November 2015

TABLE OF CONTENTS

COMMISSION DECISIONS

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

Review was granted in the following cases during the month of November 2015:

Michael K. McNary v. Alcoa World Alumina, Inc., Docket No. CENT 2015-279 (Judge Moran, September 28, 2015)

Secretary of Labor v. Northshore Mining Company, Docket No. LAKE 2014-219-M (Judge Barbour, October 21, 2015)

Secretary of Labor v. Consolidation Coal Company, Docket No. VA 2012-42, et al (Judge Rae, October 22, 2015)

Review was denied in the following case during the month of November 2015:

Secretary of Labor v. Wm J. Clark Trucking Service, Inc., Docket No. WEST 2015-55 (Judge Miller, September 9, 2015)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 9, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JEREMY JONES	
v.	Docket No. WEVA 2015-1007-D
KINGSTON MINING, INC.	

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

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 14, 2015, the Administrative Law Judge issued a decision denying an Application for Temporary Reinstatement filed by the Secretary of Labor on behalf of Jeremy Jones against Kingston Mining, Inc. ("Kingston Mining") pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).[1] 37 FMSHRC _, slip op. at 12, No. WEVA 2015-1007-D (Oct. 14, 2015). The Secretary subsequently filed a timely petition for review of the Judge's denial of temporary reinstatement. For the reasons that follow, we vacate the Judge's decision, reverse it in part, and remand the matter in part to the Judge for further proceedings.

[1] 30 U.S.C. § 815(c)(2) provides in pertinent 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. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

I.

Factual and Procedural Background

A. Factual Background

Kingston Mining operates the No. 2 Mine, an underground coal mine located in West Virginia. Tr. 95-96, 147. Jeremy Jones was an electrician on the midnight maintenance shift at the mine for two and one-half years. Tr. 34-35, 73, 89. Mr. Jones was laid off from his position on April 10, 2015.

On August 4, 2015, Jones filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") against Kingston Mining. App. for Temp. Reinstatement at 1-2. MSHA conducted a preliminary investigation of Jones' discrimination complaint and on September 14, 2015, the Secretary filed an Application for Temporary Reinstatement, requesting an order requiring Kingston Mining to temporarily reinstate Jones to his former position as an electrician. *Id*. at 4. The Secretary alleges that the layoff was motivated by the fact that Jones raised safety concerns regarding miners covering or painting over the lights on the roof bolting machines, failing to properly anchor trailing cables for the shuttle cars, and failing to properly dispose of dust bags and trash including boards on the roof bolting machines.

At a hearing held on October 7, 2015, Jones testified that he communicated his safety concerns in three ways. First, Jones regularly submitted "Running Right" cards—cards on which Kingston encouraged miners to handwrite their safety concerns in order to bring those concerns to management's attention. Tr. 37-38. Second, as an electrician, Jones' job duties included submitting maintenance checklists indicating whether he had completed various maintenance tasks. Tr. 47. Third, Jones testified that he also frequently communicated safety complaints orally to his immediate supervisor, Daniel Laverty. Tr. 46.

When Jones' concerns were not immediately addressed by Laverty, he pursued his concerns at the next level, orally communicating them to Laverty's supervisor, Greg Shrewsbury. Tr. 47-48, 57. According to Jones, Shrewsbury usually called the foreman or the mine superintendent, who, in turn, would instruct Laverty to view the area and address the problem. Tr. 47-48. Jones testified that Laverty did not like Jones going over his head and that, as a result, Laverty was "short" with him and repeatedly assigned him to work on less desirable projects that required only one miner, thus isolating Jones from the crew of electricians. Tr. 49-51, 113. Jones testified that previously Laverty had rotated such one-miner assignments among all members of his four-miner crew. Tr. 49-50. Jones testified that after Laverty began isolating him, Laverty did not isolate other electricians. Tr. 53-54. Jones also testified that other crew members told Jones they believed that Laverty was isolating him. Tr. 54. Jones also testified that other electricians reported the same types of concerns to the same supervisors. Tr. 39-40, 55, 58, 64, 115. Additionally, he testified that other electricians would go to Shrewsbury the "same as I did." Tr. 58.

Jones testified that, until the day before his temporary reinstatement hearing, he did not know about a January 30, 2015, written evaluation of his performance shown to him during the hearing. Tr. 69; Government Exhibit ("GX") C-1. The evaluation stated that Jones "[w]orks safe, [and is] [g]ood about letting me know if he spots potential problems." Tr. 71; GX C-1. However, the evaluation also contained 15 separate inquiries where a miner was rated on a 1-to-5 scale. Laverty gave Jones nine ratings of "2" ("needs development") and six ratings of "3" ("met expectations"), including a "3" for "demonstrates safety is a priority; practices safe behaviors." GX C-1.

On April 10, 2015, with rumors of an impending layoff circulating throughout the mine, Jones told a fellow miner that if Laverty had anything to do with it, Jones would be included in the layoff. Tr. 73-74, 107-08. Indeed, on April 10, 2015, Kingston laid off 23 miners, including Jones. Tr. 76.

Jones' immediate supervisor, Daniel Laverty, and Laverty's superior, Greg Shrewsbury, agreed that Jones raised safety concerns, and confirmed that the safety issues giving rise to the concerns were a recurring problem at the mine and needed repeated correction. Tr. 137-39, 143, 145-46, 149-50, 152, 158-59, 169, 171-73.

Laverty testified, however, that all the electricians in his crew noted safety concerns that they encountered in their work, and that Jones' activity in this regard was "about the same as anybody else." Tr. 137-39. Laverty further testified that noting safety violations was part of the electrician crew's job. Tr. 150-51. He said that Jones was not more persistent than other miners. Tr. 155.

Prior to the hearing, the Secretary filed a motion in limine urging the Judge to disallow testimony by Kingston's witnesses about their reasons for permanently laying off Jones. The Judge granted the motion at the hearing prior to the parties' opening statements, finding that such testimony was not relevant to the narrow issue before him in a temporary reinstatement hearing. Tr. 10-14.

During her opening statement, the Secretary's counsel stated that the evidence would show that the evaluation process for determining who would be laid off "lent itself to being manipulated by the evaluators to disguise their real motivation for firing miners like Mr. Jones who raise safety issues." Tr. 24. Further, the Secretary's counsel stated that the evidence would show that within a week or two of the layoff, Kingston began hiring new miners. Tr. 24. The Judge, however, ruled that the Secretary would not be permitted to submit such evidence. Tr. 25. The Judge explained that, in light of the Secretary's successful motion to exclude testimony about Kingston's reasons for laying off Jones, "the Secretary can't have it both ways." Tr. 25. Such evidence, the Judge stated, would be a "huge distraction" and "shouldn't be part of [the Secretary's] case." Tr. 26; *see also* slip op. at 10 ("a temporary reinstatement proceeding is not the forum to consider competing claims about the legitimacy of the layoff procedures").

B. The Judge's Decision

The Judge concluded in his decision that Jones' discrimination complaint was frivolously brought for two reasons. First, he concluded that Jones' late filing of his complaint was "unexcused." Slip op. at 11. Secondly, the Judge found that the substance of Jones' complaint was frivolous. The Judge found that Kingston "took no negative action, by words or deeds," in reaction to Jones' raising of safety concerns. *Id.* at 11-12. The Judge reasoned that Jones' fellow electricians raised the same safety concerns as Jones, that raising safety concerns was "part of [Jones'] job" and not a "genuine safety complaint[ ]," and that Kingston "encourage[d] the miners to bring such concerns to its attention." *Id*. at 11. The Judge further relied on the "high regard" Laverty expressed in his January 2015 evaluation of Jones, and found it "noteworthy" that Laverty's evaluation was written three months before Jones was laid off. *Id*. Finally, the Judge noted that although he found Jones to be a credible, intelligent witness who understood his rights, "that does not mean that the Court accepted Jones' unsupported visceral feelings that Laverty didn't like his raising safety matters." *Id*. at 11, n.12.

II.

Disposition

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the Judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y of Labor on behalf of Price v. Jim Walter Res*., *Inc*., 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990) ("*JWR*"). The Mine Act's legislative history defines the "not frivolously brought" standard as indicating that a miner's "complaint appears to have merit." S. Rep. No. 95-181, at 36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). The "not frivolously brought" standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *JWR*, 920 F.2d at 748, n.11.

At a temporary reinstatement hearing, the Judge must determine "whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *JWR*, 920 F.2d at 744. As the Commission has recognized, "[i]t [is] not the Judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999).

We first address the Secretary's argument that the Judge erred by denying the Application for Temporary Reinstatement on the basis that Jones' complaint to MSHA was untimely. The 60-day period for filing a discrimination complaint under section 105(c)(2) is not jurisdictional. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999). A Judge is

required to review the facts "on a case-by-case basis, taking into account the unique circumstances of each situation," in order to determine whether a miner's late filing should be excused. *Id*.; *see also Hollis v. Consolidation Coal Co*., 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir. 1984). Jones testified that he did not know that section 105(c)(2) applies to layoffs. He had thought it applied only to individual discharges. Therefore, he had not filed his complaint until an MSHA special investigator advised that he could seek relief from a layoff. Tr. 105-06. The operator did not rebut Jones' assertion of a good faith misunderstanding of section 105(c) or demonstrate any prejudice from the delay in filing. We find that Jones' evidence is sufficient to excuse the late filing for purposes of a temporary reinstatement hearing. Therefore, we reverse the Judge's finding at this stage that Jones' filing was untimely.

We next address whether the Judge erred in finding Jones' complaint to be frivolously brought. The elements of a discrimination claim are that (1) the complainant engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co*., 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 817 (Apr. 1981). The Commission applies the substantial evidence standard in reviewing a Judge's factual determinations.[2]

Indisputable evidence supports a finding that Jones engaged in protected activity.[3] It is clear that Jones frequently raised safety issues. Furthermore, there is no dispute that the layoff of Jones constitutes "adverse action." Thus, the only remaining issue is whether substantial evidence supports the Judge's conclusion that Jones did not assert a non-frivolous "nexus" between the protected activity and the adverse action.

Among the indicia of discriminatory intent that establish a "nexus" between the protected activity and the adverse action are hostility or animus toward the protected activity and disparate treatment of the complainant. *Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059,

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[2] *E.g.*, *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co*., 22 FMSHRC 153, 157 (Feb. 2000). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co*., 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938)).

[3] The Judge described Jones' frequent safety complaints as "non-viable protected activity in the context that they were made and [that] Kingston took no negative action, by words or deeds, in reaction to them." Slip op. at 11-12. We interpret the Judge's use of the term "non-viable protected activity" to mean that the Judge found that Jones engaged in protected activity, but that the other electricians also raised safety concerns. Raising safety concerns is, of course, paradigmatic "protected activity" within the meaning of section 105(c)(2). The right to raise safety concerns is protected by the Mine Act, and a miner's raising of such concerns is not, for purposes of section 105(c), less protected because other miners also raise them.

1066 (May 2011) (citing *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510 (Nov. 1981)); *see also Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC1085, 1089 (Oct. 2009).

In this regard, the Judge's exclusion of evidence regarding the layoff and hiring of new miners constitutes reversible error.[4] The Secretary contended his evidence would show that the process for determining who would be laid off was susceptible to manipulation to achieve the layoff of miners who raised safety issues, and would show that within a week or two of the layoff Kingston began hiring new miners. Tr. 24. Such evidence could play a vital role in determining whether a non-frivolous claim of a nexus between Jones' protected activity and his layoff exists.[5] Therefore, we hold that the Judge abused his discretion by excluding evidence regarding the layoff and the hiring of miners.

Thus, we conclude that the Judge erred by failing to consider relevant evidence in determining whether Jones' complaint was frivolously brought. Accordingly, we vacate the Judge's decision and remand for further proceedings. On remand, the Judge shall permit the Secretary to submit evidence regarding the layoff and hiring of miners and shall permit the operator to submit relevant rebuttal evidence consistent with the recognition that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *JWR*, 9 FMSHRC at 1306.

Of course, after admission of such evidence, the Judge must carefully review the entire record in the case. This means that he must re-consider the totality of all the evidence including evidence submitted at the initial hearing related to safety complaints and animus such as the

[4] When reviewing a Judge's evidentiary rulings, the Commission applies an abuse of discretion standard. *Mark Gray v. North Fork Coal Corp*., 35 FMSHRC 2349, 2356 (Aug. 2013) *citing Pero v. Cyprus Plateau Mining Corp*., 22 FMSHRC 1361, 1366 (Dec. 2000). Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Twentymile Coal Company*, 30 FMSHRC 736, 765 (Aug. 2008).

[5] The Secretary contends that the evidence regarding the layoff would show that the operator's layoff procedure was used to rid the mine of safety complainers. Tr. 24; Secy's Pet. For Discretionary Review at 17-18. Specifically, the Secretary asserts that he can prove that the operator began hiring new miners a week or two after its April 2015 layoff of 23 miners, including Jones. The Secretary also asserts that he can prove that, despite Kingston's public explanation that the layoff was necessitated by mining conditions, Kingston ultimately hired 21 new miners by August 2015. *Id*. Such evidence is relevant to a showing of hostility or animus to the protected activity.

asserted isolation of Jones by Laverty[6] and any other evidence that, in conjunction with the newly introduced evidence, bears upon the Secretary's position that the claim is not frivolous.

III.

Conclusion

For the reasons stated above, we vacate the Judge's decision, reverse it in part, and remand the matter in part to the Judge for further proceedings consistent with this opinion.

/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

[6] In this regard, the Judge's decision did not deal explicitly with Jones' key assertion that Laverty isolated him in response to Jones going over Laverty's head. We note Jones' testimony that after an occasion when he went to Shrewsbury over Laverty's head, Laverty began having him work in isolation and did not assign other electricians to work in isolation. Tr. 49-50, 53-54. The Judge should explain the role such testimony by Jones plays in his analysis.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
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November 5, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CML METALS CORPORATION	Docket No. WEST 2014-347-M A.C. No. 42-01927-317091

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. (2012) ("Mine Act"). On January 31, 2014, the Commission received from CML Metals Corporation ("CML") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 27, 2013, and became a final order of the Commission on April 26, 2013. CML implies that its delay in filing the motion to reopen was due to the lack of a designated "safety person" at the company who would be responsible for communicating with MSHA regarding contests of cited violations. Instead,

different individuals handled safety matters during different periods of time. However, the operator asserts that it now has a designated "full time safety person" who will, presumably, be responsible for all future contests of violations cited by MSHA.

The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on June 11, 2013, and the case was referred to the U.S. Department of Treasury for collection on October 24, 2013.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). Here, the operator's lack of a designated safety person to handle matters related to MSHA enforcement represents an inadequate internal processing system, and fails to establish good cause for reopening a final order.

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

Accordingly, we deny CML's motion.

/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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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November 17, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	
v.	Docket No. LAKE 2014-738-M A.C. No. 12-00064-355402
BUZZI UNICEM USA	

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 19, 2014, the Commission received from Buzzi Unicem USA ("Buzzi") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on July 11, 2014, and became a final order of the Commission on August 11, 2014. Buzzi asserts that it mistakenly assumed that the contest was filed at the same time it submitted a partial payment for the uncontested penalties. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed. In addition, the Secretary reminds Buzzi that contests should be sent to MSHA's Civil Penalty Compliance Office in Arlington, Virginia, not its Payment Processing Center in St. Louis, Missouri.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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November 17, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. RIVERSTONE GROUP, INC.	Docket No. LAKE 2015-58-M A.C. No. 11-03208-359790

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 15, 2014, the Commission received from RiverStone Group, Inc. ("RiverStone") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 8, 2014, and became a final order of the Commission on October 8, 2014. RiverStone asserts that the proposed assessment was misplaced, which resulted in a 1-day late filing of its contest. RiverStone further notes that it promptly filed a motion to reopen with the Commission. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 17, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. M-CLASS MINING LLC,	Docket No. LAKE 2015-124 A.C. No. 11-03189-363588

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On November 19, 2014, the Commission received from M-Class Mining LLC ("M-Class") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 10, 2014, and became a final order of the Commission on November 10, 2014. M-Class asserts that it inadvertently placed the contest in this case with another pending MSHA matter, and that this mistake resulted in the contest being filed three days late. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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November 17, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. GEORGETOWN SAND & GRAVEL, INC.	Docket No. PENN 2014-944-M A.C. No. 36-05205-353996

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

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

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

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

[1] Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 25, 2014, and became a final order of the Commission on July 25, 2014. Georgetown asserts that it intended to contest the proposed assessment but attributes its failure to timely file on a series of personnel issues. Georgetown states that it has implemented new office procedures for receiving and maintaining MSHA related paperwork. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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November 17, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. CEMEX CONSTRUCTION MATERIALS, LP	Docket No. WEST 2014-1032-M A.C. No. 04-03623-358103

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 19, 2014, the Commission received from Cemex Construction Materials, LP ("Cemex") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 14, 2014, and became a final order of the Commission on September 15, 2014. Cemex asserts that a temporary reduction in administrative staff caused the contest not to be timely processed. Upon discovering that the proposed assessment had not been contested, Cemex avers that it immediately filed its motion to reopen. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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November 17, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. LM HEAVY CIVIL CONSTRUCTION, LLC,	Docket No. YORK 2014-197-M A.C. No. 19-01245-353914

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 11, 2014, the Commission received from LM Heavy Civil Construction, LLC ("LM") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 25, 2014, and became a final order of the Commission on July 25, 2014. LM asserts that it failed to timely file a contest due to a misunderstanding regarding correspondence from MSHA in another matter and that it filed the motion to reopen upon receipt of MSHA's delinquency notification dated September 9, 2014. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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November 30, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Docket No. CENT 2014-417-M A.C. No. 23-00409-344048
v.	Docket No. CENT 2014-418-M A.C. No. 23-00457-344049
THE DOE RUN COMPANY	Docket No. CENT 2014-419-M A.C. No. 23-01800-344050
	Docket No. CENT 2014-420-M A.C. No. 23-00458-344053

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 6, 2014, the Commission received from The Doe Run Company ("Doe Run") a motion seeking to reopen four penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[2]

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

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

[1] Commissioner Cohen has elected not to participate in this matter.

[2] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2014-417-M, CENT 2014-418-M, CENT 2014-419-M, and CENT 2014-420-M, which are all captioned The Doe Run Company, and involve similar procedural issues. 29 C.F.R. § 2700.12.

observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that two of the proposed assessments were delivered on February 28, 2014, and the other two proposed assessments were delivered on March 3, 2014. The former two assessments became final orders of the Commission on March 31, 2014, and the latter two proposed assessments became final orders on April 2, 2014. Doe Run asserts that it contested these four proposed assessments on April 4, 2014, after the proposed assessments had already become final orders. The Secretary opposes the request to reopen, noting that the operator does not dispute that it failed to timely contest the proposed assessments. The Secretary also notes that the safety director who received the proposed assessments had been the safety director of the company for the past six months and should have been familiar with the penalty and contest procedures.

We note that the evidence indicates that the four proposed assessments at issue were contested on or around April 4, 2014, a few days after the proposed assessments became final orders. Given this close temporal proximity, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen
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November 30, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. HUECO QUARRY, INC.	Docket No. CENT 2014-452-M A.C. No. 41-04347-332424

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 24, 2014, the Commission received from Hueco Quarry, Inc. ("Hueco") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 24, 2013, and became a final order of the Commission on October 24, 2013. MSHA sent a delinquency notice on December 9, 2013. Hueco asserts that while it timely mailed the contest of the proposed assessment on October 4, 2013, the contest was mistakenly mailed to MSHA's payment processing center in St. Louis, Missouri rather than to MSHA's civil penalty compliance office in Arlington, Virginia. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen
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November 30, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. U.S. COATING APPLICATORS, LLC,	Docket No. LAKE 2014-576-M A.C. No. 21-03404-345801 7JQ

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

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

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

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

[1] Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was mailed on March 18, 2014 and was returned undelivered. MSHA re-mailed the proposed assessment on April 7, 2014 and it was delivered on April 12, 2014. The proposed assessment became a final order of the Commission on May 12, 2014. U.S. Coating asserts that it failed to timely contest the proposed assessment because it did not receive it. U.S. Coating further asserts that the USPS tracking document confirms that it did not sign for the proposed assessment. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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William I. Althen, Commissioner

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November 30, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. JIM REEVES, employee of RODEO CREEK GOLD, INC.	Docket No. WEST 2014-83-M A.C. No. 26-02535-289894 A

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On November 26, 2013, the Commission received a motion seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that appeared to have become a final order of the Commission.

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered to Hollister mine, operated by Rodeo Creek Gold, Inc. on May 23, 2012. Mr. Reeves was cited for a violation while he was a crew shift foreman at this mine. The proposed assessment appeared to become a final order of the Commission on June 22, 2012. Mr. Reeves asserts that he never personally received the proposed assessment. The Secretary concedes that the proposed assessment may not have been successfully served on Mr. Reeves. Therefore, the Secretary does not oppose the request to reopen.

[1] Commissioner Cohen has elected not to participate in this matter.

Having reviewed Mr. Reeves' request and the Secretary's response, we conclude that the proposed penalty assessment may not have become a final order of the Commission, because Mr. Reeves may not have personally received the proposed assessment. *See* 29 C.F.R. § 2700.26 ("[a] person has 30 days after receipt of the proposed penalty assessment within which to notify the Secretary that he contests the proposed penalty assessment.") Accordingly, Mr. Reeves' motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 9, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2014-236-M A.C. No. 54-00447-344931
v.	
EMPRESAS MUNDO REAL, INC., Respondent	Cantera Mundo Real

ORDER GRANTING THE SECRETARY'S MOTION FOR SUMMARY DECISION
ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION
ORDER TO PAY CIVIL PENALTY

Before: Judge Manning

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 Empresas Mundo Real, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). Respondent operates a crushed limestone quarry in Puerto Rico. Before the case was assigned to me, the parties filed cross-motions for summary decision. The parties agreed to 13 stipulated facts, presented the deposition transcripts of three individuals, and provided other documents. The parties both assert that no material facts are in dispute. The only issue in dispute in this case is whether MSHA had jurisdiction to issue the subject order of withdrawal.

After the case was assigned to me, I ordered the parties to file supplemental briefs to address issues that were not discussed in their cross-motions. For reasons that follow, the Secretary's motion is **GRANTED** and Respondent's motion is **DENIED**.

I. BACKGROUND

On January 7, 2014, MSHA Inspector Isaac E. Villahermosa issued Order No. 8733455 to Respondent under section 104(g)(l) of the Mine Act, 30 U.S.C. § 814(g)(1), alleging a violation of section 46.7(a) of the Secretary's safety standards. 30 C.F.R. § 46.7(a). The order states, in part:

> A miner had not received appropriate task training before being assigned to use the Grove Model RT625 crane. The miner had experience operating another crane. The mine operator was aware of the part 46 training requirements.

Inspector Villahermosa determined that an injury was unlikely, that the violation was not of a significant and substantial ("S&S") nature, but that any injury could reasonably be expected to be fatal. He determined that Respondent's negligence was high and that one person would be affected. Section 46.7(a) provides, in part, that every mine operator "must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned[.]" The Secretary proposed a penalty of $212.00 for this order.

II. STIPULATED FACTS

1. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings pursuant to section 105(d) of the Mine Act, 30 U.S.C. § 815(d).
2. Respondent Empresas Mundo Real was/is a mine within the meaning of Section 4 of the Federal Mine Safety and Health Act, 30 U.S.C. § 804, and has/had products which entered interstate commerce and/or operations or products which affected interstate commerce within the meaning of § 4 at the time of the violation alleged in the citation. Respondent operates a crushed stone mine in Isabela, Puerto Rico.
3. Respondent Empresas Mundo Real was/is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 et seq. at the time of the violation alleged in the citation.
4. Santiago Varela is the President of Empresas Mundo Real.
5. Eddie Cajigas has worked for Empresas Mundo Real for twelve years as a welder and maintenance person at the mine's quarry. Mr. Cajigas supervisor is Jorge Crespo.
6. On November 2013, Empresas Mundo Real rented a "Grove" crane. The crane was used to assist in the construction of a silo and concrete plant at the mine. Respondent intended to use the silo and concrete plant to store sand and gravel and manufacture concrete. Eddie Cajigas and other mechanics repaired the crane before Respondent put it in service. Thereafter, Mr. Varela instructed Mr. Cajigas to operate the crane to collect materials - beams, channels and angle irons - that would be used to build the concrete plant.
7. Due to adverse economic conditions in Puerto Rico at the time of the construction of the silo and concrete plant, Respondent only operated its Quarry three days each week; Mr. Cajigas worked in the Quarry those three days. On the remaining two days each week, Mr. Cajigas worked on the construction of the silo and concrete plant. He did so between November 2013 and August 2014.
8. Santiago Varela supervised Mr. Cajigas at the construction site. Mr. Cajigas received one pay check for working both places.
9. Empresas Mundo Real did not train Mr. Cajigas to operate the "Grove" crane before it instructed him to do so.
10. On or about January 7, 2014, MSHA Inspector Isaac Villahermosa conducted an inspection of Respondent's Cantera Mundo Real Mine.
11. At the end of his inspection, Mr. Villahermosa issued one citation which alleged that respondent violated 30 C.F.R. § 46.7(a) because it did not provide appropriate task training to Mr. Cajigas before it assigned him to operate the "Grove Crane." The agency assessed a penalty of $212.00 for the violation. Respondent timely contested the citation.
12. Empresas Mundo Real trained Mr. Cajigas to operate the "Grove" crane on January 9, 2014.

13. In the interest of judicial economy, the parties hereby request that the Court resolve this citation via Motions for Summary Judgment.

III. SUMMARY OF PARTIES' ARGUMENTS

On February 25, 2015, the Secretary filed a Motion for Summary Judgement and Memorandum of Law in Support of the Motion in which he argued that no material facts were in dispute, that Respondent's mechanic, Eddie Cajigas, was a miner, and that Respondent did not train Cajigas in the operation of its "Grove" crane before assigning him to operate it, thereby violating section 46.7(a) of the Secretary's regulations. Sec'y Mot. 1. The Mine Act defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g); Sec'y Memo. 4-5. The Secretary asserted that, because Cajigas' was working to construct the silo and concrete plant "at the mine," he was a "miner" under the Act. Sec'y Memo. at 5; Jt. Stip. 6. According to the Secretary, "Respondent intended to use the silo and concrete plant to store sand and gravel – which it extracted from its quarry – and to manufacture concrete." *Id*. Further, Crespo and Varela supervised Cajigas while he worked at the construction site and Cajigas was issued one paycheck for his work at the quarry and construction site. Sec'y Memo. 5-6. Given that Respondent had stipulated that Cajigas was not trained in the operation of the crane before he was tasked with operating it, the Secretary argued that Respondent violated section 46.7(a) which requires, in pertinent part, that every mine operator "must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned[.]" 30 C.F.R. § 46.7(a); Sec'y Memo at 6. Finally, the Secretary argued that the proposed penalty of $212.00 is appropriate and should be affirmed. Sec'y Memo 6-7.

On March 14, 2015, Respondent filed a responsive Motion for Summary Judgement in which it argued that the concrete plant being constructed did not come within the Act's definition of a "mine." Empresas Mot. 1-3. Respondent cited the "MSHA/OSHA Interagency Agreement" for the proposition that the concrete plant under construction was separate from the mine and came under the jurisdiction of the Occupational Safety and Health Administration ("OSHA") and not MSHA. *Id*. at 3. Respondent argued that training under the cited standard was not required because MSHA did not have jurisdiction over the concrete plant and the order should be vacated.

This case was assigned to me on September 3, 2015. On September 17, 2015, I issued an Order to File Supplemental Briefs in which the parties were instructed to address the following issues. First, does the evidence provided establish that Respondent was constructing a batch plant, as that term is used in the Interagency Agreement, on the same property as the Cantera Mundo Real? Second, if a batch plant is generally considered by the Department of Labor to be under the jurisdiction of OSHA whether or not located on mine property, would the batch plant being constructed be subject to OSHA jurisdiction once it is completed? Third, is the construction of a concrete batch plant at a mine site subject to OSHA or MSHA jurisdiction? Fourth, should the fact that Cajigas worked at the quarry and also operated the crane at the batch plant being constructed affect the outcome of this case?

The Secretary, in his Supplemental Memorandum of Law in Support of the Motion, argues that the Interagency Agreement makes clear that OSHA's jurisdiction over a concrete batch plant commences only after the completion of construction of the plant and the arrival of

sand and gravel or aggregate at the plant's stockpile. Sec'y Supp. Memo. at 2-3. Because it is undisputed that a concrete batch plant at the mine site was only under construction, OSHA did not have jurisdiction. *Id*. at 1-2. The language of the Interagency Agreement provides that MSHA retains jurisdiction over employee safety and health at mines during the construction of concrete batch plants at mine sites. *Id*. at 3. Moreover, the Secretary points to the legislative history of the Act and Commission case law which states that jurisdictional doubts should be resolved in favor of coverage by the Mine Act. *Id*. at 4. The Secretary again argues that Cajigas was a miner because he was working at the mine and, in the alternative, that he was a construction worker at a mine and was covered by the Mine Act. *Id*. at 4-7. Finally, the Secretary asserts that Respondent exposed its employees to potentially serious injuries through Cajigas' operation of the crane. *Id*. at 8. In support, the Secretary asserts that when the crane arrived on site it was stored in the mine's maintenance area for three to four months and then, at some point, Respondent's mechanics assisted Cajigas in repairing and testing the crane to make sure that it was working before Cajigas moved the crane from the mine's maintenance area to the construction site where it was used to construct the concrete batch plant. *Id*. at 7-8 (citing Varela Depo.; Tr. 14-18, and Cajigas Depo Tr. 20).

Respondent, in its Supplemental Memorandum concedes that the batch plant was under construction but argues that, because there was no extraction of material from the earth nor milling of that material at the construction site, MSHA did not have jurisdiction. Empresas Supp. Memo. 1. Moreover, Respondent argues that the Interagency Agreement unambiguously states that concrete batch plants come within OSHA's jurisdiction and not MSHA's. *Id*. at 2. Further, Respondent argues that it would be illogical to grant jurisdiction to MSHA during the construction of the batch plant, since it would impose two distinct sets of safety guidelines on the plant: one during the construction phase and one during operation of the plant. *Id*. Finally, Respondent argues that the fact that Cajigas was an employee of the quarry should have no bearing on the question of jurisdiction over the construction site. *Id*. at 3.

IV. DISCUSSION AND ANALYSIS

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

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

29 C.F.R. § 2700.67(b). The Commission has long recognized that "'summary decision is an extraordinary procedure.'" *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981)). The Commission has also analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *See Also Energy West*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Cartrett*, 417 U.S. 317, 237 (1986)).

I find that the construction site was subject to MSHA jurisdiction. It is undisputed that Respondent's Cantera Mundo Real Mine is a "mine" within the meaning of the Act and is subject to the jurisdiction of MSHA and that the construction of the silo and concrete batch plant occurred "at the mine." Jt. Stips. 2, 3, 6. MSHA has jurisdiction over the extraction of material from the earth and the milling of that material to obtain the desired product. Because what constitutes milling, as opposed to manufacturing, is not always clear, MSHA and OSHA have entered into an agreement which provides guidance concerning the boundary between the two agencies' jurisdiction. MSHA/OSHA Interagency Agreement, 44 Fed. Reg. 22827 (Apr. 17, 1979), amended by 48 Fed. Reg. 751 (Feb. 22, 1983) ("Interagency Agreement").

The Interagency Agreement explicitly states that concrete batch plants, "whether or not located on mine property," are subject to OSHA jurisdiction. *Id*. at ¶B.6. However, Appendix A to the agreement, in a section under the heading "MSHA Authority Ends - OSHA Authority Begins," states that, for concrete ready-mix or batch plants, OSHA regulatory authority "commences after arrival of sand and gravel or aggregate at the stockpile." *Id*. at Appendix A. The Secretary asserts, and I agree, that the language in Appendix A of the agreement makes clear that a "triggering event" must occur for MSHA authority to end and OSHA authority to begin, namely the arrival of sand, gravel or aggregate at the batch plant stockpile. Accordingly, I find that, consistent with Interagency Agreement, until such triggering event occurs, MSHA retains authority. Here, the proposed plant was located on mine property, was still under construction, and the event which would have triggered OSHA jurisdiction had not yet occurred. It is the operation of batch plants that is subject to OSHA jurisdiction under the Interagency Agreement.

While Respondent argues that it would be illogical to impose two different sets of safety guidelines over the area based upon whether the plant was under construction versus when it was in operation, I find that the Interagency Agreement does just that. It is undisputed that the plant was being built "at the mine." Jt. Stip. 6. The fact that the plant was being built at the mine certainly lends credibility to the Secretary's concern that individuals constructing the plant would be exposed to mining hazards. While Respondent may disagree with the Secretary's determination as to when jurisdiction begins and ends, I find the Secretary's determination that "MSHA retains jurisdiction over employee health and safety at mines during the construction of concrete batch plants" to be reasonable.[1] Sec'y Supp. Memo. at 3. Accordingly, I find that MSHA had jurisdiction over the construction site and crane at the time the order was issued. In reaching this finding I am mindful of Congress' direction that "what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the [Mine] Act." S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

[1] Moreover, I note that at the direction of Varela, Cajigas drove the crane from in front of the mine office where the mine parks all its equipment to the construction site. (Cajigas Depo. Tr. 20; Varela Depo. Tr. 16-17). Employees were exposed to hazards when the crane was operated by Cajigas, both in the moving of the crane to the construction site and the use of the crane at the construction site.

The record does not disclose the distance between the construction site and the quarry/plant site but they were all on the same area of land. The parties stipulated that Respondent was constructing a "silo and concrete plant *at the mine*." Jt. Stip. 6 (emphasis added); (Varela Depo. Tr. 49-50).

I find that Cajigas was, without question, a "miner" both as that term is defined in the Act and as used in the cited regulation. The Act defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). Cajigas was clearly working at the mine. The parties stipulated that Cajigas was a welder and maintenance person at the quarry, and repaired and operated the crane while working to construct the batch plant. Jt. Stips. 5, 7. Moreover, section 46.2(g)(1) defines a "miner" as "[a]ny person, including any operator or supervisor, who works at a mine and who is engaged in mining operations. This definition includes independent contractors and employees of independent contractors who are engaged in mining operations; and . . . [a]ny *construction worker* who is exposed to hazards of mining operations." 30 C.F.R. § 46.2(g)(1) (emphasis added).

Respondent did not challenge the merits of the order and acknowledged that Cajigas had not been provided training as required by section 46.7(a). Jt. Stip. 9. The Secretary, in his motion and memo, set forth facts in support of his proposed penalty of $212.00. Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Respondent had a history of eight violations during the 15 months preceding the issuance of the subject citation. (Exhibit A to Petition for Assessment of Civil Penalty). Respondent is a small operator and worked only 19,272 hours. *Id*. The Secretary designated the negligence as "high" because Crespo told Varela that Respondent should train Cajigas how to operate the crane before it assigned him to do so, but Varela forgot to do so. Sec'y Mot. 7 (citing Exhibit 1 of Motion, Villahermosa Declaration). The Secretary determined that an injury was unlikely because Cajigas had received training on other cranes; however, if a miner were struck by a load being transported, the Secretary determined that the injury could reasonably be expected to be fatal. Sec'y Mot. 7. The Secretary determined that, because Respondent failed to train Cajigas despite being told to do so, the violation was not abated in good faith. *Id*. I note however, that Respondent fully trained Cajigas on January 9. Finally, the Secretary asserted that Respondent could not "reasonably contend that a $212 penalty would adversely affect its ability to remain in business." *Id*. Respondent did not challenge the inspector's findings regarding gravity, negligence, or the other penalty criteria in either its answer, its responsive motion for summary decision, or supplemental memorandum. I conclude that the Secretary's proposed penalty of $212.00 is appropriate.

V. ORDER

The Secretary's Motion for Summary Decision is **GRANTED**. Respondent's Motion for Summary Decision is **DENIED**. Order No. 8733455 is **AFFIRMED** as issued. Empresas Mundo Real is **ORDERED TO PAY** the Secretary of Labor the sum of $212.00 within 30 days of the date of this order.[2]

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 17, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2014-0062 A.C. No. 11-03058-335119
v.	
WHITE COUNTY COAL, LLC, Respondent	Mine: Pattiki Mine

DECISION AND ORDER
DECISION APPROVING SETTLEMENT

Appearances: Daniel R. McIntyre, Esq., Office of the Solicitor, Department of Labor, Denver, Colorado for Petitioner

Tyler H. Fields, Esq., Alliance Coal, LLC, Lexington, Kentucky for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), against White County Coal, LLC (Respondent) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(d).[1] The Secretary has proposed a total civil penalty of $13,587 for the six alleged violations of mandatory safety standards still at issue. P. Ex. 18 (Exhibit A, Docket No. LAKE 2014-0062).

The primary issues before me are: (1) whether the Secretary's gravity and negligence determinations in Citation Nos. 8451616, 8449462, 8449464, and 8451627 are appropriate; (2) whether the Secretary's negligence determinations in Citation Nos. 8451620 and 8451626 are

[1] Prior to hearing, the parties agreed to settle 31 of the 37 citations at issue in Docket No. LAKE 2014-0062. ALJ Ex. 1. My Decision Approving Settlement is set forth in Section V. Citation Nos. 8451616, 8451620, 8451626, 8451627, 8449462, and 8449464 were left for hearing.

appropriate; and (3) whether the Secretary's proposed civil penalties are appropriate for all six citations at issue.

An evidentiary hearing was held March 11-12, 2015, in Henderson, Kentucky. Witnesses were sequestered. The parties presented testimony and documentary evidence, and filed post-hearing briefs.[2] For the reasons set forth herein, I affirm the six citations, as written, and assess the proposed penalties after independent assessment of section 110(i) criteria. On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the post-hearing briefs, I find and order the following:

II. Stipulations

At hearing, the parties agreed to the following stipulations:

1. White County was at all times relevant to these proceedings engaged in mining activities at the Pattiki Mine in White County, Illinois.

2. White County's mining operations affect interstate commerce.

3. White County is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* (the "Mine Act").

4. White County is an "operator" as that word is defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the mine where the contested citations in these proceedings were issued.

5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Act.

6. On the dates the citations in these dockets were issued, the issuing MSHA coal mine inspectors were acting as a duly authorized representatives of the United States Secretary of Labor, assigned to MSHA, and were acting in their official capacities when conducting the inspection and issuing the MSHA citations.

7. The citations at issue in these proceedings were properly served upon White County as required by the Act.

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[2] Petitioner Exhibits (P. Exs.) 1-22 were received into evidence. P. Ex. 5A was subject to in-camera review, found to be protected by the deliberative privilege process, sealed, and placed in the rejected exhibit file for Commission review on appeal, if necessary. Tr. 496-97, 615. Respondent's Exhibits (R. Exs.) 1-15 were received into evidence.

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

8. The citations at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing their issuance. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties.

9. The certified copy of the MSHA Assessed Violations History reflects the history of the citation issuances at the Pattiki Mine for 15 months prior to the date of the first citations in these proceedings and may be admitted into evidence without objection by White County.

10. White County demonstrated good faith in abating the violations.

11. During 2012, the Pattiki Mine produced 2,380,484 tons of coal.

12. The penalties proposed by the Secretary in this case will not affect the ability of the Respondent to continue in business.

P. Ex. 16; P. Br. 2-3.

III. Principles of Law

A. 30 C.F.R. § 75.202(a) – Protection from falls of roof, face and ribs

Section 75.202(a) requires operators to support or otherwise control the roof, face, and ribs of areas where persons work or travel to protect those persons from hazards related to falls of the roof, face or ribs and coal or rock bursts. 30 C.F.R. § 75.202(a). In order to prove a violation of 30 C.F.R. §75.202(a), well-settled Commission case law holds 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 purpose of the standard, would have provided in order to meet the protection intended by the standard." *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987). *See also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998) (citing *Helen Mining Company*, 10 FMSHRC 1672, 1674 (Dec. 1988).

B. 30 C.F.R. § 75.370(a)(1) – Mine ventilation plans; submission and approval

Section 75.370(a)(1) requires operators to develop and follow an approved ventilation plan that is designed to control methane and respirable dust, and that is suitable to the mine's conditions and the mining system used. 30 C.F.R. § 75.370(a)(1). The terms of an approved ventilation plan are enforceable as mandatory standards under the Act. *Zeigler Coal Co., Kleppe*, 536 F.2d 398 (D.C. Cir. 1976); *see also Peabody Coal Co.*, 16 FMSHRC 2199, 2203 (Nov. 1994) (affirming ALJ's conclusion that a ventilation plan is violated when an operator does not follow its specific terms).

C. 30 C.F.R. § 75.604(b) – Permanent splicing of trailing cables

Section 75.604(b) requires that when permanent splices in trailing cables are made, they shall be effectively insulated and sealed so as to exclude moisture. 30 C.F.R. § 75.604(b); *see e.g.*, *Black Beauty Coal Co.*, 36 FMSHRC 1821, 1858 (Mar. 2014) (ALJ) ("Assuming the

continuation of normal mining operations, it was reasonably likely that the splice would be further degraded, moisture would get into the splice, and an injury of a reasonably serious nature or a fatality would result."); *see U.S. Steel Mining Co.*, 6 FMSHRC 1573 (July 1984) (recognizing that a tear in the outer jacket of a cable significantly compromises the cable's protective function); *see also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1286 (Dec. 1998) (holding there is a danger of electrocution even if no copper wires are exposed).

D. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See* e.g., *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that an assessment of the likelihood of injury is to be made assuming continued normal mining operations, without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

E. Significant and Substantial (S&S)

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). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.")

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was S&S:

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

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

6 FMSHRC 1, 3-4 (Jan. 1984).

The third element of the *Mathies* test often presents difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he 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." (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005)); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996). The S&S evaluation also considers the length of time that the violative condition existed prior to the citation, and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

F. Negligence

Negligence is not defined in the Mine Act. The Commission has provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that:

> Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). *See also JWR Res.* 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated).

The Mine Act imposes a high standard of care on foremen and supervisors. *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) (holding that "a foreman … is held to a high standard of care")); s*ee also Capitol Cement Corp.,* 21 FMSHRC 883, 892-93 (Aug. 1999) ("Managers and supervisors in high positions must set an example for all supervisory and

nonsupervisory miners working under their direction, " *quoting Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *S&H Mining, Inc*., 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

Although MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co*., ____ FMSHRC ___, slip op. at 4 (Sept. 16, 2015), MSHA defines negligence by regulation in the civil penalty context as follows:

> 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. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care, When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. . . .

30 C.F.R. § 100.3(d). Thus, mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). The level of negligence is properly designated as high 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, Table X. The level of negligence is properly designated as moderate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id*. The level of negligence is properly designated as low when there are *considerable* mitigating circumstances surrounding the violation. *Id*. (emphasis added).

Recently, the Commission held that Commission judges are not required to apply the level-of-negligence definitions in Part 100 and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *See Brody Mining, LLC*, ___ FMSHRC ___, slip op. at 13 (Aug. 25, 2015). Moreover, because Commission judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to a specific evaluation of potential mitigating circumstances, and may find "high negligence," in spite of mitigating circumstances, or moderate negligence, without identifying mitigating circumstances. *Id.* In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Id*., *citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998). Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly "mitigating" circumstances, and instead may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Id.*

G. Penalty Assessment

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary's penalty regulations and assessment formula as a reference point that provides useful guidance when assessing a civil penalty. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 2014) (ALJ); *see also Wade Sand & Gravel, supra,* slip op. at 7, n. 1 (Chairman Jordan and Commissioner Nakamura concurring). *See also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding agency's interpretation of its own regulation should be given controlling weight unless it is plainly erroneous or inconsistent with the regulation). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Unique aggravating or mitigating circumstances will be taken into account and may call for higher or lower penalties that diverge from this paradigm. My independent penalty assessment analysis applies to each of the six citations at issue.

IV. Findings of Fact and Legal Analysis

A. General Background

The Pattiki Mine, I.D. No. 11-03058, is operated by White County Coal, LLC and is located in White County near Carmi, Illinois. Tr. 226-27. The Pattiki Mine liberates enough methane to be considered a "gassy" mine, and therefore undergoes five-day spot inspections by MSHA. Tr. 226-27. White County mines coal from the Springfield and Herrin seams that are prevalent throughout Southern Illinois and Indiana. *Id*. Coal is mined on two shifts daily, five days a week, with an annual production of more than 2,000,000 tons. P. Ex. 1. The first and second shifts operate from 7:00 a.m. to 3:00 p.m. and from 3:00 p.m. to 11:00 p.m., respectively. Tr. 58, 110, 167. The third shift conducts maintenance from 11:00 p.m. until 7:00 a.m. Major repairs are conducted during third shift. Tr. 132.

The six citations litigated at hearing were issued by two inspectors on four different calendar days. P. Exs. 2, 4, 6, 8, 10-11. Five of the citations were issued during EO1 regular health and safety inspections, and one citation was issued during an EO8 non-injury accident investigation for a reported roof fall. *Id*., P. Ex. 4. Respondent concedes that it violated the mandatory safety standards set forth in each citation, but takes issue with the gravity and negligence determinations in Citation Nos. 8451616, 8449462, 8449464, and 8451627. R. Br. 26, 38, 46. Respondent disputes only the negligence determinations in Citation Nos. 8451620 and 8451626. R. Br. 37, 46.

B. Findings of Fact for Ventilation Citation No. 8451616

On August 21, 2013, at 10:00 a.m., MSHA inspector Chad Lampley issued Citation No. 8451616 alleging a violation of 30 C.F.R § 75.370(a)(1) because Respondent failed to maintain airflow in the proper direction along the unit No. 3 1st belt line in violation of the approved ventilation plan.[4] The cited regulation provides: "The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." 30 C.F.R. § 75.370.

The Citation states:

> The operator did not comply with [the] approved ventilation plan on Unit #3. When checked with chemical smoke, air along the Unit #3 and Unit #3 1st belt conveyor was not moving in the proper direction. Directional movement was tested at multiple locations along both conveyor belts, resulting in outby movement. The operators [sic] approved ventilation plan depicts air travel in the inby direction when using a return stopping line belt vent. A return line vent is present at crosscut #6.

P. Ex. 2.

Lampley determined that an injury or illness was reasonably likely to occur, that the injury could reasonably result in lost workdays or restricted duty, that two people were affected, and that the Respondent's negligence was moderate. *Id*. The Secretary proposed a civil penalty in the amount of $1,657. P. Ex. 18.

Lampley designated Citation No. 8451616 as significant and substantial ("S&S") primarily because he had written Citation No. 8451615 as an S&S violation involving multiple accumulations in contact with the moving Unit #3 1st belt conveyor that were reasonably likely to result in a lost workdays or restricted duty injury to two persons as a result of moderate negligence. Tr. 258-60; *see* P. Ex. 22. In settlement, Respondent accepted Citation No. 8451615, as written, thereby admitting the violation. ALJ Ex. 1.

Respondent contends that the S&S designation for Citation No. 8451616 was improper because Petitioner has not proven the third *Mathies* element as redundant safety measures were in place. Respondent characterizes the hazard contributed to by the violation as "delayed notification of a fire on the belt line." R. Br. 26. Petitioner counters that exposure to smoke

[4] Lampley has inspected coal mines with MSHA for approximately eight years. Tr. 221. Lampley earned a Bachelor's degree in Applied Sciences from Southern Illinois University, worked briefly at Galatia Mine, and subsequently attended and completed all required Mine Academy training for MSHA in Beckley, WV. Tr. 223-24. Lampley routinely undergoes refresher training to maintain competency on all standards of enforcement, electrical systems, and journeyman training requirements. Tr. 224. I find him to be an exceptionally knowledgeable and credible inspector.

from a fire is the hazard contributed to by the violation, which will result in an injury. Tr. 299, 483; P. Br. 26. Respondent argues none-the-less, that carbon monoxide ("CO") sensors in place at the time of the citation would detect a fire, regardless of placement and airflow. R. Br. 27. Furthermore, Respondent asserts that the moderate negligence determination should be reduced to low negligence because considerable mitigating circumstances were present at the time the citation was issued. R. Br. 33.

The record established that White County changed mining direction, and conducted a belt move "a couple days before" Citation Nos. 8451615 and 8451616 were issued. Tr. 209. The change in location and direction of mining did not allow enough room for White County to emplace the return belt vent regulator as approved in the ventilation plan and map. Tr. 277, 282; P. Exs. 3, 15.[5] The return belt vent regulator was positioned to move air inby, but was actually moving air outby. Tr. 267-68; P. Ex. 3 at 11. An intake air belt vent would have been appropriate for the direction that the air was moving, and would have complied with the ventilation plan. *Id*. Alternatively, White County could have moved the location of the regulator to the intake side of the belt. P. Ex. 14 at 41-43.

After conducting the belt move, White County installed additional check curtains between entries 5 and 6, and between cross-cuts 6, 7, and 8. Tr. 277. These curtains were not permitted by the ventilation plan. *Id*. The unauthorized check curtains combined with the improper location of the return belt vent regulator caused the airflow to course in the wrong direction. Tr. 277-79. Lampley credited White County for not deliberately causing the reverse airflow because the conditions resulted from the change in mining direction. Tr. 279, 282.

Less than two hours before issuing Citation No. 8451616, Lampley observed three distinct areas of accumulations along the same belt line. P. Ex. 22. Citation No. 8451615 states:

> Accumulations of loose coal and coal fines are present along the Unit #3 1st belt conveyor off the 9th 48. Accumulations are present in multiple areas along the belt, and in contact with the moving belt at crosscut #9 and crosscut #4. Accumulations of loose coal measuring 9 feet in length, 4 feet in width and 2 feet in height, are present at the crosscut #9 transfer point. Accumulations of dry black coal fines are in contact with a turning roller at crosscut #4. Piles of fines under bottom rollers are present between crosscuts #2 and #3. A pile of coal fines are [sic] present under the head pulley.

Id.

[5] P. Ex. 3 at 10 is a generalized view of the approved ventilation plan. P. Ex. 3 at 11 represents the actual equipment locations the day Citation No. 8451616 was issued. Both exhibits were utilized at hearing to highlight and compare the approved ventilation plan with the actual emplacement of equipment.

1. S&S Analysis

Since White County concedes the first, second, and fourth *Mathies* elements for Citation No. 8451616, my analysis focuses on the third *Mathies* element. R. Br. 26.

As noted, Citation No. 8451615 was settled as an S&S prior to hearing. ALJ Ex. 1; Tr. 534, 615. Respondent admitted this violation per paragraph 11 of the Motion to Approve Partial Settlement and Order Payment. Lampley determined that the observed accumulations that had been cited in Citation No. 8451615 were in contact with the belt line and therefore constituted "a friction ignition source." Tr. 409; P. Ex. 22. Thus, Citation No. 8451615 is a crucial link for Petitioner's S&S determination with respect to Citation No. 8451616.

The accumulations cited in Citation No. 8451615 are significant because the observed accumulations were upwind of the emplaced carbon monoxide ("CO") sensors required by the ventilation plan. Tr. 211. The Matrix S1000 CO sensors that White County utilizes are required to be placed downwind of likely ignition sources. Tr. 603; 30 C.F.R. § 75.1103-4. Placing CO sensors downwind ensures that products of combustion are transported to the sensor. Tr. 290. Fifty feet per minute of air movement sufficiently allows the air to transmit particles of combustion or CO to the sensors along the beltline. Tr. 280. Belt drives, tail pulleys, take-ups, section loading points and transfer points are likely ignition areas that require CO sensor placement to be less than 100 feet downwind. Tr. 292; 30 C.F.R. § 75.1103-4(a)(1). Misplaced sensors can cause a delay in activation, which results in miners being exposed to smoke for longer than necessary in the event of a fire. Tr. 291-92. Exposure to smoke, exacerbated by a delay in notification, is reasonably likely to cause serious injury. *American Coal Co.*, 35 FMSHRC 2208, 2265 (July 2013) (ALJ). Thus, I find the Secretary has established that the violation in Citation No. 8451616 contributed to a smoke hazard in the event of a fire that was reasonably likely to result in a serious lost-time injury as a result of the accumulations found to be S&S in Citation No. 8451615. Accordingly, all four elements of the *Mathies* test have been satisfied and the violation cited in Citation No. 8451616 was properly designated S&S.

2. Negligence Analysis

White County miner, Patrick Yates, was working on the ventilation system prior to Lampley's arrival on the belt line. Tr. 425; R. Ex. 11.[6] Yates took measurements and determined that he had more intake than return air. *Id*. This signaled that something was wrong. *Id*. Yates told Lampley that he made the ventilation changes "last night," on the second shift. Tr. 426. When questioning unidentified miners at the cited location, Lampley was told that the curtains, which contributed to the outby airflow, were hung "the night before." Tr. 304. Lampley further observed the dates, times, and initials ("DTIs") of the previous on-shift examiner, who examined the belt line prior to Lampley's issuance of Citation No. 8451616. Tr. 303.

I find that the curtains were improperly placed on August 20, 2013, sometime between 3:00 p.m. and 11:00 p.m., towards the end of the second production shift. On-shift examinations were required prior to the end of the second shift at 11:00 p.m., and a pre-shift examination was required prior to the beginning of the first production shift at 7:00 a.m. Respondent adduced no

[6] Yates' position at White County was not adduced at the hearing.

evidence that the violation was recorded and rectified. Under the best case scenario for Respondent, the cited condition existed for at least three hours during the first production shift before the citation was issued at 10 a.m. *See* P. Ex. 2.

Additionally, Respondent was aware that this particular area of the mine required more attention than other areas. Tr. 280; R. Ex. 11. Jim Connors, a White County safety representative, recorded Lampley's comments on an internal company document that states: "You guys no [sic] you are struggling for air up here on this end of the mine. You need to do something different. Pat they need to give you some help. Talking to Pat Yates." R. Ex. 11. Thus, Respondent's own exhibit establishes that Respondent's safety department was or should have been on greater alert for ventilation conditions that would adversely affect the health or safety of miners in the cited are of the mine. R. Ex. 11; *see also* 30 C.F.R. § 100.3(d) stating that "an operator is held to a high standard of care" that requires it to be on "alert for conditions or 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."

I conclude that White County knew or should have known of the violation, and acted with moderate negligence in failing to execute its ventilation plan. I credit Lampley's finding that the change in mining direction the previous day created sufficient mitigating circumstances to support a moderate negligence determination. Tr. 303. I affirm the moderate negligence determination. *See Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135-36 (7th Cir. 1995) (ALJ did not abuse discretion in crediting opinion of experienced inspector).

3. Penalty Assessment

The parties stipulated that Respondent is a large operator and that the originally proposed penalty of $1,657 would not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I affirm the Secretary's negligence and S&S determinations. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $1,657 civil penalty against the Respondent for Citation No. 8451616.

C. Findings of Fact for Roof Control Citation No. 8451620

On August 25, 2013, Lampley conducted an EO8 roof fall investigation, and observed the conditions that led to the alleged violation in Citation No. 8451620. P. Ex. 13 at 11; P. Br. 31. The next day, August 26, 2013, at 7:04 p.m., Lampley reduced Citation No. 8451620 to writing and alleged a violation of 30 C.F.R. § 75.202(a) because there were multiple areas of

inadequately supported roof in the Nos. 8 and 9 entries in front of the No. 1 seal route. Tr. 237-38.[7] Citation No. 8451620 states:

> The mine roof is not adequately supported along the Route #1 seals. The following conditions were observed in the return parallel off the 6th 48. When measured bolt spacing between the coal rib and permanent support roof bolts are in excess of [sic] 5 foot in locations along both sides of entry #8 between crosscuts #27 and #26. Supplemental support is needed in entry #9 from crosscut 28 to crosscut 23. An above anchorage fall is present in entry #9 crosscut #27 blocking access to the Route 1 seal #1. Multiple limestone thickness transitions are present through this area, rib/pillar stresses, heaving of the floor/convergence observed on 6 x 6 posts in the area of seal #3.

P. Ex. 4.

Lampley determined that an injury or illness was unlikely to occur, and that if an injury did occur, it would reasonably result in fatality, with one person affected, as a result of Respondent's moderate negligence. *Id*. The Secretary proposed a civil penalty in the amount of $1,304. P. Ex. 18.

Respondent only disputes the moderate negligence determination. Respondent asserts that low negligence is more appropriate because considerable mitigating circumstances were present at the time the citation was issued. R. Br. 33.

The record establishes that on August 25, 2013, at 2:00 a.m., White County mine examiner, Cliff Goff, discovered a four-way intersection roof fall directly in front of route No. 1, seal No. 1, entry No. 9. Tr. 310, 502, 506. White County mine examiners travel entry No. 9 three times per day, once each shift. Tr. 322, 432.

Goff recorded the roof-fall discovery in the pre-shift examination book during his 3:00 a.m. to 7:00 a.m. pre-shift examination on August 25, 2013. R. Ex. 7. Goff reported the roof fall to Greg Thompson, White County's certified "fill-in" mine manager, who then reported the fall to White County safety director, Josh Bell. Tr. 608-09. Thompson reported to Bell that he "had airflow on both sides [of the seal], wasn't picking up excessive amount of methane or harmful gas" from the seal. *Id*. Bell then notified MSHA field office supervisor, Steve Miller, who issued a section 103(j) Order over the phone. *Id.*; Tr. 213, 236-37; P. Ex. 13 at 1. After reporting the fall, Goff continued his pre-shift inspection and utilized the weekly inspected return route to travel to the back side of the fall. Tr. 513.

[7] 30 C.F.R. § 75.202(a) provides: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect the person from hazards related to falls of the roof, face or ribs and coal or coal bursts." 30 C.F.R. § 75.202(a).

Miller verbally issued section 103(j) Order No. 8451619 on August 25, 2013 at 5:15 a.m. P. Ex. 13 at 11. Miller issued the Order because he was unsure whether the No. 1 seal was damaged or remained fully intact. Tr. 310-11. The Order was modified at 5:16 a.m. to allow White County to install additional roof support in the three, unobstructed passageways in front of the No. 1 seal. Three additional crib supports were installed. Tr. 322-25, 431, 547; P. Ex. 13 at 2, 12. Installing the additional supports required miners to travel through entry No. 8. Tr. 323, 548.

Entry No. 8 was not on the examiner's normal route. The operator is not required to monitor that entry. Tr. 433, 517. Entry No. 8 is an active working, but was not required to be examined prior to issuance of the 103(j) Order. Tr. 476-77, 479.

At 5:17 a.m., the 103(j) Order was further modified to allow White County to examine and pump water near the seal. This modification required Respondent to monitor air quality to ensure that the area was safe for miners to work. P. Ex. 13 at 13.

The No. 1 seal was one of five seals in an area that contains approximately 140 to 150 acres of sealed-off, irrespirable air, with 45% methane gas present in the atmosphere. Tr. 312; P. Ex. 13 at 5-7. Air flowing through the area nearest to the first supplemental support contained traces of methane gas. Tr. 330. Thus, MSHA's number one priority was to determine whether the No. 1 seal had been breached. Tr. 331.

Lampley arrived at the mine on August 25, 2013 at approximately 9:20 a.m. He notified White County of his arrival, and modified the section 103(j) Order to a section 103(k) Order. Tr. 307; P. Ex. 13 at 14. Lampley then inspected the roof fall. Tr. 236. He observed eight to 10 feet of rock covering the entire intersection. Tr. 371. Lampley then traveled through the No. 8 entry to observe all sides of the roof fall. P. Ex. 13 at 3.

With regard to the conditions cited in Citation No. 8451620, Lampley first observed "some roof bolts" exceeding the allowed distances from the pillar in the No. 8 entry at cross cuts 26 and 27. Tr. 336, 338; P. Ex. 13 at 5. Roof pressure on the pillars, as a result of the roof fall, caused rib sloughage in the No. 8 entry, which subsequently resulted in roof-bolt spacing outside of allowable tolerances. Tr. 335-36. Lampley determined it could take "a couple of years" for the roof bolts in entry No. 8 to deteriorate to their cited condition. Tr. 336. Lampley denied White County assistant safety director Jay Kittinger's immediate offer to install extra supports and abate the roof-bolt spacing issue. Tr. 435, 484, 542.[8] Kittinger noted that "[o]ur examiners have been allowed to travel through this area over 24 hours before the citation was written." R. Ex. 10 at 2.

[8] Kittinger currently serves as White County's safety director at the Pattiki Mine. R. Br. 10. Kittinger is a 31-year veteran of the mining industry. Tr. 536. Kittinger began his career at White County as a general laborer, moved up to operate face equipment, and then worked as section foreman, third-shift foreman, and day foreman, before transferring to White County's safety department. R. Br. 10.

Lampley testified that he had authority to allow White County to install additional supports, but he did not want to further modify the 103(k) Order without "plans in place" because he was unsure whether the roof fall had breached the No. 1 seal. Tr. 436. Lampley requested Respondent's air sample readings, but was given inaccurate data. Tr. 315, P. Ex. 13 at 8. Lampley then asked for the air sample data that Respondent had recorded in the bound record book, which was more accurate. Tr. 316, P. Ex. 13 at 9.

Lampley balanced the pros and cons of miners installing supplemental support against the risk of contact with noxious air from a possible seal breach. Tr. 437. All personnel underground carry handheld detectors designed to monitor and alert the user to dangerous conditions in the atmosphere. Tr. 332. As noted, however, air readings had already been taken, and Respondent determined that there was not an air-quality hazard in the area around the roof fall, albeit after providing incorrect data to Lampley. Tr. 438-39. Additionally, a seal-monitoring station was set up in the No. 8 entry, to monitor air quality from around the fall. Tr. 438-39, 544.

Lampley next observed abnormal sloughage from a pillar corner near the seal No. 3 entry in cross cut 25. Tr. 339. Lampley noted that cap blanks installed on the tops of rib props were compressed and broken, which indicated that they were taking weight from the roof. Tr. 362.[9] Other six-by-six rib props were bowed and showed signs of taking weight. *Id*. Also, the floor heaved in this location. Tr. 339.[10] Lampley observed several pre-existing props in front of the entry to seal No. 5, which showed signs of breakage and that "the area was converging some." Tr. 346-47. Lampley further observed several additional props taking weight throughout the entire length of the No. 9 entry. Tr. 362.

Lampley determined that additional support should have been emplaced in the intersections based upon his observations made during the roof-fall investigation. Tr. 344. Lampley considered the close proximity of a prior intersection failure along the same parallel, and the fact that the route down entry No. 9 was traveled three times a day. Tr. 344, 366; P. Ex. 13 at 6. Lampley also determined that "[o]ther things was [sic] going on, that roof conditions were deteriorating, so at that point, additional support was needed." Tr. 370. For example, quick transitions of limestone were evident from visual inspection, along with differences in the length of previously installed roof bolts. Tr. 365; P. Ex. 4.[11] Lampley credibly testified that the roof

[9] "Cap blanks" are also referred to as "cat planks" in the transcript. Tr. 340, 362. They are large, wooden shims placed between the mine roof and the top of the wooden rib prop to close the gap between the mine roof and the top of the prop. *Id*.

[10] A floor heave occurs when the floor pushes up towards the mine roof. Tr. 339. The clay floor had been pushed up due to overburden pressure from the roof. Tr. 362. *See* Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 258 (2d ed. 1997). The floor heave that Lampley observed was approximately 150 to160 lateral feet from the roof fall. Tr. 340.

[11] The limestone roof transitioned from 48 inches to 18 inches in thickness across the entry covered by the fall. Tr. 367-69. Lampley observed the "relatively quick transition" because the roof fall exposed that portion of the limestone roof. *Id*.

bolt operator would have had to "detect that transition quickly enough and make adjustments accordingly to the permanent support that he's putting in place." Tr. 369. Notably, however, the permanent supports down entry No. 9 were properly installed, and still in place. Tr. 370.

Lampley's analysis of the conditions near the seal No. 3 floor heave is also persuasive. Lampley testified that the signs of stress that he had observed had likely existed for 5 days to a week, that floor heaving takes several days to several weeks to occur, and that the heave would continually get worse over time depending on roof stride above and the soft clay below. Tr. 366.

Lampley determined that the heaving and smashed props occurred over a period of time, "at least several weeks," but could change over merely "a couple of days." Tr. 341. Additionally, the presence of dust from the mine atmosphere that had accumulated on the broken props led Lampley to conclude that this condition existed for a period of time prior to the roof fall. Tr. 450-51, 475. Lampley, however, failed to record the presence of dust in his notes. Tr. 450-51. Lampley conceded the possibility that the dust from the roof fall likely accumulated on the props, and gave the appearance that the props had been broken for longer than they actually had been. Tr. 453.

Lampley recorded "considerable mitigating circumstances, not usual travel" in his notes, and confirmed this notation in testimony at trial. Tr. 444, 486; P. Ex. 5 at 4. However, Lampley testified that the cited area could have been written as high negligence or low negligence, so moderate negligence was a good balance. Tr. 487.

1. Negligence Analysis

I affirm inspector Lampley's moderate negligence determination. Respondent should have known of the size, location, and conditions observed by Lampley at the floor heave area alone. This entryway is inspected three times daily. Additionally, the presence of highly-deteriorated roof bolts and smashed cribs and props reinforce my finding. Although the roof fall constitutes a mitigating circumstance, I find that Respondent knew or should have known of the adjacent violation, and acted with moderate negligence by not adequately supporting the roof, face and ribs of areas where persons work or travel. 30 C.F.R. § 75.202(a). Accordingly, a moderate negligence determination is appropriate here.

2. Penalty Assessment

As noted previously, Respondent is a large operator, and the originally proposed penalty of $1,304 would not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have found that Respondent acted with moderate negligence. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $1,304 civil penalty against the Respondent.

D. Findings of Fact for Roof Control Citation No. 8451626

On September 10, 2013 at 11:20 a.m., Lampley issued Citation No. 8451626 alleging a violation of 30 C.F.R. § 75.202(a) because he observed an area of inadequately supported roof in entry No. 1 of unit No. 2's right side return. Tr. 372-373, P. Ex. 6. The Citation states:

> The mine roof is not adequately supported at crosscut 48, entry #1 of unit Unit #2's right side return. Adverse conditions are present in the form of slips/crack and considerable amounts of water coming from the roof in the affected intersection. Visual signs of inadequate support are present in the form of curling roof bolt bearing plates, corner pillar stresses, bagging of the mine roof, and compression of the single 30 inch four point crib built in the center of the intersection. This area is traveled weekly by the examiner.

P. Ex. 6.

Lampley determined that an injury or illness was unlikely to occur, that if an injury did occur it would be fatal, that one person was affected, and that the Respondent's negligence was moderate. *Id*. Lampley expected a roof fall to occur if the conditions persisted, but determined that an injury was unlikely because the cited area was only traveled once per week. Tr. 375-76. Lampley determined that only the examiner would be affected by the violation. Tr. 378. The Secretary proposed a civil penalty of $1,304. P. Ex. 18.

Respondent only disputes the moderate negligence determination. Respondent contends that a low negligence determination is more appropriate because it had no way of knowing that the cited condition existed. R. Br. 46.

Respondent's examination book indicated that the required weekly inspection was conducted on September 4, 2013. Tr. 455-56, R. Ex. 13. The next required examination was due the day after Lampley cited the Respondent. Tr. 456. Lampley testified that the cited conditions would continue to deteriorate, and lead to a "massive intersection failure." Tr. 215. Respondent's mine foreman, however, testified that an intersection failure was not likely. Tr. 578; R. Ex. 13.

Lampley observed 84-inch roof bolts, the primary roof support, properly installed. Tr. 215, 460. He also observed a single crib in the middle of the intersection that had taken "considerable" weight. Tr. 373-74. Lampley noted that the crib was located in a recently mined area, and that the environmental conditions "were changing quickly." *Id*. Lampley also observed water as it streamed from a large crack in the roof. *Id*. Finally, Lampley observed the roof "bagging down," and "curled" roof bolt plates, which he concluded were the result of roof pressure on the 84-inch bolts. *Id*.

Examiners travel the cited area weekly to conduct inspections. Tr. 216, 481, 579. Respondent contends that it had no way of knowing about the cited conditions since the last examination. Tr. 218-19, R. Br. 43. Lampley observed no dust on top of "some rib sloughage,"

which leads Respondent to posit that the cited conditions occurred after the last inspection. Tr. 457-58. Lampley conceded at hearing that if the cited conditions developed after the last examination, then Respondent would have had no way of knowing, nor should it have known, of the cited conditions. Tr. 458.

Lampley credited Respondent for its attempt to mitigate the deteriorating conditions by installing the supplemental crib. *Id*. He testified, however, that Respondent did not do enough to mitigate "bad roof conditions." *Id*. Lampley also testified that Respondent knew of the adverse conditions for three days or more because it stopped mining the cited area several cross-cuts out. Tr. 377.

Respondent addressed the conditions that Lampley observed and immediately "took care of [them]." Tr. 581, R. Ex. 13. Respondent added seven cribs to abate and terminate the violation. Tr. 398, P. Ex. 15 at 6.

1. Negligence Analysis

The existence of the supplemental roof support and still functioning primary roof support, combined with the rapid nature with which these conditions could develop, and the mine's evidence that no hazardous conditions were present in the last examination, support the Respondent's position regarding low negligence. Respondent, however, stopped mining the area three days earlier. Also, the presence of the supplemental supports leads to the conclusion that Respondent knew or should have known of the rapidly deteriorating roof conditions, but did not make sufficient efforts to mitigate the problem, particularly since seven additional cribs were necessary to abate and terminate the violation only three days after mining ceased. Accordingly, I affirm inspector Lampley's determination that Respondent was moderately negligent by not adequately supporting the roof, face and ribs of areas where persons work or travel. 30 C.F.R. § 75.202(a).

2. Penalty Assessment

The parties stipulated that the originally proposed penalty of $1,304 would not affect the Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have found that Respondent's negligence was moderate. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $1,304 civil penalty against the Respondent.

E. Findings of Fact for Roof Control Citation No. 8451627

With regard to roof control Citation No. 8451627, the record establishes that on September 7, 2013, four days before the citation was written, Respondent conducted an examination of the cited parallel air course and did not record any hazards. Tr. 588, R. Ex. 14. The parallel air course is traveled weekly by examiners. Tr. 216, 395, 481, 582. Lampley could not recall whether Respondent recorded any hazards in the weekly examination record book. Tr.

396. Respondent, however, had previously flagged the area to prevent travel. Tr. 391, 473; P. Ex. 9 at 1, 3.[12]

On September 11, 2013, inspector Lampley issued Citation No. 8451627 alleging a violation of 30 C.F.R. § 75.202(a) because he observed an area of inadequately supported roof in entry No. 7 on the 6th 48 parallel intake. The Citation states:

> The mine roof is not adequately supported at crosscut 35, entry #7 of the 6th 48A parallel intake (left side intake). Three loose permanent support roof bolts are present leaving an unsupported area that measured 12 feet by 7 feet. Loose rock and unconsolidated material are present at the affected area. After this citation was issued the area was flagged off to prevent travel.

P. Ex. 8.

Lampley designated the citation S&S because he determined that the primary roof support was failing and loose rock and unconsolidated material were hanging from broken wire mesh immediately above the examiner's route. Tr. 379-380; P. Ex. 9. Lampley determined that an injury or illness was reasonably likely to occur, that if an injury did occur it would result in lost workdays or restricted duty, that one person was affected, and that the Respondent's negligence was moderate. *Id*. The Secretary proposed a civil penalty in the amount of $1,944. P. Ex. 18.

Respondent argues that the Secretary has not proven the third *Mathies* element, and therefore the S&S designation should be removed. R. Br. 47. Specifically, Respondent argues that the gravity of the injury or illness in Citation No. 8451627 should be modified from reasonably likely to unlikely based on alleged similarities to Citation Nos. 8451626, which was so designated. Respondent also contends that the moderate negligence determination is inappropriate because the operator had no way of knowing about the cited conditions prior to the next required examination. R. Br. 45.

The primary roof support no longer functioned as approved, unlike the conditions cited in in Citation No. 8451626. Tr. 215. Accordingly, Lampley believed that it was more likely for loose rock or unconsolidated material to fall on a miner because of the unconsolidated nature of the roof. Tr. 215-16. Lampley also observed rusted, screen-wire mesh,[13] a rusted primary-support roof bolt protruding from the ceiling by 16 to 18 inches, and multiple layers of rock that had fallen onto the ground. Tr. 380-82, P. Ex. 9.

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[12] The operator "flags" an area by installing a readily visible warning to alert miners of unsafe roof conditions. Tr. 474; *see* 30 C.F.R. § 75.208.

[13] Tensar wire mesh is used as "skin control" to support the immediate area of rock around each roof bolt. Tr. 381.

Respondent's mine foreman, Roger Adams, admitted the damaged wire mesh was obvious. Tr. 582. Lampley photographed the fallen rock "bagging and hanging" from the rusted and partially broken skin control. Tr. 383, P. Ex. 9. A person of average height would have to duck to avoid the damaged wire mesh. Tr. 490. The supplemental wire mesh no longer controlled the roof, as designed. Tr. 381, 582. Lampley credibly testified that he should not have been able to observe the three roof bolts if they had been properly positioned. Tr. 379, 381, 385.

Wooden props were spaced along the walkway approximately seven feet apart. Tr. 382. Marks on the props indicated that Respondent had installed supplemental support, but that additional rock had fallen afterwards. Tr. 389. The unsupported area of roof is directly over the examiner's walkway. Tr. 385, 394; P. Ex. 15 at 40. Fallen and unconsolidated rock already covered the walkway. P. Ex. 9 at 3.

Lampley testified that rock in the walkway fell in multiple stages. Tr. 383-84. Rock sloughed off the roof, and fell onto the mine floor. *Id*. Lampley deduced that the rusty and muddy colored rock appeared "to have been there for a longer period of time." *Id*. Oxidation was present on rock that had fallen previously. Tr. 388-90, 470-72. Lampley opined that the initial pile of rock fell more than six days before his inspection. Tr. 488.

The unsupported area of roof should have been reported as a hazard because the conditions were obvious and the roof was no longer supported by the permanent-support roof bolts. This was evident because the roof bolt bearing plates were no longer in contact with the mine roof. Tr. 392. The area should have been reported as a section 75.202(a) hazard in the examiners book, but Respondent failed to do so. Tr. 394.

1. The Reasonable Likelihood of Injury and S&S Designations Were Appropriate

Lampley properly designated Citation No. 8451627 as S&S because the roof bolts performing primary support no longer performed their approved function and Lampley observed fallen rock substantial enough to injure a miner. Tr. 393. The primary roof support no longer functioned, as approved. Tr. 393. Fallen rock was large enough to seriously injure a person such as the examiner walking directly beneath the inadequately supported roof. P. Ex. 9. Further, unconsolidated rock would continue to fall, unless the cited conditions were abated. Additionally, the route had been flagged off by the Respondent prior to Lampely's inspection. Tr. 391, 473; P. Ex. 9 at 1, 3. Based on the preponderance of the evidence, I find it reasonably likely that unconsolidated rock would continue to fall and result in a lost-work-days or restricted-duty injury to an examiner as roof conditions deteriorated during normal mining operations. *Big Ridge, Inc.*, 36 FMSHRC 1677, 1689 (June 2014) (ALJ). Accordingly, I affirm the citation, as written. Citation No. 8451627 was correctly designated S&S.

2. Negligence Analysis

Lampley reasoned that a moderate negligence designation was appropriate because he observed sloughage throughout the entry. Tr. 387-88. Lampley testified that it is the operator's responsibility to be proactive and provide additional support where necessary, especially in an area that is deteriorating and traveled only once a week. *Id*. I find Lampley's reasoning

convincing and consonant with the spirit and intent of the Mine Act. Further, I credit Lampley's testimony that based on oxidation, the initial pile of rock had fallen prior to the last examination. Thus, Respondent knew of the deteriorating conditions because it previously flagged-off the area for travel, and had installed supplemental support. Although Respondent's installation of supplement support provides some mitigation, Respondent knew or should have known that additional support was necessary based on previously fallen rock. Accordingly, I affirm the Secretary's moderate negligence determination.

3. Penalty Assessment

As noted previously, Respondent is a large operator, and the originally proposed penalty of $1,944 would not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have affirmed the S&S and moderate negligence designations. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $1,944 civil penalty against the Respondent.

F. General Background Concerning Inspector Hudson's Issuance of Citations Nos. 8449462 and 8449464

On September 5, 2013, MSHA inspector Terry Hudson issued Citation Nos. 8449462 and 8449464 alleging violations of 30 C.F.R. § 75.604(b) because he observed damaged splices on two trailing cables, one on a shuttle car, and one on a roof bolter.[14] The regulation provides: "[w]hen permanent splices in trailing cables are made, they shall be: . . . (b) [e]ffectively insulated and sealed so as to exclude moisture." 30 C.F.R. § 75.604(b).

Respondent concedes the S&S violation for both citations at issue, but disputes that the injury or illness designation for each citation could reasonably be expected to be fatal. R. Br. 38. Respondent further disputes Hudson's designation that it acted with moderate negligence regarding both citations. *Id*. The Secretary proposed a civil penalty of $3,689 for each S&S violation. P. Ex. 18.

The Secretary argues for application of the missing witness rule with respect to both Citation Nos. 8449462 and 8449464. *See Eagle Energy, Inc.*, 23 FMSHRC 1107, 1120 (Oct. 2001). I decline to invoke such a presumption. The Secretary could have requested subpoenas for the "compulsory attendance of witnesses" at hearing, but did not do so. 29 C.F.R. § 2700.60(a).

[14] Retired MSHA coal mine inspector, Terry Hudson, worked in the coal mining industry for 32 years. Tr. 24. Hudson issued Citation Nos. 8449462 and 8449464 during the same EO1 inspection. P. Exs. 10-11. Hudson was an MSHA coal mine inspector for six years, and was an electrical specialist for MSHA for four years prior to issuing the two citations at issue. Tr. 25, 28, 81. Hudson now works for Sunrise Coal as an assistant maintenance manager. Tr. 25.

G. Findings of Fact for Shuttle Car Trailing Cable Citation No. 8449462

At 11:30 a.m., on September 5, 2013, Hudson issued Citation No. 8449462 pursuant to section 104(a) of the Act for an alleged violation of mandatory safety standard 30 C.F.R. § 75.604(b), cited above.[15] The Citation states:

> The company #4067 Auxier Welding Shuttle Car, in use on the coal producing section Unit #3 MMU-013, had two splices in the trailing cable supplying 600 VDC to the machine that were not effectively insulated and sealed so as to exclude moisture. The outer wrap on the splices was open exposing the inner leads of the cable. One of the openings measured approximately ¼ inch by 1 ½ inches and the other measured approximately ¼ inch by ¼ inch.

P. Ex. 10.

Hudson testified that the blacked taped splices on the black cable were open, damaged and readily apparent due to wear and tear during normal mining operations. Tr. 32-33, 94. Further, the area where the shuttle car was operating was damp and wet. Tr. 38-39.

Hudson determined that the violation was S&S because it was reasonably likely to lead to a fatal injury, as a result of Respondent's moderate negligence, with one miner affected. *Id*. Specifically, Hudson testified that "I felt that it was reasonably likely that if you come in contact with this 600-volt voltage that's on this cable, that it could cause a fatal shock, yes." Tr. 42.

With regard to likelihood of injury, Hudson's notes state:

> Likelyhood [sic] – reasonably likely- The splices were not sealed to exclude moisture & the mine floor is damp wet where this machines [sic] cable lays on the mine floor during operation. History of electrical shocks & fatalities due to elec. shocks are from cable hazards similar to this hazard.

P. Ex. 12, p. 18.

With regard to negligence, Hudson's notes state:

> Neg - Mod- The heat from the cable has caused this hazard & not noticed.
>
> How long – A shift or longer – based on mining exp.

[15] The Citation indicates that it was issued at 10:40 a.m., but it was amended to 11:30 a.m. consistent with Hudson's testimony that he had initially recorded the incorrect time. Tr. 83-85; P. Ex. 10.

> Who knew – The car oper. and/or the person making the weekly check.

P. Ex. 12, p. 18-19.

Respondent contests Hudson's determination that a fatal injury could reasonably be expected to occur, and that Respondent's negligence was moderate. R. Br. 38.

As noted, the day shift at Pattiki Mine begins at 7:00 a.m. Tr. 85. The shuttle car takes approximately 40 minutes to arrive at its designated workstation. *Id*. Hudson issued the citation at 11:30 a.m., which means that shuttle car #4067 was in use for less than four hours. P. Ex. 10. The shuttle car traveled "probably a few hundred feet" between loads. Tr. 37. The record establishes that the shuttle car trailing cable incurs normal "wear and tear" from frictional contact with the ribs, as well as repeated winding on and off the cable reel. Tr. 32, 101.

Respondent called assistant general manager, Joshua Bell, to testify generally about Respondent's standards book regarding personal protective equipment policies, shuttle car per-operational and operational checks, and roof bolter pre-operational and operational checks, although Bell did not know who the # 4067 shuttle car operator or his supervisor was on September 5, 2013. Tr. 158-160; R. Exs. 1-3. Bell also testified about Respondent's permissibility examination on the 4067 shuttle car on September 5, 2013 (R. Ex. 4) and on the 6096 roof bolter on August 30, 2013 (R. Ex. 5). Tr. 167-171. On cross examination, however, it was established that Bell did not supervise the permissibility checks and had no personal knowledge of the circumstances surrounding them. Tr. 173-74.

Based on R. Ex. 4, Bell testified that on the morning of September 5, 2013, during the maintenance shift prior to issuance of Citation No. 8449462, respondent's mechanic, Terry Adams, conducted a weekly permissibility examination on the #4067 shuttle car and found and replaced a broken lens cover. Tr. 168; R. Ex. 4. Adams did not testify.

Bell testified that permissibility examinations are usually conducted on the maintenance shift. Tr. 167. They require the entire trailing cable to be pulled off the reel and inspected. Tr. 164. Such examinations are conducted by a mechanic and countersigned by the maintenance chief. Tr. 141-42. They are then reviewed by the individual miner's supervisor, the maintenance foreman, and the maintenance chief. *Id*. Bell testified that Hudson did not cite Respondent for failure to conduct a proper permissibility exam. Tr. 176. Hudson, however, candidly testified that he was not aware whether Adams had performed a permissibility examination on the #4067 shuttle car on the prior shift, or whether a pre-operational check had been done by the operator. Tr. 87-88.

Hudson testified that pre-operational examinations are required on shuttle cars. Tr. 56-57; R. Ex. 2. Operators inspect for damage to the trailing cable during these examinations. *Id*. Hudson testified that the shuttle car operator should notice excessive fraying, but may not notice small openings unless he conducts a proper pre-operational examination. Tr. 88.

Spliced areas of the cable, however, are weak spots and require extra vigilance to maintain in good condition. Tr. 31, 98. Shuttle car operators must notify a foreman or repairman to repair any damaged cable. Tr. 102. A qualified person must then certify that a splice has been repaired correctly. *Id*.

As noted, Hudson observed open splices that were not being properly maintained. Tr. 29; P. Ex. 10. The openings in the splice's outer insulation were obvious to him, although he testified on questioning from the undersigned that they might not be obvious during operation of the machine. Tr. 32-33, 45, 96. No damage to the inner insulated leads was observed. Tr. 80.

The #4067 shuttle car operates via variable frequency drive, which means it rectifies 600 volts direct current ("VDC") to alternating current on the car. Tr. 52. Heat from the reel causes damage to tape splice kits. Tr. 51, 53-54. Heat causes tape splice kit adhesive to lose adhesive properties and "roll back" on the trailing cable. Tr. 129. Based on his mining experience, Hudson credibly testified that heat alone, from less than four hours of mining operations, would not cause the conditions that he observed. Tr. 86-87.

> I think that the – had it been properly insulated and sealed at the start of that shift, then I would think that it would take longer. It takes more wear and tear to – for this slice to be – receive the damage.
>
> As far as being open, it's hard for me to determine how long it was open, you know, it's – as we've talked, it's an abrasive environment and it could – it could have been pulled open on that night – and but I – as far as what caused it, I think that the – it was the heat and abrasion over a longer period of time.

Tr. 87. In short, Hudson testified that the damage was from wear and tear during normal mining operations and existed for a shift or longer. Tr. 32, 57, P. Ex. 12. P. 19.

Respondent's maintenance foreman, David Baker, testified that the Respondent "doesn't have any trouble with heat," because of the shuttle car model and set-up utilized. Tr. 129. Baker's testimony supports my finding that the cited damage to the shuttle car trailing cable existed for longer than the heat generated during one shift.

Baker abated the violation. Tr. 117-18.[16] Baker cut out the old, damaged splices and created new splices in the trailing cable. Tr. 132-33, 135.

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[16] David Baker is a 17-year veteran of White County, and has been employed in the mining industry performing maintenance work since 1990. Tr. 110-115. Baker has served as Respondent's maintenance foreman for the past seven years. Tr. 115. As maintenance foreman, he is responsible for supervising the maintenance personnel on production shifts. Tr. 110. Baker is a certified mine manager, and has his electrical card and hoisting papers in Kentucky and Illinois. Tr. 115-16.

1. A Fatal Injury Was Reasonably Likely to Occur

Higher voltage generally equates to a greater likelihood of fatal shock. Tr. 43. Hudson testified that contact with 600 volts of direct current was reasonably likely to cause death. Tr. 42; P. Ex. 10. Based on his electrical training, Hudson credibly testified that contact with amperage as low as 100 milliamps can cause death due to heart fibrillation. Tr. 43.[17] The ground fault protection on the shuttle car is set at 800 amps. Tr. 43-44, 64. Therefore, a miner could be exposed to nearly 8,000 times the amperage that could cause death due to heart fibrillation. Tr. 44

Hudson credibly testified that a fully insulated cable would effectively contain the electrical current, but the copper leads could be damaged at any point along the cable regardless of whether the outer jacket of the trailing cable was damaged. Tr. 78, 120. Thus, visible bare copper leads are not required for exposure to an electrical current. Tr. 66-67. Commission precedent directly supports this determination. *Harlan Cumberland Coal Co.,* 20 FMSHRC 1275, 1286 (Dec. 1998). In *Harlan,* the Commission held that damage to only the outer jacket is sufficient to support a finding of S&S. This is so because "there's no way of knowing [whether there are holes in the insulation surrounding the wire within the cable]." *Harlan Cumberland Coal* at 1286; *cf. U.S. Steel,* 6 FMSHRC 1573, 1574-75 (July 1984)(recognizing that a tear in the outer jacket of a cable significantly compromises the cable's protective function). Based on these facts, I conclude that under continued normal mining operations, the violation contributed to a hazard that was reasonably likely to result in a fatal injury. Accordingly, I affirm Hudson's gravity determination, as written. P. Ex. 10.

2. Negligence Analysis

I find that Respondent was moderately negligent in failing to maintain the spliced areas of the shuttle car trailing cable. In the absence of testimony from Respondent's # 4067 shuttle car operator on September 5, 2013 or any other witness with first-hand knowledge, I credit Hudson's testimony based on his extensive experience, that the damaged splices were obvious, caused by heat and abrasion, and existed for more than one shift. Accordingly, Respondent's permissibility examiner, Terry Adams, should have repaired the damaged splices in addition to fixing the broken light lens. Further, based on Respondent's own pre-operational procedures, it should have known of the damaged splices and fixed them. In addition, given the roof bolter trailing cable violation discussed below, there was more than one violation of 30 C.F.R. § 75.604(b) on the same day, and Respondent violated § 75.604(b) seven times in the 15 months preceding the instant citation. P. Ex. 1, p. 7-9. Accordingly, I affirm Citation No. 8449462, as written.

[17] Amperage is the measurement of electron current flowing in an electrical conductor. Tr. 43-44. Voltage is the pressure applied to the electrical conductor that causes electrons to flow in a specified direction. *Id*.

3. Penalty Assessment

Respondent is a large operator. The parties stipulated that the originally proposed penalty of $3,689 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have affirmed MSHA's gravity and negligence determinations. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $3,689 civil penalty against the Respondent.

H. Findings of Fact for Roof Bolter Trailing Cable Citation No. 8449464

Assistant mine manager Bell testified that that on August 30, 2013, a permissibility examination was conducted on roof bolter #6096, and the examination record indicates that examiner Terry Adams (TA) detected and remade a bad splice on the roof bolter trailing cable. Tr. 170-71, R. Ex. 5. Bell further testified that this was the last permissibility examination required prior to inspector Hudson's issuance of Citation No. 8449464 , and that another permissibility examination was not required until after Hudson's September 5, 2010 inspection. Tr. 171.

Permissibility examination for roof bolters require that the entire cable to be pulled off the reel and inspected. Tr. 164. Roof bolter operators are also required to conduct pre-operational examinations, just like shuttle car operators. Tr. 57, 161-62, R. Ex. 3.

On September 5, 2013, Hudson issued Citation No. 8449464 pursuant to section 104(a) of the Act for an alleged violation of mandatory safety standard 30 C.F.R. § 75.604(b). The Citation states:

> The company #6096 Fletcher Roof Bolter, in use on the coal producing section Unit #3 MMU-003, that had two splices in the trailing cable supplying 480 VAC to the machine that were not effectively insulated and sealed so as to exclude moisture. The outer wrap on the splices was open exposing the inner leads of the cable. One of the openings measured approximately ½ inch by 1 ½ inches and the other measured approximately ¼ inch by 2 inches.

P. Ex. 11.

Hudson determined that the violation was S&S because it was reasonably likely to lead to a fatal injury, as a result of Respondent's moderate negligence, with one miner affected. *Id*. Respondent concedes the S&S designation and only contests Hudson's determinations that a fatal injury could reasonably be expected to occur and that Respondent's negligence was moderate. R. Br. 38.

Hudson discovered the opened splices on the roof bolter trailing cable shortly after his inspection of the shuttle car trailing cable, which was at 11:30 a.m. Tr. 83-84. The roof bolter cable extends from a reel just like the shuttle car cable. Tr. 47. The roof bolter trailing cable is slightly smaller in diameter than the shuttle car trailing cable, but the openings that Hudson observed were larger than the openings observed on the damaged shuttle car trailing cable. Tr.

47, 90. Hudson did not observe any damage to the inner insulated leads. Tr. 68, 80. Respondent removed and replaced the outer wrap of the tape splice to abate the cited condition. Tr. 68.

Unlike the shuttle car trailing cable, the roof bolter trailing cable is handled frequently throughout the shift. Tr. 48. Hudson testified that during operation, damage is more likely to be observed on the roof bolter trailing cable than on the shuttle car trailing cable. Tr. 96. The roof bolter trailing cable is repetitively moved from the ground, and hung on the ribs during operation. Tr. 71. Also, unlike the shuttle car trailing cable, the roof bolter trailing cable does not travel as extensively throughout the mine, but instead remains closer to the coal cutting machine at the face. Tr. 50. Water is constantly being applied by the coal cutting machine. *Id*. Thus, the roof bolter trailing cable is constantly exposed to wet conditions. *Id*. Moisture between the inner and outer layers of cable insulation allows the electrical current to track. Tr. 39, 78. The #6096 roof bolter was operating in a "damp, to wet" area of the mine. Tr. 50.

Hudson admitted that the openings in the damaged splices that allowed the opportunity for moisture to penetrate the damaged outer jacket and reach the leads could have occurred during the shift. Tr. 97, 100, 205-06. However, based on the extent of heat deterioration and abrasive wear on the taped splices, his thirty-two years of mining experience lead him to conclude that the condition had deteriorated over a longer period of time. Tr. 97, 99. Hudson's notes regarding negligence state:

> Neg – Mod – Heat, abrasion & wear have caused the splice outer wrap to be in this cond. & not noticed.
>
> How long – A shift or longer – hard to determine
>
> Who Knew – The operators and/or the person making the wkly chc.

P. Ex. 12, p. 27; Tr. 70. Further, Bell opined that the roof bolter trailing cable violation would have existed for a longer period of time than the shuttle car trailing cable violation. Tr. 193.

1. A Fatal Injury was Reasonably Likely to Occur

Hudson credibly testified it is reasonably likely that contact with 480 volts alternating current ("VAC") will cause death. Tr. 47. I take judicial notice that contact with 480 VAC has caused death.[18] I apply the same analysis for the roof bolter trailing cable as I applied to the shuttle car trailing cable in which I found that the violation contributed to an electrocution hazard that was reasonably likely to result in a fatal injury. I emphasize that the roof bolter trailing

[18] MSHA, *2003 Fatalgrams and Fatal Investigation Reports Coal Mines*, http://www.msha.gov/FATALS/2003/FAB03c21.htm (last visited July 29, 2015) (attributing death of a miner to electrocution from damaged trailing cable energized with 480 VAC).

cable had larger damaged areas, was handled more frequently, and was operated in wet conditions that were more extensive than the shuttle car trailing cable.

Based on these facts, I conclude that under continued normal mining operations, the violation contributed to an electrocution hazard that was reasonably likely to result in a fatality. Therefore, I affirm Hudson's gravity designation, as written. P. Ex. 11.

2. Negligence Analysis

I find that Respondent was moderately negligent in failing to maintain the spliced areas of the roof bolter trailing cable. I have credited Hudson's testimony that during operation of the roof bolter, damage is more likely to be observed on the roof bolter trailing cable than on the shuttle car trailing cable. Further, the openings in the roof bolter trailing cable were larger than the shuttle car trailing cable openings. In the absence of testimony from Respondent's # 6096 roof bolter operator on September 5, 2013 or any other witness with first-hand knowledge, I credit Hudson's judgment based on his extensive experience that the damaged splices were caused by heat and abrasion that likely exceeded one shift. Based on Respondent's own pre-operational procedures, it should have known of the damaged splices on the roof bolter trailing cable and fixed them before Hudson cited them. In addition, given the shuttle car trailing cable violation discussed above, there was more than one violation of 30 C.F.R. § 75.604(b) on the same day, and Respondent violated § 75.604(b) seven times in the 15 months preceding the instant citation. P. Ex. 1, p. 7-9. Accordingly, I affirm the moderate negligence determination.

3. Penalty Assessment

Respondent is a large operator. The parties stipulated that the originally proposed penalty of $3,689 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have affirmed MSHA's gravity and negligence determinations. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $3,689 civil penalty against the Respondent.

V. Decision Approving Settlement

As noted at footnote 1, the parties filed a joint motion to approve settlement of 31 of the 37 citations at issue. ALJ Ex. 1. A total reduction in penalties from $50,130 to $35,091 is proposed for those 31 citations, as set forth below. The parties request that Citation Nos. 8451609, 8451610, 8451611, 8451630, 8451631, 8451633, 8451634, 8451635, and 8451642 be modified to reduce the level of negligence from "high" to "moderate." The parties request that Citation No. 8451605 be modified to reduce the level of negligence from "moderate" to "low." The parties also request that Citation No. 8451614 be modified to reduce likelihood of injury or illness from "reasonably likely" to "unlikely," and to remove the "S&S" designation. Finally, the parties request that Citation No. 8445198 be modified from "fatal" to "lost workdays or restricted duty." I have considered the representations and documentation submitted in this case, and I conclude that the proffered partial settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The settlement amounts and citation modifications are as follows:[19]

Citation No.	Assessment	Settlement	Modification To Citation
8445186	$1,944	$1,944	None
8451605	$308	$100	Reduce to low negligence
8445189	$1,944	$1,944	None
8451609	$1026	$200	Reduce to moderate negligence
8451610	$1,111	$200	Reduce to moderate negligence
8451611	$1,111	$200	Reduce to moderate negligence
8445194	$334	$334	None
8451612	$5,080	$2,745	None
8431977	$5,080	$5,080	None
8431978	$3,405	$3,405	None
8451613	$1,657	$1,657	None
8451614	$1412	$200	Reduce to unlikely & non-S&S
8451615	$2,901	$2,901	None
8445196	$392	$392	None
8445198	$5,080	$1,000	Reduce to LWD or RD
8445199	$1,795	$1,795	None
8445200	$224	$224	None
8451623	$1,795	$1,795	None
8449465	$946	$946	None
8451628	$285	$285	None
8451629	$285	$285	None
8451630	$946	$200	Reduce to moderate negligence
8451631	$946	$200	Reduce to moderate negligence
8451632	$285	$285	None
8451633	$946	$200	Reduce to moderate negligence
8451634	$946	$200	Reduce to moderate negligence
8451635	$1026	$200	Reduce to moderate negligence
8451638	$207	$207	None
8449477	$5,080	$5,080	None
8451642	$946	$200	Reduce to moderate negligence
8451644	$687	$687	None
	$50,130	$35,091	

[19] Pursuant to 29 C.F.R. 2700.1(b) and Federal Rule of Civil Procedure 12(f), I strike paragraphs three and four from the Secretary's Motion as immaterial and impertinent to the issues legitimately before the Commission. The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the Act.

VI. Order

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

It is **ORDERED** that Citation Nos. 8451609, 8451610, 8451611, 8451630, 8451631, 8451633, 8451634, 8451635, and 8451642 be **MODIFIED** to reduce the level of negligence from "high" to "moderate."

It is **ORDERED** that Citation No. 8451605 be **MODIFIED** to reduce the level of negligence from "moderate" to "low."

It is **ORDERED** that Citation No. 8451614 be **MODIFIED** to reduce likelihood of injury or illness from "reasonably likely" to "unlikely," and to remove the "S&S" designation.

It is **ORDERED** that Citation No. 8445198 be **MODIFIED** from "fatal" to "lost workdays or restricted duty."

For the reasons set forth above, Citation Nos. 8451616, 8451620, 8451626, 8449462, 8449464, and 8451627 are **AFFIRMED,** as written.

It is further **ORDERED** that the operator pay a total civil penalty of $48,678, i.e., $35,091 for the settled violations and $13,587 for the violations litigated at hearing, within thirty days of this Order.[20]

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

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Tyler H. Fields, Esq., Alliance Coal LLC, 1146 Monarch Street, Lexington, KY 40513

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
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November 18, 2015

SECRETARY OF LABOR, MSHA, on behalf of **THOMAS MCGARY** and **RON BOWERSOX**, Complainants, v. THE MARSHALL COUNTY COAL CO., MCELROY COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-583-D MORG-CD 2014-15 Marshall County Mine Mine ID: 46-01437
SECRETARY OF LABOR, MSHA, on behalf of **RICK BAKER** and **RON BOWERSOX**, Complainants, v. OHIO COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-584-D MORG-CD 2014-16 Ohio County Mine Mine ID: 46-01436
SECRETARY OF LABOR, MSHA, on behalf of **ANN MARTIN** and **RON BOWERSOX**, Complainants, v. HARRISON COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-585-D MORG-CD 2014-17 Harrison County Mine Mine ID: 46-01318

SECRETARY OF LABOR, MSHA, on behalf of **RAYMOND COPELAND** and **RON BOWERSOX**, Complainants, v. MONONGALIA COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-586-D MORG-CD 2014-18 Monongalia County Mine Mine ID: 46-01968
SECRETARY OF LABOR, MSHA, on behalf of **MICHAEL PAYTON** and **RON BOWERSOX,** Complainants, v. MARION COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-587-D MORG-CD 2014-19 Marion County Mine Mine ID: 46-01433

DECISION AND ORDER

Appearances: Charles Lord, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainants;

Laura Carr, UMWA, Washington, D.C., for the Complainants;

Thomas Smock and Philip Kontul, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Pittsburgh, Pennsylvania, for the Respondents.

Before: Judge Miller

These cases are before me based upon complaints of interference brought by a number of employees at five mines owned and operated by Murray Energy Corporation. The cases were brought pursuant to the interference provisions of section 105(c) of the Federal Mine Safety and

Health Act of 1977, as amended, 30 U.S.C. § 815(c) ("the Act"). At issue in each of the cases is a mandatory "awareness meeting" that was held at each of the mines in which the CEO of Murray Energy, Robert Murray, discussed complaints that had been made by miners to the Mine Safety and Health Administration ("MSHA"). The parties appeared at a hearing beginning on Tuesday, September 21, 2015, in Pittsburgh, Pennsylvania. The parties agreed that because, for the most part, the same presentation was given at each mine and the facts contained in the allegations are the same for each mine, a single hearing addressing the issues at all five mines was appropriate.

The parties have agreed that Murray Energy Corporation is a mine operator as defined by the Mine Act. Robert Murray is the President and CEO of Murray Energy Corporation ("Murray Energy"). Jt. Stips. ¶ 1. He is also President and CEO of Murray American Energy, Inc. ("MAEI"), Consolidation Coal Company, and McElroy Coal Company, which are all wholly owned by a subsidiary of Murray Energy, Ohio Valley Resources, Inc. Jt. Stips. ¶ 2. Murray is also President and CEO of the Marshall County Coal Company, the Ohio County Coal Company, the Harrison County Coal Company, the Monongalia County Coal Company, and the Marion County Coal Company, all local subsidiaries owned by MAEI. Jt. Stips. ¶¶ 3, 4. The local subsidiaries operate, respectively, the Marshall County Mine, the Ohio County Mine, the Harrison County Mine, the Monongalia County Mine, and the Marion County Mine. Jt. Stips. ¶¶ 7-11. All are underground coal mines located in West Virginia with hourly production and maintenance workers represented by a United Mine Workers Local Union. Jt. Stips. ¶¶ 6-11. At the time relevant to this case, five of the complainants, Thomas McGary, Ricky Baker, Ann Martin, Raymond Copeland, and Michael Payton, served as United Mine Workers ("UMW") representatives at the five mines, each at a different mine. Jt. Stips. ¶¶ 13-17. The sixth complainant, Ron Bowersox, is an International Safety Representative employed by the United Mine Workers. Jt. Stips. ¶ 12.

The issue before me is whether Murray Energy interfered with the Complainants' rights to make a complaint to MSHA pursuant to section 103(g) of the Act and therefore violated the interference provision of section 105(c)(1) of the Act. For the reasons set forth below, I find that Murray Energy and the five mines did violate section 105(c).

Facts.

The parties have stipulated to most of the relevant facts. At hearing, the parties presented a list of Joint Stipulations that included factual stipulations as well as twenty-eight exhibits that had been agreed upon. In addition, the Secretary introduced Exhibits 29, 30, and 31, which were accepted into the record. The Respondents declined to present additional documentary evidence. The parties also declined to present witness testimony at hearing. The following facts and decision are based upon the parties' stipulations, a careful review of all stipulated documents, a review of the audio tape, my review of the entire record, and consideration of all evidence and the post-hearing briefs.

In December 2013, ownership of the five mines named in this case was transferred from CONSOL Energy, Inc., to a subsidiary of Murray Energy. Jt. Stips. ¶ 6. Shortly thereafter, a number of 103(g) complaints were made to MSHA regarding alleged safety hazards and violations at the mines. From December 2013 through July 2014, MSHA conducted inspections to investigate the complaints and issued forty-two citations and orders as a result of these inspections. Jt. Stips. 30; Ex. 3. These included citations for accumulations of coal and other combustible materials, inadequate pre-shift examinations, obstructed travelways, a ventilation plan violation, and roof support violations. Ex. 3. In some cases, the inspector chose not to issue a citation after a review and discussions with the mine. Ex. 14, 15.

In response to these complaints, Robert Murray sent a letter to UMWA president Cecil Roberts on April 10, 2014. Jt. Stips. 18; Ex. 18. A copy of the letter was also sent to management employees of Respondents. Jt. Stips. 18. In the letter to Roberts, Murray complained about the "rash" of complaints being made by "disgruntled employees" and union officials who were "striking back" at the company. Ex. 18. He wrote that the complaints were not being made for safety reasons and that the misuse of the 103(g) process was wasting the inspection resources of MSHA and the mines. *Id*. Murray then requested that, while the company would "never interfere with a miner's right to file 103(g) complaints," management "be given the opportunity to *also* simultaneously be informed [of] safety issues in place of the 103(g) complaints, or afterwards." *Id*. A similar letter was sent to each of the Local Union Presidents, Safety Committee Officers, and Mine Committee Officers at the five mines. Jt. Stips. 19; Ex. 19. That letter also requested that miners inform the company of safety issues instead of or in conjunction with making a 103(g) complaint. Ex. 19. It emphasized that the company did not intend "to chill the exercise by concerned miners of their rights under Section 103(g)"; rather, the reporting policy was intended as "the most effective means to address and correct safety issues." *Id*.

On April 24, 2014, Robert Murray held the first in a series of "awareness meetings" at the Marshall County Mine. Jt. Stips. 20. The meetings were mandatory for all miners and were held at each shift. *Id*. They consisted of a speech by Murray along with a PowerPoint presentation. Jt. Stips. 21. The mine employed approximately 1004 workers at that time. Ex. 23. Both management and hourly workers were required to attend. Similar mandatory presentations were subsequently given to all shifts at the four other mines: in June 2014 at Marion County Mine, which employed 680 workers; on June 24 and 25, 2014, at Monongalia County Mine, which employed approximately 534 workers; on or around June 27, 2014, at the Harrison County Mine, which employed 589 workers; and on July 9, 2014, at the Ohio County Mine, which employed 712 workers. Jt. Stips. 22-29; Ex 23.

At these meetings, Murray gave a speech along with a PowerPoint presentation.[1] Jt. Stips. 20-29. Murray also sent a copy of the PowerPoint presentation to Cecil Roberts prior to the first meeting. Ex. 20. The presentation informs miners that the topic of the presentation will be "the circumstances at [the mine] surrounding your job and your family livelihood" as well as "what

[1] The PowerPoint presentations for each mine vary slightly, primarily in the discussion of production rates at each mine. The slides relevant to this case are identical in each presentation, however. *See* Exs. 5-8. For convenience, in this section and the discussion that follows, citations will be only to the presentation at the Marshall County Mine.

we must do to assure a future for our Mine, jobs and livelihoods." Ex. 4 at 4 (emphasis omitted). Murray asks the miners to "Take a Moment to Think About *Your Job* Being *Suddenly Gone*" and reminds them that "There Are *No Jobs* in This Area That *Pay Anywhere Close* to What Is Paid" at the mine. Ex. 4 at 14-16. The presentation informs them that the future of their jobs depends on the coal marketplace, and that the mine must produce the lowest cost coal to survive. Ex. 4 at 21-31. Murray goes on to address issues at the mine including production rates, drug and alcohol use, and employee absences. Ex. 4. at 37-60. He then discusses the issue of § 103(g) complaints. The presentation informs miners:

> You *Must* Report *Unsafe Situations* and *Compliance Issues* to Management so that they Can Be *Addressed* By Management
>
> *103(g) Complaints* Relative to the *Mine Safety and Health Administration ("MSHA") Are Your Right*
>
> Your *Company* Will *Never Interfere* With This *In Any Way*
>
> But, you Are Also *Required* To Make the *Same Report* to *Management*

Id. at 61-62. Murray states that there are "High Percentages of Negative Findings from MSHA on the 103(g) complaints" and that "This Indicates That This Right Is Being Used To Get Back At Management Regarding Something That You Disagree With That Has Nothing To Do With Safety." *Id*. at 63 (emphasis omitted). He claims that this "Dilutes Company and MSHA Resources[.] It Hurts your Company and Job Survival." *Id*. (emphasis omitted). Murray concludes by discussing the threat of competition from non-union mines.[2] *Id*. at 64-70.

At one of the meetings at the Marshall County Mine, a miner made a recording of Murray's speech, which the Secretary introduced into evidence. Ex. 29. Murray's speech closely tracks the PowerPoint presentation. In his discussion of 103(g) complaints, he states

> And I'll never interfere, and the company never will, and I won't, interfere with your right to file a 103(g) complaint with MSHA. That's not the way we go about it. I'll never interfere with your right to do it. But you also, and I'm telling you, are required to make that same report to management before, the same time, afterwards, you need to report it to management, that's a requirement.

Ex. 30 at 1-2. The speech also makes a connection between safety complaints and the tough

[2] The Marshall County Mine presentation also includes discussion of a recent conflict between management and the union over a temporary shutdown at the mine. Ex. 4 at 64-66.

market conditions for coal. In reference to 103(g) complaints that do not result in safety citations, Murray states

> Using these 103(g) complaints because you're unhappy with management is not something that will be accepted. . . . When we're fighting inside and we get shut down because of a 103(g) complaint because you're mad at somebody in management that just hurts you. . . . And if you want to fight inside let me tell you I'll go on to a better coal mine and we'll close this one. 'Cause the market's [unintel.] all the time anyway and every mine is fighting with every other mine. And I don't make any decisions about closing the mines, the marketplace does them, I make the decision about which mine [unintel.] and which mine doesn't [unintel.]. And right now you guys and the Monongalia County Coal Company are at the bottom of the list out of the five mines, the others have stepped up. Marshall is at the bottom of the list. The most radical workforce in the area . . . .

Ex. 30 at 2-3. Recordings were not made of the speeches given at the other mines.

On June 23, 2014, Ron Bowersox filed a complaint of discrimination with MSHA in relation to these meetings and letters pursuant to section 105(c) of the Mine Act. Jt. Stips. 12. On July 21, 2014, the five individual miners filed additional 105(c) complaints based upon the same allegations. Jt. Stips. 13-17. The complaints alleged that the mine management at the five mines was "trying to intimidate miners" and interfere with their statutory right to file anonymous 103(g) complaints with MSHA. The Secretary brought these actions on the basis of those complaints. The Secretary alleges that Murray Energy interfered with the exercise of statutory rights of miners. He argues that, in requiring that a miner who makes a 103(g) complaint make the same complaint to management, the mine violated the statutory protection against disclosure of the complaining miner's identity. The Secretary further argues that Murray Energy interfered with the rights of miners by threatening reprisal and closure of the mine if the miners continued to make 103(g) complaints to MSHA.

After the initiation of these cases, the parties conducted discovery. Respondent took the deposition of each of the complainants, Ron Bowersox, Rick Baker, Raymond Copeland, Ann Martin, Thomas McGary, and Michael Payton. Prior to hearing, and at the request of the Court, both parties filed a list of witnesses who would testify in the matter. The Secretary's list included Ron Bowersox, Michael Payton, and Ann Martin. On the Friday just prior to the scheduled hearing, a complaint was filed on behalf of several of the Respondents in the United States District Court for the Northern District of West Virginia against the UMWA and Ron Bowersox for activity at the five mines. The complaint alleges a breach of the collective bargaining agreement based upon the fact that miners have made 103(g) complaints to MSHA without taking those complaints first to the mine operator. The complaint names Bowersox as a defendant, and quotes from the depositions of Michael Payton and Ann Martin taken in this case. Over the weekend prior to the hearing, the Secretary filed a motion to cancel the hearing and submit the case for summary decision based on the intimidation of his named witnesses. The

witnesses were not aware at the time the depositions were taken that their testimony would be used in a separate law suit filed against the union, and subsequently did not wish to testify further.

At hearing, the Secretary renewed the motion to submit the matter for summary decision, and thereby released the three witnesses from testifying. The Secretary did not call any witnesses, instead agreeing to the stipulated evidence and documents. The Secretary moved to admit into evidence the federal district court complaint naming his three witnesses, as well as an audio tape of Mr. Murray's presentation. The exhibits were received, despite an objection by Respondents that the tape was not authenticated. Respondent also declined to call any witnesses and presented no further documentary evidence. When questioned by the court, Respondents' attorneys stated that at the time the depositions were taken, they had no knowledge that another lawsuit was planned that would include copies of the depositions of the three witnesses.

The interference claim.

The prohibition against interference is established in section 105(c)(1) of the Mine Act, which provides that "[n]o person shall discharge or in any manner discriminate against . . . *or otherwise interfere with* the exercise of the statutory rights of any miner" because the miner has made a complaint under the Act. 30 U.S.C. § 815(c)(1) (emphasis added). Section 105(c)(2) permits a miner or his representative to file a discrimination complaint with the Secretary if he believes "that he has been discharged, interfered with, or otherwise discriminated against" in violation of the Act. 30 U.S.C. § 815(c)(2). The Senate Report relating to 105(c) indicates that the provision is intended to "protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion … but also against the more subtle forms of interference, such as promises of benefits or threats of reprisal." S. Rep. No. 95-181, at 36 (1977).

In a recent case, two commissioners articulated a test for evaluating interference claims brought pursuant to section 105(c). *UMWA ex rel. Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Jordan & Nakamura, Cmm'rs.), *vacated & remanded*, __ Fed. Appx. __, 2015 WL 4647997 (Aug. 2015). Under this test, an interference violation occurs if

> (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
>
> (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Id. This test is consistent with Commission precedent in cases alleging interference. *Id*.; *see Sec'y of Labor ex rel. Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 9 (Jan. 2005) (analyzing "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere

with the exercise of [protected] rights"); *Moses v. Whitely Dev. Corp*., 4 FMSHRC 1475, 1478-79 (Aug. 1982) (concluding that conduct that "could logically result in a fear of reprisal and a reluctance to exercise the right in the future" violated section 105(c)), *aff'd*, 770 F.2d 168 (6th Cir. 1985).

The Commission previously analyzed whether statements to a miner constituted interference in *Moses v. Whitely Development Corp*., 4 FMSHRC 1475 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). That case involved a foreman who, after MSHA inspectors arrived to investigate an accident, asked an employee whether he had called MSHA, and repeatedly accused him of doing so in front of other employees. *Id*. at 1475-77. The Commission decided that this constituted interference. *Id*. It emphasized that coercive conversations and harassment were among the "more subtle forms of interference" prohibited by section 105(c). *Id*. at 1478. It explained that such actions could "instill in the minds of employees fear of reprisal or discrimination" and "chill the exercise of protected rights," which would undermine the "goal of encouraging miner participation in enforcement of the Mine Act." *Id*. at 1478-79.

Another Commission case, *Secretary of Labor ex rel. Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005), involved the issue of whether verbal threats made by a supervisor in a joking manner constituted interference. The Commission emphasized there that "Whether an operator's question or comments concerning a miner's exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act 'must be determined by what is said and done, and by the circumstances surrounding the words and actions.'" *Gray*, 27 FMSHRC at 8 (quoting *Moses*, 4 FMSHRC at 1479). The Commission noted that the judge should "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Id*. at 10 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). Circumstances that the Commission considered relevant to the interference analysis in *Gray* were the persistence with which the supervisor raised the subject of the protected activity; the accusatory manner with which the subject was raised; where the statements were made; the nature of the relationship between the supervisor and the complainant; the fact that the statements related to confidential grand jury testimony; and the fact that the supervisor attempted to speak to the complainant alone. *Id*. at 11-12.

The 103(g) provisions.

As discussed above, an interference claim requires proof that the operator's conduct interfered with "the exercise of protected rights." *Gray,* 27 FMSHRC at 8; *Moses*, 4 FMSHRC at 1478-79. Here, the right at issue is the right of miners and their representatives to make health and safety complaints directly to MSHA. Under section 103(g) of the Mine Act, a miner who has reasonable grounds to believe that a violation of the Act or a safety or health standard exists at the mine "shall have a right to obtain an immediate inspection" upon giving notice to the Secretary. 30 U.S.C. § 813(g)(1). The legislative history of the Act explains that this provision was included because of "the Committee's firm belief that mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral

part in the enforcement of the mine safety and health standards." S. Rep. No. 95-181, at 30 (1977).

The Act protects miners who make these complaints from having their identities disclosed to mine operators. The Act requires the Secretary to furnish the mine operator with a copy of the 103(g) notice filed by the miner, but it provides that "The name of the person giving such notice and the names of individual miners referred to therein shall not appear" in copies given to the operator. 30 U.S.C. § 813(g)(1). The legislative history of this provision indicates that Congress intended to protect the confidentiality of miner complainants: "While other provisions of the bill carefully protect miners who are discriminated against because they exercise their rights under the Act, the Committee feels that strict confidentiality of complainants under Section [103(g)(1)] is absolutely essential." S. Rep. No. 95-181, at 30 (1977).

Indeed, confidentiality is crucial to the exercise of the 103(g) right. *See Franks*, 30 FMSHRC at 2109-11 (Jordan and Nakamura, Comm'rs.). The essential problem is outlined in a discussion by the Seventh Circuit of the common law informer's privilege:

> The underlying concern of the doctrine is the common-sense notion that individuals who offer their assistance to a government investigation may later be targeted for reprisal from those upset by the investigation . . . . With the threat of reprisal real and unprotected against, well-intentioned citizens may hesitate or decline to assist the government in tracking down wrongdoers . . . . The most effective means of protection, and by derivation the most effective means of fostering citizen cooperation, is bestowing anonymity on the informant, thus maintaining the status of the informant's strategic position and also encouraging others similarly situated who have not yet offered their assistance.

Dole v. Local 1492, Int'l Bhd. of Elec. Workers, 870 F.2d 368, 372 (7th Cir. 1989) (citations omitted); *see also Sec'y of Labor ex rel. Logan v. Bright Coal Co*., 6 FMSHRC 2520, 2524-25 (Nov. 1984) (recognizing the informer's privilege in Mine Act proceedings). In the mine safety context, while miners have an interest in working in a safe environment, they also have an interest in maintaining good working relationships with fellow workers and mine management. If confidentiality is not guaranteed, a miner is forced to weigh these competing interests when deciding whether to report a dangerous condition to MSHA. For a miner to be truly free to exercise his statutory rights under section 103(g), then, confidentiality is essential.

The Totality of the Circumstances.

Having established that the miners had a protected right to make anonymous complaints to MSHA regarding health and safety violations, the question is whether Murray Energy and its CEO interfered with that right.

Commission precedent indicates that conduct that, viewed under the totality of circumstances, is "coercive" or "chills the exercise of protected rights" constitutes interference.

Gray, 27 FMSRHC at 9-10; *Moses*, 4 FMSHRC at 1478-79. Cases decided under the interference provision of the National Labor Relations Act (NLRA), section 8(a)(1), are also instructive. The National Labor Relations Board (NLRB) evaluates work rules for whether they "would reasonably tend to chill employees in the exercise of their statutory rights": a rule violates the NLRA if it "explicitly restricts" protected activity or if "employees would reasonably construe the language to prohibit" such activity. *Guardsmark, LLC v. NLRB,* 475 F.3d 369, 374 (D.C. Cir. 2007) (internal quotations omitted). In the context of employer speech, the NLRA protects the employer's right to express his views on organizing activity, but speech may nevertheless violate section 8(a)(1) if it contains a "threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c); *Chamber of Commerce of U.S. v. Brown,* 554 U.S. 60, 67-68 (2008); *cf. Gissel Packing*, 395 U.S. at 619 ("[A]n employer is free only to tell 'what he reasonably believes will be the likely economic consequences of unionization that are outside his control,' and not 'threats of economic reprisal to be taken solely on his own volition.'" (quoting *NLRB v. River Togs, Inc*., 382 F.2d 198, 202 (2d Cir. 1967)).

In this case, miners were required to attend a meeting led by the CEO of the company in which he discussed the difficult economic climate for mining. Murray's tone as evidenced in the recording was serious and at times threatening. Throughout the two-hour presentation, miners were repeatedly reminded that their jobs, futures, and family livelihoods were at risk. Miners were informed that, while the company would "never interfere … in any way" with their rights under section 103(g), they were "required to make the same report to management" if they decided to make a 103(g) complaint to MSHA. Ex. 4 at 62. Murray stated his belief that 103(g) complaints were "being used to get back at management regarding something that you disagree with that has nothing to do with safety," which "dilutes company and MSHA resources" and "hurts your company and job survival." Ex. 4 at 63. At the Marshall County Mine, Murray told miners, "When we're fighting inside and we get shut down because of a 103(g) complaint because you're mad at somebody in management that just hurts you. . . . And if you want to fight inside let me tell you I'll go on to a better coal mine and we'll close this one." Ex. 30 at 2-3.

A reasonable miner would have concluded from this presentation that management at the mine was hostile to the 103(g) complaint process, especially as it was currently being used at the mine. While Murray stated that he had no intention to interfere with miners' rights, the statement had little force when considered in the context of the rest of Murray's speech. A reasonable miner would additionally have understood that company policy now required him to make any safety complaint that he took to MSHA to management as well. As explained above, a miner who wishes to inform MSHA of a safety violation relies on the fact that he will remain anonymous. Murray's policy of requiring miners to also inform management of complaints removes this guarantee, which forces the miner to consider the impact of making a complaint on his relationships with management and his coworkers. While section 105(c)(1) of the Act prohibits discriminating against a miner who makes a safety complaint, a reasonable miner would fear that making a complaint would anger his managers and lead to negative consequences, even if they did not rise to the level of discrimination under the Act. This is especially true where management had already expressed its hostility to the complaint process being used at the mine. Thus, a reasonable miner could well be intimidated and discouraged from making a 103(g) complaint after attending one of Murray's awareness meetings.

I am not persuaded by Respondents' argument that no rule was created by Murray's statements because the mine's collective bargaining agreement requires that any new rules be submitted to UMWA representatives in writing for discussion before they are implemented. Resp. Br. 8-10. The relevant perspective on the issue is that of a reasonable miner, and I find that a reasonable miner would have thought that a statement made by the CEO of the company at an all-staff mandatory meeting constituted binding company policy. *Cf. Cent. States Se. & Sw. Areas, Health & Welfare & Pension Funds*, 362 NLRB No. 155 (2015) (holding that a work rule was established by a statement by a manager to a single employee in the presence of several others). Respondent's argument that the policy was merely a "request" and not a mandatory rule is similarly unconvincing given the tone and language of Murray's presentation. Resp. Br. at 15-16; *see* Ex. 4 at 61-62 ("But, you Are Also *Required* To Make the *Same Report* to *Management*.") I find, therefore, that the communications made to miners at Murray's awareness meetings interfered with the miners' exercise of their statutory rights.

Respondents' legitimate and substantial reason

Under the interference test outlined in *Franks*, an operator may defend against an otherwise valid interference claim if it offers a "legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights." *Franks*, 36 FMSHRC at 2108, 2116.

The mine's proffered legitimate and substantial reason here is that it had a right to be informed of unsafe conditions at the mine. Respondents cite the Commission decision *Pack*, in which the Commission determined that a mine operator could lawfully discharge an employee for failing to report a dangerous safety condition to management, even though he had reported the condition to MSHA. *Sec'y of Labor ex rel. Pack v. Maynard Branch Dredging Co*., 11 FMSHRC 168, 170-73 (1989), *aff'd*, 896 F.2d 599 (D.C. Cir. 1990). In that case, the mine operator had a policy requiring employees to report dangerous conditions to management, which the Commission held to be permissible. *Id*. at 172. It explained,

> It is beyond dispute that a mine operator has the right to hire individuals whose job duties include the reporting of dangerous conditions. The Mine Act itself recognizes the importance of such an arrangement. While section 2(e) of the Mine Act provides that mine operators have the primary responsibility to prevent unsafe conditions in mines, that section adds that miners are to provide assistance to operators in meeting that responsibility. It would make little sense to assert that an operator may not receive such assistance because a miner elects instead to report such a condition only to MSHA.

Id. at 173. The Commission was especially concerned with the situation in which a miner's decision to report a condition to MSHA instead of management would expose other miners to danger. *Id*. It held that an operator had a right to discipline an employee in such a situation. *Id*.

I find that Murray's policy can be distinguished from the policy sanctioned in *Pack*. The Commission in *Pack* emphasized that

> Maynard Branch did not have a policy that prohibited miners from reporting dangerous conditions to MSHA, a policy that would clearly be prohibited by the Mine Act. Nor did Maynard Branch have a policy that required miners to notify the company prior to contacting MSHA. The company policy only required employees to report dangerous conditions to the company, and contained no instructions or prohibitions as to employees' actions vis-a-vis MSHA.

Pack, 11 FMSHRC at 172-73. In contrast, the policy at the Murray mines directly related to MSHA complaints: while miners were directed to report all unsafe conditions to management, Murray placed special emphasis on the conditions that miners chose to report to MSHA. Ex. 4 at 61-63. In *Pack*, the mine's policy could credibly be understood as an attempt to promote safety at the mine. But in this case, given the context in which the policy was announced, the same cannot be said. The reporting requirement was announced in a presentation in which the CEO of the company expressed his dissatisfaction with the current use of the MSHA complaint process and repeatedly discussed the possibility of closing the mine and of miners losing their jobs. These actions went beyond what was necessary to establish a safe environment at the mine. Rather, they were calculated to discourage miners from using the MSHA complaint process. I find that the operator's interests do not outweigh the harm to miners' protected rights in this case.

Penalty and Remedies.

The Secretary asks the court to order the mine to cease and desist from violating section 105(c), rescind its rule requiring notice to management about 103(g) complaints, and reverse any disciplinary actions issued as a result of the rule. The Secretary further asks the court to order a Murray Energy corporate officer to read a notice to all miners regarding 105(c) violations, and to order Murray Energy to mail such notice to all miners and post it at the mine for one year.

Section 105(c)(2) authorizes the Commission to require a person who has committed a violation of section 105(c)(1) "to take such affirmative action to abate the violation as the Commission deems appropriate." 30 U.S.C. § 815(c)(2). In cases involving statutory rights under the NLRA, courts have found that it is appropriate to order a management official to read a remedial notice to employees when there is a "particularized need." *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 929-30 (D.C. Cir. 2005). An illustrative case is *Conair Corp. v. NLRB*, in which the president of the company held captive audience meetings where he made threats to employees about closing a plant if it were unionized and expressed his personal animus against unions. 721 F.2d 1355, 1385-87 (D.C. Cir. 1983); *see also Federated Logistics*, 400 F.3d at 930 (upholding notice-reading order where many of the NLRA violations were committed by high-level managers). A reading of a statement by a high-level official has the function of communicating clearly to employees that that official is bound by the statutory requirements. *Federated Logistics*, 400 F.3d at 930.

Accordingly, Respondents are **ORDERED TO CEASE AND DESIST** from violating section 105(c)(1) as described in this decision. Respondents are further **ORDERED** to rescind the rule announced at the awareness meetings requiring miners to give notice to management of 103(g) complaints. In the event that any miner has been disciplined or received any adverse action as a result of that rule, that action is **ORDERED** to be rescinded immediately. Robert Murray is **ORDERED** to hold a meeting at each mine in which he shall read a prepared and approved statement notifying miners that they are not required to contact management when making a complaint to MSHA. Respondent is further **ORDERED** to post for one year on a document that is at least 8 1/2 by 11 inches in a public and conspicuous place at each mine a notice to all miners detailing the miners' rights pursuant to section 103(g) of the Act and stating that there is no requirement or expectation that miners will make the same complaint to management.

The Secretary has proposed a penalty in the amount of $20,000.00 for each of the five mines and an additional penalty of $20,000.00 at Marshall County Coal Mine for the threat of reprisal. I find that the claim alleging interference and threats of reprisal at the Marshall County Mine found in Count Two of the Secretary's First Amended Complaint involves the same facts and analysis as Count One of that complaint, and therefore merges into that count. Count Two of the Secretary's First Amended Complaint is therefore dismissed.

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the ALJ must consider six statutory penalty criteria: the operator's history of violations; its size; whether the operator was negligent; the effect on the operator's ability to continue in business; the gravity of the violation; and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id*. at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence. The mines have no history of interference violations. The mines and the Murray entities are large operators. The parties have stipulated that the penalties as proposed will not affect Respondents' ability to continue in business. Jt. Stips. ¶¶ 34, 35. I find that Respondents did not demonstrate good faith in abating any violation. Instead, they exacerbated the situation by filing a complaint in federal court that named the three individuals the Secretary had named as witnesses in this case. The timing of the filing of the complaint, along with the fact that the deposition testimony taken in this case was attached, tends to indicate that the mine attempted to intimidate the witnesses. The filing of a legal action is an extension of the intimidation at Murray's awareness meetings and shows that

Respondents did not wish to make any good faith effort to eliminate the interference. I find interference with the right to make anonymous complaints to be a very serious matter that undermines the safety of the mine. The negligence is high.

Therefore, I find that a high penalty is appropriate and I assess a penalty of $30,000.00 for each of the five violations. Each of the five mines is hereby **ORDERED** to pay the sum of $30,000.00 to the Secretary of Labor within 40 days of the date of this order.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 23, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2014-124-M AC No. 21-03479-335864
v.	
HAMMERLUND CONSTRUCTION, INC., Respondent	Mine: Harris Pit - Portable Crusher

SUMMARY DECISION

Before: Judge Bulluck

This case is before me upon a Petition for the Assessment of a Civil Penalty filed by the Secretary of Labor (the "Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") against Hammerlund Construction, Incorporated ("Hammerlund"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815. The Secretary seeks a total penalty of $216.00 for two alleged violations of his mandatory safety standards regarding site-specific hazard awareness training, and roadside berms or guardrails.

The Secretary filed a Motion to Plead in the Alternative alleging that Hammerlund also violated a mandatory safety standard regarding the unloading of equipment or supplies. Hammerlund responded by filing its Motion for Summary Decision and Opposition to the Secretary's Motion to Amend the Pleadings ("Resp't Mot. I"), supported by Affidavits of Daniel Rehkamp ("Hamm. Ex. 1") and David Nartnik ("Hamm. Ex. 2"), and the Bid Request from St. Louis County Public Works ("contract"). I granted the Secretary's Motion to Plead in the Alternative. The Secretary, thereafter, filed a Motion for Summary Decision ("Sec'y Mot."), supported by the Declaration of MSHA Inspector Wilbert Wayne Koskiniemi, his inspection notes, and the contested citations. ("Gov. Exs. 1 through 5"). Hammerlund subsequently filed its Supplemental Points and Arguments ("Resp't Mot. II"), and Joint Stipulations ("Jt. Stips. 1 through 69").

As a preliminary matter, I note that during a conference call with the parties on May 29, 2015, Hammerlund agreed that should I find that MSHA had jurisdiction over the portable crusher, unprocessed material dumpsite, and processed material stockpile, rather than the portable crusher alone, it would accept the citations, as issued, and pay the Secretary's proposed penalties in-full. See Jt. Stips. 60, 61. Accordingly, the parties' Cross-Motions raise one issue for resolution in this case: whether issuance of the citations was a valid exercise of MSHA's jurisdiction under the Act.

I. Standard of Review Governing Summary Decision

Commission Rule 67(b) states that a Judge shall only grant a motion for summary decision "if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b).

Analogizing that standard to the U.S. Supreme Court's interpretations of Rule 56 of the Federal Rules of Civil Procedure, the Commission calls upon Judges to look to the whole record '"in the light most favorable to . . . the party opposing the motion,' and . . . 'the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.'" *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law on the issue of whether MSHA acted within its jurisdiction. Accordingly, I **AFFIRM** Citation Nos. 8740638 and 8740639, as issued, and order payment of the Secretary's proposed penalties.

II. Joint Stipulations

The parties stipulated as follows:

1. Hammerlund Construction, Inc. ("Hammerlund"), is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* (the "Mine Act").

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the Act.

3. Inspector Wilbert Wayne Koskiniemi, a representative of the Mine Safety and Health Administration ("MSHA"), was acting as a duly authorized representative of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citations from the docket at issue in this proceeding.

4. The citations at issue in this proceeding were properly served upon Hammerlund as required by the Mine Act, and were properly contested by Hammerlund.

5. Hammerlund owns the portable crusher with Mine ID 21-03479 (the "crusher") that was cited by Inspector Koskiniemi on August 13, 2013. The portable crushing plant travels between multiple locations to perform material processing.

6. At all relevant times, the products of the Harris Pit entered commerce, or the mine operations or products affected commerce, within the meaning of the Mine Act, 30 U.S.C. §§ 802(b) and 803.

7. In 2013, Hammerlund was contracted by the St. Louis County, Minnesota Public Works Department to provide crushing services at four St. Louis County properties.

8. The "Request for Bids" or contract which is attached to Hammerlund's Motion for Summary Decision is a true copy of the bid document and describes the project for which Hammerlund was awarded the contract.

9. Under the contract, Hammerlund was contracted to crush, screen and stockpile Aggregate Base, Class 5 (Modified) material at four pits owned and operated by St. Louis County.

10. The contract provided that Hammerlund would produce a total amount of 112,600 tons of Class 5 (Modified) material for use and sale by St. Louis County and several other public entities.

11. Hammerlund anticipated the entire crushing project (at all four of the County's pits) to last about two weeks.

12. Citations Nos. 8740638 and 8740639 both allege violations that occurred at the Harris Pit.

13. The Harris Pit is owned by St. Louis County.

14. Inspector Koskiniemi conducted an E01 inspection of Mine ID 21-03479.

15. On August 13, 2013, Inspector Koskiniemi issued Citation No. 8740638 to Hammerlund Construction at Mine ID 21-03479.

16. Citation No. 8740638 was issued under 30 C.F.R. § 46.11(a) for failure to provide site-specific hazard awareness training before any person designated under the section was exposed to mine hazards.

17. On August 13, 2013, Inspector Koskiniemi issued Citation No. 8740639 to Hammerlund Construction at Mine ID 21-03479.

18. Citation No. 8740639 was issued under 30 C.F.R. § 56.9300(a) for failure to provide and maintain berms or guardrails on the banks of roadways where a drop-off existed of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

19. There were multiple stockpiles at the Harris Pit. Unprocessed material was maintained in stockpiles to be transported to the crusher. Material processed by the crusher was fed into stockpiles by Hammerlund conveyors. Processed and unprocessed stockpiles were located on opposite ends of the crushing plant.

20. The material dumpsite and location of the unprocessed stockpile was approximately 80-100 feet from the crusher.

21. Under the contract, St. Louis County designated where the stockpiles at each location were to be located.

22. The material to be crushed by Hammerlund was provided by St. Louis County "without cost" to Hammerlund.

23. Under the contract, Hammerlund was to incorporate existing stockpiles of bituminous and concrete at some of the County's pits into the final aggregate base materials produced. At the Harris Pit, the stockpiled material included bituminous, but not concrete.

24. Under the contract, "additional materials required to augment existing soils shall be hauled and stockpiled within the limits of the pit by the County prior to the start of production." "If stockpile locations are not finalized at the time of pre-bid review, the contractor's bid price included the cost of retrieving and transporting augmenting materials from anywhere within the pit limits."

25. Under the contract, Hammerlund was to "retrieve materials from existing stockpiles located within the limits of the pit and transport to the crusher location for inclusion into the final product. The District Superintendent will identify the bituminous and concrete stockpiles to be utilized during pre-bid reviews."

26. Under the contract, "[w]hen crushing operations begin, the Contractor assumes liability and responsibility for maintaining compliance with all rules and regulations prescribed by OSHA, MSHA as well as the County Planning and Zoning Department."

27. At the time of the inspection, Hammerlund owned and operated the following equipment at the Harris Pit: a feed hopper/jaw crusher, 2 conveyors, a cone crusher/screener, a stacker conveyor, an operations booth, a genset trailer, a Caterpillar 246(c) skid-steer, and a Caterpillar 988(h) front-end loader.

28. In accordance with the contract, Hammerlund's liability terminated when all equipment was removed from the pit.

29. In accordance with the contract, if Hammerlund identified a specific type of augmenting material [that] was insufficient in quantity, Hammerlund was required to notify the District Superintendent immediately to discuss a course of action to remedy the situation.

30. During the life of the contract, Hammerlund agreed to provide and "have at all times" a competent superintendent in charge of the gravel pit sites who would be personally available at the site of work within 24 hours' notice.

31. Under the contract, "[g]ravel for the purposes of the contract shall be furnished by the County without cost to the Contractor."

32. Under the contract, all material would be obtained in County-designated pits as indicated in the schedule of price sheets. "The material shall be stockpiled in a manner so as to minimize segregation and promote a well-blended aggregate. All operations necessary in building, shaping, or blending of the stockpile, shall be considered incidental work and shall be included in the unit price for the work."

33. Under the contract, the County designated hours of operation between 7:00 a.m. and 8:00 p.m., Monday through Saturday.

34. Under the contract, "the Contractor shall notify the District Superintendent at least 72 hours in advance of any proposed work in any pit as the Contractor mobilizes between pits during the project."

35. St. Louis County controlled access to the Harris Pit property, on which the Hammerlund crusher was operating.

36. Under the contract, the St. Louis County District Superintendent was responsible [for] "resolv[ing] all questions relating to pit operations and materials produced which did not meet specifications."

37. Under the contract, site preparation within the gravel pits was performed by St. Louis County.

38. Under the contract, St. Louis County agreed to conduct site preparation by clearing, grubbing, [and] stripping an area and/or face adequate to meet the contract quantities.

39. Hammerlund was required to notify the St. Louis County District Superintendent in writing if the pit was not satisfactorily prepared.

40. Hammerlund was instructed by St. Louis County employees where to set-up the portable crushing plant.

41. Hammerlund used its front-end loader to bring materials from the stockpiles to the portable plant for crushing.

42. Only Hammerlund employees operated the crusher and fed material into the portable plant with the front-end loader.

43. On or around August 13, 2013, the crusher was conducting crushing operations at the Harris Pit, when MSHA Inspector Koskiniemi conducted a regular inspection.

44. At the time the inspection began, the crusher was in operation.

45. At the time of the inspection, Hammerlund had two employees on the site. One employee monitored the portable plant; the second employee operated the front-end loader.

46. Other than the two citations at issue here, Inspector Koskiniemi issued five citations on August 13, 2013 to Hammerlund for safety violations on the transfer conveyor, cone crusher/screener feed conveyor and the stacker conveyor.

47. After Inspector Koskiniemi issued the violations on the crushing plant equipment, Hammerlund shut down the crusher until abatement was completed.

48. During his inspection, the inspector observed two dump trucks owned and operated by St. Louis County [that] delivered binding material to the stockpiles ("dumpsite") to use in production of Class 5 material.

49. Hammerlund did not provide site-specific hazard awareness training to St. Louis County truck drivers prior to issuance of the citation.

50. St. Louis County also owned and operated a bulldozer that operated around the Harris Pit, maintaining roadways and the dumpsite.

51. Inspector Koskiniemi observed the bulldozer pushing material into stockpiles at the dumpsite and knocking down berms constructed by Hammerlund employees.

52. The Inspector would testify that during the inspection, he observed a St. Louis County employee walk unaccompanied through the mine site to collect samples from processed stockpiles while the crusher was in operation.

53. Hammerlund's policy was that the crusher would stop operating or run without processing material any time that samples were being obtained from the processed material stockpile.

54. Hammerlund's policy was that a Hammerlund employee would take a companion sample to any sample taken by St. Louis County, in order to verify the accuracy of any sample results taken by the County.

55. Hammerlund did not remove or transfer any material from the processed stockpiles.

56. Under the contract, acceptance of materials produced would be based upon individual tests taken by the St. Louis County Superintendent from the stockpile.

57. The citations at issue in this proceeding were properly served upon Hammerlund as required by the Mine Act, and were properly contested by Hammerlund.

58. Hammerlund demonstrated good faith in abating the violations.

59. Without Hammerlund admitting the propriety or reasonableness of the penalties proposed herein, the proposed penalty of $216.00 will not affect the ability of Hammerlund to continue in business.

60. The "Condition or Practice" section of Citation No. 8740638 is accurate and describes a violation of 30 C.F.R. § 46.11(a).

61. The "Condition or Practice" section of Citation No. 8740639 is accurate and describes a violation of 30 C.F.R. § 56.9300(a).

62. The gravity of Citation No. 8740638 is assessed as "Reasonably Likely" and "Fatal."

63. The gravity of Citation No. 8740639 is assessed as "Reasonably Likely" and "Fatal."

64. The "Number of Persons Affected" section of Citation No. 8740638 is assessed as affecting one person.

65. The "Number of Persons Affected" section of Citation No. 8740639 is assessed as affecting one person.

66. Hammerlund's negligence with regard to Citation No. 8740638 was "Low."

67. Hammerlund's negligence with regard to Citation No. 8740639 was "Low."

68. A penalty of $108.00 is appropriate for the condition alleged in Citation No. 8740638.

69. A penalty of $108.00 is appropriate for the condition alleged in Citation No. 8740639.

III. Background

In early August of 2013, Hammerlund contracted with St. Louis County, Minnesota Public Works Department to process, i.e., crush, screen, and stockpile, aggregate base Class 5 (modified) material, for road construction and maintenance by St. Louis County and other public entities, over a two-week period at four separate sites, including the County-owned Harris Pit. Hamm. Ex. 1 at 1; Resp't Mot. I at 2; Jt. Stips. 7, 9, 11, 13. To perform the work, Hammerlund brought to the pit and operated its portable crushing plant, two conveyors, stacker conveyor, operations booth, genset trailer, skid-steer, and front-end loader. Jt. Stip. 27. An unprocessed material dumpsite and a processed material stockpile were located on opposite sides of the crushing plant; the unprocessed material dumpsite was approximately 80 to 100 feet from the crusher. Jt. Stips. 19, 20. Tandem-axel dump trucks, owned and operated by St. Louis County, made deliveries to the unprocessed material dumpsite, and a County-owned and operated bulldozer maintained roadways around the Harris Pit, including the unprocessed material dumpsite. Jt. Stips. 48, 50. Hammerlund used its front-end loader to transport material from the unprocessed material dumpsite to feed the crusher. Jt. Stips. 41, 42. A Hammerlund conveyor took the crushed product to the processed material stockpile. Jt. Stip. 19.

On August 13, 2013, MSHA Inspector Wilbert Koskiniemi conducted a regular inspection of operations at the Harris Pit. Gov. Ex. 1 at 2. During his inspection, Koskiniemi observed St. Louis County truck drivers dumping binding material at the unprocessed material dumpsite, where berms were inadequate at the six to eight foot drop-off to prevent overtravel and rollover hazards. Gov. Ex. 1 at 2-3; Jt. Stip. 48. He also observed the Hammerlund loader operator repairing the berms which, subsequently, a County bulldozer, pushing dumped unprocessed material into stockpiles, proceeded to knock over. Gov. Ex. 1 at 2-3; Jt. Stip. 51. Also, while the crusher was in operation, Koskiniemi observed an unaccompanied County employee walk past the crusher and conveyor belts to the processed material stockpile, where he collected product samples. Gov. Ex. 1 at 2; Jt. Stip. 52. Thereafter, Koskiniemi reviewed Hammerlund's training records, and determined that St. Louis County employees were not provided with site-specific hazard awareness training. Gov. Ex. 1 at 2; Jt. Stip. 49. Consequently, he issued Citation Nos. 8740638 and 8740639.

A. Citation No. 8740638

Koskiniemi issued 104(a) Citation No. 8740638, alleging a "significant and substantial" violation of section 46.11(a) that was "reasonably likely" to cause an injury that could

reasonably be expected to be "fatal," affecting "one person," and was caused by Hammerlund's "low" negligence.[1, 2] The "Condition or Practice" is described as follows:

> No site specific hazard training was given to the St. Louis County workers operating tandem dump trucks and dozers on the mine site while providing binding material for Hammerlund Construction crushing operation. Also on site was a St. Louis County material sampler who would enter the mine site to collect material samples from the stock piles that Hammerlund Construction was producing. This condition exposed persons to various mine hazards with resulting injuries. The County workers were observed backing a tandem axle dump truck on a dump site with no berms. They stated that they didn't know it wasn't allowed.

Gov. Ex. 2. The citation was terminated on August 13, 2013, after site-specific hazard awareness training was provided to the St. Louis County workers.

B. Citation No. 8740639

Koskiniemi issued Citation No. 8740639, alleging a "significant and substantial" violation of section 56.9300(a) that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," affecting "one person," and was caused by Hammerlund's "low" negligence.[3] The "Condition or Practice" is described as follows:

> Inadequate berms were provided on the material dump located on the west side of the pit area where the St. Louis county truck drivers were delivering binder material for the Hammerlund crushing plant to use in the production of Class 5 material. The county's tandem axle trucks wound back onto the dump without adequate berms to stop them from going over the edge, exposing them to roll over hazards. The trucks delivered numerous loads per shift. At one point the Hammerlund loader operator fixed the berms, only [to] have the county employee push them over with the county dozer. The county employee was unaware that

[1] Generally speaking, a violation is significant and substantial if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Div., Nat'l Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

[2] 30 C.F.R. § 46.11(a) requires a mine operator to "provide site-specific hazard awareness training before any person specified under this section is exposed to mine hazards." Section 46.11(b) requires training for a host of non-miners, including customers and delivery workers.

[3] 30 C.F.R. § 56.9300(a) provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." Alternatively, the Secretary alleges a violation of 30 C.F.R. § 56.9301, which provides that "[b]erms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning."

berms were necessary. No site specific hazard training was done. See citation 8740638.

Gov. Ex. 4. The citation was terminated on August 13, 2013, after adequate berms were constructed at the unprocessed material dumpsite.

IV. Jurisdiction

It is uncontroverted that the crusher, itself, is registered with MSHA as a mine, and is subject to MSHA's jurisdiction. Resp't Mot. I at 8; Jt. Stip. 5. In fact, Hammerlund accepted and paid five citations, also issued during Kosiniemi's August 13 inspection, for safety violations pertaining to the condition of the crusher itself, including the transfer conveyor, cone crusher/screener feed conveyor, and the stacker conveyor. Resp't Mot. I at 6; Jt. Stip. 46. However, Hammerlund argues that Citation Nos. 8740638 and 8740639 should be vacated because they concern conditions at the unprocessed material dumpsite and the processed material stockpile, areas that it contends were not under its authority or control and, therefore, not part of its mine. Thus, the question boils down to whether the crusher, alone, or the crusher, and the processed and unprocessed stockpiles, constituted the mine over which Hammerlund bore compliance responsibility. Resolution of this issue requires an analysis of the extent to which the cited conditions reflected mining operations under the control or supervision of Hammerlund, in its capacity as a mine "operator," performing its duties under the contract.

A. Indicia of Operational Control

In pertinent part, section 3(h)(1)(C) of the Act defines a "mine" to include "lands. . . or other property . . . on the surface or underground . . . used in, or to be used in, the milling of . . . minerals, or the work of preparing . . . [such] minerals." 30 U.S.C. § 802(h)(1)(C). The Commission has interpreted this definition "expansively," and has stated that questions of jurisdiction "must be resolved within the Act's overall purpose of protecting miners' safety and health." *W. J. Bokus Indus., Inc.*, 16 FMSHRC 704, 707-08 (Apr. 1994). "Congress intended the Mine Act to protect individuals from potential hazards that are incidental to entry into a mine, even if the potential hazards are not located on land owned by the mine operator." *TXI Operations*, *LP*, 23 FMSHRC 54, 60 (Jan. 2001) (ALJ); *Ellis & Eastern Co.*, 37 FMSHRC 1607, 1612 (July 2015) (ALJ) ("the extraction and processing areas, rather than the legal property boundaries, determine the zone of MSHA's authority"); *Pickett Mining Grp.*, 36 FMSHRC 2444, 2451-52 (Sept. 2014) (ALJ).

The touchstone of an entity's liability under the Act and, therefore, whether it is subject to MSHA's jurisdiction, is whether and to what extent it "operates, controls, or supervises" a "mine." 30 U.S.C. § 802(d) (defining "operator"); *see Berwind Nat. Res. Corp.*, 21 FMSHRC 1284, 1293 (Dec. 1999) (to be an "operator," an entity must have "substantial involvement" in the operation of the mine); *Youngquist Bros. Rock, Inc.*, 36 FMSHRC 2492, 2494 (Sept. 2014) (ALJ) ("an entity cannot be held liable unless it 'operates, controls, or supervises' the mine") (citation omitted).

Among the factors considered when determining whether an entity is an "operator" of a mine is whether it has the authority to supervise or control the conditions of the mine. *Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 573 F.3d 788, 795 (D.C. Cir. 2009); *Ames Constr., Inc.*, 33 FMSHRC 1607, 1611 (July 2011); *Berwind*, 21 FMSHRC at 1293 (evaluating whether a parent corporation was an operator under the Act based on the extent of its involvement in the mine's engineering, finances, production, personnel, and health and safety matters). Also instructive in determining an entity's control is the connection between the entity and the disputed area of the mine - - specifically, the relationship between its activities and operation of the mine, and the extent of its presence at the mine site - - factors considered when determining whether an entity is an independent contractor. *Otis Elevator Co.*, 11 FMSRHC 1896, 1902 (Oct. 1989); *Joy Tech., Inc.*, 17 FMSHRC 1303, 1307 (Aug. 1995).

These factors are considered in light of the Commission's "longstanding view that the purpose of the Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed." *Old Dominion Power Co.*, 6 FMSHRC 1886, 1892 (Aug. 1984) (citing *Phillips Uranium Corp.*, 4 FMSHRC 549, 553 (Apr. 1982)).

The Secretary argues that the contract allocated responsibility and liability associated with the entire Harris Pit to Hammerlund, because Hammerlund was responsible for compliance with MSHA regulations, Hammerlund agreed to use its front-end loader to retrieve material from the unprocessed dumpsite to feed its crusher, and because Hammerlund agreed to provide a superintendent to take charge of the gravel pit sites. Sec'y Mot. at 4-5; Jt. Stips. 25, 26, 30, 41.

Hammerlund argues that the contract cannot support a finding of requisite operational control over the Harris Pit, because St. Louis County retained too much authority. For example, it points out, St. Louis County owned the land on which the crushing operation was located, was responsible for site preparation, controlled access to the pit, selected the material that constituted the unprocessed stockpile, selected the location of the stockpiles and crusher, and delivered unprocessed material to the pit with County-owned and operated dump trucks. Resp't Mot. I at 2, 12; Resp't Mot. II at 2, 3; Jt. Stips. 13, 21, 22, 35, 37, 38. Hammerlund further contends that it lacked sufficient operational control, because the St. Louis County Superintendent had authority to "resolv[e] all questions" related to the operation of the Harris Pit, and the County owned and operated the bulldozer that maintained the roadways and the unprocessed material dumpsite. Resp't Mot. I at 15; Resp't Mot. II at 3, 4; Jt. Stips. 36, 50, 51.

B. Hammerlund's Control of Operations

Based on application of the indicia of operational control, i.e., Hammerlund's control over the processed material stockpile and unprocessed material dumpsite, I find that the undisputed facts establish that MSHA's jurisdiction extended beyond the crusher to include the stockpiles integral to Hammerlund's mining operation of crushing, screening, and stockpiling Class 5 material.

Hammerlund had the exclusive contractual duty to retrieve materials from unprocessed stockpiles to be processed by the crusher. Retrieving material from the unprocessed material

dumpsite, then, became an integral component of Hammerlund's operation of the crusher. Similarly, Hammerlund owned and controlled the conveyors used to move the final product of crushed materials to the processed stockpile, and Hammerlund maintained the stockpile, i.e., built, shaped, and blended it. Based on these activities, Hammerlund had the "bottom line authority" over production activities related to the processed and unprocessed stockpiles. *See Berwind*, 21 FMSHRC at 1294.

It was a Hammerlund employee that Koskiniemi observed repairing berms at the unprocessed material dumpsite. Building berms is an example of Hammerlund's acceptance of the contractual provision holding the contractor responsible for compliance with safety regulations. Furthermore, despite Koskiniemi's observation of the St. Louis County worker taking product samples while the crusher was operating, Hammerlund had a policy of stopping the crusher or running it without processing material during sample retrieval - - a clear demonstration of its authority over safety at the processed material stockpile. Jt. Stip. 53; *see Ames Constr., Inc.*, 33 FMSHRC 1607, 1613 (July 2011) (noting that "the ability to stop unsafe work implies supervisory authority"); *Berwind*, 21 FMSHRC at 1293 (noting that control over health and safety is indicative of supervisory control); *Otis*, 11 FMSHRC at 1902 (finding an entity to be an operator where its employees "had a direct effect on . . . safety"); *Youngquist*, 36 FMSHRC at 2497 (finding an operator's safety policy, that had applicability to the disputed area of the mine, indicative of the operator's control over that area).

Regarding the connection between Hammerlund's contractual obligations and its utilization of the stockpiles contested as components of the "mine," it is undisputed that Hammerlund moved material to the crusher from unprocessed stockpiles, and fed product from the crusher to processed stockpiles. I find Hammerlund's activities with respect to these areas essential to its mining operation. *See Joy*, 17 FMSHRC at 1308 (finding that the continuous miner and shuttle cars sufficiently relate to the mine because without them, "[c]oal could not be mined"); *Otis*, 11 FMSHRC at 1902 (finding elevator service contractor's services to be sufficiently related to the extraction process of the mine where the contractor was exposed to mining hazards and had a direct effect on the safety of others); *Lewis-Goetz and Co., Inc.*, 35 FMSHRC 2192, 2195 (July 2013) (ALJ) (finding fabrication, maintenance, and repair of conveyor belts to sufficiently relate to the mine, as they are essential parts of the mining process and, therefore, not incidental or *de minimis*); *Kempton Transp., Inc.*, 37 FMSHRC ___, slip op. at 3, No. WEST 2014-998; WEST 2015-20 (Oct. 28, 2015) (ALJ) (finding sufficient relation to mining process where haul truck drivers unload material to be crushed and processed on the mine site).

Hammerlund's crushing operation was performed at the Harris Pit for three to four days, during the course of a two-week period. The Commission has found that even "relatively limited" periods of contact with a mine may be sufficient to uphold liability where the activities performed by the entity are an integral aspect of the mining process. *Lang Bros., Inc.*, 14 FMSHRC 413, 420 (Sept. 1991) (finding seven to ten days of presence on a non-continuing basis to be sufficient for liability). I find Hammerlund's relatively short period of mining at the Harris Pit to be counterbalanced by its authority and control over mining operations at the processed material stockpile and the unprocessed material dumpsite - - operations critically related to completing its contractual obligations.

When these factors are considered with Congressional intent that MSHA's jurisdiction under the Act be construed inclusively, I find that the undisputed facts establish that Hammerlund had operational control over the unprocessed material dumpsite and the processed material stockpile and, therefore, that these areas, in addition to the portable crusher, constituted the mine. Accordingly, I find that MSHA acted within its jurisdiction in issuing Citation Nos. 8740638 and 8740639.

Having found MSHA jurisdiction over the disputed stockpiles, I also find, by the parties' stipulations as to the accuracy of Citation Nos. 8740638 and 8740639 and Hammerlund's agreement to accept the citations, as issued, and pay-in-full the Secretary's proposed penalties, that Hammerlund violated sections 46.11(a) and 56.9300(a), as alleged.

ORDER

WHEREFORE, the Secretary's Motion for Summary Decision is **GRANTED**, and Hammerlund's Motion for Summary Decision is **DENIED**; and Hammerlund Construction, Incorporated, is **ORDERED TO PAY** a total civil penalty of $216.00 within thirty days of the date of this Decision.[4]

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

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/tcp

[4] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 24, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. VA 2014-335 A.C. No. 44-07156-353502
v.	
NINE MILE MINING, INC., Respondent	Mine: #3

DECISION AND ORDER

Appearances: Paige I. Bernick, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner

James F. Bowman, Midway, West Virginia, for the Respondent

Before: Judge Rae

I. STATEMENT OF THE CASE

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor ("the Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d). At issue is a single order issued to mine operator Nine Mile Mining, Inc. ("Nine Mile") under section 104(d)(1)[1] of the Mine Act for allegedly failing to adequately examine electric equipment. The Secretary proposes a penalty of $2,000.00 for the violation.

A hearing was held in Bristol, Tennessee on July 21, 2015, at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence at length and have cited to the testimony, exhibits and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. Based upon the entire record and my observations of the demeanor of the witnesses, I uphold the order as written for the reasons set forth below.

[1] The issuance of a citation or order under section 104(d)(1) denotes that the alleged violation was caused by the mine operator's "unwarrantable failure" to comply with a mandatory health or safety standard. 30 U.S.C. § 814(d)(1).

II. FACTUAL BACKGROUND

The parties have stipulated to the following facts:

1. Nine Mile is subject to the Mine Act and to the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.
3. Nine Mile has an effect upon commerce within the meaning of section 4 of the Mine Act.
4. Nine Mile operates Mine #3, Mine Identification Number 4407156.
5. Inspector Sammy Elswick was acting in his official capacity as an authorized representative of the Secretary when he issued Order Number 8180541.
6. Order Number 8180541 is complete, authentic, and admissible.
7. Order Number 8180538 is complete, authentic, and admissible.
8. On June 23, 2014, Order Number 8180538 became a final order.
9. Order Number 8180539 is complete, authentic, and admissible.
10. On June 23, 2014, Order Number 8180539 became a final order.
11. Inspector Sammy Elswick's notes from October 29-30, 2014 are complete, authentic, and admissible.
12. The R-17 violation history for Mine #3 is complete, authentic, and admissible.
13. Mine #3 produced 113,806 tons of coal in 2014, and had 101,032 hours worked in 2014.
14. Nine Mile abated the citations involved herein in a timely manner and in good faith.

Joint Exhibit 1; Tr. 6.[2]

The #3 mine is a relatively small underground coal mine located in Wise, Virginia. Tr. 76. MSHA Inspector Sammy Elswick[3] visited the mine on October 29, 2013 to continue an ongoing regular inspection. Tr. 15-16. Nine Mile's chief electrician, Cillis Lankford, accompanied Elswick on the inspection. Tr. 16-17.

During the inspection, Elswick discovered several problems with the lights on a continuous mining machine and a roof bolting machine that were sitting idle but ready for service on the No. 2 section. Tr. 19-25, 56. These machines are equipped with spotlights that shine in the direction of operation and area lights that illuminate the surrounding area. Tr. 21. On the continuous miner, Elswick observed that a spotlight on top of the machine was askew and

[2] In this decision, the abbreviation "Tr." refers to the transcript of the hearing. The Secretary's exhibits are numbered S-1 to S-5. The Respondent did not submit any exhibits at the hearing.

[3] Elswick spent about twenty years working as a preparation plant foreman and surface miner before he was hired by MSHA in June 2012. To become a coal mine inspector for MSHA, he attended MSHA's Mine Academy in Beckley, West Virginia and completed field training that included accompanying experienced inspectors as they carried out inspections of underground mines. Elswick received his Authorized Representative card in May 2013 and graduated from the Mine Academy in October 2013 before he issued the violations referenced in this decision. The #3 mine was the first mine he inspected by himself. Tr. 11-14, 40-43.

one of the two bolts holding it in place was hanging loose as if it were broken; a spotlight on the right side of the machine had one missing bolt and one bolt that was too long, which prevented the bolt from holding the light tightly to the frame of the machine; and an area light that was supposed to be fastened flush against the side of the machine was gapped open and hanging down because both of its bolts were loose. Tr. 20-21, 55-56. On the roof bolter, the globe over one of the area lights was broken, exposing the bare bulb; a spotlight on the operator side of the machine was loose and hanging down; and a spotlight mounted between the two drill heads was loose and hanging because one of its bolts was missing and the other was too long. Tr. 23-24, 54. Based on his observations, Inspector Elswick issued two unwarrantable failure orders, Order Number 8180538 and Order Number 8180539, alleging violations of the mandatory safety standard at 30 C.F.R. § 75.503. Exs. S-2, S-3. The cited standard requires electric face equipment to be maintained in permissible condition.[4] Nine Mile did not challenge the two permissibility violations, and ultimately they became final orders. The conditions were abated by bolting the loose lights securely in place and replacing the broken globe. Exs. S-2, S-3.

After issuing the two permissibility violations, Inspector Elswick returned to the surface and reviewed the records in the mine office to see when the continuous miner and roof bolter had last been examined pursuant to 30 C.F.R. § 75.512, which requires electric equipment to be frequently checked for unsafe operating conditions. Tr. 25. Each machine had undergone an electrical examination during the October 24, 2013 evening shift immediately after being idled due to the mine running out of roof bolts. Tr. 18-19, 26. No hazards were recorded for either machine. Tr. 26. Production at the mine had not yet resumed by the time of the October 29 inspection, although miners had remained onsite to perform "dead work" such as rock dusting and setting timbers; as a result, the roof bolter had not been run since being examined on October 24 and the continuous miner had been run for just a few hours since then. Tr. 18-19, 25-26, 50. Inspector Elswick believed the permissibility hazards he had identified on the machines could not have developed after they were examined and therefore informed Lankford that he planned to issue a violation for failure to adequately examine the equipment. Tr. 26-27.

The next day, after further discussing the matter with his supervisor, Elswick returned to the mine and issued Order Number 8180541 alleging a violation of § 75.512 for failure to conduct adequate electrical exams of the continuous miner and roof bolter. Tr. 27, 64-65; Ex. S-1. The order was terminated later that day after the machines had been adequately examined. Tr. 27-28; Exs. S-1, S-2, S-3.

III. LEGAL PRINCIPLES

A. Gravity

The gravity of a violation is generally expressed as the degree of seriousness of the violation. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000); *Consolidation Coal Co.*, 18

[4] "Permissible" is a term of art used within the mining industry to describe equipment whose electrical parts are designed, constructed, and installed in accordance with specifications set forth by the Secretary that are intended to minimize the risk that the equipment will cause a mine explosion, fire, or other accident. *See* 30 C.F.R. § 75.2 (defining "permissible"), § 18.46 (setting forth permissibility requirements for headlights on electric motor-driven equipment).

FMSHRC 1541, 1549 (Sept. 1996). The Secretary measures gravity in terms of the likelihood of injury, the type of injury expected, the number of persons affected, and whether the violation is significant and substantial (S&S). The focus of the gravity inquiry "is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550; *see also Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that some violations are serious notwithstanding the likelihood of injury, such as a violation of an important safety standard; a violation demonstrating recidivism or defiance on the operator's part; or a violation that could combine with other conditions to set the stage for disaster).

B. Negligence/Unwarrantable Failure

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

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

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

The factors listed above must be viewed in the context of the factual circumstances of a particular violation, and it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that the violation is unwarrantable. *Wolf Run*, 35 FMSHRC at

3520-21; *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1193 (Oct. 2010); *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). However, all factors that are relevant should be considered. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007).

IV. FINDINGS OF FACT AND ANALYSIS

A. The Violation

Order Number 8180541 alleges that Nine Mile violated the mandatory safety standard at 30 C.F.R. § 75.512. Ex. S-1. The cited regulation states:

> All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

30 C.F.R. § 75.512; *see also* 30 U.S.C. § 865(g).

In this case, potentially dangerous conditions existed on the continuous miner and roof bolter that were not recorded or addressed when the machines were examined on October 24, 2013 in that five of the lights on the equipment were loose and the globe for one light was broken.

Nine Mile's witness, Lankford, asserted that the lights are mounted on rubber bushings that allow them to move freely, which merely creates a false appearance of looseness. Tr. 86-87. However, Inspector Elswick countered that most of the lights he cited were spotlights, which are bolted directly to the frame of the machine. Tr. 96-98. Lankford also claimed that "everything was tight and everything was permissible" on the equipment at the time of the inspection. Tr. 81. This self-serving assertion is contradicted by the fact that Nine Mile accepted the two permissibility violations Elswick issued for the loose lights and abated those violations by bolting the lights more securely to the equipment. Exs. S-2, S-3. I accept Inspector Elswick's credible testimony that the lights were loose and reject Lankford's statements to the contrary.

I also agree with Inspector Elswick's assessment that the conditions he cited on October 29 had existed at the time the equipment was examined on October 24. The roof bolter had not been run since it was examined and the continuous miner had been run for just a few hours afterward. Tr. 25-26, 50. It is highly unlikely that the cited lights were jostled loose during this time period or that the globe on the roof bolter somehow became broken while the machine was sitting idle.

The cited conditions should have been recorded and addressed during the October 24 electrical exams because, contrary to Nine Mile's assertions, the conditions were potentially dangerous. Although Nine Mile argues that a certified electrical examiner would not have realized that a reportable hazard existed, loose lights on face equipment have long been accepted

as a permissibility hazard. *See, e.g.*, *Consolidation Coal Co.*, 15 FMSHRC 1264, 1276-77 (June 1993) (ALJ); *U.S. Steel Mining Co.*, 6 FMSHRC 722, 729 (Mar. 1984) (ALJ). The Secretary's specifications for underground electric equipment include a requirement that lights be constructed as explosion-proof enclosures and be mounted to provide illumination where it will be most effective. 30 C.F.R. § 18.46. The loose lights cited by Elswick were crooked and hanging from the miner and roof bolter, which created a potential hazard by preventing the lights from providing illumination in the intended direction. Tr. 30, 60. More significantly, the broken globe and the operator's failure to keep the lights bolted down tightly created a permissibility hazard in that the lights' electrical components were no longer safely sealed within explosion-proof enclosures fastened securely to the surface of the machines so as to isolate potential sparks from the mine atmosphere. As Elswick explained, a loose light could create a spark by striking the metal frame of the machine, could be pulled loose from its ground, or could incur damage to its conduits, packing glands, or enclosures, giving rise to a risk of an ignition that could trigger a fire or explosion. Tr. 32, 60-61, 67-71.

Because potentially dangerous conditions existed on the roof bolter and continuous miner that were not properly recorded and addressed during the October 24 electrical examinations, I find that a violation of § 75.512 occurred.

B. Gravity

Inspector Elswick assessed this violation as capable of causing a "lost workdays or restricted duty" type of injury to one miner, but he characterized the probability of injury as "unlikely" and marked the violation non-S&S. Ex. S-1. He explained that the operator of the roof bolter or continuous miner would likely receive burn injuries if the loose and damaged lights were to spark and cause an ignition, but this was unlikely to occur because there were no immediate ignition sources and the mine was not gassy. Tr. 31-32, 59-64, 66-69, 75.

Accepting Elswick's assessment that an injury-causing event was unlikely, permissibility violations on a roof bolter and continuous miner nonetheless pose a serious risk because these machines are used at the face where methane is liberated and rock dust is created, providing an opportunity for combustion or an explosion if sparking occurs. I find that this was a serious violation because it could have exposed the equipment operators to serious burn injuries.

C. Negligence and Unwarrantable Failure

Parties' Positions

Inspector Elswick charged Nine Mile with high negligence and issued this violation as an unwarrantable failure to comply with § 75.512. Ex. S-1. He believed that the potentially dangerous conditions on the roof bolter and continuous miner would have taken a lengthy amount of time to develop, were obvious, and should have been noticed not only by the certified electrical examiners who checked the equipment on October 24, but also by the section foremen who would have regularly traveled through the area to perform preshift and onshift exams between October 24 and October 29. Tr. 33-37. In addition, the violation marked the sixth time this mine had been cited for violating § 75.512 in the most recent eight inspections. Tr. 37-38, 75-76.

Nine Mile argues that it did not act negligently in connection with this violation. Nine Mile contends the cited condition was not extensive, lasted for a short duration, and posed no danger. Nine Mile further takes the position that its employees could not have known and were not on prior notice from MSHA that loose lights on electric face equipment constitute a permissibility violation. Resp.'s Post-Hr'g Br. 11-12.

Duration of Violation

As discussed above, the potentially dangerous conditions Inspector Elswick noted during his October 29 inspection – loose lights and a broken globe on a roof bolter and continuous miner – had existed since before the equipment was idled on October 24. The globe was likely broken while the roof bolter was in use and the bolts that should have been holding the lights securely in place on both machines were likely loosened by the vibration of the equipment as it was operating. Tr. 38-39. In addition, some of the bolts were loose because they were too long, a condition that necessarily must have existed since they were installed. Tr. 38, 71. Thus, the hazardous conditions on the roof bolter and continuous miner had existed for at least five days, during which time the operator had failed to conduct an adequate electrical examination.

Obviousness of Violation; Extensiveness of Violation

The hazardous conditions cited by Inspector Elswick were very obvious: the globe was completely broken on one of the cited lights, exposing the bare bulb, and the other lights were visibly gapped open, hanging from the equipment, and not pointing in the correct direction. Tr. 20-24, 34, 35, 71. In view of these conditions, the inadequacy of the October 24 examinations of the cited equipment was equally obvious. The violation was also extensive in that it involved six different lights on two pieces of equipment.

Operator's Knowledge of Violation

The operator's knowledge of a violation is both a factor affecting the unwarrantable failure analysis and a prerequisite for an MSHA inspector to make a finding of high negligence under 30 C.F.R. § 100.3. Knowledge is established where the operator knew or should have known of the violation. *See Coal River Mining, LLC*, 32 FMSHRC 82, 90-92 (Feb. 2010).

I find that Nine Mile had knowledge of this violation. The potentially dangerous conditions on the continuous miner and roof bolter were obvious and existed for at least five days. The equipment was checked on October 24 by certified electrical examiners, who are agents of the operator with specialized training and who should have noticed the loose and damaged lights. Tr. 37, 46-48. Although the working section where the equipment was located was idled from October 24 to October 29, miners remained onsite to perform dead work. Tr. 18. Thus, the area would have been subjected to regular preshift and onshift exams during which the loose and damaged lights should have been noticed. In addition, as discussed above, some of the bolts holding the lights in place were the wrong size, which must have been known to whomever installed them.

Nine Mile's representative suggested at hearing that the operator could not have been reasonably expected to recognize a hazard under the circumstances presented and elicited testimony from Lankford that electricians are not trained that loose bolts on light fixtures constitute a permissibility violation. Tr. 83. However, immediately after agreeing that loose bolts on lights (which are required to be housed within permissible explosion-proof enclosures) are not a permissibility violation, Lankford offered the incongruous opinion that loose bolts on permissible electrical enclosures do constitute a reportable permissibility violation and a maintenance issue and should be tightened down. Tr. 83-84. I reject Nine Mile's argument that it was unaware that loose and damaged lights constitute a permissibility hazard that must be reported and addressed.

Operator's Notice that Greater Efforts at Compliance Were Necessary

An operator's history of past similar violations or other specific warnings from MSHA is relevant to the extent the past violations and warnings placed the operator on notice prior to the issuance of the citation that greater efforts were necessary for compliance with the cited safety standard. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3080-81 n.5 (Dec. 2014).

Nine Mile denies being placed on notice that greater compliance efforts were needed to address the specific hazardous condition at issue here: loose and damaged lights on permissible face equipment. Tr. 84; Resp.'s Post-Hr'g Br. 12. Although this particular issue may not have arisen in the past, the mine had been cited for failure to conduct adequate electrical examinations during five of the last seven inspections. Tr. 29, 36, 75-77. This should have placed Nine Mile's management, and particularly its electrical examiners, on notice that greater efforts were needed to comply with § 75.512 by thoroughly and adequately examining the mine's electric equipment.

Operator's Abatement Efforts

The abatement effort factor measures an operator's response to violative conditions that it knew or should have known about before the violation was issued. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Also relevant is the level of priority the operator has placed on abating conditions for which it received prior notice that greater compliance efforts were necessary. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009). Abatement efforts undertaken after the issuance of the violation are not relevant. *Id.*

In this case, Nine Mile knew that inadequate electrical examinations of the roof bolter and continuous miner were conducted on October 24. This violation could have been abated by reporting the loose and damaged lights on another examination, fixing them, or tagging the continuous miner and roof bolter out of service. Nine Mile had ample time to address the conditions while production was idled, yet made no effort to abate the violation in the five days that elapsed before Inspector Elswick cited it.

Degree of Danger Posed

Although permissibility violations on face equipment present serious risks, I find that the degree of danger was not unusually high in this case given that the Secretary has conceded the

low probability of an injury-causing event and that the cited equipment was not in use during the five days after the inadequate electrical exams were conducted.

Conclusions

After considering the factors discussed above and all the facts surrounding this violation, I find that Nine Mile engaged in aggravated conduct amounting to more than ordinary negligence by failing to correct obvious, known permissibility violations on two pieces of electric equipment for at least five days during which miners were performing "dead work" and therefore would have had ample time to fix the hazardous conditions. Although the conditions did not pose a high degree of danger under the particular circumstances of this case, permissibility violations on face equipment pose a serious risk and should never be taken lightly. Nine Mile's conduct in allowing the conditions to go uncorrected during a required electrical exam and to remain unaddressed for five days while the mine was idle, considered in conjunction with the mine's history of violating § 75.512 in almost every recent inspection, reveals an attitude on the part of mine management that these examinations are not particularly important. I find that the operator's conduct constituted an unwarrantable failure to comply with § 75.512.

The negligence associated with this violation is high because Nine Mile knew of this violation, failed to abate it, and has not identified any mitigating factors.

V. PENALTIES

The Secretary proposes a civil penalty of $2,000.00 for this violation, which is the minimum penalty amount the Mine Act permits for 104(d)(1) violations. *See* 30 U.S.C. § 820(a)(3)(A). The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

> Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:
>
> The operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

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

Violation History

The Secretary has submitted an MSHA document showing Nine Mile's history of violations at three different mines during the fifteen months preceding the issuance of Order Number 8180541. Ex. S-5. The document is devoid of any qualitative or comparative analysis that would allow me to assess the operator's overall violation history. However, I take note of Inspector Elswick's testimony that Nine Mile had been cited for violations of § 75.512 during five of the preceding seven inspections. Tr. 29, 36, 75-77.

Size of Operator; Ability to Continue in Business

The parties have not submitted information regarding the operator's size. Inspector Elswick testified that the mine itself is "fairly small," with just two working sections and approximately eighty employees. Tr. 76. The parties stipulated to the mine's tonnage, which corresponds to a small- to moderate-sized mine under MSHA's penalty formula. *See* Joint Exhibit 1; 30 C.F.R. § 100.3, Table I. Nine Mile has not alleged or presented any evidence that a minimally assessed $2,000.00 penalty would affect its ability to remain in business.

Good Faith

Although Exhibit A to the Secretary's penalty petition does not reflect that the operator was credited with good faith in abating the violation, Elswick's testimony indicates the conditions he cited were promptly corrected in good faith. Tr. 27-28, 38.

Negligence and Gravity

The negligence and gravity are discussed in the body of my decision above.

Conclusion

After considering the six statutory penalty criteria, I assess a penalty of $2,000.00 for this violation.

ORDER

Nine Mile Mining, Inc. is hereby **ORDERED** to pay the sum of $2,000.00 within thirty (30) days of the date of this Decision and Order.[5]

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

Distribution:

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James F. Bowman, Representative, Nine Mile Mining, Inc., P.O. Box 99, Midway, WV 25878

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 30, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. PEABODY TWENTYMILE MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2015-64 A.C. No. 05-03836-362873 Mine: Foidel Creek Mine
PEABODY TWENTYMILE MINING, LLC, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	CONTEST PROCEEDING Docket No. WEST 2014-930-R Citation No. 8481807; 08/06/2014 Foidel Creek Mine Mine ID 05-03836

DECISION

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

R. Henry Moore, Jackson Kelly
Three Gateway Center, Suite 1500,
401 Liberty Avenue, Pittsburgh, PA 15222

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a civil penalty petition filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (MSHA), against Peabody Twentymile Mining, LLC (Respondent) Foidel Creek Mine, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. Prior to hearing, the parties settled five of the six citations contained in this docket. The remaining citation contested at hearing involved the alleged improper use of polyurethane spray foam to seal the perimeter of a concrete block ventilation stopping.

At hearing, MSHA Inspector Yasser Akbarzadeh, Inspector James Preece, and Technical Advisor Barry Grosley testified for the Secretary. Peabody Twentymile Supervisors Adam Patterson, Ronald Hockett, and Robert Derick testified for the Respondent. For the reasons that follow, Citation No. 8481807 is **AFFIRMED** as written and assessed with a civil monetary penalty of **$162.00**.

II. FINDINGS OF FACT

A. Background

The Foidel Creek Mine is an underground bituminous coal mine that has been in continuous operation since 1983 and is commonly referred to as the Twentymile Mine. Tr. 42, 137, 139. The mine employs both longwall and conventional room and pillar mining methods. Tr. 32. The mine produces approximately 7 million tons of coal annually and contains over a thousand different ventilation stoppings built at different stages of the mine's development. Sec'y Petition, Ex. A; Tr. 49, 98. The ventilation stoppings separate the intake and return to the belt intake air and prevent contamination of air in the escapeway and working face. Tr. 30.

Pursuant to the mine's MSHA approved ventilation plan, the mine uses both dry-stacked blocks and metal panel (Kennedy) construction to build ventilation stoppings. Tr. 136. As concisely summarized by Respondent's counsel:

> The building of a block stopping involves the removal of any loose debris from the floor and the rib lines across a 17 to 23 foot wide entry that is 8-1/ 2 feet high. Tr. 11 6-17. A level base is built with three inch cinder blocks across the floor. Tr. 118. Rows of cinder blocks are then stacked and wedged against the ribs by driving a wedge between the last cinder block and the coal rib. Tr. 117, 125. This holds the blocks in place as the stopping is built. Tr. 125. The blocks are "dry" stacked, meaning that no mortar is placed between the blocks. Tr. 117. Once the blocks reach the roof line, wedges are driven between the roof and the top of the blocks. Tr. 117.
>
> This secures the blocks and provides strength to stopping. Tr. 99, 117. The face of the blocks is then coated with a strength enhancing sealant material. Tr. 117.

> This material is applied using a trowel and is not the sealant that is (cited within Citation No. 8481807). Tr. 118. Prior to the citations at issue here, the perimeter of the stopping, as referenced in the MSHA-approved ventilation plan, was sealed by injecting a ()[1] polyurethane grout around the perimeter. Tr. 118.

Resp. Br., 2-3 (citing Under Ground Mine Manager Ronald Hockett's testimony).

The ventilation plan contains a section entitled "USE OF POLYURETHANE FOAM" that lists RHH Versi-Foam System 15, Micon FoamPak, Touch 'n Seal Mine Foam, and Touch 'n Seal Mine Block Mortar as the only polyurethane foam used at the mine. Sec'y Ex. 3, 1. The ventilation plan states that:

> Application of foam for ventilation device installation will be limited to sealing the perimeter and joints of such devices. Foam may be used to repair ventilation device doors and holes in stoppings up to 4 inches by 4 inches in size. Foam may not be applied to the inside of ventilation tubing or ducting. The application shall not overlap more than 12 inches onto the roof and ribs.

Id.

Peabody applied polyurethane foam as the primary sealant at the perimeter of both dry-stacked block and metal ventilation stoppings on a routine basis at the Twentymile Mine from the start of the mine's operation in 1983 until the issuance of Citation No 8481807 in August 2014. Tr. 87, 118, 140. MSHA performs complete inspections of the Twentymile Mine at least four times annually on a quarterly basis. Tr. 14. Prior to the issuance of Citation No. 8481807, MSHA had issued Citation No. 8468872 on October 16, 2012 for excessive application of Versi-Foam at a metal Kennedy stopping. Tr. 72-73. MSHA inspectors had not cited any block stoppings for impermissible use of spray foam prior to the issuance of Citation No. 8481807. Tr. 111-13, 157.

B. Citation No. 8481807

MSHA Inspector Yasser Akbarzadeh issued Citation No.8481807 for an alleged violation of 30 CFR §75.333(e)(1)(i) on August 6, 2014. Akbarzadeh alleged within the citation that:

> The usage of "polyurethane spray foam" for application as a sealant for Kennedy mine ventilation structures and as a repair sealant for cracks in concrete block ventilation structures is not

[1] The Respondent refers to the Polyurethane grout as MSHA approved. Resp. Br., 3. While the cited Touch n Seal U2 200/600 is listed as a suitable stopping sealant by MSHA, it is listed as non strength enhancing and is not included in approved block stopping construction methods.

> built in a traditionally accepted method that has demonstrated to perform adequately. It was observed that the foam sprays at the sealant are not strengthened and are not reaching the ribs. The seal was located at 13 left, 3-4 Entry, one crosscut outby the dump point. The MMU number was 008. Parameters of the stopping (Ribs, floor along the top) was not made of strengthen enhance material. The ventilation plan needs to be revised to address; 1) the guidelines for the use of polyurethane foam system. 2) Temporary underground storage for polyurethane spray foam containers.…
>
> Standard 75.333(e)(1)(i) was cited 2 times in two years at mine 0503836 (2 to the operator, 0 to a contractor).

Sec'y Ex. 1, 1-2.

Akbarzadeh filed a modification for Citation No 8481807 later that day, stating that,

> The cinder block stopping being used on the 13 Left working section MMU 008-0, located in the first crosscut outby the loading point, No. 3 to 4 crosscut between the haulage road and the belt. The stopping was not built in a traditionally accepted method that has demonstrated to perform adequately. The following conditions were observed;
>
> l.) The perimeter of the stopping was not sealed with mortar.
> 2.) The perimeter of the stopping was sealed with touch N seal foam measuring approximately 0 to 6 inches along the ribs and roof.
> 3.) Underground storage of foam was not being with in accordance with the manufacture recommendations.
> 4.) The foam packs were being stored in a mobile trailer along with other extraneous materials on the working section.
> 5.) The valves on a set of foam canisters were left in an on position. The mine operator is in the process of revising their handling procedures and implementing this into their ventilation plan. Termination time will be extended to allow the operator time to train miners in the handling procedures.

Id. at 3.

Akbarzadeh designated Citation No. 8481807 as a moderate negligence violation that was unlikely to contribute to the occurrence of an injury resulting in lost workdays or restricted duty. *Id* at 1. Akbarzadeh determined that the failure to properly seal the ventilation structure was not significant and substantial. *Id*. The Respondent abated the citation by removing the block stopping and installing a metal panel stopping that was sealed with spray foam at the perimeter. *Id.* at 4. The Secretary has proposed a regularly assessed penalty of $162.00 for Citation No. 8481807. Sec'y Petition, Ex. A.

1. Testimony

a. The Secretary

Inspector Akbarzadeh testified that he had received a Ph.D. in mine engineering and rock mechanics and completed an internship with the National Institute of Safety and Health (NIOSH) prior to joining MSHA. Tr. 17. However, Akbarzadeh confirmed on cross-examination that he had not worked in the mining industry or visited underground mines on a regular basis prior to joining MSHA. Tr. 24. Akbarzadeh testified that Citation No. 8481807 was the fourth citation he had issued as an inspector and that the subject inspection was his first underground inspection. Tr. 22.

Akbarzadeh stated that Assistant District Manager Jim Preece accompanied him on the inspection to show him if he was "missing something." Tr. 19. Akbarzadeh stated that Preece pointed out the spray foam and explained how that was a violation. Tr. 20. Akbarzadeh stated after review with Preece and other MSHA officials, Akbarzadeh made modifications to the text of Citation No. 8481807. Tr. 21-22.

MSHA Assistant District Manager Preece testified that he had worked in the mining industry since 1975 and joined MSHA in 2000. Tr. 27-28. Preece testified that in his experience concrete block stoppings were intended for permanent use along permanent main entries while metal Kennedy stoppings were designed for temporary use in retreat areas in longwall sections. Tr. 32. Preece stated that he had always used strength enhancing block bond mortar to seal the perimeter of block stoppings. Tr. 34-35. Preece testified that metal Kennedy stoppings normally used metal flags to narrow the gap between the panel edge and rib wall in addition to the spray foam. Tr. 36-37.

Preece stated that at the cited stopping, he noticed that the block face had been properly sealed but the perimeter only had polyurethane foam. Tr. 44. Preece did not recall if there were any gaps at the perimeter of the stopping and did not recall if Inspector Akbarzadeh had measured any gaps. Tr. 46. Preece stated on direct examination that the polyurethane foam was not strength enhancing and was not fire rated and could burn out in the event of a fire and allow smoke to spread into the escapeway. Tr. 50.

On cross-examination, Preece confirmed that Touch N Seal Foam does in fact have an ASTM flame spread rating that meets MSHA requirements. Tr. 53-54. However, on re-direct, Preece explained that MSHA standards required sealants at block stoppings to meet flammability, strength, and fire requirements and that that the Touch N Seal Foam had only received a flame spread rating. Tr. 62-63. Preece also testified that the seal at the perimeter should have the same strength as the rest of the stopping. Tr. 65.

MSHA Inspector Grosley testified regarding guidance he had previously provided to Peabody safety personnel regarding the use of spray foam at block stoppings while issuing a

separate citation.[2] Tr. 71. Grosley stated that on October 16, 2012 he issued a citation at the Twentymile Mine for improper use of spray foam at a metal Kennedy stopping. Tr. 72-73. Grosley stated that at that stopping, the operator had attempted to fill voids up to 17 inches wide with spray foam. Tr. 73. Grosley testified that this application did not comply with manufacturer's recommendations and resulted in a very weak seal that allowed air to leak through to the other side of the stopping. Tr. 73-74.

Grosley further stated that after he issued this citation, he had a conversation with Peabody Safety Manager Lance McLaughlin regarding his concerns on the application of spray foam at the Twentymile Mine. Tr. 76. In addition to concerns regarding proper application at metal stoppings, Grosley stated that he informed Mr. McLaughlin that spray foam should only be applied at block stoppings as a secondary sealant after first filling the perimeter with a strength enhancing mortar. Tr. 78.

During rebuttal testimony, Assistant District Manager Preece acknowledged that MSHA had not issued citations for using spray foam to seal the perimeter of dry-stacked blocked stoppings prior to Citation No. 8481807. Tr. 157. Preece stated that the regional MSHA inspection unit relied on a number of inexperienced inspectors that may not have had adequate training or may not have been paying attention to the perimeter of the stoppings. *Id*. On cross-examination, Preece conceded that the Twentymile Mine had been regularly inspected by a number of experienced inspectors in the years prior to the issuance of Citation No. 8481807. Tr. 158-59.

b. The Respondent

Peabody MSHA Compliance Manager[3] Adam Patterson testified for the Respondent that he accompanied Inspectors Akbarzadeh and Preece on the August 5, 2014 inspection. Tr. 86. Patterson stated that the cited block stopping had been constructed in the same manner as all other block stoppings at the Twentymile Mine prior to 2014. Tr. 86-87. Patterson testified that he did not observe any deficiencies in the construction or the six inch gaps described in the body of the citation. Tr. 87.

Patterson testified that he believed the language of the mine's ventilation plan permitted the operator to use polyurethane foam to seal the perimeter of both metal and block stoppings. Tr. 91. Patterson stated that in his experience the polyurethane foam was a better sealant because it did not dry and crack like the mortar mix sealants did. Tr. 90. Patterson testified that the mine considered testing a customized stopping per ASTM standards but that the laboratory tests did not permit the blocks to be wedged at the top of the assembly. Tr. 93. Patterson stated that

[2] The Respondent objected to Mr. Grosley's testimony as not relevant. The Court overruled the Respondent's objections and for the reasons stated within found Mr. Grosely's testimony relevant to determining the negligence level of the alleged violation.

[3] Mr. Patterson stated that he had started work as a long term planner for the continuous miner section of the Foidel Creek Mine after the issuance of Citation No. 8481807.

without the wedges, any test would not have been representative of how the stopping functioned. Tr. 93.

When questioned on cross-examination, Patterson explained that he considered the cited stopping "traditionally accepted" as it was built the same as hundreds of other block stoppings at the Twentymile Mine that had previously been observed by MSHA inspectors. Tr. 107-08. Patterson stated that Safety Manager McLaughlin had not informed him of Inspector Grosley's instruction regarding the use of spray foam at block stoppings. Tr. 110.

Peabody Underground Mine Manager Ronald Hockett testified regarding the construction of ventilation stoppings at the Twentymile Mine. Tr. 116-118. Hockett stated that using the polyurethane spray foam formed a superior seal to mortar mix at the perimeter of block stoppings as it was easier to spray into the narrow void space and the spray foam expanded rather than cracked like the mortar mix. Tr. 118-119. Hockett testified that the citation Inspector Grosley issued in 2012 was issued for deficient workmanship and was not similar to Citation No. 8481807. Tr. 120. Hockett also stated that he believed that using spray foam to seal the perimeter of block stoppings was a traditionally accepted construction method because the operator had built stoppings in that manner for the entire twenty three years he had worked at the Twentymile Mine and MSHA had never raised an objection to the use of spray foam itself at any stopping. Tr. 123.

Former Peabody Safety Manager Robert Derick testified on the development of the Twentymile underground ventilation plan. Tr. 132. Derick explained that in his mining career, he had observed polyurethane foam applied to block stoppings at many different mines. Tr. 136. Derick stated that when he began work at the Twentymile Mine in 1991, the operator was using polyurethane foam to seal both block stoppings and metal Kennedy stoppings. Tr. 136, 138. Derick stated that upon his review, he had confirmed that each version of the Twentymile ventilation plan submitted to MSHA included the use of polyurethane spray foam to seal ventilation stoppings. Tr. 138-39. Derick explained that this included the original 1983 ventilation plan as well as revisions submitted in 1991, 2000, and 2011. *Id*. On cross-examination, Derick confirmed that no version of the ventilation plan specifically listed polyurethane foam as an approved primary sealant at the perimeter of block stoppings. Tr. 143-44.

C. The Cited Standard

30 CFR § 75.333(e)(1) mandates:

> Except as provided in paragraphs (e)(2), (e)(3) and (e)(4) of this section all overcasts, undercasts, shaft partitions, permanent stoppings, and regulators, installed after June 10, 1996, *shall be constructed in a traditionally accepted method and of materials that have been demonstrated to perform adequately or in a method and of materials that have been tested and shown to have a minimum strength equal to or greater than the traditionally accepted in-mine controls*…. In-mine tests shall be designed to

> demonstrate the comparative strength of the proposed construction and a traditionally accepted in-mine control.

30 CFR § 75.333(e)(1)(emphasis added).

MSHA promulgated the current version of 30 CFR 75.333(e)(1) along with a number of other revisions to MSHA's ventilation regulations in June 1996. In adopting the revised rules, MSHA published a detailed synopsis of each revised rule within the preamble to the rule. March 11, 1996 Federal Register 61 FR, 9783-84. For 30 CFR § 75.333(e)(1) MSHA states,

> Since the inception of the Mine Act, a number of traditionally accepted construction methods have performed adequately and have served their intended function of separating air courses. These traditionally accepted construction methods are: 8-inch and 6-inch concrete blocks (both hollow-core and solid) with mortared joints; 8-inch and 6-inch concrete blocks dry stacked and coated on both sides with a strength-enhancing sealant suitable for dry-stacked stoppings; *8-inch and 6-inch concrete blocks dry-stacked and coated on the high pressure side with a strength enhancing sealant suitable for dry-stacked stoppings*; steel stoppings (minimum 20 gauge) with seams sealed using manufacturer's recommended tape and with the tape and perimeter of the metal stopping coated with a suitable mine sealant; and lightweight incombustible cementatious masonry blocks coated on the joints and perimeter with a strength enhancing sealant for dry-stacked stoppings. . . . For new construction methods or materials other than those used for the traditionally accepted constructions identified above, the final rule requires that the strength be equal to or greater than the traditionally accepted in-mine controls. Tests may be performed under ASTM E72-80 Section 12 . . . or the operator may conduct comparative in-mine tests. In-mine tests must be designed to demonstrate the comparative strength of the proposed construction and a traditionally accepted in-mine control.

61 FR, 9783-84 (emphasis added for the method nominally employed by the Respondent at the stopping cited within Citation No. 8481807).

The spray foam applied at the perimeter of the cited stopping, Touch N Seal U-200/600FR, is currently approved by MSHA as a suitable sealant for ventilation controls but MSHA has noted that Touch N Seal U-200/600FR is "non-strength enhancing." MSHA June 2014 List of Suitable Sealants, 2 (Designating Clayton Touch 'N Seal U2-200FR & U2-600FR

as suitable but non-strength enhancing sealants).[4] Additionally, within MSHA's 2013 List of Suitable Ventilation Controls Touch N Seal U-200/ 600FR is only approved when used with steel stopping materials. MSHA 2013 List of Suitable Ventilation Controls, 2-3 (Listing Touch 'N Seal Mine Foam and Clayton Corp U2-200FR as approved sealants only for Kwic-Wall steel panels and GMS modular steel overcast ventilation controls).

III. CONCLUSIONS OF LAW

A. The Violation

The cited standard requires underground coal operators to install ventilation stoppings in a "traditionally accepted manner" with "materials that have been demonstrated to perform adequately …" 30 CFR §75.333(e)(1). The standard does not itself define what methods or materials are traditionally accepted but the preamble to 30 CFR 75.333(e)(1) states that the following five traditionally accepted methods have been demonstrated to perform adequately in separating air courses,

1) 8 inch and 6 inch concrete blocks with mortared joints;
2) 8 inch and 6 inch dry stacked concrete blocks with strength enhancing sealants on both sides;
3) 8 inch and 6 inch dry stacked concrete blocks with strength enhancing sealants on the high pressure side;
4) Steel stoppings with seams sealed with manufacturer's recommended tape and the perimeter sealed with a suitable mine sealant;
5) Lightweight incombustible cementatious masonry blocks coated on the joints and perimeter with a strength enhancing sealant suitable for dry stacked stoppings.

61 FR, 9783.

The court finds that the preamble list of "traditional construction methods" is exhaustive as MSHA states that "These traditionally accepted construction methods **are**…" and required engineering tests for all "new construction methods **or materials other than those used for the traditionally accepted constructions identified above**." FR, 9783-84. Accordingly, the court finds that the prior or even longstanding use of a particular sealant or construction method within a mine is irrelevant to whether a stopping is built according to "traditionally accepted construction methods."

The court acknowledges that the preamble to a regulation is not binding when it is not contained within the regulation itself. *Austin Powder Co*., 29 FMSHRC 909, 916 (Nov. 2007). However, the Respondent has not offered any other MSHA publication or Commission precedent to support the argument that this court should consider an operator's customary

[4] The court took judicial notice of MSHA's publicly available list of suitable ventilation sealants and stopping construction assemblies after hearing but prior to the submission of the parties post hearing briefs. The court provided the parties copies of all referenced MSHA publications on August 18, 2015.

construction technique in determining whether or not a stopping is built in a "traditionally accepted method." The Respondent has not argued that the language of the preamble contradicts the text of 30 CFR § 77.333(e)(1). As such, this court holds that the preamble to 30 CFR § 77.333(e)(1) provides the most relevant and complete set of guidance on the requirements for determining whether a stopping is built in a "traditionally accepted method." And the preamble specifically mandates that the perimeter of cementatious masonry block stoppings must be sealed with a "strength enhancing sealant suitable for dry stacked stoppings." 61 FR, 9783.

The Respondent argues in reference to the preamble that, "If (a suitable sealant) works for Kennedy stoppings, it will work for concrete block stoppings and the preamble does not support the Secretary's position." Resp. Br, 14. However, the Respondent's argument ignores the preamble's additional mandate that "lightweight incombustible cementatious masonry blocks (must be) coated on the joints *and perimeter with a strength enhancing sealant suitable for dry-stacked stoppings*." 61 FR, 9783 (emphasis added).

In the court's view, concrete block stoppings are much more similar to lightweight cementatious block stoppings than the metal panel stoppings relied upon by the Respondent in their argument. Furthermore, the preamble states the requirement for a strength enhancing sealant at the *perimeter* of cementatious masonry blocks by requiring a "strength enhancing sealant *suitable for dry-stacked stoppings*." *Id*. Accordingly, this court finds that 30 CFR 77. 333(e)(1) requires operators to seal the perimeter of dry-stack block stoppings with a strength enhancing sealant in order to conform with traditionally accepted construction methods.

Finally, upon this court's review, none of the block stoppings included on MSHA's 2013 List of Suitable Ventilation Controls use Touch N Seal U-200/600FR, or any other polyurethane spray foam, as a perimeter sealant. MSHA 2013 List of Suitable Ventilation Controls, 1-4. Indeed, although MSHA approved Touch N Seal U-200/600FR as a suitable sealant in 2001, it has consistently designated Touch N Seal U-200/600FR as non-strength enhancing and only approved its use as a perimeter sealant when used in metal stopping assemblies. MSHA June 2014 List of Suitable Sealants; MSHA 2013 List of Suitable Ventilation Controls; MSHA 2010 Suitable Sealant List; MSHA 2001 Touch N' Seal S-17-00 Sealant Approval.

The Respondent has argued that the Secretary has not properly alleged a violation of 30 CFR 75.333(e)(1) as Citation No. 8481807 contains allegations that relate to polyurethane spray foam requirements set forth in the mine's ventilation plan and not 30 CFR § 75.333(e)(1). Resp. Br., 9-10. The Respondent's argument is unavailing. Citation No. 8481807 clearly and unambiguously lists 30 CFR § 75.333(e)(1) as the standard violated. Sec'y Ex. 1, 1. Additionally, the text of both the original citation and subsequent modification reference the improper use of spray foam at block stoppings, in addition to alleging improper spray foam storage procedures. Sec'y Ex. 1. The court agrees that Citation No. 8481807, particularly the original version, is less than a perfect model of clarity. However, the text of Citation No. 8481807 describes the alleged violative condition (improper application of spray foam) with sufficient specificity to allow the Respondent to both abate the citation and prepare an adequate defense. *Erie Mining Co.,* 2 FMSHRC 2717, 3721 (Sept. 1980)(ALJ Lasher).

The Respondent also contends that this court should rely on the mine's ventilation plan to determine whether the cited stopping was built in a traditionally accepted method. Resp. Br., 9-10 (citing *Big Ridge, Inc*., 32 FMSHRC 1020, 1028 (Aug. 2010)(ALJ Melick); *Cyprus-Empire Corp*., 11 FMSHRC 1795, 1809 (Sept. 1989)(ALJ Morris). However, the ALJ decisions cited by the Respondent do not elevate the language of mine specific plans over the language of the agency's regulations. They only state that the Commission should employ the most specific relevant Congressional statute or agency regulation to the alleged facts of the violation. *Big Ridge*, 32 FMSHRC 1028 (applying 30 CFR § 77.1107(d) rather than 30 CFR § 75.1107(1)(c) when the regulation treated battery powered equipment differently than cable powered equipment);Cyprus-Empire Corp., 11 FMSHRC 1809 (holding that an alleged violation of 30 CFR § 70.100 must be evaluated under the language of section 104(f) of the Act).

Accordingly, this court will not defer to a provision of an operator's "MSHA approved" ventilation plan if it is, in fact, contrary to the language of the regulation. Furthermore, the Twentymile ventilation plan does not specify that the operator intended to use polyurethane spray foam at the perimeter of *block* stoppings. Sec'y Ex. 3, 1; Tr. 143-44. Given all the above, determining the proper interpretation or import of the Respondent's ventilation plan is unnecessary to these proceedings. Similarly, any inquiry into prior MSHA inspectors' acceptance of similar construction techniques at the Twentymile Mine is immaterial to the court's ruling on the violation. *King Knob Coal Co*., 3 FMSHRC 1417, 1421-22 (1981)(holding that "evidence of prior inconsistent enforcement of a safety standard does not constitute a viable defense to a violation…").

In sum, this court finds that 30 CFR 77.333(e)(1) requires the use of strength enhancing sealant at the perimeter of block stoppings in order to conform with traditionally accepted construction methods. As the Respondent sealed the perimeter of the subject stopping with non-strength enhancing Touch N Seal U-200/600FR and did not submit this assembly type for laboratory testing, the court finds that the Respondent failed to comply with 30 CFR § 77.333(e)(1). Tr. 86-87.

B. Gravity

MSHA Inspector Akbarzadeh and Assistant District Manger Preece did not perform any strength testing or attempt to isolate any air leaks at the cited stopping. Tr. 95. Inspector Preece did testify that the cited spray foam lacked ANSI strength and fire ratings. Tr. 63. On cross-examination, the Secretary questioned former Safety Manager Derick regarding a NIOSH report on the effectiveness of polyurethane spray as a ventilation sealant. Tr. 147-48. However, as the Secretary failed to provide the report to the Respondent prior to the pre-hearing conference as required by the court's initial prehearing order, the court excluded the report from evidence. Tr. 151-52.

Given the above, the court affirms Inspector Akbarzadeh's gravity findings for Citation No. 8481807 as unlikely to contribute to the occurrence of an injury resulting in lost workdays or restricted duty and non-significant and substantial.

C. Negligence

The regulation preamble and subsequent MSHA approved sealant lists notified the Respondent that the perimeter of block stoppings must be sealed with strength enhancing sealants and that Touch N Seal U-200/600FR was non strength enhancing. MSHA June 2014 List of Suitable Sealants; MSHA 2013 List of Suitable Ventilation Controls; MSHA 2010 Suitable Sealant List; 61 FR, 9783. Additionally, MSHA Inspector Grosley credibly testified that he informed Peabody Safety Manager McLaughlin that polyurethane spray foam should not be used as a primary sealant at blocks toppings in October of 2012. Tr. 78. Although none of the Respondent's witnesses had any prior knowledge of Mr. Grosley's October 2012 conversation with McLaughlin, they did not specifically rebut Mr. Grosley's testimony regarding that verbal warning.[5] Tr. 94, 120-21.

However, the testimony of both parties indicates that MSHA inspectors failed to issue citations for using spray foam at the perimeter of block stoppings at hundreds of different block stoppings despite a system of full-mine quarterly inspections. Tr. 107-08, 157. Accordingly, the court finds that the Respondent acted with moderate negligence in violating the cited standard.

D. Penalty

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

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

30 U.S.C. 820(I).

These criteria are generally incorporated by the Secretary within a standardized penalty calculation that results in a pre-determined penalty amount based on assigned penalty points. 30 CFR 100.3: Table 1- Table XIV. The Secretary has proposed a regularly assessed penalty of $162.00 for Citation No. 8481807 based upon the 30 CFR 100.3 penalty tables. Sec'y Petition, Ex. A.

The Respondent is a large operator with a relatively low rate of total violations per inspection day and a minimal number of repeat violations of 30 CFR 75.333(e)(1) in the 15

[5] The Respondent did not offer Mr. McLaughlin as a witness and Safety Manager Patterson testified that McLaughlin retired from Peabody Mining one week before the date of the hearing. Tr. 102.

months prior to the citation at issue. I have found that the Respondent acted with moderate negligence. The Respondent has stipulated that the proposed penalty will not affect its ability to continue in business. Resp. Pre-Hearing Report, 5. I have found that the violation was unlikely to result in an injury and any injury that occurred would result in lost workdays/or restricted duty. The parties have stipulated that the Respondent promptly removed the block stopping and installed a permissible metal stopping with polyurethane spray foam perimeter sealant. Sec'y Ex. 1, 4: Tr.

After considering this evidence in light of the six statutory factors I uphold the Secretary's proposed penalty and assess a penalty amount of $162.00.

IV. PARTIAL SETTLEMENT

The Secretary has filed a motion to approve settlement of the five remaining violations contained in this docket. Pursuant to 29 C.F.R. § 2700.1(b) and Fed. R. Civ. P. 12(f), I strike paragraphs three and four from the Secretary's Motion as immaterial and impertinent to the issues legitimately before the Commission.[6] The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act.

Instead, I have considered the provided specific factual explanations for the agreed upon settlement per sections 110(i) and 110(k) of the Act. I acknowledge and accept the explanation for the agreed upon settlement contained in the parties' settlement motion and amendments. The originally assessed amount was **$3,457.00** and the proposed settlement is for **$2,858.00.** The parties have agreed to bear their own legal fees associated with this matter, including costs which may be available under the Equal Access to Justice Act. The parties have moved to approve the proposed settlement as follows:

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[6] The Secretary's Motion for Decision and Order Approving Settlement reads in pertinent part:

> 3. In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citation as indicated above.
>
> 4. Consistent with the position the Secretary has taken before the Commission in The American Coal Company, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k).

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
WEST 2015-64			
8479229	$1,203.00	$950.00	Modify Cited Standard from "30 CFR §75.1103-1" to "30 CFR §75.1101-10" Modify language in Section 8 to read, "At the belt drive on the 4 main north belt at cross cut 38 plus 49 the fire suppression system did not stop the belt from running while water was flowing." Modify Chance of Injury or Illness from "Reasonably Likely" to "Unlikely" Remove "Significant and Substantial" Designation
8481806	$634.00	$571.00	Reduce Monetary Penalty
8479230	$585.00	$475.00	Reduce Negligence from "Moderate" to "Low"
8479232	$873.00	$700.00	Modify Chance of Injury or Illness from "Reasonably Likely" to "Unlikely" Remove "Significant and Substantial" Designation
8484028	$162.00	$162.00	Accept as written
Total	**$3,457.00**	**$2,858.00**	

I have considered the representations and documentations submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve settlement is **GRANTED**, the citations contained in this docket are **MODIFIED** as set forth above.

V. ORDER

The Respondent, Peabody Twentymile Mining, LLC is **ORDERED** to pay the Secretary of Labor the sum of **$3,020.00** within 30 days of this order.[7] The associated notice of contest proceeding WEST 2014-930 is **DISMISSED**.

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

Distribution: (U.S. First Class Mail)

Michele A. Horn, Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204

R. Henry Moore, Jackson Kelly, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

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

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 3, 2015

SANDRA G. MCDONALD, Complainant, v. TMK ENTERPRISE SECURITY, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEVA 2014-387-D HOPE-CD 2013-10 Frasure Creek Mining, LLC Mine ID 46-07014 5G1

ORDER ON REMAND

Before: Judge Feldman

This case is before me based on a discrimination complaint filed on January 7, 2014, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) (Mine Act). The complaint, filed by Sandra G. McDonald under section 105(c)(3), concerns her employment as a security guard by a security services contractor at a mine site operated by Frasure Creek Mining, LLC, ("Frasure Creek") during the period, on or about, May 2011 through September 3, 2013. McDonald seeks to recover appropriate relief, including employment reinstatement and back pay under Section 105(c) of the Mine Act,[1] from TMK Enterprise Security Services, Inc. ("TMK"), a business entity that had been incorporated in West Virginia.

However, the evidence of record reflects that TMK's corporate status was terminated by the state of West Virginia on June 12, 2009. Consequently, McDonald was never employed by TMK prior to its termination as a corporate entity. Rather, McDonald was employed by George King and Mark Toler, the former principles of TMK, who continued to operate their security services business as a non-corporate entity.

Consequently, on February 3, 2015, I issued a stay order to provide counsel with an opportunity to amend the pleading by adding King and Toler as the proper respondents. However, rather than amending the complaint to include King and Toler—who during several

[1] Section 105(c)(1) provides, in pertinent part:

> No person shall discharge or in any manner discriminate against … any miner … because such miner … has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent … of an alleged danger or safety or health violation in a coal or other mine … or because such miner … instituted any proceeding under or related to this Act ….

30 U.S.C. § 815(c)(1).

telephone conferences had asserted a financial inability to pay any relief claimed by McDonald—McDonald's counsel sought to substitute Frasure Creek as an entirely new respondent, under a new theory of the case. Specifically, McDonald's counsel alleged:

> Frasure Creek was intimately involved in and had direct knowledge of all of the hazard complaints at issue in this discrimination case, and had a direct role in effectuating an illegal and discriminatory course of conduct, by communicating and consummating an adverse employment action against the Complainant in retaliation for protected activity.

Mot. to Lift Temp. Stay and to Amend Compl., at 2 (Feb. 18, 2015).

On March 12, 2015, I issued an Order Denying McDonald's Motion to Amend Complaint, which sought to substitute Frasure Creek for TMK, rather than add King and Toler as respondents. McDonald's motion was denied because McDonald was precluded from bringing a discrimination action against Frasure Creek in a 105(c)(3) proceeding as the allegations of discrimination against Frasure Creek had not been investigated by the Secretary under section 105(c)(2) of the Mine Act. 37 FMSHRC 683, 685 (Mar. 2015) (ALJ); *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991) (citations omitted). The case was dismissed because McDonald's counsel elected not to amend the complaint to include King and Toler as respondents. *Id.* However, the March 12, 2015, Order noted that the dismissal was *without prejudice* to any subsequent reopening of McDonald's 105(c)(3) discrimination complaint against King and/or Toler, as individuals. *Id.*

On March 23, 2015, McDonald filed a Petition for Reconsideration with the undersigned that sought to set aside the March 12, 2015, dismissal order by allowing McDonald to add King and Toler as respondents. Shortly thereafter, on March 31, 2015, the Commission exercised review *sua sponte* of the March 12, 2015, Order. On October 23, 2015, the Commission remanded this matter granting leave to McDonald to "amend the complaint to add other relevant parties, including King and Toler," an opportunity that was essentially previously extended by the undersigned and initially rejected by McDonald. 37 FMSHRC __, slip op. at 5 (Oct. 23, 2015).

ORDER

Consequently, consistent with the Commission's remand, **IT IS ORDERED** that leave is granted for McDonald to amend her complaint to include King and Toler, as well as any other relevant parties. *Id.* Failure to file an amended complaint **within 30 days of the date of this Order** may result in the issuance of an Order to Show Cause why McDonald's discrimination complaint should not be dismissed for a failure to prosecute.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution:

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/acp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 3, 2015

POCAHONTAS COAL COMPANY, LLC, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	CONTEST PROCEEDING Docket No. WEVA 2014-395-R Order No. 3576153; 12/19/2013 Mine: Affinity Mine Mine ID: 46-08878
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. POCAHONTAS COAL COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2014-1028 A.C. No. 46-08878-350475 Mine: Affinity Mine

ORDER DENYING POCAHONTAS' MOTION FOR SUMMARY DECISION AND GRANTING THE SECRETARY'S MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Miller

This case is before me on a petition for penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) (the "Mine Act" or "Act"). One citation remains in this docket, but the primary focus of the case and this decision is the Pattern of Violations ("POV") allegation. Both parties filed motions for summary decision and memoranda of law in support of those motions, and subsequently filed responses in opposition. The parties, during the course of a conference call, acknowledged a preference for deciding the POV matter on the record, as there is little, if any, dispute of fact. The parties agreed to complete the final portion of discovery and supplement the record so that a decision could be made without a hearing. The final submissions were made on August 19, 2015, and the parties agree that the case is ready for decision on the record. A draft order had been prepared when the *Brody II* decision was issued by the Commission and the parties were given an opportunity to further supplement the record, but both declined to do so. Based upon the entire record in this case and for the reasons that follow, I deny Respondent's motion for summary decision and I grant the Secretary's motion.

On October 24, 2013, the Mine Safety and Health Administration ("MSHA") notified Pocahontas Coal Company, LLC, ("Pocahontas") that MSHA had determined that a pattern of

violations existed at Pocahontas's Affinity Mine and issued Written Notice No. 7219153 (hereinafter the "notice" or "NPOV") pursuant to section 104(e)(1) of the Mine Act. Subsequently, MSHA issued multiple 104(e) withdrawal orders, which are at issue in this proceeding. The parties have settled all but one of the citations, and those are addressed in a separate order approving partial settlement. In addition to the 104(e) withdrawal order, the validity of the underlying NPOV remains at issue.

The parties' motions address the issue of the validity of the notice of pattern of violations ("NPOV") only. Both parties assert in their motions that the material facts are not in dispute, and each asserts that summary decision should be granted in its favor. The Secretary asserts that the citations and orders listed in the NPOV establish a pattern of violations, and that issuance of the notice was a valid exercise of his prosecutorial discretion. Respondent argues that the notice is invalid because the Secretary's actions were arbitrary and capricious and violated due process. It further argues that the Secretary has failed to provide a meaningful definition of "pattern" and therefore has failed to meet his burden of proof with respect to the POV sanction.

The Secretary's Motion for Summary Decision

The Secretary argues that partial summary decision should be entered in his favor and Written Notice No. 7219153 should be affirmed. He asserts that he did not abuse his discretion in issuing the NPOV. Further, because the Secretary relied upon the citations and orders listed in the NPOV in establishing that a pattern of violations existed, and because those citations and orders are now final orders of the Commission, there are no genuine issues as to any material fact. Finally, the Secretary argues that the citations and orders listed in the NPOV demonstrate the mine's tendency to commit S&S violations and establish that a pattern of violations exists at the mine.

Given that the Commission has upheld the pattern of violations rule, *Brody Mining, LLC*, 36 FMSHRC 2027 (Aug. 2014), the Secretary argues that Pocahontas's challenge to the rule is limited to, at most, the question of whether the Secretary abused his discretion in the application of the rule to this mine. Sec'y Memo. 11. The Secretary's own POV regulations require that he consider eight criteria listed in 30 C.F.R § 104.2 and provide a written notice to the mine of the basis for the NPOV. Sec'y Memo. 4; Sec'y Supp. Br. 3. The Secretary argues that since MSHA followed these procedures, it did not abuse its discretion in issuing the NPOV. Sec'y Memo. 12; Sec'y Supp. Br. 3-4.

The Secretary next asserts that the violations considered by MSHA and listed in the notice provided to Pocahontas demonstrate a pattern of violations. The Secretary argues, relying on dictionary definitions and judicial interpretations of other statutes, that a pattern of violations "exists if the S&S violations are 'ordered' or 'arranged' in such a way that reflects an 'external organizing principle'—the principle that the operator has a tendency to commit to [sic] S&S violations[.]" Sec'y Memo. 7-8. He notes that legislative history indicates that Congress intended a pattern to be "'more than an isolated violation' but 'not necessarily . . . a prescribed number of violations of predetermined standards.'" *Id*. at 8 (citing S. Rep. No. 95-181, at 32 (1977), *reprinted in* Senate Comm. on Human Res., Subcomm. on Labor, *Legislative History of the Federal Mine Safety and Health Act of 1977* 620 (1978)). He further argues that, given the

Secretary's rulemaking power under the Mine Act, if the Commission concludes that the term "pattern" is ambiguous, it must defer to the Secretary's reasonable interpretation. *Id*. at 8-9.

The NPOV purports to establish two patterns of violations. The first is based on alleged S&S violations that contribute to roof and rib hazards, and identifies twenty-four S&S violations occurring during a twelve-month period preceding issuance of the NPOV. The second involves emergency preparedness and escape way hazards and is based on sixteen S&S violations occurring during the same time period. The Secretary argues that in both cases the conduct evidences a failure to prevent reoccurrence of similar violations and a tendency towards repeated violations that significantly and substantially contribute to safety and health hazards. Accordingly, he argues that a pattern of violations has been established and the NPOV should be upheld.

Pocahontas' Motion for Summary Decision

Pocahontas argues that the Secretary cannot meet his burden of proving the validity of the pattern of violations, that material facts are not in dispute, and, accordingly, that summary decision should be entered in its favor and the NPOV should be vacated.

First, Pocahontas argues that MSHA failed to define a pattern of violations prior to imposing the sanction, and that application of the POV statute to Pocahontas is therefore a violation of due process. Resp. Memo. 23. Neither the Act nor the regulations define the term "pattern," but MSHA argues that the meaning is plain. Pocahontas argues that the meaning is not in fact plain, since MSHA supplements its dictionary definition with judicial interpretations of other statutes, and since the MSHA District Manager referred to the screening criteria when asked to provide a definition of pattern at his deposition. *Id*. at 26-28. Pocahontas argues that a vague definition coupled with judicial deference to MSHA's reasonable interpretation of the statute would give MSHA unfettered discretion to impose the POV sanction on any operator. *Id*. at 27.

Second, Pocahontas argues that MSHA improperly applied the pattern of violations screening criteria as a binding norm in violation of the Administrative Procedure Act ("APA"). *Id*. at 28-29. The APA requires that agency rules be promulgated in accordance with notice and comment procedures. *Id*. at 29 (citing 5 U.S.C. § 553). Courts to consider the issue have held that an agency policy is a "rule" subject to notice and comment requirements if it operates as a binding norm. *Id*. at 30 (citing *National Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009)). Pocahontas argues that MSHA used the screening criteria as a binding norm, since the POV Review Panel and District Manager did not reexamine the enforcement history of the mine when deciding whether there was a pattern of violations once the mine had met the screening criteria. *Id*. at 30-32.

Third, Pocahontas asserts that MSHA failed to provide adequate procedural due process protections in imposing the NPOV. It notes that it has a significant property interest in the continuing operation of the mine, and that the NPOV gives MSHA broad authority to shut down the mine. Resp. Memo. 33-34. Pocahontas points to a number of potential defects in the procedures surrounding 104(e) withdrawal orders: the chairman of the POV Review Panel may

have had a conflict of interest because of his position in another division of MSHA; the panel did not consider all evidence regarding violations, injuries, and accidents at the mine, and did not properly consider the mine's Corrective Action Plan; and there were no records kept of the panel proceedings. *Id*. at 36-37. Pocahontas asserts that these defects amount to a denial of due process that warrants vacating the NPOV. *Id*. at 40.

Fourth, Pocahontas argues that the current POV rule was retroactively applied in violation of due process. MSHA adopted a new POV rule effective March 25, 2013. Resp. Memo. 40. Two-thirds of the citations and orders in the NPOV issued to Pocahontas occurred prior to that date. *Id*. at 43. Pocahontas argues that because the new POV rule allowed MSHA to consider citations that were not final orders, whereas the old rule did not, application of the new rule to old citations increased the mine's liability for past conduct, and thus was an impermissible retroactive application. *Id*. at 42.

Finally, Pocahontas argues that MSHA's actions in issuing the NPOV were arbitrary and capricious. Specifically, Pocahontas asserts that MSHA's application of the screening criteria was arbitrary and capricious in that it considered enforcement actions that were later modified. One of the screening criteria is whether twenty-five percent of the mine's S&S violations were a result of high negligence or reckless disregard. However, three of Pocahontas's S&S violations for the twelve month period at issue were ultimately modified from high to moderate negligence, bringing the total number of high negligence violations to less than twenty-five percent. Pocahontas also argues that the POV Review Panel acted arbitrarily and capriciously by failing to give appropriate weight to the mine's Corrective Action Plan ("CAP") as a mitigating circumstance. *Id*. at 45. The Review Panel stated that the CAP was not a mitigating circumstance because it was submitted too late. *Id*. at 46. Pocahontas counters that there was no timeline provided to operators for when to submit a CAP, and that a significant number of its citations were issued after the CAP had been submitted. *Id*. at 47. Additionally, MSHA failed to conduct an inspection of the mine after the CAP was approved, as is recommended in MSHA's Mitigating Circumstances Guidance. *Id*. at 45. Finally, Pocahontas argues that the review panel's reliance on two fatalities at the mine as justification for the POV was arbitrary and capricious, given that the fatalities were not related to the roof control and escape way citations listed in the NPOV. *Id*. at 47.

Summary Decision Standard

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

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

29 C.F.R. § 2700.67(b). The Commission has explained that summary decision is an extraordinary procedure. *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). A material fact is one that is indispensable to the case, the absence of which would render the case unsupported. *Black's Law Dictionary* 881 (5th ed. 1979). In reviewing the record on summary decision the judge should do so in the light most favorable to the non-moving party. *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007).

Based upon my review of the record, the briefs of the parties, and their attachments and supplemental submissions, I find that there is not a dispute of material fact and that summary decision is appropriate as a matter of law.

Facts Not in Dispute

The parties submitted numerous depositions and other documents to support the motions filed by each. The facts are drawn from a number of documents, including briefs, depositions, affidavits and documentary evidence.[1] Based upon the submissions of both parties, I find the following material facts are not in dispute:

1. The POV screening criteria was adopted by MSHA on March 25, 2013. 78 Fed. Reg. 5056 (Jan. 23, 2013); Jay Mattos Deposition Transcript, p. 27, ln. 18; p. 28, ln. 5 (Ex. 4).
2. On September 16, 2013, MSHA began its screening of mines for a pattern of violations pursuant to 30 C.F.R. § 104 and MSHA's Pattern of Violations Screening Criteria (2013) for the twelve-month period ending August 31, 2013. The screening covered all 14,600 mines under MSHA's jurisdiction. Letter from David Mandeville to Jack Toombs (Oct. 24, 2013) (Ex. 3); U.S. Department of Labor, News Release: MSHA Issues First POV Notices Under New Rule (Oct. 24, 2013) (Ex. 1).
3. Based on a computer generated report, MSHA concluded that the Affinity Mine met Criteria 1 of the POV screening criteria because for the applicable screening period (1) at least fifty S&S citations and orders had been issued; (2) the degree of negligence for at least twenty-five percent of the S&S citations and orders issued was high negligence or reckless disregard; (3) the mine had at least 0.5 elevated citations and orders issued per 100 inspection hours; and (4) the injury severity measure for the mine was greater than the overall industry severity measure for mines of the same type and classification. MSHA, Screening Criteria Results for Pattern of Violations (Ex. 5).
4. The POV screening period was from September 1, 2012, through August 31, 2013. MSHA, Screening Criteria Results (Ex. 5); Jay Mattos Deposition Transcript, p. 71, ln. 15-18 (Ex. 4).
5. On September 17, 2013, Jay Mattos, in his capacity as Director of the Office of Assessments, Accountability, Special Enforcement and Investigations ("OAASEI"), prepared a memorandum for Kevin Stricklin ("Stricklin"), the Administrator for Coal Mine Safety and Health, wherein he concluded that the Affinity Mine, Brody Mine,

[1] Appendix I is attached and lists each document referenced in this decision by number. Because many documents were submitted more than once and by each party, Appendix I was drafted for ease of reference to the number for each exhibit.

and Tram Mine met the POV screening criteria for the selected period. Memorandum from Jay Mattos to Kevin Stricklin (Sept. 17, 2013) (Ex. 6).

6. MSHA's POV procedures require that once a mine has been identified through the data screening, the administrator must issue a memo to each district manager who has mines in his district that meet the POV screening criteria. District managers must then review the mines for mitigating circumstances and report their findings in a memo to the Administrator. MSHA, Pattern of Violations (POV) Procedures Summary 1 (Ex. 14).
7. In this instance, the administrator for coal, Stricklin, sent a memo to David Mandeville, the district manager, on September 19, 2013, notifying him that the Affinity Mine had met the POV screening criteria. David Mandeville Deposition Transcript 25-26 (Ex. 7). Mandeville contacted the owners of the Affinity mine, Pocahontas Coal Company, and met with representatives from the mine on September 20, 2013. Mandeville Deposition at 29-30.
8. After receiving notice from Mandeville that the mine was under consideration for the POV notice, John Schroder, manager of the Affinity Mine, submitted a mitigating circumstances explanation to MSHA. Letter from John Schroder to David Mandeville (Sept. 26, 2013) (Ex. 10); Mandeville Deposition at 54.
9. Mandeville prepared and submitted to the POV Review Panel a Mitigating Circumstances Determination Form. The form addresses whether the mine was inactive, whether there was a bona fide change in mine ownership, and whether there was an approved CAP in place. MSHA, Mitigating Circumstances Determination Form: Affinity Mine (Ex. 11).
10. MSHA procedures require that the POV panel review the mitigating circumstances information provided by the District Manager and make a recommendation to the Administrator as to whether the mine should be excluded from POV notification due to mitigating circumstances. MSHA, POV Procedures Summary 1 (Ex. 14).
11. In this instance, the POV Review Panel consisted of Jay Mattos, the Director of the Office of Assessments; Donald Foster, a District Manager in Metal/Non-Metal; Brian Goepfert, Chief of the Safety Division in Metal/Non-Metal; Thomas Light, a District Manager in Coal; and Jim Langley, an Acting District Manager in Coal. Mattos Deposition at 77, ln. 14 (Ex. 4).
12. The stated purpose of the POV Review Panel was to determine "whether the [subject mines] should be excluded from POV notification or have POV notifications postponed due to mitigating circumstances." Memorandum from Jay Mattos to Kevin Stricklin re: Pattern of Violations Review Recommendations 1 (Oct. 22, 2013) (Ex. 9); *see also* MSHA, POV Procedures Summary 1.
13. The information reviewed by the POV Review Panel included the number of citations and orders issued during the relevant period of time; the S&S issuance rates during that time; the Mitigating Circumstances Determination form; the Corrective Action Program for Affinity; the status of the mine; legal identity filings; and accident and injury information. Mattos Deposition at 82-83 (Ex. 4).
14. The POV Review Panel held deliberations involving the three mines that had met the screening criteria on October 16, 17, 18, and 21, 2013. POV Review Panel Recommendations 1 (Ex. 9); Mattos Deposition at 75-76 (Ex. 4).

15. MSHA procedures provide that a possible mitigating circumstance that could justify a decision not to issue or to postpone the issuance of a POV Notice is an operator's approved and implemented Corrective Action Program (CAP) accompanied by positive results in reducing S&S violations. MSHA, POV Procedures Summary 1 (Ex. 14).
16. Pocahontas originally submitted its proposed CAP to MSHA's District 4 office for approval on August 6, 2013. It submitted a revised CAP on August 14, 2013. The revised version was approved by the District Manager, Mandeville, on September 23, 2013. Letter from John Schroder to David Mandeville (Sept. 26, 2013) (Ex. 10); Mandeville Deposition at 42-45 (Ex. 7); Letter from David Mandeville to Jack Toombs (Sept. 23, 2013) (Ex. 15).
17. The POV Mitigating Circumstances Guidance provides that "MSHA may be less likely to find that a CAP justifies postponing a POV Notice if a mine met the quantitative criteria for a POV for several months before submitting a CAP." MSHA, Mitigating Circumstance Guidance 5 (Ex. 12).
18. The POV Review Panel used the Pattern of Violations regulations to guide its deliberation process. POV Review Panel Recommendations 3 (Ex. 9).
19. The POV Review Panel concluded that Affinity's approved CAP was not a sufficient mitigating circumstance because the mine did not implement the CAP until six months after two fatalities occurred at the mine, and because the number of S&S violations increased in the last two months of the review period. The panel therefore recommended that a POV notice be issued to the Affinity Mine. It submitted this recommendation to Kevin Stricklin. POV Review Panel Recommendations 6-7 (Ex. 9).
20. A team of inspectors from the MSHA District Office and attorneys from the Regional Solicitor's Office also conducted a "qualitative review" of the compliance history of the mine, including its history of violations and documentation relating to those violations. Sabian Scott Van Dyke Deposition 36 (Ex. 32).
21. The selection of citations and orders to include in the NPOV was made by attorneys in the Solicitor's Office. Kevin Stricklin Deposition Transcript 46-48 (Supp. Ex. A); Declaration of Sabian Scott VanDyke ¶¶ 26-29 (Ex. 37).
22. In making this selection, the attorneys discussed the evidentiary value of specific citations with inspectors in the field office who had inspected the mine. They relied in part on citation files and notes compiled by Field Office Supervisor Sabian Scott VanDyke. Declaration of Sabian Scott VanDyke ¶¶ 17, 22, 26-28 (Ex. 37).
23. The citations and orders selected were subsequently presented to Administrator Stricklin for inclusion in the NPOV. VanDyke Declaration ¶ 28 (Ex. 37); Kevin Stricklin Deposition Transcript 41-46 (Ex. 32).
24. Stricklin made the ultimate decision whether to issue the NPOV. He reviewed the initial screening documents, the memo prepared by the POV Review Panel, and the draft notice detailing the two sets of patterns alleged at this mine. While he was not involved in the initial determination of which citations and orders were to be included in the final notice, he reviewed and had discretion to accept the patterns as listed. Stricklin Deposition at 12-14, 29-30, 41-46 (Ex. 32).
25. Based on his review of the information submitted to him, Stricklin instructed the District Manager to issue the notice. The notice was issued by David Morris as

Acting District Manager because Scott Mandeville was on vacation. Mandeville Deposition at 59-60 (Ex. 7); David Morris Deposition Transcript 25 (Ex. 8); Stricklin Deposition at 12-14, 29-30, 46 (Ex. 32).

26. Morris received the instruction to issue POV Notice No. 7219153 in a phone call with Stricklin and Charlie Thomas on October 24, 2013. Morris Deposition 25-27 (Ex. 8).
27. Neither Mandeville nor Morris was involved in selecting the enforcement actions described in POV Written Notice Number 7219153. Mandeville Deposition at 59 (Ex. 7); Morris Deposition at 52-53 (Ex. 8).
28. Morris delivered POV Written Notice No. 7219153 to the mine on October 24, 2013, along with a letter signed by Morris on Mandeville's behalf explaining the significance of the notice. Morris Deposition at 50 (Ex. 8); POV Written Notice No. 7219153 (Ex. 2); Letter from David Mandeville to Jack Toombs (Oct. 24, 2013) (Ex. 3).
29. POV Written Notice No. 7219153 lists forty-two enforcement actions (citations and orders) and alleges two discrete patterns of violations. Because six enforcement actions (8149059, 8156134, 8155047, 8155074, 7276508 and 9000362) are listed as contributing to both patterns, the total number of enforcement actions is thirty-six. The enforcement actions listed were issued from September 9, 2012, through August 13, 2013. POV Written Notice No. 7219153 (Ex. 2).
30. The alleged patterns set forth in POV Written Notice Number 7219153 are violations that contribute to roof and rib hazards and violations that contribute to emergency preparedness and escape way hazards. POV Written Notice No. 7219153 (Ex. 2).
31. Two of the citations listed in the NPOV were subsequently modified to non-S&S, 104(a) citations. The thirty-four remaining citations and orders listed in the NPOV, all of which are now final orders of the Commission, are S&S violations.

I. The Secretary's POV Regulations

Pocahontas argues that the Secretary's regulations failed to provide fair notice to regulated parties, and that the NPOV should therefore be vacated on due process grounds. Specifically, Pocahontas argues that the Secretary failed to define a "pattern of violations" before imposing the sanction on the Affinity Mine. It makes a similar argument in its Supplemental Memorandum of Law, contending that the Secretary's failure to define a pattern prevents him from proving that a pattern existed. Resp. Supp. Memo. at 15. The Commission recently addressed this issue in *Brody Mining, LLC*, 37 FMSHRC ___, No. WEVA 2014-82-R, slip op. at 9-13 (Sept. 29, 2015) ("*Brody II*"), rejecting the argument that the Secretary had failed to provide an adequate definition of "pattern." I therefore hold that Pocahontas is not entitled to summary judgment on this ground.

The Mine Act requires that "If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists." 30 U.S.C. § 814(e)(1). If, within 90 days after the notice is issued, an inspector finds a significant and substantial (S&S) violation at the mine, MSHA is directed to issue a withdrawal order under section 104(e) of the Act. *Id*. The mine will then be subject to a withdrawal order for any subsequent S&S violation

until an inspection of the entire mine reveals no further S&S violations. 30 U.S.C. §§ 814(e)(2), (3).

The Mine Act does not define the term "pattern of violations," nor is there a definition provided in the Secretary's regulations. The Commission decided in *Brody II*, however, that the definition submitted by the Secretary in litigation, together with the Secretary's implementing regulations for the POV, established a sufficiently clear definition of "pattern" consistent with the purpose of the Act. *Brody II*, slip op. at 12. The Commission noted that the legislative history of the Mine Act indicates that while "a pattern is more than an isolated violation, pattern does not necessarily mean a prescribed number of violations of predetermined standards nor does it presuppose any element of intent or state of mind of the operator." *Brody II*, slip op. at 9 (citing S. Rep. No. 95-181, at 32 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 621 (1978)). The Commission thus found that a relatively flexible definition of pattern was appropriate, whereby "[n]o particular number of S&S violations is required." *Id*. at 11.

The Commission's decision is binding on the case at hand. Therefore, I find that the Secretary did not violate the due process rights of Pocahontas by failing to provide a formal definition of "pattern" in his regulations, and that the absence of such a definition does not preclude the Secretary from proving a pattern of violations.

II. The Secretary's POV Procedures

The Secretary implemented the most current rule regarding pattern of violations in March 2013. 78 Fed. Reg. 5056, 5056 (Jan. 23, 2013). The rule provides that at least once each year, MSHA will review the compliance and accident, injury, and illness records of mines to determine if any meet the POV screening criteria. 30 C.F.R. § 104.2. The standard establishes eight factors for MSHA to review in deciding whether a mine has a pattern of violations.[2] The first six of the factors relate to enforcement actions against the mine, and the last two involve

[2] The eight factors are:

(1) Citations for S&S violations;
(2) Orders under section 104(b) of the Mine Act for not abating S&S violations;
(3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;
(4) Imminent danger orders under section 107(a) of the Mine Act;
(5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
(6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;
(7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and
(8) Mitigating circumstances.

30 C.F.R. § 104.2(a).

additional information about health and safety problems at the mine and mitigating circumstances. *Id*. The standard also refers parties to the MSHA website for the "specific pattern criteria." 10 C.F.R. § 104.2(b). The website provides two sets of screening criteria that will trigger consideration for an NPOV, each of which is based on the number and severity of safety and health violations at the mine. Mine Safety and Health Administration, Pattern of Violations Screening Criteria (2013), www.msha.gov/POV/POVScreeningCriteria2013.pdf [hereinafter MSHA, POV Screening Criteria].

A computerized screening was done in September 2013 of the 14,600 mines in MSHA's jurisdiction for the period from September 1, 2012, through August 31, 2013. Three mines, including Affinity Mine, met one of the screening criteria for that period. In accordance with MSHA procedures, the MSHA Administrator for Coal, Kevin Stricklin, notified the district manager, David Mandeville, that Affinity Mine had met the screening criteria and was being considered for the POV. Mandeville in turn notified and met with representatives from the mine. The mine provided a written response outlining why it should not receive an NPOV. The letter described the mine's Corrective Action Program and measures it had taken to increase safety after two fatalities occurred in February 2013. The mine did not dispute any of the data concerning the number and severity of citations at the mine from the MSHA data system, but rather submitted potential mitigating factors. After meeting with mine representatives and reviewing the letter, Mandeville completed a mitigating factors form and submitted it to the POV Review Panel. The panel, chaired by Jay Mattos, Director of the Office of Assessments, reviewed the citations and orders issued during the relevant period of time, accident and injury information, and mitigating circumstances including the Corrective Action Program. It submitted a memo with its findings to Stricklin. Around the same time, the district office and the regional Solicitor's office worked together to review the citations and orders contained in the initial screening and compiled two lists of citations that constituted two separate patterns. Stricklin reviewed the findings of the panel and the proposed pattern lists and determined that the mine should receive an NPOV. Stricklin sent the notice to the district office, along with a cover letter, to be presented to the mine.

Pocahontas makes several challenges to the Secretary's procedures in issuing the NPOV, arguing that the Secretary cannot meet his burden of proving the validity of the notice, and, accordingly, that summary decision should be entered in favor of the mine and the NPOV vacated. Specifically, Pocahontas alleges that MSHA improperly applied the screening criteria as a binding norm and disregarded Pocahontas's due process rights in imposing the POV sanction and retroactively applying the rule to citations and orders issued before the rule went into effect. The Commission addressed most of these issues in *Brody Mining, LLC*, 36 FMSHRC 2027 (Aug. 2014) ("*Brody I*"). The remaining challenges I find to be without merit. I therefore deny Pocahontas's motion for summary judgment on these grounds.

a. Notice & Comment Procedures

Section 104.2 of the POV rule describes the Secretary's criteria for a pattern of violations and states that "MSHA will post the specific pattern criteria on its Web site." 30 C.F.R. § 104.2. The criteria posted on the website are the numeric "screening criteria" that MSHA used to generate the computer report identifying three mines for consideration for a POV. *See* Ex. 6.

Pocahontas argues that MSHA applied the screening criteria as a "binding norm," and that the criteria were therefore subject to the requirements for notice and comment rulemaking under the Administrative Procedure Act ("APA"). *See* 5 U.S.C.§ 553.

The Commission addressed this argument in *Brody I*, rejecting the contention that the screening criteria were applied as a binding norm. 36 FMSHRC at 2047-51. The Commission explained that "the screening criteria assist MSHA in ascertaining how it will 'concentrate enforcement efforts' regarding POV enforcement." *Brody I*, 36 FMSHRC at 2049 (quoting *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1056 (D.C. Cir. 1987)). Rather than automatically singling out mines to receive the NPOV, the screening criteria were used as the initial step in a process of further review. *Id*. The Commission thus concluded that the criteria were a "general statement of policy" rather than a "legislative rule," and so did not require notice and comment rulemaking procedures. *Id*. at 2049-51. The Commission's decision is a binding precedent, and therefore I find that MSHA did not violate the APA in establishing its screening criteria without using notice and comment rulemaking.

b. Retroactivity

MSHA's current POV rule went into effect on March 25, 2013. 78 Fed. Reg. 5056, 5056 (Jan. 23, 2013). One significant change in the new rule is that it allows MSHA to consider violations that are not yet final orders when determining whether a mine has a pattern of violations; the previous POV rule limited MSHA to considering final orders. *Id*. at 5056; *Brody I*, 36 FMSHRC at 2030. MSHA applied the new POV rule in issuing the NPOV to Pocahontas. Thus, some of the violations contained in the NPOV were not final orders when the NPOV was issued. Moreover, some of those violations occurred before the effective date of the new POV rule. Pocahontas argues that the inclusion of these non-final orders on the NPOV increases the mine's liability for past conduct, and is thus an impermissibly retroactive application of the new POV rule.

In *Brody I*, the Commission found that application of the current rule to violations occurring before the effective date of the rule was not impermissibly retroactive. 36 FMSHRC at 2051-53. The Commission rejected the argument that application of the rule increases the mine's liability for past conduct. *Id*. at 2052. It explained that "section 104(a) may be analogized to 'repeat offender' provisions under which an enhanced penalty is not an 'additional penalty for the earlier crimes,' but rather was a 'stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one.'" *Id*. at 2052 (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948)) (alteration in original). The Commission also noted that the current rule does not impair vested rights that the mine held under the prior rule, because the rule does not affect the mine's right to contest the citations listed in the NPOV or the assessed penalties. *Id*. I apply the same reasoning to the case at hand and find that the inclusion in the NPOV of non-final citations and orders issued prior to the effective date of the new POV rule did not amount to a retroactive application of the rule.

c. Due Process

Pocahontas additionally argues that "the 'ad hoc' process utilized by MSHA to impose the POV sanction in respect of the Affinity Mine evades a plethora of basis [sic] due process procedural protections." Resp. Memo. 39. The mine lists numerous perceived defects in the procedure through which the NPOV was issued, including that the POV Review Panel chairman may have had a conflict of interest; that the panel failed to review all the relevant information, and failed to give adequate weight to the mine's Corrective Action Program; that the panel's deliberations were too brief; and that there were no records kept of the panel's deliberations.

The Commission addressed a due process challenge to MSHA's current POV procedures in *Brody I*, 36 FMSHRC at 2041-47. It applied the Supreme Court's test for evaluating procedural due process protections, which balances (1) the private interest affected, (2) the risk of erroneous deprivation through the procedures used and the value of additional procedural safeguards, and (3) the government's interest. *Id*. at 2042 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The Commission found that a mine operator has a significant property interest in the continued operation of the mine, though it noted that the impact does not occur when the NPOV is issued, but rather when the mine remains "on the 'chain' of withdrawal liability until the chain is broken by a clean inspection." *Id*. On the other hand, MSHA has a "paramount" interest in protecting public health and safety "which justifies summary administrative action." *Id*. (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981)). With regard to the second factor, the Commission held that MSHA's pre- and post-deprivation procedures adequately addressed the risk of erroneous deprivation. *Id*. at 2044-47. The protections it considered were that MSHA provides an online monitoring tool that gives operators notice that they might be subject to consideration for an NPOV; operators may submit mitigating circumstances to the District Manager at any time; operators may implement a Corrective Action Program ("CAP") to reduce S&S violations at any time; MSHA reviews mitigating circumstances, the CAP, and other information before issuing the notice; operators may request expedited hearings of S&S citations and orders if they are approaching consideration for an NPOV; and after the NPOV is issued, operators may seek temporary relief from section 104(e) withdrawal orders or expedited proceedings of contests of those orders. *Id*. at 2045-46.

The procedures that the Commission found in *Brody I* to adequately safeguard the mine's property interest were all applied here. Pocahontas had access to the online monitoring tool for POVs. It had an opportunity to implement a CAP and submit mitigating circumstances, both of which it did. MSHA reviewed the CAP and the mine's mitigating circumstances before issuing the notice. Finally, Pocahontas had access to expedited proceedings for the citations underlying the NPOV and for subsequent withdrawal orders. I do not find that any of the procedural complaints cited by Pocahontas, including the affiliations of panel members, length of the review panel proceedings, and recordkeeping, undermined these procedures. While Pocahontas argues that the panel did not give adequate weight to the mine's CAP, there is no dispute that the panel reviewed and rejected the CAP as a mitigating circumstance. Statement of Facts ¶ 19. Pocahontas's argument is a substantive disagreement with MSHA and not relevant to procedural due process. Thus, I hold that MSHA's procedures satisfied due process.

III. The Pattern of Violations

The Secretary argues that partial summary decision should be entered in his favor and Written Notice No. 7219153 should be affirmed. He argues that the citations and orders listed on the NPOV constitute two patterns of violations, the first relating to roof and rib hazards, and the second relating to escape way and emergency preparedness hazards. He notes that those citations and orders are now final orders of the Commission, and thus argues that he has established a pattern of violations.

a. Abuse of Discretion

The Commission has not articulated the exact extent to which the agency's actions in issuing the NPOV are subject to judicial review. The Secretary argues that his decision to issue the NPOV is an exercise of his prosecutorial discretion and therefore subject only to limited judicial review. Sec'y Supp. Br. 2-4. In *Brody II*, the Commission similarly commented that "evidence should not be developed, nor should discovery be permitted, regarding MSHA's prosecutorial discretion in issuing a POV notice." *Brody II*, slip op. at 16. Under that system, due process review of agency procedures would still be available and the POV itself would be reviewed de novo by the judge, but the agency's decision-making process would not be otherwise examined. Pocahontas argues, however, that the agency's actions in issuing the NPOV should be reviewed for whether they were arbitrary and capricious. Resp. Supp. Memo. 8-10. As explained below, I find that MSHA's actions should be reviewed for abuse of discretion, but find that the agency did not abuse its discretion here.[3]

The Commission reviews agency actions under the arbitrary and capricious or abuse of discretion standard in a number of contexts, including the promulgation of regulations, approval of plans, and issuance of imminent danger and failure to abate orders. *See e.g. Twentymile Coal Co.,* 30 FMSHRC 736, 748 (Aug. 2008) (applying arbitrary and capricious standard of review to Secretary's approval of an emergency response plan); *Emerald Coal Res., LP*, 29 FMSHRC 956, 966 (Dec. 2007) (same); *Brody I*, 36 FMSHRC at 301-04 (reviewing the validity of the Secretary's POV rule under an arbitrary and capricious standard); *Energy W. Mining Co*., 18 FMSHRC 565, 569 (Apr. 1996) (reviewing an inspector's decision to issue a failure to abate order for abuse of discretion); *Pattison Sand Co*., LLC, 688 F.3d 507, 512-13 (8th Cir. 2012) (reviewing issuance of section 103(k) order under arbitrary and capricious standard); *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2164 (Nov. 1989) ("*R&P Coal*") (reviewing inspector's issuance of imminent danger order for abuse of discretion). In these cases, the nature of MSHA's action makes it appropriate for the judge to defer to the agency's judgment. *See e.g. R&P Coal*, 11 FMSHRC at 2164 ("Since he must act immediately, an inspector must have considerable discretion in determining whether an imminent danger exists."); *Energy W. Mining*, 18 FMSHRC at 269 ("The Act does not address the extent of an inspector's inquiry in making the determination of whether abatement time should be extended."). In the plan approval

[3] The draft of this decision was being finalized at the time *Brody II* was issued. After reading the Commission decision regarding the review of prosecutorial discretion, it was unclear if the Secretary's discretion should be reviewed at all. Because the parties had developed extensive evidence on the topic, and after a great deal of consideration, it was decided that a review is appropriate.

context, the Seventh Circuit has explained that the deferential arbitrary and capricious standard is appropriate because plan approval is essentially a policymaking activity, an area in which the Secretary has special expertise that the Commission lacks. *Mach Mining, LLC v. Secretary of Labor, Mine Safety & Health Administration*, 728 F.3d 643, 646-58 (7th Cir. 2013) (analogizing plan approval to rulemaking, which is subject to deferential review, and contrasting this with enforcement actions, which are subject to "full review on the merits").

Nevertheless, the Commission has also reviewed select enforcement decisions for abuse of discretion, including the Secretary's decision to cite an operator for its independent contractor's violations. *See Twentymile Coal Co*., 27 FMSHRC 260, 265-66 (Mar. 2005). In these cases, the Secretary's action is subject to heightened rather than deferential review: the Secretary must justify both that the citation is valid and that he did not abuse his discretion in issuing it. In this case of first impression, I find that this two-level form of review, one for the issuance of the notice and a separate for the pattern itself, is appropriate in the case of the NPOV. Notably, MSHA has issued detailed procedures governing its own enforcement decision-making in the POV context. The Supreme Court has held that, "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). In view of the discretion available to the Secretary in deciding which mines are subject to the NPOV and the seriousness of the penalty at stake, I find that it is appropriate to examine whether the Secretary followed his own procedures or otherwise abused his discretion in issuing the notice.

The Commission articulated the scope of review under the arbitrary and capricious standard in *Twentymile Coal*:

> The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing the explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

30 FMSHRC 736, 754-55 (quoting *Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)).

I find that MSHA followed all statutory, regulatory, and internal procedural requirements and considered all relevant information, and that therefore the Secretary's actions in issuing the notice were not arbitrary or capricious.

The first stage in MSHA's procedures for issuing the NPOV is a computerized review of the enforcement data of every mine subject to MSHA's jurisdiction. 30 C.F.R. § 104.2; MSHA, POV Screening Criteria; MSHA, POV Procedures Summary 1 (Ex. 14). MSHA has posted two sets of screening criteria on its website. MSHA, POV Screening Criteria. If a mine meets either set of criteria, it is selected for further consideration for an NPOV.[4] *Id*. Affinity Mine was selected under the first set of criteria: it had at least 124 S&S citations or orders issued during the twelve-month period at issue; twenty-five percent of those citations and orders had a degree of negligence of high or reckless disregard; 1.49 elevated citations or orders were issued per 100 inspection hours; and the mine's Injury Severity Measure of 5,665.03 was greater than the industry average of 438.85. MSHA, POV Screening Results (Ex. 5).

Pocahontas takes issue with the application of the criterion regarding high negligence citations. Resp. Mot. 44-45. It notes that three of the mine's citations from the twelve-month period were eventually modified from high negligence to moderate negligence, bringing the total below the twenty-five percent necessary for the mine to meet the screening criteria. MSHA, POV Screening Criteria. It thus argues that MSHA's actions were arbitrary and capricious because the agency did not have adequate factual support for its decision. Resp. Memo. at 45 (citing *Twentymile Coal*, 30 FMSHRC at 753-54).

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[4] The two sets of screening criteria are as follows.

> Mines meeting all of the following four criteria:
>
> 1. At least 50 citations/orders for significant and substantial (S&S) violations issued in the most recent 12 months.
> 2. A rate of eight or more S&S citations/orders issued per 100 inspection hours during the most recent 12 months OR the degree of negligence for at least 25 percent of the S&S citations/orders issued during the most recent 12 months is "'high" or "reckless disregard."
> 3. At least 0.5 elevated citations and orders [issued under section 104(b); 104(d);104(g); or 107(a) of the Mine Act] issued per 100 inspection hours during the most recent 12 months.
> 4. An Injury Severity Measure (SM) for the mine that is greater than the overall Industry SM for all mines in the same mine type and classification over the most recent 12 months.
>
> *Or*
>
> Mines meeting both of the following criteria:
>
> 1. At least 100 S&S citations/orders issued in the most recent 12 months.
> 2. At least 40 elevated citations and orders [issued under section 104(b); 104(d);104(g); or 107(a) of the Mine Act] issued during the most recent 12 months.

MSHA, POV Screening Criteria.

The Commission addressed a similar argument in *Brody I*, in which it held that MSHA was not arbitrary and capricious in relying on non-final S&S citations to establish a pattern of violations. *Brody I*, 36 FMSHRC at 2038-40. The Commission noted that "[i]f 20%, or even 33%" of the citations listed on Brody's NPOV were to "lose their S&S designation after litigation, it would still leave a significant number of S&S violations on which a pattern of violations could be found." *Id*. at 2039. Like the S&S analysis, there is no requirement in the statute or regulations that twenty-five percent of the mine's violations be high negligence. I thus find Pocahontas's argument unpersuasive. Given that the mine does not dispute the substance of the screening criteria or the accuracy of MSHA's enforcement records, I therefore find that MSHA did not abuse its discretion at this step of the POV procedure.

The second stage in MSHA's POV procedures is a review of mitigating circumstances by the POV Review Panel. MSHA, POV Procedures Summary 1 (Ex. 14); *see also* 30 C.F.R. § 104.2. In the third and final stage, the Administrator for Coal considers the recommendations of the panel along with the mine's record of violations and decides whether to issue the notice. MSHA's internal policies indicate that potential mitigating circumstances to be considered by the panel and the administrator include an approved and implemented Corrective Action Program (CAP); a bona fide change in mine ownership resulting in improvements in compliance; and the mine becoming inactive. MSHA, Mitigating Circumstances Guidance 2 (Ex. 12); *see also* 78 Fed. Reg. 5056, 5063. Here, the district manager gathered information from the mine regarding these factors prior to issuing the NPOV, and the POV Review Panel addressed them in its recommendations to Kevin Stricklin. POV Review Panel Recommendations 4-7 (Ex. 9). Pocahontas argues, however, that the panel was arbitrary and capricious in its consideration of the mine's CAP. Resp. Memo. 45.

Pocahontas submitted its proposed CAP on August 6, 2013, and submitted a revised version on August 14, 2013. MSHA approved the revised CAP on September 23, 2013. The POV Review Panel reviewed the CAP, but concluded that it was not a sufficient mitigating factor because the mine did not implement the CAP until six months after the two fatalities had occurred at the mine. The panel also noted that the number of S&S violations increased in the last two months of the review period. Pocahontas argues that the panel should not have rejected the CAP as a mitigating circumstance based on its date of submission: the mine points out that MSHA has not provided guidance to operators as to when a CAP should be implemented, and that the plan for Affinity was submitted before the mine actually met the POV screening criteria. Resp. Memo. 47. Pocahontas also argues that MSHA failed to conduct a complete inspection of the mine after the CAP was implemented. *Id*. MSHA's Mitigating Circumstances Guidance provides that "In rare cases, postponement of a POV Notice could be appropriate where an operator has implemented a CAP in a timely fashion, but there has been insufficient time for MSHA to conduct an inspection to evaluate the CAP's effectiveness in reducing S&S violations." MSHA, Mitigating Circumstances Guidance 3 (Ex. 12). The Secretary contends that the fatalities at the mine put the mine on notice that it had a safety problem, and that it should have implemented a CAP sooner than six months after the fatalities. POV Panel Recommendations 5-7 (Ex. 9). In other words, the CAP was not implemented "in a timely fashion" and so did not justify postponing the NPOV.

I find MSHA adequately considered the CAP as a mitigating circumstance, and that it was not arbitrary and capricious in finding that the CAP did not justify postponing the NPOV. As explained above, when deciding whether an agency's actions are arbitrary and capricious, a court looks to whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfr's Ass'n,* 463 U.S. at 43. I find that MSHA has done so here. The agency considered the mine's record of violations and injuries over a twelve-month period and its efforts to implement a CAP. The agency was well within its discretion to conclude that the CAP implemented at the end of the review period did not mitigate the mine's record of violations over the past year. MSHA was under no obligation to wait and see whether the CAP would reduce the number of violations at the mine. It was within the agency's discretion to move forward with the NPOV as a means of addressing safety issues at the mine.

Pocahontas additionally argues that the agency was arbitrary and capricious in considering the two fatalities at the mine as part of its decision to issue the NPOV, given that the fatalities were unrelated to the issues of roof and rib control and escape way hazards described in the NPOV. Resp. Memo. 47-48. It argues that the agency disregarded the CAP because it perceived that, in view of the fatalities, Pocahontas was a "bad actor." *Id*. at 3. I find this argument to be without merit. The agency primarily considered the two fatalities with respect to the timeline for implementing a CAP, finding that the fatalities put the operator on notice of safety issues at the mine and the need for corrective action. This information was relevant as to whether there were mitigating circumstances at the mine, and the agency was right to consider it. Therefore, the agency did not abuse its discretion.

b. The Pattern

In order to succeed on summary judgment, the Secretary must prove that a pattern of violations existed at the Affinity Mine. The Act requires that, when an operator has a pattern of S&S violations of mandatory health or safety standards, the Secretary shall issue written notice to the operator that a pattern exists. 30 U.S.C. § 814(e)(1). The Act does not define the term "pattern of violations." Rather, as explained in *Brody I*, Congress has "expressly delegated to the Secretary responsibility for determining when a pattern of violations exists." *Brody I*, 36 FMSHRC at 2036. While the Secretary's regulations identify criteria that MSHA must consider when determining whether an operator has engaged in a pattern of violations, they do not provide a formal definition of a pattern of violations, either. 30 C.F.R. §§ 104.1-104.2.

The Commission, however, recently addressed the meaning of a "pattern of violations" in *Brody II*:

> [A] "pattern of violations" under section 104(e) is established by an inspection history of recurrent S&S violations of a nature and relationship to each other such that the violations demonstrate a mine operator's disregard for the health or safety of miners. No particular number of S&S violations is required in order to constitute a pattern of violations, and a finding of a pattern of violations does not presuppose any element of intent or state of

> mind of the operator. The eight criteria listed in section 104.2(a) are relevant to the determination of whether a pattern of violations exists.

Brody II, slip op. at 11. The criteria in § 104.2(a) are the record of serious enforcement actions at the mine, including S&S citations, orders for failure to abate an S&S violation, unwarrantable failure citations and orders, imminent danger orders, and withdrawal orders for training violations; other enforcement measures that have been applied at the mine; other information demonstrating a serious safety or health management problem at the mine, such as accident, injury, and illness records; and mitigating circumstances. 30 C.F.R. § 104.2(a). The preamble to the POV regulations indicates that "other information that demonstrates a serious safety or health management problem" can include evidence of the mine operator's lack of good faith in correcting the problem that resulted in repeated S&S violations; repeated S&S violations of a particular standard or standards related to the same hazard; knowing and willful S&S violations; citations and orders issued in conjunction with an accident; and S&S violations that contribute to accidents and injuries. 78 Fed. Reg. 5056, 5062 (Jan. 23, 2013); *see also Brody II*, slip op. at 11 n.17. The Commission in *Brody II* also mentioned eight additional factors proposed by the Secretary that "may be helpful interpretive tools" in deciding whether a pattern exists: the nature and seriousness of the hazards; the timing of the violations; the location of the violations; trends with regard to injuries and accidents; involvement of management personnel; the standards violated; the operator's response to the violations; and "any other factor that is revealed by the evidence to establish a mode or series of acts that are recognizably consistent." *Id*. at 12 (internal quotations admitted).

The Secretary argues that the citations and orders listed in the NPOV establish two patterns of violations, the first based on S&S violations that contributed to roof and rib hazards, and the second based on S&S violations that contributed to emergency preparedness and escape way hazards. The NPOV as issued listed thirty-six S&S citations and orders. Two of those citations, Nos. 8155043 and 7276516, were subsequently modified to non-S&S; I rely on the remaining thirty-four citations and orders in my analysis of whether a pattern exists. The remaining violations are twenty-four citations and orders involving roof and rib hazards and sixteen involving emergency preparedness and escape way hazards. Six of the violations involve both types of hazard. All of these violations occurred within a twelve-month period and are now final orders. I find that that these citations and orders demonstrate the operator's disregard for the safety of miners and, therefore, establish a pattern of violations.

I first address the alleged pattern of roof and rib support violations. A key factor in the POV analysis is the mine's enforcement record of serious violations, which the Secretary has addressed in the NPOV. *See Brody II*, slip op. at 11; 30 C.F.R. § 104.2(a)(1)-(5). The NPOV lists twenty-four S&S citations and orders involving roof and rib hazards. Ex. 2. These include four violations of the mine's roof control plan; one failure to identify a dangerous roof condition in a pre-shift examination; two instances of a generally unsupported or loose roof; one instance of loose ribs; seven unsupported brows; eight unsupported kettle bottoms; and one excessively wide crosscut. Sec'y Mot. 13-21. Twenty-two of these violations were cited as S&S violations under section 104(a) of the Mine Act, and the remaining two were cited in unwarrantable failure

orders under section 104(d)(2). These violations are indicative of an obvious and recurring problem with roof and rib support at the mine.

In addition to the mine's enforcement record, the Secretary may also produce "[o]ther information that demonstrates a serious safety or health management problem at the mine." 30 C.F.R. § 104.2(a)(7). A table of accidents and injuries at the mine during the review period was included in the memo from the POV Review Panel to Kevin Stricklin. Ex. 6. The table indicates that eleven accidents occurred at the mine between September 1, 2012, and August 31, 2013. *Id*. While the Secretary has not produced evidence about the circumstances surrounding these accidents, the number of accidents does indicate some measure of indifference toward safety and health. The record also includes reports of investigations into two fatalities at the mine that occurred during the review period. Exs. 22, 23.

The Secretary has not produced evidence relating to all of the potential POV factors listed by the Commission in *Brody II*, but rather focuses on the fact that there were "[r]epeated S&S violations of a particular standard or standards related to the same hazard." Sec'y Mot. 29-30; 78 Fed. Reg. 5056, 5062 (Jan. 23, 2013); *Brody II*, slip op. at 11 n.17. He also makes reference to the "nature and seriousness of the hazards presented," *Brody II*, slip op. at 12 n.19, noting that "falls of the roof, face and ribs pose one of the most serious hazards in the coal mining industry." Sec'y Mot. 29 (citing *United Mine Workers of America v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989)). Indeed, both the Commission and Congress have acknowledged the high degree of danger posed by roof, face, and rib falls, which have historically been one of the leading causes of injury and death in underground mining. Safety Standards for Roof, Face and Rib Support, 53 Fed. Reg. 2354, 2354, 2369 (Jan. 27, 1998); *Elk Run Coal Co.,* 27 FMSHRC 899, 904 (Dec. 2005); *Cyprus Plateau Mining Corp*., 16 FMSHRC 1610, 1616 (Aug. 1994).

The mine's safety record shows repeated violations involving the same hazard of roof and rib falls, a serious threat to the safety of miners. I do not find that there were mitigating circumstances to show that the mine was taking steps to correct this problem on its own. Rather, I find that the Secretary has demonstrated the operator's disregard for the safety of miners who could be injured by a roof fall or similar accident, and therefore has established a pattern of violations.

With regard to the sixteen violations listed in the NPOV involving emergency preparedness and escape way issues, I also find that the Secretary has demonstrated the operator's disregard for the safety of miners. The violations listed in the NPOV include a failure to provide a lifeline to an alternate refuge; a failure to provide an up-to-date escape way map on an active section; a failure to maintain positive pressure in the primary intake escape way; five unsupported kettle bottoms in escape ways or near lifelines; five instances of mud, rock, or water impeding travel in an escape way or near a lifeline; an unsupported brow in an escape way; a failure to provide reflective material on a lifeline; and damaged airlock doors in an escape way. Sec'y Mot. 22-27. Fourteen of these were cited under section 104(a), and two were cited in section 104(d)(2) unwarrantable failure orders. These violations all relate to escape way and emergency preparedness hazards, and indicate a recurring problem. The Secretary has not produced evidence that these violations led to any accidents or injuries. However, he notes that the Commission, in the context of the S&S analysis, has held that the seriousness of emergency

preparedness violations should be evaluated by assuming the existence of an emergency. Sec'y Mot. 30-31 (citing *Black Beauty Coal Co*., 36 FMSHRC 1121, 1123-24 (May 2014)). In the context of an emergency, these violations could delay or prevent miners from evacuating the mine, potentially causing injury or death. As with the roof and rib control violations, I do not find that the mine's conduct was mitigated by the CAP or other safety measures it advances: the violations occurred continuously throughout the review period, indicating that any corrective measures the mine took were not effective. I find that the violations show the clear tendency of the mine to disregard the safety of miners, and thus that these violations also constitute a pattern of violations.

IV. Order

In view of the foregoing, I find that the Secretary has proven that a pattern of violations existed at Affinity Mine. Accordingly, Pocahontas Coal Company's Motion for Summary Decision is **DENIED**. The Secretary's Motion for Partial Summary Decision is **GRANTED** and the POV Written Notice No. 7219153 is upheld as validly issued. The validity of the violation cited in the one 104(e) order in this docket remains in issue.

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

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APPENDIX I

- Exhibit A. Copies of the citations and orders listed on Pattern of Violations Written Notice No. 7219153.
- Exhibit 1. News release from the U.S. Department of Labor announcing the issuance of three POV notices.
- Exhibit 2. Pattern of Violations Written Notice No. 7219153.
- Exhibit 3. Cover letter sent to Affinity Mine with the Notice of Pattern of Violations.
- Exhibit 4. Deposition of Jay Mattos, Director of the Office of Assessments, Accountability, Special Enforcement, and Investigation (OAASEI), Mine Safety and Health Administration.
- Exhibit 5. Computer printout of screening criteria results for Pattern of Violations for Affinity Mine.
- Exhibit 6. Memorandum from Jay Mattos to Kevin Stricklin listing the three mines that met the initial POV screening criteria. Attachments include a list of the citations and orders at each mine and a table of accidents and injuries at each mine.
- Exhibit 7. Deposition of David Scott Mandeville, District Manager for District Four, Mine Safety and Health Administration.
- Exhibit 8. Deposition of David Morris, Assistant District Manager for District Four, Mine Safety and Health Administration.
- Exhibit 9. Memorandum from Jay Mattos to Kevin Stricklin presenting the recommendations of the Pattern of Violations Review Panel.
- Exhibit 10. Letter from John Schroder, General Manager, Pocahontas Coal Company, Affinity Mine Division, to David Mandeville describing mitigating circumstances at the mine to be considered in the POV review process.
- Exhibit 11. Pattern of Violations Mitigating Circumstances Determination Form for Affinity Mine.
- Exhibit 12. Mine Safety and Health Administration Mitigating Circumstances Guidance.
- Exhibit 13. Pocahontas Request for Production of Documents.
- Exhibit 14. Mine Safety and Health Administration Pattern of Violations Procedures Summary.
- Exhibit 15. Corrective Action Program for Affinity Mine with approval letter from MSHA.
- Exhibits 16, 18 & 20. Emails between Kevin Stricklin, David Morris, and others discussing language to include in the Notice of Pattern of Violations and cover letter.
- Exhibit 17. Draft of the Notice of Pattern of Violations for Affinity Mine.
- Exhibit 19. Draft of the Notice of Pattern of Violations cover letter.
- Exhibit 21. Pocahontas Discovery Request
- Exhibit 22. Mine Safety and Health Administration Report of Investigation into fatal accident at Affinity Mine on February 7, 2013.
- Exhibit 23. Mine Safety and Health Administration Report of Investigation into fatal accident at Affinity Mine on February 19, 2013.
- Exhibit 24. Decisions Approving Settlement for seven of the citations and orders listed on the Notice of Pattern of Violations.

- Exhibit 25. Affidavit of Gary B. Chilcot, consultant with United Coal Company, LLC, regarding the potential impact of a Notice of Pattern of Violations on Affinity Mine.
- Exhibit 26. Briefs relating to the Notice of Pattern of Violations issued to Brody Mining, LLC.
- Exhibit 27. Federal court documents for a case involving the validity of Pattern of Violations Procedures.
- Exhibit 28. Transcript of oral arguments in the Brody Mining, LLC, Pattern of Violations dispute.
- Exhibit 29. Secretary of Labor's Motion to Limit Discovery
- Exhibit 1a. Deposition of Kevin Stricklin, Administrator for Coal Mine Safety and Health, Mine Safety and Health Administration
- Exhibit 1b. Deposition of Sabian Scott VanDyke, Field Office Supervisor, Mine Safety and Health Administration.
- Exhibit 2b. Table of communications between Sabian Scott VanDyke, attorneys at the Office of the Solicitor, and others.
- Exhibit 3b. Transcript of the Status Conference for this case on June 25, 2015, before Judge Miller.
- Exhibit 30. Memorandum from Kevin Stricklin to David Mandeville notifying Mandeville that mines in his district had met the screening criteria and directing him to review the violations listed and obtain information on mitigating circumstances.
- Exhibit 31. Table of citations and orders at Affinity Mine.
- Exhibit 32. Declaration of Sabian Scott VanDyke, Field Office Supervisor, Mine Safety and Health Administration.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 18, 2015

SCOTT D. MCGLOTHLIN, Complainant, v. DOMINION COAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. VA 2014-233-D NORT-CD-2013-04 Mine: Dominion No. 7 Mine ID: 44-06499

ORDER DENYING PARTIES' REQUEST FOR UNCONDITIONAL CONFIDENTIALITY

Before: Judge Feldman

This matter is before me based on a Complaint of Discrimination brought by Scott D. McGlothlin against Dominion Coal Corporation ("Dominion"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) ("Mine Act" or "the Act"). A consolidated Decision Granting Complainant's Motion for Summary Decision and Decision on Liability, issued on June 11, 2015, resolved the liability at issue in this matter without the need for an evidentiary hearing. *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (June 2015) (ALJ). That decision held that Dominion violated the anti-discrimination provisions of section 105(c) by interfering with McGlothlin's right to pay protection under 30 C.F.R. Part 90 as a miner with pneumoconiosis, when Dominion reduced McGlothlin's pay after McGlothlin sought a determination from the National Institute for Occupational Safety and Health ("NIOSH") concerning his eligibility for Part 90 protection. *Id.* at 1264-1266.

On September 2, 2015, the parties filed a Joint Motion to Dismiss McGlothlin's discrimination complaint based on their proposed agreement regarding the relief to be awarded to McGlothlin, including reimbursement of attorney fees. By an order dated October 21, 2015, the parties joint motion to dismiss was denied because it was contingent on the parties' proposed terms releasing Dominion from an adjudicated finding of liability in a Commission proceeding. 37 FMSHRC __, slip op. at 5 (Oct. 21, 2015) (ALJ). The October 21, 2015, order noted that upon resubmission of the parties' joint petition for relief, it is immaterial whether the parties' agreement on relief is styled as a joint petition for relief, or, as a motion to approve settlement. *Id.*

On November 11, 2015, the parties submitted a revised Joint Motion to Approve Settlement, which is substantively a joint petition for relief. To rectify the flaw in the previously-submitted terms for relief in which Dominion was absolved of liability, the parties now state that their proposed terms "include[] Dominion's waiver of its right to appeal this Court's Decision on Liability."[1]

Consistent with the October 21, 2015, order, the parties also submitted documentation to support McGlothlin's proposed monetary relief, including detailed fee petitions to support McGlothlin's claimed reimbursement of attorney fees in this matter. The parties have requested that the relief sought, as well as the supporting documentation, be kept confidential.

It is well-settled that oversight of proposed settlement terms (i.e. joint petitions for relief) in both section 105(c)(2) and (c)(3) discrimination proceedings is committed to the sound discretion of the trial judge, which may be ultimately subject to Commission approval. *Eastern Assoc. Coal Corp.*, 7 FMSHRC 2015, 2027 (Dec. 1985); *see also Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390 (March 1993); *Leeco, Inc.*, 20 FMSHRC at 707. Requests for confidentiality can be given effect in cases where the parties' proposed terms of relief are adopted. However, public disclosure of the parties' proposed terms may be required in instances where the parties' proposed terms of relief, including attorney fees, are either disputed, or not approved by the judge. *See*, *e.g.*, *Pendley v. Highland Mining Co. and James Creighton*, 37 FMSHRC __ slip op. (Sept. 21, 2015) (ALJ). As the parties' proposed relief is currently subject to review, the confidentiality requested by the parties cannot be unconditionally guaranteed.

ORDER

In view of the above, **IT IS ORDERED** that the parties' request for unconditional confidentiality **IS DENIED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

[1] In view of Dominion's decision not to appeal the Decision on Liability, the parties' proposed relief must be considered as a joint petition for relief, as there is a substantive difference regarding whether the parties' proposed terms are viewed as a motion to approve settlement, or as a joint petition for relief. In exercising oversight over motions to approve settlement, Commission judges' authority is limited to only approving or denying the settlement terms. Thus, the judge lacks the authority to impose his terms, rather than those proposed by the parties. In contrast, as Dominion has waived its right to appeal the Decision on Liability, the appropriate relief to be awarded in this matter will be determined in a forthcoming decision on relief. As such, the issue of the appropriate monetary relief remains committed to the sound discretion of the judge. *Secretary of Labor on behalf of Maxey v. Leeco, Inc.*, 20 FMSHRC 707, 707 (July 1998).

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November 23, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. CENT 2014-444-M A.C. No. 23-02004-353548
v.	
CON-AGG OF MO, LLC, Respondent	Mine: Huntsville Quarry

ORDER AFFIRMING BENCH DECISION
ON RESPONDENT'S MOTION FOR DIRECTED VERDICT

Appearances: Leigh Burleson, Esq., and Alan Kelly, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for the Petitioner

Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, Maryland, for the Respondent

Before: Judge Rae

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

At issue is a single citation, Citation Number 6566854, issued to mine operator Con-Agg of MO, LLC ("Con-Agg" or "the operator") under section 104(a) of the Mine Act following a fatal accident that took place at the operator's facility in September 2013. Docket CENT 2014-66 and two other citations contained in CENT 2014-444 were initially at issue in this proceeding but were settled prior to hearing.

A hearing was held in St. Louis, Missouri on October 14, 2015, at which time the Secretary offered testimony. At the close of the Secretary's presentation of his case, I granted Con-Agg's motion for directed verdict for the reasons discussed herein.

Undisputed Facts

Con-Agg operates the Huntsville Quarry, a small to medium size stone quarry located in Randolph County, Missouri. The quarry has multiple benches, or ledges, that were being mined in addition to an abandoned underground mine from which the operator was taking rock to make a pit. The rock from the old mine was transported to the primary crusher via haul trucks which were loaded by front-end loaders in the pit. Once the rock was brought to the crusher plant, it

was resized for various uses. The trucks used a haul road that leads from the pit up a steep incline past the benches where it intersected with an upper two-lane-wide haul road that led to the crusher. Tr. 21-22. Located along the side of this 52-foot-wide road abutting the highwall are boulders measuring 10 feet long by 6 feet deep by 4.5 feet high and weighing sixteen tons set three to four feet apart from one another which serve as the berm. Tr. 50, 55, 58, 74, 75, 133. The boulder berm has been in place as it was in September 2013 for approximately twelve years without modification. Tr. 54, 136. As many as thirteen inspectors from MSHA had inspected the berm and had found it adequate to meet the mandatory standard cited herein. Tr. 88-89. Steven Thompson was among those inspectors who had inspected this haul road at least ten to twelve times in the past and never issued a citation for an inadequate berm. Tr. 91, 127.

On September 16, 2013, haul truck driver David. A. Gully was traveling from the pit up on the haul road to the upper portion of the road where he made a 90-degree left-hand turn heading uphill towards the crusher. However, rather than straightening out onto the right-hand side of the road as would be expected, he continued to drive in an arc-like direction across the opposite side of the road and went through the berm at a 20-degree angle dragging a boulder along with his truck. While the haul truck continued down the slope towards the pit, eventually toppling over, the unrestrained driver was thrown to his death from the truck. The vehicle came to rest on top of the driver at the bottom of the pit eighty feet below where it had left the upper haul road. Tr. 26 -27, 41, 125.

An investigation ensued following the tragic events of September 16. When tested, the brakes on the truck were determined to be fully functional, as was all other equipment on it. Tr. 72; Ex. S-8. The results of the study also revealed that the truck was operating at full speed of eleven to fifteen miles per hour with the gas pedal depressed at the time it went through the berm. The operator did not engage the brake at any time. Tr. 93, 95-96. Further, upon testing it was found that not only would applying the brake have prevented the accident but had the driver released the gas pedal he would have safely coasted to a stop before impacting the berm. Tr. 72; Ex. S-8.

In the aftermath of the accident, MSHA Inspector Robert D. Seelke issued a citation to Con-Agg for a violation of mandatory standard 30 C.F.R. § 56.9300. As Inspector Seelke stated, he found the berm was inadequate specifically because the boulders were spaced too far apart and the gaps were greater than necessary for roadway drainage or other permitted purposes. Tr. 51.

Of significance here is that MSHA specifically approves of the use of boulders as berm material. Their inspection handbook states that boulders are to be placed at a distance from the edge of the highwall to offer adequate resistance. The handbook also goes on to say that berms are not designed to give an equipment operator a "false sense of security." They are designed to "give the driver a visual indication of the location of the roadway edge; provide a sensation of contact to the driver if they accidentally contact the berm; [and] provide restraint to the vehicle to give the operator the opportunity to regain control and keep the vehicle from leaving the roadway." Ex. S-6, Chapter 8, Tr. 67-69. A berm is not intended to be a barrier that prevents a vehicle from traveling past or through it. Tr. 67. The National Mine Health and Safety Academy training materials dated September 20, 2013 provide that boulder berms are adequate if they are

of mid-axle height and the boulders are spaced sufficiently close so that a vehicle cannot run between them but they may be set sufficiently apart to allow for drainage or for other purposes. Tr. 78; Ex. R-9. The training document goes on to say that a berm "is by no means meant to stop a runaway vehicle. It is only there to be used like a curb on a street. It's just to let you know when you're on the edge of the road, not to prevent you from going over the edge." Tr. 83-84; Ex. S-9. Inspectors Seelke and Thompson testified that they are in agreement with the training literature and the boulders were sufficient to meet all of the requirements set forth herein as stated in both of these training sources. Tr. 73, 84, 111, 133, 135, 136, 139.

Seelke further testified, however, that because an accident occurred, he determined that the operator was liable for an inadequate berm. This is the point at which the testimony for the two government witnesses diverged significantly leading to my granting of a directed verdict made by the Respondent.

Robert Seelke's Testimony

Despite being of the opinion that the berm met all of the requirements as stated above, Seelke was of the opinion that the boulders were too far apart. He could not state, however, how a different placement of the boulders would have offered greater resistance. He admitted that MSHA has no information on what distance between boulders is acceptable and merely speculated that the boulder in question did not offer sufficient resistance. Tr. 61. Neither he nor anyone else measured the distance at which the boulders were placed from the edge of the highwall and he had no idea how much resistence was offered. Tr. 74. He further acknowledged that he has no experience constructing boulder berms and has no educational expertise in the area. Tr. 62. He was aware that the smallest vehicle to operate at the mine was sufficiently wide that it could not pass between the boulders and he never inquired of anyone at the mine whether the distance at which the boulders were placed from one another was necessary for drainage of rain or clearing of snow and ice from the haul road. Tr. 63-66, 80-82.

Seelke readily confirmed that as many as thirteen inspectors over the course of ten to twelve years had inspected this berm and found it adequate. He further expressed his confidence in each of these inspectors and felt they had not been negligent in their opinions concerning this berm. Tr. 88-89, 91. He stated that thirteen inspectors could have thirteen different opinions but somehow an operator would know what distance gap would be acceptable by perhaps calling an inspector and asking. Tr. 89. When the question was put to him, "Is there any particular thing that we could look to ... we as operators could look to, as to why your opinion is right and the other 12 or 13 inspectors were wrong," his response was, "Probably nothing. No." Tr. 89-90.

After confirming that the driver was out of control, had not taken his foot of the accelerator, was driving in third or fourth gear at a top speed of eleven miles per hour and could have easily stopped his vehicle by either taking his foot off the gas or applying the brake, Seelke stated that he believed the operator was conscious at the time and that the gap in the boulders was the direct cause of the accident. Tr. 113. He found the driver's failure to maintain control of the truck and his not wearing a seat belt were merely contributing factors. Tr. 113. Although he was of the opinion Gully was conscious, he could not account for how a driver would travel across a roadway at full throttle and not react when impacting a 16-ton boulder. Tr. 70. When

asked if he had received information during the course of his accident investigation that Gully had health issues, Seelke was less than forthcoming. He stated "there was some third-hand information, yes." When pressed as to the nature of that information he responded, "That he – the weekend prior, he was having – he did not want to wear his seat belt because he felt uncomfortable, it was restraining him, in his personal vehicle." When pressed even further he finally said, "That – that's – was the – was the part that – that – let's see. I – there may have been something about maybe some chest – chest pains, but that was – I – I don't recall anything else." Tr. 71.

When asked if he made the decision to issue this citation in light of the investigative findings, Seelke was equally evasive claiming it was "MSHA's idea as an agency." Tr. 92.[1]

Steven Thompson's Testimony

Thompson's testimony completely contradicts Seelke's. He disagreed that the boulders were insufficient in height, size or placement to be considered adequate. He felt they were still adequate, in fact, and that no violation was committed. Tr. 133-36, 141. He freely admitted that persons he interviewed at the mine told him that the driver had been complaining of chest pains and indigestion-like symptoms prior to the accident. Tr. 133. It was his opinion that Gully was not conscious when he hit the boulder considering the manner in which the truck veered off the road without slowing or braking and that the driver had suffered some sort of physical event which rendered him unconscious thereby causing the accident. Anyone who was conscious could have avoided the accident easily. Tr. 133-35, 143. He emphatically stated that insufficient berms did not cause the accident. Tr. 142-43. Thompson also added that MSHA does not have any data to suggest what size boulder would withstand being pushed off a highwall when hit by a 50-ton truck. Tr. 139. These boulders were set far enough away from the edge that the truck had to have pushed it nine feet before going over the wall. Tr. 133. There is no set footage on gap measurements provided by MSHA and the only requirements are that the boulders be of mid-axle height and set sufficiently close together to prevent a vehicle from driving between them as this was.

I find it incomprehensible that the Secretary would present a case in which his only two witnesses contradict and impeach one another yet would represent to the court that there is a preponderance of evidence upon which to find the operator subject to liability. Not only does one's testimony nullify the other's, but any reasonable interpretation of the facts leads to the conclusion that the operator must prevail on its motion. First, the scenario offered by Thompson of the driver having suffered some medical event leaving him unable to respond is the most reasonable interpretation of the objective facts. Secondly, the operator could not have had fair notice of a violation where the only proponent of the violation admitted that he and all of his esteemed colleagues found the boulder berm sufficient for ten to twelve years until this aberrant occurrence. The Secretary, in closing remarks, stated that drivers have heart attacks while

[1] There was a representation made by the Secretary through my law clerk that a civil suit is pending in this matter. I would sincerely hope that a direction to issue a citation was not given by to the inspector to assist in that civil matter where the facts clearly do not support imposing such liability upon the operator.

operating equipment which is foreseeable to the operator. I find this a most interesting interpretation of fair notice but not worthy of discussion.

Thompson's and the operator's belief that the berm was sufficient is also supported by MSHA's own literature concerning the use of boulders as a berm stating that the purpose of the berm is not to serve as a physical barrier capable of stopping a vehicle.

Respondent's motion for directed verdict was **GRANTED** at trial and I herein memorialize that ruling. Citation Number 6566854 is hereby **VACATED**.

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

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November 24, 2015

TXI OPERATIONS LP, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDING Docket No. CENT 2015-101-RM Order No. 8774407; 10/15/2014 Mine: Hunter Cement Plant Mine ID: 41-02820
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. TXI OPERATIONS LP, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2015-176-M A.C. No. 41-02820-368753 Docket No. CENT 2015-388-M A.C. No. 41-02820-378255 Mine: Hunter Cement Plant

ORDER DENYING SETTLEMENT

Before: Judge Moran

These cases are before the Court upon two petitions for assessment of civil penalties and one notice of contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary has filed a motion to approve settlement. The originally assessed amount for the two penalty dockets was $7,314.00, and the proposed settlement is for $4,294.00. At least for purposes of this Motion, the Secretary has decided to vacate the imminent danger order, Order No. 8774407, contested in CENT 2015-101-RM. For Citation Nos. 8774406 and 8774409, contained in CENT 2015-388-M and CENT 2015-176-M, respectively, TXI Operations LP ("Respondent") has agreed, for now, to accept those citations as written and pay the full penalty amount.[1]

For Citation No. 8774408, a matter in which the Secretary seeks an 80% reduction in his proposed settlement, from $3,784.00 to $764.00, the motion must be denied for lack of sufficient justification. In that citation, the Inspector recorded that "[t]he exit ramp at scale 1 [one] had a

[1] Should the matter continue to hearing, with the settlement denied, the Secretary and the Respondent would be free to withdraw all aspects of the motion, not simply the citation about which the Court has issues.

broken bolt on the support under the grating causing the platform *to lean towards the exit end of the scale*. *Both top bolts* on the platform were bent *and continued operation of the system could further damage the bolts*." (emphasis added). Further, the Inspector noted that "[a] customer truck driver *had been observed using the ramp* to close the lid/hatch on top of the tanker. Continued operation of this system could expose a person to a fall hazard if the platform fails due to the defective bolts." (emphasis added). The situation was deemed serious enough by the Inspector that he issued an imminent danger order, Order No. 8774407. It was the Inspector's further evaluation that the violation was significant and substantial and that the injury was "Highly Likely" with a fatality to be reasonably expected. Negligence was listed as "Moderate."

Despite the Inspector's description of the condition, and his observation of a miner using the leaning platform, the Secretary's eighty-five word settlement for this citation provided a total of 32 words to justify the reduction: "*Respondent asserts* that all four bolts supporting the ramp's handrails would have to break to expose miners to a fall hazard. The MSHA Inspector observed that one bolt of four was bent." Motion at 3 (emphasis added). Of those 32 words, 11 are, based on the face of the citation, inaccurate. As noted, the Inspector averred that *two* bolts, *not one*, were bent and that they were top bolts. The Motion then completely omits mention that another one of the bolts was also broken, not merely bent. The Secretary's Motion also makes no mention of the associated imminent danger order.

That leaves for the Court's review 21 words to assess the legitimacy of the submission: "Respondent asserts that all four bolts supporting the ramp's handrails would have to break to expose miners to a fall hazard." The Motion does not say a word about the Secretary's reaction to the operator's claim that all four bolts would have to break to create a fall hazard. Nor does the Secretary inform whether he consulted with the Inspector regarding the claim. Even if such a consultation was made, there is no declaration about the likelihood that the bolts would break, nor is there any discussion about the effect of the platform's leaning state and the impact of that condition increasing the chances of the bolts breaking. When machinery is designed, and four bolts are used for support as here, it can be stated with confidence that the number of bolts used has a functional reason behind it, not an aesthetic one.

Remembering that the Secretary's default position in his motions is to claim that he need not provide any information to the Commission,[2] other than announcing that the matter has been

[2] For virtually all it settlements, the Secretary continues to recite that "[i]n reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above. . . . Consistent with the position the Secretary has taken before the Commission in *The American Coal Company*, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k)." This is the equivalent of telling the public that there's "nothing to see here, move along." Apart from the lack of "transparency," a

(continued…)

settled, and his view that the Commission's role is to merely bring out a stamp with the word "approved" on it and apply it to the motion, it is not surprising that he has only reluctantly provided a minimalist and slapdash offering, which misstates the condition and avoids the pertinent context under which the citation was issued. Such motions, involving large reductions, with insufficient explanations, underscore the importance of the Commission's review of settlements, per section 110(k) of the Mine Act. Accordingly, absent a fuller explication, the matter remains set for hearing, commencing December 15th.

Wherefore, the Motion to Approve Settlement Agreement is **DENIED**.

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

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[2] (…continued)
term the Secretary often invokes in defending its position that he need not say more by explaining the basis for reductions to miners and to the public generally, there is the matter of the Commission's role per section 110(k) of the Mine Act.