ORDERED** that Respondent pay a total penalty of $1,384 within thirty days of this decision.[23]

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

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/tjr

[23] Payment should be sent to: Mine Safety & 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
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November 9, 2012

PATTISON SAND COMPANY, LLC, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. CENT 2012-137-RM
v.	:	Citation No. 8659952; 11/09/2011
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. CENT 2012-138-RM
	:	Citation No. 8659953; 11/09/2011
	:	Mine: Pattison Sand Company, LLC
	:	Mine ID:13-02297

DECISION ON REMAND

Before: Judge McCarthy

Statement of the Case

These contest proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Act"). By Order dated September 27, 2012, a three-member panel of the Commission remanded this matter to the undersigned Administrative Law Judge for further consideration of Contestant's requests for modification of the section 103(k) Order, consistent with the decision of the United States Court of Appeals for the Eight Circuit in *Pattison Sand Company, LLC v. FMSHRC*, 688 F.3d 507, 509 (8th Cir. 2012)(granting in part and denying in part Contestant's petition for review)(Circuit Judge Sheperd, concurring in part and dissenting in part).

A conference call was held with the parties on October 10, 2011 to determine if this matter was moot. The Contestant indicated that the matter was not moot as bolting and meshing in new areas was an ongoing process. The parties indicated that a settlement conference would be held on November 8 and 9, 2011 in Washington, DC. Given the litigious nature of this controversy and the parties inability to date to resolve this once-expedited matter, I declined to stay my consideration of this matter. For the reasons set forth below, I decline to modify the section 103(k) Order as requested by Contestant.

Relevant Factual and Procedural Background

Pattison Sand Company, LLC ("Pattison" or "Contestant") operates a sandstone mine in Clayton County, Iowa. On November 9, 2011, after a roof fall in the 12 AR area of the mine two days earlier, an inspector with the Department of Labor's Mine Safety and Health Administration

(MSHA) issued Order No. 8659953 pursuant to section 103(k) of the Act.[1] That order prohibited activity in, and withdrew miners from, "all areas of the mine South of crosscut L that are not bolted and meshed." *Pattison Sand Co., LLC*, 33 FMSHRC 3096, 3097 (Dec. 2011) (ALJ McCarthy).

Pattison challenged the 103(k) Order before the Commission on the basis that no accident had occurred and that the scope of the order was an abuse of discretion. *Id*. at 3123-32. Pattison requested that the 103(k) Order be vacated in its entirety. Alternatively, Pattison requested that the scope of the order be modified by limiting the withdrawal to the area affected by the roof fall. *Id*. at 3133. Pattison also filed an emergency motion to modify the order to permit its experts to access the mine to examine and evaluate conditions, install monitoring equipment, and conduct tests. *Id*. at 3133-36. In its eleventh-hour Emergency Motion, Contestant asked the Commission to modify the scope of the existing 103(k) Order to permit Pattison's experts to enter the underground mine (south of crosscut L) for the limited purpose of: (1) installing instrument monitoring technology in areas where previous inspections by Pattison personnel have revealed no visible signs of deterioration, and (2) using that technology to develop a ground control instrumentation and data collection program that will allow production to continue in areas of the underground mine that are safely supported by adequate roof control measures.

I held an evidentiary hearing on an expedited basis in Washington, D.C. Shortly, thereafter, in a 44-page decision, I affirmed the validity of the section 103(k) Order after concluding that the roof fall was an accident and that MSHA's issuance of the order was not an abuse of discretion. I also concluded that the Commission has no authority to modify the section 103(k) Order. *Id.* at 3147. I found that Pattison had failed to cite any authority granting the Commission the power to modify section 103(k) orders. I found no such authority. I reasoned that section 103(k) orders are an enforcement action, not an adjudicatory action delegated to the Commission. Given the distinct enforcement and adjudicatory authority delegated to the Secretary and the Commission, respectively, I found that neither the Commission nor its judges are authorized representatives of the Secretary under Section 103(k), and just as they do not have legal authority to charge an a operator with violations of the Mine Act by modifying a citation, I found that they likewise did not have the legal authority to modify a 103(k) enforcement order. *Cf*. *Conshur Mining, LLC*, Docket Nos. KENT 2008-562 and KENT-2008-782, slip op. at 10 (Nov. 28, 2011) (ALJ Feldman), *citing Consolidation Coal*, 20 FMSHRC 1293, 1298 (Dec.

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[1] Section 103(k) of the Mine Act, 30 U.S.C. § 813(k), provides in pertinent part:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine . . . .

1998), *quoting Mettiki Coal Corp*., 13 FMSHRC 760, 764 (May 1991). Accordingly, I concluded that under the statute, as written by Congress, the 103(k) Order must either be vacated, or affirmed, as written and modified by MSHA. I affirmed the scope of the 103(k) Order, as modified by MSHA, but refused to modify it, as requested by Contestant. *Id*. I further concluded that even if the modification request was alternatively viewed as a motion for temporary relief under section 105(b)(2) of the Act, 30 U.S.C. § 815(b)(2), the request did not satisfy the prerequisites for temporary relief. *Id*. at 3148-49.

The Commission denied Pattison's petition for discretionary review of my decision. Subsequently, Pattison filed a petition for review in the Eighth Circuit. The Court affirmed my conclusion that the section 103(k) Order was valid. 688 F.3d at 513. The Court also affirmed my review of the section 103(k) Order under an arbitrary and capricious standard, and found substantial evidence supporting my finding that the roof fall was an accident within the meaning of the Act, and that the scope of the order was neither arbitrary nor capricious. *Id*. at 513-14.

The Court majority found that I erred, however, by determining that the Commission lacks authority to modify a section 103(k) order. The Court reasoned as follows:

> Whether the Commission possesses authority to modify a § 103(k) order apart from the Act's temporary relief provision is a question of first impression in the federal courts of appeals. The Act is silent regarding the Commission's ability to review § 103(k) orders, but its power to conduct such review has been recognized by judicial decisions analyzing the Act's structure and legislative history. *See, e.g., Am. Coal Co. v. U.S. Dep't of Labor*, 639 F.2d 659, 660–61 (10th Cir.1981). In concluding that the Commission has authority to review § 103(k) orders, the Tenth Circuit looked in *American Coal* to sections of the Act providing for Commission review of other types of orders, including citations and abatement orders issued under § 104 and imminent danger orders issued under § 107(a). *Id.* at 660 & n. 2. Both provisions provide that following a hearing on the matter, the Commission shall issue an order, based on findings of fact vacating, affirming, or modifying the citation or order. *See* 30 U.S.C. §§ 815(d), 817(e). The *American Coal* court also looked to legislative history discussing in general terms the Commission's power of review and providing that ALJs shall "hear matters before the Commission and issue decisions affirming, modifying or vacating the Secretary's order." 639 F.2d at 661 (emphasis added) (quoting S.Rep. No. 95–181, at 13 (1977)).
>
> In determining that he lacked authority to modify § 103(k) orders, the ALJ relied on decisions holding that because the Act affords the Secretary enforcement authority, while limiting the Commission to adjudicatory functions, the Commission may not find violations not charged by the Secretary or modify an order from one type to another. *See, e.g., Sec'y of Labor v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1298 (1998); *Sec'y of Labor v. Mettiki Coal Corp*., 13 FMSHRC 760, 764 (1991). On appeal, the Secretary advances this same

principle, contending that modification of § 103(k) orders is barred by *SEC v. Chenery Corp*., 332 U.S. 194 (1947). There, the Supreme Court held that in reviewing acts of administrative agencies, a court "must judge the propriety of such action solely by the grounds invoked by the agency." *Id.* at 196, 67 S.Ct. 1575. The Secretary now asserts that the Commission would impermissibly substitute its own judgment for that of the agency if it were to modify a § 103(k) order. We note that because the Secretary did not advance this argument in the administrative proceedings, it is not entitled to deference on appeal. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[A]gency 'litigating positions' are not entitled to deference when they are ... advanced for the first time in the reviewing court." (citations omitted)).

We conclude after study that the Commission has the power to modify § 103(k) orders. First, the Secretary does not challenge the Commission's ability to review § 103(k) orders and affirm or vacate them. The Commission's power to conduct such review is based on legislative history and other provisions of the Act which also suggest that it generally has the power to modify the orders it reviews. *See Am. Coal Co.*, 639 F.2d at 660–61. It follows that if the Commission can review § 103(k) orders, it also has the power to modify them. Second, the ALJ's reliance on Commission authority holding that it and its administrative law judges may not change an order from one type to another or increase the number of charged violations is misplaced. Pattison's requested modifications are not of this character. The modifications it seeks would maintain the Secretary's order as a § 103(k) order, but lessen its severity by limiting the scope of the order or by permitting its experts access to the mine. This approach is in line with Commission authority discussing modification of a § 104 order and indicating that an ALJ may "modify a citation or order so long as the essential allegations necessary to sustain the modified enforcement action are contained in the original citation or order." *Sec'y of Labor v. Mechanicsville Concrete, Inc. t/a Materials Delivery*, 18 FMSHRC 877, 880 (1996). The allegations sustaining the original order here would continue to support a grant of Pattison's modification requests.

We also find the Secretary's reliance on *Chenery* unpersuasive. That case dealt with an Article III court reviewing administrative action. Unlike such a court, the Commission is an independent adjudicatory body that "stands in a fundamentally different position in relation to the Secretary than does a court of appeals.... The Commission is comprised of persons who 'by reason of training, education, or experience' are qualified to carry out its specialized functions under the Act." *Sec'y of Labor v. Old Ben Coal Co.*, 1 FMSHRC 1480, 1484 (1979) (quoting 30 U.S.C. § 823(a)). Moreover, the *Chenery* decision reflected a concern about courts entering a "domain which Congress has set aside exclusively for the administrative agency." 332 U.S. at 196. There is less danger of that here since

> Congress has explicitly provided the Commission with the authority to modify orders issued under the Act. We thus can discern no limiting principle that would allow Commission review of § 103(k) orders but prohibit modification of such orders.
>
> The Secretary contends that even if we determine that the Commission has authority to modify a § 103(k) order, remand is not necessary here because the ALJ determined that the scope of the Secretary's order was not arbitrary and capricious. The ALJ then was proceeding, however, under the assumption that he lacked authority to do anything but enforce the order as written or vacate it entirely. We cannot say that he would have reached the same conclusion had he recognized his authority to modify the order. Accordingly, we remand Pattison's requests for modification of the order to the Commission for its consideration. Upon remand the Commission may well decline to modify the order, but it is for it to make a decision in the first instance. Because we conclude that the ALJ's determination that he lacked authority to modify the § 103(k) order was in error, we do not address Pattison's arguments related to the Act's temporary relief provisions.

688 F.3d at 515-16.

Circuit Judge Shepherd dissented on this issue. He reasoned as follows:

> As the majority explains, whether the Commission has the authority to modify the Secretary's section 103(k) order is a question of first impression in our Court and in all other federal courts of appeals. While there appears to be ample authority regarding the Commission's ability to administratively review a section 103(k) order and either affirm or vacate the order, the majority's opinion expands this basic review to bestow upon the Commission the authority to modify orders. Absent any support for such authority in the Federal Mine Safety and Health Act, this expansion exceeds the authority granted to the Commission by Congress.
>
> Pattison argues that support for the Commission's ability to modify a section 103(k) order is found in section 105(b)(2)'s "of any order" language. Section 105(b)(2) states, "the Commission [may] grant temporary relief from any modification or termination of any order or from any order issued under [Section 104] of the Act." 30 U.S.C. § 815(b)(2). The meaning of this section is plain and clear. The Commission may grant temporary relief from a part "of any order," including a section 103(k) order, that has been modified or terminated. Congress did not grant unto the Commission the authority to grant temporary relief from those parts of section 103(k) orders that have not been modified or terminated. Pattison contends "there is no conceivably logical explanation" for this interpretation of the Act. However, when we are given statutory text that is plain and clear, our obligation is to apply the text as written. *See Chevron U.S.A., Inc.*

v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Accordingly, because the Act does not grant to the Commission the authority to modify section 103(k) orders and the plain language of section 105(b)(2) states that the Commission may only grant temporary relief from those parts of a section 103(k) order that have been modified or terminated, I would deny the petition for review in total.

Analysis and Disposition on Remand

The doctrine of "law of the case" provides that when an appellate court has rendered a decision and states in its opinion a rule of law necessary to that decision, that rule is to be followed in all subsequent proceedings in the same action.[2] Accordingly, the terms of the Court's remand bind the Commission as the law of the case unless the Supreme Court grants certiorari and vacates or amends the decision imposing the remand.[3] Applying the Eighth Circuit's decision as the law of the case, I find that the Commission has authority to modify

[2] Black's Law Dictionary (8th ed. 2004) defines the term "law of the case" as the doctrine holding that a decision rendered in a former appeal of the case is binding in a later appeal.

[3] That is not to say that the Commission must acquiesce in the Eighth Circuit's view in other circuits, or even in other cases in the Eighth Circuit. There is considerable authority that an administrative agency charged with the duty of formulating uniform and orderly national policy in adjudications is not bound to acquiesce in the views of the U.S. courts of appeals that conflict with those of the agency. *See, e.g., S & H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1273, 1278–1279 (5th Cir. 1981); *see generally* Samuel Estreicher, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 681 (1989). To date, the Commission has not addressed the nonacquiescence issue or passed on the issue of first impression presented in this case.

section 103(k) orders.[4] As the Court noted, however, the Commission may decline to modify the order.

After careful review of the existing record in light of the Court's remand directive, I decline to modify the § 103(k) Order to limit it to the immediate area surrounding the roof fall, or to allow Pattison's experts to enter the prohibited area of the mine to examine and evaluate conditions, install monitoring equipment, and conduct tests. I find that the scope of the section 103(k) Order was justified in light of the uncertainty and instability of the roof conditions in the underground areas south of crosscut L. The scope of the § 103(k) Order was based on the fact that the roof fell in an area that was mined to cap rock. Tr. 140, 159. Pursuant to the initial ground control plan, roof mined to cap rock only needed to be scaled, and thus needed no additional support, unless there were brows, potholes, or cap rock thickness of less than four feet. Tr. 98-100, 250; Sec'y Ex. at 2. Since none of these conditions were present at the site of the November 7, 2011 roof fall, and because proper scaling occurred, the assumption underlying the ground control plan, i.e., that the cap rock could adequately support the mine's roof, was indeed suspect. Tr. 144.

The record also establishes that on August 3, 2011, just a few months earlier, MSHA issued a section 107(a) imminent danger order closing the mine due to concerns about roof falls

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[4] Upon reconsideration of the issue, I find some merit in the Eighth Circuit's view, which I am bound to apply here, that the Commission retains authority to modify the scope of section 103(k) orders. Although the Eighth Circuit's decision pragmatically searches to fill a statutory void, the overall statutory scheme does lend some support to the view that the Commission has authority to modify the orders it reviews. For example, restricting the authority of the Commission to modify section 103(k) orders may have unintended consequences that would undermine the safety of miners. If the Commission were limited to vacating 103(k) orders or accepting them as written or modified, and MSHA issued a 103(k) order in response to an accident that was necessary to insure the health or safety of miners, but the scope of the control order was overly broad or arbitrary and capricious, the Commission would be left with a Hobson's choice: strike down the order entirely, or leave the arbitrary or overly broad order in place. The former would deprive miners of any protection whatsoever. The latter would be unfair to the operator. By contrast, if the Commission has authority to modify the order as the Eighth Circuit has held, there is no need to throw the proverbial baby out with the bath water. The Commission could simply amend the arbitrary scope of the order and give force to the Secretary's legitimate enforcement action.

In my view, such authority should be used sparingly. In the 103(k) context, the Commission should afford the Secretary a high level of deference in her assessment of the scope of the order necessary to ensure the safety of miners in the wake of an accident. The Commission, whose judges and members have not visited the accident site, nor specifically been trained in the breadth of its hazards, are not well positioned to second guess the Secretary's life and death determinations in such scenarios.

in the underground portion of the mine. Tr. 153, 213, 224-25, 229. The ground control plan at issue was negotiated in an effort to settle that 107(a) enforcement action. Tr. 229, 235-36. While Contestant argues that this history of roof falls should be discounted due to the fact that they occurred in inactive areas of the mine, I find that the history of roof falls at the mine strongly supports MSHA's position that the cap rock was unsafe without additional support.

In addition, I take administrative notice of the reported fact that on January 11, 2012, one month after I issued my initial decision in this matter, Pattison's underground sandstone mine experienced another significant ground fall of about two tons of material, in addition to the six reported falls of ground that occurred in 2011. The accident area had been scaled but not bolted or equipped with straps for ground control, according to enforcement paperwork. *See Mine Safety and Health News*, Vol. 19, No. 2, p.37 (Jan. 23, 2012).

Given this history, and the fact that the November 7, 2011 ground fall occurred in roof that Contestant had represented was safest (cap rock), MSHA rationally concluded that the roof in the mine south of crosscut L that was not bolted and meshed - - some of which already had, or was scheduled to have, ground support, - - was dangerous. Tr. 236-37. An experienced MSHA inspector who was very familiar with the mine (Tr. 133), issued the section 103(k) Order prohibiting all activity in areas south of crosscut L that are not bolted and meshed until an MSHA examination or investigation determined that it is safe to resume mining operations in the affected area. Given the testimony, photographs, and/or documentary evidence regarding the November 7, 2011 roof fall, the August 2011 imminent danger order for roof fall, and the history of other recent roof falls in areas mined to cap rock, the Secretary rationally demonstrated that Contestant's ground control plan was no longer sufficient to protect the safety of any person working in underground areas south of crosscut L that are not bolted or meshed.

On the existing record, I decline to second guess MSHA's reasonable judgment to require bolting and meshing throughout areas of the mine south of crosscut L, and to prohibit Respondent's proposed entry into such areas. I find it contrary to the fundamental purpose of the Act to limit the scope of the withdrawal order to the area affected by the ground fall, i.e. 12AR, when it is known that a similar risk to miner safety from the same conditions existed elsewhere throughout areas of the mine south of crosscut L. As I made clear in my initial decision, Pattison's assertions that the affected area was geologically unique from other sections of the mine is not persuasive. I declined to credit the assertion from Contestant's expert, David West, that the "the strength of the caprock [in 12AR was] locally compromised by the presence of a gully on the surface topography." Tr. 293. I found his testimony to be contrived because it was strikingly similar to testimony that he had provided for the same law firm in another case several years earlier, and it failed to explain how the unique moisture conditions were a proximate cause of the ground fall. By contrast, I found the testimony of the Secretary's expert, Dr. Mark, to be more persuasive because it was based on his observation of prior roof falls at the Pattison mine. The Court affirmed my findings. 688 F.3d at 514.

In short, the mine's history of roof falls in areas mined to cap rock demonstrates that the instant roof fall was indicative of a larger problem encompassing far more than the immediately affected area. In these circumstances, I decline to circumscribe the scope of the section 103(k) Order to the area affected by the ground fall.

I also decline to modify the order, as requested, to permit Pattison's experts to examine and evaluate conditions, install monitoring equipment and conduct tests. MSHA informed Contestant that it was not possible to determine the stability of the roof at the Pattison Mine from visual observations. MSHA further determined, as experience has shown, that even roof that has been freshly scaled may suddenly collapse without warning, and MSHA reiterated its expert conclusions at the hearing that the only way that the roof can be "made safe" is to install roof support. While MSHA expressed a willingness to discuss alternative support designs for the future, MSHA determined that the most appropriate support pattern was 8 foot bolts with mesh. MSHA further asserted a reasonable belief that Pattison's proposed activities were "research oriented, " as two PhD students were to accompany its experts. In addition, MSHA informed Pattison that ground movement monitors were not an acceptable replacement for roof support in the Pattison Mine, and that while studies of the mine design and ventilation issues were desirable, they did not address the immediate need for roof support at the mine. In these circumstances, MSHA rationally expressed its belief that Pattison's proposed work plan did not justify the exposure of individuals to the hazards of the unsupported roof at the Pattison Mine. I decline to second guess its expert judgment.

Based on the foregoing, Pattison's requests for modification of the section 103(k) Order are **DENIED.**

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

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November 9, 2012

DAVID STANLEY CONSULTANTS, LLC, Contestant,	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2012-498-R
	:	Citation No. 4900439, 12/06/2011
	:	
	:	Docket No. WEVA 2012-499-R
	:	Citation No. 4900440, 12/06/2011
	:	
	:	Docket No. WEVA 2012-500-R
v.	:	Citation No. 4900589, 12/06/2011
	:	
	:	Docket No. WEVA 2012-501-R
	:	Citation No. 4900604, 12/06/2011
	:	
	:	Docket No. WEVA 2012-502-R
	:	Citation No. 4900615, 12/06/2011
	:	
	:	Docket No. WEVA 2012-503-R
SECRETARY OF LABOR	:	Citation No. 8431839, 12/06/2011
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Upper Big Branch Mine – South
Respondent,	:	Mine ID 46-08436 YBV
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2012-540
Petitioner,	:	A.C. No. 46-08436-274683-01 YBV
	:	
v.	:	Docket No. WEVA 2012-541
	:	A.C. No. 46-08436-274683-02 YBV
DAVID STANLEY CONSULTANTS, LLC,	:	
Respondent.	:	Upper Big Branch Mine – South

ORDER GRANTING IN PART AND DENYING IN PART DAVID STANLEY CONSULTANTS' MOTION FOR SUMMARY DECISION &
ORDER GRANTING IN PART AND DENYING IN PART THE SECRETARY'S MOTION FOR PARTIAL SUMMARY DECISION

These cases are before me upon notices of contest filed by David Stanley Consultants ("DSC") and petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), pursuant to section 105(d) of the

Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Act" or the "Act"). The cases involve five 104(a) citations and one 104(d)(1) citation issued to DSC on December 6, 2011.

I. BACKGROUND

On April 5, 2010 an explosion occurred at Performance Coal Company's ("Performance") Upper Big Branch Mine-South ("UBB" or the "mine"). Eleven DSC employees worked at the mine prior to and at the time of the explosion. Following an extensive investigation, MSHA issued the six citations that are the subject of the above captioned dockets[1] to DSC. Three citations were issued for various training violations, while three other citations were issued for failure to correct hazardous conditions observed and recorded by one of the DSC employees during the course of examinations he conducted. The parties determined that the primary issue in these cases is one of jurisdiction and that the matter could be decided on cross motions for summary decision. Specifically, the parties dispute whether DSC is an "independent contractor" subject to liability under the Mine Act.

On July 6, 2012 DSC submitted its Motion for Summary Decision ("DSC Mot."), while the Secretary submitted her Motion for Partial Summary Decision ("Sec'y Mot."). Subsequently, on July 27, 2012, DSC filed its Opposition to the Secretary's Motion ("DSC Opp."), while the Secretary submitted her Reply to DSC's Motion ("Sec'y Rep.").

[1] Citation No. 4900615 alleges a violation of Section 75.363(a) of the Secretary's regulations, and contends that a DSC employee working at the mine "failed to immediately correct or post with conspicuous 'Danger' signs hazardous conditions observed and recorded during the examinations[.]" Citation No. 8431839 alleges a violation of Section 75.360 of the Secretary's regulations, and contends that a DSC employee working at the mine "failed to conduct adequate preshift examinations[.]" Citation No. 4900604 alleges a violation of Section 75.363(a) of the Secretary's regulations, and contends that a DSC employee working at the mine "failed to immediately correct hazardous conditions or post the area with conspicuous 'DANGER' signs for hazards observed and recorded during the examinations[.]" Citation No. 4900589 alleges a violation of Section 75.1713-3 of the Secretary's regulations, and contends that DSC "failed to develop, implement, and train select supervisory employees, to assure they have received the required first-aid training, for all sections, on all shifts." Citation No. 4900440 alleges a violation of Section 48.7 of the Secretary's regulations, and contends that DSC, "which provides contract employees to the Upper Big Branch Mine[,] failed to ensure their employees received task training for the jobs they were performing." Citation No. 4900439 alleges a violation of Section 48.6 of the Secretary's regulations, and contends that a DSC, "which provides contract employees to the Upper Big Branch Mine, failed to ensure their employees received experienced miner training."

II. STIPULATIONS

The parties submitted the following joint stipulations:

1. 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 Federal Mine Safety and Health Act of 1977 ("the Act").
2. The Upper Big Branch Mine-South ("UBB") was operated by Performance Coal Company ("Performance"), a former subsidiary of Massey Energy Company.
3. Performance was an "operator" as defined in Section 3(d) of the Act at the coal mine at which the order at issue in this proceeding was issued.
4. The products of the mine at which Citations 4900615, 8431839, 4900439, 4900440, 4900589 and 4900604 were issued entered commerce, or the operation or products thereof affected commerce, within the meaning and scope of Section 4 of the Act.
5. DSC does business in several states and maintains its headquarters in Fairmont, West Virginia.
6. DSC is in the business of providing temporary labor to the mining industry. Such laborers are DSC employees, in that they are hired by and paid by DSC, but mining activities performed by such employees is performed at the client mine to which, at the request of the client mine, the laborers have been assigned for a certain period of time (which can range from days to months, depending on the client mine's need).
7. DSC provides company training to its employees before placing them at mine sites. In general, this training includes expectations of employees (e.g., showing up on time, working safely, following instructions, accident reporting, etc.), general roof control and ventilation plan theory and the rights of miners to know the contents of the plans, accident prevention, and hazard recognition.
8. DSC had an agreement with Performance to provide such temporary labor to UBB, before and on April 5, 2010.
9. All of the temporary laborers employed by DSC and assigned to UBB were hourly employees. The DSC employees working at UBB before and on April 5, 2010 were David E. Farley, Blake J. Accord, John W. Morris, Owen Thomas Davis, William Campbell, Adam B. Farley, Justin L. Hatcher, Timothy G. Sigmon, James A. Smith, Joshua S. Napper and Jason M. Stanley.
10. Most of the workers supplied to UBB by DSC were inexperienced miners. (i.e., most had fewer than 12 months mining experience).
11. William Campbell worked as a David Stanley employee at UBB from December 7, 2009 until April 9, 2010. At the direction of Performance, Mr. Campbell worked for a time as a fire boss and examined belts at UBB.
12. James Gump was the Director of Operations and Safety for DSC before and on April 5, 2010.

13. DSC did not maintain an independent office or work area at UBB.
14. DSC is responsible for reprimanding, and would reprimand, its employees, including those who were supplied to UBB, if, for example, DSC learned that they had acted in violation of DSC company policies, such as failing to report to work on time or being insubordinate.
15. DSC has in the past submitted 7000-1 accident report forms regarding accidents involving its employees.
16. The daily instruction of DSC employees working at UBB was provided by Performance supervisors.
17. The penalties which have been assessed for Citations 4900615, 8431839, 4900439, 4900440, 4900589 and 4900604 and pursuant to 30 U.S.C. 820 will not affect the ability of DSC to remain in business.
18. The individual or individuals whose signatures appear in Block 22 of Citations 4900615, 8431839, 4900439, 4900440, 4900589 and 4900604 were acting in their official capacity and as an authorized representative for the Secretary of Labor when the citations were issued.
19. True copies of Citations 4900615, 8431839, 4900439, 4900440, 4900589 and 4900604, with any and all modifications and abatements, were served on DSC or its agent as required by the Act.
20. The Citations contained in Exhibit A attached hereto are an authentic copy of Citations 4900615, 8431839, 4900439, 4900440, 4900589 and 4900604, including any and all modifications or abatements.
21. Citations 4900615, 8431839, 4900439, 4900440, 4900589 and 4900604, along with any and all modifications and abatements, may be admitted into evidence, without objection, although Respondent may dispute specific allegations contained within the citations.

III. SUMMARY OF THE PARTIES' ARGUMENTS

i. DSC's Motion for Summary Decision

DSC argues that there are no genuine issues of material fact and that it is entitled to summary decision as a matter of law. DSC Mot. 2. Specifically, DSC argues that, "because [it] did not operate the subject mine, . . . [the citations] were unlawfully issued to DSC and must therefore be vacated. DSC Mot. 1-2.

DSC avers that its primary business is "to provide temporary labor to the mining industry[,]" and, as a provider of temporary labor, "DSC has no authority to supervise the work done by the laborers, nor any involvement in making any of the work-related decisions at or concerning a client mine-operator's mine site." DSC Mot. 2, 4. While DSC does offer services in addition to temporary labor, such services or resources would only be provided "by contractual agreement for that additional service or resource." DSC Mot. 5.

Prior to, and on April 5, 2010, DSC had an agreement with Performance for DSC to provide temporary employees to Performance at the UBB mine. DSC Mot. 5. DSC did not

provide any other services or resources under the agreement, nor did DSC "have any presence, actual or constructive, at UBB, or have the authority to or exercise any control over any portion or the mine site or the work assignments of miners working at the mine, or training of those miners, directly or indirectly." DSC Mot. 5. "DSC was never hired by Performance to provide training of any type to DSC employees assigned to work at UBB, or to any other miners working at UBB." DSC Mot. 6. Moreover, William Campbell, like the other miners assigned to UBB, was a DSC employee assigned to work at UBB as an hourly miner and "DSC had no authority to direct Mr. Campbell's tasks or control or examine the workplace conditions in which he worked at UBB." DSC Mot. 5-6.

DSC argues that it was not an "operator" as defined by the Mine Act. DSC Mot. 6. The Mine Act's definition of "operator" contemplates production-operators and independent contractors "performing services or construction at such mine." DSC Mot. 6-7. Performance was the production-operator at UBB, as it was the "only entity with 'substantial involvement . . . in the mine's engineering, financial, production, personnel, and health and safety matters.'" DSC Mot. 7 (quoting *Berwind Nat'l Resources Corp.*, 21 FMSHRC 1284, 1293 (Dec. 1999)). DSC "had no involvement with UBB's operations, other than to provide UBB with temporary mine laborers whose work Performance controlled and supervised." Further, DSC is not an independent contractor as contemplated by the Act. DSC Mot. 7. DSC argues that it "does not become an independent contractor 'operator' merely by virtue of a business relationship with a mine." DSC Mot. 8. DSC argues that the Secretary's own policy, set forth in her Program Policy Letter No. P-11-V-05, is that "temporary employment agencies are *not* Mine Act independent contractors, and thus are *not* operators under the Mine Act."[2] DSC Mot. 8.

DSC suggests that "the Commission routinely looks to OSHRC decisions for guidance in analogous situations under the OSH Act." DSC Mot. 10 n. 5. OSHRC has long recognized that a temporary employment agency cannot be liable for violations committed by its employees at OSHA regulated sites if the employment agency did not create or control the hazardous conditions alleged." DSC Mot. 10 (citing *Manpower Temp. Services*, Inc., 5 BNA OSCH 1803 (No. 76-9809, 1977)(ALJ) 1977 WL 6891 (Jan. 1977*), aff'd Manpower Temp. Services, Inc.*, 5 BNA OSHC 1803 (No. 76-980, 1977), 1977 WL 7973 (June 1977)). Here, DSC "ha[d] no authority to inspect, manage, enter, or oversee" the mine site where the subject citations were issued. DSC Mot. 12. Further, "like the employee in *Manpower* that was assigned to a supervisory position, the fact that Mr. Campbell in particular had his fire boss certification and was, for a period of time, assigned by Performance to conduct examinations at UBB . . . does not make him a supervisor or agent of DSC for purposes of imputing liability to DSC." DSC Mot. 13

Finally, DSC argues that, even if it is found to be an independent contractor under the Mine Act, it cannot be liable for conditions over which it has no control. DSC Mot. 15 (citing *Sec'y of Labor v. National Cement Co. of California*, 573 F.3d 788, 795 (D.C. Cir. 2009), *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1276 (Oct. 2010), *Berwind Nat'l Resources Corp.*, 21 FMSHRC 1284, 1293 (Dec. 1999), and *Ames Construction, Inc. v. FMSHRC*, No. 11-1303,

[2] The 2011 PPL, which was in place at the time DSC was cited and the proposed penalties were assessed, was simply a reissue of the 2009 PPL, i.e., PPL P09-V-02, which was in place at the time of the explosion.

slip op. at 5 (D.C. Cir. April 17, 2012)). Specifically, DSC alleges that it "lacked control over any aspect of UBB, including the work assignments, workplace conditions, and training of the DSC employees assigned to work at the mine[.]" DSC Mot. 17.

ii. Secretary's Reply to DSC's Motion

The Secretary responds by arguing that DSC is more than a "temporary employment agency contractor" and its relationship with Performance included an agreement "for DSC to build seals, which is traditional contractor work." Sec'y Rep. 2, 4. DSC's own website markets the company as "very diverse" and capable of "all types of infrastructure work[.]" Sec'y Rep. 2.

The Secretary argues that the OSHRC case law relied upon by DSC is not controlling, while the Commission case law, which "DSC's motion glosses over," is clear on "how the court should examine whether an entity is an independent contractor and an operator under the Mine Act." Sec'y Rep. 2-3.

The Secretary disputes a number of the "undisputed facts" included in DSC's Motion. Namely, the Secretary "cannot agree that temporary manpower is the principle resource provided by DSC." Sec'y Rep. 3. Moreover, despite DSC's contrary contention, DSC did exercise control at the mine as evidenced by the DSC employees working at the mine, the presence of DSC's Director of Operations and Safety underground a half dozen times, and the presence of a DSC agent fire boss and examiner who conducted and controlled examinations. Sec'y Rep. 3, 5. Further, while DSC contends that the training it provided its employees was not intended to satisfy the Part 48 requirements, and that it was not hired by Performance to conduct training of any type, the Secretary argues that DSC did exercise control over training, and it is the inadequacy of that training that forms the basis of the training violations issued here. Sec'y Rep. 4-5

iii. Secretary's Motion for Partial Summary Decision

The Secretary argues that there are no genuine issues of material fact and that she is entitled to partial summary decision as a matter of law. She further states that the subject citations were properly issued to DSC, who, as an independent contractor and operator under the Act, is liable for the actions of its employees. Sec'y Mot. 1-3, 13-14.

The Secretary argues that, on September 26, 2006 DSC entered into an agreement with Performance to build seals at UBB. Sec'y Mot. 12. That agreement refers to DSC as an independent contractor. Sec'y Mot. 12. That same agreement was amended on June 9, 2008 and certain provisions were replaced, including provisions "pertaining to the Price Schedule, payment, governing law, jury trial waiver and arbitration, and enforcement of judgment." Sec'y Mot. 12. "All other terms and conditions of the . . . [2006 agreement] remained unchanged and in full force and effect. Sec'y Mot. 13. The Secretary asserts that eleven DSC employees worked at UBB before and on the date of the deadly explosion, and that DSC's Director of Operations and Safety at the relevant times, James Gump, "traveled underground at UBB a half dozen times." Sec'y Mot. 13.

The Secretary states that, consistent with Commission case law, the issue of whether an independent contractor is a statutory operator under the Mine Act turns on (1) "whether the independent contractor has a sufficiently proximate relationship to the extraction process and . . . [(2)] the extent of the independent contractor's presence at the mine." Sec'y Mot. 14-15 (citing *Otis Elevator Co.*, 11 FMSHRC 1896 (Oct. 1989); *Otis Elevator Co.*, 11 FMSHRC 1918 (Oct. 1989)). Moreover, she argues, the Act's definition of operator "'does not extend only to certain 'independent contractor[s] performing services . . . at [a] mine; by its terms it extends to 'any independent contractor performing services . . . at [a] mine." Sec'y Mot. 15 (citing *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285,1290 (D.C. Cir. 1990) (omissions and additions in Secretary's Motion).

The Secretary argues that the line of Commission and Courts of Appeal cases on this subject "suggest[] that section 3(d) covers any independent contractor performing more than *de minimis* services at a mine, although no Court has specified what would constitute *de minimis* services." Sec'y Mot. 16. While the determination of whether one is independent contractor is "not confined by the terms of [the parties'] contract[,] . . . the contracts are evidence of the parties' actual relationships." Sec'y Mot. 16 (citing *Bulk Transp. Servs., Inc*., 13 FMSHRC 1354 (Sept. 1991)).

The Secretary argues that DSC was "extensively involved" in the extraction process in the form of "[f]irebossing, conducting examinations, correcting hazards, and training," which "are all essential to ensuring the safety of workers during the mining process, including the extraction of coal." Sec'y Mot. 17. Given that DSC was the employer of the eleven cited individuals, it had the "authority and influence to play a substantial role in controlling" their activities. Sec'y Mot. 18.

The Secretary argues that the agreement and amendment between DSC and Performance, while not dispositive, is evidence of DSC's status as an independent contractor. Sec'y Mot. 18. She points to the inclusion of language in the original agreement identifying DSC as a contractor, as well as language indicating that DSC is responsible for the acts of its employees. Sec'y Mot. 18-19. Moreover, she cites specific language regarding the DSC's responsibility to file all necessary reports and documents required by law, as well as to provide all safety training to DSC's employees as required by law. Sec'y Mot. 19. Finally, she references language in the agreement regarding DSC being "solely liable" for all "assessments, penalties, or other fines" for violations of law by DSC or its employees. Sec'y Mot. 19.

The Secretary also notes that DSC had an MSHA contractor ID and had been operating as an independent contractor at mines under Mine Act jurisdiction since at least 2001. Sec'y Mot. 19-21 n. 4. The Secretary argues that the work that DSC employees were conducting at UBB "falls within the plain meaning of 'services' under the Mine Act." Sec'y Mot. 20. The dictionary defines "services" as "the performance of any duties or work for another; helpful or professional activity: medical services." Sec'y Mot. 20 (citing *Dictionary.com*). She argues that the examinations and other tasks performed by DSC employees at UBB all constitute services. Moreover, the 2006 agreement between DSC and Performance "explicitly describes DSC's work product as 'services' to be provided to Performance in fulfillment of the contract." Sec'y Mot. 21.

The Secretary, citing *Joy Technologies, Inc., v. Sec'y of Labor*, 99 F.3d 991, 997 (10th Cir. 1996), argues that "independent contractor," as contemplated in the Mine Act, is somewhat different than "independent contractor" as understood by common law. Sec'y Mot. 22. Given the ambiguity of the term, the court should defer to the Secretary's interpretation that the circumstances of this case "provide reasonable grounds for the Secretary's judgment that DSC was an independent contractor and, because it was providing services to UBB, an operator under the Mine Act." Sec'y Mot. 24.[3] The Secretary argues that "DSC cannot contract to avoid duties imposed upon it by the Mine Act" by claiming that "Performance, by exercising some degree of concurrent control over DSC's employees, was in some sense operating as a subcontractor to DSC." Sec'y Mot. 24

The Secretary acknowledges that an independent contractor who exercises no control will not be responsible for a violation. Sec'y Mot. 25-26 (citing *Musser Engineering*, 32 FMSHC 1257 (Oct. 2010), *Joy Technologies*, Inc., 17 FMSHRC 1303 (1995), aff'd, 99F.3d 991 (10th Cir. 1996), and *Sec'y of Labor v. National Cement Co. of California*, 573 F.3d 788 (D.C. Cir. 2009)). However, unlike *Musser* where the Commission found that the independent contractor did not exercise control, DSC did exercise control in the form of performing the contractual duties underground at the mine. Sec'y. Mot. 26-27. Moreover, the DSC's presence was further demonstrated by DSC Director of Operations and Safety, James Gump's being at the mine approximately six times. Sec'y Mot. 27.

The Secretary argues that it is well-settled that operators are liable for the actions of their employees. Sec'y Mot. 27. Accordingly, DSC is liable for the violations of the eleven employees it had assigned to UBB. Sec'y Mot. 27. This is true of both the lack of training violations, as well as the actions of William Campbell, who was an agent of DSC. Sec'y Mot. 28. The Secretary argues that Campbell, by virtue of his function as a mine examiner who conducted numerous examinations that were crucial to the mine's operation and were performed while alone and functioning as a supervisor of his own activities, was an agent of DSC. Sec'y Mot. 28-30. In addition, the Secretary points to language in the 2006 Agreement that, among other things, addresses the conduct and control DSC exerted, DSC's sole responsibility for the acts of its employees, and the fact that neither DSC, its agents, employees, etc. could be treated as agents of or employees of Performance. Sec'y Mot. 30-31. Nevertheless, the Secretary argues that she may cite the production operator, the independent contractor, of both for violations of the Mine Act committed by the independent contractor. Sec'y Mot. 32-33 (citing *Speed Mining, Inc., v. FMSHRC*, 528 F.3d 310, 314 (4th Cir. 2008)).

Finally, the Secretary argues that her program policy letter, PPL P09-V-02, addressing temporary employment agency contracting in the context of Part 50 applies only to those reporting obligations under that part of her regulations. Sec'y Mot. 34. To apply the PPL outside of the context of Part 50 would be inconsistent with the purpose of the PPL. Sec'y Mot. 34-35

[3] The Secretary asks for *Chevron* deference on this issue, but states that "[e]ven if the court were not to afford Chevron deference to the Secretary, it should nonetheless apply *Auer* deference [.]" Sec'y Mot. 24

iv. DSC's Opposition to the Secretary of Labor's Motion

DSC agrees that it entered into an Independent Contractor Agreement with Performance in September of 2006 for DSC to construct mine seals at UBB. DSC Opp. 4. DSC further agrees that, during the period of seal construction, it was an independent contractor and an operator according to the Act. DSC Opp. 5. However, DSC argues that it last performed services related to the building of seals at UBB in April of 2007, three years prior to the April 2010 explosion, and that said services were, and are, totally unrelated to the April 2010 explosion at UBB. DSC Opp. 2, 5, 7. While the 2006 Independent Contractor Agreement was amended in 2008, the amendment was, "for all practical purposes, a new agreement – no longer to build seals, but one to supply temporary labor." DSC Opp. 5. Accordingly, the 2006 contract is irrelevant to the current situation. DSC Opp. 6-8.

Further, as pointed out by the Secretary, "the independent-contractor operator analysis is not 'confined' by the terms of a contract." DSC Opp. 8 (citing Sec'y Mot. 16-17). Rather, "the key to determining whether the independent-contractor operator status attaches is the '*actual relationship[]*'between the purported contractor and the production-operator[.]" DSC Opp. 8 (citing *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1358 n. 2 (Sept. 1991)(emphasis added)). Accordingly, "the Commission must consider the relationship between DSC and Performance as it existed at the time of the accident[.]" DSC Opp. 8. At the time of the explosion, and in the years leading up to such, DSC's only connection to UBB "was that certain DSC employees worked at UBB." DSC Opp. 2.

DSC argues that the temporary labor provided to Performance does not qualify as a "services" as is contemplated by the term "independent contractor" in the Act's definition of "operator." DSC Opp. 9. There is no precedent for holding DSC liable as an independent contractor, as "DSC merely provided manpower to perform services that were assigned, directed, and controlled exclusively by Performance." DSC Opp. 9. Further, unlike the present situation, the cases relied upon by the Secretary "each involves work performed under the direction and supervision of the contractor." DSC Opp. 9.

DSC further argues that the Secretary's dismissal of her PPL denies the underlying rationale of the PPL, which is that "work performed by miners from temporary employment agencies is not 'true contract work' because the temporary employment agency does not 'maintain[] supervisory control over its employees.'" DSC Opp. 11-12 (citing DSC Mot. Exs. 2 and 3). DSC also disputes the Secretary's argument that her interpretation of "independent contractor" is entitled to deference. DSC Opp. 15. DSC notes that the Secretary does not address any ambiguities to which she may be entitled to deference in her interpretation. DSC Opp. 15. Moreover, any deference to her stated position would be in contradiction to her position in the PPL. DSC Opp. 15.

DSC disputes the Secretary's argument that William Campbell's activities as a fire boss make him an agent of DSC. DSC Opp. 16. Specifically, DSC argues that, consistent with basic agency law, Performance alone had the legal obligation to examine the mine, and Performance alone assigned Campbell to conduct such examinations. DSC Opp. 16, 17. Thus, Performance alone is the only principal liable for Campbell's actions as an examiner. DSC Opp. 17. Finally,

DSC argues that, even if it were found to be an independent contractor, it would "still not be liable as an operator because the work performed by the miners assigned to Performance was outside its 'control and supervision.'" DSC Opp. 18

IV. DISCUSSION

Commission Procedural Rule 67 sets forth the grounds for granting summary decision as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67. The parties have agreed and I find that there are no genuine issues as to any material fact and that this jurisdictional question can properly be decided based on the record before me.

Liability under the Mine Act is imposed upon "operators" of mines. *See* 30 U.S.C. § 814. Section 3(d) of the Act defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or *any independent contractor performing services or construction at such mine*." (Emphasis added). In the case at hand, the Secretary seeks to impose liability upon DSC under the "independent contractor" clause of Section 3(d).[4]

While the Act does not define "independent contractor," the Secretary's regulations define an "independent contractor" as an entity "that contracts to perform services or construction at a mine." 30 C.F.R. § 45.2(c). In *Joy Technologies Inc.*, 17 FMSHRC 1303 (Aug. 1995) *aff'd*, 99 F.3d 991 (10th Cir. 1996), the Commission held that, in determining whether an entity is an "independent contractor", the "'focus is on the actual relationship between the parties, and is not confined to the terms of [the parties'] contracts. . . . [T]he determination of whether a party is a properly designated to be within the scope of section 3(d) of Act is not based on the existence of a contract, nor the terms of such a contract.'" (quoting *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354 (Sept. 1991). Nevertheless, the contract between the parties may be "evidence of the parties' actual relationships." *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1358 n. 2 (Sept. 1991).

[4] The Secretary argues that deference should be afforded to her interpretation of "independent contractor." I agree with DSC that the Secretary's deference argument is not entirely clear. Nevertheless, I find that no ambiguity exists in the Act, the Secretary's regulations, or Commission case law and that this matter can properly be decided without affording deference to any interpretation the Secretary has put forth.

In 1989 the Commission addressed the issue of "operator" liability pursuant to the "independent contractor" clause of Section 3(d) in two Otis Elevator Company decisions, *Otis Elevator Co.*, 11 FMSHRC 1896 (Oct. 1989) (hereinafter "*Otis I*") and *Otis Elevator Co.*, 11 FMSHRC 1918 (Oct. 1989) (hereinafter "*Otis II*"). In *Otis I* the Commission explained that "Section 3(d) [of the 1977] Mine Act expanded the definition of 'operator' under . . .[the 1969 Coal Act] to include 'any independent contractor performing services or construction at such mine.'" 11 FMSHRC at 1900. "[T]he goal of Congress, in expanding the definition of 'operator' . . . to include 'independent contractors,' was to broaden the enforcement power of the Secretary so as to reach not only owners and lessees but a wide range of independent contractors as well." *Id.* at 1900-1901. However, the Commission noted that, in analyzing an independent contractor's contacts with the mine, "not all independent contractors are operators under the Mine Act, and that 'there may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed.'" *Id.* (quoting *National Industrial Sand Ass'n*, 601 F.2d 289, 701 (3rd Cir. 1979)).

First, I find that DSC is an independent contractor performing services at the mine. In its Otis decisions the Commission outlined a two pronged test for determining whether an entity is an "operator" pursuant to the "independent contractor" clause of Section 3(d) of the Mine Act. First, one must examine the subject entity's "proximity to the extraction process" and second, whether that entity's work is "sufficiently related" to that process. *Otis I*, 11 FMSHRC 1896, 1902 (Oct. 1989). In *Otis I* the Commission determined that the independent contractor, an elevator service contractor, satisfied this prong of the test because its employees "were working in the center of mining activities while servicing equipment essential to the mining process, were exposed to mining hazards, and had a direct effect on the safety of others because of their exclusive control over the safety of the mine elevators[.]" *Id.*

The second prong of the Otis test requires an examination of "the extent of [the entity's] presence at the mine." *Otis I*, 11 FMSHRC 1896, 1902 (Oct. 1989). In *Lang Bros., Inc.*, 14 FMSHRC 413, 420 (Sept. 1991), the Commission stated that "[a]n independent contractor's presence at a mine may appropriately be measured by the significance of its presence, as well as by the duration or frequency of its presence."

The undisputed material facts establish that "DSC had an agreement with Performance to provide . . . temporary labor to UBB, before and on April 5, 2010." Jt. Stip. 8. That agreement is memorialized in the June 2008 document entitled "Amendment No. 1 to Independent Contractor Agreement." Sec'y Mot. Ex. C (hereinafter the "2008 Amendment"). The language of the 2008 Amendment states that "WHEREAS, Owner and Contactor entered into that certain Independent Contractor Agreement dated September 26, 2006 . . . ; and WHEREAS Owner and Contactor agree to amend the agreement as set forth below." The September 26, 2006 agreement referenced in the Amendment, Sec'y Mot. Ex. B (hereinafter the "2006 Agreement"), called for DSC to build mine seals at UBB. DSC argues that the 2006 Agreement is irrelevant because after completing the seals in 2007 DSC's only involvement at the mine was the provision of temporary labor. DSC Opp. 4-9. Instead of drafting a new contract, the parties simply amended, albeit inartfully, the original contract. As the Commission stated in *Bulk Transportation Services*, 13 FMSHRC 1354 (Sept. 1991), while the "focus [of this analysis] is on the actual

relationships between the parties, and is not confined by the terms of their contracts," the contract between the parties may be "evidence of the parties' actual relationships." I find that the 2006 Agreement and 2008 Amendment provide some evidence of an ongoing contractual relationship between the parties.

While DSC asserts, and Secretary does not explicitly dispute, that DSC had not provided seal building services since April of 2007, certain provisions of that agreement remained intact up until April, 2010. Further, I note that, in spite of the alleged ceasing of any services under the 2006 Agreement, the parties clearly had an ongoing contractual relationship for the provision of services.[5] While seal building, as opposed to the provision of temporary labor, may be more easily classified as a traditional contractor service, it does not take away from the fact that that ongoing independent contractor relationship was initiated on September 26, 2006 and continued, albeit modified, at least until April 5, 2010 and that relationship included the provision of services by DSC.

Tellingly, and as pointed out by the Secretary, while DSC may have stopped building seals in April of 2007, there is no indication that the 2006 Agreement was at any point terminated. The fact that DSC and Performance chose to amend the 2008 Agreement is clear evidence of the acknowledgement that an independent contractor relationship continued to exist between the parties. However, I agree with DSC that the nature of the relationship changed after the completion of the seals in April, 2007. The scope of work included in the original contract provided that DSC would supply labor and supervision necessary to build the mine seals at UBB and that UBB would provide all tools and safety equipment for the workers. The agreement between the parties was changed after the seals were installed and thereafter, DSC provided temporary labor to UBB. This finding is supported by the affidavit filed by James Gump, the Director of Operations and Safety for David Stanley Consultants, LLC. Gump asserts in his supplemental declaration that the intent of the parties in entering into the amended contract was to set forth a rate of pay for the various employees and to change the relationship of the parties to that of DSC providing only temporary workers to the mine. DSC Opp. Ex. 1. There is no "scope of work" included in the amendment but it does include a list, dated September 4, 2008 setting forth the agreed upon billing rate for each classification of employee. Sec'y Mot. Ex. C. The amendment is simply unclear and, while I find that there was a contractual relationship between DSC and Performance, I cannot find that various portions of the original contract remained in effect after September, 2008. The terms of the amended agreement, specifically the duties ascribed to DSC are not clear.

In both his statement to MSHA and in his affidavit, Gump explains that DSC recruited employees for many mines, including the various Massey mines. DSC Mot. Ex. 1; Sec'y Mot. Ex. D. Gump does not explain the terms of the agreement, and he specifically does not address whether DSC expected to indemnify Performance for penalties assessed as a result of the actions of its employee, which was something that was addressed in the original 2006 Agreement with Performance. However, Gump's statements do indicate that the miners remained employees of DSC and were not employees of UBB. Although somewhat contrary to his statement to MSHA, Gump explained in his affidavit that DSC hires only individuals who have had new miner

[5] See *infra* discussion of "services" below.

training. DSC Mot. Ex. 1. Applicants for employment must show all documents and certifications as to their experience and positions. Gump further explained that while DSC conducted an initial training, about one hour in duration, it covered items such as information on "mining and miner responsibilities" as well as attendance at work, and an overview of mine plans. DSC also covers hazard recognition and reporting accidents. The training took place at the Massey Marfork training facility. DSC does not conduct training for any particular mine, unless otherwise contracted to do so, and, according to Gump, did not conduct training for miners sent to UBB. However, in his statement, Gump acknowledges that DSC employs at least two trainers, and it does provide refresher training to miners who are being assigned to work at UBB. The refresher training is a requirement of UBB. Sec'y Mot. Ex. D.pg 30. However, Massey conducted most training for miners sent to its mines. DSC Mot. Ex. 1, p. 3; Sec'y Mot. Ex. D, p. 13-14, 17-18.

DSC primarily provides new hire miners to UBB at the request of Massey. The mine provides all safety equipment for each worker, including a SCSR. Once the miner is placed with UBB, they attend annual refresher training according to the mine's schedule. Sec'y Mot. Ex. D, p. 18. Additionally, once the individual is assigned to a mine, "all decisions regarding where and when that individual must show up for work and what work tasks that individual must perform at the mine, are made by the client mine operator." DSC Mot. Ex. 1 ¶ 4. However, according to Gump, DSC has a mine ID and does report any accidents in which employees sent by DSC are involved. Sec'y Mot. Ex. D, p. 34. In reporting accidents, DSC uses both the mine ID and DSC's contractor ID in filling out the report. DSC gives each employee a handbook with DSC policies and a safety handbook. Moreover, DSC disciplines the employees when necessary, including for failure to timely show up for work and insubordination. DSC provides verifications for miners to show that they are experienced using their time cards and is responsible for providing the paychecks to the employees placed in a mine.

A company whose only function is to hire the miner, send them to the mine, and process the payroll may result in a different finding. However, DSC does more than simply hire, assign, and pay workers. As described above, DSC disciplines employees even after placed in the mine, trains certain miners, and reports accidents that include its employees. In addition, the trainers at DSC use the Massey training facilities, attend certain trainings and visit the mine location on occasion. Therefore, I find that the employees of DSC are intimately connected to the extraction process. While DSC's involvement in the actual work of its miners may be limited, it is nevertheless sufficiently connected to the extraction process.

In addition to the training and discipline of miners who are assigned to work underground, the DSC employees are proximately involved in the extraction process for other reasons. One such employee, William Campbell, was a fire boss and examined belts at UBB. Jt. Stip. 11. That same miner was subject to reprimand, employment rules, and accident reporting by DSC. Mr. Campbell, among other things, was tasked with the responsibility of examining the belts. Moreover, while examining the belts, he was constantly exposed to mining hazards. Accordingly, his activities as a DSC employee, even if they were at the direction of Performance, were sufficiently proximate to the extraction process.

As to the second prong of the Otis test, I find that DSC and its DSC's employees had an extensive presence at the mine. There is no dispute that the eleven individuals were "employed by DSC" and were working at UBB. Jt. Stip. 11. Mr. Campbell had been working at the mine for approximately four months at the time of the explosion. Jt. Stip. 11. The ten other DSC employees were working at UBB "before and on April 5, 2010." Jt. Stip. 9. In *Joy Technologies Inc.*, 17 FMSHRC 1303, 1308 (Aug. 1995) the Commission found that substantial evidence supported the ALJ's finding that an independent contractor spending six days at the mine over a two and a half month period, along with an expectation that such contact would continue, satisfied the second prong of the Otis test. *See also Lang Bros., Inc.*, 14 FMSHRC 413 (Sept. 1991) (sufficient presence found when contractor was present seven to ten days on a non-continuing basis) and *Otis I*, 11 FMSHRC 1896 (Oct. 1989) (sufficient presence found when contractor was present six hours per month). I find that the extended presence of Mr. Campbell, combined with the presence of the ten other DSC employees, amount to a sufficient and significant presence at the mine. In addition, the use of the Massey training facility by DSC, along with Gump's visits to the mine demonstrate a continued presence at the mine. Accordingly, I find that the Secretary has satisfied the second prong of the Otis test and that DSC is an independent contractor.

The Mine Act creates liability for operators who are independent contractors performing services at the mine. DSC argues that it does not provide services and, therefore, is not an independent contractor. I disagree. The Commission noted that, in analyzing an independent contractor's contacts with the mine, "not all independent contractors are operators under the Mine Act, and that 'there may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed.'" *Id.* (quoting *National Industrial Sand Ass'n*, 601 F.2d 289, 701 (3rd Cir. 1979)). Neither the Act nor the Secretary's regulations define "performing services." "In the absence of a statutory or regulatory definition of a term, the Commission applies the ordinary meaning of that term." *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008). The dictionary defines the singular form of "services" as "the work performed by one that serves." *Webster's New Collegiate Dictionary* 1051 (1979). The term "services" is broad. DSC supplied employees, provided information to those employees, hired and placed those employees with the mine, and could discipline those employees if needed. The actions of DSC in providing employees and all that entails demonstrate that it did provide a service to UBB.

Next, section 3(d) covers any independent contractor performing more than *de minimis* services at a mine. As a result, I must determine whether the DSC contact was so infrequent or *de minimis* that it would be difficult to conclude that services were being performed. *Northern Illinois Steel Supply Co. v. Secretary of Labor*, 294 F.3d 844, 848-49 (7th Cir. 2002), *Musser Engineering, Inc., 32 FMSHRC 1257, 1276 (Oct. 2010).* In *Musser*, the Commission determined that the services provided by Musser were extensive in time and substantial in content. Musser's activities included "engineering support, mapping, and surveying services" that were performed to meet the operational needs of the mine. Musser had no office at the mine, but did provide employees who performed activities both at the mine and at the Musser office. The activities provided by those employees were found to be adequate to determine that Musser provided services to the mine. The Circuit Court of Appeals did find that services were *de minimis* in *Northern Illinois, Id*. but characterized the contractor as a vendor who provided

supplies once or twice a week. DSC's contact is far greater. Accordingly, the services provided by DSC in this case were not *de minimis*.

I note that much of DSC's argument in this case is premised upon its claimed status as a temporary employment agency and what it perceives as the law's insulating treatment of such entities with regard to the employment agency's liability for the actions of its employees at their respective placements. However, the supporting case law submitted by DSC in its motion, DSC Mot. 10-15, is not controlling. It is well settled that the jurisdictional reach of the Mine Act is broad. Based on the controlling Commission case law discussed above, to restrict the reach of Mine Act jurisdiction in this instance would not serve to effectuate the goal of Congress when it expanded the definition of "operator" to include a "wide range of independent contractors." *Otis I*, 11 FMSHRC at 1900-1901. [6]

With regard to DSC's argument that the Secretary's PPL formally sets forth a policy "that temporary employment agencies are not Mine Act independent contractors, and thus are not operators under the Mine Act[,]" the PPL states under the "purpose" heading that it is issued to "clarify that miners obtained through a temporary employment agency contractor are "miners for purposes of reporting under 30 C.F.R. Part 50." It goes on to explain that when a temporary employment agency provides miners, it is the mine operator who is responsible for reporting any accident, injuries, illnesses, production and hours worked by these employees. It then discusses the definition of "miner". The PPL acknowledges that mines often hire employees through employment agencies and the miners hired through an agency work alongside those hired directly by the mine. The PPL explains that "when a temporary employment agency or other contractor supplies miners to the operator, the mine operator supervises these miners." Because the mine supervises the miners, the mine must complete MSHA required reporting for those miners. I cannot agree that the PPL has the meaning and intent that DSC asserts. Instead, it is a clarification that the company who supervises a miner must report any accidents or injuries. Accordingly, I reject DSC's argument that the PPL sets forth a policy that temporary employment agencies are not Mine Act independent contractors. In any event, UBB and DSC chose not to follow the policy set forth in the PPL and it was DSC, not UBB, who reported accidents at the mine in which DSC employees were involved.

Having found that DSC is an independent contractor providing services, I must analyze the issue of potential liability for the citations that were issued. In order to impute liability to a contractor who performs services, that independent contractor must "exercise supervision or control" over the area or persons who were cited. The Commission has recognized that, while strict liability under the Act "'means liability without fault[;] [i]t does not mean liability for things that occur outside one's control or supervision." *Ames Const.*, Inc., 33 FMSHRC 1607, 1611 (quoting *Sec'y of Labor v. National Cement Co. of Cal., Inc.*, 573 F.3d 788, 795 (D.C. Cir. 2009) (citation omitted)), *aff'd*, 676 F.3d 1109 (D.C. Cir. 2012), *see also Joy Technologies Inc.*,

[6] On appeal, the D.C. Circuit explained how broad the "wide range of independent contractors" is when it stated that "Section 3(d) does not extend only to *certain* "independent contractor[s] performing services ... at [a] mine"; by its terms, it extends to " *any* independent contractor performing services ... at [a] mine." 30 U.S.C. § 802(d) (emphasis added)." *Otis Elevator Co. v. FMSHRC*, 921 F.2d 1285 (D.C. Cir. 1990) (*aff'g Otis I* and *II*)

17 FMSHRC 1303, 1309 (Aug. 1995) (Noting the limitations in holding an independent contractor liable for matters over which it and its employees have no control) and *Musser Engineering*, 32 FMSHRC 1257 (Oct. 2010). Recently in *Musser,* the Commission addressed the issue of supervision and control and in doing so looked first to the specific violation and then to whether Musser was in a position to prevent errors. Consequently, the Commission determined that Musser's role in preparing a map was insufficient to bring it within the parameters of the specific standard involved in that case.

In the instant matter, I find that, DSC did not exercise supervision over the day to day instruction of the miners, did not assign work tasks, did not supervise the daily work and did not maintain an independent office or work area at UBB. Jt. Stips. 13 and 16. The eleven DSC employees were working underground at the mine and, once they entered the mine, they were subject to the sole supervision and control of the mine operator, UBB. Jt. Stip. 16; DSC Mot. Ex. 1, p. 1-2, 4-6. DSC had no authority to direct the work force or be in a position to understand what tasks they were assigned daily. While the cited individuals, who were performing their contractually obligated labor duties at the mine, were DSC employees, DSC had no control over those miners or the tasks they were assigned to once they entered the mine. Sec'y Mot. Ex. D, p. 32. Accordingly, DSC cannot be held liable for the actions of Mr. Campbell and his alleged failure to conduct adequate examinations and correct hazards observed during those examinations as alleged in Citation Nos. 4900615, 8431839, and 4900604.[7] DSC would have no way in which to observe Campbell's actions or determine if he was adequately performing his assigned tasks. Moreover, given that DSC had no knowledge of or control over what tasks its miners were assigned by UBB personnel, it cannot be held liable for Citation No. 4900440 and its alleged failure to task train those miners. DSC had no means to alter the work tasks or assignments, had no way of preventing any action, and had no manner in which to correct or direct the work of the persons assigned at UBB. Like Musser, DSC was in no position to prevent errors on the part of the workers. Nor was DSC in a position to know when task training was needed or required.

However, while I find that DSC had no control over the actions of the miners once they entered the mine, there is evidence to establish that DSC had some control and supervision over other non-task specific training that was cited in Citation Nos. 4900589 and 4900439. DSC stipulated and Gump testified regarding the administration of training, including mining specific safety training, as well as hazard recognition training, to the miners it assigned to UBB. Jt. Stip. 7; Sec'y Mot. Ex. D, p. 18, 20. Certainly, the administration of mine safety training, including hazard recognition training, is evidence enough that DSC retained at least some control in the context of the types of training discussed in Citation Nos. 4900589 and 4900439; supervisory first-aid and experienced miner training. DSC claims that it had no authority to train its own employees. DSC Mot. 5. However, this claim is in direct conflict with DSC management's own acknowledgement, Sec'y Mot. Ex. D p. 19-20, and the parties' stipulation, Jt. Stip. 7, that DSC did in fact provide training. Further, as mentioned above, DSC provides annual refresher training to prospective employees at UBB, and, as explained by Gump in his sworn statement, he

[7] The Secretary has argued that Campbell, as a face boss, was an agent of DSC, but I do not find that argument persuasive for purposes of determining the supervision and control of DSC.

used the Massey training facilities, has observed the training conducted by Massey, and must understand the training that each employee has had prior to placement. Sec'y Mot. Ex. D p. 18-22, 30. DSC, in its position as the employer of the miners, had some responsibility to assure that they are adequately trained. I find that, given DSC's closeness to Massey, both physically in the training facility, and in working to place miners, DSC exercises control and supervision as to training. While its control does not extend to task training, it does extend to the other training areas cited by the Secretary.

Accordingly, I find that DSC may properly be cited for the training violations alleged in Citation Nos. 4900589 and 4900439. However, given its lack of control or supervision over the miners once they enter the mine, DSC may not be cited for the alleged examination and task specific training violations over which it had no control or supervision.

V. ORDER

DSC's Motion for Summary Decision is **GRANTED IN PART** and **DENIED IN PART**. The Secretary's Motion for Partial Summary Decision is **GRANTED IN PART** and **DENIED IN PART**. Citation Nos. 4900615, 8431839, 4900604, and 4900440 are **VACATED.** The citations that remain have not addressed the issues related to the gravity, negligence and other penalty criteria. Therefore, the parties are **ORDERED** to contact the court within fifteen days to schedule a conference call to discuss how the case will proceed from this point.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW Suite 520N
Washington, D.C. 20004

November 15, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 2009-955
	:	A.C. No. 15-18911-181323
v.	:	
	:	Docket No. KENT 2009-1426
	:	A.C. No. 15-18911-192304
CAM MINING, LLC Respondent	:	Mine No. 28

DECISION

Appearances: Schean G. Belton, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
Mark E. Heath, Spilman, Thomas & Battle, PLLC, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Feldman

Before me for consideration are Petitions for the Assessment of Civil Penalty filed by the Secretary of Labor ("the Secretary") pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 820(a), against the Respondent, Cam Mining LLC ("Cam Mining"). These matters concern the disposition of two alleged violations of mandatory safety standards contained in 30 C.F.R. Part 75 of the Secretary's regulations governing underground coal mines.

Docket No. KENT 2009-1426 is a single penalty proceeding containing 104(a) Citation No. 8222328, that alleges a significant and substantial ("S&S") violation of section 75.400 which prohibits a mine operator from permitting float coal dust to accumulate on electrical equipment located in active workings.[1] 30 C.F.R. § 75.400. The Secretary seeks to impose a civil penalty of $1,337.00 for Citation No. 8222328.[2]

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[1] Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

[2] The Secretary had attributed the cited accumulations to an unwarrantable failure for which a civil penalty of $6,624.00 had been proposed. As a general matter, an unwarrantable failure occurs when a violation is caused by aggravated conduct rather than ordinary negligence.
(continued...)

Docket No. KENT 2009-955 contains 45 citations, with a total proposed civil penalty of $38,372.00. The parties proffered a comprehensive partial settlement agreement for approval, resolving 44 of the subject 45 citations. The parties agreed to a reduction in proposed penalties for the 44 settled citations from $37,787.00 to $29,474.00. The settlement terms include a reduction in the degree of negligence attributable to Cam Mining for the violative conditions in six citations, deleting the S&S designation for five citations, and a reduction in the gravity assessed for two citations. The specific terms of the agreement are contained in the parties' May 22, 2012, written motion for approval of their partial agreement and are incorporated by reference. The settlement terms for the 44 citations were approved on the record. (Tr. 5).

The Secretary proposes a civil penalty of $585.00 for remaining Citation No. 8222333 in Docket No. KENT 2009-955. Citation No. 8222333 alleges an S&S violation of the mandatory safety standard in section 75.512-2, which requires weekly electrical examinations. 30 C.F.R. § 75.512-2. Thus, the total proposed civil penalty for the two citations in issue is $1,922.00.

The hearing in these proceedings was conducted on June 6, 2012, at the Commission's headquarters in Washington, D.C. At the culmination of the hearing, the parties were urged to settle these matters based on my preliminary evaluation of the record. However, the parties failed to reach an agreement and have elected to file joint stipulations in lieu of post-hearing briefs. (Joint Stip. 1-12, filed Aug. 12, 2012).

I. Findings of Fact

A. Background

There are two overlapping production shifts and one maintenance shift at Cam Mining's No. 28 Mine. The first is the day production shift from 6:00 a.m. until 3:00 p.m. The second is the night production shift from 2:00 p.m. until 11:00 p.m. The third, or midnight shift, is a maintenance shift that begins at 11:00 p.m. and ends at 7:00 a.m. (Tr. 35-36).

Kilovolt Amp (kVA) boxes, also called transformer boxes, power belt drives, pumps and lights. (Tr. 52). A typical kVA box is approximately 4 feet high by 6 feet wide, and fifteen feet long. (Tr. 53; Gov. Ex. 3). The boxes contain vent openings to permit heat to escape, which also allow dust to enter. (Tr. 62). It is common for a kVA box to have rust and discoloration inside. (Tr. 137). These transformer boxes are highly energized at 7200 volts. To prevent contact with energized conductors, coal production must be discontinued and transformers de-energized before transformer boxes can be safely opened. (Tr. 65).

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[2](...continued)
Emery Mining, 9 FMSHRC 1997, 2001 (Dec. 1987). The unwarrantable failure allegation was withdrawn, resulting in a reduction of the proposed penalty to $1,337.00. (Tr. 111-112).

Kenneth Fleming, the issuing Mine Safety and Health (MSHA) Inspector in these matters, described the standard method for electrical examinations of kVA boxes. Since transformers cannot be routinely opened for weekly on-shift electrical examinations without interrupting mining operations, each box is designed with a 10 inch by 10 inch window "for purposes of doing examinations." (Tr. 55, 136). Fleming testified that a typical examination involves kneeling down on the mine floor while using the battery light from a hard hat to view the inside of the box and its electrical connection points. (Tr. 57).

The two citations adjudicated in these matters involve one of several kVA transformer boxes, designated as box 3C, located in the No. 28 Mine. Citation Nos. 8222328 and 8222333 were issued, respectively, for violative accumulations of float coal dust approximately 1/8 inch in depth in the 3C kVA box, and, an alleged inadequate weekly electrical examination believed to be insufficient because it did not identify the cited 3C transformer box accumulations.

B. 104(a) Citation No. 8222328 - Accumulations

Section 75.512 of the Secretary's regulations requires weekly recorded examinations of electrical equipment. *See* 30 C.F.R. §§ 75.512, 75.512-2. During the second production shift on Monday, February 9, 2009, Enos Little, Cam Mining's electrical examiner, conducted his weekly electrical examination. Little's examination report noted that kVA boxes 1 through 8, 3A, 3B and 3C were "O.K." (Tr. 73; Gov. Ex. 6 at 4; Joint Stip. 1).

Inspector Fleming arrived at the mine site the following morning, at 6:30 a.m., on Tuesday, February 10, 2009. (Tr. 42). Fleming testified that he is required to inspect each belt conveyor in its entirety. That day, Fleming inspected the 3C belt conveyor at the loading point, the belt drive, and the starter box, as well the associated components for the belt drive. (Tr. 48). Fleming noted "just a light coating of accumulations" along the mine floor of the 3C conveyor for approximately 25 breaks, that he characterized as "paper thin" in extent. (Tr. 49). Fleming proceeded to inspect the 3C kVA transformer box located in proximity to the 3C belt conveyor drive. Using his caplight to provide illumination through the transformer box's observation window, Fleming observed a 'black powdery substance' which looked like float dust on the floor of the box and on the conductors. (Tr. 58). Specifically, Fleming noted cone-shaped accumulations approximately 1/8 inch deep on the phase leads. (Tr. 59).

As a result of his observations, on February 10, 2009, Fleming issued Citation No. 8222328, citing a violation of the mandatory standard in section 75.400, that prohibits float coal dust on rock-dusted electrical equipment.[3] Citation No. 8222328 states:

> Accumulations of combustible material in the form of black, powdery float coal dust have been allowed to exist inside the kVA box (S/N 11425) at the #3C belt conveyor drive. These accumulations are evident through the boxes [*sic*] inspection window and appear to be approximately 1/8 of an inch in depth and are deposited upon the energized components and the boxes [*sic*] floor. This condition exposes miners to hazards associated with fire and/or dust ignition on a regular basis. Management has been put on notice that greater efforts are needed toward compliance with this mandatory standard.

(Gov. Ex. 4).

Fleming designated the cited violation as S&S, because he believed there was a discrete hazard of a dust ignition that jeopardized the health and safety of the 15 to 20 miners that were assigned to the 3C working section. (Tr. 109). However, Fleming did not observe any defects in the electrical components of the transformer box. As the cited accumulations were approximately 1/8 inch in extent, Fleming initially attributed the violation to a moderate degree of negligence. (Gov. Ex. 4). The citation required Cam Mining to abate the cited accumulations in the 3C box prior to 3:00 p.m. on the following day. (Tr. 148).

Fleming did not examine any other kVA boxes during his inspection on the morning of February 10, 2009. (Tr. 48). To comply with the abatement requirement, that evening, Cam Mining's third-shift chief electrician Douglas Gray removed the lid on the 3C kVA box and cleared the accumulations with a leaf blower. (Tr 206; Joint Stip. 3). Although no analysis of the combustible content was performed, Gray believed, based on his observations after the lid was removed, that the accumulations were primarily rock dust because they were gray in color. (Tr. 207-08). Gray testified that he advised Fleming of his opinion that the accumulations were primarily rock dust when Fleming arrived at the mine at 6:50 a.m. on February 11, 2009, as the maintenance shift was ending and the day shift was beginning. (Tr. 209).

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[3] Section 75.400 provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

Although Citation No. 8222328 was initially issued as a 104(a) citation, as discussed below**,** after reviewing the weekly electrical examination book upon his return to the mine on February 11, 2009, Fleming modified the citation to a 104(d)(2) order, to reflect that the cited violation was attributable to a high degree of negligence evidencing an unwarrantable failure. (Gov. Ex. 5 at 2). The unwarrantable failure was based on Little's February 9, 2009, weekly electrical examination report which did not reflect accumulations in the 3C transformer box. (Tr. 73; Joint Stip. 4, 5).

On May 24, 2012, the Secretary filed an uncontested motion to return 104(d)(2) Order No. 8222328 to a 104(a) citation, by modifying Cam Mining's negligence to moderate, thus deleting the unwarrantable failure designation. The Secretary's motion did not provide an explanation for the modification. Thus, the issue of unwarrantable failure is no longer at issue in this proceeding.

C. 104(a) Citation No. 8222333 - Electrical Examination

As noted, Fleming viewed the weekly electrical examination record book upon his arrival at the mine during the early morning hours on February 11, 2009. Fleming believed that Little's failure to note the accumulations in the 3C box during his weekly electrical examination was indicative of a perfunctory examination. (Tr. 70). Consequently, Fleming issued Citation No. 8222333, citing section 75.512-2 for an inadequate weekly electrical examination. (Joint Stip. 4, 6). Citation No. 8222333 states:

> *An inadequate electrical examination* has been performed on the #3C belt conveyor transformer S/N 11425. The examination record indicates that the examination performed on 2-9-09 revealed no hazardous conditions. However, on 2-10-09 an MSHA inspector observed accumulations of black float coal dust deposited on the inside, energized phase conductors and floor, which resulted in the issuance of a violation of 75.400. This condition was observed through the boxes [*sic*] provided inspection window and would be obvious to any reasonably prudent person familiar with the requirements of this type of examination. This condition of performing inadequate electrical examinations exposes miners to a wide variety of serious hazards on a daily basis.

(Gov. Ex. 7) (emphasis added).

Fleming considered the alleged inadequate weekly electrical examination to be S&S as a consequence of the failure to alleviate the hazard posed to section personnel in the event of a coal dust ignition. Fleming attributed Little's failure to identify the 1/8 inch of accumulations in the 3C transformer box for corrective action to a moderate degree of negligence. (Gov. Ex. 7).

Although Fleming had only inspected transformer 3C, Fleming ordered Cam Mining to conduct a thorough electrical re-examination of all of its transformers, designated as boxes 1 through 8, 3A, 3B and 3C. (Tr. 80-81). Fleming cautioned that "allowing accumulations to exist is unacceptable," and that *any accumulations* must be recorded in the examination book. (Tr. 82).

Consistent with Fleming's admonition,[4] Little re-examined the kVA transformers during the 2nd production shift on February 11, 2009. (Tr. 83). Little's examination notes[5] reflected:

> Boxes 1, 2 and 3: "Light accumulations of light gray dust."
> Boxes 4 through 7: "Transformer need cleaned."
> Box 8: "Light accumulations of gray dust."
> Box 3A: "Transformer and splitter box needs cleaned."
> Boxes 3B and 3C: "Transformer O.K." (Little's re-examination occurred after Gray had removed the accumulations in kVA box 3C).

(Gov. Ex. 6; Joint Stip. 7). Having previously cleaned transformer 3C**,** following Little's re-examination Gray cleaned transformers 4 through 8 during his maintenance shift. (Gov. Ex. 6; Tr. 214; Joint Stip. 8). As noted above, Gray considered the accumulations to be primarily rock dust. (Tr. 209).

Fleming returned to the mine at 8:30 a.m. the following morning, February 12, 2009, to confirm, for abatement purposes, that Little had conducted an adequate electrical re-examination. (Tr. 81; Joint Stip. 9). Although he found Little's re-examination adequate, Fleming noted that corrective action had been taken for some, but not all, of the conditions reported by Little. (Tr. 95; Joint Stip. 10). Fleming did not have an opportunity to further view the accumulations in the cited 3C transformer box before they were cleaned by Gray. Fleming also did not observe the conditions inside transformer boxes 4 through 8 before they had been cleaned by Gray, so the nature and extent of any accumulations that had existed in those boxes is unclear.

However, Fleming testified that he did observe the internal conditions of transformer boxes 1, 2, 3, 3A and 3B, which had not been cleaned by Gray, after these boxes were de-energized and the lids were removed. (Tr. 128; Joint Stip. 11). Fleming observed that box 3B was free of accumulations. Although Little had noted accumulations in boxes 2 and 3A, Fleming concluded that the conditions in those boxes did not constitute accumulation violations after viewing the accumulations directly with the transformer lids removed. (Tr. 96-100).

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[4] Gray testified that, in order to satisfy Fleming, Little noted accumulations in his re-examination report even though the accumulations were essentially rock dust. (Tr. 230).

[5] At trial, Fleming testified that Little's re-examination notes may have been altered to reflect the accumulations were gray in color. (Tr. 88). The Secretary has not formally asserted the notes were altered. Such alterations are not material to the validity of the subject citations.

Fleming issued section 75.400 citations for accumulations in transformers 1 and 3 that are not subjects of these proceedings. Based on his preliminary inspection through the observation windows, Fleming initially contemplated issuing S&S citations for these violative coal dust accumulations. However, Fleming determined that "after [the] KVA lids were removed [and] visually examined, [the] accum[ulations] . . . were not as bad as seen [through the] inspection windows." (Gov. Ex. 8 at 6; Tr. 128; Joint Stip. 12). Consequently, the citations issued for transformer boxes 1 and 3 were designated as non-S&S. (Tr. 98-99). Thus, it is significant that Fleming's opinions with respect to the S&S nature and extent of the accumulations based on his initial observations through the examination windows were not confirmed by his subsequent inspection after the lids were removed. In the final analysis, after the lids on the uncleaned transformers were removed, Fleming did not observe any evidence of S&S accumulations in transformers 1, 2, 3, 3A and 3B. (Gov. Ex. 8 at 6; Tr. 99).

II. Further Findings and Conclusions

A. 104(a) Citation No. 8222328 – Accumulations

1. Fact of Violation

It is axiomatic that the Secretary has the burden of proving every element of a cited violation. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). Thus, the Secretary must establish, by a preponderance of the evidence, that Cam Mining violated section 75.400 by permitting float coal dust to accumulate on electric equipment. Cam Mining asserts the cited coal dust accumulations in the 3C transformer box consisted primarily of incombustible rock dust. The Secretary contends the accumulations were composed of combustible float coal dust.

As a threshold matter, whether conditions constitute accumulations prohibited by section 75.400 should be committed to the broad discretion of the mine inspector. *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980); *Amax Coal Co.*, 19 FMSHRC 846, 847, 849 (May 1997); *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 483 (Mar. 1997); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 19-20 (Jan. 1997) (Marks, concurring). Thus, Fleming's opinion with respect to the accumulation conditions in transformer box 3C constituting a violation is entitled to considerable weight. Even if the accumulations observed by Fleming contained incombustible rock dust, the Commission has rejected "a construction of [section 75.400] that excludes loose coal . . . mixed with noncombustible materials [because it] defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985). Given the deference accorded to the observations of mine inspectors, Cam Mining's assertion that the cited accumulations consisted of non-violative rock dust must fail.

Moreover, Cam Mining's asserted rock dust defense is inconsistent with Little's February 11, 2009, electrical re-examination, which reflected that transformer boxes 1 through 8 and 3A needed cleaning. Although this matter involves the conditions inside transformer box 3C, the general conditions of accumulations within the other transformer boxes are relevant because

they were exposed to similar atmospheric mine conditions. While it is true that Fleming required Little to 'thoroughly' inspect the transformer boxes, the fact remains that Little conceded dust accumulations were present. As discussed above, Little's notations that some of these accumulations were gray in color do not, alone, in the absence of combustibility analysis, discredit Fleming's conclusion that an accumulation violation had occurred. Consequently, the Secretary has satisfied her burden of establishing that the cited section 75.400 violation occurred.

2. S&S

As a general proposition, a violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4; *see also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission explained its *Mathies* criteria as follows:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984) (emphasis in original).

The Commission subsequently reasserted its prior determination that as part of any S&S finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Co.*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130. Thus, consideration must be given to both the time frame during which the violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

It is clear that the first, second and fourth elements in *Mathies* necessary for an S&S designation have been met. In this regard, the Secretary has demonstrated a violation of section 75.400 that poses the discrete hazard of a coal dust ignition, and that serious injury or death will result if such an ignition were to occur. The remaining third element - whether it is reasonably likely that the hazard contributed to by the violation will result in an event causing serious injury - is more problematic.

The Commission and Congress have recognized that accumulations of combustible material constitute hazardous conditions, as any combustible material, when placed in suspension, can propagate an explosion. *Enlow Fork Mining Co.*, 19 FMSHRC at14 (citing S. Rep. No. 411, 91st Cong., 1st, ess. 65 (1969)), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 191 (1975). However, the essence of the S&S determination in this matter is whether it is reasonably likely that the hazard contributed to by the cited accumulations of approximately 1/8 inch in depth will result in an ignition causing serious or fatal injuries. *Bellefonte,* 20 FMSHRC at 1254-55.

As a general matter, accumulations prohibited by section 75.400 are not significant and substantial *per se*. Thus, in assessing the likelihood of an ignition caused by a combustion hazard, the Commission looks to whether there is a "confluence of factors" present based on the particular facts surrounding the violation that would make a fire, ignition, or explosion reasonably likely. *Texasgulf,* 10 FMSHRC 498, 501 (Apr. 1988). Some of these factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Enlow Fork Mining Co.,* 19 FMSHRC at 9 (citing *Utah Power & Light Co.*, 2 FMSHRC 965, 970-71 (May 1990)); *Texasgulf*, 10 FMSHRC at 500-03.

Applying the *Texasgulf* analysis with respect to "confluence of factors," the Secretary's characterization of the cited accumulations must fail for several reasons. Direct evidence is "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." Circumstantial evidence is "[e]vidence based on inference and not on personal knowledge or observation." *Black's Law Dictionary* 636 (9th ed. 2009). Here, the evidentiary facts relied on by the Secretary to prove S&S are based on indirect observation obtained under poor viewing conditions rather than personal knowledge gained through normal direct observation. Such indirect observations cannot be relied on as direct evidence (personal knowledge) establishing the true nature and extent of the subject accumulations.

While it is not uncommon for the Secretary to establish the elements of a violation by inference, there must be a "logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Resources*, 6 FMSHRC 1132, 1138 (May 1984). In this instance, the Secretary, in effect, seeks to establish the likelihood of combustion based on Fleming's observations with respect to content and extensiveness. Fleming "observed" the cited accumulations through a relatively small observation window, illuminated by cap light, rather than by directly observing the accumulations after the transformer lid was removed. Moreover, Fleming's assessment was not based on objective measurement. The rub is that Fleming's impressions based on his initial observations are not reliable, in that he has conceded that several accumulations that he observed after transformer lids were removed "were not as bad as [when] seen thru [*sic*] inspection windows."[6] (Gov. Ex. 8 at 6; Joint Stip. 12).

With respect to combustible content, it is significant that Gray used a leaf-blower to clear the cited accumulations in transformer box 3C before Fleming had an opportunity to observe the accumulations after the lid was removed. Thus, Fleming's opinion with respect to the color of the accumulations is based solely on his limited observations through the examination window.

Finally, the Secretary has not shown any credible evidence of defects in the 3C transformer box that would constitute a reasonably likely ignition source under the *Texasgulf* analysis. Although Fleming opined that arcing can occur during normal operation of a transformer box, his 'anything can happen' opinion is unavailing. Moreover, his opinion was primarily based on his recollection of an incident involving a spliced cable. However, spliced cables were not present in the subject transformer boxes. In this regard, Fleming testified:

> Court: Mr. Fleming, describe for me the source of ignition in the kVA box. What would the source of ignition be?
>
> Fleming: You've got multiple areas, Your Honor, that's ignition points. You've got relays that go in and out. UVRs, they're called shunt trips. *All your electrical connection points* are always a weak place in electricity. And those weak places, *if they're not adequate*, *they will heat up. I don't know if anybody has ever seen it or not, but if you make a splice in a cable, that splice adds resistance to the voltage that runs through that cable and it will cause it to heat.* So anytime you have a connection point with amp electricity, that's a heat-generating source. Okay? Not only do you have all those ignition points there, but you have the sheer magnitude of the transformers that will heat up so hot that men cook off them.
>
> Court: All right. Let me see if I understand. So the ignition source is from the normal operation of the transformer or if there is a malfunction in the wiring?

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[6] I am not suggesting that all transformer inspections based on observations through inspection windows are suspect. However, the irrefutable evidence in this case reflects that, by his own admission, Fleming's initial observations were unreliable. (*See* Joint. Stip. 12).

Fleming: It's the normal . . . normal operation, yes.

Court: And your opinion is that the heat could serve as an ignition source?

Fleming: *Well, the heat [dries] the coal well*, which makes it more readily ignitable. Your ignition sources are the knife blades being thrown out even under a load or not. Now, the ones that I experienced over at Mountain Edge was – I was pulling them out under a load. Now, they will arc even if they're not under a load.

(Tr. 105-07) (emphasis added).

In the final analysis, there was a disconnect between Fleming's testimony that transformers routinely arc, and his reliance on unusual circumstances to illustrate ignition sources. Moreover, Fleming's assertion that arcing is a continuing source of ignition is inconsistent with MSHA's requirement of weekly, rather than daily, electrical examinations. In addition, Fleming's designation of the prohibited accumulations in transformer boxes 1 and 3 as non-S&S belies his contention that arcing is an ever present source of ignition. (Tr. 98-99). While Fleming testified that the heat generated by a transformer will dry coal, Fleming does not contend that the heat is sufficient to ignite coal. Thus, on balance, Fleming's testimony with regard to the reasonable likelihood of an ignition based on the heat generated by, and the electrical connections in, a transformer box is not credible.

In view of the above, the Secretary has failed to demonstrate that the cited accumulations are properly designated as S&S. Consequently, Citation No. 8222328 shall be modified to reflect that the cited violation of section 75.400 is not S&S in nature, and, that the violation is attributable to no more than low to moderate negligence.

3. Civil Penalty

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and

2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.,* 19 FMSHRC 1495, 1503 (Sept. 1997).

The parties do not contend that imposition of the total civil penalties proposed in this case, including those contained in their settlement agreement, will adversely affect Cam Mining's ability to continue in business, or, that the penalties are otherwise inappropriate given the size of Cam Mining's operations. The cited conditions were abated in good faith and in a timely manner, as evidenced by the remedial action taken by Gray to clean the 3C transformer box shortly after Citation No. 8222328 was issued. Finally, the Secretary does not assert that Cam Mining's history of violations is an aggravating factor. Given the modification of Citation No. 8222328 deleting the S&S designation, the $1,337.00 civil penalty initially proposed by the Secretary shall be reduced to $450.00.

B. 104(a) Citation No. 8222333 - Electrical Examination

1. Fact of Violation

Regular examinations for the purpose of detecting and correcting hazards are "of fundamental importance in assuring a safe working environment underground." *Enlow Fork Mining Co.*, 19 FMSHRC at 15 (quoting *Buck Creek Coal Co.* 17 FMSHRC 8, 15 (Jan. 1995)). Consequently, section 75.512 requires mine operators to conduct an examination of all electrical equipment on a weekly basis for the purpose of identifying potentially dangerous conditions.

Despite the essential role that examinations have in promoting mine safety, as noted, the Secretary bears the burden of demonstrating that the facts surrounding the examination evidence a

violation. *Garden Creek, supra.* Although the Mine Act is a strict liability statute, reliance on strict liability to establish the fact of a violation begs the question. In other words, a mine operator can be held strictly liable only after the Secretary has demonstrated that a violation has occurred. *Order concerning Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 1675, 1677 (Sept. 1992) (ALJ Broderick).

In resolving whether a mine operator has violated section 75.512, the proper inquiry is whether the subject electrical examination has been adequately performed. *See, e.g., RAG Cumberland Resources LP*, 26 FMSHRC 639 (Aug. 2004) (holding that although mandatory standards may not explicitly require adequate or effective measures by mine operators, such a requirement is implicit in the standard's underlying purpose), *aff'd* 171 Fed.Appx. 852 (D.C. Cir. 2005). In this regard, Fleming based Citation No. 8222333 on his belief that the electrical examination of transformer 3C was 'inadequately' performed. (Gov. Ex. 7).

Resolving the adequacy of Little's electrical examination requires consideration of both the methodology and sufficiency of the examination. With regard to methodology, the test is whether the electrical examination was performed in accordance with accepted mining industry practice and procedures. *See Alabama By-Products Corp*., 4 FMSHRC 2128, 2129 (Dec. 1982) (providing an objective reasonable person test for determining whether an operator's conduct violates mandatory standards). It is clear that Little's examination through the observation window of transformer
box 3C during a production shift, when the transformer was energized, was an acceptable method of performing an electrical examination. In fact, Fleming admitted that he routinely inspects transformers for electrical hazards by peering through the examination window while the transformer box is energized. (Tr. 57).

Evaluating the sufficiency of Little's examination findings requires an analysis of the thoroughness of his examination. In this regard, the term "adequate" is defined as "sufficient to satisfy a requirement or meet a need." *American Heritage Dictionary of the English Language* 20 (4th Ed. 2009). Compliance with examination requirements must be evaluated on a case-by-case basis. Adequacy determinations must be viewed in context in that examinations cover a myriad of mine conditions, as well as a variety of equipment and cables. Thus, a failure to note a violative condition in a routine on-shift, pre-shift or electrical examination, alone, is not necessarily evidence of an inadequate examination. Rather, the adequacy of the examination must be viewed in the context of whether the overlooked violation is obvious or otherwise reasonably discoverable. In addition, the violation must be sufficiently hazardous to warrant a reasonable examiner to conclude that corrective action is required.

I stress that the question is not whether the overlooked condition constitutes a violation of a safety standard. Rather, the question is whether the failure to identify this condition for remedial

action renders the examination inadequate, especially in this case where reasonable people may differ as to whether minimal accumulations required cleaning.[7]

In the instant case, the cited overlooked accumulations in transformer box 3C have been determined to be non-S&S in nature. Although Citation No. 8222333 is based solely on Little's failure to note the accumulations in box 3C, the re-examination required for abatement reflects Little's weekly electrical examination was considered to be inadequate with regard to all transformers.

Given the Secretary's burden of proof, the Secretary has only managed to demonstrate non-S&S accumulations in three of eleven transformer boxes that went unnoted in Little's initial electrical examination. The failure to note such non-S&S accumulations, minimal in extent and viewed through an observation window, does not rise to the level of an inadequate electrical examination. I do not question the sincerity or good faith of Inspector Fleming. However, with the benefit of hindsight, the evidence does not substantiate Fleming's initial impression that the electrical examination was inadequate. Accordingly, Citation No. 8222333 shall be vacated.

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation No. 8222328 in Docket No. KENT 2009-1426 **IS MODIFIED** to delete the significant and substantial designation, and to reflect that the degree of underlying negligence attributable to Cam Mining is low to moderate. Accordingly, **IT IS ORDERED** that a civil penalty of $450.00 shall be assessed for Citation No. 8222328.

IT IS FURTHER ORDERED that Citation No. 8222333 in Docket No. KENT 2009-955 **IS VACATED**.

IT IS FURTHER ORDERED that the parties' motion to approve partial settlement for Docket No. KENT 2009-955 **IS GRANTED**. Consistent with the parties' settlement terms, **IT IS ORDERED** that Cam Mining shall pay a total civil penalty of $29,474.00 in satisfaction of the remaining 44 citations in issue.

[7] As previously discussed, on re-examination, Little believed accumulations that he viewed through the windows of transformers 2 and 3A required cleaning. On the other hand, Fleming concluded the conditions in these boxes did not constitute accumulation violations after viewing these accumulations with the transformer lids removed. (Tr. 96-100).

Consistent with the $450.00 civil penalty assessed for Citation No. 8222328, as well as the parties' settlement terms, **IT IS ORDERED** that Cam Mining, LLC pay, within 40 days of the date of this decision, a total civil penalty of $29,924.00 in satisfaction of the 46 citations that are in issue in these proceedings.

IT IS FURTHER ORDERED that, upon receipt of timely payment, the civil penalty proceedings in Docket Nos. KENT 2009-955 and KENT 2009-1426 **ARE DISMISSED**.

/s/ Jerold S. Feldman
Jerold Feldman
Administrative Law Judge

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November 23, 2012

SECRETARY OF LABOR, MSHA, on behalf of TODD FAGG, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. WEST 2013-133-DM
	:	WE MD 12-25
v.	:	
BAKER HUGHES, INC., Respondent	:	Argenta Mine and Mill
	:	Mine ID 26-01152

Order Approving Temporary Reinstatement Agreement

Before: Judge Moran

This temporary reinstatement proceeding arises under Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). On November 1, 2012 the Commission received the Secretary's Application for Temporary Reinstatement of the complaining miner, Todd Fagg. On November 6, 2012 the case was assigned to the Court. On November 20, 2012 the parties submitted a Joint Motion for Temporary Reinstatement. As stated in the Settlement Agreement and Joint Motion for Temporary Reinstatement, the terms of the agreement are as follows:

1. The Secretary asserts that miner Todd Fagg's complaint of discrimination in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("The Mine Act"), 30 U.S.C. §801, et seq., and 29 C.F.R. §2700.45, was not frivolously brought.

2. Without in any way admitting that the said complaint was not frivolously brought, and solely for the purposes of avoiding the cost and expense of a hearing on the issue of temporary reinstatement, and only until the merits of Complainant's discrimination complaint has been resolved, Respondent agrees to the entry of an Order of Temporary Reinstatement and not to oppose same.

3. The parties further agree, due to the distances involved and the need for quick action in this matter, that facsimile signatures and signatures on electronically submitted documents shall be deemed valid, and documents with original signatures shall follow immediately by mail.

4. By this Joint Motion, the parties hereby agree to settle this temporary reinstatement proceeding on the terms described herein, and move that this settlement be approved and that an Order be entered granting economic temporary reinstatement of Mr. Fagg to his position as Assistant Supervisor - Technical II ("Assistant Supervisor") at Respondent's Argenta Mine and Mill located at 13 miles east of Battle Mountain, Nevada 89820.

5. Pursuant to this economic reinstatement, Respondent must:

a. (economically/employ Mr. Fagg at his Assistant Supervisor position at the Argenta Mine and Mill at the same rate of pay, ($30.61 per hour) for straight time and ($45.91 per hour) for overtime, that he was paid immediately prior to his suspension and eventual termination on August 28, 2012.

b. economically employ Mr. Fagg at his Assistant Supervisor position at the Argenta Mine and Mill for the same number of hours (40 hours straight time and 10 hours overtime) that he worked immediately prior to his suspension and eventual termination on August 28,2012.

c. pay Mr. Fagg a prorated boot allowance of $5.77 (FIVE DOLLARS AND SEVENTY-SEVEN CENTS) per two-week pay period.

d. pay Mr. Fagg a $95.00 (NINTY-FIVE DOLLARS AND ZERO CENTS) allowance per pay period in lieu of providing him a company cellular telephone for personal use, a company vehicle for personal use, and a company gas card for personal use.

e. pay Mr. Fagg $3,467.77 (THREE THOUSAND FOUR HUNDRED AND SIXTY-SEVEN DOLLARS AND SEVENTY-SEVEN CENTS) every two weeks on Respondent's regularly scheduled pay days, from which Respondent may deduct all required tax withholdings from Mr. Fagg's pay checks. This $3,347.77 amount is the sum of 40 hours at $30.61 an hour, ten hours of overtime at $45.91 an hour, the $5.77 boot allowance, and the $95.00 telephone, vehicle, and gas card allowance.

f. deposit this $3,467.77 amount due Mr. Fagg via electronic transfer into the same bank account that Respondent had been electronically transferring his bi weekly pay immediately prior to his termination. This first payment is due on the first regularly occurring payday after the effective date of Mr. Fagg's reinstatement

g. issue Mr. Fagg, by the tenth of every month, a copy of his pay stubs for the electronic deposits that Respondent made to him in the previous month by sending them to the following address via first class United States mail:

Todd Fagg
134 Indian Springs Ct.
Battle Mountain, NV 89820

h. provide to Mr. Fagg and his family the same level of benefits that Respondent provided to them immediately prior to his suspension and eventual termination on August 28,2012, including, but not limited to:

i. Respondent agrees to provide the same medical, dental, and vision health coverage for Mr. Fagg and qualified dependents and Respondent agrees to pay the premiums and costs associated with this coverage in the same manner that it paid immediately prior to his suspension and eventual termination on August 28, 2012, and to deduct from Mr. Fagg's gross pay Mr. Fagg's portion of such premiums in the same manner that it deducted immediately prior to his suspension and eventual termination on August 28,2012;

ii Respondent agrees to pay the premiums that it paid immediately prior to his suspension and eventual termination on August 28,2012, of a life insurance policy for Mr. Fagg wherein the value of such policy is at least equal to one-year of his pay - $87,313 (EIGHTY-SEVEN THOUSAND THREE HUNDRED AND THIRTEEN DOLLARS) and to deduct from Mr. Fagg's gross pay Mr. Fagg's portion of such premiums in the same manner that it deducted immediately prior to his suspension and eventual termination on August 28,2012;

iii Respondent agrees to deduct 5% (FIVE PERCENT) of Mr. Fagg's bi-weekly pay and contribute that amount to his 401(k) plan subject to company policy and the applicable maximum contribution laws;

iv. Respondent agrees to make a matching contribution equal to 5% (FIVE PERCENT) of Mr. Fagg's bi-weekly pay to his 401 (k) plan subject to Respondent's policy governing such contributions and the applicable maximum contribution laws;

v. Respondent agrees that Mr. Fagg shall remain eligible to participate in Respondent's Pension Plan on the same terms as prior to his August 28, 2012 termination, which includes a contribution by Respondent to that pension plan of 2% (TWO PERCENT) of Mr. Fagg's base salary subject to Respondent's policy governing such contributions;

i. issue the Secretary's counsel, by the tenth of every month, a copy of Mr. Fagg's pay stubs for the electronic deposits that Respondent made to him in the previous month by sending them to the following address via first class United States mail:

Norman E. Garcia, Esq., Office of the Solicitor United States Department of Labor 90 Seventh Street, Rm. 3-700, San Francisco, California 94105.

In lieu of sending these pay stubs by United States first class mail, Respondent can send them by e-mail to the following e-mail address garcia.norman@dol.gov.

6. Mr. Fagg's reinstatement will be effective on the date that the Federal Mine Safety and Health Review Commission enters an Order of Temporary Reinstatement in this matter.

7. Each party agrees that the Administrative Law Judge shall continue to have jurisdiction over all aspects of the economic temporary reinstatement until the Administrative Law Judge issues an order dissolving the economic temporary reinstatement.

8. If Respondent fails in any way to provide payment and benefits as required by this Settlement Agreement and Joint Motion for Temporary Reinstatement, the parties agree that the Administrative Law Judge and/or the Federal Mine Safety and Health Review Commission may seek sanctions against Respondent.

9. Each party agrees to bear all fees and other expenses, including any court costs or attorney's fees incurred by such party in connection with the temporary reinstatement stage of this proceeding and any attorney's fees which may be available under the Equal Access to Justice Act as amended.

WHEREFORE, the Joint Motion for Temporary Reinstatement is **GRANTED.**

It is further **ORDERED** that the Secretary initiate a conference call with the Court at 202 577 6809 or reach the Court via email at wmoran@fmshrc.gov on December 26, 2012, or before that date, of her determination regarding whether discrimination occurred in violation of the Mine Act.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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November 26, 2012

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of ROBERT MITCHELL,	:	Docket No. LAKE 2013-89-DM
Applicant	:	MSHA No. MC-MD-13-01
	:	
v.	:	Bolingbrook Underground
	:	
VULCAN CONSTRUCTION,	:	Mine I.D. 11-03149
MATERIALS, LP,	:	
Respondent	:	

ORDER GRANTING THE PARTIES' JOINT MOTION TO APPROVE SETTLEMENT ORDER OF TEMPORARY ECONOMIC REINSTATEMENT

This matter is before me on an application for temporary reinstatement filed by the Secretary of Labor ("Secretary") on behalf of Robert Mitchell, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2), against Vulcan Construction Materials, LP ("Vulcan"). Mitchell was terminated from his position as a front-end loader operator on May 9, 2012.

On November 21, 2012, the parties filed a Settlement Agreement and Motion for Temporary Economic Reinstatement ("Joint Motion"). The parties agreed that miners with Mitchell's position and seniority are currently subject to a seasonal layoff that started on November 9, 2012, and are not presently employed at the mine. The settlement reached by the parties requires Vulcan to economically reinstate Mitchell from the date he would have been called back to work based on his seniority if he had not been terminated on May 9, 2012.

The Joint Motion provides a detailed description of the terms of the economic reinstatement and the rights and responsibilities of the parties, which are all incorporated into this order by reference. The Joint Motion sets forth the regular pay, overtime pay, and benefits that Mitchell is entitled to. Benefits include health, retirement plan, and seniority accrual benefits. Vulcan must ensure that "Mitchell's seniority status and all benefits attributed to that be uninterrupted and continue to accrue as if he was never terminated." (Joint Motion ¶ 7).

I have considered the representations and documentation submitted in this case and I conclude that the Joint Motion is appropriate under section 105(c)(2) of the Mine Act. The Joint Motion is **GRANTED** and the proposed settlement of this temporary reinstatement proceeding is **APPROVED**. The parties are **ORDERED** to comply with all the terms and conditions set forth in the Joint Motion. The Secretary is **ORDERED** to complete her investigation of the

underlying discrimination complaint as soon as possible. The Secretary shall provide a report on the status of MSHA's investigation of the discrimination complaint by no later than **January 4, 2013**. If the parties settle the underlying discrimination case, counsel for the Secretary shall immediately notify my office. Counsel for the Secretary shall also immediately notify my office if the Secretary determines that Vulcan did not violate section 105(c) of the Mine Act. I retain jurisdiction over this temporary reinstatement proceeding.

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

Distribution:

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Robert Mitchell, 14 Park Avenue, Cherry, IL 61317 (First Class Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004
November 26, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. CENT 2011-138-M AC No. 29-01460-235405
v.	:	Mine: CR #1 Mine ID: 2901460
C & E CONCRETE, INC., Respondent.	:	

DECISION

Appearances:

Bryan Kaufman, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

Walter Lee Meech, President, C & E Concrete, Milan, New Mexico, for Respondent

Before: Judge Tureck

This case is before me on a *Petition for Assessment of Civil Penalty* filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against C & E Concrete ("C & E"), pursuant to §§ 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 ("the Act"). The Secretary proposes assessing a penalty of $100 against C & E for one alleged violation at C & E's mine CR #1, relating to citation 6567956. The Secretary contends that this violation was significant and substantial ("S & S"). C & E challenges the occurrence of the violation and the S & S designation.

Initially, MSHA had cited C & E's mine for nine violations. However, eight of the citations were settled prior to trial, leaving only citation 6567956 to be litigated. A formal hearing was held in Albuquerque, New Mexico on April 17, 2012. At the hearing, Government's Exhibits 1-10 and Respondent's Exhibits 1-2, were admitted into evidence, and each party provided testamentary evidence.[1] At the conclusion of the hearing, each party opted to present oral closing statements instead of filing post-hearing briefs.

[1] Citations to the record of this proceeding will be abbreviated as follows: GX.- Government's Exhibit, RX.- Respondent's Exhibit; Tr. – Hearing Transcript.

Findings of Fact and Conclusions of Law

C & E's mine CR #1 ("the mine") is a crushed limestone mine that produces concrete. It is located 35 miles from Milan, New Mexico, and has its own quarry. Tr. 21-22. On August 31, 2010, MSHA inspector James Coats inspected the Mine. Tr. 21. Coats has been an MSHA inspector for nine years, during which time he has inspected sand gravel operations, underground mines, and surface operations. Tr. 19-20. Prior to becoming an MSHA inspector, Coats had twenty years of underground mining experience. Tr. 20. He has conducted hundreds of inspections, and at least ninety percent of his inspections involved the inspection of conveyors. When inspecting conveyors, he would look for exposed rollers, head pulleys, tail pulleys and return rollers. Tr. 20-21.

During the August 31 inspection of the mine, Coats was accompanied by Benny Lara, the MSHA field officer at Albuquerque and Coats' supervisor. Tr. 22. Lara supervises seven inspectors in his field office. Tr. 40. Lara has been a supervisor for MSHA for thirteen years. Tr. 41. Prior to becoming an MSHA inspector, Lara had thirteen years of mining experience. Lara has conducted approximately seven hundred inspections in his career. Tr. 41. Lara occasionally accompanies inspectors on inspections for the purpose of evaluating them. During these inspections, Lara makes his own observations in addition to the inspector's observations. Tr. 41.

Coats was also accompanied by Wayne Vigil, who was the supervisor at the mine, and John Lopez, the safety officer at the mine. Tr. 22-23. Coats inspected the entire conveyor belt system. Tr. 32. In the course of the inspection, Coats inspected the #32 conveyor belt of the mine which transported crushed limestone. Tr. 23-24. Coats testified that it is common for some of the crushed limestone being transported on a conveyor belt to fall off, and for the miners to clean up the fallen limestone. Tr. 24-25.

While inspecting the #32 conveyor belt, Coats noticed that the #1 and #2 return rollers on this belt lacked guarding on the side. Tr. 25. In GX. 4, the top left photo is of the #1 return roller, and the top right photo is of the #2 return roller. Coats explained that while the #1 roller was completely exposed, the #2 return roller was partially covered by a skirt board. Tr. 32. Coats later testified that these two return rollers were also exposed from below. Tr. 37. Coats testified that C & E had guards on some of its other rollers. Tr. 32.

Coats stated that the #1 return roller was approximately five feet above the ground, and the #2 return roller was six feet above the ground. Tr. 27-28. Coats noticed during his inspection that there were at least three miners in the vicinity of the #32 conveyor belt; these miners were cleaning up and repairing some guards. Tr. 28-29. However, he could not recall the distance between these miners and the conveyor belt. Tr. 35. The conveyor belt was in operation during his inspection. Tr. 29. Coats told Vigil that two return rollers were exposed, and Vigil responded that due to a deficiency in the hydraulics system, the conveyor belt was lower than normal. Tr. 29-30.

Coats testified that a miner could come into contact with these two exposed return rollers in a variety of ways. Tr. 30-31. A miner could come into contact with the rollers if he was walking beside the conveyor belt and stumbled, or if he was underneath the conveyor belt, or if

part of his shovel became stuck in the return roller. Tr. 30-31. A miner who came into contact with one of these two exposed rollers could suffer permanently disabling injuries. Tr. 31. In connection with Coats's testimony, the Secretary also offered evidence of an employee at a different mine who was fatally injured when his arm became entangled between a return roller and the conveyor belt. GX. 10.[2] Based on his observations of the exposed return rollers, Coats issued Citation 6567956 for a violation of 30 C.F.R. § 56.14107(a), which states that "moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drives, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." GX. 3, 6.

Lara, the MSHA field supervisor who accompanied Coats on the August 31 inspection, confirmed all of Coats' observations and agreed with his issuance of Citation 6567956. Tr. 46-47. Lara also indicated that the two return rollers were high enough for miners to walk underneath them, but low enough that miners walking underneath may come into contact with them. Tr. 53. Lara stated that if these two rollers were only two and a half feet above the ground, MSHA inspectors would normally not issue a citation since it would be very unlikely that a miner would be underneath the rollers. Tr. 53.

C & E does not dispute that the two return rollers were exposed. However, C & E claims that even though these two rollers were exposed, no violation of 30 C.F.R. § 56.14107(a) occurred. Under 30 C.F.R. § 56.14107(b), which provides an exception to 30 C.F.R. § 56.14107(a), "guards shall not be required where the exposed moving parts are at least seven feet *away* from walking or working surfaces." (Emphasis added). C & E contends that when the conveyor belt is in operation, the exposed moving rollers are more than seven feet away from any walking or working surface.

Gustavo Delgado has been an employee of C & E for three years. Tr. 57. In 2010, he worked as a laborer for C & E, in which capacity he shoveled material and monitored the guards. Tr. 57. He testified that his work area was at least thirty feet away from the #32 conveyor belt. Tr. 58. He stated that in 2010, none of C & E's employees ever went into the area of the #32 conveyor belt while it was in operation, and that all employees would stay at least thirty feet away from this conveyor belt. Tr. 59. He stated that while the rollers on this conveyor belt would occasionally require maintenance, the employees would ensure that the conveyor belt was shut off and locked out before working on the rollers. Tr. 59.

Delgado also testified that C & E used a specialized skid steer to rake out the material from underneath the conveyor belts, including material that fell through holes in the conveyor belts. Tr. 62, 65. According to Delgado, this skid steer precludes the need for employees to shovel underneath the conveyor belts. Tr. 65. Delgado also stated that material never spills off the belt at the section of the two return rollers. Tr. 60. However, he later conceded that at other sections of the belt, material may fall through holes in the conveyor belt. Tr. 64. To clean up such material, employees may sometimes shovel underneath the conveyor belt instead of using

[2] Gov't. Ex. 10 contains reports of two fatalities. The Secretary represented that only the Cherry Valley Pit fatality is relevant.

the skid steer. Tr. 64. However, prior to shoveling underneath the conveyor belt, employees always check that the conveyor belt has been shut off. Tr. 64.

John Lopez has been an employee of C & E for seven years. Tr. 68. For the last six years, he has been C & E's safety officer, in which capacity he accompanies MSHA inspectors on inspections. Tr. 69. He stated that C & E's employees who walk by the #32 conveyor belt are forty to fifty feet away from it. Tr. 71. He stated that the two exposed return rollers on the #32 conveyor belt do not need to be maintained while the conveyor belt is in operation. Tr. 72. He testified that he conducts safety meetings each week where employees are instructed to shut off the conveyor belts before trying to maintain or repair the belts. Tr. 72. He also testified that he has personally never seen anyone use the area underneath the two exposed rollers as a walkway. Tr. 73. He believes that none of the employees would have any reason to walk underneath these two rollers since just ten to fifteen feet away, they could walk right underneath the conveyor belt with plenty of space between them and the belt. Tr. 73-74.

Discussion

This penalty proceeding presents two issues. The first issue is whether a safety standard, 30 C.F.R. § 56.14107, was violated. If the evidence indicates that there was a violation, the second issue is whether the violation was significant and substantial.

Under 30 C.F.R. § 56.14107(b), "[g]uards shall not be required where the exposed moving parts are at least seven feet *away* from walking or working surfaces." (Emphasis added). C & E claims that the two exposed rollers on the #32 conveyor belt fall within this exception since they are more than seven feet away horizontally from any walking or working surface (even though both rollers are less than seven feet above the ground). I will assume that the respondent, C & E, bears the burden of proof regarding whether the two rollers fall within the exception.[3]

At 53 Fed. Reg. 32509 (Aug. 25, 1988), in MSHA's comments to the final rule *Safety Standards for Loading, Hauling and Dumping and Machinery and Equipment at Metal and Non-Metal Mines*, it is stated that "guarding by location is recognized as an alternative to a physical guard in instances where the exposed moving parts are *elevated* at least seven feet above walking or working surfaces." (Emphasis added). But this comment, if meant to limit the application of §56.14107(b) to *vertical* guarding by location, is inconsistent with the plain language of the regulation, which states that "guards shall not be required where the exposed moving parts are at least seven feet *away* from walking or working surfaces." (Emphasis added). The comment does not indicate how MSHA arrived at this restrictive interpretation of §56.14107(b) considering that section uses the word "away," not "elevated" or "above," in creating its exception to the requirements of § 56.14107(a).

[3] The law is unclear regarding who bears the burden of proof on the §56.14107(b) exception. I will treat the § 56.14107(b) exception an affirmative defense. Accordingly, the Respondent bears the burden of proof.

Section 56.14107(b) is not ambiguous, and is not open to the interpretation suggested by the comment. Had MSHA intended to limit that section as the comment suggests, surely the regulation would have used the word "above," not the word "away" which is far, far broader. Accordingly, based on the plain language of §56.14107(b), if the two exposed rollers at issue were at least seven feet from anywhere miners walk or work, C & E will have satisfied the exception to §56.14107(a)'s requirement of providing guards for moving machine parts, and will not have violated the Act.

In this regard, first Delgado, an employee of C & E who monitored the condition of the guards, testified that his work area was at least thirty feet away from the #32 conveyor belt, and that he had personally never seen any of C & E's employees come within thirty feet of this conveyor belt while it was in operation. Tr. 58- 59. Lopez, C & E's safety officer, stated that all employees who walk by the # 32 conveyor belt are at least forty to fifty feet away from it. Tr. 71. Delgado and Lopez's testimony indicates that the two exposed rollers were at least thirty feet from any walking or working surface. Tr. 71.

The Secretary alleges that during the inspection a truck was parked within thirty feet of the conveyor belt. The evidence the Secretary offered to prove her contention was a photograph in GX. 4 which shows that a truck was in the vicinity of the two rollers; however, the photograph fails to provide any definitive evidence of the distance between the truck and the rollers. Moreover, the Secretary has not contended that the photograph shows the truck to be as close as seven feet from the belt. It would have been a simple matter for the MSHA inspectors to measure the distance between the truck and the conveyor belt during the inspection, but they did not do it. While Lopez indicated that the truck probably belonged to C & E, he could not state either from the photograph or his own memory of the inspection just how far the truck was from the conveyor belt. Tr. 85-87. There is simply no probative evidence that the truck was within thirty feet of the conveyor belt, let alone seven feet.

Therefore, I find that no employees came closer to the exposed rollers than thirty feet while the conveyor belt was in motion.

Second, there was un-contradicted evidence, which I credit, that employees were warned to turn off the #32 conveyor belt before maintaining the rollers, and that they heeded such warnings. Delgado testified that while the rollers would occasionally require maintenance, employees would ensure that the conveyor belt was shut off by the operator before working on the rollers. Tr. 59. Lopez testified that the two rollers do not need to be maintained or repaired while the conveyor belt is in operation. Tr. 72. He also testified that he conducts safety meetings each week where employees are instructed to shut off the conveyor belts before trying to maintain or repair the belts. Tr. 72.

Third, C & E generally uses a specialized skid steer machine to remove any accumulated material from underneath the # 32 conveyor belt. Tr. 62, 65. Delgado conceded that material may fall through holes in the conveyor belt, and to clean up such material, employees may sometimes shovel underneath the conveyor belt instead of using the skid steer. Tr. 64. However, he testified that material never spills off at the section with the exposed rollers. Tr. 60. Moreover, he testified

that prior to shoveling underneath any section of any conveyor belt, employees always check that the belt has been locked out. Tr. 64.

Fourth, if, miners would decide to walk beneath the conveyor belt to get to the other side while the belt was in motion, they would not have any reason to use the space underneath the two exposed rollers as a walkway. Lopez testified that the conveyor belt was much higher only ten to fifteen feet away from the two rollers, and miners could easily cross to the other side of the conveyor belt without fear of coming into contact with it at that spot. Tr. 73-74. There was no reason for anyone to cross to the other side of the belt underneath the two exposed rollers. It should be noted, however, that no evidence was presented that miners actually walked under the conveyor belt at any point while it was in motion.

C & E has therefore proven that its two exposed return rollers on the #32 conveyor belt fall within the § 56.14107(b) exception, since no miners came within seven feet of the moving conveyor belt, and I conclude C & E has not violated §56.14107.[4]

Since I have vacated the sole citation in this docket, it must be dismissed in its entirety.

ORDER

IT IS ORDERED that Citation 6567956 be vacated, the proposed penalty is ***DENIED,*** and this case is ***DISMISSED.***

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

Distribution: (certified mail)

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Walter Lee Meech, President, C & E Concrete, P.O. Box 2547, Milan, New Mexico. 87021

/DM

[4] Since no violation occurred, S&S is no longer an issue.

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November 29, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ROBERT JACKSON, Applicant v. LAFARGE NORTH AMERICA, INC., Respondent	: : : : : : : : : : :	TEMPORARY REINSTATEMENT PROCEEDING Docket No. CENT 2013-74-DM MSHA No. SE-MD-12-19 Courtney Ridge Plant Mine I.D. 23-02239

ORDER GRANTING THE PARTIES' JOINT MOTION TO APPROVE SETTLEMENT ORDER OF TEMPORARY ECONOMIC REINSTATEMENT

This case is before me on an application for temporary reinstatement brought by the Secretary of Labor on behalf of Robert Jackson against Lafarge North America, Inc., ("Lafarge") 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"). Jackson was terminated from his position as a plant operator on or about September 24, 2012.

On November 28, 2012, the parties executed a Joint Motion to Approve Settlement and Order Temporary Reinstatement ("Joint Motion"). The parties agree that Jackson will be economically reinstated and that this reinstatement will begin retroactively as of November 9, 2012. The Joint Motion provides a detailed description of the terms of the economic reinstatement and the rights and responsibilities of the parties, which are all incorporated into this order by reference. The Joint Motion provides, in part, that Jackson shall receive the rate of pay, including all pay increases, bonuses for which he would have otherwise been eligible, and all benefits at the rates he received immediately prior to his termination with any rate increases that may have occurred since his termination. Within five days of the parties' execution of the Joint Motion, Lafarge shall pay Jackson a lump sum equal to his normal rate of pay for 40 hours per week, less regular deductions and withholdings, for the period between November 9, 2012, and the date that the Joint Motion was executed. Lafarge will thereafter pay Jackson his normal rate of pay via direct deposit. Jackson will also accumulate any and all other benefits he is entitled to that other Lafarge employees receive.

I have considered the representations and documentation submitted in this case and I conclude that the Joint Motion is appropriate under section 105(c)(2) of the Mine Act. The Joint Motion is **GRANTED** and the proposed settlement of this temporary reinstatement proceeding is **APPROVED**. The parties are **ORDERED** to comply with all the terms and conditions set forth in the Joint Motion. The Secretary is **ORDERED** to complete her investigation of the

underlying discrimination complaint as soon as possible. The Secretary shall provide a report on the status of MSHA's investigation of the discrimination complaint to the undersigned judge by no later than **January 15, 2013**. If the parties settle the underlying discrimination case, counsel for the Secretary shall immediately notify my office. Counsel for the Secretary shall also immediately notify my office if the Secretary determines that Lafarge did not violate section 105(c) of the Mine Act. I retain jurisdiction over this temporary reinstatement proceeding.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 30, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. LAKE 2012-81-M A.C. No. 12-02442-268053
v.	:	
NORTHERN AGGREGATES, Respondent	:	Mine: Monon Quarry

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

Before: Judge Lesnick

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

The CLR has filed a motion to approve settlement. A reduction in the penalty from $1,500.00 to $100.00 is proposed. The CLR states that, given the record, the citation at issue did not warrant a special assessment. In support of this reduction, the CLR states that "[u]pon further review of the facts surrounding the cited condition [in Citation No. 6496560], Petitioner concedes that a regular assessment under [30 C.F.R.] § 100.3 is more appropriate." Specifically, the CLR notes the Respondent's assertion that "the worker cited was not a miner under the definition contained in 30 CFR 46.2(g), but a service worker employed by Scott's Landscape Management. This issue is not addressed in the citation or the inspector's notes[,] and the inspector is now deceased." In light of this information, the CLR requests that Citation No. 6496560 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and the severity from "fatal" to "permanently disabling;" and to delete the significant and substantial designation.

The CLR also requests that the citation be amended as to the standard that was violated, from 30 C.F.R. § 46.5(a), covering new miner training, to 30 C.F.R. § 46.11(b), which requires site-specific hazard awareness training to be provided to "any person who is not a miner."

I have considered the representations and documentation submitted in this case. Although the magnitude of the proposed reduction in penalty is large, I note that it is consistent with the Secretary's broad discretion in administering her Part 100 regulations. Section 100.5 of those regulations states in relevant part: "MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment." 30 C.F.R. § 100.5(a). Here, the Secretary reconsidered a determination that the cited conditions warranted a special assessment, which was consistent with the broad discretionary authority set forth in section 100.5(a).

I also find that the settlement motion proffered by the Secretary and agreed to by the Respondent is fully supported by the particular facts set forth in the motion. My authority to review settlement agreements filed by the Secretary and mine operators is found at section 110(k) of the Act, which provides in relevant part: "No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). The Commission has held that section 110(k) "directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives." *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981).

Although I am not bound by the Secretary's exercise of her discretion under the Part 100 regulations, *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678-679 (Apr. 1987), in the context of the instant settlement agreement, I find it appropriate to defer to the judgment of the parties in arriving at an agreement that is consistent with those regulations and the factual bases for the change in the assessment formula used by the Secretary in proposing the penalties set forth in her motion. Particularly in light of the facts provided by the Secretary, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act and "consistent with the Mine Act's objectives." *Knox County*, 3 FMSHRC at 2479.

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

It is **ORDERED** that Citation No. 6496560 be **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and the severity from "fatal" to "permanently disabling;" to delete the significant and substantial designation; and to identify 30 C.F.R. § 46.11(b) as having been violated, rather than 30 C.F.R. § 46.5(a) as set forth in the citation.

It is further **ORDERED** that the operator pay a penalty of $100.00 within thirty days of this order.[1]

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

Distribution:

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Dan L. Venier, Conference and Litigation Representative, U.S. Department of Labor, MSHA, 515 West First Street, Duluth, MN 55802

/tas

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

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

November 9, 2012

BIG RIDGE, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2012-453-R
v.	:	Citation No. 8431667; 03/06/2012
	:	
SECRETARY OF LABOR	:	Docket No. LAKE 2012-454-R
MINE SAFETY AND HEALTH	:	Citation No. 8431668; 03/06/2012
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. LAKE 2012-455-R
	:	Citation No. 8431669; 03/06/2012
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2012-263
Petitioner	:	A.C. No. 11-03054-273420-03
	:	
v.	:	Docket No. LAKE 2012-262
	:	A.C. No. 11-03054-273420-02
BIG RIDGE, INC.,	:	
Respondent	:	Docket No. LAKE 2012-174
	:	A.C. No. 11-03054-270696-02
	:	
	:	Docket No. LAKE 2012-175
	:	A.C. No. 11-03054-270696-03
	:	
	:	Docket No. LAKE 2011-349
	:	A.C. No. 11-03054-242336-02
	:	
	:	Mine: Willow Lake Portal

ORDER DENYING RESPONDENT'S MOTION TO COMPEL

These cases are before me upon three Notices of Contest and related Petitions for Assessment of Civil Penalties, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Respondent filed a Motion to Compel Discovery and a Motion for

Extension of Time to File Prehearing Reports.[1] In its Motion to Compel Discovery, Respondent asks that the Secretary be required to produce, where applicable, all Special Assessment Review (SAR) forms for the citations and orders at issue in these matters.[2] Absent such production, Respondent asks that the Secretary's request for specially-assessed penalties be stricken.

During discovery, the Secretary provided Respondent with a privilege log, withholding, inter alia, the SAR forms and claiming deliberative process privilege. The sufficiency of that privilege log is not at issue. In response to the motion to compel, the Secretary filed an Opposition arguing that the SAR forms are not relevant discoverable matter, are fully protected by the deliberative process privilege, and are not essential to a fair determination in this proceeding.

The Commission has not decided whether SAR forms are discoverable. This is likely because discovery issues are not subject to interlocutory review under Commission precedent and may become moot after a case is settled or litigated. *See Asarco*, *Inc*., 14 FMSHRC 1323, 1328 (Aug. 1992) ("[U]nless there is a 'manifest abuse of discretion' on the part of a judge, discovery orders are not ordinarily subject to interlocutory appellate review").

Commission judges are split on whether the SAR forms are discoverable. *Pocahontas Coal Co., LLC, 34* FMSHRC 903 (Apr. 2012) (ALJ Feldman) (motion to compel SAR forms denied because Secretary's special assessment criteria is not relevant given *de novo* authority of Commission to assess civil penalties, however, personal observations of issuing inspector which may have served as basis for special assessment is discoverable through depositions); *Hidden Splendor Resources, Inc*., 33 FMSHRC 2345 (Sept. 2011) (ALJ Rae) (motion to compel denied as SAR forms protected from disclosure by work product and deliberative process privileges and irrelevant to *de novo* determination of assessed penalty); *Humphrey Enterprises, Inc*., 2011 WL 7463292 (Dec. 2010) (ALJ Paez) (motion to compel denied as entire form protected by deliberative process and not essential to a fair determination); *but see Consolidation Coal Co., 34* FMSHRC ___, slip op., No. WEVA 2011-940 (July 6, 2012) (ALJ Barber) (motion to compel granted since court must explain significant departures from penalties proposed; operator has right to know why special assessments were made; forms explain inspector's recommendation by reciting facts and whether supervisor, assistant district manager and district manager agree with inspector's factual assessment; and forms contain facts already known, with no meaningful

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[1] Respondent's Motion for Extension of Time to File Prehearing Reports was granted and this matter was consolidated with additional dockets. An Amended Notice of Hearing, Order to Consolidate, and Order to File Pre-Hearing Report issued on October 26, 20102, scheduling the above-captioned dockets to be heard on December 17 and 18, 2012 in Benton, Illinois.

[2] During an October 12, 2012 conference call, Respondent expanded its original request to encompass all SAR forms at issue in the above-captioned consolidated dockets. I ordered that the SAR forms at issue in Respondent's original motion be provided for *in camera* inspection. The Secretary submitted those forms for my *in camera* review.

discussion of pros and cons for special assessments, and no exegesis of policy reasons behind Secretary's choices); *Big Ridge Inc*., Unpublished Order, No. LAKE 2011-716 (Mar. 16, 2012**)** (ALJ Zielinski) (motion to compel SAR forms granted as to all factual portion of forms in boxes 1-10, including inspector's recommendation for special assessment in box 10, but allowing Secretary to redact comments of reviewing supervisor, assistant district manager, and district manager in boxes 11-13, respectively); *American Coal Company*, 33 FMSHRC 2352 (Sept. 2011) (ALJ Melick) (motion to compel denied as to SAR forms; deliberative process privilege found to be inapplicable because positions taken in the documents were adopted as the agency's position regarding the "charging documents" at issue; forms contain inspector's factual basis for recommendations, and "upon the Secretary's acceptance by issuing citations, the inspector's recommendations and those of his supervisors become the agency's position and any claim to deliberative process is thereby lost," *citing CDK Contracting Co.*, 25 FMSHRC 88, 90 (Feb. 2003) (ALJ Manning) (motion to compel SAR forms granted, even though forms were found irrelevant and inadmissible for penalty assessment purposes, and not protected by deliberative process privilege on which Secretary had taken inconsistent position in past cases, because forms had marginal relevance to high negligence and unwarrantable failure determinations); *Aggregate Industries, West Central Region, Inc*., 25 FMSHRC 88, 89 (Feb. 2003) (ALJ Manning) (same).

Having reviewed my colleagues' various opinions and the sampling of SAR forms turned over by the Secretary *in camera*, I find myself guided by Judge Paez's well-reasoned and thoroughly researched decision in *Humphrey Enterprises, Inc., supra,* 2011 WL 7463292 (Dec. 2010) (ALJ Paez). I need not repeat that scholarly analysis here. In short, I conclude that boxes 10-13 of the SARs forms are protected by the deliberative process privilege because they contain the inspector's recommendation and his supervisor's, assistant district manager's, and district manager's review as to whether a violation is flagrant and/or warrants a special assessment during the pendency of an open case that may be settled or litigated. The documents are part of a pre-decisional process that leads to a final agency decision as to whether a violation should be deemed flagrant and/or be specially assessed. The SAR forms travel from a subordinate issuing inspector, who makes a factual or strategic advice-giving recommendation, through superior officials, who engage, at times rather perfunctorily, in the give-and-take of the deliberative process, and either agree or disagree with the recommendation for the same or independent reasons. This is the essence of the deliberative process, a well-established privilege, imbedded in American jurisprudence. *See generally Coastal States Gas Corp. v. Dep't of Energy*, 617 F. 2d 854, 866-870 (D.C. Cir. 1980).

Respondent cites *Coastal States* for the proposition that "even if the document is pre-decisional at the time it is prepared, it can lose that status if it is adopted formally or informally, as the agency position." R. Mot. at 6, *citing* 617 F.2d at 866. The Court, however, cited no authority for this dicta. Moreover, the Commission has rejected the conclusion that documents concerning completed matters automatically fall outside the privilege. *See In re: Contests of Respirable Dust Sample Alteration Citations (Dust Cases*), 14 FMSHRC 987, 994 (June 1992). Here, the litigation is not completed, and the Narrative Findings for a Special Assessment attached to the Petitions do not contain the same deliberative material that is set forth in boxes 10-13 of the SAR forms. That material reflects advisory opinions, recommendations, and

deliberations comprising the process by which MSHA's special assessment and/or flagrant decisions are formulated. *Cf. NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

Accordingly, I conclude that boxes 10-13 of the SAR forms are protected by the deliberative process privilege, a *qualified* privilege that is subject to the balancing test set forth in *Bright Coal Company*, 6 FMSHRC 2520 (Nov. 1984), governing the informant's privilege. *Dust Cases*, 14 FMSHRC at 994. In other words, if "disclosure is essential to the fair determination of a case, the privilege must yield." *Bright Coal Co.*, 6 FMSHRC at 2523 (*citing Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)). This analysis turns on the particular circumstances of each case, including whether the Secretary is in sole control of the information, the nature of the violation, possible defenses, and the impact of the information. *Dust Cases*, 14 FMSHRC at 988; *Bright Coal Co.*, 6 FMSHRC at 2526. The party seeking disclosure, Respondent here, has the burden of proving the facts necessary to establish that the information sought is essential to a fair determination of the case. *Bright Coal Co.*, 6 FMSHRC at 2526. Respondent has not met its burden as the Motion to Compel is silent on the appropriate analysis.

Concededly, boxes 1-9 of the SAR forms contain basic facts about the case. These boxes set forth the following: "MSHA District Office, Field Office, Mine ID/Contractor ID, Mine Name, Operator Name, Citation/Order Number, Citation/Order Issue Date, and Yes or No boxes to be checked in response to queries, "Accident Related Violation?" and "Operator Notified of Special Assessment?". Normally, Respondent is entitled to such factual information that does not expose an agency's decision making process and does not come within the ambit of the privilege. *Dust Cases*, *supra*, 14 FMSHRC at 993 (*citing Exxon v. Doe*, 585 F. Supp. 690, 698 (D.D.C. 1983)). Respondent already has this basic factual information, however, and it would be unduly burdensome and wasteful to require the Secretary to turn over this information after redacting boxes 1-9. Although the inspector's recommendation for special assessment in box 10 may, at times, contain a significant amount of factual information, that information directly relates to the task of determining and recommending whether a special assessment or flagrant assessment is warranted. Consequently, because this information guides the Secretary's deliberative decision-making process, it must be privileged as well. *Cf. Consolidation Coal*, 19 FMSHRC 1239, 1249-50 (July 1997) (determining that factual material was not privileged because it did not play a role in agency's decision-making process).

For the reasons set forth above, Respondent's Motion to Compel Discovery is **DENIED.** Respondent's request that the specially-assessed penalties be stricken is also **DENIED.**

/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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November 15, 2012

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
Petitioner,	:	Docket No. CENT 2010-1140-M
	:	A.C. No. 000227643
	:	
	:	Docket No. CENT 2011-818-M
	:	A.C. No. 000254335
	:	
v.	:	Docket No. CENT 2011-1115-M
	:	A.C. No. 000263002
	:	
	:	Docket No. CENT 2012-355-M
	:	A.C. No. 000277448
STANDARD GRAVEL COMPANY	:	
INC.,	:	Mine: SGC Green Land
Respondent.	:	Mine ID: 16-01497

DECISION AND ORDER
ON JOINT MOTION FOR PARTIAL SUMMARY DECISION

Procedural History/Chronology of Events

In 2008, Standard Gravel Company (SGC) purchased from Green Land Limited Partnership, a heavy equipment and fabrication shop (Green Land) that had been in business for over 50 years.

Having reviewed MSHA inspector's notes from inspections conducted at SGC mines, Ms. Maria Rich, MSHA's Denham Springs Field Office Supervisor, became aware of the Green Land facility owned by SGC. In late November 2009, she ordered MSHA inspector Gary Swan to go to the facility to determine if this off-site facility was a "mine" subject to MSHA jurisdiction. On December 1, 2009, Swan went to Green Land where he observed the work being performed; he spoke to employees and had a conversation with Green Land's Vice President, Spencer Green. He determined from the information he gathered that the activities at Green Land were directly related to SGC's mining operations. He then contacted Ms. Rich and provided her with his findings. Thereupon, Ms. Rich determined that the property was a mine and was subject to MSHA health and safety inspections and so informed Swan who proceeded to

inspect the facility and issued 17 citations. He also reviewed Green Land's records and found that SGC had submitted an MSHA Part 46 Training Plan evidencing that the shop employees working at Green Land had received MSHA new miner and annual refresher training.

During the inspection, Green called Rich objecting to MSHA exercising jurisdiction over the facility. He was informed at that time by Rich that the inspection served as notice of MSHA's jurisdiction over the facility as a mine.

On December 3, 2009, Green filed a Mine Legal Identity Report "under protest" for the Green Land facility. SGC also contested the 17 citations issued by Swan in December 2009. Thereafter, the facility was inspected by MSHA in June 2010, March 2011, June 2011 and November 2011. SGC raised the jurisdiction issue in response to the citations issued during each of the three inspections. On January 10, 2012, the Secretary agreed to vacate the citations issued in December 2009, but sent a letter to counsel for SGC accompanying the Notice to Vacate Citations stating that she maintained her position that Green Land fell under MSHA jurisdiction.

The parties agreed to submit the issue of jurisdiction to the court by and through motions for summary decision.

Summary Decision Standards

Commission Rule 67 sets forth the guidelines for granting summary decision:

> (b) A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows:
>
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. §2700.67(b).

The Commission "has long recognized that [ ] 'summary decision is an extraordinary procedure,' and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Hanson Aggregates New York, Inc.,*29 FMSHRC 4, 9 (Jan. 2007)(quoting *Energy West Mining Co.,* 16 FMSHRC 1414, 1419 (July 1994)). In reviewing the record on summary judgment, the court must evaluate the evidence in "the light most favorable to…the party opposing the motion." *Hanson Aggregates.* 29 FMSHRC at 9 (quoting *Poller v. Columbia Broad. Sys.,* 368 U.S. 464, 473 (1962)). Any inferences "drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motions.'" *Hanson Aggregates,* 29 FMSHRC at 9 (quoting *Unites States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962)).

The issues presented in this penalty proceeding are whether the Mine Safety and Health Administration (MSHA) has regulatory jurisdiction over the Standard Gravel Company's SGC Green Land facility and whether Standard Gravel Company was provided fair notice of MSHA jurisdiction to assess penalties against it. The parties have not provided any conflicting material facts which would prevent issuance of summary decision on these issues. Summary decision is appropriate in this case on the issues of jurisdiction and fair notice.

Uncontested Facts and Issues Raised

SGC owns and operates three sand and gravel mines in the state of Louisiana. In August 2008, SGC purchased a maintenance and fabrication shop ("Green Land" or "the facility") located in Franklinton, Louisiana situated two miles from the nearest SGC mine and forty miles from the farthest one. The work performed at Green Land includes structural repair (welding), equipment maintenance and servicing and major engine repair on mobile equipment. It also builds and repairs conveyors, pumps, dredges and the like and fabricates specialized equipment. The primary purpose of the shop is to service the mining equipment used at the SGC mines. In fact, SGC states that ninety-eight percent of the work done at Green Land is for their mines. The other two percent of the work done at the facility is for other customers.[1]

The thirteen citations at issue here were written by inspectors from MSHA during regular inspections done at Green Land between June 2010 and November 2011, pursuant to Section 104(a) of the Federal Mine Safety and Health Act ("the Act"), 30 U.S.C. §841(a), alleging violations of various mandatory standards. [2]

SGC contests MSHA's jurisdiction over the Green Land facility asserting that it is not a "coal or other mine" as defined by the Act and is therefore not under the jurisdiction of MSHA. Additionally, SGC alleges it was deprived of fair notice that MSHA considered Green Land to be a mine for the purposes of assessing fines.

---

[1] SGC alleges that Green Land is a "commercial maintenance" shop open for outside commercial business in addition to servicing its own mining equipment. The Secretary raises an objection to this allegation as being unsupported by documentary or other evidence. SGC has not, in fact, provided any supporting evidence for this assertion. However, I find that even assuming it is true; it is not a material fact and does not alter my decision.

[2] The citations at issue are contained in the captioned dockets which were consolidated upon joint request of the parties for adjudication on the issue of jurisdiction and hearing on the merits.

Analysis and Legal Conclusions

1. SGC Green Land is a "mine" subject to MSHA jurisdiction

The Secretary bases her position that Green Land is a "mine" subject to MSHA regulatory jurisdiction upon the plain language of the Mine Act, Commission law and the 1979 Interagency Agreement between MSHA and the Occupational Safety and Health Administration (OSHA).

SGC, in the alternative, asserts that neither the language of the Act nor case law interpreting the Act's definition of a "mine" apply to Green Land. The distinguishing factor here is that Green Land is an off-site commercial business open to servicing customers other than their own mining operations. It likens the stretching of the definition of a "mine" (to include structures and facilities "used in the preparation of coal" or "used in, or to be used in, or resulting from" extracting minerals) to include the Green Land facility, to including a sandwich shop that serves lunch to miners as a "mine." SGC further disagrees that the 1979 Interagency Agreement applies to commercial maintenance, repair and service shops, rather than to mining and milling operations.

Both parties have cited their authorities including the Act, the Interagency Agreement and numerous cases, stating their arguments for and against their application to the facts here in support of their positions as set forth above. I find it is not necessary to recite or discuss each of the cases cited herein. Only those relevant to my decision will be addressed.

The definition of a "mine" under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801, *et seq.* ("Mine Act" or "Act") Section 3(h)(1) is, in relevant part, as "[A[n area of land from which mineral are extracted …and, (C) lands, excavations,..structures, facilities, equipment, machines, tools, or other property …used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits…or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals…"

The statutory definition of a mine is "sweeping" and "expansive." *Marshall v. Stoudt's Ferry Preparation Co.,* 602 F.2d. 589, 591-92 (3rd Cir. 1979.) The term was intended to be given the "broadest possible interpretation" with conflicts to be resolved in favor of the inclusion of the facility within the coverage of the Act. *Id.* at 592.

SGC takes that position that regardless of the expansiveness of the definition, because the Green Land facility was not on SGC mining property and offered services not related to the mining industry, it cannot be included within even the broadest of sense of the term. It argues that never has such a facility been found to be under MSHA jurisdiction. It further asserts that if it is successful in garnering a larger percentage of non-mining related business, than it would be clear that the operation is not a mine. They assert that the "Secretary has suggested no limitation or 'limiting principle'" in MSHA's exercise of jurisdiction over off-site facilities. I find this

argument to be without merit. Turning their argument around, if the facility was located on SGC's mine property, there would be no doubt it was subject to MSHA jurisdiction. The repair and servicing of mining equipment and fabrication of parts are functions normally performed in daily mining operations at any facility.

SGC's assertion that the percentage of mining-related work performed by Green Land is irrelevant speaks directly to the functional analysis or preparation-versus-manufacturing test first applied by the Commission in *Sec'y of Labor (MSHA) v. Oliver M. Elam, Jr.,* 4 FMSHRC 5, 7 (1982). The relevant question is exactly what the activities of the facility are. While *Elam* involved a discussion of the term milling as opposed to manufacturing, it underscored the fact that the nature of the activity is the primary focus.

In the latter case of *Jim Walters Resources*, (JWR) 22 FMSHRC 21 (Jan. 2000) the Commission addressed the situation nearly identical to the instant one where MSHA asserted jurisdiction over a general machine shop and a central supply shop located off premises of the mine. The ALJ found the machine shop which repaired and serviced electrical and mechanical equipment used in the JWR mines was an integral part of the mining facility properly fell under MSHA's jurisdiction. In finding that the supply shop which housed safety glasses, hard hats, nails, conveyor belts etc., was not a mine, the Commission disagreed. The Commission first confirmed that the definition of a mine is given broad and sweeping interpretation. A mine is not limited to an area of land from which materials are extracted but also includes equipment, facilities and other property used in the extraction of minerals. *Harless Inc.,* 16 FMSHRC 683, 687 (Apr. 1994). It recognized that a storage garage shared by a mine and an asphalt company could be a mine where the equipment housed there "was used or was to be used in mining and that the cited conditions could affect miners in the garage." *W.J. Bakus Industries, Inc.,* 16 FMSHRC 704, 708 (Apr. 1994). In distinguishing the holding in *Elam,* the Commission focused on the fact that the basis of jurisdiction over the supply shop is the presence of equipment and facilities used in the extraction process. The Commission ultimately ruled that the ALJ erred in finding the function provided by the supply shop was one normally done by a vendor not exposed to the hazards of mining. Employees should not be differentiated because a mine operator has centralized supply room operations to four of its mines at a single off-site warehouse. Dangers to miners include improperly maintained equipment and supplies that are used in mining.

In a recent decision the Commission again emphasized that the proper focus in determining jurisdiction is the nature of the activity and its relationship to the end product – the functional analysis test. *Shamokin Filler Company,*____FMSHR _____(Penn. 2009-774 et. al.)(August 28, 2012).

Under the analysis applied by the Commission in these leading opinions, the function of Green Land was to keep coal production machines and equipment operating which is an integral part of extracting minerals- or mining. SGC admittedly uses Green Land as a centrally located facility servicing and repairing equipment and fabricating parts used at its mines. That a minuscule part of the work it performs is for the benefit of non-mining enterprises is immaterial

and does not detract from the finding that the function of the facility is to support SGC mining activities. SGC's self-serving statement that it desires to increase the percentage of business it does in the non-mining arena is also irrelevant. The function it performs at the present time is to service its mining operations. Additionally, the employees at Green Land are provided new miner and refresher training and travel to the mine sites when equipment in need of servicing cannot be brought to Green Land. This is further indication that SGC's argument is disingenuous and that it recognizes its employees are miners. As the Commission pointed out in *W.J. Bakus*, employees should not be differentiated because a mine operator has centralized operations to a single off-site warehouse. Dangers to miners include improperly maintained equipment and supplies that are used in mining.

The Secretary's interpretation of the definition of a mine is entitled to deference. *evron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984) Her application here is well within the ambit of reasonable interpretation of the term and in furtherance of the purpose of the Act.

With respect to the application of the Interagency Agreement, the same conclusion is reached that the Green Land facility is a mine. SGC asserts that Green Land was inspected by the Louisiana State Safety & Health Section of the Department of Labor in 1998. Reps. Ex. D. They, in turn, looked to the U.S. Occupational Health and Safety Administration's (OSHA) standards for guidance. SGC advances the argument that when OSHA was consulted in this case, had they been fully apprised of the full details, it may not have allowed MSHA to assume jurisdiction over the facility. In addition, the Interagency Agreement only applies to facilities engaged in both milling and processing at a single location. Here Green Land was not engaged in either activity.

SGC's first argument lacks merit. First, SGC makes a bald faced allegation that OSHA was not fully apprised of the facts and poses the hypothetical position that had it been, OSHA would not have relinquished jurisdiction to MSHA. SGC provides not evidence of either allegation. Furthermore, this argument ignores the fact that the OSH Act and the Interagency Agreement both provide that MSHA has primary jurisdiction over any facility that fits the definition of a "mine" where MSHA has promulgated regulations and standards that protect the occupational health and safety of the employees. Section 4(b)(1) of the OSH Act allows other federal agencies to preempt OSHA's jurisdiction. 29 U.S.C. §653. *See generally Secretary of Labor (MSHA) v. Westwood Energy Properties*, 11 FMSHRC 2408, 2411 (December 1989).

The language of the Interagency Agreement makes clear that the Congressional intent was to resolve doubts in favor of the inclusion of a facility within the coverage of the Mine Act rather than with OSHA. The Agreement requires MSHA to consult with OSHA at the local level only when conflicts in jurisdiction arise. For example, where OSHA has asserted jurisdiction, inspected the facility and issued violations, MSHA cannot unilaterally assert jurisdiction without consulting OSHA. *Westwood Energy Props.,* 11 FMSHRC 2408 (Dec. 1989). SGC cites only one inspection by the State of Louisiana in 1998 which used OSHA guidelines. There is no evidence that OSHA had conducted any inspections at Green Land or evidenced in any way that

OSHA considered the facility to be under its jurisdiction. In fact, SGC has admitted that OSHA has never inspected the facility. Sec. Ex. 1 page 16. Despite the fact that no conflict existed between OSHA and MSHA concerning the facility, the stipulated facts indicate that MSHA Assistant District Manager Gatewood spoke with OSHA's Federal Agency Programs Officer for Region VI Robin Bonville who informed MSHA of their concurrence with MSHA's assertion of jurisdiction. Sec. Ex. 4. Where a conflict does not exist, as here, MSHA need only exercise its authority over the facility by implementing its safety standards or regulations that cover the specific working conditions at issue. *Pennsylvania Elec. Co. V. FMSHRC,* 969 F.2d. 1501, 150405 (3d Cir. 1992).Clearly, MSHA has standards and regulations that cover the specific working conditions found at Green Land. Inspector Swan visited Green Land in December 2009. He had a conversation with Green as did Field Office Supervisor Rich in which Green was informed MSHA was asserting jurisdiction over Green Land. MSHA has exercised its authority over the facility by citing violations found at SGC Green Land pertaining to equipment, electrical and housekeeping violations of its promulgated safety and health standards and regulations. Sec. Ex. 3-B. Although MSHA need not have provided Green Land with advance notice that it intended to exercise jurisdiction over Green Land, Green Land had advance actual notice. That SGC was not pleased with that determination is immaterial.

SGC's second argument that the Interagency Agreement does not apply to Green Land because it is not engaged in milling and processing at a single location is also rejected. Based upon the same analysis as detailed above, the definition of a mine which includes but is not limited to lands, facilities, equipment, tools used in the process of extracting coal or other work usually done by the operator of a mine is to be interpreted broadly. Application of the functional analysis test leads to the conclusion that the servicing and repair of equipment and fabrication of parts used in the SGC mines is an integral part of the mining operation usually done by the mine operators. The employees performing the work are miners and have been trained in accordance with MSHA directives. SGC cannot elude inspection of its fabrication, equipment repair and service shop which are normally located on the mine site itself simply by moving it off- site. Such a result would frustrate the ability to protect the miners who work in the shop and service the equipment in contravention of the Act. This is particularly true in light of the fact that the facility is not inspected by OSHA leaving SGC completed unregulated.

2. SGC had Notice of MSHA jurisdiction to impose penalties

SGC had adequate notice of MSHA's assertion of jurisdiction for the purposes of being inspected. The Commission iterated in its *Calmat Co. of Az.* decision that an operator should know they are subject to MSHA's jurisdiction where "a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects the parties to conform" by "reviewing the regulations and other public statements issued by the agency." *Calmat* Co. *of Az*., 27 FMSRC 617 (Sept. 2005) citing *General Electric Co. v. EPA,* 53 F.3d 1324, 1329 (D.C. Cir. 1995). Here, SGC should have known the site and equipment would be subject to MSHA's jurisdiction because it was used at SGC's mines.

In addition to constructive notice, SGC had actual notice of MSHA's jurisdiction when Green was informed of MSHA's position by Swan and Rich in December 2009. In an abundance of a sense of fair play, the Secretary filed a motion to vacate the citations issued during the December 2009 inspection. Rich's phone call to Green precipitated his filing Legal Identity report "under protest" leaving no room for doubt that SGC was aware from that time forward, they would be required to conform to the mandatory health and safety regulations promulgated by MSHA. This actual notice to SGC is sufficient to fulfill the due process requirement for the purposes of imposing a penalty for the violations issued after December 2009. *See generally General Electric Company v. EPA, Supra*. That SGC had not been given the opportunity to contest MSHA's position before the Commission as it protests, does not constitute a lack of due process or fair notice. It is notice that the agency (MSHA) intends to exercise its authority that is the actual notice, not the operator's opportunity to challenge it before the court.

Conclusion and Order

I grant the Secretary's Motion for Summary Decision on the jurisdictional issue and conclude that MSHA has jurisdiction over the Green Land facility for regulatory and punitive purposes. I deny SGC's cross-motion for Summary Decision. I order the parties to confer for the purposes of settlement negotiations or setting of a hearing date in accordance with my previously issued Prehearing Order.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 21, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2012-473-M A.C. No. 04-02098-000278138
v.	:	
SUNOL AGGREGATES, Respondent.	:	Mine: Sunol Aggregates

ORDER ACCEPTING APPEARANCE
ORDER DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Lesnick

This case is before me upon a petition for assessment of the civil penalties filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

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

The CLR has filed a motion to approve settlement. The CLR states that Citation Nos. 8611198 and 8611201 have been vacated. The Secretary's discretion to vacate a citation or order is not subject to review. *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993).

The CLR also requests that Citation Nos. 8611199 and 8611200 be modified as to the operator to which they were issued. The citations were issued to Sunol Aggregates ("Sunol"). The CLR now wants them to be issued to Sunol's subsidiary/contractor, DeSilva Gates (JDX) ("DeSilva"). Specifically, the CLR requests that the citations "be modified to" DeSilva.

In its Answer to the petition, Sunol (not DeSilva) states that it "had recently acquired the property lease at the mine site, and was demolishing the existing aggregate plant to prepare for the construction of a new plant." Ans. at 1. According to Sunol, it hired DeSilva "to harvest raw material from the quarry pit and stockpile it for future production." *Id.*

The Mine Act confers enforcement authority upon the Secretary. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Section l04(a) of the Act delegates to the Secretary authority to issue citations for violations of the Act or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to the Act. The Commission, on the other hand, adjudicates disputes under the Mine Act. It has no authority to inspect mines, investigate violations, or issue citations. *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879 (June 1996). In keeping with this distinction between the respective roles of the Commission and the Secretary under the Mine Act, the Commission has concluded that its United States Administrative Law Judges are not authorized representatives of the Secretary and do not have authority to charge an operator with violations of section 104 of the Mine Act. *Mettiki Coal Corp.*, 13 FMSHRC 760, 764 (May 1991).

The CLR in essence requests that I issue Citation Nos. 8611199 and 8611200 to DeSilva, which under the well-settled Commission law cited above I lack the authority to do.

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

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

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November 27, 2012

BRIDGER COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2013-81-R
v.	:	Citation No. 8477831; 09/25/2012
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Bridger Underground Coal Mine
ADMINISTRATION, MSHA,	:	Mine ID 48-01646
Respondent	:	

ORDER ON MOTION FOR EXPEDITED PROCEEDING

Before the Court is Contestant Bridger Coal Company's Motion for Expedited Proceeding. The Secretary filed an opposition to the motion; Bridger then filed a reply, following which the Secretary filed a sur-reply. All submissions were considered. Upon consideration, the Court DENIES Bridger Coal's Motion but directs the parties to participate in a conference call on Wednesday, December 5, 2012, at a time to be determined, for the purpose of setting the matter for a hearing[1] to be conducted in late January or during February 2013.

Contestant, Bridger, simultaneously filed its Motion for Expedited Proceeding with its Notice of Contest in this matter. The controversy may be succinctly stated. In connection with an MSHA investigation of an accident at Bridger's mine, MSHA sought copies of miners' statements made to Bridger pertaining to that accident. Bridger initially refused to turn over the statements. However, when faced with the specter of the issuance of a section 104(b) Order, Bridger acceded to the demand for the statements. Bridger maintains that section 103(a) of the

[1] The parties are to email the Court at wmoran@fmshrc.gov, affirming availability for the call, and to suggest a time for the call. As noted herein, it may well be that the parties can stipulate to the pertinent facts and submit the issue for a legal determination and thereby obviate the need for a hearing.

Mine Act "does not require mine operators to give MSHA inspectors, on demand, copies of any internal company statements . . . ." [2]

In seeking expedited review, Bridger contends that, at least in the context of a citation and the threat of a order being issued for failing to provide the statements, MSHA's demand for those statements is an "unprecedented assertion of authority" which amounts to "extorting confidential company documents . . . by means of unlawful enforcement threats." Motion at 1. Without an expedited proceeding, Bridger maintains that MSHA will make other unlawful demands of that ilk. Thus, Bridger asserts that because "substantial legal issues [are] at stake" and because it maintains there is a "high probability" that MSHA will repeat its conduct, an expedited proceeding is justified. *Id.* at 4.

In its Opposition, the Secretary ticks off all the events which did *not* occur in connection with the Citation. Among these, it was not designated as "S&S," there was no prolonged abatement period, as it was terminated fifteen minutes after being issued, no high gravity was claimed, nor was high negligence asserted. The Secretary notes, correctly in the Court's view,[3] that the only genuine issue is whether MSHA exceeded its enforcement authority in demanding the statements.

While Bridger's Reply maintains that the matter is both extraordinary and unique, and as such warrants expedited review by the Court, the Secretary's Sur-Reply asserts that the absence of any continuing harm or hardship surrounding the citation in issue, is fatal to Contestant's effort for an expedited hearing.

The Court agrees that Bridger has failed to establish a sufficiently legitimate basis for expedited review. Instead, the heart of the matter here is whether, due to Bridger's claim of the work-product privilege, it is entitled to withhold from MSHA the statements from its miners taken by Bridger and pertaining to the accident at the mine. As noted earlier, this seems to be an issue that the parties could submit to the Court, following discovery, and then upon stipulated facts, for a legal determination.[4]

---

[2] At least at first blush, Bridger's simultaneous claim that it did not violate section 103(a) of the Act, seems to be contradicted by Bridger's own statement it initially refused to turn over the statements. Therefore, the critical issue is whether Bridger is correct that it was not obligated to turn over the statements. If it prevails on that contention, there was no violation. However, if it does not, it would seem that the violation would be established.

[3] The Court agrees there is no substance to back up Bridger's claim of a "very real possibility" that the problem will be repeated.

[4] Of course, if core facts are in dispute, a hearing would be necessary for such findings of fact to be made by the Court.

However, determining that an expedited proceeding is not warranted does not mean that the matter may be permitted to laze about, relegated to position itself in queue with all other matters being litigated, akin to taking a number at a deli. The Contestant has, after all, filed a notice of contest and it is entitled to a prompt, albeit not expedited, hearing. The Secretary has inferentially agreed that Bridger is so entitled to a prompt hearing, as cases it cited in arguing that expedited treatment is unjustified note that an expedited *basis* is warranted by virtue of "invoking the contest provisions of Section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), wherein an operator may elect to contest a citation without waiting for a civil penalty to be proposed." *See, Consolidation Coal*, 16 FMSHRC 495, 1994 WL 170800, at * 496, February 14, 1994 and *Energy West Mine Co.,*15 FMSHRC 2223, 1993 WL 560283 at * 2224, (1993). Secretary's Sur-Reply at 1.

Accordingly, for the foregoing reasons, Contestant Bridger's Motion is DENIED but the matter is still to be set for a prompt hearing per the instructions in this Order.

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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November 30, 2012

UNITED STEEL WORKERS, LOCAL 5114, ON BEHALF OF MINERS, Complainant,	:	COMPENSATION PROCEEDING Docket No. WEST 2012-466-CM
v.	:	
HECLA LIMITED, Respondent.	:	Mine: Lucky Friday Mine ID: 10-00088

ORDER DENYING HECLA'S MOTION FOR PARTIAL SUMMARY DECISION

This compensation proceeding is before me pursuant to section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S. C. § 821 (the "Mine Act" or "Act"), upon a complaint for compensation filed by the United Steel Workers, Local 5114 ("USW"), against Hecla Limited ("Hecla"). In its complaint, USW relies upon the fourth sentence of section 111 which provides that "[w]henever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay . . . for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated." 30 U.S.C. § 821. USW contends that Hecla violated this provision of section 111 because Hecla failed to comply with a section 103(k) order and that order has not been vacated or terminated by MSHA. Hecla opposes the complaint for compensation and also filed a motion for partial summary decision on the basis that the section 103(k) order at issue was terminated as a matter of law when MSHA issued a subsequent section 103(k) order. USW opposes the motion for partial summary decision.

I. BACKGROUND

On November 16, 2011, a rock burst occurred at Hecla's Lucky Friday Mine. Hecla reported the fall to MSHA. The same day, MSHA Inspector Scott Amos issued Order No. 8605614 pursuant to section 103(j) of the Act. The order, as originally issued, withdrew miners from specific underground areas of the mine. A large number of miners were idled as a result. MSHA modified the order to a 103(k) order and allowed essential personnel entry into certain portions of the withdrawn area to, among other things, assess damage, conduct surveys, and begin repairing the affected areas. Under this order, Hecla was required to establish survey points in the affected area of the mine and to monitor these points for pressure changes twice a day. The purpose of the monitoring was to detect movement or pressure building in the area being repaired so that miners performing repair work could be removed from the area if movement or a change in pressure were detected.

On December 14, 2011, another rock burst occurred in the area being repaired, injuring seven miners. USW alleges that, upon investigation, it was determined that the required survey was not conducted and pressure readings were not taken in the period immediately prior to the rock burst. On December 21, 2011, MSHA issued Citation No. 8565565 under section 104(a) of the Mine Act for violating the terms of the section 103(k) order. The citation alleges that Hecla allowed work to be performed in the affected area and that, on December 14, 2011, it "failed to take the last reading just prior to another violent rock burst that resulted in serious injuries to seven miners." Because the required survey was not conducted, MSHA determined that Hecla allowed work to be undertaken "in the face" of the 103(k) order.

MSHA also issued Order No. 8605622 under section 103(j) on December 14, 2011. This order covered the entire mine. The order was subsequently modified to a section 103(k) order and was subsequently modified several other times to allow certain repair work to be performed.

USW alleges that its miners at the Lucky Friday Mine have been idled as a result of the issuance of Order No. 8605614 and that Hecla worked in the face of that order. Accordingly, USW has requested compensation for affected employees from November 16, 2011, the date of issuance of Order No. 8605614, until such time as Order No. 8605614 is terminated, vacated, or complied with. Order Nos. 8605614 and 8605622 have not yet been terminated by MSHA.

II. PARTIES' ARGUMENTS

Hecla argues that it is entitled to partial summary decision as a matter of law. Specifically, Hecla asserts that Order No. 8605614 was terminated as a matter of law when MSHA issued Order No. 8605622. (Hecla Mot. 1). Beginning on December 14, 2011, Order No. 8605622 "prohibit[ed] all activity in all underground areas of the mine[.]" *Id*. at 2. As a result of the prohibitions set forth in Order No. 8605622, "it became impossible for Hecla to comply with the requirements of Order No. 8605614." *Id*. at 3. Accordingly, "Order No. 8605614 was effectively terminated by the issuance of Order No. 8605622." *Id*.

Hecla, via affidavits of its own personnel, avers that subsequent discussions with MSHA confirmed that "MSHA considered Order No 8605614 to be 'superseded' and 'terminated' by the issuance of Order No. 8605622." *Id*. at 4. While Hecla has requested that MSHA formally terminate Order No. 8605614, MSHA has not done so. *Id*. Hecla argues that MSHA's "refusal to terminate Order No. 8605614 is incorrect as a matter of law" given that "the issuance of Order No. 8605622 has made compliance with Order No. 8605614 impossible." *Id*. "The defense of impossibility has been found to be consistent with 'principles that are implicit in the . . . Act.' " *Id*. (citing *Sewell Coal Co. v. FMSHRC*, 686 F. 2d 1066, 1070 (4th Cir. 1982)). Moreover, the defense has been "recognized [by another Commission ALJ] in relation to the issuance of an order under § 103(k)[.]" *Id*. (citing *Jim Walters Resources*, 25 FMSHRC 435 (July 2003)(ALJ)).

Finally, Hecla argues that the "continued effectiveness of Order No. 8605622 meets the full intent and purposes of § 103(k)," i.e., "to ensure the safety of any person in a mine[,]" and to protect against all the hazards that Order No. 8605614 covered. *Id*. at 4-5.

USW argues that material facts remain in dispute and that partial summary decision on the issue of termination of Order No. 8605614 is not appropriate. (USW Opp. 2). USW contends that Order No. 8605614 has not been terminated and remains in effect. *Id*. at 3-4. The "underlying facts relating to [Hecla's] assertion of 'effective termination' are in dispute[.]" Specifically, USW has no knowledge regarding the alleged discussions between MSHA and mine management. *Id*. at 4. Further, there is no submission or statement from MSHA in the motion to verify what may have been discussed between MSHA and mine management. *Id*.

USW asserts that additional material facts were not addressed in Hecla's motion. *Id*. at 5. Specifically, the alleged violative conduct performed in the face of Order No. 8605614 (i.e., the conduct that is the subject of Citation No. 8565565) "occurred prior to MSHA's issuance of Order No. 8605622." *Id*. This alleged violative conduct forms the basis of USW's compensation claim. *Id*. Moreover, USW personnel have had conversations with MSHA in which MSHA personnel have stated that Order No. 8605614 has not been terminated and that Order No. 8605622 did not serve to terminate the prior order. *Id*. at 5-6; Affidavit of Rick Valerio ¶ 8.

USW states that the statutory compensation period extends from the time MSHA issued Order No. 8605614 until such time that the order is "complied with, vacated, or terminated." *Id*. at 7. In light of the fact that none of these "ending events" has occurred, the court should not curtail the compensation period "without the aid of a hearing on all of the facts and circumstances surrounding the citations and orders at issue." *Id*. at 6-8.

USW next argues that nothing in the plain language of the Act, or Commission case law, supports Hecla's argument that Order No. 8605614 was "effectively terminated" when Order No. 8605622 allegedly made compliance with the earlier order "impossible." *Id*. at 8. "[T]he impossibility defense . . . is applied on a case-by-case basis." *Id*. (citing *Sewall Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982)). "Given the broad remedial nature of the fourth sentence of section 111, application of the impossibility defense is not available in the instant case." *Id*. at 10. Unlike the first three sentences of section 111, the fourth sentence of section 111, which gives miners the right to compensation when the mine operator violates a 103(k) order, "allows for an expansive compensation period[.]" *Id*. at 9. The subject section "ensures that miners are not economically penalized due to the operator's reckless disregard of the Mine Act when the operator is found to be 'working in the face of an outstanding order.' " *Id*.

USW argues that, even if the impossibility defense can be raised, it is an affirmative defense, and Hecla has not met its burden of establishing the defense for purposes of summary decision. *Id*. at 10. The two affidavits that Hecla relies upon to demonstrate MSHA's purported agreement with Hecla's position are based on hearsay. *Id*. MSHA has not corroborated these affidavits and the court should not infer that MSHA has accepted Hecla's impossibility defense. *Id*. Moreover, the affidavit of miner's representative Rick Valerio indicates that MSHA had not terminated Order No. 8605614 and that Order No. 8605622 did not operate to "effectively terminate" or supersede Order No. 8605614. *Id*. at 11. Procedurally it makes more sense for the court to first consider the legitimacy of the underlying citations and orders that were issued following the rock bursts. *Id*. at 2. The issue presented in Hecla's motion "should not be resolved until MSHA presents evidence addressing whether 103(k) Order No. 8605614 was

'effectively terminated' on December 14, 2011, by the issuance of a second 103(k) Order . . . due to impossibility of compliance." *Id*. at 11.

III. DISCUSSION

Commission Procedural Rule 67 sets forth the grounds for granting summary decision as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission has long recognized that "summary decision is an extraordinary procedure."' *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The Commission has also analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *See Also Energy West Mining Co.*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Cartrett*, 477 U.S. 317,237 (1986)).[1]

When the Commission reviews a summary decision under Comm. P. R. 67, it looks " 'at the record on summary judgment in the light most favorable to . . . the party opposing the motion,' and that 'the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.' " *Hanson Aggregates New York Inc.*, 29 FMSHRC at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

I find that Hecla is not entitled to partial summary decision under Comm. P. R. 67 because there are genuine issues concerning the facts in this case. The record is simply not complete enough for me to grant Hecla's motion for partial summary decision. I have broken Hecla's arguments down into three sections: Hecla's impossibility defense, effective termination, and duplication.

Concerning Hecla's impossibility defense, one of the cases that Hecla depends upon as justification for its defense, *Jim Walter Resources*, resulted in the judge's denial of the operator's

[1] Federal Rule of Civil Procedure 56(c)(A) states, in pertinent part, that a motion for summary judgment should be granted if "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" show that there is no issue of material fact and the movant is entitled to summary decision as a matter of law. Fed. R. Civ. P. 5(c)(A).

motion for summary decision. *Jim Walter Resources*, 25 FMSHRC 435, 443 (July 2003) (ALJ Barbour). The judge acknowledged that "for me to make these determinations, the record must be complete." *Id*. at 443. Although factually distinct from the present case, the impossibility defense in *Jim Walter Resources* required numerous underlying factual determinations, just as the present case does. This fact-intensive quality common to the impossibility defense is the very reason that "case-by-case adjudication" is the appropriate approach for dealing with the impossibility defense. *Sewell Coal Co.*, 686 F.2d 1066, 1070 (4th Cir. 1984). Unless the necessary facts are fully stipulated to, assessing the merits of an impossibility defense upon summary decision is difficult.

If the only reason that Hecla could not comply with Order No. 8605614 was because MSHA ordered it not to do so through the issuance of Order No. 8695622, then MSHA's position on this issue is certainly a material fact.[2] The parties acknowledge the importance of this material fact by focusing their efforts on proving MSHA's position on this issue through their affidavits, but these affidavits simply offer conflicting accounts of discussions with MSHA officials. Construed most favorably to the non-moving party, the fact that MSHA did not terminate Order No. 8605614 and the existence of contradictory affidavits make it possible that Order No. 8605614 was not terminated and was not impossible to comply with. At the very least, there is an issue of material fact. In short, the record does not contain the factual foundation necessary to analyze the legal questions raised by Hecla with regard to their impossibility defense.

Hecla also argues that the issuance of Order No. 8695622 "effectively terminated" Order No. 8605614. USW, however, disputes this assertion, as well as Hecla's main supporting claim that MSHA officials told Hecla that Order No. 8695622 effectively terminated Order No. 8605614. The parties present conflicting affidavits concerning the issue of effective termination, all of which rely solely on hearsay to show that MSHA officials agree with their respective positions. Neither party, however, presents any direct evidence concerning the topic of effective termination. In a summary decision, I cannot rule upon an issue when the only information before me is conflicting second-hand interpretations of material fact.

Hecla's argument that continued compliance with Order No. 8695622 renders the requirements of Order No, 8605614 moot also fails. Relying on *Western Fuels*, Hecla essentially argues that Order Nos. 8695622 and 8605614 are duplicative. *Western Fuels*, however, does not relate to the termination of an order by a subsequent order, but rather deals with duplicative, over-lapping safety standards. *Western Fuels-Utah, Inc.*, 19 FMSHRC at 1004. Considering the record before me, I cannot grant Hecla's Motion for Partial Summary Decision based upon the argument that Order No. 8695622 renders the requirements of Order No. 8605614 moot or that the two orders are duplicative.

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[2] Order Nos. 8605614 and 8695622 are currently before me in contest cases brought by Hecla, WEST 2012-353-RM and WEST 2012-354-RM. Citation No. 8565565 is before me in WEST 2012-355-RM. The Secretary and Hecla are currently conducting discovery in these cases. The Secretary has not yet proposed a penalty for Citation No. 8565565, but she should be doing so in the near future.

As far as I can determine, this is a case of first impression seeking an interpretation of the fourth sentence of section 111 of the Mine Act under these circumstances. Based upon the facts before me, I cannot rule that Order No. 8605614 was terminated as a matter of law on December 14, 2011, at the time that Order No. 8695622 was issued. In reaching this conclusion, I am not denying Hecla's position on the merits; I am merely holding that Hecla is not entitled to summary decision on the issues raised because too many genuine issues of fact have not been resolved.

IV. ORDER

Accordingly, Hecla's Partial Motion for Summary Decision is **DENIED** on the basis that there are genuine issues of material fact.

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

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