

November 2013

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## ADMINISTRATIVE LAW JUDGE ORDERS

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Review was granted in the following cases during the month of November 2013:

Secretary of Labor, MSHA v. Big Ridge, Inc., Docket Nos. LAKE 2012-475. (Judge McCarthy, September 25, 2013)

Secretary of Labor, MSHA v. Maxxim Rebuild Company, LLC, Docket No. KENT 2013-566. (Judge Miller, October 23, 2013)

No cases were filed in which Review was denied during the month of November 2013.



## **COMMISSION DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

November 20, 2013

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

v.

REVELATION ENERGY, LLC

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Docket No. KENT 2011-71-R

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

**DECISION**

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). At issue is whether a Commission Administrative Law Judge correctly determined that a two-ton rock leaving a mine after a blast and landing in a residential yard, with no injuries, constitutes an “accident” for purposes of an order issued pursuant to section 103(k) of the Mine Act, 30 U.S.C. § 813(k).<sup>1</sup> For the reasons that follow, we conclude that the definition of “accident” set forth in section 3(k) of the Mine Act, 30 U.S.C.

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<sup>1</sup> Section 103(k) of the Mine Act provides:

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, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

§ 802(k),<sup>2</sup> applies to usage of the term in section 103(k) of the Act, and that the term “accident” in section 3(k) includes events that are similar in nature to, or have a similar potential for injury or death as, the events specifically listed in section 3(k). Finally, we conclude that the subject blasting event constitutes an accident within the meaning of sections 3(k) and 103(k). Accordingly, we affirm in result the Judge’s determination.

## I.

### **Factual and Procedural Background**

Revelation Energy, LLC, operates the S-1 Hunts BR Mine, a surface coal mine in Pike County, Kentucky. On October 7, 2010, during blasting operations, a two-ton rock, which was about six feet in diameter, was blasted off the mine property. The rock rolled down a hill through a residential yard and came to rest in a creek near a roadway below the owner’s home. Nobody was injured.

On October 8, 2010, an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Order No. 8247763 pursuant to section 103(k) of the Mine Act, requiring Revelation to obtain MSHA’s approval before undertaking further activities or engaging in blasting operations.<sup>3</sup> Later that day, the order was modified to permit implementation of the operator’s plan of action. On October 20, 2010, MSHA terminated the

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<sup>2</sup> Section 3 of the Mine Act provides in part:

For the purpose of this chapter, the term –

(k) “accident” includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person.

30 U.S.C. § 802(k).

<sup>3</sup> The order states in part:

A non injury blasting incident occurred at this surface at approximately 6:30 PM resulting in a rock about 6 feet in diameter and weighing approximately 2 tons leaving mine property. . . .

This 103(k) order is issued to protect the safety of all persons on mine site and off mine site. The mine operator shall obtain prior approval from an authorized representative of the Secretary for all actions to investigate and restore operations to normal. . . .

RE Mot. for Sum. Dec., Ex. 1.

order after Revelation revised its ground control plan to include additional blasting precautions to prevent similar occurrences. S. Br. at 2.

Revelation subsequently contested the order and filed a motion for summary decision before the Administrative Law Judge asserting that the order was invalid because the blasting event was not an “accident” within the meaning of section 103(k) of the Mine Act. The operator contended that the incident did not result in any injuries and was not one of the events listed in the definition of “accident” set forth in either section 3(k) of the Mine Act or in 30 C.F.R. § 50.2(h).<sup>4</sup> The Secretary of Labor opposed the motion, arguing that the incident constituted an accident because it was similar in nature or presented a similar potential for injury as the types of

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<sup>4</sup> 30 C.F.R. § 50.2(h) provides:

*Accident* means:

- (1) A death of an individual at a mine;
- (2) An injury to an individual at a mine which has a reasonable potential to cause death;
- (3) An entrapment of an individual for more than 30 minutes or which has reasonable potential to cause death;
- (4) An unplanned inundation of a mine by a liquid or gas;
- (5) An unplanned ignition or explosion of gas or dust;
- (6) In underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery;
- (7) An unplanned ignition or explosion of a blasting agent or an explosive;
- (8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;
- (9) A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour;
- (10) An unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or, failure of an impoundment, refuse pile, or culm bank;
- (11) Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes; and
- (12) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.

events enumerated in section 3(k) of the Mine Act, which, he contends, defines “accident” for purposes of section 103(k).

On June 30, 2011, the Judge issued a decision concluding that the blasting event was an accident.<sup>5</sup> 33 FMSHRC 1555, 1557-60 (June 2011) (ALJ). Relying on the common dictionary definition of “accident,” the Judge concluded that an accident is an “unexpected and undesirable” event, and that the blasting event was clearly unexpected and undesirable. *Id.* at 1559. The Judge stated that the Secretary need not prove that the event is similar in nature or has a similar potential to cause death or injury as the enumerated items listed in section 3(k). *Id.* at 1557 n.3, 33 FMSHRC at 1562.

The Commission granted Revelation’s petition for discretionary review.

## II.

### Disposition

On review, Revelation argues that the blasting event did not constitute an accident and that, on the basis of MSHA’s Program Policy Manual,<sup>6</sup> the Secretary should be limited by his definition of the term set forth in 30 C.F.R. § 50.2(h). The operator also asserts that the statute is unconstitutionally vague and that the Secretary’s interpretation violates its due process rights. We disagree.

This case turns on the meaning of the word “accident” as used in section 103(k) of the Mine Act. As discussed below, and applying a “*Chevron*” analysis, we conclude that the plain meaning of “accident” in section 103(k) refers to the definition of “accident” in section 3(k) of the Act, that the plain meaning of “accident” in section 3(k) includes more than the specific events enumerated in section 3(k), and that the scope of section 3(k)’s definition of “accident” is ambiguous. We accord deference to the Secretary’s reasonable interpretation of “accident” as including events that are similar in nature to, or have a similar potential for injury or death as, the events specifically listed in section 3(k).

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<sup>5</sup> On January 21, 2011, the Judge had issued an order holding that the blasting event was an “accident” within the meaning of section 103(k) and denying Revelation’s motion for summary decision. *See* 33 FMSHRC 1561, 1562 (June 2011) (ALJ). Based on the Judge’s determination, the Secretary subsequently filed a motion to dismiss the operator’s notice of contest. Revelation opposed the motion and filed a renewed motion for summary decision. The Judge’s June 30, 2011, decision granted the Secretary’s motion to dismiss and denied Revelation’s renewed motion for summary decision.

<sup>6</sup> Under the section regarding “Mine Accident and Rescue, Recovery and Preservation of Evidence,” the PPM states that “the term ‘accident’ is defined in 30 C.F.R. part 50.2(h).” I MSHA, U.S. Dep’t of Labor, Program Policy Manual, Sec. 103, at 17 (Jan. 2010).

Section 103(k) of the Mine Act empowers an authorized representative of the Secretary to issue such orders as he deems appropriate to insure the safety of any person in a mine in the event of an “accident” at the mine. 30 U.S.C. § 813(k). Section 3(k) of the Mine Act, which sets forth definitions “[f]or the purpose of this chapter,” provides that “accident includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person.” 30 U.S.C. § 802(k).

In considering the meaning of the Mine Act, we must “give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). If however, the statute is ambiguous or silent on a point in question, a second inquiry is required to determine whether an agency’s interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. 843-44; *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 n.2 (Apr. 1996). Deference is accorded to “an agency’s interpretation of the statute [that] it is charged with administering when that interpretation is reasonable.” *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency’s interpretation of the statute is entitled to affirmance, as long as that interpretation is one of the permissible interpretations that the agency could have selected. *Joy Technologies, Inc. v. Sec’y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) (citing *Chevron*, 467 U.S. at 843); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

As the Eighth Circuit recently held in a similar case, the “plain text of section 3(k) suggests that the term ‘accident’ is not limited to the enumerated items contained in the definition.” *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 513 (8th Cir. 2012). The court reasoned that the definition uses the word “includes,” which is usually a term of enlargement, and not of limitation. *Id.* (citing *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008) (citation omitted)). “When a statute uses the word ‘includes’ rather than ‘means’ in defining a term, it does not imply that items not listed fall outside the definition.” *Id.* (quoting *United States v. Whiting*, 165 F.3d 631, 633 (8th Cir. 1999)); *see Burgess*, 553 U.S. at 130; *see also American Coal Co.*, 35 FMSHRC 380, 386 (Feb. 2013) (quoting *Pattison*, 688 F.3d at 513). The court noted that all other definitions in the Act, with one exception, use “means” rather than “includes,” and that the differentiated use of “means” and “includes” by Congress implied that it was mindful of the distinct connotations of the two words when it drafted the definition section. *Id.* (citing *Sosa v. Alvarez–Machain*, 542 U.S. 692, 711 n.9 (2004)).

Nonetheless, “[w]hile the text indicates that the term ‘accident’ extends beyond the definition’s enumerated items, ambiguity remains regarding just how far the definition sweeps.” *Pattison*, 688 F.3d at 513. In *Pattison*, as in this case, the Secretary argued that “accident” includes events that are similar in nature or have a similar potential to cause death or injury as the listed items. *Id.* The court held that under *Chevron*, the Secretary’s interpretation was reasonable. *Id.* The court reasoned that because the Act is remedial in nature, its terms should be construed broadly. *Id.* (citing *Sec’y of Labor, o/b/o Bushnell v. Cannelton Indus. Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989)). It explained that the Act’s purpose in protecting miners

would be undermined if the Secretary lacked the power to take remedial measures simply because all miners fortuitously escaped injury or death in a dangerous mine incident. *Id.*

Consistent with the court's reasoning in *Pattison*, we conclude that the scope of the term "accident" is ambiguous, and that the Secretary's interpretation is permissible and entitled to deference under *Chevron*.

First, the Secretary's interpretation is consistent with the language of the Act. The use of the term "includes" in section 3(k) is a term of enlargement that reasonably includes events that, while not listed, are similar in nature to, or have a similar potential to cause death or injury as, the listed items.

Second, the Secretary's interpretation is consistent with the legislative purpose of the Act. Section 103(k) constitutes a broad grant of discretionary authority to the Secretary to protect miners in the event of a mine accident. *See Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983) ("Section 103(k) gives MSHA plenary power to make *post-accident* orders for the protection and safety of all persons.") (emphasis in original). The Senate Report states:

The unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure [sic] the safety of any person. The grant of authority . . . in Section [103(k)] to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders. . . .

S. Rep. No. 181, at 29 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978).

Reading section 103(k) to give the Secretary authority to protect miners and other persons in the event of an incident that is similar in nature to, or presents a similar potential for injury or death as, the events specifically listed in section 3(k) is consistent with Congress' intent to give the Secretary broad authority to protect persons in the event of an accident. *See also American Coal Co.*, 35 FMSHRC at 386 (stating that the determination of "accident" should be read broadly to carry out Congress' objective).

We do not accept the operator's argument that the Secretary, in issuing section 103(k) orders, should be limited by his definition of "accident" set forth in section 50.2(h). The definition of "accident" in section 50.2(h) is narrower in scope than the definition of "accident" in section 3(k) of the Act and defines what constitutes an accident for reporting purposes. *Aluminum Co. of Am.*, 15 FMSHRC 1821, 1826 (Sept. 1993) (stating that section 50.2(h)'s definition of "accident" applies for "reporting purposes"); *Energy West Mining Co. v. FMSHRC*,

40 F.3d 457, 459 (D.C. Cir. 1994) (providing that Part 50 “govern[s] a mine operator’s duty to report accidents, occupational injuries and occupational illnesses.”). Section 50.2 plainly limits its application to terms “used in this part,” that is, Part 50 of MSHA’s regulations (the reporting regulations). 30 C.F.R. § 50.2. In contrast, the definition of “accident” in section 3(k) applies to the entire Mine Act, as section 3 of the Mine Act specifically states that the definition of the term “accident” set forth in paragraph (k) applies “[f]or the purpose of this Chapter . . . .” 30 U.S.C. § 802. Thus, section 3(k) is the applicable provision for purposes of determining what constitutes an “accident” under section 103(k).<sup>7</sup>

We note further that the Secretary’s position has been consistent over time. The Secretary advanced the same position before the Judge as he did before the Commission, as well as in *Pattison*. As the court noted in *Pattison*, the Commission has expressed agreement with the Secretary’s longstanding position. 688 F.3d at 513 (citing *Aluminum Co.*, 15 FMSHRC at 1825–26).

We also find unavailing the operator’s remaining argument that the Secretary’s interpretation of section 3(k) violates its due process rights. Courts have found statutes to satisfy due process as long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the standards are meant to address and the objectives the standards are meant to achieve, would have fair warning of what the standards require. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-10 (1972); *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997). Section 3(k) provides illustrative examples of what constitutes an “accident,” and, as the Eighth Circuit stated in *Pattison*, the plain language of the Act, utilizing the term “includes,” indicates that these examples are non-exhaustive. Thus, a reasonable person familiar with the language and objectives of section 3(k) would have fair warning that any event that is similar to what is listed in the statute, or which has the potential to cause injury or death, may constitute a basis for a section 103(k) order.

Applying the Secretary’s interpretation of section 3(k) to the instant case, we easily conclude that the blasting event constitutes an “accident.” A blast that unexpectedly causes a two-ton rock that is six feet in diameter to enter a nearby residential yard outside of the mine site clearly has a similar potential to cause injury or death as the events listed in section 3(k). Furthermore, the fact that section 103(k) requires an accident to occur “in a coal or other mine” does not preclude the Secretary’s application of section 103(k) to the subject blasting event. Although a separate portion of the accident, i.e., the rock entering the yard, occurred outside of

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<sup>7</sup> Nor do we find compelling the operator’s argument that the PPM cites Part 50 for the definition of “accident” and that the Secretary’s interpretation is inconsistent with the PPM. As the Commission has long recognized, the PPM does not prescribe rules of law and is not binding on the Secretary or the Commission. *D.H. Blattner & Sons Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996) (citing *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986)), *aff’d*, 152 F.3d 1102 (9th Cir. 1998).

the mine, the launching of the rock took place inside of the mine, which amounts to an “accident” occurring “in a . . . mine.”

### III.

#### Conclusion

For the reasons set forth above, we affirm in result the Judge’s denial of Revelation’s renewed motion for summary decision and his granting of the Secretary’s motion to dismiss the notice of contest.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

November 22, 2013

|                                |   |                            |
|--------------------------------|---|----------------------------|
| SECRETARY OF LABOR,            | : |                            |
| MINE SAFETY AND HEALTH         | : |                            |
| ADMINISTRATION (MSHA)          | : | Docket Nos. KENT 2011-1153 |
|                                | : | KENT 2011-1154             |
| v.                             | : | KENT 2011-1530             |
|                                | : |                            |
| LONE MOUNTAIN PROCESSING, INC. | : |                            |

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

**DECISION**

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). These cases come to the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit. *Lone Mountain Processing, Inc. v. Sec’y of Labor*, 709 F.3d 1161 (D.C. Cir. 2013). The Court directed the Commission to review the Commission’s denial of three motions filed by Lone Mountain Processing, Inc. to reopen the penalty assessment cases, in light of prior Commission decisions that an operator’s contest of an underlying citation demonstrates an intent to contest the penalty. *Id.* at 1163. Consistent with the Court’s mandate and our precedent, we again deny all three motions to reopen.

**I.**

**Factual Background**

In June 2010, the Mine Safety and Health Administration (“MSHA”) issued 30 citations to Lone Mountain for a range of violations in connection with a fatality that had occurred at the Clover Fork No. 1 Mine. In July 2010, Lone Mountain filed timely pre-penalty notices of contest with the Commission, challenging 11 of the 30 citations.

On August 24, 2010, Lone Mountain received a proposed penalty assessment in the amount of \$21,840. Because Lone Mountain did not contest the proposed assessment, the assessment became a final order of the Commission on September 23, 2010, pursuant to section 105(a) of the Act. 30 U.S.C. § 815(a). In December 2010, MSHA mailed a notice of delinquency for nonpayment of the final penalty amount.

On January 18, 2011, Lone Mountain received a second proposed assessment in the amount of \$212,054. Because Lone Mountain did not contest the second proposed assessment, it became a final order on February 17, 2011. In April 2011, MSHA mailed Lone Mountain a notice of delinquency for nonpayment of this second final penalty amount.

On June 6, 2011, Lone Mountain filed two motions requesting that the two final orders be reopened. Lone Mountain's motions included an affidavit from its safety manager, asserting that on two separate occasions in August 2010 and January 2011, the proposed assessments were misplaced by Lone Mountain in the process of forwarding them from one of its offices to another. The motions did not explain, or even acknowledge, that the same failure had been repeated five months apart, or that it took the operator nine months and four months, respectively, to file these motions to reopen after the assessments had become final orders of the Commission. The motions also failed to address the fact that MSHA had mailed the operator delinquency notices in December 2010 (a month before the second proposed assessment was delivered) and April 2011. In his affidavit, Lone Mountain's safety manager assured the Commission that in order to avoid a repeat of this error, he would henceforth travel to the other office himself to collect the proposed assessments. Aff. at 3.

The Secretary opposed the motions to reopen and argued, among other things, that the fatality and the large penalty amounts should have alerted the operator to the consequences of its inadequate internal procedures. The Secretary questioned whether the operator was acting in good faith, in light of its delinquency record and its repeated disregard of proposed penalty assessments.

In September 2011, while the first two motions were pending before the Commission, Lone Mountain filed a third motion to reopen another proposed assessment. This proposed assessment had been delivered in July 2011, a month after the previous motions to reopen were filed. Unlike the prior motions, Lone Mountain had not timely contested the underlying citations resulting in this third assessment.<sup>1</sup> Nonetheless, it contended that it was important to reopen the final order because the penalty amount was \$262,500.

Although the third motion mentioned the two previous motions pending before the Commission, Lone Mountain provided the same excuse for failing to timely contest the proposed assessment – another affidavit by the same safety manager, again claiming that the proposed assessment had been misplaced during delivery between the operator's two offices. There was no reference in the motion or the affidavit to the safety manager's prior assurances that he would collect the proposed assessments himself. Nor was there any indication of an attempt to correct the asserted repeated failures in the internal mail system and the lack of any procedures to follow up on proposed assessments and file timely contests.

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<sup>1</sup> In its first two motions, Lone Mountain erroneously referred to 13 previously contested citations and orders. We clarify that two of the 13 were actually not included in the two proposed assessments for which these motions were filed. Lone Mountain's third motion to reopen contained four underlying citations which were not timely contested.

After consideration of all the facts and arguments, we concluded that Lone Mountain had failed to establish entitlement to extraordinary relief. We found that the operator had been put on notice of its obligations but had neglected to fix the problems with its internal procedures. Because the operator made no showing of good cause or exceptional circumstances warranting reopening, we denied its motions to reopen. *Lone Mountain Processing, Inc.*, 33 FMSHRC 2373, 2376 (Oct. 2011).

Lone Mountain filed a petition for review with the D.C. Circuit, seeking review of the Commission's October 11, 2011 order. The Court subsequently remanded the case to the Commission for an explanation of whether our denial of the motions was consistent with Commission precedent that a contest of the underlying citation evidences an intent to contest the penalty. *Lone Mountain*, 709 F.3d at 1163-64.

## II.

### **Legal Principles Applicable to Motions to Reopen Final Penalty Assessments**

Section 105(d) of the Mine Act allows operators to challenge a citation or order within 30 days of receipt regardless of whether a proposed penalty assessment has been issued. 30 U.S.C. § 815(d). In accordance with the statute, Commission Procedural Rule 20 permits operators to contest a citation within 30 days of receipt, before the Secretary of Labor issues a proposed assessment. 29 C.F.R. § 2700.20.

Separately, under section 105(a) of the Mine Act, the Secretary must notify a mine operator of the proposed civil penalty for the issuance of any citation or order. 30 U.S.C. § 815(a). In turn, an operator who wishes to contest a proposed penalty must notify the Secretary no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary within the 30-day period, the proposed penalty assessment becomes a final order of the Commission by operation of the statute. *Id.* Commission Procedural Rule 21 explicitly states that the filing of a notice of contest of an underlying citation does *not* constitute a challenge to a subsequently issued proposed penalty assessment, which must be filed as a separate notice of contest. 29 C.F.R. § 2700.21; *see Marfork Coal Co.*, 29 FMSHRC 626, 636 (Aug. 2007).<sup>2</sup>

We have held 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 finds guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which a party may be relieved from a final order of the Commission upon a showing of mistake, inadvertence, surprise, excusable neglect, or other

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<sup>2</sup> MSHA's notice of the proposed penalty assessment specifically informs operators that filing a prior notice of contest does not relieve them of the obligation to timely contest the proposed assessment.

reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787.

Due to the extraordinary nature of reopening a penalty that has become final, the operator has the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening:

An operator seeking to reopen a proceeding after a final order is effective bears the burden of establishing an entitlement to extraordinary relief. At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. . . .

*Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010).

In reviewing an operator's explanation, we consider the entire range of factors relevant to determining mistake, inadvertence, surprise, excusable neglect, or other good faith reason for reopening. No precise formula exists for weighing the factors, and the analysis is conducted on a case-by-case basis. However, key factors are readily identifiable.<sup>3</sup>

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<sup>3</sup> The Commission has provided guidance to operators on its website with regard to factors that will generally be considered in determining whether to grant relief:

The Commission has considered a number of factors in determining whether good cause exists: the error does not reflect indifference, inattention, inadequate or unreliable office procedures or general carelessness; the error resulted from mistakes that the operator typically does not make; procedures to prevent, identify and correct such mistakes have been adopted or changed, as appropriate; in cases where receipt of the penalty assessment is an issue, the operator maintains proper addresses with MSHA. Motions for relief must identify and explain: why a timely contest was not filed; how and when you first discovered the failure to timely contest the penalty and how you responded once this was discovered. . . .

FMSHRC, *Requests to Reopen*, <http://fmsihrc.gov/content/requests-reopen> (last visited November 18, 2013).

We have repeatedly and unequivocally held that a failure to contest a proposed assessment as a result of an inadequate or unreliable internal processing system does not establish grounds for reopening an assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008).

Further, we have emphasized the importance of the operator's explanation of the time it took to file for reopening after receipt of a notice of delinquency. In *Highland Mining Co.*, the Commission advised operators:

In the future, to save time and conserve its resources, the Commission will ordinarily analyze the question of whether the request to reopen was filed in a reasonable time in the following manner. Motions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will presumptively be considered as having been filed within a reasonable amount of time.

Motions to reopen filed more than 30 days after receipt of such information from MSHA should include an explanation for why the operator waited so long to file for reopening. The lack of such an explanation is grounds for the Commission to deny the motion.

31 FMSHRC at 1316-17.

Of course, the good faith of the operator's actions is also a factor. *Pioneer Inv. Servs. Co. v. Brunswick Associated Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FC Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006); *Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132 (June 2011). An operator's detailed recounting of the circumstances should demonstrate that the operator acted at all times in good faith and without any purpose of evasion or delay, taking into account the nature of the violation, the amount of the penalty, the circumstances of receipt and processing of the notice, whether errors were within the operator's control, and the reasons for any delay in filing the motion itself, especially after notice of a delinquency.

We also consider MSHA's acquiescence or opposition to the motion. We do this not simply to ascertain MSHA's position, but also to determine if MSHA's response contributes to the analysis of the multitude of factors related to the operator's failure to contest the penalty in a timely manner.

The Commission also takes into account, as we did in reaching our initial decision, that the filing of a contest of an underlying citation is an indication of an initial intent to contest the subsequent proposed assessment. *E.g.*, *Oldcastle Stone Prods.*, 31 FMSHRC 1103, 1104 (Oct.

2009). The Commission has not held that a challenge to the citation creates a presumption, rebuttable or irrebuttable, of a right to reopen after failing to contest the penalty. The filing of a challenge to the underlying citation is a factor and, indeed, in many cases may be an important factor. However, all factors relevant to reopening are weighed. The challenging of a citation does not inevitably excuse the failure to contest the penalty.

### III.

#### Disposition

In accordance with the Court's remand, the Commission has again considered Lone Mountain's motions to reopen, in light of Lone Mountain's contest of 11 citations issued in June 2010, that were among the citations that were assessed in the proposed assessments issued in August 2010 and January 2011.<sup>4</sup> The filing of those 11 notices of contest is clearly outweighed by the overwhelming evidence establishing that, in accordance with the Commission's precedent, the operator in this case should not be relieved of the responsibility for the final orders imposed following its default.

First, as stated above, a primary factor considered by the Commission is whether the operator's failure to file a timely contest resulted from "inadequate or unreliable office procedures." Our previous decision rested on our affirmative finding that Lone Mountain's failures "represent[ed] an inadequate or unreliable internal processing system." 33 FMSHRC at 2375. The identical problem assertedly occurred three separate times in less than a year, and Lone Mountain, despite its safety manager's assurances, took no effective action to correct its internal processing system deficiencies. Its failure to provide a reliable system was held to be dispositive.

In support of its motion to reopen Docket No. KENT 2011-1153, the operator submitted the affidavit of Lone Mountain's Safety Manager, Wilburn Howard, dated June 2, 2011 in which Mr. Howard stated in part:

Lone Mountain received the proposed assessments for Assessment Case Numbers 000228827 and 000243808, but the sheets were sent to Patrick Leedy our Chief Engineer, who then forwarded them to me by courier. Mr. Leedy and I are located in different office buildings approximately 10 miles away. During the delivery of these assessments they were misplaced. *We are changing the way of delivery of these assessments in which I will personally travel to our office weekly to collect these assessment sheets to avoid a repeat of this error.* [emphasis added]

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<sup>4</sup> Lone Mountain did not contest any of the four citations that were assessed a total civil penalty of \$262,500 mailed by MSHA in July 2011 and addressed in its third motion to reopen. Therefore, the factor of a prior contest of the underlying citations does not come into play with respect to that motion.

In support of its motion to reopen Docket No. KENT 2011-1154, the operator submitted an identical June 2, 2011 affidavit in which Mr. Howard again represented that:

*We are changing the way of delivery of these assessments in which I will personally travel to our office weekly to collect these assessment sheets to avoid a repeat of this error. [emphasis added]*

Approximately a month and a half *after* Mr. Howard executed the above-referenced affidavits, Lone Mountain was served on July 20, 2011 with the proposed assessment it seeks to reopen in Docket No. KENT 2011-1530. In support of its motion to reopen, the operator submitted an affidavit from Mr. Howard dated September 15, 2011. Despite the prior representations Mr. Howard made to this Commission that the operator was changing its internal processing system to avoid future problems, in the most recent affidavit Mr. Howard stated:

The proposed assessment sheet for A.C. Number 000261203 was addressed to Patrick Leedy our Chief engineer. According to the “Retrieve Report” provided by the Civil Penalty Office, the assessments sheet was delivered and signed or by “S. Roddy” on July 20, 2011. Susie Roddy is a secretary of Lone Mountain. *After signing, Ms. Roddy would have placed this information in Patrick Leedy’s mailbox, who would have then forwarded it to me by courier.* During the delivery of these assessments they were apparently misplaced or may have been sent to the wrong location. [emphasis added]

Clearly, the operator had taken no action to rectify the problem. Its final affidavit, which is inconsistent with the assurances in the two previous affidavits, undermines its credibility and leads us to question its sincerity in making its initial assurances of procedural reform.

Second, in addition to the fatal defect found in its internal processing system, Lone Mountain did not explain its failures to respond to MSHA’s delinquency letters in a timely fashion. Under Commission precedent set forth above, an operator that fails to move to reopen within 30 days after learning that it did not file a timely challenge to a proposed assessment must provide sufficient explanation for the delay. In this case, Lone Mountain waited six months and two months after receiving its first two delinquency notices before filing its motions to reopen. Then, even though the Secretary pointed out Lone Mountain had failed to justify those delays, Lone Mountain never provided any further explanation. It did not simply provide an insufficient excuse for failing to file for months after receipt of notices of delinquency – it failed to provide any excuse at all.

Third, Lone Mountain failed to establish that its motions to reopen were filed in good faith, a factor specifically challenged by the Secretary in her response. The Secretary highlighted Lone Mountain’s repeated failures to meet deadlines in this case, and its outstanding delinquency total of approximately \$550,000 (which includes the penalties involved in the first two motions to reopen), in arguing that Lone Mountain may not have filed the motions in good faith. Lone Mountain did not rebut the Secretary’s argument. We have held that silence in the face of a delinquency history with

nearly identical facts militates against the grant of extraordinary relief. *Oak Grove Res., LLC*, 33 FMSHRC at 1132.

It is thus apparent that the facts and our precedent impose significant barriers to granting extraordinary relief in this case. Against this backdrop, we now turn to the D.C. Circuit's admonition that we should have explained why we had ruled in some prior cases that operators' challenges to citations justified granting motions to reopen, but that the contest of the citations in Lone Mountain did not warrant relief. 709 F.3d at 1164. As set forth below, those cases are substantially distinguishable from Lone Mountain and do not support reopening when compared to the number and weight of factors against reopening.

In *Oldcastle Stone Prods.*, the operator was inexperienced with MSHA contest procedures and asserted that it did not know it had to contest the proposed assessment in addition to contesting the underlying citation. Oldcastle's counsel discovered the delinquency one month after the proposed assessment became a final order of the Commission (before receiving any notices from MSHA) and filed a motion to reopen within one week. 31 FMSHRC at 1104. We determined that Oldcastle had demonstrated an intent to contest the proposed penalty and reopened the citation. *Id.* at 1104-05.

*Oldcastle* did not involve a defect in the operator's internal processing of penalty assessments. Rather, it claimed ignorance of a requirement to *also* contest the penalty where it had contested the citation. In *Oldcastle*, we re-opened the penalty for one citation which had been contested and refused to reopen those where no contest had been filed, consistent with the operator's excuse. *Id.* at 1104. It is also noteworthy that Oldcastle discovered its failure on its own and acted promptly to seek reopening, unlike the present case.

In contrast to Oldcastle, Lone Mountain is an experienced operator that was fully aware of the procedures for contesting proposed assessments. Lone Mountain does not argue that it was unaware of the contest procedures; it maintains instead that it repeatedly misplaced the critical paperwork. Unlike the instant case, *Oldcastle* did not involve a deficient internal processing system, unexplained delays in filing motions to reopen, and no response to the Secretary's allegation of bad faith.

The other two cases cited by the Court – *McCoy Elkhorn Coal Corp.*, 33 FMSHRC 1 (Jan. 2011), and *Phelps Dodge Sierrita, Inc.*, 24 FMSHRC 661 (July 2002) – arose in a very different context from *Lone Mountain*. Both of those cases involved inadvertent payments of proposed penalties where each operator argued that it intended to contest the proposed assessments. Commission case law establishes that the payment of a proposed penalty forecloses the operator from challenging the underlying citation and the penalty itself unless the operator can show that the payment was inadvertent. *See, e.g., Ranger Fuel Corp.*, 12 FMSHRC 363, 370 (Mar. 1990). Thus, the operators' prior challenges of the underlying citations in the two cases were significant only because they supported the operators' claims that the penalty payments had been inadvertent. Because the instant case does not involve an inadvertent payment issue, the holdings in the two cases do not apply to this case. Likewise, neither *McCoy Elkhorn* nor *Phelps Dodge* involved major factors such as deficient internal processing systems, unexplained delays in filing motions to reopen, or allegations of bad faith.

In again denying Lone Mountain's motions to reopen, the Commission is not departing from precedent. We have carefully considered all the facts and arguments to decide whether extraordinary relief is warranted, including the contests of 11 of the citations. Having done so, we find Lone Mountain's failures to be far more significant, including the grossly deficient internal processing procedures, unexplained delays in filing motions to reopen after learning it had missed deadlines through receipt of delinquency notices, and its failure to establish that the motions were filed in good faith. The fact that Lone Mountain challenged some of the underlying citations does not overcome its numerous failures to file timely penalty contests and its lack of adequate explanations of those failures. A different result is not warranted by Commission precedent regarding contests to underlying citations.

#### IV.

#### Conclusion

For the reasons set forth above, we again conclude that Lone Mountain has failed to establish that it should be granted extraordinary relief because of mistake, inadvertence, excusable neglect, or other just cause. Because of its repeated failures to meet its obligations, its lack of adequate explanations for its delays, and its inability to demonstrate that its motions were filed in good faith, Lone Mountain falls far short of establishing good cause for granting relief.

Accordingly, we again deny Lone Mountain's motions to reopen.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

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

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Chief Administrative Law Judge Robert J. Lesnick  
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# **COMMISSION ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

November 5, 2013

|                        |   |                            |
|------------------------|---|----------------------------|
| SECRETARY OF LABOR,    | : |                            |
| MINE SAFETY AND HEALTH | : |                            |
| ADMINISTRATION (MSHA)  | : |                            |
|                        | : | Docket No. CENT 2012-128-M |
| v.                     | : | A.C. No. 23-02347-262760   |
|                        | : |                            |
| PIERCE SAND            | : |                            |

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 21, 2013, the Commission received from Pierce Sand a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On August 1, 2012, the Chief Administrative Law Judge 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 Pierce Sand’s failure to answer the Secretary of Labor’s November 18, 2011 Petition for Assessment of Civil Penalty.

Pierce Sand asserts that it timely answered the Show Cause Order and submits a copy of the answer date-stamped by the Commission as received on August 27, 2012. Pierce Sand states that the answer was mistakenly only applied to a companion case, Docket No. CENT 2012-129-M. The Secretary does not oppose the request to reopen, and agrees with the operator’s contentions.

Having reviewed Pierce Sand's request and the Secretary's response, we conclude that the Default Order did not effectively become a final order of the Commission because the operator filed a timely response to the Show Cause Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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November 5, 2013

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| SECRETARY OF LABOR,    | : |                             |
| MINE SAFETY AND HEALTH | : |                             |
| ADMINISTRATION (MSHA)  | : |                             |
|                        | : | Docket No. CENT 2013-3-M    |
| v.                     | : | A.C. No. 41-04375-300222-01 |
|                        | : |                             |
| COLORADO COUNTY SAND & | : |                             |
| GRAVEL, LLC            | : |                             |

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 21, 2013, the Commission received from Colorado County Sand & Gravel, LLC (“Colorado County”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On January 30, 2013, the Chief Administrative Law Judge 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 Colorado County’s failure to answer the Secretary’s October 11, 2012 Petition for Assessment of Civil Penalty. The Commission did not receive Colorado County’s answer within 30 days, so the default order became effective on March 4, 2013.

Colorado County asserts that it contested six citations in A.C. No. 000300222 and believed they were all included in Docket No. CENT 2013-4-M. Colorado County further states that it did not receive the Petition for Assessment of Civil Penalty or the Order to Show Cause. It did not discover that Citation No. 8679247 was not included in Docket No. CENT 2013-4-M until it received a motion to approve settlement agreement. The Secretary does not oppose the request to reopen.

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

direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the judge's order here has become a final decision of the Commission.

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

Having reviewed Colorado County's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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November 5, 2013

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|--------------------------|---|------------------------------|
| SECRETARY OF LABOR,      | : |                              |
| MINE SAFETY AND HEALTH   | : |                              |
| ADMINISTRATION (MSHA)    | : |                              |
|                          | : | Docket No. WEST 2012-1177-M  |
| v.                       | : | A.C. No. 26-00500-293069 1WA |
|                          | : |                              |
| NORTHAMERICAN INDUSTRIAL | : |                              |
| SERVICES, INC.           | : |                              |

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 27, 2013, the Commission received from NorthAmerican Industrial Services, Inc. (“NorthAmerican”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On February 5, 2013, the Chief Administrative Law Judge 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 NorthAmerican’s perceived failure to answer the Secretary’s August 22, 2012 Petition for Assessment of Civil Penalty.

NorthAmerican asserts that it timely answered the penalty petition and encloses a copy mailed to MSHA on September 20, 2012. NorthAmerican further states that it responded to the Show Cause Order by email to the Commission’s Docket office on February 7, 2013. The Secretary does not oppose the request to reopen, and notes that MSHA received NorthAmerican’s answer to the penalty petition.

Having reviewed NorthAmerican's request and the Secretary's response, we conclude that the Default Order did not effectively become a final order of the Commission because the operator filed a timely response to the Show Cause Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

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

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November 5, 2013

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| SECRETARY OF LABOR,       | : |                           |
| MINE SAFETY AND HEALTH    | : |                           |
| ADMINISTRATION (MSHA)     | : |                           |
|                           | : | Docket No. WEVA 2011-2202 |
| v.                        | : | A.C. No. 46-08812-260211  |
|                           | : |                           |
| GLEN ALUM OPERATIONS, LLC | : |                           |

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 2, 2013, the Commission received from Glen Alum Operations, LLC (“Glen Alum”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On August 13, 2012, the Chief Administrative Law Judge 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 Glen Alum’s perceived failure to answer the Secretary’s September 1, 2011 Petition for Assessment of Civil Penalty.

Glen Alum asserts that it timely answered the penalty petition and submits a copy of the answer date-stamped by the Commission as received on September 23, 2011. Glen Alum also submits a copy of its email to the Commission on August 16, 2012, in response to the Show Cause Order. The Secretary does not oppose the request to reopen.

Having reviewed Glen Alum's request and the Secretary's response, we conclude that the Default Order did not effectively become a final order of the Commission because the operator filed a timely response to the Show Cause Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

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

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November 5, 2013

|                               |   |                           |
|-------------------------------|---|---------------------------|
| SECRETARY OF LABOR,           | : |                           |
| MINE SAFETY AND HEALTH        | : |                           |
| ADMINISTRATION (MSHA)         | : |                           |
|                               | : | Docket No. YORK 2012-84-M |
| v.                            | : | A.C. No. 17-00576-277211  |
|                               | : |                           |
| HARRY C. CROOKER & SONS, INC. | : |                           |

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 8, 2013, the Commission received from Harry C. Crooker & Sons, Inc., (“Crooker”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On July 24, 2012, the Chief Administrative Law Judge 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 Crooker’s failure to answer the Secretary of Labor’s February 16, 2012 Petition for Assessment of Civil Penalty. The Commission does not have a record of receiving Crooker’s answer within 30 days, so the default order became effective on August 24, 2012.

Crooker asserts that it sent its timely answer to the Show Cause Order to the Department of Labor and to the Commission. The Secretary does not oppose the request to reopen and notes that MSHA received Crooker’s answer on August 24, 2012.

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

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993).

Having reviewed Crooker’s request and the Secretary’s response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

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

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

# **ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 Pennsylvania Avenue, N.W Suite 520N  
Washington, DC 20004-1710  
Telephone No.: 202-434-9933

November 5, 2013

|                              |   |                           |
|------------------------------|---|---------------------------|
| SECRETARY OF LABOR,          | : | CIVIL PENALTY PROCEEDING  |
| MINE SAFETY AND HEALTH       | : |                           |
| ADMINISTRATION, (MSHA),      | : |                           |
| Petitioner                   | : |                           |
|                              | : |                           |
| v.                           | : | Docket No. KENT 2013-307  |
|                              | : | A.C. No. 15-19132-308412A |
| PAUL D. BENTLEY, Respondent, | : |                           |
| employed by BLEDSOE COAL     | : | Abner Branch Rider        |
| CORPORATION                  | : |                           |
|                              | : |                           |

**ORDER GRANTING MOTION FOR SUMMARY DECISION<sup>1</sup>**

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;  
Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, Kentucky for Respondent Bentley  
Marco M. Rajkovich, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky for Respondent Bledsoe Coal

Before: Judge Moran

**Introduction.** This matter arose in the wake of a fatality, which occurred when a miner was fatally crushed by a very large rock,<sup>2</sup> which slid out from a rib. An investigation ensued, with MSHA issuing citations and orders, separately, to Bledsoe Coal and to Mr. Paul Bentley, the mine’s first shift foreman. Mr. Bentley, like Bledsoe itself, was issued a section 104(d)(1) citation and a (d)(1) order, which initially alleged that he “knowingly authorized, ordered, or

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<sup>1</sup> Counsel for Mr. Bentley and Counsel for the Secretary have filed a joint motion to sever. At the time of the hearing, this docket had been consolidated with docket KENT 2011-481, because the citations and orders issued arose out of the same events. Subsequently, post-hearing, and at the Court’s suggestion, the Joint Motion to Sever the two dockets was filed and that Motion is hereby GRANTED. The severance allows the Court to issue its decision without waiting to issue its decision in KENT 2011-481, which matter may yet settle.

<sup>2</sup> The rock was estimated to weigh 9.3 tons. Tr. 247.

carried out violations of the 30 C.F.R. §75.202(a) and 30 C.F.R. § 75.362(a)(1).<sup>3</sup> The former standard requires the roof, face and ribs to be supported or otherwise controlled to protect persons from falls, while the latter requires an on-shift exam of working areas to check for hazardous conditions. A hearing was held in this matter commencing on May 14, 2013. At the close of the government's case, Counsel for Respondent Bentley moved to have the 110(c) charges against his client dismissed. Having heard that evidence, the Court concluded that the charges against Mr. Bentley had not been proven and it so informed the parties of this conclusion during a conference call on July 10, 2013. This Order memorializes that determination. Accordingly, for the reasons that follow, the 110(c) actions against Mr. Bentley in this proceeding are hereby **DISMISSED**.

### **Section 110( c) actions**

Section 110( c) of the Mine Act provides: "Whenever a corporate operator violates a mandatory health or safety standard ... , any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation, ... shall be subject to ... civil penalties." 30 U.S.C. § 820(c). The Commission has stated that "[t]he proper legal inquiry for determining liability under section 110( c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd* on other grounds, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); accord *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110( c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation thus occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. The Commission has explained that "[a] person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *Id.* (citation omitted). In addition, section 110( c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). *Sec. v. Matney, employed by Knox Creek Coal Corp.*, 34 FMSHRC 777, at \* 783, 2012 WL 1799023 (April 2012).

### **Findings of Fact**

As noted, on January 22, 2010 Mr. Travis Brock, a continuous miner operator, was fatally injured when a large rock, described as a "slickenside," slid out from a pillar, crushing him. MSHA Inspector Charles Ramsey was the lead investigator for the fatality investigation.

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<sup>3</sup> A few days before the hearing, the government moved to add a third charge against Mr. Bentley, adding the claim that he performed an inadequate preshift exam on January 22, 2013.

The investigation began on the day of the fatal accident. With Ramsey at the mine that day were MSHA Assistant District Manager Jim Langley, MSHA Supervisor Ron Burns, John Boylen, MSHA roof control specialist. On the following day, MSHA's Dr. Sandlin Phillipson joined the MSHA investigation. More than five months after the investigation began, MSHA issued the citation and order which are the subject of the action against Mr. Bentley. As stated in the Introduction, above, those are Citation No. 8355746, a section 104(d)(1) alleging a violation of 30 C.F.R. §75.202(a) and Order No. 8355777, alleging a violation of 30 C.F.R. §75.362(a)(1).<sup>4</sup> At the hearing, the government moved to add, in its action against Mr. Bentley, Order No. 8355747, citing 30 C.F.R. §75.360(b), and alleging that Mr. Bentley was also culpable under section 110(c) for an inadequate preshift exam.

Though not one of the violations against Mr. Bentley, by way of pertinent background information, Citation No. 8355745, a section 104(a) citation was issued to Bledsoe Coal alone, alleging an inadequate roof control plan, per 30 C.F.R. § 75.220(a)(1). Inspector Ramsey stated that he issued that citation because of the slickenside<sup>5</sup> which fatally injured miner Brock, as well as for the numerous loose ribs he found on the section. All of the citations and orders issued in connection with the fatality involved the 001 MMU (mechanized mining unit), located at the mine's 8 Mains. The Inspector stated that where there is a change in mining conditions, there is an obligation to have the roof control plan address those changes. No one disputes that duty exists. In the area of the fatality, the coal seam became very small,<sup>6</sup> as little as 6 inches, and then it quickly became very high. Tr. 59. Such seam changes can lead to hazardous rib conditions; other times such hazardous conditions may not develop.

Inspector Ramsey then turned to Citation No. 8355746, the section 104(d)(1) citation alleging inadequate support of the ribs, and for which both Bledsoe Coal and Mr. Bentley were each cited. That citation asserted loose coal/rock ribs at: “#32 Crosscut on the sides and inby corners of the coal pillar blocks in the #3 and #4 Headings, (2) at #33 Crosscut in the #3 Belt Heading where the upper inby corners of the left and right ribs were separated from the coal pillar and top approximately ½ inch and in the # 4 Heading where loose coal was separating from the rib line, and (3) at the # 34 Crosscut in the #3 Belt Heading, where the right side inby corner of the coal pillar cracked and separated from the pillar and a part of the rib measuring 3.3 feet to 6.8 feet thick x 5.5 feet long x 9 feet wide and slid out of the rib line and struck the

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<sup>4</sup> The same citation and order were also issued to Bledsoe Coal. They form, along with a section 104(a) citation, No. 8355745, invoking 30 C.F.R. §75.220(a)(1) and a section 104(d)(1) order, citing 30 C.F.R. §75.360(b), the matters in the separate action against Bledsoe Coal in Docket No. KENT 2011-481.

<sup>5</sup> The term “slickenside” was variously described by witnesses. Ramsey defined it as a condition where two planes meet; a coal plane meeting a rock plane. Tr. 59. Later, he added that it refers to situations where there is a sharp increase in the coal seam, which can cause a side to slide out. Tr. 167.

<sup>6</sup> This was great narrowing of the seam was also described as a “washout” and a “squeeze.”

continuous miner operator fatally injuring him. In the #3 Heading at the # 34 Crosscut, *the 2<sup>nd</sup> shift foreman's dates, times, and initials* ["DTIs"] **were on the exact location of the loose area of the rib that detached from the rib and slid out**, fatally injuring the continuous miner operator. Upon examination of the pre-shift book dates, back to January 7, 2010, foremen were writing the following statement in the "Remarks" section, "Use caution around ribs and watch for draw rock." No written explanation was given as to any measures taken to protect miners against the hazardous rib conditions.<sup>7</sup> The operator has engaged in aggravated conduct constituting more than ordinary negligence in that management did not take measures to ensure safe working conditions around ribs. This violation is an unwarrantable failure to comply with a mandatory standard."<sup>8</sup> (GX 9, emphasis added), (GX 21, drawing marking loose ribs, including location of fatal rib roll.) Thus, to be clear, and because the Court considers it to be important, the dates, times and initials ("DTIs") were right next to the location where the slickenside fell out. The Inspector conceded that one would not put DTIs next to a rock that is about to fall. Tr. 207. As to whether the foreman, Mr. Bentley, should have seen the slickenside, Inspector Ramsey stated that he simply did not know. Tr. 207. Although Inspector Ramsey expressed his view that the various rib problems he noted, six in total,<sup>9</sup> had existed for days, this was based solely upon his mining experience as he had no other information, such as rock dusting, to support that opinion. Tr. 83, 149.

Bledsoe Coal, was also issued a section 104(d)(1) order, asserting an inadequate pre-shift exam occurred on January 22, 2010 for the 001 MMU at 8 Mains. Order No. 8355747. GX 10. As alluded to, though not part of the original, two, charges against Mr. Bentley, shortly before the hearing, the government moved to add that Order as another 110(c) charge against him.<sup>10</sup>

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<sup>7</sup> John Caldwell, section foreman, later testified that the notation in the exam book to "use caution around ribs and watch for draw rock," was included because the mine had some troubles outby and had been wrapping ribs. However, he maintained this problem was outby the track entry, and outby the working section. Tr. 575. In contrast, another witness for the Respondent, Kevin Jump, had a different interpretation of that phrase as he expressed that its use was more than a simple warning and informed that the mine is "going through some changes." Tr. 662. With regard to the parties conflicting claims as to the import of the preshift report warnings to watch out for bad roof, the Court, upon hearing the various testimonial views, concludes that it was a general safety warning and not, as MSHA has implied, a tacit admission that the mine knew there were serious roof and rib problems.

<sup>8</sup> It is worth remembering that statements and conclusions in any citation or order are assertions. When challenged, as here, it is up to the Court to make the findings of fact and conclusions of law regarding the content of such documents issued by MSHA's authorized representatives.

<sup>9</sup> While GX 21 lists other areas of alleged rib sloughing, Inspector Ramsey personally observed only the areas noted in his citation. Tr. 93. The other areas of rib sloughing indicated on GX 21 were found by MSHA's Dr. Phillipson.

<sup>10</sup> Some 4 ½ months after the fatal rib roll, upon completing its investigation, MSHA issued the citations and orders associated with this matter against Mr. Bentley and, in KENT 2011-481, against

(continued...)

In large measure, that Order repeats the assertions made in Citation No. 8355746, next above, but it then adds the following: “ (2) the entry width of the sheared corner of the rib in the #3 Left and #3 Right at #33 Crosscut measured 30 feet. The maximum allowable entry width of the sheared area in the approved roof control plan is 28.1 feet; (3) in various areas in the #2, #3, and #4 Headings, T-5 dome channel straps were installed over cracks and draw rock in the roof with a regular 6 x 6 flat roof bolt plate, which is not in accordance with the manufacturers recommendations; and (4) an area along the left rib in the #2 entry at #33 Crosscut, that measured 7 feet x 12 feet, was not completely bolted.<sup>11</sup> The operator has engaged in aggravated conduct constituting more than ordinary negligence in that upon inspection of the pre-shift exam book, none of these hazardous conditions were recorded in the 001 MMU exam book. This violation is an unwarrantable failure to comply with a mandatory standard.”

The preshift was performed prior to the start of the day shift on January 22, 2010, the day of the fatal accident. The onshift, that is the exam on the day of the accident, would have been done about an hour before the fatal rib roll. That onshift was done by Respondent Bentley, as the 001 section day shift foreman. As with the preshift shortcomings alleged by Inspector Ramsey, the absence of problems being noted in the onshift was construed as a failure to note those conditions. However, the Court would note again that these admitted absences can be construed differently, as the absence of such notations also can be asserted to show that the conditions were not present.<sup>12</sup>

Inspector Ramsey agreed that, as he was not present when the fatal rib fall occurred, he could not state whether anyone could have seen if the rib was going to fall, nor could he state whether it was cracked before it fell, nor if it was “easily recognizable” before it fell. Tr. 167. Speaking specifically to Mr. Bentley and whether he knew there was a slickenside present before

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<sup>10</sup>(...continued)

Bledsoe Coal. However, the motion to add the charge of an inadequate pre-shift against Mr. Bentley did not occur until nearly three years later, shortly before the hearing. On the second day of the hearing the Court ruled that the motion to add the preshift violation to the charges against Mr. Bentley was granted. The effect of the motion, procedurally, was to graft the preshift allegations onto the onshift charges. In granting the motion, the Court noted that proof was still needed to sustain that charge against Mr. Bentley. Tr. 303. It is noteworthy that Inspector Ramsey never alluded to any alleged preshift inadequacies in his deposition. Instead the preshift charge against Mr. Bentley was not added until years later. Ultimately, by this Order, the Court has concluded that the government failed to meet its burden for any of the three charges it has brought against Mr. Bentley.

<sup>11</sup> The Inspector stated that at least 3 more bolts were needed in this area; however that incomplete bolting did not contribute to the fatality. Tr. 222. To put this in perspective, there were more than a thousand bolts from crosscuts 31 to 34. Tr. 267.

<sup>12</sup> A separate basis for the Inspector’s conclusion that the conditions noted had existed for some prior period of time and had not just arisen, was the remark in the preshift and onshift reports to “use caution around the ribs and watch for draw rock.” Tr. 132-133, 136. This issue is potentially of more import for the charges against Bledsoe, than for those against Mr. Bentley.

it fell, the Inspector acknowledged he did not know; the rib could have been cracked but it also might not have been. Tr. 169. Further, he admitted that with regard to the crosscut 33 sloughing, that condition had no connection with the rib fatality. Nor did he find any sloughing in entries 1, 2 or 5. Ramsey also conceded that he could not state with certainty that rib bolting or even rib wrapping<sup>13</sup> would have prevented the fatality.<sup>14</sup> Tr. 197.

With regard to the section 104(d)(1) order, which alleged an inadequate preshift exam, and which order, as noted, was issued to Mr. Bentley and separately to Bledsoe Coal, that Order, No. 8355777, stated: “. . . adequate on-shift examinations were not performed on January 21 and 22, 2010, on the 001MMU. The following deficiencies were noted: (1) the 2<sup>nd</sup> shift on-shift report for January 21, 2010, did not identify a hazardous rib condition in the #3 Belt Heading, (2) the 3<sup>rd</sup> shift on-shift report for January 22, 2010, did not identify a hazardous rib condition in the #3 Belt Heading, and (3) the 1<sup>st</sup> shift on-shift report recorded on January 22, 2010, which was performed approximately 1 hour prior to the fatal accident, did not identify any hazardous roof condition. All three on-shift examiners recorded “None Observed” in the on-shift record for the #3 Belt Heading. Mine management directed that the offset in the mine floor be trimmed in the #3 Left Crosscut.” GX 15. As noted, the absence of noted problems, is capable of two very different interpretations. One, darker, is that all three of the on-shift examiners saw, but did not record, the problems. The other outlook is that the problems were not then present. Normally, conflicting views of such results are resolved by credibility determinations or inconsistencies in testimony. Here, in the Court’s view, the inconsistencies were all from the government’s witnesses, who did not all see the same alleged rib problems, and who had differing interpretations as to whether they required immediate attention or not.

Inspector Ramsey acknowledged that the inadequate on-shift allegation was not arrived at until a month after the other three citations had been drafted. Tr. 226. Here, the on-shift exam would start about four breaks back from the face; in this instance, that was about 240 feet. While Inspector Ramsey took photographs during his investigation, he did not take a picture of the asserted ½ inch crack he saw in the No. 3 and No. 4 belt entry. Tr. 239. GX 21, and blue marking on that exhibit. Nor did the Inspector take a photograph of the loose ribs he observed. GX 21, pink marking. Tr. 240. Why no photos were taken in those instances was not explained. Further, and of significance, the Inspector agreed that a crack in a rib is not necessarily indicative of a hazard. Tr. 240-241. Later, Inspector Boylen, in his testimony, would confirm that rather significant statement: a crack, by itself, does not mean that there is a bad rib. Tr. 355, 384. Boylen added that a ½ inch crack at the top of a rib does not inform him that there is a problem; to determine that, one must see it firsthand. Tr. 384. Further, Inspector Boylen informed that even a good rib may slough off. Tr. 355. In terms of the fatality, Inspector

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<sup>13</sup> Further, the pillar where the fatal rib roll occurred was not yet formed when the fall occurred. A rib wrap is not an option until a pillar is fully formed. Tr. 177-178.

<sup>14</sup> Complicating the matter further, Inspector Ramsey agreed that it was possible that the rib slide might not have occurred if the rib corners had been permitted to be trimmed, as Bledsoe had requested for years. Tr. 198.

Ramsey agreed that it would be unlikely that the victim would have placed himself under the rib which fell out if there had been an obvious crack present. Most significantly, Inspector Ramsey then conceded that it was “probable” that the rock simply came loose in one moment with no advance warning. Tr. 251. Referring to the other alleged troublesome areas, as circled in blue and pink on GX 21, Inspector Ramsey agreed that MSHA’s Dr. Phillipson noted some troublesome areas that he did not identify. Thus, even Ramsey had to admit that he missed some areas that Dr. Phillipson believed were present. Tr. 251-253. This lack of consensus, of identification of alleged problems, and even of the location of rib problems, undercuts the 110(c) charges. If the lead Investigator could miss areas, while in the process of looking for such problems, the idea that Mr. Bentley should have done a better job during his onshift exam, not to mention the claim that he knew or had reason to know of such conditions, is untenable.

As an overarching consideration in these charges against Mr. Bentley, the Court considered it to be important that when it asked Inspector Ramsey to sum up the basis for his conclusion that the cracks did not develop immediately before the accident but rather developed over a period of time, he stated: “Well, in all honesty, I can’t say really either way because I didn’t see the condition before the rock fell out. There may have been no cracks and yet there may have been some that could have been visible. I honestly can’t say either way because I didn’t see the piece before it fell.” Tr. 276-277.

Such an admission by MSHA’s lead Investigator cannot suffice to support the section 110(c) charges against Mr. Bentley. The Inspector maintained that part of his conclusion for the inadequate onshift assertion against Mr. Bentley was also based on the other loose ribs and conditions he observed in the area and not solely because of the slickenside fatality. Tr. 278. When challenged by Counsel for Mr. Bentley about this claim, the Inspector maintained that his inadequate onshift order was not based solely on the slickenside even while contending that he simply “forgot” to list the other conditions. This “oversight” was not corrected until about three years later, when the Secretary moved to amend its citation in 8355746 to add additional alleged troublesome conditions.

MSHA’s John Boylen, a roof control specialist and coal mine inspector with long private and public mining experience, also testified. Inspector Boylen was assisting Inspector Ramsey with his investigation and he had input into the allegations included in the citations and orders issued. Tr. 311. In terms of the “squeeze” or, as it was also described, “a washout of the roof,” which occurred not long before the accident, Mr. Boylen stated that while one must be observant of such conditions when encountered, sometimes problems will occur but other times no problems will result. Inspector Boylen’s primary concern and focus pertained to the mine’s overall rib control in the area.<sup>15</sup> Tr. 314. In this regard, he marked on GX 20 those areas of

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<sup>15</sup> This contention carried its own problems; rib sloughing could be argued to be a problem for which MSHA played a role. Although this is an aspect of more significance for any civil penalties which may be issued in the proceedings against Bledsoe Coal itself, Inspector Boylen informed that the pillar corners in this area were laid out on 60 degree angles and that such sharp angles are more prone to fall  
(continued...)

concern to him. It is fair to state that Inspector Boylen was dismayed over the omissions in the citations and orders of several areas that he believed needed attention. Such problem rib areas, which he described as “needing attention,” would have been included had he been the one issuing those citations and orders. He did not become aware of those alleged shortcomings until shortly before the hearing began. Tr. 319. This problem had consequences for the government’s proof. For example, where Mr. Boylen marked an as “crushed,” a term he uses as synonymous for “sloughing,” he could not provide further detail because he assumed someone would be issuing additional citations for such areas, but that never happened. Tr. 321. Accordingly, Inspector Boylen would have issued additional citations, or at least added the other problem areas in the citations and orders, and citing section 75.202(a), with the gravity listed as moderate and as “S&S.” Again, no such additional detail, or citations, were issued. Therefore, while these areas were identified during his testimony, including claims that several ribs needed “attention” and some that had already “rolled out,” additional citations were not issued for the problems he perceived. As the Court has taken note of, neither Mr. Bentley nor Bledsoe can be held to account for alleged problematic rib areas not identified within the four corners of any citation or order.

Regarding MSHA’s claim that there was an inadequate preshift exam performed, Inspector Boylen stated that it was “more than likely” that he would have issued such a claim. Tr. 340. In the Court’s view, and as he was there at the same time as Inspector Ramsey, this affirmation falls short, as it was less than a full endorsement of that charge. Importantly, Inspector Boylen affirmed that the rib conditions that concerned him did not relate to the fatality. Tr. 352. Further, he stated that he did not know how things looked, in the location of the slickenside, just prior to the accident. In an admission that the Court views as supporting Mr. Bentley’s defense, Inspector Boylen stated that in the area “where it slid out right adjacent to [the slickenside], it was solid.” Tr. 352. In fact, both sides of the slickenside were solid. So too, Boylen agreed that one would not put dates, times and initials right next to a bad rib. Tr. 353.

Inspector Boylen also agreed that things can change quickly in a mine and that a ½ inch gap can happen in short order. Tr. 356-357. Further, although he, like Inspector Ramsey, could not know what Mr. Bentley saw during his preshift, it was still his belief that Mr. Bentley *did not* see it. Further, Inspector Boylen did not know if the condition was even present and therefore capable of being seen before it occurred. Tr. 370. As he saw no evidence of small material coming off in that location, he inferred in his testimony that there were no warnings to heed. In addition, and in the Court’s view of significance, Inspector Boylen did not feel that Mr. Bentley was a poor mine foreman. Tr. 382.

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<sup>15</sup>(...continued)

and accordingly it is not unusual to see corners slough off. Bledsoe had requested permission to cut its sharp angled corners but MSHA, at that time at least, denied that request. Bledsoe’s general manager, David Osborne, later testified that it had asked MSHA to allow its roof control plan to be modified to permit removal of the sharp corners from the pillars. Tr. 680. *But it was not until after the fatality*, that this request was approved. Tr. 354.

Dr. Sandin Phillipson, an MSHA geologist, also testified for the government. He was at the mine the day after the fatal event and GX 8 was created by him. That Exhibit reflects his observations and findings of the accident and nearby area. GX 24 is Dr. Phillipson's field notes associated with this investigation. Consistent with Inspector Boylen's opinion, Dr. Phillipson agreed that the average miner or foreman would not have been able to recognize the slickenside nor able to process and interpret the geometry and therefore not able to realize that there was a potential for the failure which occurred. Tr. 438. The doctor also told the MSHA investigative team that there was no pillar stability problem in the area. His concern was with the acute angled corners of the pillars, a subject which has been discussed earlier. Though expressing that concern, he acknowledged that such angular crosscuts are a by-product of the continuous haulage system.

It is also of note that, while Dr. Phillipson saw cracks in ribs, he could not tell if they were simply skin cracks or whether they went all the way through the pillar. Tr. 441. Further, rib sloughing is not usually an indicator of pillar stability, as it is more of a skin condition. Even after his investigation was completed, the doctor made no recommendation for changes in the mine's pillar design. Tr. 447. Of particular significance for the charges made against Mr. Bentley, Dr. Phillipson saw no sloughing or flaking at all coming off the ribs in the fatal rib roll zone.<sup>16</sup> Tr. 447. It is also worth noting that Dr. Phillipson expressed that, even if the mine had been installing rib bolts with the so called "pizza pan" or "spider plate," those types of rib bolting would not have prevented the fatal accident here. Tr. 454.

Dr. Phillipson distinguished the accident scene area from other locations that gave him concern, with the latter, in his estimation being areas where an average miner could recognize of sloughing. As with MSHA's other witnesses, the doctor expressed that it was "definitely reasonable" to conclude that the slickenside came out rapidly and not with several movements that would have provided some warning that it would occur. Tr. 477. It is also noted that of the 12 or so areas that Dr. Phillipson marked on his map, representing instances of rib sloughing, he described them as having *the potential* to become a hazard. This is important because he did not conclude that they constituted things that needed to be attended to immediately.<sup>17</sup>

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<sup>16</sup> In contrast, Dr. Phillipson did see "problems," that is, evidence of sloughing on the pillar corners and the ribs beginning around crosscut 16 and through the No. 4 entry up to crosscut 33.

<sup>17</sup> Dr. Phillipson had only one exception to his remark that the sloughing he observed did not need immediate attention. The lone area needing attention right away, in his view, was "the corner bounded by the red line with the 40." For that one location, he believed attention was needed sooner, rather than later. Tr. 479-480.

At the conclusion of the government's case, Counsel for Respondent Bentley made a motion to dismiss<sup>18</sup> on the grounds that a knowing violation had not been established. As Mr. Bentley's Attorney expressed it ". . . nobody has pointed to issues that a mine foreman would have seen, would have known, would have grasped the danger and hazard and then knowingly just refused to rectify or address those issues." Tr. 528.

A ruling was deferred and the case continued with testimony from witnesses called by the Respondents. John Caldwell, the mine's section foreman and production foreman, was at the mine the night before the accident. Mr. Caldwell did the onshift exam of the area the day before the accident and he stated that he did not see any hazards, nor loose ribs, nor missing bolts. Tr. 540. Later that night, Mr. Caldwell, not Mr. Bentley, also performed the last preshift before the fatal accident occurred. When the Court inquired about whether there were problems earlier that week, Mr. Caldwell advised that there were such problems where things would start to "break away," but he maintained that these would not develop until weeks or months had passed. Tr. 596. However, when these did occur, the mine would wrap such problematic crosscuts.

Kevin Jump, third shift mine foreman, was also called by Respondent Bledsoe. Essentially, Mr. Jump's testimony was that, while he did note some hazards on the shift he worked, he did not see any loose ribs, nor missing bolts. Tr. 620-622.

Last, Mr. Paul Bentley testified. It is accurate to state that Mr. Bentley was profoundly shaken by the fatal accident. At the time of the accident he was the section foreman, but presently he is a preshift foreman. In this new role, he preshifts outby the working section. When he arrived at the mine on the day of the fatal accident, at a time before 7 a.m., he looked at the preshift report from the individual who performed that task, finding that no hazards were there noted. Mr. Bentley's shift lasted from 7 a.m. to 3 p.m. on that day. During the time of his shift, he was not required to examine outby crosscut 33. He did not find any hazards during his onshift exam on the day of the accident. Tr. 757. The Court expressly found Mr. Bentley to be a credible witness.

## **Discussion**

At the conclusion of MSHA's case, Respondents moved for dismissal, referring to 29 C.F.R. §2700.67, entitled "Summary decision of the Judge." This Order deals with the Motion for dismissal for Mr. Bentley. Essentially, as just noted, Counsel maintained that the government failed to meet its burden of proof to establish the 110(c) violations<sup>19</sup> in that no

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<sup>18</sup> Counsel for Bledsoe Coal also made a motion for dismissal at the conclusion of the government's case. That motion was denied.

<sup>19</sup> Mr. Bentley's Counsel emphasized that "knowingly" is the key word in matters 110(c). Placing the charges in context, Counsel Shelton noted that initially the onshift charge, per Order No. 8355777, covered only the location of the fatal accident. Then the Secretary amended that Order to add  
(continued...)

witness for the government “pointed to issues that a mine foreman would have seen, would have known, would have grasped the danger and hazard and then knowingly just refused to rectify or address those issues.” Tr. 528. For the reasons which follow, the Court agrees that the Secretary failed to meet its burden of proof in the charges against Mr. Bentley.

Though the label used to convey the intent behind the motion varies, sometimes being referred to as a “directed verdict,” and other times as seeking “summary decision,” the purpose remains constant, with a Respondent essentially contending that the government is not entitled to prevail as a matter of law. As noted in *Clifford Meek v. Essroc Corporation*, “If during a trial without a jury a party has been fully heard with respect to an issue ..., the court may enter judgment as a matter of law against that party on any claim.” 15 FMSHRC 606, (April 1993)<sup>20</sup>

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

the other areas listed in Citation No. 355746, the insufficiently supported ribs charge. Still later, the Secretary moved to add the areas listed in the preshift charge issued to Bledsoe, then adding those areas against Mr. Bentley too.

<sup>20</sup> It is clear that the Court can decide a matter after hearing the evidence without waiting for post-hearing briefs. A few examples follow. In *Sec. v. Drummond Company, Inc.*, 14 FMSHRC 2039, (Dec. 1992, ALJ) the Court granted Drummond’s motion, seeking “a directed verdict arguing that based on the Secretary’s case alone, it was clear that the violation charged was fully abated at the time the Section 104(b) order was issued and that the Secretary was without authority under that section to require it to take the additional specified action beyond what was necessary to remedy and correct the violative condition cited.” The motion was granted in a bench decision. In *Secretary v. Consolidation Coal*, 11 FMSHRC 311 (March 1989), “[a]t the conclusion of the Secretary’s case-in-chief, Consol moved for a directed verdict on the grounds that the Secretary’s evidence did not support a violation of the cited standard. The Motion for Directed Verdict (See Fed. R. Civ. P.41(b) applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. 2700.1(b)) was granted at hearing . . .” The judge found that “the matter that [was] before [him] and clearly from the undisputed evidence presented by the government there [was] no violation of the cited standard, the standard with which [there had been] evidence throughout the government’s case and upon which the operator has been conducting its cross-examination . . . there has been no violation of that standard based on the evidence presented.” That being the case, the motion for directed verdict was granted. In *Secretary v. Cyprus Emerald Resources*, 10 FMSHRC 1417 (October 1988), at the conclusion of the Secretary’s case-in-chief, Emerald filed a motion for directed verdict and a motion for summary decision. “The Motion for Directed Verdict (See FED.R.CIV.P.41(b) applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. 2700.1(b) was granted at hearing and that decision appears as follows with only non-substantive corrections . . .” In *Jim Walter Resources, Inc. v. Secretary*, 34 FMSHRC 1386, (June 2012), at the conclusion of the Secretary’s case, the Respondent made a motion for summary decision, arguing that the Secretary failed to establish a prima facie case that it violated Section 77.400(d). After listening to oral arguments, the motion was granted in an oral decision. In *Eastern Associated Coal v. Secretary*, 22 FMSHRC 1020, (August 2000), “[a]t the conclusion of the Secretary’s case, Eastern made a motion for a summary decision. After listening to arguments from both counsel a decision was made granting the motion.” Finally, in *Aluminum Company of America v. Secretary*, 15 FMSHRC 1821 (September 1993), the Commission noted that at “ the conclusion of the Secretary’s case, the judge entered a decision from the  
(continued...)

As noted at the outset of this decision, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. Such a violation occurs when an individual in a position to protect employee safety and health, fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition. Since the government's own witnesses refuted the claim that Mr. Bentley had such knowledge or reason to know of the existence of the slickenside, which condition was the initial basis for its claims against him, that left the other rib problems in the area as the basis for its claim against him. However, between its three witnesses, Inspector Ramsey, Inspector Boylen and Dr. Phillipson<sup>21</sup> and their divergent views of which ribs needed attention,<sup>22</sup> when coupled with the testimony of Mr. Bentley and other witnesses for the Respondent, it is clear that the government failed to meet its burden of proof for any of the three charges brought against Respondent Bentley.

The addition of the preshift violations, added to show that the conditions existed prior to the onshift examination conducted by Mr. Bentley, is a classic bootstrap argument. It fails in two ways. First, as Mr. Bentley did not do the preshift exam for January 22<sup>nd</sup>, it is an attempt to show that, because the government alleges that the rib issues asserted to exist at the time of the onshift exam are also asserted to have existed during the preshift which preceded it, Mr. Bentley had to have seen those conditions alleged in the preshift when he did his onshift. The attempt to pin those preshift conditions on Mr. Bentley, apart from the fact that he did not do that preshift, require that the conditions were indeed present at the time of the preshift. Without implicitly ruling on that preshift charge in the action against Bledsoe Coal in the associated case, KENT 2011-481, the Court notes that the standard of proof is different for a section 110(c) matter than in a matter under sections 105 and 110 of the Mine Act, 30 U.S.C. §§ 815 and 820. The evidence presented by the Secretary at the hearing was insufficient to establish section 110(c) liability for either the preshift or onshift charges against Mr. Bentley.

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<sup>20</sup>(...continued)

bench granting Alcoa's motion to dismiss. The judge subsequently issued a written decision confirming his bench decision. While the judge credited the testimony of the Secretary's witnesses, including expert testimony as to the hazardous nature of mercury . . . , he held that the Mine Act gives the Secretary the authority to issue a section 103(k) order only if there has been an accident, as that term is defined by section 3(k) of the 1824 Mine Act. . . . The judge concluded that the Secretary did not prove that the mercury contamination detected in the R-300 area was the result of an accident and, accordingly, he vacated the section 103(k) order.”

<sup>21</sup> As Counsel for Mr. Bentley correctly characterized the testimony of Dr. Phillipson, while there were some problems that he perceived with the ribs, they did not need to be corrected immediately. That being the case, they were outside of the preshift and onshift responsibilities of a mine foreman. Tr. 528-529.

<sup>22</sup> There were other instances of MSHA's right hand not being sure about what its left was doing. For example, while Inspector Ramsey found a problem with the rib at the left inby corner of Belt entry 3 at crosscut 32, Inspector Boylen, while admitting he was in the same area, did not detect such a problem. Tr. 376.

Not only did the government witnesses have non-uniform assessments of the presence and/or conditions of various ribs in the section, with regard to the slickenside fatality rock slide, the government witnesses could not express whether those conditions were detectable for Mr. Bentley when he did his onshift report. There was also agreement that it would be very unlikely that one would then place DTI's right next to such a claimed obvious hazard. That being the case, it could hardly be claimed that they were visible earlier to Mr. Bentley, as implied by the inadequate preshift charge, for which charge the government points to the absence of noted problems to show that problems were present. As noted earlier, the fact that all three on-shift examiners recorded "None Observed" in the #3 Belt Heading for January 22, 2010, can also be interpreted to mean that no hazardous ribs were found and not simply that hazards were ignored or overlooked. As also has been noted, but which bears reemphasis, apart from the location of the fatal rib fall, MSHA accident investigators themselves did not see nor assess each of the other rib issues uniformly. The point is that, at least on this record, it is possible to conclude that different individuals, including Bledsoe employees, could look at the ribs cited and legitimately reach different conclusions about the sloughage and whether, if detected, they were in need of immediate attention or not. Further, while the Court found Inspector Boylen to be a knowledgeable and credible witness, the government can hardly establish its case against Mr. Bentley based on rib conditions detected by Inspector Boylen but not included by the lead investigator in the charges made against Mr. Bentley or Bledsoe itself for that matter. The government must be limited to the charges of roof control problems to those it identified in its citations and orders. That other areas, according to Inspector Boylen, should have been cited is not the concern of either of the Respondents or the Court. In terms of Mr. Bentley's potential 110(c) culpability, which is the subject of this Order, it is clear that the evidence falls far short of establishing that he had knowledge or reason to know of the violative condition, much less that he engaged in aggravated conduct constituting more than ordinary negligence.

Accordingly, for the foregoing reasons, all charges against Mr. Bentley are hereby **DISMISSED.**

**SO ORDERED.**

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

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November 6, 2013

|                         |   |                             |
|-------------------------|---|-----------------------------|
| SECRETARY OF LABOR,     | : | CIVIL PENALTY PROCEEDING    |
| MINE SAFETY AND HEALTH  | : |                             |
| ADMINISTRATION, (MSHA), | : | Docket No. KENT 2012-575    |
| Petitioner              | : | A.C. No. 15-19447-277203-01 |
|                         | : |                             |
| v.                      | : |                             |
|                         | : |                             |
| ICG KNOTT COUNTY LLC,   | : | Mine: Kathleen              |
| Respondent              | : |                             |

**DECISION**

Appearances: Brian D. Mauk, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner  
John M. Williams, Esq. Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, KY, for Respondent

Before: William B. Moran

This case involves a section 104(a) citation related to a roof fall at the Respondent's Kathleen Mine. The roof fall occurred between some roof bolts, seriously injuring a roof bolter operator, Mr. Jared Sargeant. That fall resulted in the miner's foot being amputated the following day. The case does not involve a violation of the roof control plan, rather it is a citation alleging a violation of section 75.202(a) and its provision requiring that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." A hearing was held on May 30, 2013 in Pikeville, Kentucky.<sup>1</sup> For the reasons which follow, the Court finds that the Secretary did not establish that the Respondent violated the cited standard. Accordingly, the case is DISMISSED.

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<sup>1</sup> The transcript inadvertently included a transcript for an unrelated matter brought before the Circuit Court of Loudoun County, Virginia. (Case No. 77544, dated June 7, 2013) That matter, 27 transcript pages in length, plus a seven page word index, was not connected in any way with this, nor any other Mine Act proceeding. Accordingly, the Court removed the immaterial pages and returned them to the court reporting service.

## Findings of Fact

Claudius Ray Johnson, a coal mine inspector for MSHA since 2006, testified for the Secretary.<sup>2</sup> On September 20, 2008, Inspector Johnson received word that there had been a roof fall at the Respondent ICG Knott County, LLC's Kathleen Mine and that there had been a resulting injury to a miner from that event. The event had occurred on September 19<sup>th</sup> and Inspector Johnson went to the mine the following day. MSHA roof control specialist Rick Runyon also joined Inspector Johnson at the mine. Upon arriving at the mine site, the mine's Stewart Bailey, advised Johnson that MSHA was not called earlier because they believed the injury to the miner, roof bolter operator Jarrod Sergeant, was not life-threatening. Tr. 19. Instead, the mine made a "courtesy call" to MSHA the following day, upon learning that the miner had a leg amputation from the event. Tr. 20.

Johnson and others then proceeded to the scene of the accident, examining the location where the rock had fallen, causing the serious injury to the miner. The roof fall was in the No. 3 heading, which was an active section. The essence of the incident can be rather simply stated: a large rock fell from the roof and hit the miner in the leg. Tr. 24. The fall occurred about 8 to 10 feet inby the last open crosscut. Tr. 21. As the rock from the fall had been moved before the Inspector's arrival, MSHA could only measure the cavity remaining in the roof. Nevertheless, the cavity informed the Inspector that the rock which fell was 48 inches wide, 33 inches long and 10 3/4 deep. Tr. 22. The mining height in the area of the fall was 55 inches (4 feet 7 inches).

The Inspector described the general area of the rock fall as containing several areas that were "sloughing out [i.e. loose rock hanging from the mine roof which needed to be pulled and removed] and a kettle bottom that hadn't been strapped." Tr. 24, 26. Citations were issued by Inspector Runyon for those conditions. Tr. 24. In terms of the proximity of the sloughing roof and the kettle bottom to the rock fall, the Inspector stated that these were in the No. 5 and No. 6 entries, which were 60 to 80 feet away, whereas the roof fall itself was in the No. 3 entry.<sup>3</sup> Tr. 27. While these other matters were in different entries, Inspector Johnson still considered them to be important in his evaluation of the accident scene, as he considered them to be "in the same area in relationship to [one another]." Tr. 27. One of those other conditions was inby the last open crosscut; the other was not. His fellow Inspector, Mr. Runyon, also considered these other conditions to be relevant to the cited roof fall assessment.

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<sup>2</sup> Inspector Johnson has his foreman papers and worked in the mining industry for 20 years prior to joining MSHA. Tr. 15.

<sup>3</sup> The Inspector stated that the No. 5 entry would have been some 80 to 150 feet from the roof fall. As he could not remember the centers between the entries, the Inspector could not be more specific about the proximity of these other conditions to the roof fall location, which of course was the matter that prompted his investigation. Tr. 27.

Additional detail about the site of the rock fall was provided. The entries were 18 ½ feet wide. The rock that fell was near the right rib and it fell out between two rows of roof bolts. Tr. 32. The roof bolts were on centers of slightly less than 4 feet. Other support was in the area. These were straps and some of the bolts had a “pie pan” installed. That device covers a greater area than the 8 x 8 plate that is installed with a roof bolt. In fact, one pie pan was “right beside where the rock fell.” Tr. 33. The straps and pie plates were not required under the roof control plan. Tr. 33. In fact, right next to where the rock fell, there was a pie pan and some straps around three sides of it. Tr. 34 and Ex. P 2, a drawing of cited condition at p. 18 of the Inspector’s notes. The word “strap” appears 3 times in the drawing.

Inspector Johnson also interviewed the accident victim, Mr. Sergeant. Ex. P 3. That interview occurred about a month after the event. The injured miner informed that on that day he was performing roof bolting in the No. 3 entry, at a location out of the air movement in the last open crosscut. At the time of the accident, he was on his knees when he then heard the roof starting to “work,” that is, it was making noise. Though he tried to get to safety, Mr. Sergeant was unable to leap out of the area fast enough, because of the low mining height, and the rock hit his leg. Tr. 40. In the amputation which ensued, the miner lost his leg from about 6 to 8 inches below his knee. Tr. 38.

On November 8, 2011, Inspector Johnson, having completed his investigation,<sup>4</sup> returned to the mine and issued Citation No. 8261958, the citation which is the subject of this litigation. Tr. 16, 44, Gov. Ex. P 4. Tr. 16, Exhibits P1 and P 2. As stated, the citation invoked section 75.202(a), which provision requires that roof and ribs be supported or otherwise controlled from such falls. The Inspector believed that the mine had not fully protected the miners from a fall of roof and ribs. He also marked the negligence as “moderate” on the basis that the operator knew or should have known of the condition “because it was obvious in other areas of the mine[.]” Tr. 47. He believed that the operator “should have kn[own] they had a problem.” The moderate negligence designation was viewed, in effect, as a concession by the Inspector. That is, it was considered to be a mitigating factor, because the mine was following its roof control plan. The Inspector also marked the citation as “significant and substantial.” Tr. 48. However, a roof control plan represents the minimum requirement.

In sum, as expressed by the Inspector, “With what we [saw] during our visit the first day, with the citations that [were] issued for the other conditions, and one of them being in the area close to [the location of the roof fall] [he] felt they should have known it.” Tr. 47. Inspector Johnson’s construed the mine’s installation of some straps and the pie pan right in the area of the fall as indicative that the mine knew there were problems at that area. Tr. 48.

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<sup>4</sup> The Inspector’s investigation also included speaking to some miners on the section. Their remarks were reflected in his notes and are part of the record.

Following the accident, MSHA requested that the mine's roof control plan be revised to require that the mine *not* drill holes through kettle bottoms and that they *would* strap them. The Plan was revised to require those steps. Tr. 49. MSHA considers drilling through kettle bottoms to be an unsafe practice. When encountering these, MSHA instead requires strapping or some other method placed over them. Tr. 51. Despite the additional procedures for the mine's roof control plan, it is significant to note that the Inspector stated that the rock that fell *had not* been drilled through. Tr. 52.

Upon cross-examination, the Inspector agreed that a roof bolter's responsibilities include being a front line person to look at the conditions of the roof. Tr. 54. While conceding that role, the Inspector added that he did not know if the injured miner was the one that bolted the area where the rock fell out. The Inspector conceded that a piece of mine roof can come out under circumstances where one cannot tell if that will happen; that not every rock which falls out is a kettle bottom; and that this rock fell out between the bolts. Accordingly, the most the Inspector could say with confidence was that a rock had fallen out, but not whether it was a kettlebottom.<sup>5</sup> Tr. 55. The Inspector's reaffirmed his view that, because there were straps installed, and a pie pan was right beside the rock, those actions were signs of recognition that there was a problem in the area. Tr. 55-56. However, he admitted those steps could also be viewed as indicating that people were being attentive to the roof conditions and taking responsible steps, by adding support such as strapping, where they saw problems.<sup>6</sup> Tr. 56.

As to the citations issued at the time of the investigation by fellow inspector Runyon, Inspector Johnson agreed those were two or three entries away from the location of the rock fall. Tr. 57. Importantly, Johnson agreed that those other violations were not considered to be contributory to the rock fall incident. Tr. 58. Inspector Runyon is a roof control specialist whereas Inspector Johnson does not have that expertise. In fact, Johnson conceded that Runyon was involved in the investigation because of that expertise. Tr. 59. Also, Inspector Johnson did not issue any citations to the mine examiners, such as pre-shift or on-shift examiners, in this instance. Tr. 60. He noted that there was an exam done that day and that the examiners did not note any roof problem. Further, there were paint marks in that area, indicating that someone did

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<sup>5</sup> The Inspector retreated from his earlier statement that the rock which fell was a kettle bottom. The most he could state was that this mine has a history of kettle bottoms. Tr. 57-58. Accordingly, the Inspector could not state whether the rock that fell could be identified beyond that it was a rock and thus he could not characterize it as a kettle bottom or a slickenside rock: "[t]here was a piece of rock that fell." Tr. 62. In fact, he candidly admitted that he didn't know what the term "slickenside" actually meant. Further, even a kettle bottom might not be visible, as there can be times when it is under a layer of rock. *Id.*

<sup>6</sup> The Inspector also agreed that this mine has a history of adding strapping or other supplemental support when they find a need to do so. Tr. 58.

examine that area that day.<sup>7</sup> The paint mark was a directional centerline, which is made to help keep the entries straight. Tr. 60-61.

When the Court asked if MSHA was, in effect, engaging in “Monday morning quarterbacking,” about the rock fall and that the mine operator really couldn’t have figured out that there was something that needed attention, the Inspector first noted that MSHA was at a disadvantage in assessing whether the mine had foreknowledge because the rock had been removed and thus it was impossible to assess the obviousness of the condition before the fall. Tr. 64. He then added that, with all the citations his fellow Inspector, Mr. Runyon, had issued for roof issues and the amount of strapping installed, and still needed, it was his conclusion that not enough had been done to address the area where the rock fell. Tr. 65. Still, Johnson agreed that none of the statements he took from miners, other than from the injured miner, suggested that the citation he issued was warranted. Tr. 67.

In terms of the strapping that was present, the Inspector noted that there was some “to the outer edges” of the location of the rock fall, but “nothing right against it.” Tr. 70. Clarifying earlier testimony, the Inspector stated that the rock that fell out was outby the face a short distance, on the order of 7 feet “inby the corner of the last open crosscut, starting into the head.” Tr. 72. When asked if, when working outby the area of the rock fall, there were other areas that needed support, the Inspector advised there were not. Tr. 72. Consistent with that conclusion, there were no other roof citations issued for the number 3 entry. Tr. 74.

### **The Parties’ Contentions**

The Secretary contends that several factors establish that a reasonably prudent mine operator would have recognized the cited hazardous condition. In this regard it contends “[b]oth CMI [coal mine inspector] Johnson and Inspector Runyon observed obvious and extensive adverse roof conditions throughout the travelway leading to the accident site [and] [t]hey also observed adverse conditions when they arrived on the active section.” Sec. Br. at 5. From that, the Secretary contends that “[i]t is reasonable to believe that these hazards were apparent to the operator, placing it on notice that protective measures were needed to alleviate hazards from adverse roof conditions.” *Id.* The Secretary also looks to the fact that the Respondent had installed some additional roof support in the area of the accident site as “demonstrating that the operator was aware of deteriorating roof conditions.” Last, the Secretary notes that Inspector Johnson’s notes record that the accident victim, Mr. Sergeant, told him that he had installed roof bolts in various places on the morning of the accident. The Secretary adds that such bolt installation in various places is “known as ‘spot bolting’ [and that] this is done to alleviate hazardous roof conditions.” However neither the term “spot bolting,” nor its purpose, is part of the testimony in the record, nor does the Secretary ask for, or point to, a basis for taking

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<sup>7</sup> As his first response to a question posed on cross-exam was imprecise, Respondent’s attorney, asked again whether the condition was one which should have been noted by the pre-shift or on-shift exam. That is, whether the condition was apparent, if one had looked at the roof before the rock fell. Inspector Johnson responded that he concluded it was not apparent by such exams. Tr. 61.

administrative or official notice of such as facts. There are other problems with this evidentiary reference. The accident occurred in the active working section #3 entry. The Inspector's notes of the Mr. Sergeant's statement to him record that on the day of the accident, his foreman told him to spot bolt at the # 1 entry.<sup>8</sup> Further, the spot bolting reference is immediately followed by the comment that "CMI Johnson correctly summed up [that the reason] the operator's conduct was a violation, [was] "[t]hey weren't putting enough into it to protect the miner." *Id.* The Court would note that while the "spot bolting" and the claim that the mine was not "putting enough into it" to protect the miner were juxtaposed, the two were not tied together in the Inspector's testimony at all. As noted, the Inspector said nothing in his testimony about spot bolting, nor that it is a practice used to alleviate hazardous roof.

The Respondent contends the Citation should be vacated, as the Secretary failed to establish that a reasonably prudent mine operator would have provided additional roof support. R's Br. at 4. Citing *Cannon Coal*, 9 FMSHRC 667 (April 1987),<sup>9</sup> Respondent notes the Commission's holding that liability under the cited standard's requirement for adequate roof support is "measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard would have provided in order to meet the protection intended by the standard." *Id.* at \*668.

*Cannon*, as the Respondent notes, went on to "emphasize that the reasonably prudent person test contemplates an objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue." *Id.* Referring to the administrative law judge's examination of the evidence presented, the Commission then noted "that the Secretary had failed to produce evidence that objective signs existed prior to the roof fall that would have alerted a reasonably prudent person to install additional roof support beyond the support that actually had been provided by the operator." *Id.*

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<sup>8</sup> As the Inspector did not testify about this part of his notes, it is possible that those notes reflect that the miner was told to spot bolt in the # 7 entry. Left with reading the inspector's handwritten notes, and with no testimony to decipher what was written, the Court cannot be sure whether the Inspector's recorded a "1" or a "7" for the entry. Importantly, what is clear is that the notes do not record spot bolting being done that day in the # 3 entry, the area of the accident.

<sup>9</sup> *Cannon Coal* dealt with the predecessor standard, 30 C.F.R. §75.200, to the provision cited here, 30 C.F.R. §75.202, but the critical language is shared in both that the roof and ribs are to be supported or otherwise controlled to protect miners from falls. Now listed as the "Scope," Section 75.200 used to provide: "Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." The superceding, present, standard, 30 C.F.R. §75.202, now provides: "(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

It is the Respondent's contention, and the Court's conclusion, that the Secretary failed to satisfy the *Cannon* standard. In essence, the Respondent maintains that the evidence falls short of establishing that a reasonably prudent mine operator would have provided additional support. Certainly, Respondent observes, the fact that there was a rock fall and that the fall injured a miner does not establish a violation. Nor, it contends, does the fact that there were roof control citations issued for other areas in the mine establish that *the cited fall* was the result of a failure to provide the protection a reasonably prudent mine operator would have taken. In this regard it notes that those cited areas were in different entries, and some 150 to 200 feet from the fall cited here. Further, those other areas, it was conceded, did not contribute to the occurrence of the cited condition. Anticipating the Secretary's assertion, Respondent argues that the fact it had installed strapping in the area of the fall can not be turned against it to show that more support was needed. Instead, it shows that the operator did take action where it perceived the need for additional support. R's Br. at 7.

In its Response Brief, the Respondent asserts that the record does not support a claim that there was a hazardous roof condition which was "apparent to the operator." It notes that the Inspector did not allege preshift exam deficiencies because it was not known if the condition was apparent. As for the Secretary's claim of obvious and extensive adverse roof, Respondent notes that those problems were not in the area where the rock fell. Focusing upon the requirement for objective proof, Respondent notes that there was no evidence that the area where the rock fell needed additional support. It argues that the idea that the Secretary need only identify *other unconnected* problem locations in a mine to establish a violation runs contrary to *Cannon Coal's* teaching. R's Reply at 2. Nor, it adds, should the mine's salutary safety actions, by installing strapping and pie pans in the same area, be used as a cudgel against it. *Id.* at 2-3. Finally, Respondent comments upon the Secretary's post hearing brief remark that the injured miner spot bolted the area of the rock fall. It notes that no mention of this was made during the hearing and the note itself does not establish that such bolting was done to alleviate hazardous conditions. *Id.* at 3. Had that been the case, the Secretary had the option to call the injured miner to testify about the conditions.

## **Discussion<sup>10</sup>**

The parties and the Court are in agreement that *Cannon Coal* is the Commission authority to turn to in determining whether a violation of 30 C.F.R. 75.202(a) has been established. To begin, based on this record, the Court does *not* view the other citations, issued at the time of the matter in dispute here, as tending to show that the reasonably prudent person would have taken additional steps for the distinct condition cited in Citation No. 8261958. Those other cited conditions were insufficiently related, in proximity, to the Citation in issue and as such they do not inform about the condition at the site of the roof fall. Applying the objective test required

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<sup>10</sup> The reader will note that discussion and findings by the Court are not limited to this section of the decision.

under *Cannon*, and absent a showing that the roof conditions were endemic throughout the working section, the Court must focus on the conditions at, or very near to, the roof fall. Thus, the Court does not agree that the cited condition was in the same area as the other areas cited. As in *Cannon Coal*, the Court here finds here too, that “the Secretary failed to produce evidence that objective signs existed prior to the roof fall that would have alerted a reasonably prudent person to install additional roof support beyond the support that actually had been provided.” *Cannon Coal* at \*668.

In terms of the location where the rock fell, again, based on this record, the conditions observed do not support the Secretary’s claim. No claim was made that the roof control plan was not being followed. While true that following the roof control plan is not the end of the inquiry, here it was conceded that pie pans and straps were also used, though not required by the plan. As noted, one such pan was right beside where the rock fell. In addition, straps were present around three sides of the area where the rock fell. It is true that the Inspector “felt,” that is, he believed, that the mine operator had not done enough to control the roof, such a subjective basis does not square with the requirements under *Cannon Coal*.

While, post-accident, the mine revised its roof control plan so that it would not drill holes in kettle bottoms, but instead would strap them, the Inspector was unable to state that the rock which fell was a kettle bottom. Beyond that, revisions to roof control plans, by themselves, cannot be used to establish that a hazardous condition, resulting in the issuance of a citation, was present prior to that change in the plan. So too, as noted, no preshift or onshift citations were issued in connection with this rock fall. Those exams did not note any roof problem and there were paint marks in the area, indicating that the exams were made.

Thus, on the record before the Court, it is concluded that this was an extremely unfortunate accident which occurred and for which the Court has genuine sympathy for the serious injury received by Mr. Jared Sergeant. However, this decision must be made on the basis of the evidence adduced. That evidence, in turn, must rely on objective factors in determining whether the mine operator failed to meet the standard required under *Cannon Coal*. Applying that evidence, the Court finds that this serious accident was unpredictable and that the Respondent, acting as a reasonably prudent mine operator, was not put on notice that additional support was indicated.

Accordingly, the matter is DISMISSED.

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

Distribution: (E-mail and Certified Mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
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November 13, 2013

|                          |   |                                  |
|--------------------------|---|----------------------------------|
| LUDWIG EXPLOSIVES, INC., | : | CONTEST PROCEEDINGS              |
| Contestant,              | : |                                  |
|                          | : |                                  |
| v.                       | : | Docket No. LAKE 2011-530-RM      |
|                          | : | Citation No. 6555529; 02/23/2011 |
|                          | : |                                  |
| SECRETARY OF LABOR       | : | Docket No. LAKE 2011-531-RM      |
| MINE SAFETY AND HEALTH   | : | Order No. 6555528; 02/23/2011    |
| ADMINISTRATION (MSHA),   | : |                                  |
| Respondent.              | : | Mine: Tuscola Stone Company      |
|                          | : | Mine ID 11-01657 B1N             |
|                          | : |                                  |
|                          | : |                                  |
| SECRETARY OF LABOR       | : | CIVIL PENALTY PROCEEDING         |
| MINE SAFETY AND HEALTH   | : |                                  |
| ADMINISTRATION, (MSHA),  | : | Docket No. LAKE 2012-56-M        |
| Petitioner,              | : | A.C. No. 11-01657-267325 B1N     |
|                          | : |                                  |
| v.                       | : |                                  |
|                          | : |                                  |
| LUDWIG EXPLOSIVES, INC., | : | Mine: Tuscola Stone Company      |
| Respondent.              | : |                                  |
|                          | : |                                  |
|                          | : |                                  |
|                          | : |                                  |
| SECRETARY OF LABOR       | : | CIVIL PENALTY PROCEEDING         |
| MINE SAFETY AND HEALTH   | : |                                  |
| ADMINISTRATION, (MSHA),  | : | Docket No. LAKE 2012-25-M        |
| Petitioner,              | : | A.C. No. 11-01657-267815         |
|                          | : |                                  |
| v.                       | : |                                  |
|                          | : |                                  |
|                          | : |                                  |
| TUSCOLA STONE COMPANY,   | : |                                  |
| Respondent.              | : | Mine: Tuscola Stone Company      |
|                          | : |                                  |
|                          | : |                                  |

## DECISION

Appearances: Nadia A. Hafeez, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor.

Daniel Foltyniewicz, *pro se* (non-attorney), Wheaton, Illinois, for Ludwig Explosives, Inc.

Alan R. Shoemaker, *pro se* (non-attorney), Tuscola, Illinois, for Tuscola Stone Company.

Before: Judge Lewis

### STATEMENT OF THE CASE

These civil penalty proceedings are pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* (the “Act” or “Mine Act”). This matter concerns Citation No. 6555522 issued against Respondent, Tuscola Stone Co., and Citation No. 6555529 issued against Respondent, Ludwig Explosives, pursuant to Section 104(d) of the Mine Act. A hearing was held in Springfield, Illinois, on May 6, 2013. After the hearing, the parties submitted post-hearing briefs, which have been fully considered.

### ISSUES

The issues to be determined are: whether the 107(a) imminent danger order was validly issued; whether the Respondents violated 30 C.F.R. § 56.3200; whether the violations were significant and substantial in nature; and whether the violations constituted unwarrantable failures.

### STIPULATIONS

The parties submitted the following joint stipulations at hearing:

- 1) Respondent, Tuscola Stone (“Tuscola”) was, at all relevant times, the operator of the Tuscola Stone Company Mine; Mine ID: 11-01657.
- 2) Respondent, Ludwig Explosives (“Ludwig”) was, at all relevant times, a contractor (Contractor ID B1N) performing blasting activities at the Tuscola Stone Company Mine; Mine ID: 11-01657.
- 3) The mine listed above is a mine, as defined in the Mine Act.
- 4) Tuscola and Ludwig are engaged in mining operations in the United States, and their mining operations affect interstate commerce.

- 5) Tuscola and Ludwig are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-965.
- 6) The Federal Mine Safety and Health Review Commission has jurisdiction over these matters under the Mine Act.
- 7) The citations at issue in this matter were issued on the dates indicated on each.
- 8) Inspector Peter Ackley, whose signature appears in block 22 of citations at issue, was acting in his official capacity and acting as an authorized representative of the United States Secretary of Labor.
- 9) The Secretary proposed penalties for each citation as listed on Exhibit A to each of the petitions for penalty assessment filed in these matters and those amounts are incorporated by reference herein.
- 10) The proposed penalties will not affect Tuscola's or Ludwig's ability to continue in business.
- 11) Tuscola and Ludwig demonstrated good faith in abating the violations.
- 12) The exhibits to be offered by the parties are stipulated to be authentic but no stipulation is made as to their relevance or as to the truth of the matters asserted therein.

## **SUMMARY OF THE TESTIMONY**

### **1. Peter Ackley**

Peter Ackley ("Ackley") appeared and testified on behalf of the Secretary.

Ackley had worked for three and a half years as a safety and health inspector for the Department of Labor, Mine Safety and Health Administration ("MSHA") in the metal and nonmetal division. Tr. 11.<sup>1</sup>

Prior to working for MSHA, Ackley had worked for a cement plant for approximately 15 years, and before that he had worked as a heavy equipment operator for 15 years. Tr. 12. At the cement plant, Ackley did not examine the highwalls of the facility's pits. Tr. 58. Ackley served in the Navy as an operating engineer with the Seabees and he had some community college credits. Tr. 12, 54. He had formal training with the Mine Academy for 26 weeks for entry level inspections. He also had journeyman training; going out with journeymen inspectors when they performed inspections. Tr. 12. His normal duties as an inspector included performing regular

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<sup>1</sup> The hearing transcript will hereinafter be referred to as "Tr." followed by page number.

inspections, doing hazardous condition complaints, filing reports, going out to mine sites and visiting and verifying compliance with 30 C.F.R. Tr. 12.

Ackley usually inspects approximately 70 mines per year, most of which are limestone, sand, and gravel pits. Tr. 12-13.

Ackley was familiar with Respondent's mine, having performed inspections in February, 2011. He characterized the mine as "mid-range" in size. Tr. 13. As compared to many mines that had two to three employees, Tuscola Stone employed 12 employees. Tr. 14. The mine used a multiple bench methodology for mining and crushing limestone products.<sup>2</sup> Tr. 14.

When he performed his inspection in February, 2011, Ackley followed his normal inspection procedures: driving to the scale house or office; informing the highest ranking official that he intended to perform an inspection; going through some standard questions; and traveling through the mine with the mine operator or representative of the mine operator, and possibly miner's representatives. Tr. 14. On February 23, 2011, Ackley was accompanied by members of the management team, including Rodney Hatten, Alan Shoemaker, and foreman Jay Carter. Tr. 15. There was no miner's representative.<sup>3</sup> Kevin LeGrand, Ackley's field office supervisor, also accompanied him. Tr. 15, 55-56.

As a result of his inspection, Ackley issued Citation No. 6555522 to Tuscola Stone Co. on February 23, 2011, at 12:48. Tr. 15; SX-4.<sup>4</sup>

Ackley had issued the citation because miners were working at the base of a high wall that had loose unconsolidated material, which had not been removed before the commencement of work. Tr. 16. The rock was fractured and broken vertically and horizontally, and there were sections that were gapped from the highwall and overhanging. Tr. 16-17.

Ackley used his camera to photograph the highwall. Tr. 16. He stated that the photograph admitted as SX-5 depicted the blasters at the base of the highwall, where

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<sup>2</sup> Multiple Bench methodology is a "method of quarrying a rock ledge in a series of successive benches or steps." Dictionary of Mining, Mineral, and Related Terms (2<sup>nd</sup> Edition).

<sup>3</sup> As noted *infra*, Shoemaker was not present during the entire inspection. At hearing Hatten also identified himself as a miner's representative. Tr. 230.

<sup>4</sup> Secretary's exhibits will hereinafter be referred to as "SX" followed by the exhibit number. Respondent, Tuscola Stone's, exhibits will hereinafter be referred to as "TSX" followed by the exhibit number. Respondent, Ludwig Explosives', exhibits will hereinafter be referred to as "LX" followed by the exhibit number.

there was loose, unconsolidated material above them.<sup>5</sup> Tr. 18. Two miners, a blaster and blaster's helper, were loading shots at the base of the high wall.<sup>6</sup> Tr. 19. They were close enough to touch the highwall, which was located above them and had cracked vertically and horizontally and had overhang material. Tr. 19-20.

If material fell, it could kill or injure the miners standing below. Tr. 20. Ackley marked the gravity as "highly likely" because of the presence of two miners who were exposed to falling material during a time when material had actually fallen. Tr. 22. While he had not actually observed the material fall, Ackley had been advised of such by individuals at the scene, including Robert McAdam, Justin Coner, and Michael Schafer. Tr. 22.

The photograph at SX-6 accurately depicted conditions at Tuscola Stone that Ackley had observed. This included an atypical amount of coarse material laying about at the bottom of the wall. Tr. 23-24.

Ackley would not have expected to see so much material on the ground. He further would have expected to have seen the wall scaled. The materials should not have been gapped and unconsolidated. Tr. 25.

Other than a quick visual inspection, Respondent Tuscola Stone had failed to do anything to correct the conditions of the wall. Tr. 25. Given the height of the wall and the material, Respondent should have performed a thorough visual inspection and removed unsafe materials. Tr. 26. Ackley could not take actual measurements of the unconsolidated material due to safety concerns, but made estimates of such, as reported in his citation. Tr. 26; SX-4.

Ackley estimated that the highwall was approximately 40 feet in height. Tr. 28. The photograph at SX-7 depicted the whole height of the wall, the bench that miners were working on, and the ditch dug in front of the blast area. Tr. 28. Because of the ditch's location, Ackley had a concern regarding the blaster's ability to leave the area safely if material did fall. Tr. 30. He reviewed the photograph at SX-7, which depicted loose overhanging material, some of which appeared to have already fallen. The photograph also showed where miners would have been working and where tools were located, which would later need to be retrieved. Tr. 30-32.

In determining that the hazardous condition could reasonably be expected to result in fatal injuries Ackley considered the size of the rock that was loose and unconsolidated, the height of the highwall, and that there had been fatal impact injuries associated with highwalls every year in the past. Tr. 34-35.

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<sup>5</sup> This photograph was actually taken by LeGrand in the presence of Ackley. Tr. 18.

<sup>6</sup> In quarry mining, a shot is an explosive charge in place for detonation.

Referring to MSHA's Rules to Live By III, "Preventing Common Mining Deaths," Ackley noted that MSHA had placed special emphasis on certain safety standard violations that needed to be avoided because of the fatalities associated with such. Tr. 35; SX-8, p. 2. MSHA had gathered statistics regarding the Rules to Live By, and made the results available to mine operators through its website, discussions during inspections, and the circulation of brochures. Tr. 36.

Two people would have been affected by the violation because both the blaster and blaster's helper were working under the highwall, and could have been fatally injured by falling rock. Tr. 37. Ackley further explained that once material begins to loosen and fall, more than one falling rock is usually involved in an incident. Tr. 37.

The violation was the result of highly negligent conduct because Respondent, Tuscola Stone, had reason to know about the hazardous condition of the highwall. Tr. 37.

Respondent's personnel traveled in the area as part of normal mining activities and used the haul road. Tr. 37. On Monday meetings with the blasters, Respondent had been informed that the highwall was unsafe. Tr. 37-38. Despite being informed of such, the mine operator failed to take any actions to correct the hazardous highwall conditions. Tr. 37-38. Ackley concluded that the unsafe conditions had existed for "a couple of weeks, maybe longer." Tr. 38.

Ackley issued a 104(d)(1) citation because the violation was of a mandatory safety standard that was highly likely to cause serious injuries. The operator had reason to know of the condition and had failed to take corrective actions. Tr. 38-39.

Because blasters had informed the operator's foreman, Rodney Hatten, on Monday that the wall was unsafe, the operator should have conducted a thorough examination and taken corrective actions before miners would have been permitted to work underneath the highwall again. Tr. 39.

Three Ludwig employees were working in the affected area: two by the base of the highwall and one by the explosives truck. Tr. 39-40. Any miners who would be going down to the pit would have observed the condition of the highwall. Also, the person who dug the trench would have been able to see the condition. Tr. 40. Those individuals, however, would not have been exposed to the same hazard as the two blasters because they would not have been as close to the highwall. Tr. 40.

Ackley had spoken to both Shoemaker and foreman Hatten regarding the condition. Shoemaker reportedly informed Ackley that "it was common during [that] time of year during thaw and freeze cycles for material to move off the wall." Tr. 41.

Based upon "the extent of the gap and breaks in the walls, overhanging material and experience of the miners that work at Tuscola," management should have recognized the cited conditions before the date of inspection. Tr. 41. Due to the high degree of

danger posed by the condition, Ackley issued a verbal imminent danger order to Hatten as he and Hatten were driving down to the blast area to observe the blasters. Tr. 42.

In order to terminate the citation, the operator scaled back the highwall, using a crane and excavator.<sup>7</sup> Tr. 42. In order to retrieve a hose, some boosters and blasters that had been left behind, Respondent used an unsparking shovel and a pole with a manlift to scoop the boosters and caps and take them out of the area. Tr. 43-44; SX-9.

Ackley indicated that Citation No. 6555529, which was issued to Respondent, Ludwig Explosives, was essentially identical to Citation No. 6555522 issued to Respondent, Tuscola Stone. Tr. 47.

Pursuant to MSHA's procedure handbook for writing citations under the dual compliance guide, Ackley had issued two citations, one to each Respondent, for violating §56.3200. When a cited violation involves both a mine operator and contractor, both may be cited for the unsafe condition. Tr. 47.

One of the factors considered in issuing a citation is who has responsibility for the abatement of the citation. Because Tuscola Stone knew (or should have known) of the hazardous condition and because Ludwig employed two blasters who were in the affected area and exposed to the hazardous conditions, both Respondents were cited. Tr. 47.

Under strict liability standards, Tuscola Stone had the responsibility to ensure that its mine site was safe and that any hazardous highwall condition be corrected. Even as an independent contractor, Ludwig still had the duty to ensure that its employees not be exposed to hazards. Tr. 48.

For the same reasons that he outlined in his testimony against Tuscola Stone, Ackley had marked Ludwig's violation as highly likely to result in a fatal injury. Tr. 49.

Ludwig's lead blaster also had the responsibility to examine the highwall and to make certain conditions were safe for the blasters. When doing a workplace examination he was an agent of the operator. The person in charge at the mine for the blasters, Ludwig's employee, was aware of the fact that rock had fallen from the hole. However, rather than immediately moving everybody out of the danger area, he continued loading the hole they were working on. Tr. 49-50.

During an interview with Ackley after he had been withdrawn from the area, McAdam had reported that he heard a rock fall but, nonetheless, decided to finish loading the last hole before withdrawing from the area. Tr. 50.

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<sup>7</sup> See also abatement description at Tr. 53: "[T]hey did a mechanical scaling of the high wall with a backhoe for the section that wasn't as tall, and for the taller sections they used a crane and they drug a track up and down, knocking loose material down from the high wall."

Ackley opined that the blasters, upon hearing a rock fall, should have immediately backed away from the situation and reevaluated it to determine a safe procedure. They should not have finished loading the hole or moving the tools or explosives out of the way once they heard something fall. Tr. 51. Without taking the time to back off and observe the wall, the blasters would not have known whether it was just one rock falling or the start of continuing material falling. Tr. 51.

Ackley had issued the imminent danger order to Hatten of Tuscola Stone because he was at the scene. Tr. 51. Ackley noted that he could have issued additional citations on the date of his inspection, including one for failure to properly examine the highwall. However, he was involved with other concerns, such as withdrawing all affected miners from the highwall and dealing with explosives left at the base of the wall. Tr. 52-53.

The same actions to abate Citation No. 6555522 were taken to abate Citation No. 6555529. Tr. 53.

Ackley reaffirmed that the lead blaster had informed him that loose rock had fallen on February 21 and 22, 2011. Tr. 61-65. Ackley had not personally witnessed the falls. Nor did he see any of the deposited material, depicted in the photograph at SX-4, fall to the ground. Tr. 65-66.

Ackley spoke with all three of Ludwig's blasters—Robert McAdam, Justin Coner, and Mike Payton—who asserted that they heard material fall on February 23, 2011. Payton heard it fall from the truck he was standing next to. The blaster and driller heard material hitting mud close to where they were working. Tr. 66.

The ditch in front of the highwall was reportedly present on Monday and was dug sometime between Monday, February 21, 2011, and the Wednesday, February 23, 2011, inspection. Tr. 67.

When working near highwalls, miners should maintain a distance from the base of the highwall of one third of its height. Such a distance, while not a specific MSHA regulation, was a “rule of thumb” recognized in the industry. Based upon the subject highwall's estimated 40-foot height, a miner would therefore need to keep a distance of approximately 15 feet. Tr. 68-69. Ackley, however, saw miners next to the highwall, with one actually touching it. Tr. 70.

The mine operator and blasters came up with a plan to safely remove materials, including explosives, at the base of the wall by using a JLG manlift. Tr. 74-76. It was safer to use an extension over a ditch with a tagged out JLG manlift to remove explosives than to allow miners to approach and remove blasting material on foot.<sup>8</sup> Tr. 80-81. Ackley agreed that whether individuals were using a JLG or approaching the affected

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<sup>8</sup> See discussion of decision to utilize this piece of equipment at Tr. 78-80, 89, 101; See also McAdam written statement at SX-15, describing use of manlift with plastic shovel taped to a long pipe.

area on foot, if they determined that conditions were unsafe, they could both withdraw from the area.<sup>9</sup> Tr. 82.

Ackley confirmed that MSHA had a rule that a loaded hole should not be left for an extended period of time without being shot. Tr. 77.

Ackley conceded that Rules to Live By III may not have been available when the citation was issued. SX-8; Tr. 86.

On redirect examination, Ackley testified that he understood that on February 21, 2011 Ludwig had left the site of the highwall because it was unsafe to blast that day. Tr. 87. He further received no indication that measures had been taken to abate the unsafe conditions before work was begun on February 23, 2011. Tr. 88.

Before he was able to get the miners' attention, they were approximately five feet from the highwall. Tr. 91; SX-11.

Other than taking corrective actions such as scaling the highwall and removing blasting caps, MSHA rules would not have permitted any other work to continue in the affected area. Tr. 92-93; SX-12.

Ackley denied that he had utilized Rules to Live By in order to justify his negligence finding. Tr. 94. He had referred to the Rules only to show that highwalls had been a known problem in the industry and had involved fatalities in the past. Tr. 94.

On recross, Ackley confirmed that he had cited the JLG manlift for an auxiliary violation, but had not ordered such taken out of service. Tr. 95.

On cross examination by Shoemaker, Respondent Tuscola Stone's representative, Ackley confirmed that he had not physically given Tuscola Stone a copy of Citation No. 6555522 on the date of issuance. Tr. 97-98; SX-4.

Ackley did not think it necessary to note in the body of the citation that the blasters working at the highwall were control blasters, or that the lead blaster, Robert McAdam, had informed him that loose rock had fallen on February 21, 2011. Tr. 98-99.

Ackley was told that the men had left the shot on Monday, February 21, 2011, because "of heavy rain and the high wall was unsafe." Tr. 100.

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<sup>9</sup> As discussed *infra*, the pertinent point is not that a miner using a JLG or a miner on foot could, if they perceived the condition to be unsafe, both reasonably withdraw from the affected area. The critical question, given this case's particular circumstances, is whether blasters standing close to the base of a highwall with a ditch near them could withdraw as quickly and safely as individuals who already had been evacuated from the immediate area beyond the ditch or as an individual in a manlift extending over the ditch.

Even though the JLG manlift had been cited and tagged, it was a “good” decision on the part of Tuscola Stone to have taken it out of service in taking corrective actions. Tr. 101.

Ackley agreed it was a “judgment call” that the highwall he cited contained loose material. Tr. 107. He observed Tuscola Stone employees use a bucket of an excavator to scale the highwall area that wasn’t as tall and a crane with dozer track to scale taller areas. A track attached to a wrecking ball helped to remove some of the material. Tr. 108-109.

Ackley further agreed that Shoemaker had offered to scale the entire highwall as a safety measure. Tr. 111.

Shoemaker and Hatten were the two individuals from Tuscola Stone that he had interviewed during his investigation. Tr. 114. Ackley did not request that the Respondent test the affected area or prove there was no loose material before issuing his citation. Tr. 112-113. Tuscola Stone had been cited because it was responsible for the highwall and issued an unwarrantable failure because it was aware that the affected area had hazardous conditions that remained uncorrected when the blasters returned to work. Tr. 117.

On redirect examination, Ackley stated that Tuscola Stone, as owner/operator of the mine, owed the same degree of care to its employees and contractor employees to ensure their safety while they were working at the mine. Tr. 118.

Referring to his general field notes, Ackley stated that he was told that rock or rock material was seen coming off the wall on Monday, February 21, 2011.<sup>10</sup> Tr. 118.

Tuscola Stone had not, in fact, asked for the opportunity to demonstrate the highwall was sound. Tr. 120.

Referring to his close out conference summary at SX-13, Ackley indicated that Shoemaker had reportedly asserted that blasters are trained to recognize highwall standards and should inform him of any hazardous conditions. It was not his responsibility to check on the highwalls. Tr. 121-122.

As discussed *infra*, the factual issue of whether any of the employees of either Respondent had informed Ackley that rock had been seen falling on February 21, 2011 was hotly disputed. Ackley’s field notes indicate that McAdam had reportedly informed Hatten on February 21, 2011 that “rock was falling from heavy rains on Monday.” See also, LX-1, p. 18.

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<sup>10</sup> At hearing, Shoemaker objected, on behalf of Tuscola Stone, to the admission of SX-13 on the grounds that he had, in fact, not denied his responsibility to check the walls. As noted *infra*, however Shoemaker ultimately chose not to take the witness stand under oath.

## **2. Michael Schafer**

At hearing, Michael Schafer appeared and testified on behalf of Respondent, Ludwig Explosives.

Schafer testified that he had gone to the subject mine on February 21, 2011 to be on the shot. Tr. 125-126. However, he was telephoned by blaster, Gary Lideras, that “a waterfall [was] coming off of the top of the highwall,” and that Lideras was not going to load the shot. Tr. 125-126. Schafer heard no mention of “stone, rock, mud, anything else...” Tr. 127. Schafer felt that the blasters needed to wait for water to stop draining before continuing with the shot. Tr. 127. After the water stopped draining, they would have to go back in and re-examine the holes. If they were going to shoot, they would need to do another workplace examination, check everything out, make certain that the area was safe and stable, go back in and reload the shot. Tr. 127-128.

Schafer stated that on the morning of February 23, 2011, he telephoned Hatten and was told that the water had stopped coming off the face and that it would be “okay to go.” Tr. 128-129.

On cross examination, Schafer testified that water coming off a wall would not be a hazard in and of itself.<sup>11</sup> Tr. 129.

Schafer had not been present at Tuscola Stone on February 21 or 23, 2013, and had therefore not observed any of the cited conditions firsthand. Tr. 129-130.

On cross examination by Tuscola Stone’s representative, Schafer described various other reasons why Ludwig’s blasters had waited for two hours without doing a shot. These included: the need to fill the trucks’ water tanks, the need to wait for trucks to clear the ramp, and the need for chips to be delivered. Tr. 131.

Schafer stated that Ludwig blasters had reported to Hatten that they wanted to reschedule the shot because of the water washing off the highwall. There was no mention of rock running off the highwall or overhangs or loose unconsolidated material. Tr. 132.

## **3. Robert McAdam**

At hearing, Robert McAdam (“McAdam”) appeared and testified on behalf of Respondent, Ludwig Explosives.

On February 21, 2011, McAdam was working as the bulk truck operator at Tuscola Stone. Gary Lideras was the lead blaster. Tr. 134. McAdam stated it was

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<sup>11</sup> Schafer’s testimony on this point was somewhat contradictory. He also stated that water cascading off the top of a highwall “could be” a hazard if workers were directly under it. Tr. 129. A “gushing wave of water coming over the face” might also prevent a shot. Tr. 131.

raining “pretty heavily” on February 21, 2011, which led Lideras and McAdam to decide to delay blasting. Tr. 134.

On February 23, 2011, the weather had changed. McAdam returned to the mine site, this time working on the lead blaster. He conducted a workplace examination. Also present were Justin Conder and Mike Payton. Tr. 134-135. A perimeter was established preventing entry into the blasting zone by unauthorized individuals. Tr. 135.

A ditch had been dug in front of the wall since February 11, 2011. Tr. 137. McAdam wore a harness to avoid falling into such if he stumbled. Tr. 138.

While loading for the shot, McAdam heard “a noise like something had fallen.” Tr. 138. He had “no idea what that was,” but told Conder that they were going to stop loading the shot and vacate the area.<sup>12</sup> They proceeded to the cab of the truck in order to notify supervisor, Mike Schafer. Tr. 140. While they were in the process of removing equipment, including a hose and detonating caps, MSHA had arrived on the scene.<sup>13</sup> Tr. 140.

They were “trying to probably roll it back up and get it out of the hole.” Tr. 141. If the hose remained in place, it might have shot or explosive material, all of which could be destroyed, causing a waste of assets. Tr. 141. There were approximately 10 loaded holes. Tr. 141.

McAdam could not recall whether MSHA had instructed him to withdraw from the site. He informed MSHA that the hose had to be moved and the unused explosive materials had to be picked up from the remainder of the shot. Tr. 142. MSHA wanted Respondent to come up with a different plan rather than re-entering the affected area on foot. Tr. 142.

Eventually it was decided to create something to pick the materials up and bring them out of the area. Tr. 142. McAdam did not know whose idea it was. Tr. 143.

Tuscola Stone brought down a manlift and used improvised equipment to scoop up the cast primers and the detonating caps. Tr. 143.

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<sup>12</sup> As discussed *infra*, McAdam’s assertion on this point appears directly contradicted by the reported statement of Conder on June 8, 2011. Conder indicated that on February 23, 2011 he was standing two feet from the highwall, and McAdam was four to five feet from him when a chunk of rock fell between them. If Conder’s written statement was an accurate depiction of events, McAdam’s failure to recollect such a traumatic event strains credulity. See also SX-6.

<sup>13</sup> Detonating caps initiate the firing of the explosive material in the hole. Tr. 141.

McAdam stood in the manlift, which was extended over the ditch. Tr. 143-144. He had some concern for his own safety in utilizing such a procedure, but was not 100% certain that he expressed his concern to MSHA. Tr. 144; SX-7.

After removing the supplies, McAdam, as lead blaster, still had to hook up the explosive caps. The detonators had to be hooked up so they would detonate properly. At that time they were just sitting in the hole. McAdam did not believe that MSHA had advised him of the need to shoot the holes. Tr. 145. After making sure that all was safe, McAdam fired the shot. Tr. 146.

On cross examination, McAdam indicated that he had performed a workplace examination, but not a ground control examination. Tr. 147-148.

After hearing something fall and calling Schafer about such, McAdam left the area where the hole was located and the noise was heard. Tr. 148. He remained in front of the high wall. Tr. 148. McAdam did not recall his conversation with inspector Ackley on February 23, 2011. Tr. 149.

Regarding a prior written statement that he had given on June 22, 2011, McAdam stated that he had felt unsafe on February 21, 2011, stating: “that it was raining and just the weather itself wasn’t great and I’m not 100% sure, but I believe there was a waterfall coming over the top down.” Tr. 150. The water in and of itself could have made conditions unsafe, creating such hazards as mud slides and debris falling off the wall.<sup>14</sup> Tr. 150.

Regarding his prior written statement contained at SX-15, p. 3, McAdam stated that he was excited on February 23, 2011 because he heard a noise. He did not know how close it was, but it was close enough to have frightened him. Tr. 151-152; *see also* Conder statement at SX-6.

McAdam characterized the decision to use the manlift to retrieve the blast caps as a “collective [one] between all involved parties.” Tr. 152. MSHA did not require that a manlift be used. Tr. 152.

McAdam could not recall telling Inspector Ackley that he had informed Hatten on February 21, 2011 that rock had been falling due to heavy rain. Tr. 153. By “withdrawing from the area,” McAdam meant to indicate getting off the shot and getting material out of the way, not moving away from the highwall. Tr. 154-155.

Upon questioning from the undersigned, McAdam stated that if the area were immediately evacuated, the following would have been abandoned: “a hose full of

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<sup>14</sup> As discussed *infra*, if McAdam had notice on February 21, 2011, that the volume of water cascading over the highwall may have loosened material, he should not have proceeded with the shot on February 23, 2011 before making certain that Tuscola Stone had tested and scaled the wall.

explosive material,” unused cast primers and detonating caps, and “ten holes loaded with explosives.” McAdam testified that such abandonment of explosive materials was dangerous because rock falls or thunderstorms might cause an explosion. Tr. 155-156.

Although the hose containing explosive material might also be retrieved by detaching such from the truck and pulling it back like a garden hose, this would have been a very strenuous task and, in the act of pulling, material might squirt out of the hose onto the ground. Tr. 157.

On cross examination by Tuscola Stone’s representative, McAdam stated that water coming over the highwall was in itself a hazardous condition. However, he did not see any rock falls or cracking or loose rock or unconsolidated material or overhangs on February 21, 2011. Tr. 160.

Stating the corrective action by Ludwig was to leave the area on Monday and come back on Wednesday, McAdam also noted no overhangs or loose material on Wednesday. Tr. 162. He did not notify anybody at Tuscola after he heard the noise on February 23, 2011 and stopped the shot. Tr. 162-164.

On recross examination, McAdam stated that he “probably” would not have worked loading shots beneath the area of highwall depicted in the photograph in SX-5; but, from his vantage point he had not seen the cracks depicted in the photograph. Tr. 165.

#### **4. Michael Payton**

At hearing, Michael Payton appeared and testified on behalf of Respondent, Ludwig Explosives.

Payton was a member of the blasting team on February 23, 2011. Although he was not present during the attempted shot on February 21, 2011, he was aware that it had been cancelled. Tr. 172.

On February 23, 2011, a workplace exam was conducted involving the shot, the highwall, and the face immediately in front of the blast team. It was concluded that the workplace was safe. Tr. 174.

McAdam put on a safety harness and proceeded to go onto the shot; Payton went to the opposite side behind the truck. Tr. 174. Payton’s duties included spotting the highwall for any dangers and being in control of the truck. Tr. 174-175.

Payton witnessed a rock off to his left, to the west.<sup>15</sup> Tr. 175. As soon as this happened, Payton warned Conder and Hatten of the danger, and that was when the shot was called off. Tr. 175.

Payton found it difficult to determine the distance the rock fell from the blasting because of his position. Tr. 176. The blasting team spoke among themselves and decided to call the shot off. Tr. 176.

Payton asserted that federal and state regulations required that the team not leave a loaded shot. The team planned to clean up the site and detonate. They placed cones up to warn individuals not to enter the blast zone. Tr. 177-178. Hatten and the two MSHA inspectors, however, went beyond the cones. When they approached, they were told that the shot had already been called and the team was trying to formulate an action plan to get material off of the shot and to get the shot detonated. Tr. 179. The inspectors indicated that they had seen a rock fall, but Payton was uncertain if this was the same rock he had seen falling. Tr. 179.

McAdam and Conder came down off the shot, McAdam first having to get his harness. Tr. 179-180. McAdam explained to the MSHA inspectors that material had to be removed. Tr. 180. Payton believed it was Kevin LeGrand, Ackley's supervisor, who decided that a manlift should be used.<sup>16</sup> Tr. 181. LeGrand was aware that the machine had been cited and tagged out. Tr. 182. Payton heard McAdam commenting that he was uncomfortable using the manlift approach. Tr. 184-185.

On cross examination, Payton indicated that he had worked at Tuscola Mine "quite a few" times. Tr. 190. He had seen water come over the highwall previously but had not seen rocks fall off before the incident in question. Tr. 190.

As to his prior written statement at SX-17, Payton explained that he was actually talking about shots having been called off in the past due to *water* falling over the

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<sup>15</sup> The undersigned again notes the differing descriptions of the rock fall between McAdam, Conder, and Payton, which, among other interpretations, raises the possibility that there were multiple rock falls on February 23, 2011. This confirms the high degree of danger that was posed by the unscaled highwall.

<sup>16</sup> Ackley noted, *infra*, that it was in fact Hatten who proposed use of the manlift.

highwall, *not rocks*.<sup>17</sup> Tr. 192-193. Payton, however conceded that he had “probably” seen rock come off the highwall at Tuscola Stone.<sup>18</sup> Tr. 193-194.

Payton stated that it was “absolutely” not Ludwig’s decision to use a manlift for retrieval of material, that Kevin LeGrand had decided this was the safest way. However, he was unsure whether McAdam had participated in the decision. Tr. 198.

On cross examination by Tuscola Stone’s representative, Payton stated that he had been shooting at the mine site for four years. Tr. 202. Tuscola Stone had always been cooperative regarding operational or safety issues. Tr. 203.

On recross examination by the Secretary, Payton confirmed that Ludwig had signed into the mine at 11:00 a.m. on February 23, 2011, had performed a visual examination, and at 12:48, the citation had been issued. SX-4. During this time period there had been a change in conditions in that the rock had fallen; however, Payton could not determine what caused the rock to fall. He believed it was “an act of God.” Tr. 205.

## **5. Justin Conder**

At the hearing, Justin Conder appeared and testified on behalf of the Respondent, Ludwig Explosives.

Conder was not at Tuscola Stone on February 21, 2011. On February 23, 2011, he was part of the three-man blasting team, together with Michael Payton and Rob McAdam. Tr. 210.

After Payton stated that a rock had fallen, McAdam began to get the hose out of the hole. Conder waited for McAdam to get out of the way. Tr. 211. Referring to the photograph contained in SX-11, Conder stated that the picture depicted him and McAdam as they were trying to pull the hose out. McAdam, as lead blaster, determined that this was the proper corrective action. Tr. 212-213. Conder may have been bracing himself against the quarry wall so McAdam could get out of the way. Tr. 214.

On cross examination by the Secretary, Conder was asked about statements he had given in a June 8, 2011 interview. SX-19. In his written statement, Conder reported that he was about four to five feet from McAdam when a chunk fell off between them. SX-19, p.2.

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<sup>17</sup> Payton wrote in his June 8, 2011 written statement: “While working at Tuscola Stone Company I have observed rock falling from the highwall. At that point we refused to load the shot and notified Rodney Hatten the foreman. *This has happened more than one time. I cannot give you the exact number.* SX-17, p.2 (emphasis added).

<sup>18</sup> Payton’s equivocations on this point made him a less than fully credible historian.

Conder testified that he did not remember stating such. Tr. 217.

## **6. Rodney Hatten**

At the hearing, Rodney Hatten appeared and testified on behalf of the Respondent, Tuscola Stone. Hatten had been a foreman at Tuscola Stone for two years and had worked at the mine for 22 years. Tr. 223.

As foreman, Hatten had responsibility for the pit and quarry, and Jay Carter had responsibility for the upper plant. Tr. 224.

On February 21, 2011, Hatten had been contacted by McAdam who informed him that the shot could not go forward due to water coming off the highwall. Tr. 225. Hatten denied that McAdam told him anything about rocks falling off at the face, loose unconsolidated material, cracks, or overhangs. Tr. 226.

On Tuesday, February 22, 2011, Hatten did not observe any hazardous conditions associated with the north face highwall. Tr. 228.

As a loader operator, Hatten had calculated the size of the loose rock described in the citations as being approximately 2.34 tons in weight and deemed it highly unlikely that a chunk that size would fall. Tr. 228-229.

Hatten had been called by Shoemaker on February 23, 2011, to accompany the MSHA inspectors during inspection. Hatten was acting both as a foreman and miner's representative. Tr. 229-230. Shoemaker had other appointments and was not present for the entire inspection. Tr. 230.

When Hatten first met the inspectors, he was not informed of any citation or imminent danger order. Tr. 233. Hatten overheard the inspectors talking to the blasters about loose rock and where the shot was going to be. Tr. 234. The inspectors did not want the blasters to go to where the shot would be because of consolidation. Tr. 235.

Hatten asked if he could bring a manlift, and inspector LeGrand stated that it could be an option.<sup>19</sup> Tr. 235-236. LeGrand did not demand such. Tr. 235-236.

Hatten thought that, given the ditch in front of the shot area, a manlift with a pole could be used to retrieve materials. Tr. 236. Despite the manlift having been tagged out, LeGrand permitted its usage. Tr. 236. Another Tuscola Stone Company employee named Jared actually operated the manlift while a Ludwig Explosives blaster used the pole. Tr. 236-237. Hatten still, at this point, had not been advised that a citation or imminent

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<sup>19</sup> Again, Hatten's confirmation that it was his idea and not a collective decision or MSHA decision to utilize a manlift appears to contradict various other witnesses for Respondents.

danger order were going to be issued. Tr. 238. Hatten had not received any reports about the highwall on Tuesday or Wednesday. Tr. 240.

On cross-examination by the Secretary, Hatten stated that he had not conducted a ground control examination on February 23, 2011. Tr. 242.

Referring to his prior June 11, 2011 written statement, Hatten agreed that he visually observed rock fall from the highwalls “during freezing and thawing times.” Tr. 244; SX-20. He went on to explain that anytime in the wintertime in Illinois (including February) there could be freezing and thawing. Tr. 245.

Noting that a crane would be necessary to test a highwall 40 feet high for loose material, Hatten testified that the wall had not been tested for loose material prior to the citation issuance in 2011. Tr. 245.

Since Shoemaker had become assistant manager, various increased safety measures had been initiated, including the furnishing of safety vests, the erection of berms around highwalls, highwall warning signs, and the purchase of a manlift. Tr. 248.

## **7. Alan Shoemaker**

After consideration, Shoemaker decided not to take the stand and testify on Tuscola Stone’s behalf.<sup>20</sup> Tr. 252-253.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

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<sup>20</sup> The undersigned draws no adverse inference from Shoemaker’s decision not to testify.

## Basic Legal Principles

The citations at issue in this case were both marked as “Highly Likely,” “Fatal,” “High” negligence, with 2 persons affected, Significant and Substantial (S&S), and “unwarrantable failure.” S&S is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). The Commission has provided additional guidance: “We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Further, “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” and “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995).

The S&S nature of a violation and the *gravity* of a violation are not synonymous. The Commission has pointed out that the “focus of the *seriousness* of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) *emphasis added*. By definition, **negligence** is:

conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. §100.3(d). The categories and definitions of the negligence criterion are as follows:

**No negligence** is where the operator exercised diligence and could not have known of the violative condition or practice;

**Low negligence** is where the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances;

**Moderate negligence** is where the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances;

**High negligence** is where the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances; and

**Reckless disregard** is where the operator displayed conduct which exhibits the absence of the slightest degree of care.

30 C.F.R. §100.3(d).

The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with...mandatory health or safety standards.” 30 U.S.C. § 814(d)(1).

The term “unwarrantable failure” is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2004; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,193-94 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC

340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

a) The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that §56.3200 was Violated as Cited in Citation No. 6555522

On February 23, 2011, Inspector Peter Ackley issued Citation No. 6555522 against Respondent, Tuscola Stone Company, for a 104(d)(1) violation of 30 C.F.R. § 56.3200. This citation, in pertinent part, under Section 8, "Condition or Practice," states as follows:

Two blasters were filling drill holes with explosives approximately two feet from the base of the north highwall. The highwall was about 40 feet high and composed of loose unconsolidated material. There was a section of rock (about 1.5 feet thick, 4 foot high, and 5 foot long) with an 8 inch gap from the highwall above where the blasters were working. Loose rock had fallen Monday (02/21/2011) when it was raining and while drill holes were being loaded today. This condition exposed the blaster to fatal impact or crushing injuries from falling rock. The Lead Blaster had informed the Foreman on Monday (02/21/2011) of the unsafe condition of the wall. The Foreman engaged in aggravated conduct constituting more than ordinary negligence in that he was aware that the high wall had unconsolidated material and failed to take any corrective action to correct the unsafe condition of the wall. This violation is an unwarrantable failure to comply with a mandatory standard. This violation is one of the factors cited in imminent danger order No. 6555521<sup>21</sup> dated 02/23/2011. Therefore, no abatement time was set.

SX-4.

Section 56.3200 provides as follows:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. §56.3200.

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<sup>21</sup> The records do not indicate that Tuscola initially contested imminent danger Order No. 6555521.

With respect to Citation No. 655522, the Secretary presented sufficiently probative evidence of hazardous conditions associated with the north highwall at Respondent's Tuscola Stone Company's subject mine, that a violation of §56.3200 was clearly established.

At the hearing, Inspector Ackley testified that he had performed inspections of the subject mine in February, 2011. Tr. 13-14. On February 23, 2011, while performing a regular inspection, he observed two miners working at the base of a 40 foot highwall, directly beneath loose, unconsolidated rock. Tr. 16-21. Ackley credibly described the area above the miners as being fractured, broken vertically and horizontally, with overhanging material. Tr. 16-22, 32, 59-60; SX-5, 6, 7, 9, 11.

Given the obvious and extensive nature of the hazardous highwall conditions which reasonably could be expected to result in death or serious physical injury, Inspector Ackley issued a verbal 107(a) imminent danger order to mine foreman Rodney Hatten. Tr. 42, 51, 52; *see also* Order No. 655528. This Court upholds the issuance of said order and specifically finds that a reasonably prudent person, who, like Inspector Ackley, was familiar with the mining industry and the protective purpose of §56.3200, would have been warranted in ordering immediate evaluation of the cited area.<sup>22</sup>

It is undisputed that there had been no corrective measures undertaken to remove any loose rock prior to the initiation of the activities described herein. Given Inspector Ackley's own observations and the inculpatory statements of several of Respondent's witnesses, discussed further below, there is more than sufficient evidence to establish that §56.3200 had been violated. In reaching this conclusion, the undersigned has considered that an inspector's testimony, standing alone, if found credible and reliable, may constitute sufficient evidence to prove the existence of a safety violation and, indeed, its S&S nature. *See Harland Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-1279 (Dec. 1998). The undersigned also further notes that the "preponderance" standard only

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<sup>22</sup> Section 3(j) of the Mine Act defines "imminent danger" as the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). To support a finding of imminent danger, an inspector must conclude that "the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991). In reviewing an inspector's finding of imminent danger, the Commission must support the inspector's determination "unless there is evidence that he has abused his discretion or authority." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2164 (Nov. 1989) (quoting *Old Ben Coal Corp. v. Interior Bd. Of Mine Op. App.*, 523 F.2d 25, 31 (7<sup>th</sup> Cir. 1975) (emphasis omitted)). The Commission has held that an "abuse of discretion" is found when "there is *no evidence* to support the decision or if the decision is based on an improper understanding of the law." *Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996) (Citations omitted and emphasis added) (affirming the judge's determination that the inspector did not abuse his discretion when he issued an order extending abatement time).

requires that the trier-of-fact conclude the “existence of a fact is more probable than its non-existence.” *RAG Cumberland Resources Co.*, 22 FMSHRC 1066, 1070 (Sept. 2000). The Secretary has convincingly carried its burden in the case *sub judice*.

b) Respondent, Tuscola Stone’s, Violation of §56.3200 was Significant and Substantial in Nature

Taking into consideration the record *in toto* and applying pertinent case law, the undersigned finds that Tuscola Stone Company’s violation of §56.3200 was Significant and Substantial in nature.

The first element of *Mathies*—the underlying violation of a mandatory safety standard—has been clearly established.

As to the second element of *Mathies*—a discrete safety hazard, that is, a measure of danger to safety, contributed to by the violation—has also been clearly established by the record. Loose material falling from a 40-foot highwall onto miners is inarguably a discrete safety hazard. Inspector Ackley’s observations and the statements of Respondent’s own witnesses that individuals were standing at the base of the north highwall and directly exposed to this hazard, established this second element.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is usually the most litigated prong. The Commission has made it clear that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury.” *Musser Engineering Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); *see also Cumberland Coal Resources LP*, 33 FMSHRC 2357, 2365-2369 (Oct. 2011). The Commission emphasized that the Secretary need not “prove a reasonable likelihood that the violation itself will cause injury...” *Id.* Further, the Commission reaffirmed the well-settled precedent that the absence of an injury producing event, where a cited practice occurs, does not preclude an S&S determination. *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) and *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The undersigned is persuaded by the Secretary’s argument that there was a reasonable likelihood that the hazard contributed to would result in injury. *See, inter alia*, Secretary’s Brief at 16. The testimony presented at hearing established that there had been recent rainfalls, causing water to cascade over the highwall. Tr. 83, 85, 100, 149-150. It can be reasonably inferred that these large volumes of water had the potential to further loosen already displaced rock, increasing the probability of a rock fall. Although Inspector Ackley had not himself observe actual rock falls, he had been informed of such by Robert McAdam, Justin Conder, and Michael Schafer. Tr. 22; *see also* discussion of these witnesses’ testimony and statement *infra*.

Ackley was also informed by Alan Shoemaker that it was common for freeze and thaw cycles during the time of year when Respondent was cited, during which material would move off the wall. Tr. 41.

The fact that a rock or rocks did in fact fall on February 23, 2011 near Ludwig employees convincingly establishes that there was a reasonable likelihood that the hazard contributed to would result in injury. Tr. 151, 210-212. Thus, the third element of *Mathies* is clearly satisfied.

Under *Mathies*, the fourth and final element that the Secretary must establish is that there is a reasonably likelihood that the injury in question will be of a reasonably serious nature. Considering, *inter alia*, the 40-foot height of the north highwall and the size of some of the rock described in Citation No. 6555522—1.5 feet thick, 4 feet high, and 5 feet long—there was clearly a reasonably likelihood of fatal impact injury. Tr. 34-35, 37; see also SX-4.

In reaching these findings, the undersigned has also considered the testimony of Rodney Hatten. The undersigned found credible Hatten's testimony that he had visually inspected the highwall on February 23, 2011. However, for reasons discussed *infra*, the undersigned finds that such a visual inspection—without testing and scaling—was manifestly inadequate. The ALJ also noted Hatten's prior written statement that he had previously witnessed rock falls from highwalls during "freezing and thawing times" in the past. Such admission further supports that Tuscola Stone should have known of the existence of a hazardous condition. *See also* Tr. 244; SX-20.

Hatten's testimony that a crane would be necessary to test a 40-foot highwall for loose material and that no such testing had been performed prior to February 23, 2011 was also indicative that Respondent failed to take reasonable measures both in the past and instantly to ensure safe ground conditions. Tr. 244-245.

Likewise, the undersigned accepts that Hatten had himself decided to use a manlift in a good faith effort to protect Ludwig's employees in attempting to retrieve detonation materials. However, the undersigned again notes that Hatten's testimony raises questions about the accuracy of Ludwig's employees' recollections, again casting doubt on their overall credibility.

Although the undersigned found Shoemaker to be sincere in his belief that his company had fulfilled its §56.3200 duties, the undersigned had no actual in-court testimony to assess because of Shoemaker's decision not to take the witness stand. Tr. 252-253.

The undersigned therefore finds that Inspector Ackley's S&S designation was justified.

In reaching this finding the undersigned specifically rejects the argument advanced by Tuscola Stone's representative and general manager, Alan Shoemaker. In

his *pro se* brief, Shoemaker suggests that the fact that Tuscola Stone’s “employees were not directly involved at the time [that] the order and citations were issued,” relieves Tuscola Stone of responsibility under the Mine Act. Resp. Brief at 1 . However, given Tuscola Stone’s overall responsibility to reasonably ensure that its highwall was free of hazards, the fact that Tuscola Stone’s employees were not present at the scene when the instant citation and orders were issued does not exculpate Tuscola Stone from its dereliction under §56.3200.<sup>23</sup>

Given, *inter alia*, reports of rock falls in the past, the fact that the shot had to be postponed on February 21, 2011, due to large volumes of water cascading over the highwall and the potential for a freeze and thaw cycle which could further loosen unconsolidated material, Tuscola Stone’s duties under §56.3200 would have required thorough inspection, testing, and scaling of the highwall prior to the commencement of detonation activities on February 23, 2011, as Inspector Ackley properly opined. See, *inter alia*, Tr. 25-26, 39. Given the high degree of danger posed by loose overhang rock on a 40-foot highwall, a simple visual inspection of such was manifestly inadequate, falling far below the high standard of care demanded of Respondent.

The undersigned found Shoemaker to be a forthright individual who no doubt honestly believes that his company had taken adequate measures to ensure miners’ safety at the highwall. However, mine operators under the Act are held strictly liable for cited conditions in activities from which they have supervisory responsibility. *Ames Construction, Inc.*, 33 FMSHRC 1807 (July 2011), *aff’d*, 676 F.3d 1109 (D.C. Cir. 2012). Tuscola Stone Company had overall responsibility to ensure that any hazardous highwall conditions were discovered and corrected before work was permitted in the affected area. Regardless of Shoemaker’s good-faith beliefs, Respondent was derelict in fulfilling this responsibility.

c) Tuscola Stone’s Conduct was Highly Negligent in Nature and Constituted Unwarrantable Failure on Respondent’s Part

In *Sec. of Labor v. Manalapan, Inc.*, 35 FMSHRC 289 (Feb. 2013), the Commission reviewed the factors to be evaluated in determining unwarrantable failure:

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

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<sup>23</sup> See also the case law and arguments of Secretary, which are on point and the undersigned fully agrees with at Secretary’s Brief, 8-9.

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator’s knowledge of the existence of the violation, (6) the operator’s efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These seven factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an operator’s conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *IO Coal*, 31 FMSHRC at 1351.

*Id.* at 5.

Considering the *Manalapan* factors *seriatim*, the undersigned finds that the violative condition was obvious and extensive and had existed for a significant period of time.<sup>24</sup> The violation clearly posed a high degree of danger, justifying the issuance of an immediate 107(a) imminent danger order. The undersigned notes that the commission in *Manalapan* reaffirmed that the factor of dangerousness may be so severe that by itself it warrants a finding of unwarrantable failure. *Manalapan*, at 294.

Given the fatal nature of impact injuries by the hazardous conditions at Respondent’s 40-foot highwall, the undersigned finds that this aggravating factor of dangerousness outweighs any mitigating circumstance. Further, as discussed *infra*, both Respondents knew *or should have known* of the existence of the conditions. The operator did make good faith efforts to abate the condition, which although not justifying a non-unwarrantable failure finding, does in part merit a reduction in the proposed civil penalty.

The undersigned therefore finds that Respondent’s conduct did constitute an unwarrantable failure.

- d) The 107(a) imminent danger order was validly issued; Respondent, Ludwig Explosives, Also Violated §56.3200; This Violation also was S&S in Nature and Constitute an Unwarrantable Failure

The undersigned incorporates the above rationale as to the violation, S&S nature, and unwarrantable conduct of Respondent, Tuscola Stone, in further finding the dual responsibility of Respondent, Ludwig Explosives. The undersigned further fully adopts

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<sup>24</sup> See also Ackley testimony at Tr. 38, estimating the violative condition had existed for “at least...a couple of weeks, maybe longer.”

the arguments advanced by the Secretary that Ludwig Explosives violated mandatory safety standard §56.3200, that said violation was significant and substantial and reasonably likely to cause fatal injuries to two persons, and that said conduct constituted an unwarrantable failure. Sec. Post-Hearing Brief, 18-20. Furthermore, the imminent danger order was validly issued.

In making the instant findings, the undersigned has carefully considered the testimony of all witnesses, including an assessment of their credibility.

The undersigned found the testimony of Secretary's witness, Inspector Ackley, to be honest and forthright, with no indication of animus or untoward motivation.

However, the undersigned found the testimony of Respondent, Tuscola Stone's, witnesses to be less than fully credible. Respondent's witnesses gave testimony which was often both inherently contradictory and also inconsistent with their past unwritten statements. The undersigned suspects that Respondent's witnesses were attempting to minimize the dangerous and unsafe character of the cited condition and their knowledge regarding such.<sup>25</sup>

Michael Payton's testimony exemplifies such. On cross examination, Payton painfully equivocated in admitting that he had witnessed rock falls in the past from Tuscola Stone's highwall. Tr. 188-189. His vague descriptions of the rock fall that he had witnessed on February 23, 2011, despite his close proximity to the scene simply did not ring true.

Michael Schafer's testimony was also equivocal and contradictory. As noted *supra*, Schafer appeared to vacillate between the position that water cascading over the highwall was a hazard and was also not a hazard. Tr. 125-131. In any case, Schafer was not personally present at the scene on February 21, 2011 or February 23, 2011, his testimony has little probative weight.

The undersigned also found the testimony of Robert McAdam and Justin Conder to be suspect. In a prior June 8, 2011 written statement, Conder averred that on June 23, 2011, a chunk of rock fell between himself and McAdam, who was standing only four to five feet away from Conder. SX-16. Yet at hearing, Conder claimed he could not remember making such a statement. Tr. 216. As trier-of-fact, this Court questions whether an individual who narrowly escaped serious injury and possible death could not recollect such an incident. Further, McAdam's assertions that he could not determine the distance of the rock fall were also highly problematic, casting doubt upon his entire testimony.

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<sup>25</sup> This Court believes that the possibility that an employee is "sugar-coating" his descriptions of unsafe conditions in a misguided attempt to protect his employer's interests is unfortunately a necessary consideration in assessing credibility.

As trier-of-fact, the undersigned should attempt to resolve inconsistencies in testimony without concluding that witnesses are lying. However, in the instant case, the most reasonable benign explanation for the differing and contradictory nature of the witnesses' accounts is that there *were in fact different multiple rock falls on February 23, 2011*. This explanation is just as detrimental for Respondent's cause, inarguably confirming the high degree of danger posed by the unscaled highwall.

The undersigned essentially concurs with the arguments advanced by the Secretary as to Ludwig Explosives' negligence. Ludwig's employees were well aware that large volumes of water had been cascading over the highwall on February 21, 2011, causing the shot to be cancelled. The undersigned further finds that Ludwig Explosives' employee knew of the freeze and thaw cycles in winter time in Illinois.

The heavy downpour on February 21, 2011, coupled with the succeeding drying out cycle, posed a danger that debris and/or loosened material might be created that could fall from the highwall onto miners working below on February 23, 2011. That a rock or rocks did fall on February 23, 2011 confirms that such a hazard was reasonably foreseeable. The undersigned specifically rejects any suggestion by Respondent that the rock fall on February 23, 2011 was merely a coincidence or unforeseeable "act of God."<sup>26</sup>

Given such, Ludwig Explosives personnel should have known that a hazard of falling rock was existent subsequent to the February 21, 2011 downpour.

Just as Tuscola Stone was derelict in failing to inspect, test, and scale the highwall on February 23, 2011 before individuals would be permitted to work in the affected area, Ludwig was equally derelict in failing to wait for such corrective actions to be completed before proceeding to engage in its shot activities. Further, compounding its negligence was Ludwig's blasting team's decision not to immediately evacuate the affected area after a rock or rocks had fallen.

As a finding of fact, the undersigned rejects Ludwig's argument and testimony suggesting it had not entered the affected area and was in the process of evacuating such when sighted by Inspector Ackley. Instead, either because the blasting team did not wish to waste assets and/or felt the need to immediately detonate the shot, it improperly entered and remained in the affected area. Any prudent person, familiar with the mining industry, would not have entered the affected area, much less remained after a rock fall. The prudent course would have been to immediately evacuate to a safe distance from the affected area for a reasonable time and assess overall conditions before proceeding with any further work activity.

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<sup>26</sup> Payton's description of such, at Tr. 205, reminds the undersigned of the unenlightened pre-Mine Act days when the beknighted explanation for all mining catastrophes was "It's God's will."

e) Penalty

In a recent decision, this Court opined that whether the Secretary proposes a regularly or specially assessed penalty the ultimate determination of the penalty amount is up to the Commission. *The American Coal Co.*, LAKE 2011-701 *et al*, *slip op.*, at 33 (September 20, 2013) (ALJ Lewis). This Court is guided in its final determinations by the polestar of 30 U.S.C. §820(i) penalty considerations:

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

The undersigned has been further guided by Commission case law instructing how §110(i) criteria should be evaluated. Inter alia, the undersigned notes: the Commission's holding in *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997) that all of the statutory criteria must be considered, but not necessarily assigned equal weight; and the Commission's holding *Musser Engineering*, 32 FMSHRC at 1289 that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed.

The undersigned in assessing the §820(i) penalty considerations, finds that both respondents demonstrated good faith in achieving rapid compliance after notification of the violation and that neither Respondent appears to be a significant recidivist in terms of previous violations. The undersigned therefore finds that a reduction in the penalty is warranted for Ludwig Explosives from \$20,900.00 to \$15,900.00, and for Tuscola Stone from \$11,900.00 to \$9,000.00.

**ORDER**

It is hereby **ORDERED** that Imminent Danger Order No. 6555528 is hereby **AFFIRMED**.

It is hereby **ORDERED** that Citation Nos. 6555522 (Tuscola Stone) and 6555529 (Ludwig Explosives) are **AFFIRMED** as modified herein.

Respondent, Ludwig Explosives is **ORDERED** to pay civil penalties in the total amount of \$15,900.00 within 30 days of the date of this decision.

Respondent, Tuscola Stone is **ORDERED** to pay civil penalties in the total amount of \$9,000.00 within 30 days of the date of this decision.<sup>27</sup>

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

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<sup>27</sup> Payments should be sent to: MINE SAFETY AND HEALTH  
ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O.  
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November 13, 2013

|                            |   |                                  |
|----------------------------|---|----------------------------------|
| OAK GROVE RESOURCES, LLC., | : | CONTEST PROCEEDING               |
| Contestant                 | : |                                  |
|                            | : | Docket No. SE 2009-261-R         |
|                            | : | Citation No. 7696616; 01/08/2009 |
| v.                         | : |                                  |
|                            | : |                                  |
| SECRETARY OF LABOR,        | : | Oak Grove Mine                   |
| MINE SAFETY AND HEALTH     | : | Mine ID 01-00851                 |
| Respondent                 | : |                                  |
|                            | : |                                  |
| SECRETARY OF LABOR,        | : | CIVIL PENALTY PROCEEDING         |
| MINE SAFETY AND HEALTH     | : |                                  |
| ADMINISTRATION, (MSHA),    | : | Docket No. SE 2009-487           |
| Petitioner                 | : | A.C. No. 01-00851-180940-01      |
| v.                         | : |                                  |
|                            | : |                                  |
| OAK GROVE RESOURCES, LLC., | : | Oak Grove Mine                   |
| Respondent                 | : |                                  |

**DECISION UPON REMAND**

Before: Judge Moran

The Commission, having reversed the undersigned administrative law judge, upon determining that the safeguard issued to Oak Grove Resources, safeguard No. 2604892, was valid, remanded the matter so that the Court “may determine whether the Secretary proved that Oak Grove violated [that safeguard] as alleged in Citation No. 7696616, and conduct such other proceedings as may be appropriate.” 2013 WL 4140414, \*4. Following that decision and remand, the Court contacted the parties, who advised, via email responses, that they would stand on their original post-hearing submissions and not provide additional briefing.

In its July 25, 2013 decision, the Commission, in finding that the subject safeguard was valid, noted that it “identifie[d] a hazardous condition, i.e. a locomotive pushing two loaded supply cars, and a remedy, i.e., cars on main haulage roads are not to be pushed.” Commission Decision at 6. The Commission also referenced its decision in *The American Coal Co.*, 34 FMSHRC 1963 (Aug. 2012), wherein it noted that it rejected the argument that a safeguard, beyond describing a hazard, must also “describe the potential risks or harms associated with that hazardous condition.” It reasoned that as “many potential risks can flow from the cited

hazardous condition . . . it would be unreasonable to require the inspector to identify each and every one.” *Id.* In remanding this matter to the Court, the Commission made clear that “a valid safeguard [is one which] provides an operator with notice of the conditions considered hazardous and the conduct required to comply with the safeguard; [and that] it need not foreshadow the events that may occur if the safeguard is not implemented.”

The subject safeguard having been upheld, it must now be determined whether that notice to provide safeguard was violated when MSHA issued Citation No. 7696616 on January 8, 2009. That citation stated: “A fatal accident occurred on May 22, 2008, when a motorman was crushed between a derailed haulage car and the locomotive he had been operating. The haulage car was being pushed on the main haulage road. The victim would not have been exposed to the pinch point between the locomotive and the haulage car if the car was being pulled instead of pushed on the main haul road.” Remand at 2, citing OG Ex. 1.

The following findings of fact from the Court’s decision<sup>1</sup> are repeated here:

“Miner Lee Graham was killed at Respondent's Oak Grove Mine on May 22, 2008. There is no dispute about the circumstances of his death which may be briefly summarized as follows: On the date of Mr. Graham's death, Oak Grove was in the process of transporting a shearer body to the longwall face via the main haulage road. The shearer body, a machine that operates on the longwall face, weighs 24 tons and at the time of the accident it was being transported on a ‘shearer carrier,’ which is a haulage carrier designed for the task of hauling the shearer body. Mr. Graham died when he was pinned between a locomotive he was operating and the shearer body.

Oak Grove was attempting to transport the shearer body using two tandem locomotives: Motors No. 3 and No. 8, to pull the shearer carrier and Motors No. 4 and 9 to push the shearer carrier. Therefore in terms of their destination to the longwall, Motors No. 3 and 8, since they were pulling, were leading and Motors No. 4 and 9 were following the procession. Each pair of locomotives was connected to one another by a coupling. For the two coupled motors pulling the shearer body, No. 8 was in the lead, and connected to No. 3. The No. 3 itself was connected to the shearer body by a one inch diameter, flexible, wire rope. Thus, unlike the relatively rigid connection between the motors, through a coupling, the connection for the pulling locomotives, utilizing a wire rope to the shearer carrier was anything but rigid. Miner Graham was operating the No. 3 motor. In contrast to the wire rope arrangement connecting the pulling motors to the shearer carrier, the pushing motors were connected to the shearer carrier by a solid drawbar.

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<sup>1</sup> The recap of the Court’s original decision is selective but it is not done with any intent to mischaracterize its findings. Instead, with the Commission having set forth the standard for evaluating safeguards, there is no point in repeating what have become irrelevant points from that original decision.

To recap, if one were standing alongside the transporting effort at the time, such individual would have observed, beginning at the front, pulling end, the No. 8 motor, which was connected to the No. 3 motor via a coupling and then the No. 3 motor connected to the shearer carrier by the wire rope. Next would be the shearer carrier itself and on the pushing end, a connection from it, by means of a solid drawbar, to the No. 4 motor. Finally, the No. 9 motor was connected to the No. 4 motor via a coupling in the same fashion as the link between the No. 3 and the No. 8. The significance of the wire rope connection will become apparent momentarily.

To understand how the fatality occurred, picture the procession moving towards its destination, as described, and reaching an upgrade. Slack then developed in the wire rope connection and the consequence was a derailment of the shearer carrier. Examining the situation, the victim unwittingly placed himself in a dangerous position, standing in the middle of the track, between his locomotive and the derailed shearer carrier. It was then that the coupled motors, Nos. 3 and 8 either slid or rolled downhill with Mr. Graham becoming fatally pinned between those motors and the shearer carrier. 33 FMSHRC 846 at \* 847.

An MSHA investigation ensued. This investigation was conducted by Inspector David Allen. Upon the conclusion of his investigation, Inspector Allen issued Citation No. 7696616, pursuant to Section 314(b) of the Mine Act for an alleged violation of Safeguard No. 2604892. In his testimony at the hearing, Mr. Allen spoke to the hazards arising from pushing cars on haulage roads. The hazards, he expressed, are plain. When one pushes a car visibility is affected because the load is in front of the pushing force. This makes it more difficult to see the track and any traffic that may lie ahead. Beyond that concern, when pushing, as opposed to pulling, one does not have positive control. Third, pushing also creates a pinch point, as happened here between the shearer carrier and the No. 3 motor. *Id.* at \*848. . . .

Allen agreed that once the shearer carrier derailed, the miners evaluated the problem. This took anywhere between two to five minutes and during that time the motors on either side of the shearer carrier did not move. At some point after that time elapsed Mr. Graham, the victim, stepped in between the shearer body and the No. 3 motor and it was then that the motor moved, resulting in Mr. Graham becoming fatally pinned between that motor and the shearer body. Tr. 56-57.

Allen, who had prior mining experience moving mining equipment, stated that, when in his past work at mines, he had performed such tasks, the equipment was pulled through the mine. The pulling was accomplished by using a solid bar, that is a tongue or a drawbar between the locomotive and the car itself. Yet, he conceded, even when moving by pulling, derailments would occur. Tr. 28-29. *Id.* . . . Allen . . . described . . . that cars on main haulage roads are not to be pushed. Tr. 42. . . . Allen then . . . identif[ied] ‘several hazards associated with [the safeguard].’ These included visibility hazards, the lack of ‘good positive control of the loads’ by pushing instead of pulling, and creating a ‘pinch point.’” Tr. 42-44. *Id.* at \*851. . . .

### **Determination of Violation.**

The underlying safeguard, No. 2604892,<sup>2</sup> as noted above, stated that a locomotive was being used to push loaded supply cars down a graded haulage supply mine track entry and it required that “cars on main haulage roads not be pushed except where necessary to push cars from side tracks located near the working section to the producing entries and rooms.” Remand at 3, citing OG Ex. 2. Here, the Respondent was pushing a shearer carrier, which carrier was transporting the shearer body to the longwall face, along a main haulage road. Chad Johnson, the mine’s assistant general mine foreman/dayshift foreman, admitted this. Tr. 99.

Clearly, Safeguard No. 2604892 was violated here, as alleged in Citation No. 7696616, as it is undisputed that a haulage car was being pushed on a main haulage road. The one exception allowed in the safeguard, allowing cars to be pushed where necessary to move them from side tracks near a working section to the producing entries and rooms, did not apply.

### **The Parties’ Contentions regarding the appropriate penalty.**

The Secretary, observing that a fatality occurred here, notes that the issuing Inspector evaluated the violation as significant and substantial (“S&S”) and of moderate negligence. For its S&S analysis, the Secretary notes that Inspector Allen identified several hazards associated with the practice of pushing the car here. There was a visibility hazard, as it is harder to see the track and traffic ahead when the load is in front of the direction of travel. A separate hazard is not being able to maintain positive control. Further, the practice of pushing created a pinch-point between the shearer carrier and motor number 3. Had the pulling requirement been adhered to, per the safeguard’s instruction, there would not have been a pinch point. The pinch point hazard resulted in the fatality here. These facts, the Secretary submits, establishes that the violation was significant and substantial.

The Secretary also contends that the negligence was moderate. Moderate negligence, it notes, is negligence where the mine operator knew or should have known of the violative condition or practice but there are mitigating circumstances. Inspector Allen considered the negligence on Oak Grove’s part to be moderate on the basis that it had not been cited for this safeguard violation in the recent past. Tr. 50.

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<sup>2</sup> The safeguard in question, which was issued on March 3, 1986 provided in full: “The No. 902 battery powered locomotive was being used to push two loaded supply cars consisting of a car of timber and a car of roof bolts down the graded haulage supply mine track entry of the main south area of the mine, near the intersection of the No. 7 and No. 14 section switch and the No. 10 and the No. 5 section switch. Such area is approximately 2100 feet from the main bottom area of the mine and approximately 3600 feet from the No. 7 section and the No 10 sections. Respectively, this notice to provide safeguard requires that cars on main haulage roads not be pushed except where necessary to push cars from side tracks located near the working section to the producing entries and rooms.”

Considering the above, the Secretary maintains that its proposed assessment of \$55,000. is the appropriate penalty. Sec. Br. at 10.

Oak Grove maintains that the safeguard did not apply to the cited condition. It contrasts mandatory standards with safeguards and asserts that they must be construed in a “more restrained [manner] than that accorded promulgated standards.” R’s Br. at 11. By “restrained,” Respondent means safeguards must be “construed strictly.” *Id.* Respondent contends that applying its wished-for construction of safeguard notices here compels the conclusion that this safeguard does not apply to “pushing heavy equipment.” R’s Br. at 17. Respondent asserts that the safeguard *only applies to cars laden with timbers or roof bolts.* *Id.* Seriously. The Respondent actually makes this claim. Adding to its view of what it means to “construe[] strictly” the safeguard notice, Respondent argues that it does not apply to the moving of heavy equipment. Heavy equipment is not moved by supply cars. Rather, heavy equipment is moved by “specially designed carriers.” Yet another distinction perceived by Respondent is that supplies are moved by a single motor, not four, as here.<sup>3</sup>

From its contention that the safeguard “does not contemplate or apply to the pushing of heavy equipment,” Respondent then turns to the S&S designation. It asserts that “[t]he Secretary is arguing essentially that the alleged condition contributed to the accident.” It counters that “[t]he occurrence of an accident does not, in fact, confirm that a condition is reasonably likely to result in an injury.” R’s Br. at 19. To support that thesis, the Respondent declares that “[t]he accident occurred because one of the persons present did not set the brakes on the motor.” Respondent describes the Secretary’s view, that the absence of a drawbar contributed to the accident, as a “theory” and one that is “tenuous at best.” *Id.* After all, it points out, the safeguard doesn’t require a drawbar and it makes no mention of pinch points either. Respondent concludes that as the hazard addressed by the safeguard was not one that resulted in the accident, an S&S designation does not apply. *Id.* at 20. Looking to the third element of the *Mathies* “significant and substantial” criteria, Respondent states that the “failure to comply with the safeguard did not result in a hazard related to the accident.” *Id.* It adds that the safeguard’s failure to identify the hazard is a deficiency that is fatal to the S&S designation.

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<sup>3</sup> Respondent *perceives* subsequently issued safeguards, *though no subsequently issued safeguard notice exists.* Instead, it looks to the waiver that was, for a time, issued to Oak Grove and construes that waiver as “in effect” a safeguard for heavy equipment, which *perceived* safeguard was then revoked. Respondent construes the waiver and its subsequent revocation as evidence that the “original” safeguard did not pertain to heavy equipment. Respondent then asserts that, although waivers don’t “appear to be an authorized procedure,” that history still shows that the original safeguard did not apply to the pushing of heavy equipment.

Because the accident “had no relation to the safeguard,” as no pushing or pulling was occurring at the time of the accident, the violation could not have contributed to the hazard.<sup>4</sup>

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<sup>4</sup> Oak Grove cites *Mar-Land Industrial Contractor, Inc.*, 14 FMSHRC 754, (May 1992), for the position that the occurrence of an accident does not confirm that a condition is reasonably likely to result in an injury. The problem with this argument is that it is a straw man. Of course the occurrence of an accident does not by itself confirm that a condition was reasonably likely to result in an injury. But, when an accident occurs, and such accident *is* connected to the cited condition, one then moves beyond the realm of reasonable likelihood. Instead, there is real world evidence of the occurrence and its connection. There is no need, when the accident in fact occurs, to get into the business of predicting the likelihood of its occurrence. To say the least, it would be a perverse outcome to claim that the case for establishing that a violation was S&S is stronger when the prediction is that it is reasonably likely to occur, but not as strong when it happens. Ironically, though cited, *Mar-Land* did not contest the S&S finding by the judge and *the issue was not before the Commission*.

In its lead citation for the principle that the occurrence of an accident does not confirm that a condition is reasonably likely to result in an injury, Oak Grove cites *Plateau Mining*, 25 FMSHRC 738, 745. There, the judge did state that the cause of certain tragic events related to the question of whether the standard was violated, while adding that establishing the cause does not necessarily establish the violation. The judge ultimately found that the violation was established and that it was S&S. In the Court’s view, this is an odd case to rely upon. It is, at best, dicta, in the judge’s decision itself and being an administrative law judge decision, not of precedential value in any event. Oak Grove notes that the Commission subsequently affirmed and reversed that decision in part. 28 FMSHRC 501 (Aug. 2006). The Commission’s split decision for the citation associated with Oak Grove’s contention, citation number 7143395, that an accident’s occurrence does not confirm that a condition is reasonably likely to result in an injury, affirmed the judge’s determination that there was a violation. This occurred in the context of the case having been remanded to the Commission by the Tenth Circuit. 519 F. 3d 1176 (10<sup>th</sup> Cir. 2008). The Westlaw site, at 2006 WL 2524065, must reflect a publication error, as its printing of the Commission’s August 22, 2006 decision, includes a reference to *the 2008 decision by the 10<sup>th</sup> Circuit*. Thus, the Westlaw 2006 publication includes the 10<sup>th</sup> Circuit’s decision, which came two years later. Indirectly, this was sorted out, as reflected in the Commission’s July 15, 2008 Order, found at 2008 WL 3248033, which Order vacated citation number 7143395. Westlaw will be contacted regarding this error.

Respondent also cites *RS & W Coal Co.*, 25 FMSHRC 589, (ALJ Weisberger Oct. 2003), as the only case “involving both a similar safeguard and a similar set of facts” to Oak Grove’s R’s Br. at 20. Oak Grove comments that *RS & W Coal* “d[id] not even address the same hazard from pushing cars as the inspector did [in this Oak Grove case], [that is] pinch points.” Oak Grove adds that visibility was not an issue in its case, because the equipment was fully stopped.  
(continued...)

The Secretary's Brief asserts that, as MSHA Inspector Allen testified that the Respondent was pushing a shearer carrier along a main haulage road and as Mr. Chad Johnson, the mine's assistant general foreman and day shift foreman, admitted to this as well, this establishes a violation of the safeguard. In light of the Commission's Decision in this matter and its decision in *The American Coal Co.* case, 34 FMSHRC 1963, (Aug. 2012), the latter of which was issued *after* the Court's original decision in this matter, the Court wholeheartedly agrees. Sec. Br. at 7, Tr. 42, 99.

Addressing the penalty criteria, the Secretary reminds that a fatality occurred in connection with this activity of pushing a car on a main haulage road and that the Inspector marked the violation as "significant and substantial" and that moderate negligence was attendant. Speaking to the "S&S" designation, the Secretary observes that designation is supported when, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Sec. Br. at 8, citing *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In the course of his testimony, Inspector Allen identified both visibility problems and an inability to maintain positive control, as hazards associated with pushing cars. He added that the prohibited pushing method created a pinch-point between the number 3 motor and the shearer carrier, a hazard that is avoided by pulling cars. That pinch-point hazard killed Mr. Graham. The Secretary maintains that the foregoing establishes that the violation met the test to be denominated as significant and substantial.

As for the moderate negligence designation, the Secretary notes that means "the operator knew or should have known of the violative condition or practice, but there are mitigating

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

It concludes that as the hazard addressed by the safeguard is not one that resulted in the accident, it is not within the definition of S&S. *Id.* It is the Respondent's contention that as the "[f]ailure to comply with the safeguard did not result in a hazard related to the accident," and as their was no contribution to a hazard by noncompliance with the safeguard, the second and third elements of *Mathies* were not met. While the administrative law judge in that case sustained the mine operator's challenge to the citations arising from the safeguards issued and though everyone recognizes that a decision by an administrative law judge has no precedential effect, the inspector who issued the safeguards in Judge Weisberger's case did testify that pushing mine cars, in that instance mine cars transporting miners, was a hazardous practice. That practice, the Inspector asserted, created a derailment, lack of control and limited visibility hazards. *Id.* at \*591. A professional engineer echoed the concerns expressed by the Inspector. The judge in that case took a different view from the MSHA witnesses, concluding that the safeguards' issuance was made outside of the sound exercise of the Secretary's discretion. The case was not appealed. Subsequent Commission decisions have overtaken any lessons that might have been gleaned from the *RS & W Coal Co.* decision.

circumstances” and that this includes “actions taken by the operator to prevent or correct hazardous conditions or practices.” In this instance, the MSHA Inspector considered the fact that “Oak Grove had not been cited for a violation of this safeguard in the recent past” to justify the moderate negligence label. Sec. Br. at 9. Considering those factors, and the other statutory penalty criteria, the Secretary submits that the proposed \$55,000 penalty is appropriate.

In its Reply Brief, Oak Grove spends its entire time on its view of the distinction between “specifying the hazard” and “descri[bing] [] the conditions for issuing a safeguard,”<sup>5</sup> and its view that both are required for a safeguard to be valid. However the Commission’s Decision and remand in this matter, as well as its holding in *The American Coal Co.* case, 34 FMSHRC 1963 (Aug. 2012), put those arguments to rest.<sup>6</sup> On the same basis, no further comments are required for the Secretary’s Reply Brief.

## Discussion

As indicated earlier, in finding that the violation was established, the Court agrees with the Secretary that Oak Grove’s “extremely narrow reading of the safeguard would render it meaningless.” In this regard, the Secretary correctly observes that by Oak Grove’s view, the cars would need to be “the exact same and the supplies would have to be essentially the same as well.” Sec. Reply at 2. Rejecting Oak Grove’s view, the violation, as noted, is affirmed.

The significant and substantial or “S&S” designation and the penalty criterion of negligence are next discussed. The significant and substantial designation is described in section 104(d)(1) of the Mine Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S, “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). 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 will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Accord, *Buck Creek Coal, Inc. v. MSHA*, 52

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<sup>5</sup> Following this perspective, Respondent goes on with its view that the safeguard notice must identify whether its concern is directed at pinch points or visibility hazards, or at least to list each and every concern the inspector had about the unsafe practice, to be valid.

<sup>6</sup> In its Reply Brief, the Secretary, concerned that the key point not be lost, reminds of the very basic fact that the safeguard in issue, issued in 1986, addressed the hazardous practice of pushing cars on main haulage roads. Sec. Reply at 2.

F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving Mathies criteria). In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125 (August 1985), the Commission explained 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). It noted that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984). Further, the question of whether any particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. 30 C.F.R. § 100.3(d). A mine operator is required to take steps necessary to correct or prevent hazardous conditions or practices. Moderate negligence, the negligence alleged here, exists when the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances present. By comparison, low negligence occurs when the operator knew or should have known of the violative condition or practice, and there are *considerable* mitigating circumstances. Finally, no negligence occurs when the operator exercised diligence and could not have known of the violative condition or practice. 2013 WL 4140378, *Secretary v. Newtown Energy, Inc.*, August 7, 2013 (ALJ), *Secretary v. The American Coal Company*, 2013 WL 4648487, (ALJ), July 30, 2013, *Secretary v. Cemex, Inc., Respondent*, 2013 WL 3152294, (ALJ), May 7, 2013.

The Court agrees with the Secretary's S&S analysis. The violation, as noted, has been found. The discrete safety hazard is present too. More accurately, several discrete safety *hazards* were identified in the course of the testimony, to include diminished visibility, the creation of a pinch point and the lack of positive control. Each of these hazards were attendant to the practice of pushing cars. Although the Respondent asserts that the occurrence of an accident does not confirm that a condition is reasonably likely to result in an injury and it describes the Secretary's view that the absence of a drawbar contributed to the accident as a "tenuous" theory, any legitimate S&S analysis must be able to consider what actually occurred. Reasonable prognostication, which is typically part of the S&S evaluation, cannot impair taking into account the reality of the events. Here, Miner Lee Graham was killed and while his death did not occur simultaneously with the moment in time at which the pushing process was taking place, *that hazardous practice* resulted in the derailment and it was in the course of assessing that derailment that the number 3 and 8 motors moved, fatally pinning him.<sup>7</sup> Although the Respondent would prefer that the S&S analysis begin *after* the derailment, when a brake was not set on a motor, that review ignores the closely-connected hazardous pushing practice which precipitated the derailment. The S&S test, after all, requires only that the discrete safety hazard

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<sup>7</sup> It is noted that Inspector Allen concluded in his investigation that pushing the shearer carrier contributed to Mr. Graham's death. Gov. Ex. 4.

*contribute* to a measure of danger of safety, which contribution certainly happened here by pushing the cars. Therefore, the Court rejects the Respondent's claim that the accident "had no relation to the safeguard." As for the final *Mathies*' element, a reasonable likelihood that the injury will be of a reasonably serious nature, again the facts answer this inquiry.

Moderate negligence is the correct designation, although a case could be made that high negligence would be supportable. To view the fact that the mine had not been *cited* for this practice in the recent past as a mitigating consideration is a generous take for the Respondent.

The other statutory were duly considered. The Court concludes that a civil penalty of \$55,000.00 is fully warranted here.

### **ORDER**

Accordingly, the Court finds that Citation No. 7696616 is upheld, that the violation was significant and substantial and of moderate negligence and Respondent is hereby **ORDERED** to pay the Secretary of Labor \$55,000.00 within 30 days of the date of this decision.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 Pennsylvania Avenue, N.W., Suite 520N  
Washington, D.C. 20004-1710

November 18, 2013

|                               |   |                            |
|-------------------------------|---|----------------------------|
| DAVID A. STACHE,              | : | DISCRIMINATION PROCEEDING  |
| Complainant,                  | : |                            |
|                               | : | Docket No. YORK 2013-41-DM |
| v.                            | : | No. NE-MD-12-05            |
|                               | : |                            |
| ALVIN J. COLEMAN & SON, INC., | : | Mine: Portable #2          |
| Respondent.                   | : | Mine ID: 27-00050          |
|                               | : |                            |

**DECISION**

Appearances:

David A. Stache, Pro Se, West Ossipee, New Hampshire

Russell “Butch” Webster, Alvin J. Coleman & Son, Inc., Conway, New Hampshire, on behalf of Respondent

Before: Judge David F. Barbour

This case is before me upon a complaint of discrimination brought by David A. Stache (“Stache”), a miner, against Alvin J. Coleman & Son, Inc. (“Alvin Coleman” or “the company”), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(3). Stache contends that he was unlawfully discharged by Alvin Coleman on August 8, 2012, because of his protected activities, specifically his safety complaints to his supervisor, Russell “Butch” Webster. Alvin Coleman contends that it did not discriminate against Stache who was discharged not for protected activities, but for physically intimidating Webster.

## PROCEDURAL BACKGROUND

On August 8, 2012, Stache was terminated by Alvin Coleman. Almost a month later, on September 6, 2012, Stache filed a discrimination complaint with the Mine Safety and Health Administration (“MSHA”) pursuant to section 105(c)(2) of the Act.<sup>1</sup> Discrim. Compl. to MSHA (Sept. 6, 2012). On October 19, 2012, MSHA determined after an investigation that there was no violation of section 105(c), and therefore, that Stache’s discharge was not prohibited by the Mine Act. MSHA Determ. of No Discrim. (Oct. 19, 2012).

Subsequently, on November 7, 2012, Stache filed a discrimination complaint on his own behalf with the Federal Mine Safety and Health Review Commission (“Commission”) pursuant to section 105(c)(3) of the Mine Act.<sup>2</sup> Stache’s Appeal of MSHA Determ. (November 7, 2012).

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<sup>1</sup> Section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), states in relevant part:

Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate.

<sup>2</sup> Section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), states in relevant part:

Within 90 days of the receipt of a complaint filed under [section 105(c)(2)], the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days notice of the Secretary’s determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]. The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant’s charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner of his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant’s charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney’s fees) as determined by the Commission to have been reasonably incurred by the miner . . . for, or in

(continued...)

Stache seeks lost wages from the date of his termination, August 8, 2012, to the estimated date of his potential seasonal lay-off, December 14, 2012.<sup>3</sup> Discrim. Compl. to MSHA (Sept. 6, 2012). A hearing was held on May 21, 2013 in Ossipee, New Hampshire.<sup>4</sup>

At the hearing, the evidence established the following chronology of events. On August 8, 2012, Stache failed to inspect and report that the emergency steering of his haul truck was defective. The defective emergency steering was cited by an MSHA inspector later the same day. Complainant's Ex. 2.<sup>5</sup> A few hours after the citation was issued, Webster suspended Stache for two days for failing to inspect and report the defective emergency steering. *Id.* After Webster informed Stache that he was suspended for two days, Stache complained to Webster about safety issues with Stache's truck and mentioned section 105(c). A few minutes after that, Webster terminated Stache. *Id.*

Stache and Webster dispute the reason for the termination. Stache alleges that he was terminated because he made complaints under the Mine Act. Tr. 32. He claims that *after* being terminated, he threw a pen at the windshield of Webster's truck. Tr. 32. Webster claims that Stache angrily threw the pen at his face *prior* to being terminated. Tr. 88-89. Webster maintains that Stache's suspension escalated to a termination not because of Stache's protected complaints, but because Stache engaged in extreme misconduct by throwing a pen at Webster's face and by displaying unstable behavior, leading Webster to fear Stache was dangerous. Complainant's Ex. 1-2; Tr. 88-89.

## **FACTUAL BACKGROUND**

### THE MINE

Alvin Coleman is a construction company that employs engineers and skilled construction workers for construction projects. *Alvin J. Coleman & Son*, Alvin J. Coleman company website, <http://www.ajcoleman.com> (last visited Aug. 20, 2013).<sup>6</sup> The company also

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<sup>2</sup>(...continued)

connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

<sup>3</sup> In his complaint to MSHA, Stache conceded that he would have been seasonally laid off on December 14, 2012. Discrim. Compl. to MSHA (Sept. 6, 2012).

<sup>4</sup> The parties did not submit post-hearing briefs, and did not agree to any stipulations.

<sup>5</sup> Complainant's Exhibit 2 is comprised of a single page. The front, hereinafter referred to as page 1, contains Stache's notice of suspension. The back, hereinafter referred to as page 2, contains Stache's notice of termination.

<sup>6</sup> Due to the paucity of evidence regarding the nature of the mine, the court consulted the company's website for relevant information.

operates a crushing division, consisting of a rock quarry (the Conway quarry), three crushers and two screening plants. The crushing division supplies the material needed for the company's construction projects. *Id.* On March 15, 2008, Stache was hired by the company to perform general maintenance on equipment. Discrim. Compl. to MSHA (Sept. 6, 2012). On December 13, 2008, he was laid off. *Id.* On April 3, 2009, Stache was recalled and became a haul truck driver in the crusher division at the Conway quarry. *Id.*; Complainant's Ex. 2, at 1. Stache operated the same Caterpillar 769 truck ("769 C") from April 2009 to his termination on August 8, 2012. Tr. 47, 59-60. While not explicitly stated, Stache's daily duties seemed to primarily comprise of hauling large pieces of rock within the quarry. Complainant's Ex. 6-7; Tr. 26-28, 48-51.

### DRIVER'S VEHICLE INSPECTION REPORT

The Driver's Vehicle Inspection Report ("DVIR") is a daily report prepared by haul truck drivers regarding any defects with their haul trucks. Discrim. Compl. to MSHA (Sept. 6, 2012); Complainant's Ex. 3. The DVIR instructs drivers to "check any defective item and give details under remarks." *Id.* Below this instruction are three columns which list approximately 35 components of the truck such as wheels and steering (though the component "emergency steering" is not explicitly listed). To the left of each component is a small box. A driver must report a defect by checking the corresponding box, provide details about the defect in a remarks section, and report whether the defect was corrected. Complainant's Ex. 3. Stache testified that he completed the DVIR at the beginning of each shift and submitted it to Webster at the end of each shift. Webster received the original copy of each DVIR, while Stache retained a carbon copy. Tr. 39-40. Stache testified that Webster reviewed the DVIR of each driver in his office, recorded any reported defects, and communicated them to a company mechanic who was supposed to fix the defects in a timely fashion. Tr. 40. Stache testified that the mechanic might take two weeks or more to repair defects. *Id.*

### HISTORY OF REPORTING SAFETY ISSUES

Stache had a history of reporting safety concerns with his 769 C haul truck. In June and September 2011, and in July 2012, he complained to Webster that his truck was being over-loaded with large pieces of rock and that the over-loading almost resulted in the truck tipping over. Complainant's Ex. 6-7; Tr. 26-28, 48-51. Subsequently, in April 2012, he complained to Webster of an oil leak; he testified that the oil leak had existed since 2010 without being repaired.<sup>7</sup> Complainant's Ex. 8-9; Tr. 51-56. In his DVIRs for the 769 C, between July 25-27, 2012, July 30-August 1, 2012, and August 7-8, 2012, Stache reported a defective air conditioning system, oil, hydraulic and exhaust leaks, a crack in the muffler, a broken seat, and

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<sup>7</sup> It is unclear whether Stache's complaints regarding the overloading of his truck and the April oil leak were communicated orally to Webster or were simply reported on his DVIR. Regardless, Webster did not dispute that Stache made these complaints and that he, Webster, was aware of them.

that the body of the truck needed welding.<sup>8</sup> Complainant's Ex. 3; Tr. 35-39. Stache testified that Webster was aware of all these safety concerns.<sup>9</sup> Tr. 60.

Stache also testified that Webster was not responsive to his safety concerns, in that multiple safety issues on his truck had not been addressed for several years. Tr. 40-41. In this regard, Webster conceded that he pondered installing a new air conditioning system in Stache's truck for several years instead of immediately installing it upon Stache's request. Tr. 100-01. However, Webster maintained that he was responsive to Stache's safety concerns, at least those made in July and August 2012. Specifically, he discussed the broken seat with Stache, and informed Stache that the cracked exhaust system was not leaking since it was double-lined. Tr. 69-70. Stache continued to insist that the exhaust was leaking despite being double-lined, but conceded that a mechanic, presumably on Webster's instructions, in August 2012, repaired the oil leak and informed Stache that the broken seat would be replaced. Tr. 67-68, 70.

### SAFETY MEETINGS

At the hearing, Webster testified that Alvin Coleman's policy since 2008 was to suspend employees who committed safety violations which resulted in MSHA citations. Tr. 80-81. The company regularly communicated this policy to employees at safety meetings in the hope that it would make employees more vigilant about the defects on their equipment, and thus reduce the number of MSHA citations received by the company. *Id.* At the hearing, the company introduced records of three safety meetings between 2011 and 2012. On April 21, 2011, employees were informed of the company's progressive discipline policy; the first violation of the policy would result in a one day suspension, the second violation would result in a one week suspension, and the third violation would result in termination.<sup>10</sup> Resp't Ex. 4. On March 30, 2012, the company informed employees that it had "zero tolerance for [MSHA] citations if [preventing violations is] in your control." Resp't Ex. 2. The company further informed employees that the punishment for preventable citations would be "time off without pay or termination." *Id.* On April 13, 2012, employees were reminded by the company that "if [you're] caught with a violation from MSHA and you hadn't [sic] reported it on your paperwork[,] you will be getting time off without pay.

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<sup>8</sup> Complainant's Exhibit 3 is comprised of loose-leaf carbon copies of nine DVIRs submitted by Stache to Webster between July and August 2012. Eight of these DVIRs pertained to the 769 C truck operated by Stache, while one pertained to an AT-18 truck. As will be discussed, on August 8, 2012, Stache temporarily operated an AT-18 truck.

<sup>9</sup> Stache failed to clarify at the hearing whether he directly handed his daily DVIR to Webster, placed it in Webster's office, or gave it to another individual who delivered it to Webster. Tr. 39-40.

<sup>10</sup> The evidence suggests that actual discipline often varied from the progressive discipline policy. In this regard, after April 2011, at least three employees were suspended for three days, similar to Stache's two day suspension on August 8, 2012, but inconsistent with the progressive discipline policy where a one day suspension is followed by a one week suspension. Resp't Ex. 1.

[Y]ou are all responsible for your piece of equipment.” Resp’t Ex. 3. Stache was present during all three of these safety meetings. Resp’t Ex. 2-4, list of signatures.

### MSHA CITATION

On the morning of August 8, 2012, between 6:15 a.m. and 8:00 a.m., Stache was temporarily operating an AT-18 haul truck (the 769 C, which he normally operated, had an oil leak that was being repaired). Discrim. Compl. to MSHA (Sept. 6, 2012); Complainant’s Ex. 3; Tr. 20, 38, 67. At approximately 8:00 a.m., after a mechanic finished repairing the 769 C and informed Stache that the truck “was running,” Stache began operating the 769 C haul truck. *Id.*, Tr. 73-75. Stache testified at the hearing that while he quickly inspected the 769 C, “due to production,” he did not have time to shut down the truck in order to inspect the emergency steering. Tr. 68.

On the same day, a federal inspector from MSHA arrived at the mine to conduct an inspection. The inspector approached Stache’s truck, the 769 C, and began inspecting the truck for any defects while Stache remained inside. Tr. 20-21. The inspector found that the emergency steering on the truck was defective due to a broken wire. Tr. 21. A mechanic was called to the truck to fix the defect. Complainant’s Ex. 3; Tr. 21, 38-39. After the emergency steering was repaired, the inspector instructed Stache to note in his DVIR for August 8 that the defect had been corrected. Tr. 38-39. Later on August 8, at some point between 8:00 a.m. and 3:15 p.m., the inspector issued a citation to the company due to the defective emergency steering on Stache’s truck. Complainant’s Ex. 2. Stache was not aware that his truck had been cited, and he continued to operate the haul truck until approximately 3:15 p.m. when he learned from Webster of the citation Tr. 21-22.

### SUSPENSION

At approximately 3:15 p.m., Stache finished his shift, parked and then exited his truck. Tr. 22, 24-25, 82. At that time, he noticed Webster driving towards him. Tr. 22. After parking in front of Stache, Webster got out of his truck, walked over to Stache, and informed him that he was suspended because he “did not do [a] complete daily inspection[.] [The] back-up steering on [Stache’s 769 C haul truck] was not checked daily and was not reported on [Stache’s] daily inspection book.” Complainant’s Ex. 2. Webster further told Stache that his failure to inspect the emergency steering on his truck had resulted in a citation which would cost the company \$5,000. Tr. 18, 23.<sup>11</sup>

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<sup>11</sup> At the hearing, Stache claimed that at the beginning of the conversation, Webster handed him a pen and a copy of the notice of suspension, and asked him to sign it without explaining why his signature was required. Tr. 17-18. As indicated below, Webster claimed that he asked for Stache’s signature towards the end of the conversation.

## TERMINATION

Upon learning that he was suspended and might cost the company \$5,000, Stache thought “it was going to be a personal fine” and he “became concerned about the safety issues on [his] truck.” Tr. 18. While the testimony is not entirely clear, the court finds that the most reasonable inference to draw from the record is that Stache became worried that he would be fined \$5,000 for receiving a citation, and would also be fined for all future safety issues with his truck. Stache then mentioned to Webster that the driver’s seat in his truck was broken. Tr. 18, 97. Specifically, he claimed that a broken adjustment tool on the seat rendered him unable to adjust the backrest, thus hurting his back. Tr. 70-71. While it is agreed that Stache mentioned the broken seat,<sup>12</sup> it is ambiguous as to whether he mentioned other safety concerns during this conversation with Webster. At the hearing, Stache claimed that on August 8, “I explained to [Webster] that I had a cracked exhaust in the truck; I had no air conditioning in the truck; excessive noise level; and broken seat.” Tr. 18. However, Webster testified that Stache did not mention the crack in the exhaust or the lack of air-conditioning during this conversation.<sup>13</sup> Tr. 97.

After Stache mentioned the safety issue(s) with his truck, Webster told Stache that he was not going to fix “petty ante stuff.” Tr. 18, 30-31.<sup>14</sup> Stache, who testified that he felt insulted and degraded after Webster dismissed his safety concern(s) as “petty,” responded by mentioning section 105(c), presumably complaining that Webster’s “petty” comment was retaliatory.<sup>15</sup> Tr. 18-19, 30-31. Webster testified that during the conversation, Stache said “what about [section] 105(c).” Tr. 97. However, Webster argued that on August 8, he did not know the meaning of section 105(c) and that Stache “knew more about [section 105(c)] than [Webster] did.” *Id.*

While there were no stipulated facts, the parties did not dispute the sequence of events leading up to Stache’s mention of section 105(c). In this regard, the parties did not dispute that at approximately 3:15 p.m., Stache was suspended by Webster who informed him that he had cost the company \$5,000, that Stache reacted to this news by mentioning safety issues which Webster

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<sup>12</sup> Webster conceded that Stache mentioned the broken seat during their August 8 conversation. Tr. 97.

<sup>13</sup> Webster did not address Stache’s claim that Stache made a complaint about excessive noise during this conversation. Tr. 97.

<sup>14</sup> The court finds that Webster characterized Stache’s broken seat complaint as “petty,” as testified by Stache, since Webster, who was unable to recall how he responded to Stache’s safety concern(s), conceded that he viewed the broken adjustment tool on the backrest as more of a comfort issue than as a safety issue, and did not dispute using the word “petty.” Tr. 97-98, 101-02.

<sup>15</sup> While neither party provided a clear chronology of events, the court finds that Stache mentioned section 105(c) after, not before, Webster’s “petty” comment, since it is reasonable to infer that the “petty” comment triggered Stache’s reference to the statutory provision.

characterized as “petty,” and that Stache responded by mentioning section 105(c).<sup>16</sup> However, the parties diverge sharply as to the events which occurred after Stache’s mention of section 105(c).

Stache claims that his mention of section 105(c) caused a furious Webster to immediately terminate him. Stache testified that Webster responded by telling him to “get the f\*\*\* off the property, you’re f\*\*\*\*\* fired.” Tr. 31. Stache testified that after being terminated, he threw a pen at Webster’s truck. The pen bounced off the truck’s windshield and almost hit Webster, who was still standing outside his truck. Tr. 31-32.

Webster claims that Stache was terminated after he threw a pen at Webster’s face. Webster testified that during the end of the heated discussion, he asked for Stache’s signature on the notice of suspension. At that point, Webster testified that Stache “came unglued,” screaming and shouting that he was “not signing any f\*\*\*\*\* paperwork” before finally throwing a pen that narrowly missed Webster’s face; the pen flew across Webster’s face and hit the windshield of Webster’s truck. Complainant’s Ex. 2; Tr. 101. Webster then decided to terminate Stache, testifying as follows:

[Stache] went off the wall on me, and threw the pen at me. And, like I said, I considered that a projectile. I mean, that could have pierced my eye. And he - I don’t know what [is] the word to use. He acted like he was getting very unstable. He was getting very red in the face and his eyes were wandering around. I mean, there’s rocks, sticks and everything there, I could only imagine what was coming at me next. So I decided to defuse the situation, and that’s when I discharged him.

Tr. 88-89.

### **THE LAW**

In order to establish a *prima facie* case of discrimination under section 105(c) of the Mine Act, a miner must demonstrate by a preponderance of the evidence “(1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity.” *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The Commission has noted that “direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev. on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse

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<sup>16</sup> Regarding the sequence and timing of events leading up to Stache’s mention of section 105(c), the court is relying largely on Stache’s testimony since Webster did not mention the chronological order for the events on August 8.

action, (2) knowledge of protected activity, (3) hostility or animus toward the protected activity and (4) disparate treatment. *Chacon*, 3 FMSHRC at 2510.

Once the complainant has established a *prima facie* case of discrimination “[t]he operator may attempt to rebut a *prima facie* case by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity.” *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). The operator may also affirmatively defend by proving by a preponderance of the evidence that it was motivated by both the miner’s protected and unprotected activities and would have taken the adverse action for the unprotected activity alone. *Robinette*, 3 FMSHRC at 818 n.20. The Commission has explained that an affirmative defense should not be “examined superficially or be approved automatically once offered.” *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must “determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.” *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has held that “pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator’s normal business practices.” *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). However, the Commission has also held that “our judges should not substitute for the operator’s business judgment our views of good business practice.” *Chacon*, 3 FMSHRC at 2516.

### **PRIMA FACIE CASE**

#### COMPLAINTS DURING CONVERSATION ON 8/8/12

On August 8, 2012, at approximately 3:15 p.m., immediately after being informed of his suspension, Stache allegedly mentioned four safety issues with his truck to Webster - cracked exhaust, defective air conditioning, excessive noise, and a broken seat. Tr. 18, 70-71, 97. Webster responded by calling Stache’s safety concerns “petty” prompting Stache to ask “what about [section] 105(c),” presumably complaining that Webster’s “petty” comment was retaliatory. Tr. 18-19, 30-31. At the hearing, Webster did not dispute that Stache complained about the broken seat and mentioned section 105(c) during the August 8 conversation. Tr. 97. Webster also did not dispute that these complaints were protected under the Mine Act. *Id.* Webster denies, however, that Stache complained about the exhaust or air conditioning during the conversation. Tr. 97.<sup>17</sup>

First, the court considers whether Stache can establish a *prima facie* case based on his undisputed complaints during the August 8 conversation - that he was unable to adjust the backrest on the driver’s seat of his truck and that he mentioned section 105(c). Tr. 18, 70-71, 97. The court finds that both these complaints were protected. Stache’s complaint regarding the broken seat was protected as a safety complaint, despite Webster’s opinion that the broken seat was more an issue of comfort than safety. Tr. 97-98, 101-02. In this regard, the court credits Stache’s testimony that an inability to adjust the backrest on the driver’s seat could result in

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<sup>17</sup> Webster failed to address whether Stache complained about excessive noise during the conversation on August 8. Tr. 97.

accumulated back pain to the haul truck driver, who spends multiple hours each working day operating his truck. Tr. 70-71. Further, Stache's mention of section 105(c) was protected as an exercise of Stache's rights under the Act, as undisputed by the company.

Regarding Webster's motivation for terminating Stache, since there is no direct evidence that Stache's termination was motivated by his protected activity, the court must rely on circumstantial evidence of motivation. The Commission has noted that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Chacon*, 3 FMSHRC at 2510 (Nov. 1981). Circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse action, (2) knowledge of the protected activity, (3) hostility or animus toward the protected activity and (4) disparate treatment. *Id.*

Regarding temporal proximity, the Commission has found that a discharge occurring approximately two weeks after protected activity is sufficiently coincidental in time to support a finding of discriminatory motive. *Secretary of Labor on behalf of Clay Baier v. Durango Gravel*, 21 FMSHRC 953, 959 (Sept. 1999). This case presents an even stronger causal connection since Stache was terminated on the same day, and within a few minutes of making these protected complaints. Complainant's Ex. 2; Tr. 88-89.

Regarding knowledge, the Commission has recognized that an operator's knowledge of protected activity "is probably the single most important aspect of a circumstantial case." *Chacon*, 3 FMSHRC at 2510. Webster conceded that Stache complained about the broken seat and mentioned section 105(c) during the August 8 conversation.<sup>18</sup> Webster, who directly terminated Stache, thus had knowledge of both instances of protected activity.

Regarding animus, the Commission has recognized that the more that animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Chacon*, 3 FMSHRC at 2511. There is evidence that Webster was hostile towards Stache's complaint of a broken seat. Webster, who called this complaint "petty," clarified at the hearing that he personally viewed the broken seat as more of a comfort issue than an actual safety issue. Tr. 101-02. However, there is no evidence that Webster was hostile towards Stache's mention of section 105(c).

The Commission has stated in *Bradley* that "evidence of knowledge and timing present in [*Bradley*] constitutes substantial evidence that [the complainant's] discharge was at least partially motivated by his protected refusal to work." *Bradley*, 4 FMSHRC at 993. The

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<sup>18</sup> Webster argued that he was not aware of the precise meaning of section 105(c) on August 8, 2012. Tr. 97. However, Stache mentioned section 105(c) during a conversation regarding safety issues and immediately after Webster characterized Stache's safety complaints as "petty." Tr. 18-19, 30-31. In this regard, even assuming that Webster was unaware of the precise meaning of the statutory provision, the court finds that Webster was aware that Stache was referring to a legal provision concerning mine safety. Therefore, the court concludes that Webster knew that Stache's invocation of section 105(c) constituted protected activity under the Mine Act

Commission has recently stated in *Metz v. Carmeuse Lime*, 34 FMSHRC 1820, 1826 (Aug. 2012) that “the supervisors’ knowledge of the complaints and the timing of those complaints constitute evidence that would allow a factfinder to conclude that [the complainant’s] discharge was at least partially motivated by his protected safety complaints.” In *Bradley* and *Metz*, the Commission found that the complainant made out a *prima facie* case based solely on management’s knowledge of protected activity and coincidence in time between the protected activity and the adverse action.

In the case at bar, regarding the broken seat complaint and Stache’s mention of section 105(c), Webster clearly knew of the protected activity, and terminated Stache mere minutes after he engaged in the protected activity. The indicia of knowledge and temporal proximity are sufficient to suggest a discriminatory motive. *Bradley*, 4 FMSHRC at 993; *Metz* 34 FMSHRC at 1826. However, even if these indicia were insufficient, there is also evidence that Webster was hostile towards Stache’s broken seat complaint. Therefore, the court finds that Stache has established a *prima facie* case regarding the broken seat complaint and his mention of section 105(c).

Second, the court considers whether, under *Bradley* and *Metz*, Stache can establish a *prima facie* case based on his alleged complaints during the August 8 conversation regarding the defective exhaust, the defective air conditioning, or the excessive noise. *Bradley*, 4 FMSHRC at 993; *Metz* 34 FMSHRC at 1826. Webster testified that during this conversation Stache failed to complain about the defective exhaust or defective air conditioning. Tr. 97. Webster did not testify about Stache’s alleged complaint about excessive noise.<sup>19</sup> *Id.*

The court finds that these additional complaints relate to safety issues with Stache’s truck, as undisputed by the company. Therefore, the court finds that these additional complaints, if they occurred, were protected activity under the Mine Act. Since these complaints were allegedly made at the same time as the broken seat complaint, a few minutes prior to Stache’s termination, there was a close coincidence in time between the alleged protected activity and adverse action. Tr. 18. The next step would be to determine whether the operator knew of these safety complaints, *i.e.* whether or not Stache made additional complaints to Webster during the conversation. However, since it is ambiguous as to whether Stache made additional complaints to Webster during the August 8 conversation, and since the court earlier found that Stache

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<sup>19</sup> Stache failed to explain the cause for the excessive noise in his truck, though the court notes that in the preceding days, Stache had complained in his DVIR that the muffler of his truck was malfunctioning. Complainant’s Ex. 3.

proved a *prima facie* case based on his complaint regarding the broken seat and his mention of section 105(c), it is unnecessary to resolve this issue.<sup>20</sup>

#### COMPLAINTS PRIOR TO CONVERSATION ON 8/8/12

Third, the court considers whether, under *Bradley* and *Metz*, Stache can establish a *prima facie* case based on his safety complaints prior to the conversation on August 8, 2012. *Bradley*, 4 FMSHRC at 993; *Metz* 34 FMSHRC at 1826. Stache testified that he complained that his truck, the 769 C, was being overloaded in June 2011, September 2011 and July 2012. Complainant's Ex. 6-7; Tr. 26-28, 48-51. He also testified that in April 2012, he complained of an oil leak. Complainant's Ex. 8-9; Tr. 51-56. During July and August 2012, he reported in his DVIRs numerous safety issues with the 769 C - the defective air conditioning; oil, hydraulic and exhaust leaks; a crack in the muffler; a broken seat; and that the truck's body needed welding. Complainant's Ex. 3; Tr. 35-39.

The court finds that these complaints relate to safety issues with Stache's truck and thus were protected under the Mine Act, as undisputed by the company. Stache's undisputed testimony that Webster was aware of these complaints established the operator's knowledge of protected activity. Tr. 60. However, Stache can only establish that some of these complaints were sufficiently close in time to his termination to indicate a causal connection. The complaints in Stache's DVIR were made between July and August 2012, and the most recent complaint regarding overloading was made in July 2012. Since these complaints were made within a month of Stache's termination on August 8, 2012, there is a close coincidence in time between the protected activity and the adverse action. However, the April 2012 complaint regarding an oil leak was made approximately four months prior to Stache's termination, and the complaints of overloading made in June and September 2011 were respectively made 14 and 11 months prior to Stache's termination on August 8, 2012. Therefore, these complaints are not temporally proximate to Stache's termination.<sup>21</sup>

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<sup>20</sup> Upon reviewing the evidence, the court has determined that it is ambiguous as to whether Stache complained about the exhaust, the defective AC or the excessive noise during the conversation on August 8, 2012. Since Stache had reported the exhaust and the defective AC on his DVIR in the morning of August 8, it is possible that he again raised those safety concerns after being suspended by Webster. Complainant's Ex. 3. However, Webster admitted that Stache made a safety complaint regarding the broken seat and mentioned section 105(c) during the August 8 conversation. Tr. 97. Webster thus established that he knew Stache had engaged in protected activity minutes before his termination. Therefore, Webster would seemingly have no incentive to falsely assert that Stache did not make any other safety complaints during the same conversation.

<sup>21</sup> The court briefly notes that there is no evidence that Webster was hostile towards any of Stache's complaints made prior to the August 8 conversation. While Webster had delayed installing a new air conditioning system in Stache's truck, other issues such as the oil leak were addressed, though perhaps not as promptly as Stache preferred. Tr. 67-68, 100-01. Stache also conceded that Webster discussed the broken seat with him, presumably prior to August 8, and explained to him that the cracked exhaust was not leaking since it was double-lined, though Stache rejected this explanation. Tr. 69-70.

Under prior Commission decisions, evidence of the operator's knowledge of protected activity and coincidence in time between protected activity and the adverse action is sufficient to establish a *prima facie* case. *Bradley*, 4 FMSHRC at 993; *Metz* 34 FMSHRC at 1826. As to the DVIR complaints and the July 2012 complaint regarding overloading, Stache established that the operator knew of these complaints and that these complaints were made within a month of his termination. Therefore, the indicia of knowledge and temporal proximity are sufficient to suggest a discriminatory motive. *Id.* However, as to the April 2012 complaint of an oil leak, and the overloading complaints made in 2011, Stache failed to establish that these complaints were sufficiently close in time to his termination to indicate a causal connection. Therefore, the court finds that Stache has established a *prima facie* case only regarding the DVIR complaints and the July 2012 complaint concerning overloading.

In conclusion, Stache has established a *prima facie* case on the basis of several complaints, made orally or verbally at different times, concerning different components of his truck. As discussed above, Stache proved a *prima facie* case regarding his complaint of a broken seat and his mention of section 105(c) to Webster during the August 8 conversation. Stache also proved a *prima facie* case regarding his complaints in his DVIRs of July and August 2012 concerning the defective air conditioning; oil, hydraulic and exhaust leaks; a crack in the muffler; a broken seat; and the truck's body needing welding. Finally, Stache proved a *prima facie* case regarding his complaint that his truck was overloaded on July 2012.

### **REBUTTAL**

Alvin Coleman has failed to rebut the *prima facie* case by either proving there was no protected activity, or that Stache's termination was in no way motivated by his protected complaints. *See Robinette*, 3 FMSHRC at 818 n.20. In this regard, the court finds that Webster, who argued that Stache was terminated solely for his unprotected misconduct, failed to show that Stache's protected complaints did not have any impact on the termination. Complainant's Ex. 2, at 2; Tr. 88-89. Therefore, the court will now consider whether the company has established an affirmative defense.

### **AFFIRMATIVE DEFENSE**

As indicated above, Alvin Coleman has failed to rebut Stache's *prima facie* case. Thus, it is clear that Stache's termination was motivated in part by his protected activity. However, the company can still avoid liability by proving an affirmative defense. In this regard, the company must show that even though Stache's termination was motivated in part by his protected activity, it was also motivated by his unprotected misconduct. *See Robinette*, 3 FMSHRC at 818 n.20. The company must further show that Stache would have been terminated for his unprotected misconduct alone, *i.e.* in the absence of the protected activity. *Id.*

Webster testified that Stache was terminated for his unprotected misconduct.<sup>22</sup> Specifically, Webster testified that Stache was terminated for physically intimidating Webster by throwing a pen at Webster's face and by displaying unstable behavior.<sup>23</sup> Complainant's Ex. 2; Tr. 88-89, 101. According to Webster, the pen was a projectile that could have harmed one of his eyes. Moreover, after Stache threw the pen, Webster testified that Stache's face was red and his "eyes were wandering around." Tr. 88-89. Webster testified that he feared that Stache, who seemed unstable, was capable of throwing other objects, such as rocks or sticks, at him. *Id.* Webster then immediately terminated Stache. *Id.*

The Commission has explained that an affirmative defense that the employee was terminated for his unprotected misconduct alone should not be "examined superficially or be approved automatically once offered" and that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Haro*, 4 FMSHRC at 1938; *Price*, 12 FMSHRC at 1534. Taking cues from other federal statutes on discrimination, the Commission analyzed the issue of pretext in *Turner v. National Cement*, 33 FMSHRC 1059, 1073, listing three ways in which a complainant can show that the operator's affirmative defense is not credible but rather a pretext for prohibited discrimination. First, a complainant can establish that the employer's proffered reason(s) have no basis in fact, that they are factually false. *Id.* Second, a complainant can show that the proffered reason(s) did not actually motivate the termination, *i.e.* the complainant admits the factual basis underlying the employer's proffered reason(s), and that such conduct could motivate dismissal, but attacks the credibility of the proffered reason(s) indirectly by showing circumstances which tend to prove that an illegal motivation was more likely than the legitimate business reason(s) proffered by the employer. *Id.* Third, a complainant can show that the employer's proffered reason(s) were insufficient to motivate termination, *i.e.* other employees were not terminated even though they engaged in conduct substantially similar to that which formed the basis of complainant's termination. *Id.*

Stache primarily sought to use the first approach to demonstrate pretext. In this regard, Stache sought to prove that the company's proffered reason for his termination, that he engaged in physical intimidation by throwing a pen at his supervisor and by displaying ensuing unstable behavior, was factually false. The court will also consider whether Stache could have used the second approach to demonstrate pretext, by proving that the company's affirmative defense did not actually motivate termination. *Turner*, 33 FMSHRC at 1073. However, the court concludes

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<sup>22</sup> As stated earlier, Webster argued that Stache was terminated solely for his unprotected misconduct, rather than arguing Stache was terminated for both protected and unprotected activity. Complainant's Ex. 2, at 2; Tr. 88-89.

<sup>23</sup> The un-contradicted evidence indicates that the pen was thrown at Webster's face. Webster testified that the pen flew across his face and narrowly missed hitting him. Tr. 82-83. Stache testified that he threw the pen at the windshield of Webster's truck. Tr. 31-32. Since it is undisputed that Webster was standing in front of his truck at the time, it is clear that the pen was thrown in Webster's direction, at the same height as the truck's windshield. Tr. 32, 82-83. Therefore, based on both parties' testimony, the court finds it reasonable to conclude that the pen was thrown at Webster's face.

that it is unnecessary to consider whether Stache could have used the third approach to prove pretext as Stache did not argue that the company's affirmative defense was insufficient to motivate termination. In this regard, Stache did not provide any evidence of disparate treatment, *i.e.* that other employees were not terminated despite engaging in the misconduct at issue.

#### TURNER FIRST APPROACH

Under the first approach in *Turner*, 33 FMSHRC at 1073, Stache sought to prove that Alvin Coleman's affirmative defense was factually false. Stache claimed that since he threw the pen *after* his termination, it could not have been a basis for his termination, and he was actually terminated solely for making protected complaints during and before the August 8 conversation. Tr. 32. Webster responded by alleging that Stache, who he claimed threw the pen *before* his termination, was terminated for throwing the pen and for his ensuing unstable behavior, not for his protected activity. Complainant's Ex. 1-2; Tr. 88-89. As indicated below, the court finds that Stache's testimony that he threw the pen after his termination is not credible.

First, the notice of termination, presumably written on August 8, 2012, corroborates the company's position that Stache was terminated for throwing the pen and for his ensuing unstable behavior. In the termination notice, Webster wrote "[Stache] threw his pen at me and refused to sign violation paper. David has a temper and I'm all done with that. I fired him at 3:15 p.m. 8-8-12."<sup>24</sup> Complainant's Ex. 2, at 2. While neither party addressed when the notice of termination was written, it is reasonable to infer that it was written immediately following the termination. Therefore, the contemporary notice of termination deserves more weight than Stache's testimony at a hearing nine months later.

Second, Stache's failed attempt to minimize the misconduct that led to his suspension harms his credibility. During direct examination, Stache implied that since he was neither trained nor instructed to check emergency steering, his suspension on August 8 was wrongful. He claimed that the DVIR, which lists steering but not emergency steering, fails to instruct drivers to check emergency steering. Tr. 15-16, 104-05. However, on cross-examination, Stache conceded that on August 8, he knew the proper procedure for inspecting emergency steering but failed to inspect it due to time constraints, testifying that "the proper procedure to check the emergency steering is to shut down the vehicle. And due to production, I didn't have time to shut the truck off to do that procedure. That was the next step." Tr. 68. Stache's knowledge of the proper procedure for inspecting emergency steering suggests that he was properly trained to inspect his truck. Stache also conceded that he should have inspected emergency steering on August 8, testifying "Yeah. I should have checked it." Tr. 69. Stache's own testimony thus indicates that he was trained, and knew that he was required to inspect emergency steering, contradicting his earlier claim that he was neither trained nor instructed to check emergency steering.

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<sup>24</sup> While Webster noted that he terminated Stache at 3:15 p.m., Stache testified that Webster approached his truck at approximately 3:15 p.m., implying that Stache was terminated a few minutes after 3:15 p.m. Given that the precise time of termination is not determinative, the court, as explained earlier, will rely on Stache's testimony regarding the times for specific events.

Stache's failed attempt to minimize the misconduct for which he was suspended undermines the credibility of his attempt to again minimize his misconduct, this time the misconduct for which he was terminated. In the former situation, Stache argued that he was not trained or unaware that he had to inspect emergency steering. In the latter situation, Stache argued that he threw the pen after his termination. The court finds that these two attempts by Stache to minimize his misconduct are strikingly similar. In both situations the alleged misconduct resulted in a disciplinary action, and Stache sought to minimize his misconduct at the hearing. In addition, in both situations the company disputed Stache's attempts to minimize his misconduct, arguing respectively that Stache was trained and aware of his duty to inspect emergency steering, and that the pen was thrown before his termination. Given the similarity between these two situations, it is reasonable to infer that if Stache's excuse regarding his failure to inspect emergency steering is not credible, his claim that he threw the pen at Webster after his termination is similarly not credible.

For the reasons above, the court finds that Stache's testimony that he threw the pen after his termination is not credible. Instead, the court credits Webster's testimony that Stache threw the pen prior to his termination since Webster was a forthright, credible witness whose testimony is corroborated by the contemporary notice of termination. Accordingly, the court finds that Stache failed to prove that the company's affirmative defense was factually false.

#### TURNER SECOND APPROACH

Under the second approach in *Turner*, Alvin Coleman's affirmative defense can be found to be pre-textual if the evidence shows that the alleged misconduct was not substantial enough to credibly motivate termination. *See Turner*, 33 FMSHRC at 1073-77. In *Turner*, the Commission implicitly used the *Bradley* factors to determine the substantiality of an affirmative defense. *Id.* In *Bradley*, the Commission recognized that in order to determine whether an operator would have "disciplined the miner anyway for the unprotected activity alone," a judge must consider "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." 4 FMSHRC at 993. As shown below, the court finds that Stache's misconduct, his physical intimidation of a supervisor, was substantial enough to motivate Stache's termination and thus was not pre-textual.

First, the court assesses whether the record establishes that the company previously terminated other employees for intimidating a supervisor, and the court finds that it does not. The company provided five examples of employees who were suspended in the past. Resp't Ex. 1. However, none of these employees physically intimidated a supervisor, or were terminated for their misconduct. *Id.* Therefore, the court finds that none of them were similarly situated as Stache or received the same discipline as Stache.<sup>25</sup> *Id.*

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<sup>25</sup> Respondent's Exhibit 1 is comprised of five notices of suspension, issued for offenses of absenteeism, unsafe driving, unsafe use of equipment, failure to follow instructions, and unsafe use of equipment respectively.

Second, the court assesses Stache's past work record. At the time of his termination, Stache had worked approximately four years for the company. Discrim. Compl. To MSHA (Sept. 6, 2012). Webster, Stache's supervisor since April 2009, testified that Stache was a good, hardworking employee who, prior to his suspension on August 8, 2012, had only been disciplined once, several years prior to his August 8 suspension, for guarding issues at a crusher. Tr. 98. Therefore, the court concludes that Stache had a satisfactory past work record with the company.

Third, the court assesses whether Stache received any prior warnings from the company for insubordination, the misconduct for which he was terminated. There is no evidence that Stache was ever previously warned about insubordination. Tr. 98.

Fourth, the court assesses whether any personnel rules or policies prohibited the misconduct at issue. In this regard, although the company failed to submit a copy of its official policy on employee misconduct, the disciplinary forms used by the company list unsafe behavior and insubordination as grounds for discipline. Resp't Ex. 1. It is reasonable to infer that physical intimidation of a supervisor would be prohibited generally as unsafe behavior, and specifically as insubordination.

Fifth, the court assesses the nature of the employee's misconduct.<sup>26</sup> Stache's misconduct, throwing a pen at his supervisor's face, can be characterized either as a form of extreme insubordination or extreme intimidation. As compared to lesser forms of insubordination such as a failure to follow instructions, or lesser forms of intimidation such as making an obscene gesture, Stache engaged in extreme misconduct by not merely ignoring instructions or making gestures but by angrily throwing a projectile at his supervisor. Webster's post-hearing letter to the court (July 15, 2013); Complainant's Ex. 2, at 2. The court credits and finds reasonable Webster's fear that the pen could have potentially blinded him, and that Stache, after throwing the pen, might start throwing other objects such as rocks or sticks. Tr. 88-89. As stated previously, the court found that Webster was a forthright witness and the court notes that Stache failed to dispute the potential harm to Webster, or Webster's contention that Stache seemed unstable.

Weighing all of the factors, the court finds that Stache's misconduct was substantial enough, by itself, to credibly motivate his termination. In this regard, while the court recognizes that Stache's work record was satisfactory and that the company failed to provide evidence of prior similar terminations of other employees or prior warnings to Stache for insubordination, the court cannot overlook the extreme nature of Stache's misconduct, which could have resulted in lasting harm to his supervisor. Therefore, the court finds that Stache would have failed to show that the company's affirmative defense was pre-textual under the second approach in *Turner*.

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<sup>26</sup> This factor is not explicitly enumerated in *Bradley*, 4 FMSHRC at 993. However, since the *Bradley* factors are not exhaustive, the court can consider other factors that will allow the court to determine the substantiality of the affirmative defense. *Id.*

## PROVOCATION

Finally, the court will consider whether Alvin Coleman's affirmative defense should fail because the misconduct for which Stache was terminated was provoked by the company's misconduct. The Commission has recognized that wrongful provocation by an employer may be grounds for excusing an employee's misconduct:

Even if the judge determines that [the employer] has established the elements of its affirmative defense, the question remains whether that defense must nevertheless fail because [the employee's] conduct was provoked . . . [I]n many cases decided under the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994) ("NLRA"), courts have recognized that an employer cannot provoke an employee into an indiscretion and then rely on that indiscretion as grounds for discipline . . . . The question thus remains for the judge to determine on remand whether [the employee's misconduct] was provoked by [the employer's] response to his protected [activity]. The judge must also determine whether the particular facts and circumstances of this case, when viewed in their totality, place [the employee's] conduct within the scope of the "leeway" the courts grant employees whose "behavior takes place in response to [an] employer's wrongful provocation. If [the employee's] conduct was provoked and excusable, [the employer's] affirmative defense must fail."

*Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite* ("Bernardyn I"), 22 FMSHRC 298, 305-08 (Mar. 2000) citing in part *Trustees of Boston Univ. v. NLRB*, 548 F.2d 391, 393 (1st Cir. 1977); see also *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite* ("Bernardyn II"), 23 FMSHRC 924, 935-39 (Sept. 2001); see also *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4<sup>th</sup> Cir. 1965).<sup>27</sup>

The Commission in *Bernardyn I* recognized that to assess a claim of provocation, the court must resolve two issues. First, the court must resolve whether the employer wrongfully provoked the employee. In *Bernardyn I*, 22 FMSHRC at 306, the Commission implied that the alleged provocation must consist of wrongful and unjustified employer conduct, recognizing that

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<sup>27</sup> In *Bernardyn I*, the Commission vacated and remanded the Administrative Law Judge's decision. The Judge then issued a decision on remand. After granting the Secretary's petition for discretionary review of the judge's remand decision, in *Bernardyn II*, the Commission vacated and remanded the judge's remand decision. *Bernardyn II*, 23 FMSHRC at 924.

“other courts . . . have found layoffs, based ostensibly on vulgar employee outbursts to be improper where the employee’s conduct was provoked by unjustified employer action.”<sup>28</sup> Second, assuming wrongful provocation, the court must resolve whether the employee’s misconduct after being provoked was excusable, *i.e.* whether, under the circumstances of the case, the employee’s misconduct in response to the employer’s provocation fell within the leeway courts grant such employees. *Bernardyn I*, 22 FMSHRC at 307-308.

Regarding whether Webster wrongfully provoked Stache’s misconduct, Stache argued that Webster engaged in wrongful conduct on four occasions during the conversation on August 8, which could have contributed to Stache’s emotional outburst minutes later. The evidence suggests that Webster’s conduct on the first three occasions was not wrongful, but that his conduct on the fourth occasion was wrongful, and provoked Stache into throwing the pen.

First, Stache argued that his two day suspension for failing to inspect or report defective emergency steering was unjustified. Tr. 15-16, 104-05. However, as discussed earlier, the company, which required employees to inspect and report defective equipment in their DVIRs daily, clearly prohibited the misconduct for which Stache was suspended. Tr. 68-69, 80-81. Moreover, the company had repeatedly warned employees at safety meetings in March and April 2012, which Stache attended, that if their unsafe behavior resulted in a citation, they would be suspended. Resp’t Ex. 2-3. Therefore, the court finds that Webster justifiably suspended Stache, and that the suspension was not wrongful provocation.

Second, Stache argued that Webster wrongly scolded him for allegedly costing the company \$5,000. Tr. 18-23. This caused Stache, who mistakenly believed that he might have to pay a personal fine of \$5,000, to become very nervous about other safety issues on his truck which he feared also might result in other personal fines. Tr. 18. At the hearing, Webster conceded that the proposed penalty for the citation was later assessed as \$100. Tr. 103. However, Webster’s explanation that he estimated the penalty would be \$5,000 because of the company’s history of prior violations was undisputed. Tr. 103. Since Stache failed to show that Webster’s penalty estimate was unreasonable, and since Stache’s own mistaken belief that he would be personally fined \$5,000 contributed to his emotional state, the court finds that Webster’s conduct was not wrongful, and did not provoke Stache into physically intimidating Webster.

Third, Stache argued that Webster wrongly asked him to sign the notice of suspension without explaining why his signature was required. Tr. 17-18. However, the notice of suspension clearly states that an employee must acknowledge receipt of the disciplinary form by signing it, and clarifies that the employee’s signature is not an admission of employee misconduct. Complainant’s Ex. 2, at 1. Given the clear language of the form, Webster need not have orally explained to Stache why the signature was required; by simply glancing at the form, Stache would have understood his signature’s purpose. Therefore, the court finds that Webster did not engage in wrongful conduct by asking Stache to sign the notice of suspension

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<sup>28</sup> See also *Bernardyn II*, 23 FMSHRC at 938 where the Commission stated that “if the judge finds it necessary to reach the provocation issue on remand, he must revisit his determination that [the employer’s] instruction to [the complainant] to speed up was not wrongful.”

Fourth, Stache argued that Webster's characterization of his complaint regarding the broken seat as "petty" was degrading and unjustified. Tr. 18, 30-31. During their conversation on August 8, Stache complained that the adjustment tool for the backrest of the driver's seat was broken. Tr. 18, 70-71, 97. He believed that the inability to adjust the backrest was hurting his back. Tr. 70-71. In response, Webster, who viewed the broken adjustment tool as more of a comfort issue than as a safety issue, told Stache that he was not going to fix "petty ante stuff." Tr. 18, 30-31, 101-02. Stache's complaint about the broken seat was a protected complaint under the Mine Act, and at the hearing, Webster conceded that on August 14, 2012, an MSHA inspector confirmed that the adjustment tool for the backrest of the driver's seat was indeed broken. Tr. 101. The protected complaint regarding the broken seat should not have been characterized as "petty," a comment that angered Stache, leading to the conversation becoming heated and eventually resulting in Stache angrily throwing a pen at Webster. Tr. 30-31. The court finds that Webster's "petty" comment was wrongful conduct that directly provoked Stache into committing the misconduct for which he was terminated. However, this does not end the inquiry.

Regarding whether Stache's physical intimidation of Webster was excusable, the court, similar to the Commission, relies on decisions by the U.S. Courts of Appeals regarding when, under the National Labor Relations Act, an employee's misconduct is excusable due to the employer's provocative conduct. *Bernardyn I*, 22 FMSHRC at 306-308. In this regard, the Commission has relied on the First Circuit decision in *Trustees of Boston Univ. v. NLRB*, 548 F.2d at 393, which distinguished between minor employee misconduct, *i.e.* cursing, which may be excusable, and major employee misconduct, *i.e.* physical intimidation, which is rarely excusable. *Id.*, see *Trustees*, 548 F.2d at 393, 393 n.4 citing *Florida Steel Corp. v. NLRB*, 529 F.2d 1225 (5<sup>th</sup> Cir. 1976) ("[c]ourts have been unwilling to overlook blatant misconduct such as physical intimidation.")

The Eighth Circuit succinctly stated:

An employer may not provoke an employee and then rely on the employee's intemperate response as a ground for not reinstating him . . . . Yet, an employee is not free to engage in wanton conduct following an unlawful discharge and then hide behind the Act's protections . . . . As always in cases such as this, the question is where to draw the line as to the type of conduct that forfeits an employee's right to reinstatement . . . . Courts may allow certain indiscretions by employees who are wrongfully terminated, but they cannot overlook blatant misconduct such as threats of violence and physical intimidation.<sup>29</sup>

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<sup>29</sup> In *Precision*, the employee's provoked misconduct occurred after his termination. However, the analysis in *Precision* regarding when an employer's wrongful provocation excuses an employee's subsequent misconduct is applicable to cases where the employee's misconduct occurs prior to his termination. *Precision*, 963 F.2d at 1108.

*Precision Window Manufacturing v NLRB*, 963 F.2d 1105, 1108 (8<sup>th</sup> Cir. 1992) citing *Trustees*, 548 F.2d at 393 n.4.

When Stache angrily threw a pen at Webster's face, he engaged in blatant misconduct that could have partially blinded his supervisor. This is the type of conduct that lies outside the leeway courts grant employees whose misconduct was provoked by the employer. In addition, the court notes that Stache's misconduct was disproportional to Webster's provocation. While the court agrees with Stache that Webster's "petty" comment was wrongful, the court cannot condone employee conduct that could have resulted in lasting harm to his supervisor.

For the reasons stated above, the court finds that while Stache's physical intimidation of Webster was provoked, his blatant misconduct was not excusable, and that Alvin Coleman's affirmative defense survives Stache's allegation of provocation.

### **CONCLUSION**

In conclusion, the court finds that Stache established a *prima facie* case of discrimination under section 105(c)(3) of the Mine Act. The court also finds that Alvin Coleman affirmatively defended its termination of Stache. Therefore, based on a thorough review of the record, the court concludes that Stache failed to prove, by a preponderance of the evidence, that Alvin Coleman discriminatorily terminated him in violation of section 105(c) of the Act.

### **ORDER**

Having concluded that David Stache has not established that he was unlawfully discriminated against, the court **DISMISSES** his complaint and this proceeding.

/s/ David F. Barbour  
David F. Barbour  
Administrative Law Judge

Distribution (certified mail):

David A. Stache, P.O. Box 394, West Ossipee, New Hampshire 03890-0394

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/DM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19<sup>th</sup> Street, Suite 443  
Denver, CO 80202-2536  
303-844-3577/FAX 303-844-5268

November 19, 2013

|                          |   |                             |
|--------------------------|---|-----------------------------|
| SECRETARY OF LABOR,      | : | CIVIL PENALTY PROCEEDING    |
| MINE SAFETY AND HEALTH   | : |                             |
| ADMINISTRATION (MSHA)    | : | Docket No. WEST 2008-1151   |
| Petitioner,              | : | A.C. No. 42-02028-152062-01 |
|                          | : |                             |
| v.                       | : |                             |
|                          | : | Aberdeen Mine               |
| ANDALEX RESOURCES, INC., | : |                             |
| Respondent.              | : |                             |

Appearances: Francesca Cheroutes, Esq., and Amanda K. Slater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Jason W. Hardin, Esq., and Rachel S. Anderson, Esq., Fabian & Clendenin, Salt Lake City, Utah, for Respondent.

Before: Judge Manning

**DECISION**

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor acting through the Mine Safety and Health Administration (“MSHA”), against Andalex Resources, Inc. pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (“Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Salt Lake City, Utah, and filed post-hearing briefs.

At the time the citations and orders were issued, Andalex operated the Aberdeen Mine in Carbon County, Utah. The mine is now closed. Andalex is owned by Murray Energy Corporation through its subsidiary, UtahAmerican Energy, Inc. This case included 20 citations and orders, but the parties settled 15 of these items. Three section 104(d)(2) orders and two section 104(a) citations were adjudicated at the hearing. The Secretary proposed a total penalty of \$197,267.00 for the five adjudicated items.

**I. DISCUSSION WITH FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

**A. Order No. 7287490**

On May 8, 2007, MSHA Inspector Barry Grosely issued Order No. 7287490 under section 104(d)(2) of the Mine Act alleging a violation of section 75.400 of the Secretary’s safety standards. (Ex. G-2). The order alleged that Andalex permitted combustible material to accumulate along the 12 East Longwall section belt from the head roller to the box check

stopping. There were accumulations of float coal dust throughout that area which covered the ribs, belt structure, water lines, belt drive motors, and take-up. The float dust was black in color, dry, and covered equipment with a uniform layer of float dust that was as thick as three sheets of paper. The order also stated that the pulley clusters of the belt take-up were covered with grease and coal fines and several of the roller shafts were wrapped with belt carcass string. In addition, loose coal was deposited upon the mine floor under the take-up, drives, and in the walkway. The loose coal ranged in depth from 0.5 foot to 1.5 feet, and some areas of the loose coal were covered with rock dust from previous applications. Finally, the order alleges that accumulations of loose coal contacted a moving belt and a spinning bottom roller. This belt was on top of the overcast where the belt line crosses the main return entry. The pile of loose coal measured 1.4 feet deep, 15 feet long, and 4 feet wide.

Inspector Grosely determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was significant and substantial (“S&S”), the operator’s negligence was high, and that seven persons would be affected. Section 75.400 of the Secretary’s regulations requires that “[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.” 30 C.F.R. § 75.400. The Secretary proposed a penalty of \$60,000 for this alleged violation.

For the reasons set forth below, I affirm Order No. 7287490, including the inspector’s S&S and unwarrantable failure determinations, but I find that less than seven miners would have been affected by the violation.

## **1. Summary of Evidence**

On March 1, 2006, MSHA sent a letter to each mine operator in the MSHA Coal District 9, informing them that MSHA would be conducting inspections along belt lines. (EX G-17, Tr. 27). Belt lines had been identified for inspection because MSHA believed that coal dust accumulations cause belt fires. (Tr. 28). During an inspection of the Aberdeen mine completed by Inspector Grosely in November 2006, he issued a number of citations for accumulations along the beltlines. (EX G-18, Tr. 29). In a discussion with mine managers, Inspector Grosely said that, given the company’s violation history and the citations that were issued during that inspection, Aberdeen needed to take additional steps to remove accumulations along its belt lines. (Tr. 31).

Inspector Grosely returned to the mine on May 1, 2007, to conduct a quarterly inspection. (Tr. 36). He noted that according to MSHA’s records, numerous section 75.400 citations had been issued at the Aberdeen Mine. (Tr. 37). In a pre-inspection meeting held on May 1, with foremen, examiners, and superintendents, Inspector Grosely notified them that he would be looking for accumulations along belt lines. (Tr. 38-41).

Inspector Grosely issued Order No. 7287490 on May 8, 2007, because he found accumulations of combustible material. (Tr. 42). Surfaces of equipment, ribs, the floor, belt drive motors, and pipelines in an area between crosscut 28 on the main line and crosscut 3 on 12

East, a distance of 600 feet, was covered with float coal dust. (Tr. 42-43). In addition, there was loose coal on the mine floor, under the take-up, under the drive area, and in the walkway. (Tr. 43). The loose coal had accumulated up to a depth of 1.5 feet and was in contact with the moving belt and spinning rollers. *Id.* Float coal dust had accumulated in some of the recessed areas, which indicated to the inspector that the condition had existed for several days. (Tr. 45-46). The coal was dry and black in color. (Tr. 46). Inspector Grosely determined that float coal dust was present by scraping a little off a structure, forming a pile and noting that the material did not support weight. *Id.* He also saw that there were coal fines. *Id.* Coal fines and loose coal were in contact with the moving belt and spinning rollers for a length of approximately 15 feet, which is a problem because frictional heat can cause ignition. (Tr. 49-50). The belt was moving at approximately 600 to 650 feet per minute. (Tr. 51). Previous accumulations had been rock dusted and covered with new accumulations that were not rock dusted. *Id.* The inspector determined that much of the dust he observed was float coal dust and not a mixture of float and rock dust given the very fine particle size and the concentration of the color: dark gray to black. (Tr. 52).

No hazardous conditions were noted in the pre-shift examination book, although there were notations that seemed to indicate spillage was present. (Tr. 55-57; Ex. G-4). The 12 East belt was running at the time of the inspection, but was only running intermittently because there had been a bounce in the 12 East longwall face. (Tr. 58-59; Ex. G-4). The Aberdeen mine experiences bounces near the face, in the headgate and tailgate areas, and in the yield pillars. (Tr. 181). There was a bounce on the morning of May 8, 2007 at 5:32 a.m. (Tr. 182). It is possible that a bounce could push a stage loader or the mobile tailpiece and cause the 12 East belt to come out of alignment. (Tr. 182-83). Such movement could cause coal to spill off a belt. (Tr. 183). The inspector believed that the accumulations cited in the order were unrelated to the bounce because any accumulation caused by the bounce would be thrown or blown out of the tailgate or into the bleeder given the airflow of the mine. (Tr. 60, 62-63).

Inspector Grosely marked the violation as S&S because, if uncorrected, the condition would be reasonably likely to result in a fire because the accumulations were in contact with the moving belt. (Tr. 63-64). A fire would likely lead to a serious injury. (Tr. 63, 67-68). Inspector Grosely indicated that seven persons would likely be affected because that is how many people were working in the longwall section. (Tr. 65). Although the accumulations were 1,000 feet away from the longwall at that time, a mine fire could destroy ventilating devices and expose the miners to smoke. *Id.* In fact, if there were a mine fire, it could affect miners working on other belts as well. (Tr. 66). The injuries would most likely lead to lost work days or restricted duty because a mine fire would expose the miners to heavy smoke. (Tr. 67). While miners wear self-contained self-rescuers, the smoke would initially affect them. *Id.* Aberdeen's negligence was considered high because a number of similar citations were previously issued, the condition was obvious, the operator should have known about the condition or had reason to know of the condition, and it took some time for the accumulation to form. (Tr. 69-70). Given the fact that the accumulations had layers of rock dust in them, the operator had merely covered the accumulations with more rock dust rather than removing the accumulations. (Tr. 71).

In examining the area, Inspector Grosely said that the accumulations presented an obvious hazard and that any trained miner would see that the condition created a hazard. (Tr.

74). Because the operator had been given notice several times and approximately 63 section 75.400 citations had been issued in the previous 15 months, there was a serious lack of reasonable care. (Tr. 75-76). To abate the citation, seven to ten men cleaned this area for approximately 9.5 hours, which demonstrates the seriousness of the violation. (Tr. 78-79).

Inspector Grosely also testified that he had repeatedly discussed the seriousness of accumulations and the need to remove them with mine management. (Tr. 328). Inspector Grosely advised management that repeated violations of the safety standard would eventually lead to the issuance of flagrant violations. *Id.* Andalex was on notice and was not confused about the requirements of the safety standard. (Tr. 329).

The inspector acknowledged that Andalex had numerous water sprays along the belts starting at the longwall shearer to suppress dust. (Tr. 173-74). Inspector Grosely determined that the accumulations were dry, however, by squeezing a handful of coal accumulations to see if water could be extracted. (Tr. 179).

Andalex safety manager Jim Poulson testified that when Murray Energy bought Andalex, the interest in fire prevention increased dramatically. (Tr. 352). He recognized that accumulations caused by spillage were an ongoing problem and such accumulations could occur over a very short period of time. (Tr. 405). When Andalex received information about MSHA's belt initiative, it initiated SCSR training and inspections, initiated escapeway drills, built teams for fire responses, verified the escapeways, and examined all the fire hoses. (Tr. 355-56). Andalex also checked the atmospheric monitoring system, which measures carbon monoxide (CO) and methane levels, and created a PowerPoint presentation to explain how to deal with and avoid accumulations. (Tr. 356).

Poulson testified that if a fire started in the 12 East box check area, miners could use the primary or secondary escapeway. (Tr. 366). As long as the ventilation controls worked properly, the primary escapeway and the cited areas were ventilated by different air courses. *Id.* Another way miners could escape was to cross the longwall face and exit the tailgate. (Tr. 370).

Poulson also said that there were CO monitors installed downwind from the head drive, in the drive area, in the take-up area, just before the box check, and just past crosscut 3. (Tr. 372-74). An employee on the surface continuously observed these monitors. (Tr. 374). There was also a fire suppression system between the box check and the main line transfer point. (Tr. 376-77). Hoses, nozzles, and two 10-pound fire extinguishers were located throughout the belt drive. (Tr. 377).

Poulson testified that seven people would not have been injured or affected by the alleged violation. (Tr. 419). The miners had extensive training, they knew the escapeway routes and they knew how to safely fight fires. (Tr. 420). At most one person could get injured from smoke inhalation. *Id.*

Guy Mills, a shift foreman, testified that the 12 East drive take-up area was a high maintenance area. (Tr. 484). During the graveyard shift on May 5, 2007, 1,848 tons of coal were mined and a bounce occurred during the shift. (Tr. 493; Ex. R-10 p. 2). Following the

bounce, miners cleaned and fixed equipment. *Id.* From 4:00 a.m. to 6:58 a.m. there was a full coal pass, which included some downtime. (Tr. 494-95). The last half pass was from 6:58-7:12 a.m. (Tr. 495). Completing half a pass in 20 minutes would overload the belt and cause significant spillage from the head roller to the tail and accumulations in the box check. (Tr. 496). Because their shift was nearly over, the crew wanted to switch out at the headgate in order to leave earlier. When coal comes into the box check and the belt is overloaded, the coal will hit the rubber flap throwing the coal off the belt. (Tr. 497). From approximately 5:00 a.m. to the end of the shift, accumulations would have developed very quickly. (Tr. 498).

## 2. Discussion and Analysis

Resolving the issues with respect to this order and the following two orders requires making credibility determinations. Inspector Barry Grosely holds an associate's degree in geology from Brigham Young University and a bachelor's degree in mining engineering from the University of Utah. Before becoming an MSHA inspector, he worked in various positions at several underground coal mines. As a mining engineer, he helped design belt systems and helped develop and ensure compliance with roof control plans. (Tr. 12-15). He operated various pieces of equipment in an underground coal mine. (Tr. 15). He holds mine foreman and fire boss certifications from the State of Utah. He has been an MSHA inspector since 1999 and was familiar with the Aberdeen Mine before the inspections at issue in this case.

Jim Poulson, safety manager at the mine, also has extensive experience in the coal mining industry. He started in the mid-1970s and has held various positions in maintenance departments at several mines. He transferred to the 'safety arena' in about 1999. (Tr. 348). He has experience developing firefighting plans for underground coal mines and he was involved with extinguishing a "thermal event" at a coal mine. (Tr. 349-50). He started working at the Aberdeen Mine in July 2004.

One of the key issues for this order is the cause of the accumulations. Did the coal, coal fines, and float coal dust accumulate over time as testified to by the inspector or were these accumulations present as a result of a bounce that occurred at 5:30 a.m. that morning and the overloading of the belt by the previous crew? Based upon his knowledge and experience and the physical condition of the accumulations, I credit the testimony of Inspector Grosely with respect to this order including his determination that the accumulations were not suddenly created but had gradually developed over time.

Inspector Grosely arrived at 12 East Longwall Section Belt and observed 600 feet of coal accumulations and float coal dust that was two to three sheets of paper thick over all the machinery. The conditions were obvious and had formed over a period of days. Inspector Grosely found an ignition source where coal accumulations contacted spinning rollers. When he issued the order, the belt was running at 600 to 650 feet per minute. When he touched the rollers, he found that they were "slightly warm."

Andalex was aware of the accumulations before the order was issued. The pre-shift examination book noted that a single miner was sent to clean the accumulations, however, there

were no notations indicating that the miner did so. A reasonably prudent person would have recognized that these accumulations were hazardous and required immediate attention.

Inspector Grosely determined that the bounce was not responsible for the accumulations he observed because he did not see any accumulations between the longwall face and the cited area, the airflow would have carried accumulations resulting from a bounce through the return rather than the head pulley, and there would not have been layers of rock dust in the accumulation piles. It took seven to ten miners over nine hours to clean up the accumulations.

I reject Andalex's argument that the cited accumulations would not ignite because the float cold dust was not suspended in the air and could not propagate a fire. I also reject its position that, because water sprays were used to keep coal upon the belts wet, a fire could not have started. I also do not credit Andalex's position that no miners would have been injured if a fire were to start.

I also find that the violation was S&S. Andalex violated the safety standard and this violation created the discrete safety hazard of smoke and fire. The Secretary established that it was reasonably likely that the hazard contributed to by the violation would have resulted in an event in which there was an injury. All elements of the fire triangle were present; there was fuel, oxygen, and an ignition source. Coal fines and loose coal were in contact with the moving belt and spinning rollers in one location. The material was dry. Although the rollers were apparently not hot to the touch at the time of the inspection, they were warm and, assuming continued mining operations, they could get hot enough to ignite the coal fines. Smoldering coal can propagate a larger fire and miners would likely be injured by exposure to the fire or while fighting the fire. I find that there was a confluence of factors that made an injury-producing fire reasonably likely. The accumulations were extensive and had been present for some time, Andalex made little effort to remove the accumulations, and there was an ignition source. The Secretary is not required to establish that the hazard contributed to by the violation is "more probable than not" in order to establish the third element of the *Mathies* test. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). I credit the testimony of Inspector Grosely that the bounce did not significantly contribute to the accumulations. Any injury was reasonably likely to be of a reasonably serious nature. Smoke inhalation was the most likely injury, which can result in lost workdays or restricted duty.

Carbon monoxide monitors and water sprays were present along the belts. CO monitors detect an increase in the concentration of carbon monoxide and the water sprays suppress or control a fire until miners trained to fight fires can arrive at the scene. Smoldering coal increases the level of carbon monoxide which will set off the CO monitors if the monitors are functioning properly. Andalex argues that the presence of water sprays and CO monitors made it unlikely that anyone would be injured if the accumulations started to burn or smolder with the result that the inspector's S&S determination should be vacated. The Commission, relying in part on *Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7<sup>th</sup> Cir. 1995), has rejected arguments that the presence of safety systems, such as carbon monoxide detectors and fire suppression systems, should automatically negate an S&S finding. *AMAX Coal Company*, 19 FMSHRC 846, 849 (1997); *Cumberland Coal resources, LP.*, 33 FMSHRC 2357, 2369 (2011); *Big Ridge Inc.* 35 FMSHRC 1525, 1529 (June 2013). The Commission reasoned that "adopting [the mine operator's]

argument that redundant, mandatory protections provide a defense to a finding of S&S would lead to the anomalous result that every protection would have to be nonfunctional before an S&S finding could be made.” *Cumberland Coal Resources*, 33 FMSHRC at 2369.

With respect to gravity, I find that it was unlikely that every miner working in the section would have been affected. Rather, the evidence establishes that only those miners who would be dispatched to combat the fire would have suffered any injuries. I credit the testimony of Respondent’s witnesses that the crew would have been able to escape from the mine in the event of a fire. Only one or two miners faced a reasonable possibility of injury.

Finally, I find that the violation was the result of high negligence and the unwarrantable failure of Andalex to comply with the safety standard. I credit the testimony of Inspector Grosely on this issue. Although I do not doubt that Andalex had been taking steps to ameliorate the hazards created by accumulations along its belt lines, it had not done enough to prevent the accumulations along the 12 East Longwall section belt on May 8, 2007.

The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence and it includes conduct that demonstrates a “serious lack of reasonable care.” *Emery Mining Corp.* 9 FMSHRC 1997, 2004 (Dec. 1987). The analysis is necessarily specific to the facts in each situation. I credit the testimony of the inspector that the accumulations built up over a period of days. Although some of the accumulations may have resulted from overloading the belts or from belts that had become misaligned that morning, much of the material existed for a longer period of time. I also find that the accumulations were extensive, as established by the testimony of Inspector Grosely. It took seven to ten miners about nine hours to clean up the area. Andalex had been given notice that greater efforts were necessary for compliance with section 75.400. Inspector Grosely’s testimony was detailed and persuasive on this issue, as described above. Past violations of section 75.400 and previous discussions with MSHA inspectors about accumulations provided notice to Andalex that greater efforts were necessary to address accumulations along beltlines. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *San Juan Coal Co.* 29 FMSHRC 125, 131 (Mar. 2007).

The evidence also establishes that Andalex did not take any significant steps to remove the accumulations prior to the issuance of the order. The preshift examination book indicated that a single miner was dispatched to clean up the accumulations but the evidence demonstrates that such efforts were woefully inadequate given the extensiveness of the violation. I find that the evidence establishes that the violative conditions were extensive and obvious. The violation also posed a high degree of danger if not corrected in a reasonable period of time. Respondent’s management was put on notice of the violative conditions by the notation in the preshift examination book. I find that Order No. 7287490 was the result of Andalex’s unwarrantable failure to comply with section 75.400.

The Secretary based his proposed penalty for this order upon his special assessment regulation. 30 C.F.R. § 100.5. MSHA’s “Special Assessment Narrative Form” in the file shows the calculations for a regular assessment and a special assessment for this order. If the Secretary had calculated the penalty using the regular assessment formula, the proposed penalty would have been \$20,302, but he proposed a \$60,000.00 specially assessed penalty. I have reduced the

penalty to \$45,000 taking into consideration the penalty criteria in section 110(i) of the Mine Act. I reduced the gravity because the number of miners likely to be affected was not as great as Inspector Grosely indicated.

### **B. Order No. 7287683**

On June 7, 2007, at 9:55 a.m. Inspector Grosely issued Order No. 7287683 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.400 of the Secretary's safety standards. (Ex. G-7). The order states that Andalex permitted combustible materials to accumulate along the 12 East Longwall section belt from the return overcast to the box check stopping and out the dogleg entry in 12 East. He estimated the distance to be about 600 feet. The order states that there were significant accumulations of float coal dust in the cited area which covered the ribs, floor belt structure, belt control box, water lines, belt drive motors, and take-up. The float dust was black in color, dry, and it covered the equipment with a uniform layer of float dust that was as thick as three to four sheets of paper. In addition, there were accumulations of coal fines and loose coal compacted upon the steel frame of the belt take-up structure which were in contact with the moving belt and spinning bottom rollers. Loose coal was deposited upon the mine floor under the belt take-up area. The loose coal ranged in depth from .5 foot to 1.0 foot. Finally, loose coal accumulations were in contact with the moving belt and a spinning bottom roller on top of the overcast where the belt line crosses the main return entry. The pile of loose coal measured 1.2 feet deep, 10 feet in length and 4-feet in width.

Inspector Grosely determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was significant and substantial, the operator's negligence was high, and that seven persons would be affected. The Secretary proposed a penalty of \$60,000 for this alleged violation.

For the reasons set forth below, I affirm Order No. 7287683, including the inspector's S&S and unwarrantable failure determinations. This violation occurred in essentially the same location as Order No. 7287490 about one month later.

### **1. Summary of Evidence**

Inspector Grosely testified that he issued this order in the 12 East area of the Aberdeen Mine called the "dogleg". (Tr. 81). At first, Inspector Grosely thought he was having déjà vu: the accumulations were in the same general area as the accumulations in Order 7287490, discussed above, and were just as serious if not more serious. (Tr. 82). The black float coal dust covered all surfaces between crosscut 28 and crosscut 3 in the dogleg, including the ribs, floor, equipment, the drive, and take-up area. *Id.* The float coal dust obscured the original color of the equipment structures. (Tr. 83). There were accumulations of grease upon the rollers and coal fines were mixed with the grease upon the pulley clusters. (Tr. 84). Grease mixed with coal provided fuel for a fire. (Tr. 85). These accumulations contacted the moving belts and rollers. (Tr. 84). Under the belt were intermittent piles of loose coal. *Id.* The belt moved at approximately 650 feet per minute. (Tr. 86). Inspector Grosely determined that the accumulations were there for at least four hours or more. *Id.* The accumulations were obvious.

(Tr. 88). The accumulations crested over the bottom belt, which was riding upon and cutting into these accumulations. (Tr. 89). The accumulations were compacted under the belt. *Id.* Inspector Grosely testified that he was told that there had been a bounce. (Tr. 90). The bounce was said to have happened at 9:48 a.m. and the order was issued at 9:55 a.m. (Tr. 91). Inspector Grosely testified that he did not hear, feel, or sense a bounce when he was in the area. (Tr. 92).

Inspector Grosely determined that this violation was reasonably likely to result in an injury because it was a fire hazard. (Tr. 103-04). At the time of the inspection, there was float coal dust in the air; sprays for water were present, but they were not operating at the time. (Tr. 104). The amount of float coal dust in the atmosphere, along with heat, air, confinement, and fuel, made it possible that there was enough float coal dust to create a “quick flash” of fire. (Tr. 107-08). If there was not such a flash, but a fire started by belt friction, the presence of suspended float coal dust could exacerbate the fire. *Id.* If a mine fire had started, it was likely that someone would be burned or suffer smoke inhalation.

The inspector believed that, in contrast to Order No. 7287490, the injuries associated with the present order were likely to be permanently disabling. (Tr. 109). Seven people would have been affected. (Tr. 110, Ex. G-8). Inspector Grosely did not observe anyone cleaning or signs that any cleaning had recently taken place. (Tr. 112). The operator was highly negligent because the violation was similar to the order Inspector Grosely issued on May 8 and the operator had previously been on notice that greater efforts were required. *Id.* Inspector Grosely concluded that the operator demonstrated a serious lack of reasonable care and indifference to the health and safety of miners. (Tr. 113). Inspector Grosely found no mitigating circumstances. (Tr. 114). He also found it unlikely that the bounce Andalex reported at 9:48 that morning created or worsened the condition. *Id.* Five to ten men worked in the area for 4.5 hours to abate the citation. (Tr. 115). The belt was intact and functioning, suggesting that the accumulations developed over a period of time.

Jim Poulson’s testimony was essentially the same as it was with respect to Order No. 7287490. Poulson testified that seven people would not have been injured or affected. (Tr. 419). The miners have extensive training, they know the escapeway routes, and the mine has firefighting capabilities, fire protection systems, and appropriate ventilation. (Tr. 420).

Poulson testified that if a mine examiner discovers a belt spinning in coal, he is required to shut the belt system down, proceed to the drive area to lock and tag it out, notify management of the conditions, and then start removing the accumulations. (Tr. 427). If Inspector Grosely found a belt spinning in coal and the pre-shift examinations said “none observed” it was likely that the condition developed between the pre-shift exam and Inspector Grosely’s inspection. (Tr. 428).

Timothy Paul Blanton performed the pre-shift examination at the end of the graveyard shift, between 4:00 and 7:00 a.m. in the morning. (Tr. 534). He examined the belt line and called the “book room” to report that there were accumulations at the return overcast that needed to be shoveled. *Id.* After the examination, he returned to the face where they were mining. *Id.*

Mr. Blanton also testified that, on June 7, the longwall shearer completed four-and-a half passes and mined 3,136 tons of coal. (Tr. 537). The bounce occurred at 9:48 a.m. (Tr. 538). He testified that the conditions in the box check were different from what he saw during his preshift exam: previously there had not been coal in the box check and there had only been some spillage three or four feet away from the belt. *Id.* Blanton reported that spillage needed to be cleaned. (Tr. 542; Ex. R-3 p 27 of Inspector Grosely's notes). Blanton's notes stated "Shovel return overcast," which means that the accumulations he found were cleaned. (Tr. 544; Ex. R-3 penultimate page). Mr. Blanton told Inspector Grosely that he had not taken the belt out of service earlier because he did not think the condition was a hazard. (Tr. 545).

## 2. Discussion and Analysis

I credit the testimony of Inspector Grosely as to the conditions he found during his inspection. The accumulations of float coal dust and loose coal were all along the dogleg, belt, and equipment in the same general area as the order he issued in May. I find that the Secretary established a violation of section 75.400.

I also credit the inspector's testimony that the float coal dust was so extensive that the color of the framework for the belt was not discernible. The belt was running at 650 feet per minute and no water sprays were on to address the float coal dust. The accumulations were in contact with the moving belt and there were intermittent piles of coal underneath and above the edges of the belt. Some of the accumulations were compacted under the belt structure and the rollers were covered in coal fines and grease accumulations. Additionally, float coal dust was suspended in the air. I find that these conditions were reasonably likely to result in permanently disabling injuries; the violation was S&S. The Secretary established all four elements of the *Mathies* test for the reasons discussed with respect to the previous violation. I find that any injuries would most likely be permanently disabling. This violation was more serious than the previous violation and more people could have potentially been injured.

I also find that the Secretary established that the violation was the result of Andalex's high negligence and unwarrantable failure to comply with section 75.400. I credit the testimony of Inspector Grosely that the conditions he observed existed for some period of time because accumulations were under the belt, the belt was running in the accumulations, and the edge of the belt was rubbing in the accumulations. I find that, although the bump may have added additional accumulations, the majority of the accumulations were present before the bump occurred. I credit the testimony of Inspector Grosely in this regard. The accumulations were obvious, extensive, had been present for significantly longer than four hours, and Andalex made little effort to remove them. The mine's examiner did not consider the conditions to be unsafe. The mine had been put on notice that greater efforts were necessary to comply with the standard.

The Secretary based his proposed penalty for this order upon his special assessment regulation. 30 C.F.R. § 100.5. MSHA's "Special Assessment Narrative Form" in the file shows the calculations for a regular assessment and a special assessment for this order. If the Secretary had calculated the penalty using the regular assessment formula the proposed penalty would have been \$41,574. I find that the proposed penalty of \$60,000.00 is appropriate for this violation taking into consideration the penalty criteria in section 110(i) of the Mine Act.

### **C. Order No. 7287776**

On June 18, 2007, Inspector Grosely issued Order No. 7287776 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.400 of the Secretary's safety standards. (Ex. G-10). Order No. 7287776 states that Andalex allowed combustible materials to accumulate at the #5 belt drive and take-up area from the head roller to the end of the #5 belt take-up. There were coal fines from the drive rollers through the belt take-up. The coal fines were 1 to 3.5 feet in depth and about 8 feet in width. The coal fines were dry to damp and in contact with the spinning drive rollers and moving belt. The coal fines were about 3.5 feet deep at the drive rollers and in contact with the full width of the belt for about 12 feet. The order states that the accumulations of coal fines were obvious and piling up. Also, the head roller structure was covered with coal fines.

Inspector Grosely determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, and that seven persons would be affected. The Secretary proposed a penalty of \$60,000.00 for this order.

For the reasons set forth below, I affirm Order No. 7287490, including the inspector's S&S and unwarrantable failure determinations, but I find that less than seven miners would have been affected by the violation.

#### **1. Summary of the Evidence**

Inspector Grosely issued Order 7287776 because accumulations from 1 foot to 3.5 feet in depth were in contact with the moving rollers of the belt drive for a distance of about 12 feet. (Tr. 120,123; Ex. G-11 p. 2). When Inspector Grosely observed this condition, the belts were running at about 600 feet per minute. (Tr. 121-22). The coal fines in this area were damp to dry, but were not wet. (Tr. 123). The accumulations were obvious and could be easily seen when walking through the area. *Id.* The coal fines were black, not white as they would have been if they were rock dusted. (Tr. 124). This type of accumulation, created as a result of carry back on the belt, would have taken days if not weeks to accumulate. (Tr. 124). This area should be examined by the operator during pre-shift examinations. *Id.* The pre-shift examination was completed between 4:00 a.m. and 6:30 a.m. (Tr. 125). The previous pre-shift exam did not list any hazards in the cited area. *Id.* Inspector Grosely did not believe that the violative condition could have developed after the pre-shift examination. (Tr. 126).

"Carry back" occurs when coal fines stick to the bottom of the belt because the fines are wet. As the belt moves through its cycle, it becomes dry causing material to fall off. (Tr. 127). A mine operator should take steps to avoid carry back by installing a belt scraper to remove accumulations from the bottom of the belt. *Id.*

Inspector Grosely determined that an injury or illness was reasonably likely to occur because there was a discrete safety hazard of fire, which leads to smoke inhalation. (Tr. 128). Inspector Grosely determined that a permanently disabling injury would likely occur. (Tr. 129). Even though some of the coal fines were damp, the coal fines that were in contact with the belt

would immediately dry out. (Tr. 130-31). The violation was marked as S&S because a fire was reasonably likely to occur and a fire was reasonably likely to cause injury or illness. (Tr. 131). Seven people would likely be affected by an accident because seven people worked in the 12 East longwall section. (Tr. 132-33).

The inspector believed that the violation was the result of Andalex's high negligence and its unwarrantable failure because the condition was obvious, the combustible material accumulated over a significant period of time, and the operator was on notice that it needed to do more to remove coal accumulations. (Tr. 133, 138). The condition demonstrated aggravated conduct that was more than ordinary negligence. To abate the citation, Andalex dispatched eleven men who worked about six hours to clean up the cited area. The inspector admitted that the cited area was more than 4,000 feet away from the longwall. (Tr. 291). He also admitted that if ventilation devices work properly, any smoke from a fire would not reach the longwall. (Tr. 292).

Guy Mills indicated that the belt scraper was not functioning properly. If the scraper was damaged or broken, coal and coal fines could accumulate around the #5 take-up drive very quickly. (Tr. 521). When a scraper fails, sometimes there is a small amount of spillage and other times there are large accumulations in an hour. *Id.* Although Mills did not have direct knowledge of the conditions at the belt, he testified that the belt could not have been operating if the accumulations had existed for a significant period of time. (Tr. 530). An accumulation of excessive coal fines in that area triggers a switch that will shut down the belt. (Tr. 522-23 530).

## **2. Discussion and Analysis**

I find that Andalex allowed hazardous accumulations to occur, despite previous warnings and orders of withdrawal issued by MSHA. These accumulations were 1 foot to 3.5 feet deep. Inspector Grosely observed damp to dry coal fines in contact with rollers and the entire width of the belt for a distance of 12 feet. He was concerned that the belt was drying the coal where it contacted the belt. These accumulations were obvious and were formed over a period of days, possibly weeks. They were black in color and had not been rock dusted. The accumulation was so extensive it took 11 miners 6.5 hours to clean.

Andalex had pre-shifted the area, but no hazards were reported. Inspector Grosely testified that the accumulations could not have developed since the pre-shift examination. Inspector Grosely thought that the accumulations were likely caused by a malfunctioning or missing belt scraper. I credit the testimony of Inspector Grosely.

I find that if a fire were to develop, injuries would be permanently disabling or, at the least, would result in lost workdays or restricted duty. The violation would have affected at least one miner and up to seven miners. I find that this violation was S&S for the same reasons discussed above with respect to Order Nos. 7287490 and 7287683. My S&S analysis for those orders is hereby applied to Order No. 7287776.

I also find that the violation was the result of Andalex's high negligence and its unwarrantable failure to comply with section 75.400. I reach this conclusion for the same reasons I set forth with respect to the previous two orders issued by Inspector Grosely.

The Secretary based his proposed penalty for this order upon his special assessment regulation. 30 C.F.R. § 100.5. MSHA's "Special Assessment Narrative Form" in the file shows the calculations for a regular assessment and a special assessment for this order. If the Secretary had calculated the penalty using the regular assessment formula, the proposed penalty would have been \$35,543. I have reduced the penalty from \$60,000 to \$50,000 taking into consideration the penalty criteria in section 110(i) of the Mine Act. I reduced the gravity because the number of miners affected was not as great as Inspector Grosely indicated.

#### **D. Citation No. 7288442**

On February 9, 2008, MSHA Inspector Ronald Paletta issued Citation No. 7288442 under section 104(a) of the Mine Act, alleging a violation of section 75.223(a)(1) of the Secretary's safety standards. At hearing, the Secretary alleged in the alternative a violation of section 75.202(a). The citation states that a non-injury, reportable burst dislodged eight rocprops in the No. 2 entry that leads to the primary and secondary escapeways. The rocprops dislodged at a 60 degree angle, leaving only 1.6 to 1.7 feet between the rocprops and the stage loader. (Ex. G-20).

Inspector Paletta determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 75.202(a) of the Secretary's regulations requires that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). Section 75.223(a)(1) states that the operator shall propose revisions of its roof control plan "[w]hen conditions indicate that the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts[.]" 30 C.F.R. § 75.223(a)(1). The Secretary proposed a penalty of \$11,306.00 for this citation.

For the reasons set forth below, I affirm Citation No. 7288442, including the inspector's S&S and negligence designations, but I find that the cited condition was reasonably likely and not highly likely to cause a serious injury.

#### **1. Summary of Evidence**

Inspector Paletta issued Citation No. 7288442 during an investigation of a non-injury accident on February 9, 2008 for a violation of section 75.223(a)(1). (Tr. 585, 588). Inspector Paletta estimated that there were 1,000 rocprops in the cited entry, which was an area that had a history of several bursts and also had constant traffic, making a serious injury highly likely to occur. (Tr. 615-16). Rocprops are pressurized cylinders used as roof support that weigh over 100 pounds each. (Tr. 597). At the mine, there is also chain link fencing that catches rock and coal bursts and is supported by the rocprops. (Tr. 598, 609-10). When properly pressurized and

installed, the inspector has never seen a rocprop move. (Tr. 598). Dislodged rocprops act like missiles and coal or rocks could also strike miners, meaning the likely injury to a miner as a result of the cited condition would be fatal. (Tr. 616, 710). Steve Richens, the mine superintendent, told the inspector that the cited rocprops were not installed properly. (Tr. 610-11).

The inspector testified that he designated Citation No. 7288442 as the result of Andalex's moderate negligence because Andalex had a responsibility to install rocprops properly. (Tr. 621). No one at the mine could tell or show Inspector Paletta the appropriate installation of the rocprops. *Id.* Poulson testified that the rocprops were installed by an independent contractor. (Tr. 714). Andalex mitigated its negligence by doing "quite a bit of work[.]" (Tr. 621).

## 2. Discussion and Analysis

I find that Andalex violated section 75.202(a); it failed to control the ribs of the cited area to protect persons from the hazard of rock bursts because it incorrectly installed eight rocprops. The Commission has held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purposes of the standard, would have provided in order to meet the protection intended by the standard." *Harlan Cumberland Coal Co.* 20 FMSHRC 1275, 1277 (Dec. 1998) (citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987)). Andalex argues that Inspector Paletta's testimony should not receive judicial deference because it was unreasonable, overreaching, and inconsistent.<sup>1</sup> I credit the Inspector's testimony, however, that a properly pressurized and installed rocprop would rarely move. Although the inspector's testimony concerning the improper installation of these rocprops is unclear and suggests that he has sparse knowledge of the installation of rocprops, I credit the Inspector's testimony that the mine superintendent told him that the rocprops were incorrectly installed. I find that the cited rocprops fell because they were incorrectly installed. Andalex's roof control plan requires the installation of rocprops to control bursts. A reasonably prudent person familiar with the mining industry would have provided properly installed rocprops to protect miners from bursts. Andalex, through its contractor, failed to install the rocprops correctly, which means that Andalex failed to protect miners from bursts in violation of section 75.202(a).

I find that Citation No. 7288442 was S&S. Andalex violated section 75.202(a), which created the discreet safety hazard that a miner would be crushed by a burst. I find that these improperly installed rocprops, which were located in an area regularly traveled by miners, were reasonably likely to cause a serious injury to a miner. I credit Inspector Paletta's testimony that bounces were common in the cited area and the failure of these rocprops allowed coal to strike miners and turned the rocprops into missiles in the event of a bounce. Although Inspector Paletta testified that the cited conditions "could" cause an injury based upon these factors, I find that the conditions were *likely* to cause an injury, not merely able to cause an injury. Coal, rock, or the rocprops themselves unleashed due to a burst could cause a fatal injury by striking a

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<sup>1</sup> Although the Secretary alternatively alleged violations of both sections 75.202(a) and 75.223(a)(1), the Secretary only addressed section 75.202(a) in his brief. Conversely, Andalex's brief focused mainly upon disproving a violation of section 75.223(a)(1).

miner. Although the rocprops were secured against movement with wire ropes, they moved far enough to be a hazard. As a result of Citation No. 7288442 leaving miners unprotected in the event of a burst, miners were reasonably likely to suffer a fatal injury.

The cited condition was reasonably likely to cause a serious injury, but not highly likely. The inspector surmised that Citation No. 7288442 was highly likely to cause a serious injury if Andalex continued to install rocprops improperly, while the secretary argued that it was “clear” that since eight rocprops failed due to a bounce, the conditions cited in Citation No. 7288442 were highly likely to cause serious injury. (Tr. 616). This violation of section 75.202(a), however, does not address the manner of rocprop installation used by Andalex, but rather the improper installation of eight specific rocprops. My findings are specific to the cited rocprops. The Secretary’s arguments, furthermore, provide no support for the “highly likely” designation of Citation No. 7288442 other than the comment that it is “clear” that the designation is correct. (Sec’y Br. at 22).

I find that Citation No. 7288442 resulted from Andalex’s moderate negligence because Andalex should have known that the rocprops in the cited area were incorrectly installed, were no longer functioning correctly, and therefore posed a hazard to miners. A penalty of \$8,000.00 is appropriate for this violation.

#### **E. Citation No. 7288447**

On February 19, 2008, Inspector Paletta issued Citation No. 7288447 under section 104(a) of the Mine Act, alleging a violation of section 75.1725(a) of the Secretary’s safety standards. The citation states:

[t]wo bottom conveyor rollers on the 14th east belt were found damaged with one end of each roller spinning in the fine loose dry coal. The end of one roller that was spinning in the dry coal was warm to the touch. The belt air is being used to supply intake air to the longwall working section.

(Ex. G-29).

Inspector Paletta determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in a permanently disabling injury. Further, he determined that the violation was S&S, the operator’s negligence was moderate, and that seven persons would be affected. Section 75.1725(a) of the Secretary’s regulations requires that “[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.” 30 C.F.R. § 75.1725(a). The Secretary proposed a penalty of \$5,961.00 for this citation.

For the reasons set forth below, I affirm Citation No. 7288447, but I find that less than seven miners would have been affected by the violation and that the likely injury would be a lost workday or restricted duty injury.

## 1. Summary of Evidence

Andalex stipulated that it violated Section 75.1725(a) and that the conditions cited in Citation No. 7288447 were reasonably likely to lead to a serious injury and were S&S, but it disputed the number of miners affected, the likely injury, and the negligence. (Tr. 721).

Inspector Paletta testified that the cited rollers could cause a fire. The fire could spread quickly as there was no fire suppression in the area, rib sloughage could provide fuel, and methane tests showed 0.3% methane. (Tr. 725-26, 728). Both the inspector and Poulson testified that the main injury concern from a fire would be smoke inhalation. (Tr. 726, 748). The inspector believed that smoke inhalation could affect all seven miners at the longwall because it was inby the cited area. (Tr. 726-27). The inspector and Guy Mills testified that smoke inhalation could cause a fatality. (Tr. 725, 574). The inspector suffered smoke inhalation while working at a coal mine when a belt in the section he was working caused a fire; he suffered from “a couple hours” of coughing. (Tr. 728).

The inspector testified that Andalex should have been aware of the condition because he previously cited rollers at the mine twice. (Tr. 729). The condition existed since at least that morning or the shift prior to the graveyard shift, as Andalex does not run the belt during the graveyard shift. (Tr. 729). Both the Inspector and Guy Mills testified that if Andalex examined the area while the belt was off, it could be difficult to see the condition. (Tr. 731, 571). The side of the rollers that dropped into the coal, however, was on the walkway side, which made it “very visible.” (Tr. 732).

The longwall was at least 3,600 feet from the cited conditions. (Tr. 736). The inspector believed that Andalex both examined and rock dusted the area. (Tr. 739). The mine examiners traveled the location on a weekly basis. (Tr. 741).

## 2. Discussion and Analysis

I find that Citation No. 7288447 was the result of Andalex’s moderate negligence because Andalex should have known of the cited condition. Andalex was on notice that greater efforts were necessary to maintain their belts and rollers due to the previous citations that Inspector Paletta issued. Even if the belt was not running during the previous preshift examination, I credit Inspector Paletta’s testimony that the rollers contacted the coal on the side of the belt closest to the walkway, which made the rollers easier to see.

Andalex may have lacked actual knowledge of the condition because its examiner did not observe it, but it should have known of the condition. Andalex argues that it did not observe the cited condition and therefore could not correct it, but I find that Andalex should have identified and abated the cited condition. Although the belt was not running, the two rollers that were next to the walkway were still visible. Andalex’s negligence with respect to Citation No. 7288447 was moderate.

I find that smoke inhalation as a result of Citation No. 7288447 was most likely to cause a lost workday or restricted duty injury. I also find that Citation No. 7288447 was likely to affect

two, not seven miners for the same reasons I explained in relation to Order No. 7187490. A penalty of \$4,000.00 is appropriate for this violation.

## II. SETTLED CITATIONS AND ORDERS

On May 16, 2013, I granted the Secretary's unopposed motion to approve partial settlement in this case. I approved the settlement of 14 section 104(a) citations and 2 section 104(d)(2) orders. I ordered Andalex to pay a total penalty of \$18,655.00 for the settled matters.

## III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Andalex's history of previous violations is set forth in Exhibit G-1. Between 2/08/2006 and 5/07/2007, Andalex had a history of 299 paid violations at the mine of which 135 were S&S violations. Between 11/27/2006 and 2/26/2008, Andalex had a history of 234 paid violations at the mine of which 111 were S&S violations. At all pertinent times, Respondent was a large coal mine operator. The violations were abated in good faith. There was no proof that the penalties assessed in this decision will have an adverse effect upon Respondent's ability to continue in business. The gravity and negligence findings are set forth above. The gravity and negligence presented by the accumulation violations was a key factor in my assessment of the penalties for the three section 104(d)(2) orders.

## IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

| <u>Citation/Order No.</u> | <u>30 C.F.R. §</u> | <u>Penalty</u> |
|---------------------------|--------------------|----------------|
| 7287490                   | 75.400             | \$45,000.00    |
| 7287683                   | 75.400             | 60,000.00      |
| 7287776                   | 75.400             | 50,000.00      |
| 7288442                   | 75.202(a)          | 8,000.00       |
| 7288447                   | 75.1725(a)         | 4,000.00       |
| TOTAL PENALTY             |                    | \$167,000.00   |

For the reasons set forth above, the citations and orders are **AFFIRMED** or **MODIFIED**, as set forth above. Andalex Resources, Inc., or its successors and assigns, is **ORDERED TO PAY** the Secretary of Labor the sum of \$167,000.00 within 40 days of the date of this decision.<sup>2</sup>

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

Distribution:

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Jason W. Hardin, Esq., Fabian & Clendenin, 215 South State Street, Suite 1200, Salt Lake City, UT 84111-2323

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<sup>2</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, D.C. 20004

November 26, 2013

|                                 |   |                                |
|---------------------------------|---|--------------------------------|
| SECRETARY OF LABOR,             | : | CIVIL PENALTY PROCEEDINGS      |
| MINE SAFETY AND HEALTH          | : |                                |
| ADMINISTRATION (MSHA),          | : | Docket No. KENT 2011-205       |
| Petitioner,                     | : | A.C. No. 15-18732-236340 (KYD) |
|                                 | : |                                |
|                                 | : | Mine: Mine No. 5               |
| v.                              | : |                                |
|                                 | : | Docket No. KENT 2011-351       |
|                                 | : | A.C. No. 15-16054-239324 (KYD) |
| PRESLEY TRUCKING COMPANY, INC., | : |                                |
| Respondent.                     | : | Mine: No. 1 Plant              |

**DECISION**

Appearances: C. Renita Hollins, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, on behalf of the Secretary of Labor;  
William J. Sturgill, Esq., Sturgill & Sturgill, P.C., Norton, Virginia, on behalf of Respondent.

Before: Judge Paez

These proceedings are before me upon the petitions for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) under section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. The case was called for hearing on September 25, 2013, in Pikeville, Kentucky. Near the conclusion of the hearing, the Secretary requested a brief recess. (Tr. 222.) At the conclusion of the recess, the parties stated that they had resolved their differences. (Tr. 222–23.) Counsel for the Secretary specified the terms of the settlement, which I outline below, and counsel for Presley Trucking Company, Inc. (“Presley Trucking” or “Respondent”) concurred. (Tr. 223–25.) I directed the parties to submit settlement documents that worked out any mathematical discrepancies in the settlement agreement. (Tr. 225.)

On November 7, 2013, pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, the Secretary filed a Joint Motion to Approve Settlement that memorialized the terms of the agreed settlement and slightly amended the settlement amounts for several violations to make the total match the parties’ agreed upon total settlement amount.

The originally proposed assessment for these two combined dockets was \$23,409.00, and the proposed cumulative settlement amount is \$14,300.00, which includes modifications to several of the citations and an installment plan. The proposed settlement is as follows:

**KENT 2011-205**

| <u>Citation/<br/>Order No.</u> | <u>Date</u> | <u>30 C.F.R.</u> | <u>Assessment</u> | <u>Settlement</u> |
|--------------------------------|-------------|------------------|-------------------|-------------------|
| 8361079                        | 08/30/2010  | 77.1605(d)       | \$ 285.00         | \$ 215.00         |
| 8361080                        | 08/30/2010  | 77.1605(b)       | \$ 1,412.00       | \$ 1,050.00       |
| 8361081                        | 08/30/2010  | 77.1605(d)       | \$ 285.00         | \$ 215.00         |
| Total:                         |             |                  | \$ 1,982.00       | \$ 1,480.00       |

**KENT 2011-351**

| <u>Citation/<br/>Order No.</u> | <u>Date</u> | <u>30 C.F.R.</u> | <u>Assessment</u> | <u>Settlement</u> |
|--------------------------------|-------------|------------------|-------------------|-------------------|
| 8349235                        | 09/29/2010  | 77.1104          | \$ 263.00         | \$ 200.00         |
| 8349237                        | 09/29/2010  | 77.404(a)        | \$ 6,996.00       | \$ 5,222.00       |
| 8349236                        | 09/29/2010  | 77.404(a)        | \$ 6,996.00       | \$ 2,000.00       |
| 8347335                        | 09/29/2010  | 77.404(a)        | \$ 6,996.00       | \$ 5,222.00       |
| 8347336                        | 09/29/2010  | 77.1104          | \$ 176.00         | \$ 176.00         |
| Total:                         |             |                  | \$21,427.00       | \$12,820.00       |

Cumulative Totals:    \$23,409.00    \$14,300.00

In support of the proposed settlement, the Secretary has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act, 30 U.S.C. § 820(i), including information regarding Respondent's size, ability to continue in business, and history of previous violations.

In addition, the Secretary has stated reasons fully warranting the agreed upon reduction in the proposed penalties, specifically with regard to the level of negligence imputed to the operator.

After review and consideration of the pleadings, arguments, hearing testimony and submissions in support of the settlement motion, I find that the proposed settlement is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.31, the motion is **GRANTED**, and the settlement is **APPROVED**.

**ORDER**

It is hereby **ORDERED** that Respondent **PAY** a penalty of \$14,300.00 in fourteen (14) equal installments of \$953.33 and one (1) final installment of \$953.38.<sup>1</sup> The first installment shall be made within 30 days of the date of this Order, with subsequent installments made every 30 days thereafter until the total penalty is paid in full.

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<sup>1</sup> Payments should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.

Additionally, within 30 days of this Order, the Secretary is **ORDERED** to **MODIFY** the following:

| Citation/<br>Order<br>No. | Standard | Likelihood       | Gravity  |                    | Number<br>of<br>Persons<br>Affected | Negligence | Type<br>of<br>Action |
|---------------------------|----------|------------------|----------|--------------------|-------------------------------------|------------|----------------------|
|                           |          |                  | Severity | S&S                |                                     |            |                      |
| <b>KENT</b>               |          |                  |          |                    |                                     |            |                      |
| <b>2011-205</b>           |          |                  |          |                    |                                     |            |                      |
| 8361079                   | N/A      | N/A              | N/A      | N/A                | N/A                                 | To “Low”   | N/A                  |
| 8361080                   | N/A      | N/A              | N/A      | N/A                | N/A                                 | To “Low”   | N/A                  |
| 8361081                   | N/A      | N/A              | N/A      | N/A                | N/A                                 | To “Low”   | N/A                  |
| <b>KENT</b>               |          |                  |          |                    |                                     |            |                      |
| <b>2011-351</b>           |          |                  |          |                    |                                     |            |                      |
| 8347335                   | N/A      | N/A              | N/A      | N/A                | N/A                                 | To “Low”   | N/A                  |
| 8349235                   | N/A      | N/A              | N/A      | N/A                | N/A                                 | To “Low”   | N/A                  |
| 8349236                   | N/A      | To<br>“Unlikely” | N/A      | To<br>“Non<br>S&S” | N/A                                 | N/A        | N/A                  |
| 8349237                   | N/A      | N/A              | N/A      | N/A                | N/A                                 | To “Low”   | N/A                  |

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

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/pjr

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
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November 27, 2013

|                              |   |                              |
|------------------------------|---|------------------------------|
| SECRETARY OF LABOR           | : | CIVIL PENALTY PROCEEDING     |
| MINE SAFETY AND HEALTH       | : |                              |
| ADMINISTRATION (MSHA),       | : |                              |
|                              | : | Docket No. KENT 2010-1529-M  |
|                              | : | A.C. No. 15-00079-230016 E24 |
| Petitioner                   | : |                              |
|                              | : |                              |
| v.                           | : | Mine: Fort Knox Quarry       |
|                              | : |                              |
| AUSTIN POWDER COMPANY, INC., | : |                              |
|                              | : |                              |
| Respondent                   | : |                              |

**DECISION**

Before: Priscilla M. Rae, Administrative Law Judge

This case comes before me on a Petition for Assessment of Civil Penalties filed in accordance with section 105(c) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. §§ 801, et seq. At issue is one §104(a) citation issued in violation of 30 C.F.R. § 56.3200 of the Act by a Mine Safety and Health Administration ("MSHA") inspector. A hearing was held in Lexington, Kentucky. The parties introduced testimony and documentary evidence,<sup>1</sup> and post-hearing briefs were submitted.

**Findings of Fact**

The Fort Knox Quarry is a medium sized limestone quarry located outside of Elizabethtown, Kentucky (Tr. 10). On June 2010, Fort Knox was operated by Vulcan Materials. Vulcan Materials contracted with Austin Powder Company to load headings and benches at the lime stone quarry (Tr. 11). The citation decided herein arose during an inspection of the quarry conducted by an authorized MSHA inspector (Tr. 24).

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<sup>1</sup> Respondent's exhibits were marked after the hearing took place and were never offered for admission. They are therefore not part of the official record. Respondent's exhibits were used to assist its witnesses whose testimony is of record. The introduction of the exhibits would not have provided any additional relevant evidence or affected my decision in this matter.

## 1. The Inspection

Donald Gabbard is an MSHA inspector with five years of experience in his position. Prior to his employment with MSHA, he completed a two-year associate's degree in which he had some formal training in geology. He also has approximately five years of experience in surface coal mining with highwalls and about 28 years of underground mining experience with extensive work in benching and highwalls (Tr. 55-56).

On June 2, 2010, Gabbard arrived at Fort Knox to conduct an E0-1 quarterly inspection. When he arrived at the active benching area, he observed a sign posted on cones in the haul road that read "Danger, Keep Out" (Tr. 14, Gov. Ex. S-1, p. 1). The sign was close to 500 feet or further away from the mining activity where the benching and drilling took place (Tr. 16). There were fresh tire marks on the road and a highwall could be seen in the distance behind the sign and cones (Tr. 15). Gabbard and the mine representative accompanying him continued on the haul road past the danger sign to observe the condition of the highwall (Tr. 15).

When arriving at the highwall, Gabbard stated that he observed "an exorbitant amount of loose material" in and around the bench and work area of the wall (Tr. 16). He took photographs of the hazardous loose rock on the highwall, and took photographs of the rock that he believed had already fallen in the work area (Tr. 19; Gov. Ex. S-1 pgs. 2-5). He also took photographs of blue paint marks in the active work area where the Respondent's blaster had traveled and marked locations for the quarry driller to drill (Tr. 17, Gov. Ex. S-1 pgs. 2, 3, and 15).

The highwall also had a 20 foot ledge or safety bench (Gov. Ex. S-1 p. 14), which was intended to protect miners by catching any loose rock that could have fallen from the upper ledge (Tr. 95). Gabbard testified, however, that the safety bench was filled with rock piles that caused the ledge to be too narrow to actually control rock that would fall from the upper layer of the highwall (Tr. 18-19; Gov. Ex. S-1 p.3 and p.14). Gabbard concluded that this created a hazard of falling rock that would reasonably likely cause miners serious injuries by crushing their lower legs (Tr. 46).

On the day that the citation was issued, Gabbard noted that a drill had been delivered to the mine site (Tr. 85, Gov. Ex. S-3). Austin Powder sales representative, Hardin Davis, testified that he recalled marking off the area about five days prior to the citation being issued on June 2 (Tr. 119). He stated that typically a company would come out to drill a couple of days after he marked the locations for drilling (Tr. 120).

The highwall was not scaled and there was no berm to protect miners in the area (Tr. 80-81). The citation was abated after a substantial berm was built 25 feet from the bench wall (Tr. 20). The berm was completed before Gabbard completed his inspection that day (Tr. 21).

## The Citation

Citation No. 6518869 reads as follows:

An Austin Powder worker proceeded past a berm & a Danger-Keep Out sign, and marked off a bench for drilling & blasting that was below a highwall covered with extreme amounts of loose hazardous ground. The majority of the loose material was on the lower 20 ft. seam of the highwall but was open to direct access for a distance of about 250 ft. unbermed. The actual marking of the holes (parallel) beneath the highwall extended a measured distance of 110' in length below the wall. The measured distance accessed (perpendicular) from the wall was 16 & ½ ft. Loose material piled up about 4 ½ ft. up the wall to 8 ft. away from wall to propel any falling material toward persons or equipment on the work bench. This exposed this worker to crushing type injuries. The loose condition was highly visible & activity beneath it demonstrated high negligence.

Gov. Ex. 4.

The gravity of the violation was assessed as reasonably likely to result in a permanently disabling injury and as significant and substantial (S&S). The operator's negligence level was assessed as high and the proposed penalty is \$15,570. Gov. Ex. 4.

## The Standard

30 C.F.R. § 56.3200 provides:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

## The Violation

The Secretary claims that section 56.3200 requires mine operators to abate hazardous ground conditions in an affected area before work or travel is permitted there. Until abatement occurs, operators must post a warning sign to prevent entry, and when the affected area is left unattended, a barrier must be installed to prevent unauthorized entry, says the Secretary. 30 C.F.R. § 56.3200.

The Secretary asserts that the operator violated section 56.3200 because hazardous ground conditions existed at the highwall, and Davis performed work there without abating the conditions. P. Br. at 6. The Secretary argues that an "exorbitant amount of loose material" at the

highwall existed (Tr. 16, 19; Gov. Ex. S-1 pgs. 2-5). The Secretary also relies on the fact that Davis traveled and marked locations by laying down blue paint marks in the hazardous work area for the quarry driller to drill (Tr. 17, Gov. Ex. S-1 pgs. 2, 3, and 15). The Secretary points to Gabbard's testimony that the blue paint marks measured approximately 16 ½ feet from the base of the hazardous highwall (Tr. 29; Gov. Ex. S-1 p. 5 and p. 15). The wall was not scaled and there was no berm or other type of barricade to protect miners in the area (Tr. 80-81).

The Secretary contends that the loose and falling rock was reasonably likely to endanger Davis and any other miners working near the highwall. The Secretary notes that Gabbard believed that rocks were spilling from the safety bench out and away from the highwall. Gabbard saw rocks that, in his opinion, had fallen an estimated distance of 40 to 45 feet away from the base of the highwall onto the active working floor (Tr. 19, Gov. Ex. S-1 p. 14). Furthermore, according to Gabbard, the spillage was so bad that a loader had been used to push fallen rocks back towards the base of the highwall (Tr. 19; Gov. Ex. S-1 p. 3 and p. 14). According to Gabbard, rocks were piled up at the base of the highwall at such a height and at such an incline that any additional falling rock from the upper shelf would be propelled into the work area (Tr. 19; Gov. Ex. S-1 p. 3, p. 14).

In addition, the Secretary argues that the safety bench would not have mitigated the risk of the hazardous conditions at the highwall. The Secretary relies on Gabbard's testimony that the safety bench was filled with piles of rock, making it too narrow to control any additional rocks falling from the upper shelf (Tr. 18-19; Gov. Ex. S-1 p.3 and p.14).

The Secretary also argues that the "DO NOT ENTER" signage in the road was not an adequate warning sign. The Secretary notes that the signage in the road was close to 500 feet or further away from the mining activity where the benching and the drilling was being conducted (Tr. 16). The Secretary states that ideally, any signage should be located at the edge of the actual active work bench and not so far away (Tr. 16). The Secretary also points to the fact that the highwall was not scaled or supported, no berm or other type of barricade had been erected to protect the miners, and the area "had been accessed with people under it." (Tr. 16).

The operator contends that the Secretary failed to prove that the ground conditions created a hazard in the location where Davis worked. R. Br. 9-11. The operator argues that, in order to prove a violation of section 56.3200, the Secretary must show that the hazard affected the area where work or travel was done or permitted. The operator points to a decision in which an ALJ found no violation of 57.3200,<sup>2</sup> despite the fact that hazardous ground conditions existed, because the Secretary adduced no evidence that there was any work or travel in any area affected by the conditions. *Mountain Parkway Stone, Inc.*, 11 FMSHRC 1289, 1298 (July 1989) (ALJ).

The operator argues that "distance" is an appropriate factor for determining whether hazardous ground conditions may affect an area where miners work and travel. R. Br. at 10, *citing* Preamble to the Final Rule, 51 FR 36192 (Oct. 8, 1986) (describing standard as intended

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<sup>2</sup> In its brief, the operator erroneously cites section 56.3200 as the standard at issue in *Mountain Parkway Stone*. However, the applicable standard at issue was 57.3200 because the case arose in an underground mine. 56.3200 only applies to surface mines.

to be "performance-oriented"). The operator argues that the blue marks that Davis painted measured 20 feet from the base of the highwall, and not 16 ½ (Tr. 123-24), because Gabbard incorrectly measured the distance starting from the toe of the muck pile instead of the base of the wall. (Tr. 98, R. Ex. 3). The operator argues that the 20 foot distance that Davis established was sufficient to prevent a hazard to himself and others.

The operator brings forth testimony from various witnesses to show that the 20 foot distance was sufficient to protect miners from the hazardous highwall. Wayne Lively, a safety consultant at the mine, testified that any material landing on the muck pile would not likely be propelled out onto the bench because "the loose material ... acts as a cushion." Lively opined that if the floor were solid, the rocks would "hit and bounce," but "where it's loose, if a rock falls and hits another rock, they just tumble together." (Tr. 149). Lively further testified that the rocks on the active working floor that were 40-45 feet away from the highwall did not fall from the wall, as Gabbard claimed. Rather the rock "could have been left there when ... [the operator was] ... mucking out," and "[t]here's a thousand places it could have come from." (Tr. 150). In addition, Davis testified that although there was some loose material on the safety bench, it was not full and would continue to absorb the fall of any material that might fall from higher up (Tr. 134). Charles Lambert, a blaster for Austin Power, along with Mr. Lively, also testified that the safety bench was not full. (Tr. 91, 100, 158).

Finally, the operator argues that I should not rely on MSHA policy to find a violation. According to Gabbard, MSHA has a written policy that dictates that highwalls must have a safety zone of at least 25 percent of the height of the wall (Tr. 70-71). For example, if a highwall is 100 feet, the required distance is a minimum of 25 feet away (Tr. 90). In addition, MSHA's policy requires that the operator place a berm outside the 25 percent safety zone (Tr. 70-71). The operator contends that reliance on this policy is objectionable for two reasons: First, the operator claims that MSHA's policy raises constitutional notice concerns. The operator claims that although the policy was cited by Gabbard at hearing, it was never published or publicized by MSHA and does not appear on the agency's website. Furthermore, the Secretary did not enter this policy into evidence, and although Gabbard testified that inspectors were told to enforce the policy, it was apparently never shared with mine operators. (Tr. 70-71). Second, the operator claims that the policy violates the notice and comment rulemaking requirements of the Administrative Procedure Act (APA). 5 USC § 553. The operator argues that Gabbard's description of the policy at hearing indicates that he believed that the policy defines what the standard requires. (Tr. 70). According to the operator, it therefore in effect became the new standard, without ever going through notice and comment rulemaking. The operator points to a D.C. Circuit decision in *American Mining Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993), in which the court noted that "an amendment to a legislative rule must itself be legislative." The D.C. Circuit also held that "new rules that work substantive changes or major legal additions to existing rules or regulations are subject to the APA's notice and comment procedures as legislative rules." See *U.S. Telecom Ass'n v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 2005). Similarly, "if an agency adopts a new position inconsistent with an existing regulation, or effects a substantive change in the regulation, notice and comment are required." *Id.* at 35

(quoting *Shalala v. Guernsey Mem 'l Hosp.*, 514 U.S. 87, 100 (1995); *National Mining Association v. Jackson*, 816 F.Supp.2d 37, 45 (D.D.C. 2011)). Since the Secretary failed to undertake notice and comment rulemaking, the MSHA policy should be off-limits when determining whether the operator violated section 56.3200, says the operator.

I reject the argument that MSHA's policy is invalid because it did not go through notice and comment rulemaking. MSHA's policy is basically an informal interpretation of section 56.3200's phrase "affected area," to require a distance equal to 25% of the height of the highwall. Although MSHA's policy does not carry force of law, I grant it some deference because I find that it has the "power to persuade" based on its "thoroughness of consideration, validity of reasoning, consistency with earlier and later pronouncements, and all other relevant factors." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002) (giving *Skidmore* rather than *Seminole Rock* deference to agency opinion letters interpreting regulations); *U.S. Freightways Corp. v. Comm'r*, 270 F.3d 1137, 1142 (7th Cir. 2001) (holding that *Mead* requires application of *Skidmore* rather than *Seminole Rock* deference to informal interpretations of existing agency regulations). I find the interpretation persuasive because it has been adopted by mine operators generally as a widespread industry practice. See e.g., *Robert Sand*, No. 11-3032, 2013 WL 772843 \*2 (January 4, 2013) (describing industry practice to keep the excavator away from the wall by at least 25 percent of highwall's height in clay pit operations); see also Mine Safety Health Administration, *Guidelines for Submittal and Evaluation of Ground Control Plans* (for underground coal mines, "the distance that ... extends out from the base of the wall is usually determined by measuring out from the base of the highwall a distance of approximately 25 percent of the highwall height."); Tr. 90, 118, 144 (describing Austin Powder's practice as using the 25 percent distance rule). Accordingly, the Secretary's interpretation that an "affected area" is within a distance measured at 25 percent of the height of the highwall is entitled to *Skidmore* deference.

Likewise, I reject the operator's argument that MSHA's policy raises constitutional notice concerns. Although the broad wording of section 56.3200 allows it to be applied to myriad factual contexts, I find that notice exists because the Secretary can show that a "reasonably prudent employer familiar with the mining industry and the protective purposes of the standard would have recognized that the condition of the quarry wall posed a hazard to persons" in the working area. *Shine Quarry, Inc.*, 17 FMSHRC 1397, 1400 (Aug. 1995) (ALJ). Gabbard testified that he and other inspectors personally notified operators during inspections about the 25% distance and berm requirements of the policy (Tr. 70-71). This is corroborated by Davis, Lambert and Lively's statements that the operator uses the 25% requirement as a "rule of thumb" for drilling highwalls (Tr. 90, 118, 144). Thus, I find that the operator had actual notice of MSHA's interpretation of the phrase "affected area." See e.g., *Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996) (holding that actual notice was provided by MSHA prior to issuance of citation); see also *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (reasoning that agency's pre-enforcement warning to bring about compliance with its interpretation will provide adequate notice). As a result, MSHA's interpretation of an "affected area" covering a distance measured at 25 percent of the height of a highwall constitutes relevant guidance to determining whether Davis violated section 56.3200.

Based on MSHA's interpretation and the evidence presented in the record, I find that the operator violated section 56.3200. To prove a violation of section 56.3200, the Secretary must establish the following three elements:

- First, hazardous ground conditions must have existed at the highwall.
- Secondly, an employee must have performed work in the area affected by the hazard.
- Third, the operator must have failed to undertake proper corrective action such as scaling, support, or erecting a barrier.

I find that the Secretary has met his burden of proof on each element, as discussed below:

First, a hazard existed at the highwall. I credit Gabbard's testimony that hazardous ground conditions existed at the highwall. Gabbard is an experienced inspector and is well-qualified to expose the opinion he reached in this case. He has personally observed hazardous highwall conditions that led to a rock crushing fatality in the past (Tr. 51-52). He testified that the conditions he observed in the instant case are similar to those in which the previous fatality occurred. (Tr. 52). He also testified that the highwall was in the worst shape he had ever seen (Tr. 17). An experienced MSHA inspector's opinion that a hazard exists is entitled to substantial weight. *Harland Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999). Thus, I find that a safety hazard occurred.

Secondly, I find that the safety hazard affected the area where Davis worked. Specifically, loose rocks were likely to fall or roll into the area where Davis painted down the blue markings. I do not give weight to any the evidence offered by Respondent's witnesses that Davis's distance from the highwall was sufficient to avoid any danger. As noted above, the operator has adopted the 25% requirement as a "rule of thumb" for drilling highwalls. Regardless of whether Davis was 20 feet or 16 ½ feet from the highwall, he was too close of a distance to be working. The highwall was 88 feet high, which would call for a minimum distance of at least 22 feet out from the base of the highwall.

Likewise, I do not give weight to Lively's testimony that the material would not be propelled out into the area where Davis worked. A rock could have fallen from the upper bench, hit the safety bench which was filled with muck, and be propelled out beyond where work was being done. Rock could also fall from the wall, hit other rocks, miss the safety bench and follow a trajectory out and past where the work was being performed. I do not credit Davis's testimony that the safety bench was not full and would continue to absorb the momentum of any material that might fall from higher up. I also do not credit Lambert's testimony that the rock would fall straight down into the safety bench, which was wide enough to catch the rock (Tr. 99), and that many of the rocks were flat and jagged, as opposed to round, and, as a matter of physics, were unlikely to bounce or roll into the working area. This argument ignores the fact that as rocks fall, they can strike the side of the wall and bounce out and away from the wall. They do not necessarily fall straight down, no matter what shape they are, and this could endanger the safety and lives of miners working nearby. Furthermore, Davis himself testified that "the wall was getting ratty looking, and it had loose material laying on the ...[safety] bench" and he was

concerned that the loose rock on the edge of the safety bench would fall into his work area. (Tr. 124 and 135). This corroborates Gabbard's assessment of the hazard affecting miners working in the area. I also reject the notion that the muck at the toe of the highwall would have absorbed the falling rock. As Gabbard testified, a considerable amount of the muck was "built up" at an incline, which would only speed up any falling rock as it rolls toward the working area (Tr. 59). I also credit Gabbard's testimony that rocks had already rolled about 40 to 45 feet away from the base of the highwall onto the active working floor (Tr. 19, Gov. Ex. S-1 p. 14). Although Gabbard did not observe the rocks falling from the highwall, I find that the rocks were likely to have fallen from the highwall and rolled out into the working area, due to their weathered condition and circular shape. Furthermore, the rocks were larger than the other rocks that were located in that part of the working area. Thus, I find it more likely than not that the rocks originated from the highwall, as opposed to having merely fallen from a truck during the mucking out process (Tr. 76, 78-79). Thus, I find that the hazardous ground conditions at the highwall affected the area where Davis was working.

Third, I find that the operator failed to undertake proper corrective action as required by section 56.3200. The standard requires scaling or support to abate the hazard of loose ground, or alternatively, a barrier must be erected when the affected area is left unattended. 30 C.F.R. § 56.3200. It had been several days since the area was used when Gabbard issued the citation so the area was unattended. Lively's testimony that there was a barrier because of an orange line drawn parallel to the wall that Davis made is completely unsupported by the record and contradicted by his own testimony. When questioned by the Court, Lively admitted that he did not know the color of the line, and that the blue dots that were drawn to mark the shots functioned as the barrier to mark off the safety zone (Tr. 163-65). Lively's testimony is also contradicted by Davis himself who drew the blue dots to mark the shots, and not to mark off a danger zone. The fact that the markings were drawn to designate shot holes means that miners were required to work in that area, which supports Gabbard's testimony. In any case, markings or lines drawn on the ground, regardless of color, do not constitute a "barrier." A barrier is something that is designed to prevent unauthorized entry into an area, such as a berm. Thus, the blue markings do not constitute a "barrier" within the plain meaning of section 56.3200.<sup>3</sup>

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<sup>3</sup> Even assuming such markings could constitute a barrier, 30 CFR § 56.2 defines a barrier as an "object" that "demarcates in a *conspicuous* manner" through means "such as cones, a warning sign, or tape." 30 C.F.R. § 56.2 (emphasis added). The blue markings here were not "conspicuous" for three reasons: First, they were not drawn in a continuous manner to indicate a marking off sign. Second, I do not give much weight to the operator's testimony that the blasters knew to interpret such blue markings to mean "DO NOT ENTER." Rather, I credit Gabbard's testimony that such blue lines are typically intended to denote drill places for drill holes and not to mark off a hazard area (Tr. 167). Drilling holes and marking off hazard areas are two entirely different tasks that could call for potentially different marking locations. Third, the markings were not parallel to the base of the highwall, which indicates that they were unrelated to the hazardous wall and thus not intended to serve as a warning sign for it. Accordingly, the blue markings were not conspicuous and do not constitute a "barrier" within the language of section 56.2.

Likewise, the "DO NOT ENTER" sign does not constitute a barrier. The sign was 500 feet away from the wall and too far away to prevent unauthorized entry. This is consistent with the fact that Davis admitted that the sign was not intended to prevent miners from entering the area, but rather to tell haul truck drivers to stay out (Tr. 127). Therefore, the sign is not an adequate "barrier" within the meaning of section 56.3200.

Moreover, Commission precedent supports a violation finding. *Cyprus Tonopah Mining Corp.* No. WEST 90-202-M, 1993 WL 396988 (March 22, 1993) is relevant here. In *Cyprus*, the Commission upheld the judge's finding of a violation of section 56.3200 based upon a similar set of facts. Specifically, the Commission affirmed the judge's findings that the safety benches were full, that there was loose material on the faces, and that the loose material "could come down and get somebody." *Id.* at 3. In addition, the Commission also upheld the judge's finding that pieces of loose material, up to several feet in diameter, existed near the top of the highwall, and that such conditions were hazardous because they could feed rock onto the slopes below and allow material to roll into the working area. Finally, the Commission affirmed the judge's finding that the rough surface of the wall would allow falling rock to bounce, become airborne, and assume a "considerable horizontal velocity." *Id.* The Commission concluded that substantial evidence supported the judge's determination that the ground conditions created a hazard within the meaning of section 56.3200.

Likewise, the safety bench at Fort Knox Quarry was full, there was loose material on the face, and the inclined surface of the wall and muck could allow falling rock to bounce or roll at a "considerable horizontal velocity" into the working area. Furthermore, no berms existed to protect people in the case of falling rock. Therefore, I find the ground conditions constituted a hazard within the meaning of section 56.3200. I further conclude that a "reasonably prudent employer familiar with the mining industry and the protective purposes of the standard would have recognized that the condition of the quarry wall posed a hazard to persons" in the working area. *Shine Quarry, Inc.*, 17 FMSHRC at 1400.

Accordingly, I affirm the Secretary's violation finding.

#### Significant and Substantial (S&S)

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); see also, *Buck Creek Coal Co., Inc.* 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec'y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985); see also *Cyprus Tonopah Mining Corp.* No. WEST 90-202-M, 1993 WL 396988 \*3 (March 22, 1993) ("In establishing that a violation is S&S, the Secretary must prove that there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury ... [whereas] section 56.3200 [merely] requires that operators restrict miners' access to areas where hazardous conditions exist, whether or not it is likely that the hazard will result in an injury."). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996).

The Secretary argues that the violation is S&S. Namely, the underlying conditions at the highwall of loose unconsolidated material, the safety bench being full of rock, and fallen rock on the bench floor all contributed to a safety hazard that was reasonably likely to cause permanently disabling injuries to Davis and other miners who had traveled and had been exposed to the hazardous highwall just days before MSHA arrived. P. Br. at 6-8.

The operator argues that the alleged violation is not S&S, primarily because the Secretary did not provide any concrete evidence that an injury was "reasonably likely" to occur. Rather, the operator contends that it is unlikely that any falling rocks could roll or bounce off the muck pile and travel more than the 20 feet provided by the safety zone. R. Br. at 14-15.

I find that the violation is S&S. With regard to the first and second elements of *Mathies*, I have already found that section 56.3200 has been violated, and that the violation contributed to a discrete safety hazard. As shown above, the safety bench was close to full, there was loose cracked material on the face, and the inclined surface of the wall and muck was reasonably likely to allow falling rock to bounce and roll into the working area. I also find that the third and fourth elements of *Mathies* have been met. As shown above, a miner was within 16 ½ feet from the toe of the muck pile and only 20 feet from base of the highwall, and rocks had already fallen 40-45 feet beyond the highwall. The miner was therefore exposed to the hazard of falling rock. This hazard was reasonably likely to seriously injure and permanently disable the miner's lower legs. Furthermore, there was no question that drillers were going to come in next and drill the shots, assuming continued normal mining operations. They would have been in serious danger as well. Therefore, I find that the Secretary has established the four *Mathies* criteria. Several other Commission judges have also affirmed S&S violations of section 56.3200 where the presence of loose, overhanging and cracked material, and other dangerous conditions were present on a highwall above an area where miners worked. *Lakeview Rock Products*, 34 FMSHRC 244, 258 (Jan. 2012) (ALJ); *Connolly- Pacific Co.*, 33 FMSHRC 2270, 2272, 2288-90 (Sept. 2011) (ALJ);

*Richard E. Seiffert Resources*, 23 FMSHRC 426, 430 (Apr. 2001) (ALJ); *Summit Inc.*, 19 FMSHRC 1326, 1335 (July 1997) (ALJ). Accordingly, I affirm the Secretary's S&S designation.

### Negligence

The Secretary argues that the violation was the result of Respondent's high negligence in failing to comply with section 56.3200. P. Br. at 8. The Secretary contends that Davis knowingly exposed himself to the hazardous work area when he painted the drill marks at the highwall, and that he was a trained, competent miner who knew that the area was unsafe and too hazardous for travel and work. *Id.*

The operator counters that the alleged violation did not result from high negligence. It emphasizes that Davis's actions to prevent hazardous conditions constitute a mitigating circumstance because he carefully examined the condition of the highwall and extended the distance away from the highwall before commencing work. R. Br. at 15-16. The operator also claims that it had never previously been cited for laying out a shot or working too close to a highwall. R. Br. at 3.

I find that the violation resulted from high negligence. High negligence occurs when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). No mitigating circumstances exist here. Davis knowingly exposed himself to the hazardous work area when he painted the drill marks at the highwall, and took no efforts to abate the violation prior to receiving the citation. Davis is a trained, competent miner, and either knew or should have known that the area was unsafe and too hazardous for travel and work (Tr. 47). Furthermore, the fact that Davis extended the distance from the highwall to 20 feet does not constitute a mitigating circumstance. As shown above, 20 feet was still too close to constitute a safe distance. The operator was well-aware of MSHA's interpretation of "affected area," which requires a distance of 25% of the height of the highwall. This requirement was not satisfied. Also, the hazardous conditions at the highwall were obvious, as Gabbard testified that the wall was in the worst shape he had ever seen (Tr. 17).

Furthermore, Lively referenced the cost of scaling numerous times as a justification for failing to do so (Tr. 161). This indicates to me that the company was more concerned with production costs than safety (Tr. 160-61). Nothing indicates to me that Respondent would have taken the action required by the standard to make the condition safe before blasting again. Accordingly, I affirm the Secretary's designation of high negligence.

## Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo*, including proposed special assessments, for violations of the Mine Act are well established. Section 110(i) of the Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. §820(i). The Act requires that in assessing civil monetary penalties, the Commission or ALJ shall consider the six statutory penalty criteria:

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

30 U.S.C. §820(i).

The record establishes that the mine is medium-sized (Tr. 10). The operator does not argue that the proposed penalties would affect its ability to continue in business. There is no dispute that the conditions were abated in good faith (Tr. 20-21). The mine does not have a significant history of violations. Mine Data Retrieval System, <http://www.msha.gov/drs/ASP/MineAction.asp>. The findings with regard to the negligence involved are discussed at length above. With regard to gravity, I find this violation to be serious.

The appropriate penalty is \$15,570.

## Order

Based upon the criteria in section 110(i) of the Mine Act, 30 U.S.C. §820(i), I affirm the citation as proposed and assess a penalty of \$15,570.00. Austin Powder is **ORDERED** to pay the Secretary of Labor the sum of \$15,570.00 within 30 days of the date of this decision.<sup>4</sup>

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

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<sup>4</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

Schean G. Belton, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN 37219,  
on behalf of the Secretary of Labor;

Nichelle Young, Esq., Law Office of Adele Abrams, P.C., 4740 Corridor Place, Suite D,  
Beltsville, MD 20705, on behalf of Austin Powder Company, Inc.

# **ADMINISTRATIVE LAW JUDGE ORDERS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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Pittsburgh, PA 15220  
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November 18, 2013

|                               |   |                            |
|-------------------------------|---|----------------------------|
| SECRETARY OF LABOR,           | : | CIVIL PENALTY PROCEEDING   |
| MINE SAFETY AND HEALTH        | : |                            |
| ADMINISTRATION (MSHA),        | : | Docket No. WEVA 2013-631   |
| Petitioner,                   | : | A.C. No. 46-09244-313287-A |
|                               | : |                            |
| v.                            | : |                            |
|                               | : |                            |
| ADAM WHITT, EMPLOYED BY INMAN | : |                            |
| ENERGY,                       | : |                            |
| Respondent.                   | : | Mine: Randolph Mine        |
|                               | : |                            |
|                               | : |                            |
| SECRETARY OF LABOR,           | : | Docket No. WEVA 2013-632   |
| MINE SAFETY AND HEALTH        | : | A.C. No. 46-09244-313288-A |
| ADMINISTRATION (MSHA),        | : |                            |
| Petitioner,                   | : |                            |
|                               | : |                            |
| v.                            | : |                            |
|                               | : |                            |
| EDWARD PAYNTER, EMPLOYED BY   | : |                            |
| INMAN ENERGY,                 | : |                            |
| Respondent.                   | : | Mine: Randolph Mine        |

**ORDER DENYING RESPONDENTS' MOTIONS TO DISMISS<sup>1</sup>**

Before: Judge Andrews

These cases are before me upon petitions for assessment of civil penalties under Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c). Respondents Adam Whitt and Edward Paynter have filed Motions to Dismiss these proceedings for failure to

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<sup>1</sup> Though these two dockets have not been consolidated, they are both resolved through this single Order because the legal issues addressed are identical.

file the proposed assessments within a reasonable time after the issuance of the citation.<sup>2</sup> For the reasons that follow, the Motions to Dismiss are denied.

## **I. Procedural Background**

On April 1, 2010, Mine Safety and Health Administration (MSHA) inspectors inspected Inman Mine as part of an E03 impact inspection. The inspectors issued 16 citations and orders. All of the orders were terminated within five days, and were contested by Inman. The orders were settled pursuant to a global settlement of former Massey Energy Company controlled mines in WEVA 2011-1934, *et al.* This settlement included over 1,000 dockets. A determination on the merits of the orders was not reached nor was there any admission of any violations of the Act or regulations by the operator.

Some time thereafter, MSHA initiated 110(c) investigations into possible agent liability for Whitt and Paynter. On January 23, 2013, the Technical Compliance and Investigation Office requested an assessment of proposed civil penalties against both agents, which indicated that the investigation had concluded. On February 4, 2013, MSHA issued civil penalties to Whitt totaling \$18,300.00 for three violations. On the same date, MSHA issued civil penalties to Paynter totaling \$26,900.00 for seven violations.

Respondents Whitt and Paynter filed the instant Motions to Dismiss on July 26, 2013.

## **II. Contentions of the Parties**

The Respondents argue that MSHA failed to assess penalties within a reasonable time, and as a result these cases should be dismissed due to the unreasonable delay and resulting prejudice. The Respondents argue that the appropriate time frame to consider is from the issuance of the underlying citation or order until the 110(c) penalty assessments. According to that time frame, 1,041 days elapsed.

The Respondents cite the MSHA Program Policy Manual and the MSHA Special Investigations Handbook to show that MSHA requires 110(c) investigations to conclude within either 18 months or 7 months (depending on which internal guideline one is referencing.) They assert that MSHA had no adequate cause for the untimely filing because the underlying citations and orders did not involve a complicated series of events. Furthermore, they argue that they suffered prejudice in the form of faded memories, the sale of Inman and closure of the mine, the resulting destruction of property and records, and the dispersal of potential witnesses. Furthermore, the Respondents argue that public policy favors dismissal because delays hinder the protective purposes of the Mine Act.

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<sup>2</sup> “Dismissal is proper under Fed.R.Civ.P. 12(b)(6) if the pleadings fail ‘to state a claim upon which relief can be granted.’” *Orica USA, Inc.*, 32 FMSHRC 709, 710 (May 26, 2010) (ALJ).

The Secretary argues that the Mine Act is clear that the relevant time frame this Court must consider is from the conclusion of the investigation to the issuance of the penalty. The Secretary argues that if this Court were to adopt the Respondents' proposed time frame, it should find that the assessment of penalties was within a reasonable time for several reasons. First, the Supreme Court has ruled in other statutory settings that without explicit statutory language or clear congressional intent, such "reasonable time" language is intended "to spur the Secretary to action, not to limit the scope of his authority." Sec. Reply to Mot. to Dismiss at 3, quoting *Brock v. Pierce County*, 476 U.S. 253, 265 (1986). In this instance, the Secretary argues that the legislative history and text of the Mine Act shows that there should be no penalty for an untimely assessment. The Secretary maintains that if any time limit is to be imposed on MSHA, it should be the general statute of limitations for civil penalty actions of five years articulated in 28 U.S.C. § 2462.

The Secretary further argues that the phrase, "reasonable time," is ambiguous, and as such is deserving of deference. He points to the increased MSHA caseload and the nature of the investigation to show adequate cause, and argues that in this instance the Respondents have shown no actual prejudice.

### **III. Analysis**

Section 105(a) of the Mine Act provides that MSHA should assess penalties within a "reasonable time," stating:

If, after an inspection or investigation, the Secretary issues a citation or order under section 814 of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 820(a) of this title for the violation cited...

30 U.S.C. § 815(a). Section 110(c), which is at issue in this case, has no such "reasonable time" requirement; however, § 105(a) time requirements are applied to § 110(c). *See e.g. Blevins*, 2008 WL 4190437 (Aug. 28, 2008) (ALJ).

Whereas the Respondents focused much of their attention on the phrase "reasonable time," there is a predicate issue that may avoid the need to draw a line here on precisely how many months is unreasonable. Section 105(a) states that the time frame to be considered is from "after the termination of such inspection or investigation." In § 110(c) cases, the reasonable time requirement comprehends the time between the termination of the investigation until the assessment of the penalty.

I fully concur with Judge Moran's reasoning and conclusion in *Robert J. Silcox*, 34 FMSHRC 947 (Apr. 27, 2012) (ALJ). In that case, Judge Moran was faced with a similar issue and concluded that "there are distinct investigations for a section 104 matter and a 110(c) matter, the conclusion of any investigation associated with a section 110(c) matter is the only reasonable point in time to gauge the Secretary's action." *Id.* at 947.

Though the Commission has not yet addressed this precise issue, numerous decisions by other ALJs, as well as by the D.C. Circuit Court of Appeals, support this conclusion. *See e.g. Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256,261 (D.C. Cir. 2005); *Laurel Run Mining Co.*, 19 FMSHRC 437, 441 (Feb. 18, 1997) (ALJ) (“Rather, the operable time period in these cases is the ...period between completion of MSHA's 110(c) investigation...and notification of the proposed penalties.”); Trujillo, 2013 WL 3152298 (May 13, 2013) (ALJ); *Christopher Brinson et al*, 2013 WL 3152293 at \*3-4 (May 7, 2013) (ALJ) *Sedgman and David Gill*, 28 FMSHRC 322 (June 2006). These decisions all note that it makes far more sense to begin counting at the conclusion of the § 110(c) investigation, rather than at the issuance of the underlying citation or order.

Respondents point to the Program Policy Manual and the Special Investigation Handbook as showing required guidelines for MSHA investigations. However, neither of these internal administration issues has the force and effect of regulation and thus they are not binding.<sup>3</sup> The guidelines contemplate a time period before the proposed penalty assessment. Since I am of the opinion that the relevant time period is from the conclusion of the investigation to the proposed penalty, the question of application of the reasonable time requirement to delays from the date of a citation or order to the conclusion of an investigation will not be considered at this time.

Furthermore, deference must be granted to the Secretary’s position in his brief that the time frame to be considered should begin only after the conclusion of the investigation. Courts have stated that although the Secretary’s interpretation in a legal brief “is not a formalized statement of statutory interpretation of the sort that usual[ly] invokes *Chevron* deference,” it should still receive deference. *Twentymile Coal*, 411 F.3d at 261 (“But because “in the statutory scheme of the Mine Act, the Secretary's litigating position before [the Commission] is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a ... health and safety standard, [it] is therefore deserving of deference.” *Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir.2003) (quoting *RAG Cumberland Res. LP v. FMSHRC*, 272 F.3d 590, 596 n. 9 (D.C.Cir.2001) (quoting *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 157, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991))))).” Certainly, in this case the “delay” of less than two weeks was reasonable.

While I am concerned about MSHA’s protracted investigation in this matter, the Act does not appear to place the limits that Respondents argue in their briefs. Neither public policy nor the goals of the Act are achieved by dismissing these cases, because the ultimate purpose of

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<sup>3</sup> Indeed, in the section of the Special Investigations Procedures Handbook that Respondents cite, the timeframes contain the following caveat: “These timeframes are management goals and shall not be used for individual performance evaluations.” Handbook No. PH05-1-4, 4-4 (Aug. 2005). If an individual at MSHA cannot be punished for missing one of the internal deadlines, it does not make sense to punish miners through strict enforcement of these deadlines.

the Act is “the health and safety of [the industry’s] most precious resource—the miner.” 30 U.S.C. § 801(a). Dismissing these cases, even in the context of MSHA’s lengthy investigation, does not serve this purpose.

Having determined the appropriate time frame for consideration, I specifically find that:

- The thirteen days from the conclusion of the 110(c) investigation to the proposed penalty assessment did not violate the reasonable time requirement of Section 105(a) of the Mine Act; and,
- No actual prejudice to the Respondents has been established as resulting from this thirteen day period of time.

Therefore, Respondents’ Motions to Dismiss are hereby **DENIED**.

/s/ Kenneth R. Andrews  
Kenneth R. Andrews  
Administrative Law Judge

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/mzm

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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November 25, 2013

|                               |   |                              |
|-------------------------------|---|------------------------------|
| SECRETARY OF LABOR            | : | CIVIL PENALTY PROCEEDING     |
| MINE SAFETY AND HEALTH        | : |                              |
| ADMINISTRATION (MSHA),        | : | Docket No. SE 2010-1107-M    |
|                               | : | A.C. No. 01-00003-227258     |
| Petitioner,                   | : |                              |
|                               | : |                              |
| v.                            | : |                              |
|                               | : | Mine: O'Neal Quarry and Mill |
| CHEMICAL LIME CO. OF ALABAMA, | : |                              |
| LLC,                          | : |                              |
| Respondent                    | : |                              |

**ORDER**

Carmen L. Alexander, Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

Charles H. Morgan, Alexandra Garrison Barnett, Alston & Bird LLP, 1201 West Peachtree Street, Atlanta, GA 30309-3424

Before: Priscilla M. Rae, Administrative Law Judge

Overview

This matter is before me on Respondent’s Motion for Partial Summary Decision relating to a 104(a) Citation, Citation No. 8545847, issued by Mine Safety and Health Administration ("MSHA") Inspector Timothy Schmidt ("Inspector Schmidt") on April 22, 2010 at the O'Neal Plant based upon his investigation of an accident that occurred at the mine site on March 5, 2010, in violation of 30 C.F.R. § 56.15006.<sup>1</sup> The violation was assessed as posing a reasonable likelihood of causing a permanently disabling injury to a miner and was deemed significant and substantial ("S&S"). A high degree of negligence was assessed. The penalty was proposed at \$1,304.00. (Schmidt Dep.) For the reasons set forth below, Respondent Motion for Partial Summary Decision is DENIED.

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<sup>1</sup> Section 56.15006 provides that "[s]pecial protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants are encountered in a manner capable of causing injury or impairment."

## Factual Background

Respondent Chemical Lime produces high calcium limestone that is used in water treatment processes and numerous products including plastics, metals, and steel. (Hunter Dep. at 17:9-20.) Respondent's O'Neal Plant contains a baghouse that is used to collect dust created from limestone traveling through the kiln. (Hunter Dep. at 22:10-14.) The baghouse is a structure consisting of multiple compartments where dust from the kiln is trapped in bags that act as filters. (Baker Dep. at 13:10-13; Hunter Dep. at 21:21-23, 22:5-9.)

In April 2010, Schmidt and another MSHA Inspector, Michael Evans, were assigned to conduct an investigation of an accident that occurred at the baghouse. (Evans Dep. at 23:1-10, 27:7-12; Schmidt Dep. at 22:6-23.) Schmidt relied on the facts gathered from the interviews he conducted, documents contained in the investigation file, and MSHA standards and references, in issuing the citation. (Schmidt Dep. at 12:14-18, 112:13, 113:18.)

The citation alleges as follows:

Adequate special protective clothing and equipment was not used and maintained in reliable condition during work in and near the baghouse. A miner working at the baghouse on 3/5/10 was injured due to lime dust inhalation and subsequently hospitalized. Other miners working in the area received chemical burns on the arms, face and neck. On several occasions miners had to flush their eyes out due to contact with lime dust. The operator did not ensure that personal protective equipment used at the mine was adequate and being used properly. (Schmidt Dep. at 12:8-18 & Ex. 5)

Respondent is seeking to have a portion of the citation vacated, as a matter of law. Respondent argues that insofar as the citation is based on the alleged failure to provide respirators or to ensure that they were being used properly, partial summary judgment on this allegation should be granted on the grounds that the Secretary of Labor (the "Secretary") cannot establish (1) that the cited standard applies to respirators; (2) that hazardous conditions requiring the use of respirators existed; or (3) that the respirators were not, in fact, properly worn.

## Legal Framework

According to 29 C.F.R. § 2700.67(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 facts; and (2) that the moving party is entitled to summary decision as a matter of law.

The Commission has "has long recognized that summary decision is an extraordinary procedure," and has analogized its rule on summary decision 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 showing of the lack of a genuine, triable issue of material fact." *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981), *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). A material fact is a fact that is significant or essential to the issue or matter at hand. Black's Law Dictionary (9th ed. 2009). A genuine issue of material fact exists when the non-moving party produces evidence that would allow a reasonable fact-finder to return a verdict in its favor. *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258 (11th Cir. 2007). The "court must evaluate the evidence ' in the light most favorable to ... the party opposing the motion." *Secretary of Labor v. Lewis-Goetz and Co., Inc.*, No. WEVA 2012-1821, 2013 WL 4648484, at \*2 (FMSHRC July 22, 2013) (ALJ). Factual disputes that are material under the substantive law governing the case will preclude entry of summary judgment. *Lofton v. Secretary of the Department of Children and Family Services*, 358 F.3d 804, 809 (11th Cir. 2004).

### Analysis

Partial summary decision is inappropriate here because there are material issues of fact in dispute.

First, Respondent contends that there is a "fatal paucity" of "credible evidence" of a hazardous condition that existed on March 10, 2010 or at any time when minors were allegedly burned or otherwise injured while working at the baghouse. (Resp. Motion). Therefore the cited standard does not apply. It relies upon the fact that no silica dust or calcium oxide exposure levels were taken at the time of the injuries. It is therefore impossible to determine that the levels were sufficiently dangerous to require the use of special protective equipment. This contention is the very crux of the Secretary's case and is in dispute. The Secretary alleges that the evidence will show that lime dust or calcium oxide is a chemical hazard to which miners were exposed while changing out bags at the baghouse or otherwise working in and around the baghouse. (Schmidt Dep., 54:4-7; Exhs. 5 and 7.) He will also present evidence that miners were burned on or about the eyes, face, neck and arms and suffered respiratory injuries evidencing a per se hazardous condition.

Respondent argues in the alternative that, assuming there is evidence of a hazardous condition, there is no "credible evidence" that a respirator was required and not worn. Both the Respondent and the Secretary in their motions have made conflicting statements as to whether respirators and/or masks were made available to the miners. (Resp. Stmt of Facts 7, 8, 10; Sec. Memo. Footnote 2 at pg. 5.) There is also conflicting evidence in the form of witness statements as to whether masks and/or respirators were in fact available at all times and properly used.

Respondent contends that proper equipment was available and used while the Secretary alleges in part that the fact that several miners suffered exposure-type injuries is a clear indication that this could not be the case.<sup>2</sup>

The Respondent's opinion that the evidence is not sufficiently credible or not in sufficient quantity to meet the requisite burden of proof to establish the elements of the cited standard in no way equates to there being no undisputed material facts. As the trier of fact, it is my job to assess the credibility and weight of the evidence once presented at hearing. It is not my job at this juncture, however, to do so. Rather, I must view the evidence in the light most favorable to the non-moving party. In so doing, it would be reasonable to find that a hazardous condition did exist while the miners were working in and around the baghouse and that respirators were not provided or not properly used to prevent the injuries allegedly sustained.<sup>3</sup>

### Conclusion

For the reasons set forth above, summary decision is improper in this matter. Respondent's focus on the Secretary's lack of "credible evidence" merely underscores the fact that the facts are in dispute and cannot be resolved without a hearing on the matter.

**WHEREFORE**, Respondent's Motion for Partial Summary Decision is **DENIED**.

/s/ Priscilla M. Rae

Priscilla M. Rae  
Administrative Law Judge

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<sup>2</sup> It is noted that Respondent has failed to state in its Statement of Undisputed Facts that it agrees that miners suffered injuries to eyes, face, neck, arms and lungs as a result of exposure to silica or lime dust on or about March 2010. The Respondent's lack of acknowledgement of these alleged facts also must lead to a finding that summary decision is not appropriate here as they are directly relevant to establishing that a hazardous condition existed when working in and around the baghouse.

<sup>3</sup> Respondent has also moved for partial summary decision on the legal argument that the cited standard does not include respirators as the type of special protective equipment mandated for use based upon the language of the MSHA Program Policy Manual interpretation of this standard. I decline to address that issue while the factual issues discussed herein remain in dispute. The applicability of the cited standard to the facts once determined at hearing may be addressed in post-hearing briefs.

Distribution:

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