

October 2011

TABLE OF CONTENTS

COMMISSION DECISIONS AND ORDERS

10-05-2011	CUMBERLAND COAL RESOURCES, LP	PENN 2008-189	Page 2357
10-11-2011	LONE MOUNTAIN PROCESSING, INC.	KENT 2011-1153	Page 2373
10-11-2011	OAK GROVE RESOURCES, LLC	SE 2011-465	Page 2378
10-21-2011	SECRETARY OF LABOR o/b/o BURDETTE BILLINGS vs. PROPPANT SPECIALISTS, LLC	LAKE 2011-855-DM	Page 2383
10-27-2011	MARTIN COUNTY COAL CORPORATION	KENT 2010-1549	Page 2389
10-27-2011	WHITE BUCK COAL COMPANY	WEVA 2010-1696	Page 2392
10-28-2011	CAM MINING, LLC	KENT 2009-444	Page 2395
10-28-2011	JIM WALTER RESOURCES, INC.	SE 2008-962-R	Page 2398

ADMINISTRATIVE LAW JUDGE DECISIONS

10-06-2011	MCCOY ELKHORN COAL CORP.	KENT 2008-260	Page 2403
10-11-2011	MACH MINING, LLC	LAKE 2009-427	Page 2428
10-14-2011	FREEMPORT-McMORAN MORENCI, INC.	WEST 2009-442-M	Page 2441
10-17-2011	ALBERT F. GAROFALO vs. PENN BIG BED SLATE CO., INC.	PENN 2010-471-DM	Page 2471
10-18-2011	SECRETARY OF LABOR o/b/o JEROME D. GEORGE vs. FREEMPORT- MCMORAN, BAGDAD, INC.	WEST 2011-1423-DM	Page 2488
10-19-2011	NALLY & HAMILTON ENTERPRISES, INC.	KENT 2008-712	Page 2490
10-20-2011	MARK GRAY vs. NORTH FORK COAL CORPORATION	KENT 2010-430-D	Page 2495

10-21-2011	AMERICAN COAL COMPANY	LAKE 2009-134	Page 2511
10-21-2011	PRAIRIE STATE GENERATING CO.	LAKE 2009-710	Page 2549
10-24-2011	THE AMERICAN COAL COMPANY	LAKE 2007-172	Page 2574
10-25-2011	CUMERLAND COAL RESOURCES, LP	PENN 2008-189	Page 2597
10-26-2011	CONSOLIDATION COAL COMPANY	VA 2010-336	Page 2600
10-28-2011	MINING & PROPERTY SPECIALISTS	VA 2010-585-R	Page 2617

ADMINISTRATIVE LAW JUDGE ORDERS

10-18-2011	JOHN GARY JARVIS vs. HIGHLAND MINING COMPANY, LLC	KENT 2011-64-D	Page 2623
10-18-2011	CONSOLIDATION COAL CO.	VA 2009-211	Page 2632
10-30-2011	THE AMERICAN COAL COMPANY	LAKE 2007-171	Page 2636

Review was granted in the following cases during the month of October 2011:

Secretary of Labor, MSHA v. Big Ridge, Inc., Docket No. LAKE 2008-436, et al. (Judge Melick, September 8, 2011)

Review was denied in the following cases during the month of October 2011:

Secretary of Labor, MSHA v. Dynamic Energy, Inc., Docket No. WEVA 2009-317. (Judge Paez, August 31, 2011)

Secretary of Labor, MSHA v. Coal River Mining, LLC., Docket No. WEVA 2011-520. (Judge Andrews, October 2, 2011 - Interlocutory Review of unpublished Order)

Secretary of Labor, MSHA v. Sprio Mining, LLC., Docket No. CENT 2011-554, et al. (Judge Andrews, July 29, 2011 - Interlocutory Review of unpublished Order)

Secretary of Labor, MSHA on behalf of Lige Williamson v. CAM Mining, LLC., Docket No. KENT 2010-280-D. (Judge Paez, August 29, 2011)

COMMISSION DECISIONS AND ORDERS

I.

Factual and Procedural Background

Cumberland operates the Cumberland Mine, an underground coal mine located in Waynesburg, Pennsylvania. On December 6, 2007, a special investigator from the Department of Labor's Mine Safety and Health Administration ("MSHA"), Thomas H. Whitehair II, inspected the Number One belt entry, the secondary escapeway for the Five Butt East longwall section. 31 FMSHRC at 1157. He inspected the escapeway for a distance of approximately 6,650 feet. *Id.* A lifeline was suspended from the roof.³ *Id.* The height of the lifeline between these two crosscuts throughout the escapeway was seven feet, eight inches. *Id.*

The inspector observed that portions of the lifeline were suspended by four-inch long hooks shaped like the letter J ("J-hooks"). *Id.* The J-hooks were approximately 50 feet apart. *Id.* The hooks were attached to the roof at the top, were open-sided, and curved upward at the bottom to hold the lifeline. *Id.* They were not pointed in the same direction throughout the escapeway. *Id.* The inspector testified that because of the lifeline's height, a miner generally would not be able to reach the lifeline but would have to flip it off the hook. Tr. 48. He further stated that because of the multiple directions of the hooks, a miner would have to flip the lifeline in multiple directions in order to get it off the hook. Tr. 48. He believed that the positioning of the hooks in this manner would have an adverse impact on a miner's ability to use the lifeline because it would be time-consuming and take a lot of effort to access the lifeline, which would hinder escape. Tr. 49.

Additionally, the lifeline was hung so high – seven feet eight inches from the mine floor – that it was impossible to reach up and touch it. Tr. 53, 56, 60, 62. Moreover, several cables along the escapeway were hung from the roof just underneath the lifeline. Thus, if the lifeline could be pulled down, it would only fall as far as the cable underneath it. A miner attempting to escape in an emergency would have to release the lifeline in order to move around the cable. Tr. 63-64.

³ Section 75.380(d)(7) provides a number of requirements that a lifeline must meet. Among other things, the lifeline must be a "continuous, durable directional" line that is "installed and maintained throughout the entire length of each escapeway," must be "flame-resistant," must have a reflector every 25 feet, and must have a directional marker at least every 100 feet. 30 C.F.R. § 75.380(d)(7). According to the inspector, a lifeline is generally a nylon cord or rope, yellow in color, 3/8ths of an inch in diameter, that continuously runs down an entire escapeway so that miners can physically hold on to it and follow it out of the mine in the event of an emergency. Tr. 34-38.

As a result of the height of the lifeline and the placement of the J-hooks, Inspector Whitehair issued Citation No. 7019884 for an alleged S&S violation of section 75.380(d)(7)(iv). 31 FMSHRC at 1149; Tr. 67.⁴

On the next day, December 7, 2007, Inspector Whitehair resumed his inspection of the mine and inspected the lifeline in the Number Two track entry of the Five Butt East longwall section for a distance of approximately 750 to 850 feet. 31 FMSHRC at 1158. The entry was the primary escapeway for the longwall section. Tr. 76. The lifeline in the escapeway was located over various pieces of track equipment for a distance of 450 feet. 31 FMSHRC at 1158. The pieces of track equipment were all at least seven feet wide and between three and five feet high. *Id.* at 1159. In addition, at various locations along the cited lifeline, cables and waterlines ran perpendicular and under the lifeline at issue. *Id.* As a result, Whitehair issued Citation No. 7019885, for an alleged S&S violation of section 75.380(d)(7)(iv). Gov't Ex. 5.⁵

On December 10, 2007, Whitehair was conducting a Mine Act section 103(i) spot inspection because the Cumberland Mine liberates one million cubic feet of methane within a 24- hour period.⁶ Tr. 112. He inspected the lifeline in the Number Two track entry, the primary

⁴ Citation No. 7019884 states:

The lifeline provided in the #1 entry (belt), secondary escapeway for the 5 Butt East longwall (011-0) working section was not maintained in a usable condition for the entire length of the escapeway. The lifeline was hung from the mine roof with J hooks and could not be reached by a miner or pulled down in most areas. The lifeline was also hung above cables in several areas and could not be pulled down for use.

31 FMSHRC at 1149, Stip. 13; Gov't Ex. 1.

⁵ Citation No. 7019885 states:

The lifeline provided in the #2 track entry, primary escapeway for the 5 Butt East Longwall (011-0) working section was not located in such a manner for miners to effectively escape in the event of an emergency. The lifeline was hung from the mine roof directly over the longwall mule train, supply cars and mantrips for a distance of approximately 450 feet. Cables and hoses were also hung under the lifeline at several locations.

31 FMSHRC at 1149, Stip. 14; Gov't Ex. 5.

⁶ Mine Act section 103(i) provides that “[w]henver the Secretary finds that a coal or
(continued...)

escapeway for the Eight Butt East section of the mine. 31 FMSHRC at 1160. He indicated that the lifeline, which was hung from the mine roof approximately seven and half feet above the floor, was located over various pieces of track equipment, for a distance of approximately 120 feet, similar to the previous inspection. *Id.*; Tr. 118. The inspector also observed that at one location the lifeline was located over a waterline that ran perpendicular to the lifeline. *Id.* Additionally, the lifeline could only be accessed at its inby end, and any miners entering the escapeway from adjacent entries would not be able to reach the lifeline and use it to help them escape. Tr. 122, 126-27. As a result, Whitehair issued Citation No. 7019887 for an alleged S&S violation of section 75.380(d)(7)(iv). Gov't Ex. 7.⁷

On December 11, 2007, Inspector Whitehair inspected the lifeline in the Number Two track entry, the primary escapeway for the 15 Butt East section of the mine. Tr. 133. He observed that the lifeline, which was hung approximately seven and a half feet above the floor, was located above track equipment for approximately 300 feet. Tr. 133-34. As a result, the inspector issued Citation No. 7019889 for an alleged S&S violation of section 75.380(d)(7)(iv). Gov't Ex. 10.⁸

⁶(...continued)

other mine liberates excessive quantities of methane . . . he shall provide a minimum of one spot inspection . . . every five working days at irregular intervals . . . [L]iberation of excessive quantities of methane . . . shall mean liberation of more than one million cubic feet of methane . . . during a 24-hour period.” 30 U.S.C. § 813(i).

⁷ Citation No. 7019887 states:

The lifeline provided in the #2 track entry, primary escapeway for the 8 Butt East (027-0) working section was not located in such a manner for miners to use effectively to escape. The lifeline was hung directly over top of 5 supply cars, rail car, and a personnel carrier from the end of the track outby for a distance of approximately 120 feet. There was also no means provided to get on a lifeline where miners could enter the escapeway at man doors. The lifeline was hung 8 feet from the mine floor and could not be reached. Waterline was hung under the lifeline at the #35 crosscut. This is the third citation issued for this condition this quarter.

31 FMSHRC 1149-50; Stip. 15; Gov't Ex. 7.

⁸ Citation No. 7019889 states:

The lifeline provided in the #2 track entry, the primary escapeway for the 15 Butt East (029-0) working section was not installed in such a manner for miners to use effectively to escape. The lifeline

(continued...)

After a hearing on the merits, the judge determined that section 75.380(d)(7)(iv) requires that lifelines must be located in a manner for miners to use “effectively” to escape, i.e., to achieve the results of a quick escape in an emergency. 31 FMSHRC 1156. The judge found that Cumberland’s suspension of the lifelines by numerous J-hooks above cables and above track equipment did not comply with this requirement. *Id.* at 1158, 1160. Accordingly, he determined that Citation Nos. 7019884, 7019885, 7019887, and 7019889 constituted four violations of section 75.380(d)(7)(iv) at four different mine locations. *Id.* at 1157-60.

With respect to the question of whether the violations were S&S, the judge applied the test set forth in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). 31 FMSHRC at 1162-63. The judge found that the record established the underlying violation, which is the first element of *Mathies*. *Id.* at 1163. He also reasoned that the second element was satisfied because these violations “contributed to the hazard of miners not escaping quickly in an emergency with attendant increased risk of injuries due to a delay in escape.” *Id.* at 1163. He determined that the third element of *Mathies* was at issue: whether there is a reasonable likelihood that the hazard contributed to will result in an injury, i.e., a reasonable likelihood of an injury-producing event. *Id.* The judge concluded that the “Secretary has failed to adduce the existence of facts that, in normal mining operations, would have tended to establish that there was a reasonable likelihood of a fire or explosion.” *Id.* He noted that “Whitehair conceded on cross-examination that a fire or explosion that would lead to reduced visibility to the point where use of a lifeline was necessary, was not reasonably likely.” *Id.* The judge rejected the Secretary’s assertion that the third element of *Mathies* must be “viewed in the context of continuing mining operations and of an emergency necessitating use of the escapeway, and by analogy, the lifeline.” *Id.* at 1163-64 n.6. The judge did not reach the fourth element of *Mathies*. *Id.* at 1163-64.

In determining penalty amounts, the judge found that the level of gravity was “more than moderate” because the inspector testified that “*in the event* of a fire or explosion, due to the manner in which the lifeline was located, miners would either be delayed or prevented from using it to escape, which *could result in a fatal injury due to carbon monoxide poisoning.*” *Id.* at 1164 (emphasis original). However, he found low negligence and determined a penalty of \$3,000 per violation to be appropriate, compared to the \$39,161 proposed by the Secretary for the four citations. *Id.* at 1148, 1166; Stip. 6.

⁸(...continued)

was hung from the mine roof directly overtop of a rail truck, 8 supply cars and a mantrip [for] [t]he distance of approximately 300 feet from the end of the track.

31 FMSHRC at 1150; Stip. 16; Gov’t Ex. 10.

II.

Disposition

The Secretary seeks review of the judge's determination that the four violations of section 75.380(d)(7)(iv) were not S&S. She asserts that, in evaluating whether the violations were S&S, the judge should have assumed the occurrence of the sort of emergency contemplated by the standard. S. Br. at 8. The Secretary notes that, by its very nature, section 75.380(d)(7)(iv) is designed to protect miners only in the event of a mine emergency necessitating an evacuation. *Id.* at 10-11. The Secretary maintains that the judge's approach is illogical because violations of emergency standards such as section 75.380(d)(7)(iv) would rarely, if ever, be found to be S&S, although those violations have an "especially high capacity for producing catastrophic injuries." *Id.* at 12. She contends that Congress cannot have intended that violations of the lifeline requirements would be effectively immunized from the Mine Act's graduated enforcement scheme. *Id.* at 15. The Secretary maintains that her interpretation is consistent with the statutory language of section 104(d)(1), the legislative history of the Mine Act, and its subsequent history contained in the Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, 120 Stat. 493 ("MINER Act"), which amended section 316 of the Mine Act. *Id.* at 12-14. The Secretary submits that her approach is consistent with *Mathies*, but that if the Commission were to deem it inconsistent, the Commission should defer to the Secretary's reasonable interpretation of section 104(d)(1). *Id.* at 18-19.

In response, Cumberland contends that the judge appropriately found that the Secretary did not meet her burden of establishing that the violations were S&S. Cumberland maintains that the *Mathies* criteria must be viewed "based on the particular facts surrounding the violation" and that an emergency cannot be assumed. *Id.* at 12-13. The operator emphasizes that the inspector admitted that his assumed emergency scenario "was not reasonably likely to occur." *Id.* at 11 (citing Tr. 146-47). It asserts that the Secretary's approach is contrary to longstanding Commission and courts of appeals precedent. *Id.* at 15, 25. Alternatively, Cumberland argues that, if the Commission assumes the occurrence of an emergency, the judge's decision should be affirmed because substantial evidence supports the judge's finding that the violations were not S&S. *Id.* at 27.

A. Legislative and Regulatory History of Section 75.380

Before turning to the S&S question, we set forth the legislative and regulatory history of section 75.380 and the lifeline requirements.

In 2006, in response to the tragic accidents at the Sago Mine and Aracoma Alma No. 1 Mine, Congress enacted the MINER Act, which amended the Mine Act in several respects. The MINER Act specifically requires operators to provide flame-resistant directional lifelines in escapeways "to enable evacuation." 30 U.S.C § 876(b)(2)(E)(iv). Congress recognized that escape is the first and preferred option in a mine emergency and emphasized the importance of providing miners with a method to assist in locating and following an escape route. S. Rep. No.

109-365, at 6, 7 (2006). Similarly, when analyzing the escapeway provisions of section 75.380, the Commission, in *The American Coal Co.*, 29 FMSHRC 941, 952 (Dec. 2007), stated that the “applicable statute and legislative history emphasize the need for miners on a working section to exit a mine expeditiously in emergency situations.” The Commission further noted that “[r]eady access to escapeways for all miners is a key component of an effective evacuation of a mine.” *Id.*

On March 9, 2006, MSHA issued an Emergency Temporary Standard (“ETS”) because of the grave dangers that miners are exposed to during underground coal mine accidents and subsequent evacuations. Emergency Mine Evacuation, 71 Fed. Reg. 12252, 12253 (2006). The ETS enhanced the protection afforded to miners by broadening the requirements for lifelines. *Id.* at 12261. It added new section 75.380(d)(7) to require that each escapeway be provided with a continuous directional lifeline, made of durable material and marked with reflective material every 25 feet. *Id.* The lifeline must be located such that it can be used effectively to escape; equipped with directional indicators showing the route of escape; and attached to, and marking the location of, stored self-contained self-rescuers (“SCSRs”). *Id.* The preamble noted the importance of proper positioning of the lifeline regarding height, accessibility, and location, which “improves the ability of miners to effectively use the lifelines to escape during emergency situations.” *Id.* On December 8, 2006, MSHA issued its final rule, which stated that in the event of a mine emergency, the first line of defense is to evacuate the mine. Emergency Mine Evacuation, 71 Fed. Reg. 71430, 71431 (2006). The preamble provides: “To assist miners in evacuating the mine under conditions of panic and poor visibility, the final rule requires mine operators to provide . . . continuous directional lifelines.” *Id.* at 71431. The final rule remained unchanged from the ETS and required that the lifelines be located in such a manner that miners could use them effectively to escape. *Id.* at 71437.

B. The Mathies S&S Analysis

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984).

The judge found that the first *Mathies* element was satisfied by his determination of the four violations of section 75.380(d)(7)(iv). 31 FMSHRC at 1163. He also found the second element, a discrete safety hazard contributed to by the violation, to be present by “the hazard of miners not escaping quickly in an emergency with the attendant increased risk of injuries due to a delay in escape.” *Id.* However, the judge determined that the Secretary had failed to meet her burden of establishing a reasonable likelihood of an injury-producing event, the third element of *Mathies*. *Id.*

Regarding the second *Mathies* element, the judge found that the hazard contributed to by the violations was “miners not escaping quickly *in an emergency* with attendant increased risk of injuries due to a delay in escape.” *Id.* (emphasis added). We conclude that this statement is an accurate description of the relevant hazard contributed to by the violations. The judge’s conclusion that the violations contributed to the hazard – the second *Mathies* factor – is supported by substantial evidence.⁹ The hazard contributed to by defectively placed lifelines necessarily involved consideration of an emergency situation.

The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“*PBS*”)

⁹ The inspector addressed the situation of the lifeline located beyond the miners’ reach and placed on J-hooks that would require the miners to use a tool to flip out the lifeline. He stated: “I believe that anything that would delay the miners’ escape by trying to [r]otate and flip a lifeline with a stick when you can’t see what you are doing to get on that lifeline . . . it’s not adequate and it can’t be safely used to escape the mine. The lifeline should be readily available for a miner to be able to get on that lifeline and quickly escape.” Tr. 158; see also Tr. 48-49, 67, 70, 159. The inspector also testified as to the danger of having track equipment positioned under the lifeline. Tr. 127. He stated that “it would injure the miner by blindly running into the piece of equipment and also hinder or prevent the miner from getting the lifeline from it being entangled with the equipment and [not] being able to use it to escape.” Tr. 127; see also Tr. 98, 108, 178-80. Additionally, the inspector testified as to the situation of positioning the lifeline above the water and other cables, which would obstruct the lifeline and cause the miner to take his hand off the cable to move around the cable. Tr. 64. He stated: “I would hate to have my life depend on swinging my arms trying to find a lifeline.” Tr. 176.

(affirming an S&S violation for using an inaccurate mine map). The Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury.” *Id.* at 1281. Importantly, we clarified that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous dangers of injury. *Id.* The Commission also emphasized the well-established precedent 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); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

Hence, under *PBS*, in addressing the third *Mathies* element, the next question before the judge was whether there was a reasonable likelihood that this identified hazard would result in injury. Through the testimony of Inspector Whitehair, the Secretary presented abundant evidence regarding the likelihood of injury as a result of the identified hazard. The inspector testified at length as to the likelihood of injury caused by Cumberland’s positioning of the lifelines during an emergency evacuation. For example, he testified as to why a lifeline was needed and why miners could not use something else like a waterline to find their way out: “[I]f they needed to use something to find their way out, the miners are in so much smoke and so dense smoke that they can’t see. So if they are using a lifeline, that lifeline has directional cones on it to tell them they are going the proper direction and . . . if a miner is in a stressful situation of trying to escape from a mine disaster, that . . . trying to feel their way down a water line, it would be very easy to become confused and maybe turn around and go in the wrong direction.” Tr. 151. According to the inspector, this happened at the Alma Mine when miners tried to use a high voltage cable, which does not indicate direction, as a guide to find their way out of the mine. They became disoriented, and one miner went the wrong way and died. Tr. 151-52.

With regard to the positioning of the J-hooks facing in different directions on one of the lifelines, as described in Citation No. 7019884, Inspector Whitehair testified that it was reasonably likely that injury would result from the hazard because of the length of the escapeway, the height of the lifeline above the mine floor, and the time it would take for miners to remove the lifeline from the J-hooks. With regard to the positioning of the lifelines above equipment on the track, as described in Citations Nos. 7019885, 7019887 and 7019889, the inspector stated that in addition to delays in escape because of problems reaching the lifelines, lead men following the lifelines in the smoke would walk into the end piece of equipment, causing injury, a fall, or a rupture of the breathing bag on the miner’s SCSR. Tr. 101, 127.

Importantly, the inspector specifically testified as to the severity of injuries that would result from such a hazard, and that they would be fatal. Tr. 71, 110. He stated that the miners would either be delayed or unable to escape at all. Tr. 70. Inspector Whitehair further testified that as a result miners “would eventually succumb to [carbon monoxide] poisoning.” Tr. 71; 31 FMSHRC at 1164. He stated that “in the event of an emergency that the lifeline would have to be used, that the miners are wearing their SCSRs [and] . . . are not able to communicate verbally

because they can't take their SCSRs off. They are not going to be able to communicate any type of signal because they can't see each other, and they are going to be panicked, scared to death, and . . . anything that would hinder or prevent them from escape could be a real catastrophe." Tr. 108.

Significantly, the judge's gravity finding credited the inspector's testimony with respect to the likelihood of serious injury as a result of miners not escaping quickly in an emergency. 31 FMSHRC at 1164. The judge found that the level of gravity was "more than moderate" because the inspector testified that "*in the event* of a fire or explosion, due to the manner in which the lifeline was located, miners would either be delayed or prevented from using it to escape, which *could result in a fatal injury due to carbon monoxide poisoning.*" *Id.* (emphasis in original).

As explained above, under the *PBS* decision, the judge in this case should have determined whether there was a reasonable likelihood that the relevant hazard – miners not being able to escape quickly in an emergency situation – would cause injury. However, the judge instead focused on the likelihood of a fire or explosion occurring at the mine. In other words, the judge addressed the likelihood that an emergency might occur, not the likelihood that the hazard contributed to by the violation would cause injury. As in *PBS*, the judge has conflated "violation" with "hazard," a position which the Commission has rejected. *See PBS*, 32 FMSHRC at 1280-81 (rejecting the operator's argument that there must be a reasonable likelihood that the violation will cause injury).

In so holding, the judge implicitly undercut his finding that a hazard had been established under the second element of the *Mathies* test. Without a mine emergency, the positioning of the lifeline would not constitute a danger to miners' safety. The judge had already found that under element two of the *Mathies* test the violations in question would indeed contribute to the hazard of miners not being able to escape quickly in the event of an emergency. In effect, the judge imposed an additional test not set forth in *Mathies* – a test of whether emergency conditions would likely occur at the mine.

The Commission has never required the establishment of the reasonable likelihood of a fire, explosion, or other emergency event when considering whether violations of evacuation standards are S&S. In *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 563-64 & n.5 (Aug. 2005), the Commission found that the failure to maintain an escapeway in safe condition was an S&S violation, noting that "in those circumstances [when] miners would be seeking quick exit from the mine in an emergency[,] . . . the potential for slips and falls would therefore be even greater during a mine evacuation." In *Rushton Mining Co.*, 11 FMSHRC 1432 (Aug. 1989), the Commission addressed whether an escapeway violation was S&S. In determining that the violation was not S&S, the Commission noted that the Secretary failed to show the reasonable likelihood of serious injury "in the event of an evacuation." *Id.* at 1437. These decisions demonstrate that, with regard to evacuation standards, the applicable analysis under *Mathies* involves consideration of an emergency. *See also Florence Mining Co.*, 11 FMSHRC 747, 756 (May 1989) (evaluating emergency escape methods in the context of a potential evacuation situation).

Evacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs. When the citation for a violation of an evacuation standard is issued, presumably no emergency exists at that moment. While it is the hope and objective of all who work in mine safety that no emergency will ever occur in the future, if an emergency does occur, it is imperative that the requirements of the evacuation standard be met at that time. As the Secretary points out in this case, “lifelines serve no purpose except in the event of an emergency necessitating an evacuation in which visibility is poor.” S. Br. at 11. We note with approval Judge Manning’s conclusion in *Twentymile Coal Co.*, 29 FMSHRC 806, 810 (Sept. 2007) (ALJ), that “it would be too simplistic to hold that the violation [of the escapeway requirements in section 75.380] was not S&S because it was unlikely that there would have been an emergency evacuation of the section or it was unlikely that the miners would need to use the alternate escapeway in an emergency.”

In this regard, Cumberland’s arguments would lead to a situation where the Secretary rarely, if ever, could prove that the violation of an evacuation standard is S&S. According to Cumberland, the inspector here could have designated the violations as S&S only if he also simultaneously discovered conditions at the mine which made it reasonably likely that there would be a fire or an explosion at that time. Moreover, even if a hypothetical mine had a completely ineffective evacuation system or no evacuation system at all, Cumberland’s arguments would lead to the conclusion that the violations could not be S&S unless the inspector found conditions in the mine that are reasonably likely to cause a fire or explosion. This conclusion defies logic and would lead to the absurd result of defeating the purpose of the standard. *Central Sand & Gravel Co.*, 23 FMSHRC 250, 254 (Mar. 2001) (refusing to adopt an interpretation that would lead to an absurd result and defeat clear purpose of standard).

Additionally, Cumberland’s arguments are flawed in that they overlook the passage of the MINER Act in 2006. The MINER Act specifically requires operators to provide flame-resistant directional lifelines in escapeways “to enable evacuation.” 30 U.S.C. § 876(b)(2)(E)(iv). As noted above, in enacting the MINER Act, Congress recognized that escape is the first and preferred option in a mine emergency and emphasized the importance of providing miners with a method to assist in locating and following an escape route. S. Rep. No. 109-365, at 6, 7 (2006). The statute’s legislative history further emphasizes the importance of planning for potential dangers to avoid future tragedies and of “[p]roviding underground personnel with assistance in locating and following escape routes, particularly in circumstances of diminished visibility.” *Id.* at 7. Given the purpose of the legislation and Congress’s emphasis on the importance of safe and effective mine evacuations in emergency situations, it would be incongruous for major violations of evacuation standards not to be S&S unless an inspector also happens to observe conditions that are reasonably likely to cause a fire or explosion. If important escapeway equipment is not functional when a mining catastrophe occurs, miners may be unable to escape, causing precisely the kind of disaster that the MINER Act was expressly enacted to prevent.

Cumberland argues that the Secretary’s position that emergency conditions should be assumed when determining whether a violation of an evacuation standard is S&S, S. Br. at 8-9, is inconsistent with *Mathies* and related Commission precedents. In support of its position, Cumberland makes two related arguments. First, it maintains that every S&S determination must be based on the “particular facts” of each violation. C. Br. at 12. According to Cumberland, this means that the violation of an evacuation standard can be S&S only if the Secretary can prove that a confluence of factors was present so that a fire, explosion, or other emergency event was reasonably likely at the time of the citations. *Id.* at 16. Second, Cumberland contends that, if the judge evaluates the S&S determination in the context of emergency conditions, every violation of an evacuation standard will automatically become an S&S violation. *Id.* at 18. According to Cumberland, this would conflict with the well established principle that S&S determinations should be made on a case-by-case basis. *Id.* at 7, 12.

We reject Cumberland’s arguments. First, the Commission is not changing *Mathies*. Rather, we are focusing on the specific “discrete safety hazard” at issue here, as required by the second element of the *Mathies* test. The judge defined this “discrete safety hazard” with clarity – “miners not escaping quickly in an emergency with attendant increased risk of injuries due to a delay in escape.” 31 FMSHRC at 1163. We accept this definition of the “discrete safety hazard” herein.

This method of analysis – focusing on the clear identification of the “discrete safety hazard” in the second element of the *Mathies* test – does not foreclose consideration of the “particular facts” of the mine in question. The point can be illustrated by this case, in which element two of *Mathies* involved the question of whether the violations of the lifeline standard would contribute to a “discrete safety hazard.” *Mathies*, 6 FMSHRC at 3; 31 FMSHRC at 1163. Here the judge found that the “violations contributed to the hazard of miners not escaping quickly in an emergency with attendant increased risk of injuries due to a delay in escape.” 31 FMSHRC at 1163. This was completely consistent with substantial evidence showing, among other things, that the violations extended over a substantial distance and that the nature of the violations was such that they could be expected to cause miners to become confused during an emergency and to be delayed in escaping. However, if the violations had instead been relatively minor in nature and scope, a fact-finder may well not have found that the violations contributed to the hazard of miners being delayed in escaping from the mine in an emergency under element two of *Mathies*.¹⁰

¹⁰ Interestingly, the Commission’s analysis of the facts in *Mathies* focused as much on the second element as on the third element. *Mathies* involved a defective sander on a mantrip. The Commission defined the hazard in the second element as “a sliding derailment or collision with some other object on the tracks.” 6 FMSHRC at 4. In this context, the Commission discussed the Secretary’s “broad determination” that a “mantrip’s brakes by themselves do not always provide sufficient traction to prevent derailment or collision and that sanders are

(continued...)

Therefore, Cumberland is wrong in claiming that every violation of an evacuation standard will automatically be an S&S violation if viewed in the context of an emergency. Because the particular facts in a case may not establish that a violation of an evacuation standard contributes to a hazard which is reasonably likely to result in injury, not every violation of an evacuation standard will be S&S. *See Rushton*, 11 FMSHRC at 1436 (reasoning that the Secretary failed to establish that an escapeway violation contributed to the existence of a “discrete safety hazard” in an emergency situation requiring evacuation in view of the specific facts of the violation).

We are also not persuaded by Cumberland’s argument that, even if the Commission considers the S&S question in this case in the context of an emergency, substantial evidence would support the judge’s finding that the violations were not S&S. C. Br. 27. Cumberland primarily relies on its fire suppression systems, carbon monoxide monitoring systems, the miners’ training on escape procedures, and the belt as an alternate lifeline to show that the violation would not be S&S in any event. In *Buck Creek*, 52 F.3d at 136, the court rejected the operator’s reliance on the additional safety measures as factors that would prevent an S&S finding. The court stated that the fact that the operator “has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners . . . the precautions are presumably in place . . . because of the significant dangers associated with coal mine fires.” *Id.* Indeed, the court rejected many of the systems that Cumberland has put forth as weighing against a finding of S&S. *Id.* (rejecting the relevance of mine’s fire safety systems, the carbon monoxide detection systems, the fire-retardant belt, the fire-suppression system, the mine rescue team, the fire fighting equipment, the mine’s ventilation that pulled smoke away from the miners). *See also Amax Coal Co.*, 18 FMSHRC 1355, 1359 n.8 (Aug. 1996) (rejecting operator’s contention that its redundant fire suppressions system reduced the likelihood of serious injury); *Amax Coal Co.*, 19 FMSHRC 846, 850 (May 1997) (same); *Crimson Stone*, 198 Fed. Appx. 846, 851 (11th Cir. 2006) (unpublished opinion upholding a S&S determination, stating that “[a]lthough these [extra] safety precautions are all well and good, they do not change the fact that a violation occurred” and if a miner had come into contact with an unguarded conveyor he could have been injured).

Moreover, adopting Cumberland’s argument that redundant, mandatory safety protections provide a defense to a finding of S&S would lead to the anomalous result that every protection would have to be nonfunctional before a S&S finding could be made. Such an approach directly contravenes the safety goals of the Act. *RNS Services, Inc. v. Sec’y of Labor*,

¹⁰(...continued)

necessary to provide added stopping power.” *Id.* The Commission then described how “the record . . . establishes the existence of a hazard on the day of the citation” because of “damp conditions in the mine, the wet track, and the fact that the mantrip’s route traversed curves and grades . . . that could have required the extra traction that sanders are intended to provide.” *Id.*

115 F.3d 182, 186-87 (3rd Cir. 1997) (providing that the “canons of statutory construction” teach us to construe the Mine Act “broadly” so as to effectuate its remedial purpose of promoting miner health and safety).

Although we could remand this case to the judge for further analysis that is consistent with the traditional *Mathies* framework as recently discussed in *PBS*, 32 FMSHRC at 1281, the judge has essentially made findings on elements three and four of the S&S test. The judge, in making his gravity determination for penalty assessment purposes, credited the testimony of Inspector Whitehair that “in the event of fire or explosion, due to the manner in which the lifeline was located, miners would either be delayed or prevented from using it to escape, which *could result in a fatal injury due to carbon monoxide poisoning.*” 31 FMSHRC at 1164 (citing Tr. 158) (emphasis original). Thus, the judge has determined that the hazard of not escaping quickly in an emergency event will result in injury of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4. As discussed, *supra*, at 8-10, abundant evidence in the record substantially supports the judge’s conclusion. Since the judge has already found that serious injuries would likely result in the event of an emergency evacuation because of the location of the lifelines, remand would serve no purpose. *See American Mine Services, Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion). Accordingly, we reverse the judge and find that the four violations are S&S.

III.

Conclusion

We vacate and reverse the judge's determination that the violations contained in Citation Nos. 7019884, 7019885, 7019887, 7019889 are not S&S. We conclude that each of the violations is S&S. Accordingly, we remand the four penalties associated with those citations for reassessment and reevaluation under Mine Act section 110(i), 30 U.S.C. § 820(i).

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/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

Distribution:

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1340
401 Liberty Avenue
Pittsburgh, PA 15222

Robin Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2228
Arlington, VA 22209

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 11, 2011

SECRETARY OF LABOR,	:	Docket No. KENT 2011-1153
MINE SAFETY AND HEALTH	:	A.C. No. 15-18647-228827
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2011-1154
	:	A.C. No. 15-18647-243808
	:	
v.	:	Docket No. KENT 2011-1530
	:	A.C. No. 15-18647-261203
LONE MOUNTAIN PROCESSING, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 14, 2011, and September 16, 2011, the Commission received from Lone Mountain Processing, Inc. (“Lone Mountain”) motions made by counsel seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2011-1153, KENT 2011-1154 and KENT 2011-1530, all captioned *Lone Mountain Processing, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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

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

The record indicates that proposed assessment No. 000228827 was delivered on August 24, 2010, signed for by D. Atkins, and became a final order of the Commission on September 23, 2010. Notice of delinquency was mailed on December 1, 2010. Proposed assessment No. 000243808 was delivered on January 18, 2011, signed for by S. Roddy, and became a final order of the Commission on February 17, 2011. Notice of delinquency was mailed on April 4, 2011. Both motions to reopen were filed on June 6, 2011. Proposed assessment No. 000261203 was delivered on July 20, 2011, signed for by S. Roddy, and became a final order of the Commission on August 19, 2011. The motion to reopen was filed on September 16, 2011.

Lone Mountain asserts it intended to contest these penalties but failed to do so due to an internal miscommunication. Lone Mountain’s Safety Manager submits in its first affidavit that the assessments were misplaced when they were forwarded to him by courier from the Chief Engineer located in a different office building. The Safety Manager further asserts that to avoid repeating this error he will travel to Lone Mountain’s office weekly to collect the assessments. The Safety Manager notes that these penalty assessments are important to Lone Mountain as they relate to eleven Notice of Contest cases involving a fatality. About two months after submitting the first affidavit, the Safety Manager failed to follow up on the third proposed assessment, No. 000261203, and submitted another affidavit asserting that the third assessment was apparently misplaced during delivery by courier.

The Secretary opposes the requests to reopen and notes that misplacing the assessments during delivery is not an adequate explanation, especially when no attempt is made to follow up to ensure the document has been received. The inadequacy of this explanation for the Secretary is underscored by Lone Mountain’s assertion that these penalties are important since they relate to a fatality. The Secretary also notes that the first two assessments were delivered five months apart but are explained by the same procedural failure. The Secretary further states that Lone

Mountain did not explain why it waited two to six months after it was notified of its delinquency to request reopening. Moreover, the proposed assessment amounts were large, \$21,840, \$212,054 and \$262,500, and MSHA's records show that Lone Mountain has eighteen delinquent penalty cases with a total delinquency of approximately \$550,000 since January 2008. The Secretary asserts that Lone Mountain's delinquency record of repeatedly disregarding final penalty assessments indicates it has not acted in good faith.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588 (Dec. 2010); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *M3 Energy Mining Co. and Clean Energy Mining Co.*, 33 FMSHRC ____, KENT 2009-1101 and KENT 2009-1102 (Aug. 3, 2011). In this case, we conclude that the failure to follow up on the proposed January 2011 assessment (after being put on notice by the December delinquency letter that an internal delivery problem existed), and then again on the July 2011 assessment, to see that they were delivered to the Safety Manager, represents an inadequate or unreliable internal processing system. *Sloss Industries, Corp. v. Eurisol*, 488 F.3d 922, 935-36 (11th Cir. 2007); *Gibbs v. Air Canada*, 810 F. 2d 1529, 1537 (11th Cir. 1987). We also note that this type of failure appears to be part of a pattern for Lone Mountain, as shown by the fact that the same error occurred three times in one year.

We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. See, e.g., *Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008); *Highland Mining*, 31 FMSHRC at 1316 n.3. Accordingly, where the Secretary raises the issue of the delay between receipt of a delinquency notice and the filing of the request to reopen, an operator who does not explain why it took as long as it did to request reopening after it was informed of a delinquency, does so at its peril. Here, the unexplained delays in responding to MSHA's delinquency notices amounted to six months in KENT 2011-1153 and two months in KENT 2011-1154. The Commission has held that a motion to reopen filed more than 30 days after receipt of a delinquency notice must be explained. *Highland Mining*, 31 FMSHRC at 1317.

Additionally, it is well recognized in federal jurisprudence that the issue of whether the movant acted in good faith is an important factor in determining the existence of excusable neglect. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). Likewise, the Commission has recognized that a movant's good faith, or lack thereof, is relevant to a determination of whether the movant has demonstrated mistake, inadvertence, surprise or excusable neglect within the meaning of Rule 60(b)(1) of the Federal Rules of Civil Procedure. *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986); *Easton Constr. Co.*, 3 FMSHRC 314, 315 (Feb. 1981); *H&D Mining, Inc.*, 33 FMSHRC ____, slip op. at 3, No. KENT 2011-1410 et al (Sept. 15, 2011). The operator's failure to respond to the Secretary's argument that

Lone Mountain's delinquency record demonstrates bad faith supports our conclusion that Lone Mountain has not met its burden of establishing entitlement to extraordinary relief.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/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

Distribution:

Marco M. Rajkovich, Esq.
Noelle Holladay True, Esq.
Rajkovich, Williams, Kilpatrick & True, PLLC
3151 Beaumont Centre Circle, Suite 375
Lexington, KY 40513

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
US Department of Labor
1100 Wilson Blvd. 25th Floor
Arlington, VA 22209

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 11, 2011

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

v.

OAK GROVE RESOURCES, LLC

:
:
:
:
:
:
:
:
:
:
:

Docket No. SE 2011-465
A.C. No. 01-00851-245478

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 25, 2011, the Commission received from Oak Grove Resources, LLC (“Oak Grove”) a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on February 11, 2011, and became a final order of the Commission on March 14, 2011. Oak Grove asserts it has an established system for processing penalty assessments. Here, however, the Safety Director left the reviewed assessment for the Safety Clerk, who was supposed to forward it to a Senior Manager at Oak Grove's parent company to mail to MSHA, but the Clerk never received it. Upon discovering the contest was never submitted, the Senior Manager contacted counsel, and the motion to reopen was filed on April 22, 2011.

The Secretary opposes the request to reopen and notes that Oak Grove makes no showing of exceptional circumstances that warrant reopening. Specifically, the procedural failure described in this request is similar to three previous reopening requests submitted by Oak Grove. Therefore, contrary to Oak Grove's assertion, it is apparent to the Secretary that Oak Grove has not instituted a system that ensures the proper processing of penalty assessments. Moreover, this proposed penalty amount of \$47,152 is added to a delinquency of about \$738,439 for twenty-one previous cases since January 2004. The Secretary asserts that Oak Grove's delinquency record of repeatedly disregarding final penalty assessments for a period of years indicates it has not acted in good faith.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011). In this case, we conclude that the failure to follow up on the proposed assessment to see that it was properly processed and timely contested represents an inadequate or unreliable internal processing system as the Secretary has alleged. *Sloss Industries, Corp. v. Eurisol*, 488 F.3d 922, 935-36 (11th Cir. 2007); *Gibbs v. Air Canada*, 810 F. 2d 1529, 1537 (11th Cir. 1987).¹ We also note that this type of failure appears to be part of a pattern for Oak Grove, as shown by the fact that it also occurred

¹ In its motion, Oak Grove alleges that the proposed assessment was received by the Safety Manager, Rusty Hedrick, "shortly before he assumed a position at the Concordia Plant." Mot. at 2. However, Mr. Hedrick did not assume the new position until March 14, 2011, which was 31 days after Oak Grove received the proposed assessment from MSHA. Mot. Ex. E. Oak Grove also alleges that its parent's Senior Manager, Michael Blevins, was hospitalized on February 14, 2011, remained in the hospital for over 30 days, and did not return to work until March 25, 2011. Mot. at 2; Declaration of Michael Blevins. However, the hospitalization of Mr. Blevins is essentially irrelevant, because the proposed assessment was lost somewhere in the attempted transfer of it from Mr. Hedrick to the Safety Clerk, Adam Fisher. Moreover, Oak Grove does not indicate that anyone was designated to take over Mr. Blevins's duties while he was hospitalized. Despite its history of similar internal miscommunications leading to delinquencies in three other recent cases, Oak Grove has apparently done nothing to monitor its assessment-contesting system to ensure that contests are timely filed.

in three other default cases recently before the Commission, Docket Nos. SE 2009-812-M, SE 2009-850 and SE 2011-16. *See Oak Grove Res., LLC*, 32 FMSHRC 1253, 1254 (Oct. 2010); *Oak Grove Res., LLC*, 33 FMSHRC _____, No. SE 2011-16 (June 7, 2011).

Additionally, it is well recognized in federal jurisprudence that the issue of whether the movant acted in good faith is an important factor in determining the existence of excusable neglect. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). Likewise, the Commission has recognized that a movant's good faith, or lack thereof, is relevant to a determination of whether the movant has demonstrated mistake, inadvertence, surprise or excusable neglect within the meaning of Rule 60(b)(1) of the Federal Rules of Civil Procedure. *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986); *Easton Constr. Co.*, 3 FMSHRC 314, 315 (Feb. 1981); *H&D Mining, Inc.*, 33 FMSHRC _____, slip op. at 3, No. KENT 2011-1410 et al (Sept. 15, 2011). The operator's failure to respond to the Secretary's argument that Oak Grove's delinquency history demonstrates bad faith supports our conclusion that Oak Grove has not met its burden of establishing entitlement to extraordinary relief.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/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

Distribution:

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center
401 Liberty Avenue, Suite 1340
Pittsburgh, PA 15222

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
US Department of Labor
1100 Wilson Blvd. 25th Floor
Arlington, VA 22209

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 21, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of BURDETTE BILLINGS	:	Docket No. LAKE 2011-855-DM
	:	
v.	:	
	:	
PROPPANT SPECIALISTS, LLC	:	

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

**DECISION ON PETITION FOR REVIEW
OF TEMPORARY REINSTATEMENT AND
APPLICATION FOR STAY PENDING APPEAL**

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. (2006) (“Mine Act” or “Act”), specifically the temporary reinstatement provisions of section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). On October 6, 2011, the Commission received from Proppant Specialists, LLC (“Proppant”) a petition for review and application to stay Administrative Law Judge Jacqueline R. Bulluck’s order granting temporary reinstatement to miner Burdette Billings. 33 FMSHRC ___, slip op. at 4, No. LAKE 2011-855-DM (Sept. 29, 2011). On October 17, the Commission received the Secretary of Labor’s opposition to Proppant’s petition and application. For the reasons that follow, we grant the petition for review, deny Proppant’s request for a stay, and thus affirm the judge’s order requiring the temporary reinstatement of Mr. Billings.

I.

Factual and Procedural Background

Complainant Billings was working at Proppant’s Oakdale Wet Plant in Monroe County, Wisconsin, as a front-end loader operator in April 2011. Sec’y’s Br. in Support of Appl. for

Temp. Reinst. (hereinafter S. Br.), Pavlat Decl. ¶¶ 5(B), (C). The Secretary alleges that, after Proppant did not address safety concerns Mr. Billings raised with it regarding miners at the plant having to walk through sand which reached temperatures of 600 degrees Fahrenheit, Mr. Billings filed hazard complaints with MSHA. *Id.* at ¶¶ 5(D), (E). In a matter of days the Department of Labor’s Mine Safety and Health Administration (“MSHA”) inspected the plant. *Id.* at ¶ 5(F). On April 27, 2011, MSHA issued four citations to Proppant, regarding the hot sand and other alleged violations, and alleging high negligence and aggravated conduct on the part of the operator. *Id.* at ¶¶ 5(G), (H). Billings was discharged by Proppant on April 28, 2011. *Id.* at ¶ 5(J).

Pursuant to section 105(c)(2) of the Mine Act, Mr. Billings filed a discrimination complaint dated May 9, 2011, with MSHA. *See* S. Br., Attach. 1. Following an investigation (Pavlat Decl., ¶ 4), on July 20, 2011, MSHA applied to the Commission for an order temporarily reinstating the miner to his position with Proppant. Proppant dropped the request it had originally made for a hearing on the Secretary’s application, and instead it and the Secretary agreed to submit their respective evidence and argument in writing to the judge. Slip op. at 1.

The judge concluded from the parties’ submissions that the allegations of discrimination contained in the Secretary’s application had not been shown to be clearly lacking in merit and thus could not be considered frivolous. *Id.* at 4. Accordingly, the judge ordered reinstatement, and in keeping with the parties’ prior agreement, Mr. Billings was economically reinstated retroactive to August 8, 2011. *Id.*

II.

Disposition

A. Petition for Review of Temporary Reinstatement

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 repeatedly 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 on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993) (quoting *Sec’y on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738 (11th Cir. 1990)). The Commission applies the substantial evidence standard in reviewing the judge’s determination. *Sec’y on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000).¹

¹ When reviewing an administrative law judge’s factual determinations, the Commission
(continued...)

The judge concluded that the Secretary had established that Mr. Billings' complaint was not frivolously brought because in the application and subsequent brief the Secretary had adequately "set forth allegations of adverse treatment, close in proximity to protected activity so as to create a nexus, sufficient to raise an inference of discrimination." Slip op. at 4. The judge thus followed the proper framework to decide an application for temporary reinstatement. *See Sec'y on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1089-91 (Oct. 2009). Moreover, Proppant does not dispute that, for purposes of this proceeding, substantial evidence supports the judge's foregoing findings (*see* P. Pet. at 5), and our review of the record confirms that such evidence is present.

The judge also came to a conclusion regarding the evidence the operator proffered in response to the application. The judge found that, "[a]t best, Proppant has shown an intent to defend its actions at hearing, on the basis of legitimate business-related, non-discriminatory reasons." Slip op. at 4.

Proppant takes issue with the judge's treatment of its evidence, stating that the judge "wholly failed to account for the uncontested Declaration of Mr. Cummins[,] in which he declared under oath that he alone made the decision to terminate Mr. Billings and that he was unaware of the complaints or the inspection at that time." P. Pet. at 5. According to the operator, it had thus "demonstrated" that the adverse action was actually taken by Mr. Cummins, who had no knowledge of the miner's complaints and the subsequent MSHA inspection. *Id.*

We cannot agree that the affidavits and other evidence submitted by either party in this case conclusively establish or disprove any of the elements of a case of discrimination under the Mine Act, as it would be improper to do so at this time. Moreover, the evidence cited by Proppant – while it may ultimately be relevant or even dispositive in the later discrimination proceeding – serves in this temporary reinstatement proceeding as no more than an alternative theory as to why Proppant discharged the miner. Contrary to Proppant's suggestion, the judge was under no obligation to adopt this theory at this stage of the proceeding. "[R]esolv[ing] conflicts in the testimony, and ma[king] credibility determinations in evaluating the Secretary's prima facie case," are simply not appropriate "at this stage in the proceeding." *Williamson*, 31 FMSHRC at 1089 (citing *Sec'y on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999)).

Proppant also submits that it was error for the judge not to address its request that the judge order the Secretary to reach a decision on whether or not she would file a discrimination

¹(...continued)

is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "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. v. NLRB*, 305 U.S. 197, 229 (1938)).

complaint on behalf of Mr. Billings under section 105(c)(2), given that the 90-day statutory period for such a filing lapsed in early August. P. Pet. at 5-6. We find it unnecessary to address Proppant's argument, because in her response to the petition for review the Secretary explains that she filed a discrimination complaint on October 14, 2011, in Docket No. LAKE 2012-34-DM, *Secretary on behalf of Billings v. Proppant Specialists, LLC*. See S. Resp. at 19.

B. Request for Stay

Commission Procedural Rule 45(f) provides that, with respect to an order granting temporary reinstatement, “[t]he filing of a petition shall not stay the effect of the Judge’s order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances.” 29 C.F.R. § 2700.45(f). The grounds for Proppant’s application for stay here were the lack of a timely filing of a discrimination complaint by the Secretary and the judge’s failure to address the issue in her order of temporary reinstatement. P. Pet. at 6-8. We conclude that the Secretary’s subsequent filing of the complaint renders the operator’s request for stay on those grounds moot, and we thus deny the application.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that the miner's discrimination complaint is not frivolous and thus deny the petition to review the miner's temporary reinstatement. In so doing, we intimate no view as to the ultimate merits of this case. We also deny the application for a stay as moot.

/s/ Mary Lu Jordan.
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/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

Distribution

Robin Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2228
Arlington, VA 22209

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Burdette Billings
12353 Grover Rd.
Camp Douglas, WI 54618

Mark N. Savit, Esq.
Marci M. Fulton
Patton Boggs LLP
1801 California Street, Suite 4900
Denver, CO 80202

Allan Fogel
Mark Gauf
International Union of Operating Engineers
Local 139, Main Office, District B
4702 S. Biltmore Lane
Madison, WI 53718

Administrative Law Judge Jacqueline Bulluck
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 27, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2010-1549
v.	:	A.C. No. 15-19193-225717
	:	
MARTIN COUNTY COAL CORPORATION	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On September 13, 2010, the Commission received from Martin County Coal Corporation a motion requesting that the Commission 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). On October 14, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, 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 F. Duffy
Michael F. Duffy, Commissioner

/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

Distribution:

Max L. Corley, III, Esq.
Dinsmore & Shohl, LLP
P. O. Box 11887
900 Lee Street, Suite 600
Charleston, WV 25339

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 27, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2010-1696
	:	A.C. No. 46-09154-226329
v.	:	
	:	Docket No. WEVA 2010-1720
	:	A.C. No. 46-08365-226320
WHITE BUCK COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On September 10 and 14, 2010, the Commission received from White Buck Coal Company motions requesting that the Commission reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹ On October 14, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the requests to reopen the assessment.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2010-1696 and WEVA 2010-1720, both captioned *White Buck Coal Company*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

Having reviewed the facts and circumstances of this case, the operator’s requests, and the Secretary’s response, 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 F. Duffy
Michael F. Duffy, Commissioner

/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

Distribution:

Max L. Corley, III, Esq.
Dinsmore & Shohl, LLP
P. O. Box 11887
900 Lee Street, Suite 600
Charleston, WV 25339

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

Melick was correctly decided and that many of the citations at issue are moot because the Secretary has already vacated them. In addition, CAM asserts that there is no authority for the Secretary's contention that a judge should apply appellate standards on motions for reconsideration before a case is final.

Judge Melick's summary decision did not acknowledge Chief Judge Lesnick's earlier order nor did he outline his reasons for declining to follow it. Without this essential information, the Commission cannot determine whether there were sufficient grounds for Judge Melick's decision.

For the foregoing reasons, we grant the Secretary's Petition for Discretionary Review, vacate the judge's summary decision, and remand these matters to Judge Melick for further proceedings.

/s/ Mary Lu Jordan.
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/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

Distribution:

Mark E. Heath, Esq.
Spilman, Thomas & Battle, PLLC
300 Kanawha Blvd. East
P.O. Box 273
Charleston, WV 25321

Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 28, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. SE 2008-962-R
	:	SE 2009-267
	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.	:	

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

DIRECTION FOR REVIEW AND DECISION

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006). On October 19, 2011, the Secretary of Labor filed with the Commission a petition for discretionary review pursuant to Commission Procedural Rule 70, 29 C.F.R. § 2700.70. In her petition, the Secretary seeks review of a summary decision issued by Administrative Law Judge Jacqueline R. Bulluck on September 20, 2011. The Secretary seeks review of the judge’s rejection of the unwarrantable failure designation of the violation and of her reduction of the civil penalty. On October 20, 2011, Jim Walter Resources, Inc. (“JWR”) filed a petition for discretionary review of the judge’s decision sustaining the significant and substantial (“S&S”) designation of the violation. For the following reasons, we grant both petitions, vacate the judge’s decision, and remand for further proceedings.

In her petition, the Secretary states that during a conference call with the judge on November 22, 2010, the parties asked to address the issue of violation via cross-motions for summary decision and requested that consideration of the S&S, unwarrantable failure, and civil penalty issues be postponed until a latter stage of the proceeding. The Secretary alleges that the judge accepted this proposal, and that consequently the parties did not refer to these issues in their cross-motions for summary decision. She argues that her description of the conference call is corroborated by the fact that both the Secretary and the operator filed cross-motions, replies,

and surreplies that addressed only the issue of violation.¹ The Secretary asks the Commission to vacate the rulings on the unwarrantable failure and civil penalty issues and to remand the case to the judge to rule on those issues after providing an adequate opportunity for the parties to address the questions.

In its petition, JWR argues that the judge's decision sustaining the S&S designation should be reversed because the judge's ruling was based on findings of fact not supported by substantial evidence and the judge's decision is contrary to law.²

¹ The cross-motions, replies and surreplies indicate that the parties did not anticipate that the case would be fully resolved on the summary judgment pleadings, unless the judge determined that the Secretary had failed to prove the existence of the violation.

² We grant the petition of JWR because, if the Secretary's assertions are correct, it should have been provided the opportunity to present argument and evidence on the S&S issue to the judge after the violation issue was resolved. We take no position on the substantive argument in JWR's petition regarding the judge's S&S determination.

It appears from the present record that the judge may have prematurely decided the S&S, unwarrantable failure, and civil penalty issues. In the interest of justice, we hereby vacate the judge's decision and remand the case to her for a determination as to whether the parties and the judge had agreed that the cross-motions submitted by the parties should have been confined to the issue of violation. If she finds that this was the case, she should, pursuant to that agreement, reopen the record to permit the parties to present evidence and argument on the S&S, unwarrantable failure, and civil penalty issues.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/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

Distribution

Warren B. Lightfoot, Jr., Esq.
Maynard, Cooper & Gale, P.C.
1901 Sixth Avenue, North
2400 Regions/Harbert Plaza
Birmingham, AL 35203

Uche N. Egemonye, Esq.
Office of the Solicitor
U.S. Department of Labor
61 Forsyth Street, S.W., Room 7T10
Atlanta, GA 30303

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
US Department of Labor
1100 Wilson Blvd. 25th Floor
Arlington, VA 22209

Administrative Law Judge Jacqueline R. Bulluck
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

October 6, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-260
Petitioner	:	A.C. No. 15-18775-131899-01
	:	
v.	:	Docket No. KENT 2008-986
	:	A.C. No. 15-18775-147567-01
	:	
	:	Docket No. KENT 2008-987
	:	A.C. No. 15-18775-147567-02
	:	
MCCOY ELKHORN COAL CORP.,	:	Mine No. 15
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2009-1154
Petitioner	:	A.C. No. 15-18775-182758-A
	:	
v.	:	
	:	
JASON ROBINSON, employed by,	:	Mine No. 15
MCCOY ELKHORN COAL CORP.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2009-1173
Petitioner	:	A.C. No. 15-18775-183018-A
	:	
v.	:	
	:	
JAMES SLONE, employed by,	:	Mine No. 15
MCCOY ELKHORN COAL CORP.,	:	
Respondent	:	

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2009-1224
Petitioner	:	A.C. No. 15-18775-182760-A
v.	:	
	:	
MICHAEL DIAMOND, employed by,	:	Mine No. 15
MCCOY ELKHORN COAL CORP.,	:	
Respondent	:	

DECISION

Appearances: Schean G. Belton, Esq., and Rachel Levinson, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for the Respondents.

Before: Judge Feldman

These consolidated civil penalty and contest proceedings concern Petitions for the Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act"), 30 U.S.C. § 820(a), by the Secretary of Labor ("the Secretary") against the respondent, McCoy Elkhorn Coal Corporation ("McCoy Elkhorn").

The petitions seek to impose a total civil penalty of \$30,948.00 against McCoy Elkhorn for two significant and substantial ("S&S") violations of Part 75 of the Secretary's mandatory safety regulations governing underground coal mines.¹ 30 C.F.R. Part 75.

Namely, the Secretary seeks to impose a civil penalty of \$27,259.00 for an alleged violation of the mandatory safety standard in section 75.400 cited in 104(d)(1) Citation No. 7432120 that is attributable to an unwarrantable failure.² 30 C.F.R § 75.400. Section 75.400 prohibits a mine operator from permitting combustible coal dust to accumulate in active workings. The Secretary also seeks to impose a civil penalty of \$3,689.00 for Citation No. 7420523 for an alleged inadequate preshift examination in violation of section 75.360(b)(3).

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

² As a general matter, an unwarrantable failure occurs when a violation is caused by aggravated conduct rather than ordinary negligence. *Emery Mining*, 9 FMSHRC 1997, 2001 (Dec. 1987).

30 C.F.R. § 75.360(b)(3). The violations were noted by Mine Safety and Health Administration (“MSHA”) inspector Brian Dotson during his October 17, 2007, inspection of the No. 15 Mine.

The proceedings also concern personal liability actions brought by the Secretary under section 110(c) of the Mine Act against section foremen James Slone, Michael Diamond, and Jason Robinson. 30 U.S.C. § 820(c). The Secretary seeks to impose personal liability for a \$900.00 civil penalty on each of these individuals for their alleged responsibility for the subject coal dust accumulations. Section 110(c) of the Mine Act provides that a corporate agent “who knowingly authorized, ordered or carried out . . . [a] violation” committed by a corporate operator may be subject to individual liability. These matters were heard on March 8 through March 10, 2011 in Prestonsburg, Kentucky. The parties’ post-hearing briefs are of record.

I. Settlement Agreements

The parties have agreed to partial settlements of Docket Nos. KENT 2008-260 and KENT 2008-986. The parties have settled Docket No. KENT 2008-987 in its entirety.

a. Docket No. KENT 2008-260

Docket No. KENT 2008-260 contains 20 citations. The alleged preshift violation in 104(a) Citation No. 7420523 is a subject of this disposition. The parties’ partial settlement agreement with respect to the remaining 19 citations was approved by Judge Zielinski on October 10, 2008. Pursuant to Judge Zielinski’s Decision Approving Partial Settlement, McCoy Elkhorn has previously paid a civil penalty of \$23,142.00 in satisfaction of these remaining 19 citations.³ (Tr. 340).⁴ As noted, the proposed civil penalty for outstanding Citation No. 7420523 that alleges an inadequate preshift examination is \$3,689.00.

b. Docket No. KENT 2008-986

Docket No. KENT 2008-986 contains seven citations, six of which are the subject of the parties’ settlement agreement that was granted on the record. Pursuant to their agreement, McCoy Elkhorn has agreed to a reduction in civil penalty, from \$6,314.00 to \$4,200.00, for these six citations that remain unmodified. (Tr. 341-42). Remaining 104(d)(1) Citation No. 7432120 alleging prohibited combustible accumulations, for which a civil penalty of \$27,259.00 is proposed, is a subject of this litigation.

³ MSHA’s Mine Data Retrieval System reflects civil penalties for the remaining 19 citations in Docket No. KENT 2008-260 have been paid.

⁴ Transcript references are referred to by page number. The transcript pages for Volumes I and II are consecutively numbered from 1-693. The transcript pages for Volume III are numbered from 361-523. Transcript references refer to Volumes I and II, unless otherwise noted by “Tr. III.”

c. Docket No. KENT 2008-987

The parties also proffered at the hearing their settlement agreement for the two citations that are the subject of Docket No. KENT 2008-987. Pursuant to their agreement, McCoy Elkhorn has agreed to a reduction in civil penalty, from \$998.00 to \$669.00, for these two citations that remain unmodified. The settlement terms were approved on the record. (Tr. 342-43).

II. Findings of Fact

a. Mining Cycle

In October 2007, the 001/002 supersection at McCoy Elkhorn's Mine No. 15 utilized a mining cycle that is common to the mining industry. The supersection consisted of two continuous miners that were permitted to cut simultaneously. The left-side miner mined entries one through four and the right-side miner mined entries five through nine. Under the approved roof control plan, McCoy Elkhorn was permitted to advance as much as 35 feet for each cut.

The typical mining cycle began by taking a cut of coal with the continuous miner. The extracted coal was transferred from the continuous miner to shuttle cars that were positioned behind the miner. After loading the shuttle car, the coal was transferred to the feeder for loading onto the beltline. After a cut was completed, the continuous miner pushed any remaining loose coal on the mine floor to the face of the cut. The continuous miner was then trammed to the next entry to begin the next cut.

The next segment of the mining cycle involved the roof-bolting machine. The bolter was transported into the cut where it installed roof bolts to within four feet of the face. After the bolter was backed out of the entry, before the next cut was taken, a scoop was taken to the face to use its bucket to remove the loose coal that had been plowed to the face by the continuous miner. In October 2007, there were three scoops utilized in the 001/002 supersection. If the residual coal accumulations pushed to the face had not been cleaned by a scoop when the continuous miner returned to start the next mining cycle, the loose coal at the face was loaded into shuttle cars by the continuous miner.

The ribs in the newly cut and bolted entry were then rock dusted by hand, as the continuous miner cycle began for the next entry. As a general matter, scooping and dusting are not required immediately after a bolter leaves an entry. Rather, scooping and dusting must be completed before the continuous miner returns to the entry to begin further advancement. (See Gov. Ex. 6; Tr. I at 71-73, 75, 125-29, 205, 208, 428, Tr. 458).

As noted above, the aforementioned mining cycle is a common industry practice. This cycle is commonly observed by mine inspectors without the issuance of citations for face accumulations that normally occur during the extraction process. (Tr. 129).

b. 001/002 Section Staffing and History

In October 2007, there were two production shifts and one maintenance shift at McCoy Elkhorn's No. 15 Mine. Jason Robinson was the section foreman for the first production shift that worked from 6:00 a.m. to 2:00 p.m. James Slone was the section foreman for the second production shift that began at 2:00 p.m. and ended at 10:00 p.m. Michael Diamond was the section foreman for the maintenance shift that began at 10:00 p.m. and ended at 6:00 a.m.

The 001/002 supersection was experiencing significant roof sloughage in October 2007. (Tr. 130, 370, 539-40). Sloughage even occurred at the faces before the next cuts were made. The degree of sloughage worsened over time after the ribs were exposed. (Tr. 130-31, 539-41). Prior to October 2007, MSHA inspector Randall Thornsby, and Benny Freeman, supervisor of the MSHA Phelps Field Office, had cautioned McCoy Elkhorn not to routinely clean rib sloughage because it would result in additional sloughage. (Tr. 464, 541, 578-80, 663-64). Additional sloughage reduces the pillar size, causes rib rolls, and compromises roof support. (Tr. 464-65).

MSHA had been concerned about McCoy Elkhorn's history of coal dust accumulation violations. On October 11, 2007, Dotson issued to Robinson a citation for accumulations that included rib sloughage. Although Robinson disagreed that the sloughage conditions constituted a violation, Dotson ordered the sloughage to be cleaned. Dotson warned that he would issue a 104(d) citation if he returned to the section and observed similar conditions. (Tr. 91, 104, 664-66, Tr. III at 370-77).

After issuing the section 75.400 citation on October 11, 2007, Dotson met with Robinson and McCoy Elkhorn superintendent Gary Hensley to inform them that greater efforts were needed to address the number of section 75.400 violations that had been issued. (Gov. Ex. 4; Tr. 161). At that time, Robinson blamed the accumulation condition on two scoops that had broken down, and on one scoop with a dead battery that was being charged after use during the previous maintenance shift. (Gov. Ex. 4).

After Dotson's initial warning on October 11, 2007, Dotson returned to the mine to inspect the 001/002 section on October 15, 2007. (Tr. 168). Dotson testified that he observed that the section was well rock dusted during the day shift on October 15. (Tr. 165). However, Dotson issued non-S&S Citation No. 7432117 citing a violation of section 75.400 for coal dust accumulations on a fletcher roof bolter. (Gov. Ex. 5).

c. 104(d)(1) Citation No. 7432120 – Accumulations

On October 16, 2007, Slone's crew advanced 14 ½ cuts in the 001/002 entries and crosscuts during the second production shift that ended at approximately 10:00 p.m. (Gov. Ex. 2). Slone testified that all of these cuts were cleaned during the mining cycles. Slone testified that he did not take a second cut in an entry or crosscut without first removing the loose coal

from the faces. (Tr. 132-33). However, there were four cuts that remained unbolted at the end of the second shift. This is consistent with Diamond's production report that reflects that "4 places" were bolted during the maintenance shift that ended at 6:00 a.m. on October 17, 2007. (Gov. Ex. 2). It is unsafe to scoop and clean an unbolted cut. Consequently, the unbolted cuts made during Slone's second shift were not immediately cleaned. (Tr. 144, 358, 462, 549).

When Diamond's maintenance shift began at 10:00 p.m. on October 16, the right-side continuous miner had taken the right lift cut in the 6-Left (the crosscut between the 5 and 6 entries), by penetrating into the No. 5 entry, which was already flush with the crosscut. Diamond testified that the right lift cut was 30 feet deep. (Gov. Ex. 6; Tr. 598-99). There was an additional, unfinished, left lift cut that did not reach the No. 5 entry that was approximately 20 feet deep. (Tr. 598-99). Consequently, Diamond found the continuous miner in the left lift of the 6-Left that had not been cut through to the No. 5 entry at the shift change. Diamond's third shift crew completed the left lift cut in the 6-Left. (Gov. Ex. 6; Tr. 68-69, 114, 582-87).

In addition to completing the 6-Left cut, Diamond's crew installed bolts in the four cuts that remained unbolted at the conclusion of Slone's shift. (Tr. 69). During the remainder of the shift, Diamond's crew performed non-production work such as using a scoop to clean and pressure dusting across the faces of all nine entries, including the left return, right return, intake and neutrals. (Gov. Ex. 6; Tr. 69-70, 75). However, Diamond's cleanup efforts were hampered because two of the three available scoops had broken down. Diamond's crew used the third scoop for the remainder of the shift until its batteries ran out of power. At the end of his shift, Diamond placed the scoop on charge and informed oncoming first shift foreman Robinson that he would not have a scoop available until charging was complete. (Gov. Ex. 2; Tr. 75, 82, 102-04).

Beginning his shift at approximately 6:00 a.m. on October 17, 2007, Robinson traversed all nine entries of the section to ensure that there were no imminent dangers. (Tr. 103-04). Robinson testified that he informed his crew that they were not going to cut any coal because the scoop was being charged and because the ribs had sloughage. (Tr. 94-95, 102-04, 457-58). Mindful of Dotson's previous admonition, Robinson reportedly ordered his crew to begin shoveling the ribs to remove the sloughage. (Tr. 91, 104, 465-66, Tr. III at 370-77). Robinson, right side continuous miner operator William Lowe, and shuttlecar operator Ricky Varney all allege that the first shift did not begin cutting coal until 2:00 p.m. on October 17, 2007, at which time the "three right cut" and "five heading cut" were made. (Tr. 457, 466-67, 499, 534-35, 543, 570, Tr. III at 377-78).

Inspector Dotson arrived at the No. 15 mine site at approximately 8:00 a.m. on October 17, 2007. (Tr. 182-83). Dotson testified that upon entering the mine office, he observed a computer screen that listed the belt lines and CO sensors, which were depicted in green, reflecting that the belts were operational and running. (Tr. 179, 352-53). Although McCoy Elkhorn concedes the belts may have been running, it asserts that there was no coal on the belts when Dotson arrived at the mine. (Tr. 680-81).

Dotson examined the preshift, onshift, and weekly examination books since his previous inspection on October 15, 2007. (Tr. 180). Dotson determined there were no conditions noted for the 001/002 section, with the exception of methane readings for three of the nine section faces. (Tr. 180).

After examining the examination books, Dotson traveled to the 001/002 MMU Section, arriving at the section at approximately 10:00 a.m. Although the belts were running when Dotson was on the surface, they were not running when Dotson went underground. (Tr. 259). Dotson made an imminent danger run across all headings. Dotson's contemporaneous notes reflect that the roof and ribs were adequately supported. His notes also reflect that the roof and ribs were rock dusted. (Gov. Ex. 5, 10/17/07 notes, p. 5).

There had been a rib roll between the power entry and the beltline when Robinson's crew arrived on the section on the morning of October 17, 2007. (Tr. 457). Robinson had assigned men to clean that area and to shovel coal from the ribs in some of the crosscuts near the faces. (Tr. 467, 470-72). The shoveled coal included rib sloughage that had already been rock dusted and sloughage, black in color, which had developed since Diamond's crew had rock dusted. (Tr. 471, 500-504). Dotson conceded that sloughage was a common occurrence at the No. 15 Mine. (Tr. 370). Dotson also conceded both that Robinson's crew was shoveling the ribs, and, that there were no continuous mining operations occurring when he arrived at the section. (Tr. 259).

At approximately 10:15 a.m., Dotson observed accumulations of coal ranging from eight to twenty-four inches on the mine floor roadways and coal ribs in all nine entries on the 001/002 section. Dotson testified he observed loose coal and float coal dust accumulated from crosscuts four to five, five to six, six to seven, and seven to eight. Dotson testified that accumulations of combustible materials were also found along the right rib, the No. 9 entry, as well as in the roadways in the Nos. 8, 7, 6, 5, 4 and 3 entries leading down to the feeder. (Tr. 189). The combustible material measured 16 to 24 inches in some areas. The material was dry, was black in color, and had not been rock dusted. (Gov. Exs. 5, 10/17/07 notes, p. 13 and 7).

Dotson believed the accumulations found in the roadway were spillage from shuttle cars hauling coal from the face to the feeder. (Tr. 190). Accumulations observed in the crosscuts appear to be residual coal left by the continuous miner that were not cleaned with scoops. (Tr. 190-91). Based upon Dotson's knowledge of the mining cycle, and the extent and location of the accumulations, Dotson concluded the section had not been adequately cleaned for at least two and one half shifts of production. (Gov. Ex. 5, 10/17/07 notes, p. 9; Tr. 209).

Dotson determined that two scoops had been taken out of service during the previous maintenance shift. Robinson told Dotson that he knew the entire section "was dirty" from the feeder to the face and that the third shift was supposed to clean the night before but didn't do a "very good [job]." (Gov. Ex. 5, 10/17/07 notes, p. 7; Tr. 191).

Dotson testified, consistent with his contemporaneous notes, that Robinson told him that he had finished making cuts in the three right and five headings before Dotson arrived on the section. (Gov. Ex. 5, 10/17/07 notes, p. 7; Tr. 191). The cuts were started where the continuous miners were located at the beginning of the shift. Significantly, Dotson's testimony seriously undermines Robinson's claim that the three right and five heading cuts were made at 2:00 p.m., after the section had been cleaned.

Based on his observations and the fact that mining had continued despite the presence of significant accumulations, Dotson issued 104(d)(1) Citation No. 7432120. The citation states:

Accumulations of combustible materials in the form of loose coal and float coal dust, dry and black in color, ranging from 8 inches to 24 inches in depth is deposited on the mine floor roadways and coal ribs across the 001/002 MMU Section. The accumulations begins [sic] at the coal feeder (located at survey station #1452) and extends a distance ranging from 100 feet to 180 feet to the faces across all nine entries on the 001/002 Section. There are 480 VAC and 995 VAC electrical equipment trailing cables located throughout the cited area. This mine has been issued a total of eighteen 104(A) [sic] citations for 75.400 C.F.R. in the past 21 months. Employees are required to work and travel along the cited area on a daily basis. This condition will cause a mine fire or explosion if left uncorrected.

(Gov. Ex. 7).

Significantly, Dotson explained that the accumulations he observed were not entirely attributable to rib sloughage. (Tr. 372). Dotson explained the basis for his belief that the accumulations he observed violated section 75.400:

The part about where they did not clean up from the continuous miner cuts and the roadway spillage, and there was some coal in these outer places that was on the rib that I cannot say was not from rib sloughage. But what I cited was accumulation of combustible materials from not cleaning up the roadways and the cuts that had been taken.

(Tr. 373).

Dotson opined that the accumulated combustible material, in the form of float coal dust and coal dust, was reasonably likely to lead to serious injuries if left uncorrected. His conclusion was based on the extensiveness of the accumulations, their duration of at least two shifts, the mine's history of excessive methane, and the potential ignition sources from the operation of two continuous miners that had made cuts shortly before his arrival on the section. Consequently, Dotson designated the cited accumulation condition as S&S in nature. Dotson attributed the violation to a high degree of negligence because the accumulations were obvious. (Tr. 249-51). Given previous warnings that greater compliance with section 75.400 was required, Dotson

believed that the two cuts made by Robinson's crew, before the section was adequately cleaned, demonstrated a sufficiently high level of negligence to support an unwarrantable failure.

As noted, the Secretary also seeks to impose personal liability on section foremen James Slone, Michael Diamond, and Jason Robinson, pursuant to Section 110(c) of the Mine Act, for allegedly 'knowingly authorizing, ordering or carrying out' the section 75.400 violation cited in Citation No. 7432120.

d. 104(a) Citation No. 7420523 – Preshift Examination

Despite his observations, Dotson did not recall seeing any notations regarding accumulations in the 001/002 section when he reviewed the preshift examination book shortly after arriving at the mine. After completing his inspection, Dotson returned to the surface to once again review the preshift examination book to determine what, if anything, Diamond had noted on his preshift examination during the preceding maintenance shift. Dotson noted the records had been changed. Superintendent Hensley had added the words "section needs cleaned" in Diamond's October 17 preshift exam record. (Gov. Ex. 1; Tr. 181-82). Hensley told Dotson he had made the entry after Robinson called out and said the section was dirty. (Tr. 182).

Dotson left the mine office to travel underground to the 001/002 section at approximately 9:30 a.m. It took approximately 40 minutes to travel by mantrip to the section. (Tr. 183-84). Hensley reportedly made the entry between the time Dotson left the mine office to go underground and Dotson's arrival on the section. (Tr. 182).

Dotson issued 104(a) Citation No. 7420523 as a result of the accumulation conditions he observed and the absence of any relevant notations identifying the need to clean the section by the preshift examiner. The citation cited a violation of the mandatory standard in section 75.360(b)(3) that requires a preshift examination for hazardous conditions in working places. Citation No. 7420523 provides:

Due to Citation # 7432120 issued on this date on the 001/002 section, and the extensiveness of the citation, it is apparent that an adequate pre-shift examination was not conducted for the dayshift on the 001/002 section. Combustible materials in the form of loose coal and float coal dust were located across the section and no hazards were listed in the pre-shift/on-shift record book for the dayshift dated 10/17/2007. Employees are required to work and travel along this section on a daily basis. Conducting an inadequate pre-shift where hazardous conditions are present will cause a serious accident to employees scheduled to work in the area.

(Gov. Ex. 8). As discussed, Dotson designated the cited violation as S&S because it was reasonably likely that the failure to recognize the hazardous accumulations will result in serious injury or death given the combustible fuel and ignition sources present during mining operations.

III. Further Findings and Conclusions

McCoy Elkhorn's Civil Liability

a. 104(d)(1) Citation No. 7432120 – Accumulations

i. Fact of Violation

Section 75.400, the cited mandatory standard, requires that coal dust and other combustible materials shall “not be permitted to accumulate in active workings.” This mandatory standard seeks to remove the hazard of combustible accumulations fueling or propagating an explosion. Since coal dust is a natural consequence of mining, the question is whether McCoy Elkhorn “permitted” the accumulations to occur without making any effort to timely remove them.

In applying section 75.400, the Tenth Circuit Court of Appeals has stated section 75.400 “prohibits permitting [coal dust] to accumulate; hence it must be cleaned up with reasonable promptness, with all convenient speed.” *Utah Power & Light v Secretary of Labor*, 951 F.2d 292, 295 n.11, (10th Cir. 1991). The Secretary has the burden of proving all elements of a cited violation. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). Thus, resolution of whether McCoy Elkhorn’s actions constitute a violation of section 75.400 is dependent on the extensiveness and the duration of the accumulations cited by Dotson.

The subject accumulations delineated by Dotson in Citation No. 7432120 were extensive in nature. It is true that some of the accumulations consisted of sloughage that had been rock dusted. However, the Commission has rejected “a construction of [section 75.400] that excludes loose coal . . . mixed with noncombustible materials [because it] defeats Congress’ intent to remove fuel sources from mines and permits potentially dangerous conditions to exist.” *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985).

In the final analysis, whether conditions constitute accumulations prohibited by section 75.400 should be committed to the broad discretion of the mine inspector. *Old Ben Coal Company*, 2 FMSHRC 2806, 2808 (October 1980); *Amax Coal Co.*, 19 FMSHRC 846, 847, 849 (May 1997); *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 483 (Mar. 1997); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 19-20 (Jan. 1997) (Marks, concurring). Dotson credibly testified that, while some accumulations were the result of non-violative sloughage, what he cited were accumulations from continuous miner cuts and roadway spillage in nine entries from the face to the feeder. (Tr. 373). Section 75.400 requires the timely removal of such accumulations.

Turning to the issue of duration, both Slone and Diamond essentially admitted that their crews failed to adequately clean the section during the two shifts preceding Dotson’s inspection. Slone’s crew left mine floor areas uncleaned. (Tr. 144, 358, 462, 549). Diamond acknowledged that his maintenance crew “cleaned what we could” because two of the three available scoops were “down all night.” (Gov. Ex. 2; Tr. 75-76). Robinson also testified that inoperative scoops

interfered with his crew's ability to clean the section. (Tr. 102-04). The inability to timely clean the section because of the unavailability of scoops is an aggravating rather than mitigating circumstance. In the final analysis, McCoy Elkhorn is responsible for ensuring that scoops are adequately maintained and charged.

Moreover, Robinson's admission to Dotson that the section was "dirty" and in need of cleaning is an evidentiary admission. (Gov. Ex. 5, 10/17/07 notes, p. 7; Tr. 191). Robinson's shift began at 6:00 a.m. McCoy Elkhorn asserts, as a mitigating factor, that the section was being cleaned when Dotson arrived on the section at approximately 10:00 a.m. (Tr. 90). However, Robinson had already spoken to Hensley after Dotson left the mine office to go underground. At that time, Hensley amended the preshift book to reflect the "section needs cleaned." (Gov. Ex. 1; Tr. 181-82). Thus, it is reasonable to assume that cleaning the section was not a priority until after Dotson went underground.

As discussed below, Robinson's testimony that he ordered the three right and five headings to be cut at 2:00 p.m. on October 17, after the section was cleaned, rather than before Dotson arrived on the section, simply is not credible. Robinson's decision to finish cuts in the three right and five headings earlier that morning, rather than to adequately clean the section before resuming mining, reflects that the combustible accumulations were not cleaned with the deliberate speed necessary to avoid liability under section 75.400. Consequently, the Secretary has satisfied her burden of demonstrating a section 75.400 violation.

ii. S&S

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

In order to establish that a violation of a mandatory safety standard is [S&S] under *National Gypsum*, the Secretary of Labor must prove:

- (1) the underlying violation of a mandatory safety standard;
- (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation;
- (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and
- (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4; *see also Austin Power Inc., v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). With respect to the

third element of *Mathies*, an S&S finding requires a determination that the violation contributes significantly and substantially to the cause and effect of a hazard. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984) (emphasis in original).

Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

The Commission, as well as Congress, have recognized that accumulations of combustible material constitute hazardous conditions, as any combustible material, when placed in suspension, can propagate an explosion. *Enlow Fork*, 19 FMSHRC 5, 14, (Jan. 1997) citing S. Rep. No. 411, 91st Cong., 1st, Sess. 65 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 191 (1975). Thus, the essence of an S&S violation is whether it is reasonably likely that the hazard contributed to by the violation will result in an event in which there are serious or fatal injuries. *Bellefonte*, 20 FMSHRC at 1254-55.

As discussed, the Commission articulated the elements of an S&S violation in *Mathies*. Applying the *Mathies* criteria, having concluded McCoy Elkhorn violated section 75.400, the first element is satisfied. Coal dust accumulations are potentially combustible, and, if combustion, *i.e.*, fire or explosion, were to occur, there is a reasonable likelihood that miners would sustain serious injury. Therefore, the second and fourth elements of the *Mathies* test are met.

The remaining criterion, a reasonable likelihood that the combustion hazard caused by the violation will result in injury, requires examining whether there was a “confluence of factors” present based on the particular facts surrounding the violation that would make a fire, ignition, or explosion reasonably likely. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of these factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area.⁵ *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (January 1997) citing *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf*, 10 FMSHRC at 500-03.

⁵ In *Cumberland Coal Resources, LP*, 33 FMSHRC __ (Oct. 2011), the Commission recently determined that resolution of whether a violation of an evacuation standard is S&S must be viewed in the context of an emergency. *Cumberland* was limited to “focusing on the specific ‘discrete safety hazard’ at issue” that precluded the quick escape of miners. *Slip op.* at 12. However, the Commission emphasized that “[it was] not changing *Mathies*.” *Id.* Thus, the longstanding *Texasgulf* analysis still applies.

As noted above, the cited accumulations were relatively extensive. It took the entire first shift crew four hours to clean the cited accumulations. I credit Dotson's testimony that cutter heads from continuous miners are potential ignition sources. (Tr. 247-49). Dotson stated, "if there was a face ignition with the amount of excessive accumulations of float coal dust that I seen . . . it would propagate and spread across the whole section, affecting everyone on the section." (Tr. 249).

In addition, McCoy Elkhorn's Mine No. 15 liberates large quantities of methane. In the event of a methane ignition, the cited accumulations could be put in suspension, increasing the hazard associated with a fire or explosion. The likelihood of fire or explosion must be viewed in the context of continued mining operations without the violation having been abated. *Texasgulf*, 10 FMSHRC at 501. Thus, the record evidence supports the conclusion that it is reasonably likely that a hazard contributed to by the cited violation will result in an accident causing serious injury. As such, the violation has been properly designated as S&S.

iii. Unwarrantable Failure

The elements of unwarrantable conduct are well settled. The Commission has determined that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining*, 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d 133, 135-36 (7th Cir. 1995) (approving the Commission's unwarrantable failure test).

The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC at 11-12, 17; *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64.

As a threshold matter, the Commission has noted that "[m]anagers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care." *Capitol Cement Corp.*, 21 FMSHRC 883, 892-93 (Aug. 1999) (quoting from *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987)). Consequently, it is well settled that the negligence of a foreman can be imputed to the mine operator for purposes of

unwarrantable failure and civil penalty assessment. *Id.* at 893 citing *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 194-97 (Feb. 1991).

In addressing the unwarrantable failure issue, it is essential to resolve the conflicting testimony of Robinson and Dotson to determine the degree of negligence, if any, that is imputable to McCoy Elkhorn through Robinson. Robinson testified that he did not make any cuts until after Dotson had left the section on the afternoon of October 17, 2007. (Tr. 88-89). Robinson testified that his crew cut the three right at approximately 1:50 p.m. and the five heading at approximately 2:20 p.m. (Gov. Ex 6; Tr. III at 477). Robinson stated the three right was advanced approximately 30 feet, and the five heading was advanced approximately 10 feet, for a total of 40 feet. (Gov. Ex 6; Tr. III at 478-79). The total advancement is supported by Robinson's first shift October 17, 2007, Production Down-Time Report that reflects a total advancement of 40 feet. (Gov. Ex. 2).

On the other hand, Dotson testified, and his contemporaneous notes reflect, that Robinson told Dotson that when Robinson arrived on the section (at approximately 6:30 a.m.), "he finished cutting . . . where the miners were in 3R and 5 heading." (Gov. Ex. 5, 10/17/07 notes, p. 7; Gov. Ex 6; Tr. III at 450-51). In fact, Dotson observed that the three right crosscut had, in fact, been cut because he observed that the last row of roof bolts was six to nine feet from the face, contrary to the approved roof control plan that required a minimum distance of four feet from the face. Dotson's notes reflect that Robinson told him this condition "existed for about four hours" because draw rock prevented the roof bolter from approaching the face. (Gov. Ex. 5, 10/17/07 notes, p. 17).

At 11:10 a.m. on October 17, Dotson also issued Citation No. 7420522, which is not a subject of this proceeding, citing a roof control violation in the three right crosscut of 30 C.F.R. 75.220(a)(1). (Gov. Ex. 9). Dotson believed the three right heading was cut and *partially bolted* to within six to nine feet of the face in the early morning hours of Robinson's first shift. Dotson's belief is supported by Diamond's testimony that his maintenance crew had *completed* roof bolting all unbolted areas during the preceding third shift. (Tr. 72-73). Thus, Diamond's testimony supports Dotson's belief that the partially bolted area in the three right heading was cut during Robinson's shift.

Significantly, Robinson could not adequately explain his assertion that the cuts were made after the section was cleaned and after Dotson had departed the section:

Court: So can you explain to me how Mr. Dotson knew at 10:00 [a.m.] that you were going to make two cuts, that's 40 feet, if you didn't make the two cuts until essentially after he left the section?

Robinson: You're asking me what now? How Mr. Dotson –

Court: Explain to me how Mr. Dotson knew at 10:00 in the morning that you were going to advance 40 feet if you didn't advance until after he left?

Robinson: I didn't know he knew I advanced 40 feet.

Court: No, I'm not asking you [that] question. Understand what I am saying.

Robinson: All right. Sorry.

Court: If what you say is true that you made these cuts after 10:00 in the morning how did he know at 10:00 in the morning that you had made two cuts, that you had made two on that shift?

Robinson: I have no idea.

Court: Was he lucky?

Robinson: I mean, the only thing I said about 3 right and 5 was where the miners were set up. That's all I said about it.⁶

Court: I'm not asking you that. I'm asking you to explain to me how you . . .

Robinson: I can't explain it . . . I mean, I don't know how to explain that to you.

(Tr. III at 479-81).

To support Robinson's assertion that cuts were not made prior to Dotson's arrival on the section, McCoy Elkhorn attempts to rely on Diamond's testimony that the five heading already was cut prior to Robinson's shift. (Gov. Ex. 6; Tr. 512-13, 583-85). It is common practice to mine entries before crosscuts are cut through to intersect them. Diamond testified that the entry at the five heading was already cut when Diamond's maintenance crew finished cutting into the No. 5 entry from the 6 left in the early hours of October 17, 2007, prior to Robinson's first production shift. (Gov. Ex. 6; Tr. 583-85).

However, whether or not the five heading at the 6 left crosscut was already cut prior to Robinson's shift is immaterial because it ignores Robinson's admission that the five heading was advanced an additional ten feet during his shift on October 17. (Tr. III at 478-79).

⁶ Under cross-examination, Dotson unequivocally testified that it was not possible that he misunderstood Robinson, as Robinson suggests, in view of Dotson's contemporaneous notes. (Tr. III at 450-51; Gov. Ex. 5, 10/17/07 notes, p. 7).

Thus, Diamond's activities during the preceding shift do not resolve precisely *when* the five heading was driven by Robinson's crew. So too, McCoy Elkhorn's assertion that there was no coal on the beltline when Dotson arrived at the mine is not determinative of whether two cuts were taken by Robinson's crew prior to Dotson's arrival.

Moreover, McCoy Elkhorn's reliance on the testimony of continuous miner operator William Lowe and shuttle car operator Ricky Varney is unavailing. Lowe, the continuous miner operator responsible for cutting the five heading on the first shift on October 17, 2007, conceded he could not recall if, or when, he cut the five heading on that day. (Tr. 507-10). On balance, Varney's purported recollection that the subject cuts were made during the afternoon of October 17, 2007, is entitled to little weight when considered in the context of Dotson's conflicting contemporaneous notes reflecting that Robinson admitted that "he finished cutting" the three right and five headings before Dotson's arrival. (Gov. Ex. 5, 10/17/07 notes, p. 7; Tr. 534-35, 543, 579).

In the final analysis, McCoy Elkhorn has failed to discredit Dotson's testimony. Consequently, the Secretary has demonstrated, by a preponderance of the evidence, that the three right and five heading cuts were made by Robinson's crew during the early morning hours of October 17, 2007, before the section was adequately cleaned.

In resolving the issue of unwarrantable failure, it is significant that Robinson knowingly advanced two cuts in a 'dirty section' before ensuring that violative combustible accumulations were removed. (Gov. Ex. 5, 10/17/07 notes, p. 7). This conduct, alone, evidences a high level of imputable negligence that is sufficient to justify an unwarrantable failure.

Moreover, there are additional aggravating factors. The accumulations were obvious and extensive, in that they extended from the coal feeder to throughout all nine entries. (Tr. 249). Significantly, Dotson observed loose coal and float dust in crosscuts four to five, five to six, six to seven, and seven to eight. Dotson also observed combustible accumulations along the right rib in the No. 9 entry as well as in the roadways in the No. 3 through No. 8 entries leading down to the feeder. (Tr. 189). The combustible material measured from 16 to 24 inches and was dry and black in color. (Gov. Exs. 5, 7).

With respect to duration, Dotson concluded that both the accumulations in the roadways from shuttle car spillage, and the accumulations in the crosscuts left by continuous miners, were not promptly cleaned during the mining cycle. (Tr. 190-91). The accumulations continued to exist for three shifts – from the second shift on October 16 through the first shift on October 17. The length of time the condition existed was exacerbated by non-functioning scoops, which is an aggravating rather than a mitigating factor.

The cited combustible accumulations were hazardous, given the potential ignition source from continuous miner operations and the fact that the No. 15 Mine liberates excessive concentrations of methane. The accumulations in the roadways were a potential source of propagation in the event of airborne suspension caused by haulage cars operating in the roadways.

Regarding notice, McCoy Elkhorn had been warned that greater efforts were required to avoid section 75.400 citations. In this regard, Dotson had recently issued citations citing section 75.400 on October 11 and October 15, 2007. In addition, McCoy Elkhorn had been issued 17 section 75.400 citations at the No. 15 Mine during the two year period prior to October 2007. (Go. Ex. 10).

Thus, the Secretary has adequately demonstrated that McCoy Elkhorn's decision to advance two cuts in the presence of significant combustible accumulations, despite prior warnings that greater compliance efforts were required, constitutes the requisite unjustified conduct indicative of an unwarrantable failure.

iv. Civil Penalty

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

The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria.

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

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

The Commission has noted that the *de novo* assessment of civil penalties by the administrative law judge does not require “that equal weight must be assigned to each of the penalty assessment criteria.” *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Rather, the judge must qualitatively analyze each of the penalty criteria to determine the appropriate civil penalty to be assessed. *Cantera Green*, 22 FMSHRC 616, 625-26 (May 2000).

The Secretary has proposed a civil penalty of \$27,259.00 for Citation No. 7432120. The parties have stipulated that McCoy Elkhorn is a relatively large mine operator, and that the penalties proposed in this proceeding will not affect its ability to remain in business. (Joint Stip. 1). McCoy Elkhorn abated the cited accumulations in a timely and good faith manner. However, continued mining operations, without regard to the presence of combustible accumulations, evidences a high degree of negligence. Moreover the cited violation is serious in gravity as it exposed miners to the hazards associated with fires and explosions. Accordingly, the civil penalty of \$27,259.00 is justified by the evidence of record and shall be imposed for Citation No. 7432120.

b. 104(a) Citation No. 7420523 – Preshift Exam

i. Fact of Violation

Citation No. 7420523 cites a violation of the mandatory safety standard in section 75.360(a)(1). This standard requires mine operators to perform preshift examinations three hours preceding any eight hour shift in which miners are scheduled to work or travel underground. Specifically, section 75.360(b)(3) requires the preshift examiner to look for hazards in all working places where miners will work during the oncoming shift.

Upon arriving at the mine site on October 17, 2007, Dotson reviewed the preshift and onshift examination book to determine if any hazardous conditions had been noted for the shifts immediately preceding the first shift that had begun at 6:00 a.m. Dotson focused on the preshift performed by Michael Diamond that occurred on the maintenance shift during the early morning hours from 2:50 a.m. to 5:30 a.m. on October 17. (Gov. Ex. 1). Dotson noted that the preshift examination recorded normal methane and CFM ventilation readings. However, Dotson determined that Diamond’s examination was devoid of any notations identifying hazardous conditions that required remedial action.

After going underground and observing the violative accumulations in the 001/002 section, Dotson returned to the mine office on the surface to once again review Diamond’s preshift examination. Dotson suspected Diamond’s preshift examination report had been altered because the notation, “section needs cleaned [sic]” was entered as a hazardous condition in the 001/002 section. Superintendent Hensley admitted to Dotson that he had made the entry after Robinson called out and said the section was dirty.

The Commission has recognized “that the preshift examination requirements are ‘of fundamental importance in assuring a safe working environment underground.’” *Buck Creek Coal*, 17 FMSHRC 8, 15 (Jan. 1995); *see also* 61 Fed. Reg. 9764, 9790 (Mar. 11, 1996) (noting that the preshift examination is a critically important and fundamental safety practice in the industry that is a primary means of detecting developing hazards). With respect to the fact of the cited violation, Hensley’s alteration of Diamond’s preshift examination is an admission that the examination was inadequate. Moreover, the dirty conditions, recognized by Robinson, were extensive and obvious. Consequently Diamond’s failure to note that the section needed cleaning constitutes a violation of section 75.360(b)(3).

ii. S&S

As previously noted, the preshift examination is a critically important and fundamental method of identifying and correcting hazardous conditions that may endanger the crew of an oncoming shift. As noted herein, the cited accumulation violation of section 75.400 in Citation No. 7432120 was properly designated as S&S. So too, the failure to note this hazardous condition, to ensure that corrective actions are taken, exposes miners to the reasonable likelihood of serious or fatal injuries as a result of a fire or explosion. Consequently, the subject preshift examination, which failed to identify an S&S violation, is properly designated as S&S in nature.

iii. Negligence

Citation No. 7420523 attributed the inadequate preshift examination to a moderate degree of negligence. (Gov. Ex. 8). However, the integrity of the preshift and onshift examination reports is fundamental to MSHA’s enforcement of the Secretary’s mine safety regulations. The alteration of Diamond’s preshift examination report, in an apparent attempt to conceal McCoy Elkhorn’s failure to identify the violative accumulations, is a serious matter. Superintendent Hensley’s conduct is imputable to McCoy Elkhorn. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991). Consequently, the preshift examination violation must be attributable to a high, rather than a moderate, degree of negligence.

iv. Civil Penalty

The Secretary has proposed a civil penalty of \$3,689.00 for Citation No. 7420523. As noted, section 110(i) of the Mine Act delegates to the Commission the *de novo* authority to assess civil penalties. This assessment does not require equal weight to be assigned to each of the penalty assessment criteria. *Thunder Basin*, 19 FMSHRC at 1503. Rather, each penalty criteria must be analyzed to determine the appropriate civil penalty to be assessed. *Cantera Green*, 22 FMSHRC at 625-26.

The willful act of altering the preshift report evidences McCoy Elkhorn's recognition of the inadequacy of the examination. Moreover, such conduct undermines the fundamental role of preshift examinations in promoting mine safety. Such willful conduct constitutes more than ordinary negligence. As such, giving due regard to the negligence penalty criterion in section 110(i), a penalty higher than that initially proposed by the Secretary is warranted. Accordingly, a civil penalty of \$6,500.00 shall be imposed for this preshift examination violation. The imposition of only a relatively small increase in civil penalty is based on the assumption that Hensley acted impulsively because he readily admitted his alteration of the examination book to Dotson. However, such conduct cannot be ignored.

IV. Personal Liability

Under the provisions of section 110(c) of the Mine Act, the Secretary seeks to impose liability on section foremen, James Slone, Michael Diamond, and Jason Robinson, in the amount of \$900.00 each, for allegedly "knowingly" permitting the combustible coal dust and loose coal cited in Citation No. 7432120 to develop without ordering the timely removal of the violative accumulations as required by section 75.400. Section 110(c) of the Mine Act provides:

Whenever a corporate operator violates a mandatory health or safety standard . . . any . . . agent of such corporation who knowingly authorized, ordered or carried out such violation . . . shall be subject to the same civil penalties [as the corporate operator].

The indicia necessary to support a finding that a corporate agent acted "knowingly" under section 110(c) is difficult to articulate. As a general proposition, a "knowing" violation under section 110(c) involves aggravated conduct rather than ordinary negligence. *Bethenergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). Individuals charged with 110(c) liability should be judged based on their individual knowledge and actions, not on the collective actions or inferred knowledge of the mine operator. Thus, an agent of a corporate mine operator is subject to 110(c) liability if he has knowledge of a hazardous condition but he *deliberately* fails to act. *Id.*

The operative term "knowingly" has been extensively discussed by the Commission and the Court. The Commission discussed the criteria for determining if there is personal liability under section 110(c) of the Mine Act in *Lefarge Construction Materials*, 20 FMSHRC 1140 (Oct. 1998). The Commission stated:

The proper inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d

(6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358,362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr. Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1971)). An individual acts knowingly where he is “in a position to protect employee safety and health [and] fails to act *on the basis of information* that gives him knowledge or reason to know of the existence of a violative condition.” *Kenny Richardson*, 3 FMSHRC at 16.

20 FMSHRC at 1148 (emphasis added).

Similarly, in *Roy Glen*, 6 FMSHRC 1583 (July 1984) the Commission stated:

Accordingly, we hold that a corporate agent in a position to protect employee safety and health has acted “knowingly” in violation of section 110(c) when, *based upon facts available to him*, he either knew or had reason to know that a violative condition or conduct would occur, but failed to take appropriate preventative steps.

Id. at 1586 (emphasis added).

In *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d. (D.C. Cir. 1997), the Court addressed the issue of individual knowledge:

. . . the meaning of “knowledge” depends upon context and that a continuum of meaning that stretches from “constructive knowledge” to “actual knowledge” with various gradations between [U]nder the Commodity Exchange Act, [an] individual “knowingly” induced a violation if he had “*actual or constructive knowledge of the core activities that constitute the violation* at issue and allowed them to continue.”

108 F.3d at 363 (emphasis added) *citing U.S. v. DiSanto*, 86 F.3d 1238, 1257 (1st Cir. 1996), and *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1567-68 (11th Cir. 1995). In the final analysis the two essential elements that are a prerequisite for personal liability under section 110(c) are knowledge of a violative condition and a failure to act.

a. James Slone

With the exception of a section 75.400 citation issued by Dotson for coal dust accumulations on a Fletcher roof bolter, Dotson conceded that his October 15, 2007, inspection found the 001/002 section to be free of accumulations and adequately rock dusted. (Gov. Ex. 5, 10/17/07 notes, p. 9; Gov. Ex. 5, 10/15/07 notes, p. 4; Tr. 165). James Slone was the section foreman for the second production shift that began at 2:00 p.m. and ended at 10:00 p.m. on October 16, 2007. During this shift, Slone's crew made 14 ½ continuous miner cuts, advancing a total of 205 feet. (Gov. Ex 2, 2nd shift report). Of these 14 ½ cuts, four cuts remained unbolted at the end of the shift. (Gov. Ex 2, 3rd shift report). Thus out of necessity, there remained uncleaned loose coal at four unbolted faces as a normal consequence of the mining cycle. There also undoubtedly remained loose coal in roadways at the end of the shift, as Dotson testified that coal had spilled from shuttle car trips to the feeder. (Tr. 190).

Slone's preshift examination that ended at 9:30 p.m. did not note any hazardous coal accumulations. Significantly, the Secretary has not sought to impose personal liability for the inadequate preshift violation of section 75.360(b)(3). Rather, Slone has been charged with personal liability for the section 75.400 accumulations violation observed by Dotson. However, the evidence reflects that any accumulations observed by Dotson that existed during Slone's October 16 shift were of short duration given Dotson's determination that the section had been cleaned and rock dusted on October 15.

In other words, the accumulations attributable to Slone that remained at the end of his shift likely existed for less than one shift, with Slone's reasonable assumption that the 001/002 working section would be cleaned by the maintenance crew. Given the short term duration of the accumulations and their location under unsupported roof, it cannot be said that Slone was "in a position to protect employee safety and health [and] fail[ed] to act." *Kenny Richardson*, 3 FMSHRC at 16. Accordingly, the citation issued to Slone for "knowingly" violating section 75.400 shall be vacated.

b. Michael Diamond

Michael Diamond was the maintenance shift section foreman for the third shift that began at 10:00 p.m. on October 16 and ended at 6:00 a.m. on October 17, 2007. During this shift, Diamond's crew finished cutting and bolting the 6 left, and bolted the four additional cuts that remained unbolted at the end of Slone's shift. (Gov. Ex 2, 3rd shift report). Slone's crew also pressure rock dusted the left and right returns, intake, and neutral entries. (Gov. Ex 2, 3rd shift report). With respect to Diamond's efforts to clean the 001/002 section, Diamond's Production Down-Time Report notes that his crew "cleaned what [they] could" noting that he "had two scoops down all night." (Gov. Ex 2, 3rd shift report).

Diamond has been charged with individual liability for the violative conditions observed by Dotson on October 17, 2007. Diamond apparently had knowledge of the subject violation, by virtue of his recognition that section cleaning was incomplete. However, knowledge alone, is not sufficient to support personal liability under 110(c). Liability requires the additional component of deliberately failing to act. *Bethenergy*, 14 FMSHRC at 1245. Diamond was precluded from adequately removing the cited accumulations because two of the three scoops available to him were inoperative. In other words, Diamond's crew attempted to clean the section, albeit ineffectively.

While McCoy Elkhorn is responsible for ensuring the maintenance and availability of the minimum number of scoops required to adequately clean a section, McCoy Elkhorn's failure to do so is not directly attributable to Diamond in terms of 110(c) liability. Thus, although Diamond apparently was aware that the section needed additional cleaning, the circumstances of this case do not demonstrate that he deliberately failed to act. Consequently, the citation issued to Diamond for "knowingly" violating section 75.400 shall be vacated.

c. Jason Robinson

Jason Robinson's first production shift began at 6:00 a.m. and ended at 2:00 p.m. on October 17, 2007. Dotson arrived at the 001/002 section at approximately 10:00 a.m. At that time, Robinson conceded to Dotson that the entire section "was dirty from the feeder to the face." (Gov. Ex. 5, 10/17/07 notes, p. 7).

Dotson had previously issued a section 75.400 citation to Robinson on October 11, 2007. At that time, Robinson blamed the violative accumulations on two scoops that had broken down and one scoop that was being charged because its battery was depleted during the previous maintenance shift. (Tr. 161; Gov. Ex. 4, 10/11/07 notes, p. 4). On October 17, 2007, Robinson conceded to Dotson that the third shift was supposed to clean the night before "but didn't do [a] very good [job]," in apparent recognition that two scoops had again broken down. (Tr. 191; Gov. Ex. 5, 10/17/07 notes, p. 7).

As noted, 110(c) liability requires evidence of knowledge of a violative condition and a deliberate failure to act. As discussed above, with respect to Diamond's liability, McCoy Elkhorn's failure to maintain an adequate number of scoops, alone, does not support individual liability under section 110(c). However, here, the evidence reflects that Robinson directed his crew to make cuts in the three right and five headings before ensuring that the section was adequately cleaned of violative combustible materials. (Gov. Ex. 5, 10/17/07 notes, p. 7; Tr. III at 450-51, 479-81). Having demonstrated that Robinson was aware of the violative accumulations, his ordering of continued continuous miner operations, before ensuring that these combustible accumulations were adequately removed, constitutes a deliberate failure to act. Accordingly, the \$900.00 civil penalty imposed by the Secretary against Jason Robinson under section 110(c) of the Mine Act shall be affirmed.

ORDER

IT IS ORDERED that 104(d)(1) Citation No. 7432120 and 104(a) Citation No. 7420523 **ARE AFFIRMED**.

IT IS ORDERED that McCoy Elkhorn Coal Corporation shall pay a penalty of \$27,259.00 in satisfaction of 104(d)(1) Citation No. 7432120 in Docket No. KENT 2008-986.

IT IS ORDERED that McCoy Elkhorn Coal Corporation shall pay a civil penalty of \$6,500.00 in satisfaction of 104(a) Citation No. 7420523 in Docket No. KENT 2008-260.⁷

IT IS ORDERED, pursuant to the parties' settlement terms, that McCoy Elkhorn Coal Corporation shall pay a civil penalty of \$4,200.00 for the six citations settled in Docket No. KENT 2008-986.

IT IS ORDERED, pursuant to the parties' settlement terms, that McCoy Elkhorn Coal Corporation shall pay a civil penalty of \$669.00 for the two citations that are the subject of Docket No. KENT 2008-987.

Consistent with the two citations that were adjudicated in this matter, as well as the parties' settlement terms in Docket Nos. KENT 2008-986 and KENT 2008-987, **IT IS FURTHER ORDERED** that McCoy Elkhorn Coal Corporation pay, within 45 days of the date of this decision, a total civil penalty of \$38,628.00.

IT IS ALSO ORDERED that the individual liability of Jason Robinson under section 110(c) of the Mine Act for the violative accumulations condition in 104(d)(1) Citation No. 7432120 **IS AFFIRMED**.

IT IS FURTHER ORDERED that Jason Robinson shall pay, within 45 days of the date of this decision, a civil penalty of \$900.00 for 'knowingly authorizing or carrying out' as contemplated by section 110(c), McCoy Elkhorn Coal Corporation's violation of section 75.400 of the Secretary's regulations prohibiting combustible accumulations.

Upon timely payment by McCoy Elkhorn Coal Corporation of the total \$38,628.00 civil penalty, and by James Robinson of the \$900.00 civil penalty, **IT IS FURTHER ORDERED** that Docket Nos. KENT 2008-260, KENT 2008-986, KENT 2008-987, and KENT 2009-1154 **ARE DISMISSED**.

⁷ As noted herein, pursuant to an approved partial settlement agreement, McCoy Elkhorn Coal Corporation has already paid a civil penalty of \$23,142.00 for the 19 additional citations contained in KENT 2008-260.

IT IS FURTHER ORDERED, consistent with this Decision, that the Secretary has failed to demonstrate that James Slone and Michael Diamond knowingly authorized, ordered or carried out the subject violation of the mandatory safety standard in section 75.400. Consequently, **IT IS ORDERED** that the personal liability cases in Docket Nos. KENT 2009-1173 and KENT 2009-1224 **ARE DISMISSED**.

/s/ Jerold Feldman

Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

Schean G. Belton, Esq., and Rachel Levinson, Esq., U.S. Department of Labor,
618 Church Street, Suite 230, Nashville, TN 37219

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC,
3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

/jel

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

October 11, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2009 427 ¹
Petitioner	:	A.C. No. 11-03141-180760-02
v.	:	
	:	Mine: Mach #1 Mine
MACH MINING, LLC,	:	
Respondent	:	
	:	

Appearances: Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner
Christopher D. Pence, Esq., Allen Guthrie & Thomas, PLLC, Charleston, West Virginia, for the Respondent

Before: Judge Weisberger

DECISION

This case is before me based upon petitions for assessment of civil penalties filed by the Secretary of Labor (“Secretary”), alleging violations by Mach Mining LLC (“Mach”) of various mandatory safety standards set forth in 30 C.F.R. The cases were scheduled for hearing on May 24 and 25, 2011 in St. Louis, Missouri. On July 22, 2011, the parties filed proposed findings of fact and a brief. In addition, on August 15, 2011, Respondent filed a response to the Petitioner’s post-trial brief.

I. Citation No. 8414216 (Docket No. Lake 2009-427)

Mach operates the Mach #1 Mine, an underground coal mine. A ventilation fan on the surface of the mine² forced fresh surface air to the areas of the mine located underground. The blades of the fan were recessed in housing (Gov. Ex. 10), approximately forty inches behind a circular collar. The circular opening to the fan was guarded by two semicircular guards, placed vertically one on top of the other, (“the upper guard” and “the lower guard”). Each guard covered

¹ Initially, this proceeding had been consolidated with Docket No. Lake 2009-426. However, on October 11, 2007, upon consideration of the parties’ joint motion, an order was issued severing Docket No. Lake 2009-426 from Docket No. Lake 2009-427.

² The housing was located approximately 18 inches above a concrete pad or platform.

half the area of the collar opening. Thus, in combination the guards completely covered the area of the circular collar, and blocked access to the blades of the fan.³

On February 18, 2009, MSHA inspector Bobby Jones inspected the subject site. He observed that the upper guard was not in place. He noted that the lack of an upper guard resulted in an unguarded area of approximately twenty-five⁴ feet, which provided access to the moving blades of the ventilation fan. According to Jones, as a result, a miner in the area could be drawn through the opening created by the missing top guard, and come in contact with the fan blades. In this connection, Jones made reference to an accident that had occurred at the fan site in December 2008, when two miners were forcibly pulled against the guards causing one miner to receive injuries to his head which required approximately 20 stitches.

According to Jones, at the time of the accident, both guards were in place. He opined that in the absence of the upper guard, should a similar accident occur, a miner would be pulled through the resultant opening, and be forced into contact with the blades causing serious injuries.

Jones issued a citation alleging that “the main mine fan inlet [was not in conformity with 30 C.F.R. § 77.400(a) in that it] was not adequately guarded to prevent a person from contacting the rotating fan.”

A. Violation of Section 77.400(a), *supra*

Section 77.400(a) provides, in relevant part as follows: fan inlets, and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded. 30 C.F.R. § 77.400(a).

In order to establish a violation under Section 77.400a, *supra*, it is incumbent upon the Secretary to establish that the item cited was within the purview of Section 77.400, i.e., that: (1) the cited area was a “fan inlet” or that there were exposed moving parts, (2) these parts were not guarded, (3) the exposed moving parts may be contacted by persons, and (4) contact may cause injury to persons.

The record establishes that the cited area is a moving part, or fan inlet that falls within the scope of section 77.400, *supra*. See *Thompson Brothers Coal Co.*, 6 FMSHRC 2094, 2096 (Sept. 1984.) Also, it is not contested that, when cited, the top or upper guard was not in place. Further, it is clear that should a person be pulled through the unguarded area, he could come in contact

³ The blades were approximately twenty inches behind the guards.

⁴ The diameter of each semi-circular guard was approximately 100 inches. Thus, the radius of the circular area within the fan collar, covered by both guards, was approximately 50 inches or 4 feet. Accordingly, the area covered by both guards was approximately 50 square feet (*pi*, or 3.14, multiplied by the radius, 4 feet, squared). Thus, the lack of the upper guard resulted in an unguarded area of approximately 25 feet.

with the fan blades, and might be injured. Accordingly, the sole matter to be resolved is whether the Secretary established that the exposed fan blades “may be contacted.” *Thompson, supra*.

1. The Secretary’s Evidence

According to Jones, the fan would be examined weekly by persons who are responsible for making an examination of the above ground operations. Also, security personnel “make perimeter checks around the mine site.” (Tr. 150). In addition, Jones opined that in an emergency, miners exiting from an escape shaft would be approximately 15 to 20 feet from the fan guards.

Jones further testified that the closest house was between three and four hundred yards from the fan, and that there were not any signs posted to prevent persons from traveling to the front of the fan, nor was the fan area fenced off. Also, there was not any notice provided regarding the lack of a guard. Jones theorized that in addition to miners, hunters, hikers, trespassers, or children might be in the area and become exposed to the pull of the fan. Jones concluded that should a person be pulled through the opening and come in contact with the fan a reasonably serious injury or fatality was reasonably likely to have occurred.

Jerry Pogue testified that on December 19, 2008, he was an employee of a security firm, and was assigned to a guard shack located on the surface at the mine. On December 19, 2008, Pogue met with Morris Niday at the fan, so that the latter could demonstrate how to knock ice off the fan. According to Pogue, he and Niday stood adjacent to the guarding but a little bit behind the collar opening. Pogue indicated that Niday hit the guard with a five-foot long rod in order to knock off the ice. According to Pogue, the fan was on at the time, and Niday “got sucked in” (Tr. 191), and he (Pogue)⁵ was “swept off [his] feet” (*id*), and his head and shoulder came in contact with the upper guard. (Tr. 193).

2. Discussion

The Commission, in analyzing the requirements of Section 77.400(e) *supra*, interpreted the phrases “may be contacted” and “may cause injury” as follows:

Use of the word “may” in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners’ behavior cannot ignore the vagaries of human conduct. Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the

⁵ According to Pogue he is six feet, seven inches and at the time weighed two hundred and twelve pounds.

vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-[case] basis.

Thompson, supra at 2093.

Thus as set forth in *Thompson, supra*, it is incumbent on the Secretary to establish the reasonable possibility of contact and injury, taking into account the accessibility of the machine parts, work areas, ingress and egress, work duties, and the vagaries of human conduct. For the reasons that follow, I find that the Secretary has failed to meet this burden.

The Secretary's argument that there was a reasonable possibility of being sucked into the blades as a result of the missing upper guard is predicated upon the prior accident in December 2008. Pogue testified that he is six feet seven inches tall, weighs 212 pounds. He said that as he stood to the left of and behind the collar, he was pulled against the guards, his feet were no longer in contact with the ground, and his head and a shoulder came in contact with the upper guard.

Not much weight was accorded his testimony regarding his contact with the upper guard. This testimony was initially adduced in response to a leading question (Tr. 196). Also, I take cognizance of his earlier testimony where he described his contact as being "somewhere . . . either on the guard or the shaft and that [he was] not sure where . . ." (Tr. 193).

In addition, I note that Respondent adduced evidence of a prior statement made by Pogue which is not consistent with his testimony that he was pulled in contact with the upper guard. Mark Hamilton, who was the president of the security firm that had hired Pogue and assigned him to Mach in December 2008, spoke to the latter the day before the hearing, i.e. May 23, 2011 at the request of Respondent's counsel "to verify a contact phone number." (Tr. 254). At that time, Hamilton discussed the December 2008 incident with Pogue. According to Hamilton, Pogue said that when he made contact with the guard when he was "sucked in," it was at or below the bottom of the top part. (Tr. 257). Hamilton testified that he asked Pogue whether, when he was hit, he was above or below the top portion of the guard. According to Hamilton, Pogue said that he was "he was at or below the portion where the top and the bottom guard come together." (Tr. 259).

I observed Hamilton's demeanor and found him to be a credible witness. There is not any evidence that Hamilton would have any motive not to be completely truthful in his testimony. Further, it is significant to note that Pogue was not recalled to testify and deny or explain his prior inconsistent statements. There is not any indication in the record of any reasonable basis for not having called Pogue to explain or contradict Hamilton's statements.⁷

⁶ Niday, who was with Pogue, testified that he was injured when he was pulled against the lower guard, and did not have any recollection of Pogue coming in contact with the upper guard.

⁷ Since Pogue is no longer employed by Hamilton, it might be inferred that he would not
(continued...)

For all these reasons, I find that evidence of a prior inconsistent statement, which has not been rebutted or impeached, greatly diminishes the probative value of Pogue's testimony that he was pulled against the upper guard. Further, it is significant that aside from Pogue's testimony, the Secretary did not present any scientific or other evidence to support the opinion of Jones that in the event of being subject to the pull of the fan, there was a reasonable possibility of being forced through the opening caused by the lack of an upper guard. Therefore, I find the probative value of Jones' opinion to be diminished.

Further, regarding the likelihood of an injury producing event, I note that on cross-examination Jones agreed to the following: that in the absence of the top guard, the fan would not have to be de-iced; that miners enter and leave the underground mine from an entry one to a half miles from the fan; that in an emergency necessitating miners to exit from the shaft he expects them to be in an area where suction forces are not experienced; that "shortly" (Tr. 165) outside the width of the fan collar, a person can stand up and tolerate the suction force; that examinations can be conducted without stepping on the concrete pad; and that the top of the bottom guard ends at a point approximately seventy inches (six feet) above the pad; and that the force of the fan would pull someone "straight to the guard."⁸ (Tr. 169) (emphasis added). As such, the likelihood of contact with the unguarded area six feet above the pad is diminished.

⁷(...continued)

have been deterred from testifying in rebuttal due to fear of retribution by Hamilton.

⁸ Jones attempted to explain how a person on the concrete pad could be pulled up above the lower guard as follows:

Q. And you can't – in your experience through the force – the pull is a straight pull, is it not?

A. It would pull somebody straight to the guard, but if they are rolled up or wadded up –

The Court: If they are?

The Witness: If they are rolled up or wadded up.

The Court: Wadded, W-A-D-D-E-D?

The Witness: Yeah.

A. Like if you are pulled up there and you are in the fetal position, by the time you straighten out or spread out, that's where you could get the extra distance and be over the top of that.

By Mr. Pence:

Q. And my question is a little more narrow. From the concrete pad, the force that one experiences is a straight pull, correct?

A. Yes.

(Tr. 169-170).

I find this testimony to be speculative and without foundation and do not accord it much weight.

In these regards, I also note the following testimony of Anthony Webb, the President of Mach, who was in charge of any activities on the surface: (1) that during weekly maintenance, the fan is greased at a location between the guard collar and the escape shaft which is not subject to any fan suction; (2) that the greatest suction pull is within the perimeter of the fan collar; (3) and that should the bottom guard develop ice, the fan would be shut down to allow de-icing of the guard. (Tr. 214-218, Gov. Ex. 9).

Therefore, based upon all the above, I conclude that the Secretary has failed to establish by a preponderance of evidence that there existed a reasonable possibility of contact with the blades of the fan as a result of the absence of the upper guard. As a consequence, I find that it has not been established that Mach violated Section 77.400, *supra*.

II. Citation No. 8414209 (Docket No. Lake 2009-427)

A. Violation of 30 C.F.R. § 75.380 (d)(4) (ii)

On February 12, 2009, Jones inspected the underground portion of the Mach #1 Mine, specifically, the primary escapeway to the headgate (“H.G.”) #2. He observed a regulator⁹ on the overcast over the main South #3 entry. The regulator extended five feet in height from the top of the overcast to the mine roof, and had been closed down to 26 inches in width.

Jones issued a citation alleging a violation of section 75.380(d)(4)(ii), *supra*, which requires as follows: “where the route of travel passes through doors or other permanent ventilation controls, the escapeway should be at least four-feet wide to enable miners to escape quickly in an emergency . . .” 30 C.F.R. § 75.380(d)(4)(ii).

Based on the inspector uncontradicted testimony, as well as Mach’s representation at the hearing that it admits to a technical violation of section 75.380, *supra*, I find that Respondent did violate this section.

B. Significant and Substantial

1. The Secretary’s evidence

Jones determined that the violation was significant and substantial, as the cited condition was reasonably likely to contribute to an injury. He explained that the narrow opening in the regulator would impede rapid escape and present an obstacle at the top of the stairs leading to the overcast (Gov. Ex. 3). Jones noted that since the direction of the airflow in this entry was inby,

⁹ The regulator is a concrete wall with a hole knocked out of it to control the amount and velocity of air going to the section.

and in the event of an escape outby, miners would be “fighting against the air”(Tr. 32)¹⁰ especially if they were carrying a stretcher. Jones explained that since a stretcher is carried by four men, one located in each corner, it would not be able to pass through the 26-inch wide regulator as the total width of the men and the stretcher would exceed 26 inches.

Jones indicated that it was likely that a strain or sprain would result from “potentially” slipping and falling down the stairs in the area especially while trying to carry the stretcher through the opening. (Tr. 36). He noted that since four persons would be carrying the stretcher, the likelihood of an injury would be increased.

2. Discussion

A "significant and substantial" violation is described in section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”) as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981.)

In *Mathies Coal Co.*, the Commission explained its interpretation of the term "significant and substantial" as follows:

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).

In *United States Steel Mining Company, Inc.*, the Commission stated further as follows:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the

¹⁰ Jones testified that he had reviewed the weekly records of the airflow and found them to be “very consistent”. According to Jones, the recorded airflow was in a range between around 75,000 and up to 105,000 cubic feet a minute (c.f.m.) (Tr. 32, 33).

cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

7 FMSHRC 1125, 1129 (Aug. 1985) (emphasis added).

Based on the inspector's testimony and the record, I find that the first two elements of the *Mathies* test have been met. Thus, in order to prevail, the Secretary must establish, first of all, the reasonable likelihood of an injury producing event. *Mathies, supra*. In this connection, Jones noted that in an emergency evacuation the miners would be walking outby, from an inby position, and would be fighting the oncoming airflow. Also, they would have to ascend stairs up to the regulator, go through the narrowed opening of the cited regulator, then descend stairs while possibly carrying a stretcher.¹¹ According to Jones, in an evacuation miners would "without a doubt" be panicked (Tr. 48), and might be exposed to smoke.

On the other hand, I note that on cross-examination Jones indicated that there were not any obstacles in the walkway, stairs, or on the overcast surface from the regulator outby to the next step. Also, he conceded that the lifeline was in good shape, and that the only violation that he noted in the cited area was the restriction in the width of the regulator. He also agreed that it was not necessary to raise one's foot in order to go from the surface of the overcast through the regulator.

He was asked whether, on the date of his inspection, he found any conditions that made an emergency likely to occur. He answered as follows: "[n]ot at that very moment" but that "the dynamics of a mine are changing constantly." (Tr. 72). However, he did not indicate the specific events or conditions that would be reasonably likely to occur with the continuance of normal mining operations that would make an injury producing emergency evacuation reasonably likely to occur.

Within the above context, and noting especially the lack of any obstructions in the area of the cited regulation,¹² I find that the third element of *Mathies* has not been met in that it has

¹¹ It is significant to note that, according to Anthony Webb, Mach's president and underground superintendent, all its stretchers contain hand-holes on the inby and outby sides of all stretchers which allow the carriers to walk in front of, and behind a stretcher rather than side-by-side. In this connection, Webb testified that in 2008, at the request of, and in the presence of two MSHA inspectors, Phillip Long and Kennie Chanpley, a 24-inch wide stretcher was carried through a 24-inch wide regulator that was located in an alternate escapeway ("stretcher test"). (Tr. 95). According to Webb, the stretcher carriers were able to navigate through the 24-inch regulator without a problem, and the inspectors did not issue any citations.

¹² It appears to be the Secretary's argument that an emergency should be assumed for purposes of an evaluation of significant and substantial regarding the escapeway standard at
(continued...)

not been established that there was a reasonable likelihood of an injury producing event. *c.f.*, *Mach Mining, LLC*, 32 FMSHRC 213 (Feb. 2010) (finding a significant and substantial violation of section 75.380, *supra* based on evidence of various obstacles in an escapeway, particularly concrete blocks, a pallet of crib ties, and a steel take-up track).

C. Penalty

1. Affect on ability to continue in business, size of the operator, history of violations, good faith abatement, and gravity

The parties stipulated that the payment of the total proposed penalty will not affect Mach's ability to continue in business. The parties further stipulated with regard to the amount of total production of tons of coal in 2008, and the history of violations. There is nothing in the record justifying either an increase or decrease in penalty based on the operator's size and history of violations.

It would appear that Mach abated the violation in good faith as there is not any evidence that it failed to do so. Based on the uncontradicted testimony of Jones that sprains or strains could result should persons slip and fall as a consequence of the violative condition, I find that possible resultant injuries are not very serious. Thus, I conclude that the level of gravity was only moderate.

2. Negligence

Jones determined that the negligence was high inasmuch as, (1) Webb told him (Jones) that a supervisor should have been aware of the opening in the regulator and (2) Webb did not provide any information to mitigate the level of negligence.

In addition, according to Jones, Mach made a decision to decrease the volume of air at the start of the longwall recovery. According to Jones, he was at the mine daily and was "aware" that

¹²(...continued)

issue, Section 75.380, *supra*. I note first of all that there are not any Commission cases specifically mandating that an emergency requiring evacuation of miners should be assumed when evaluating the significant and substantial aspect of an escapeway violation. To reach such a decision would create new law which is not within the province of a trial judge.

I further note that in *Rushton Mining Co.*, 11FMSHRC 1432, 1437 (August 1989), at issue was whether a violation of 30 C.F.R. §75.1704-2(a), (requiring that escapeways follow the safest direct practical route out of the mine), was significant and substantial. The Commission noted the Secretary's argument that "... assuming an emergency, there is a reasonable likelihood of serious injury due to the violation." However, the Commission did not specifically rule on this argument. The Commission held on other grounds that the Secretary had failed to establish a reasonable likelihood of a reasonably serious injury in the event of an evacuation.

the recovery started “somewhere around the second to the fourth of February.” (Tr. 42-43). Thus, he estimated that the cited condition had existed for seven to 10 days prior to his inspection on February 12.

Webb testified that, as the underground superintendent, he was aware of all ventilation changes and has personal knowledge of ventilation changes. He indicated that the regulator at issue, H.G. #2, had been installed in Panel 2 when the section was being developed in the fourth quarter of 2007, and was originally more than the 48 inches width requires of section 75.380(d)(4) *supra*. According to Webb, “between December 2008 and January 2009,” the cited regulator was reduced from its original width to 26 inches in order to send more air to H.G. #3 and #4 that were being developed.¹³ (Tr. 86-88).

Thus, it is clear that mine manager, i.e., Webb, had knowledge of the violative condition, and that it had existed for more than a few weeks prior to its being cited on February 12, 2009.

3. Mitigating factors

Webb indicated that in the fourth quarter of 2008, he went through the regulator at issue with MSHA inspector Jim Rusher. According to Webb, the latter did not say that the width was too narrow, and he did not issue any citation. In response to a leading question by Respondent’s counsel he (Webb) agreed that this occurred “after” the width had been reduced to twenty-six inches. (Tr. 101) (emphasis added).

This testimony might have some mitigating effect on the level of Mach’s negligence if Rusher’s inspection of the regulator at H.G. #2 in the fourth quarter of 2008, took place after its width had been reduced. According to Webb, this reduction was done in the period “December 2008 to January 2009.” (Tr. 88). However, the record does not establish with any degree of clarity if Rusher’s inspection was prior to, or after this period. The only evidence in the record consists of the following portion of Webb’s testimony:

Q. At the time that you ordered the regulator at the mouth of Headgate 2 to be reduced to 26 inches, did you know that the regulations at that time did not provide for stretcher tests in the primary escapeway?

A. No.

(Tr. 118).

The probative value of this testimony is minimized since (1) as it does not consist of his own words, but rather his agreement with a leading question posed by counsel on direct-

¹³ Webb explained that the connection of the Panel 2 to an additional source of air caused an increase in airflow to the cited area. Hence, according to Webb, the reduction of the width of the regulator did not result in an overall decrease in airflow.

examination, and (2) it was elicited on cross-examination that Webb did not recall the exact date of Rusher's inspection.

Webb indicated that when he ordered the regulator at issue to be reduced to 26 inches, he did not know that "stretcher tests" (P. 15, Fn. 11, *infra*) were allowed in alternate but not in primary escapeways. I note that as the underground supervisor, he has to exercise a high standard of care. However, I observed his demeanor, and find his testimony relating to lack of knowledge of a regulatory distinction to be credible, but of only slight mitigation.

Considering all the above, I find that the level of Respondent's negligence was relatively high.

4. Conclusion

After weighing all the penalty factors set forth in Section 110(i) of the Act, as discussed above, and placing significant weight on the finding of only a moderate level of gravity, I conclude that a penalty of \$8,000.00 is appropriate for this violation.

III. Citation No. 8414211 (Docket No. Lake 2009-427)

A. Introduction

On May 14, 2009, a hearing was held relating to, inter alia, a Notice of Contest filed in Docket No. Lake 2009-323-R¹⁴, (Citation No. 8414211). The parties were directed to file briefs addressing the limited issue of whether the cited area was a "working section."¹⁵ Each party subsequently filed a brief, and a reply. On July 15, 2009, the undersigned issued a partial decision determining that the cited area was a "working section."¹⁶

A conference call was held November 9, 2009; the parties indicated that they did not seek an opportunity to present additional evidence relating to the remaining issues raised by the Notice of Contest regarding Citation No. 8414211.

¹⁴ The Notice of Contest filed in Lake 2009-323-R challenges the issuance of Citation No. 8414211 which alleges a violation of 30 C.F.R. § 75.380(d) (1). Section 75.380(d) (1) (*supra*.) requires that a mine escapeway be "[m]aintained in a safe condition to always assure passage of anyone, including disabled persons."

¹⁵ Pursuant to 30 C.F.R. § 75.380(b)(1), an operator is required to provide an escapeway "for each working section." (emphasis added.) Thus, the existence of a working section is a predicate for the imposition of all regulatory mandates relating to escapeways, including those set forth in sections 75.380(d)(1), the standard at issue in the case at bar.

¹⁶ *Unreported decision*

On February 24, 2010, a decision was issued finding that Mach violated Section 75.380(d), *supra*, and that the violation was significant and substantial. *Mach Mining v. Secretary of Labor*, 32 FMSHRC 213 (February 24, 2010) (“*Mach I*”). The only issue remaining regarding Citation No. 8414211 is the amount of penalty to be assessed against Mach for its violation of Section 75.380(d), *supra*.

B. Factors set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977 (“The Act”)¹⁷

1. Ability to continue in business, size, good faith abatement, history of violations, and gravity

I reiterate the findings made above, II (c)(1) *infra*, relating to Mach’s ability to continue in business, size, and history of violations. It would appear that Mach abated the violation in good faith, as there is not any evidence that it failed to do so. Based on the uncontradicted testimony of MSHA Inspector Bobby Jones, further, for the reasons set forth in *Mach I, supra*, at 218-219, I find that the level of gravity was relatively high.

2. Negligence

In *Mach Mining*, 32 FMSHRC 1376 (Sept. 27, 2010) (“*Mach II*”) one of the issues at bar was whether Mach’s failure to record the hazardous material cited in Citation No. 8414211, constituted an unwarrantable failure. For the reasons set forth in *Mach II, supra*, at 1382, 1385, I reiterate the findings made relating to the extent of the violative conditions, and the length of time they existed. Further, for the reasons set forth in *Mach I, supra*, at 218-219 I find that the violative conditions posed a high degree of danger.

On the other hand, for the reasons set forth in *Mach II, supra*, at 1383-84, I reiterate findings made therein that Mach had not been placed on notice that, prior to the issuance of the citation at issue, greater efforts were necessary for compliance. Nor had Mach been previously cited for existence of materials in the escapeway that would impede a speedy evacuation. Further, for the reasons set forth in *Mach II, supra* at 1384-1385, I reiterate the findings therein that although the violative conditions were obvious, Mach had a “good faith” belief that they were not hazardous, and that this belief was objectively reasonable.

Considering all of the above, I find that a penalty of \$6,500 is appropriate for the violation of Section 75.380(d), *supra*.

¹⁷ In her Motion to Approve a Partial Settlement (“Motion”), the Secretary represents that “[the parties request that the court make a penalty determination based on the record already submitted during the contest proceeding” (Motion, p. 3). Accordingly, it is ordered that the transcript of the hearing held on May 23, 2009, be incorporated herein.

IV. Citation Numbers: 66746698, 8414208, 8414206, 8414207, 8414212, and 8414210

Subsequent to the hearing in this matter, the Secretary filed a Motion to Approve Partial Settlement relating to the above citations.

A reduction in penalty from \$7,063.00 to \$2,270.00 is proposed. I have considered the representations and documentation submitted in this case. Especially representations that, in essence, “upon further review” a reduction in penalty is sought. I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

Order

It is ordered that Citation No. 8414216 be dismissed. It is further ordered that Mach, within thirty (30) days of this decision, pay a total penalty of \$16,770.00 for the violations found herein.

/s/ Avram Weisberger
Avram Weisberger
Administrative Law Judge
202-434-9964

Distribution:

Barbara Villalobos, Esq., United States Department of Labor, Office of the Solicitor, 230 South Dearborn Street, Suite 844, Chicago, IL 60604

Christopher D. Pence, Esq., Allen Guthrie & Thomas, PLLC, 500 Lee Street, East, Suite 800, Charleston, WV 25333-3394

/cmj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N.W., SUITE 9500

WASHINGTON, D.C. 20001

Telephone: (202) 434-9933

Facsimile: (202) 434 9949

October 14, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2009-442-M
Petitioner	:	A.C. No. 02-00024-173239
v.	:	
	:	Docket No. WEST 2009-1329-M
FREEPORT-McMORAN MORENCI, INC.,	:	A.C. No. 02-00024-192740A
and RONALD Y. JURADO, employed	:	
by FREEPORT-McMORAN MORENCI,	:	Mine: Freeport-McMoran Morenci
Respondents	:	

DECISION

Before: Judge William B. Moran

Appearances: Leon Pasker, Esquire, on behalf of the Secretary of Labor, Mine Safety and Health Administration.
 Laura E. Beverage, Esquire and Dana M. Svendsen, Esquire, Jackson Kelly, P.L.L.C, on behalf of the Respondents.

This case arose in connection with a fatal accident which occurred on September 1, 2008 at the Freeport-McMoran Morenci Mine in Greenlee, Arizona. On that day Raymond Saldana, who was working on a belt replacement project at the Mine's Number 6 bedding plant, fell to his death through a 4 foot by 5 foot opening on an elevated walkway, which was situated some 28 feet above the bedding plant. Two civil penalty actions arose from that event. The Respondent mine was charged with violating 30 CFR 56.11012 and a Section 110(c) investigation concluded that mine supervisor Ronald Y. Jurado was also culpable for the violation. Mr. Jurado was specially assessed a \$7,000.00 civil penalty for his culpability in the accident. A hearing was held in Carefree, Arizona on April 25 and 26, 2011. For the reasons which follow, the Court affirms both violations and assesses the same civil penalty amounts as proposed in the civil penalty petitions.

The standard cited provides:

Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

30 C.F.R. § 56.11012

Findings of Fact

-The Fatal Accident Scene and Circumstances of the Accident

There is no dispute that on September 1, 2008, contractor employee Raymond Saldana fell to his death through a 4 feet by 5 feet opening in the floor of BC conveyor belt Number 6 bedding area, dropping in a free fall some 28 feet to the ground below. Tr. 22-26. The hole through which the victim fell was created through the removal of two steel gratings. The floor of the bedding area is made up of such steel gratings. Tr. 37. Ralph Valenzuela, a contract employee from H & S Contracting was the person who removed the gratings. Tr. 38. The gratings were removed so that equipment, parts, and welding material could be raised and lowered through the opening which was created. The grating pieces remained removed from approximately 7 to 7:30 a.m. on the morning of the accident and remained removed up to the time the victim fell through the opening created by their removal. Tr. 38. Thereafter, Mine Safety and Health Administration (MSHA) Inspector David Small arrived at the Respondent's mine on September 3, 2008 for the purpose of conducting an accident investigation stemming from the fatal accident.¹

To better understand the circumstances which led to the opening being created, it is necessary to provide some background. The mine was replacing the tail pulley belt on the BC conveyor. Consequently the belt was not operational during that time. By the date of the fatal accident, September 1, 2008, the project was nearly completed, with the work remaining to be done consisting of cleaning up and the replacement of conveyor guards. Tr. 25. Ronald Jurado was the Respondent's maintenance supervisor and he was in charge of the belt replacement project. As such, he was the person responsible for ensuring that the belt replacement project was completed. No other supervisor for the Respondent's mine was present at the scene of the accident when it occurred. Tr. 50.

Government Exhibit P 4 is a diagram of the BC conveyor elevated walkway area, and it depicts where the fatal accident occurred, including the measurements around the accident area. Tr. 36-37. The elevated area itself had two entrances: one from the pulley coming off the conveyor² and the other at the doorway. Tr. 29. As mentioned, the hole, through which the victim fell, was used to hoist equipment, including the conveyor belt and tools. Tr. 31. When

¹ Exhibit P1 is the citation Inspector Small issued in connection with that investigation. As part of his investigation, Small took photographs of the accident scene, observed the equipment involved with the accident, reviewed documents and conducted interviews.

² The tail pulley doorway, being some 275 feet from the tail pulley entrance, is not depicted on the exhibit.

Inspector Small arrived at the accident site,³ there was no cover, nor railing, around the hole. The Inspector did not observe any tape immediately around the hole; there was simply the opening. Tr. 31. As distinct from the perimeter of the hole itself, in the area between the conveyor pulley and the floor opening, there was yellow caution “tape” from one side of the walkway to the other side between the pulley and the created floor opening. Tr. 31. Thus the inspector observed the yellow caution tape from one side of the walkway to the other side, between the pulley and the opening in the floor.⁴ Tr. 31. Inspector Small identified, within Exhibit P 2, which is a photograph of the area where the accident occurred, the location where Mr. Valenzuela and Mr. Jurado were standing at the time of the victim’s fall through the hole. The Inspector stated that those individuals were near to the yet to be installed guards on the side of the BC conveyor,⁵ in the Number 6 area of the bedding mill. Both individuals were relatively close to where the victim was just prior to his fatal fall. The inspector identified Exhibit P 3 as a diagram of the elevated walkway up by the BC conveyor and he identified the location of Mr. Valenzuela and Mr. Jurado at the time of the accident with both of them then about 20 to 30 feet from the opening through which the victim fell. Tr. 28. Inspector Small stated that the distance from the yellow tape, that is marked with an ‘X’ on Exhibit P 2, and the hole in the floor, was 5 feet 9 inches on one side and 10 feet on the other.⁶ Tr. 38-39. The distance between the pulley

³ MSHA’s David Brown, the field supervisor for the Mesa field office, arrived at the site on the day of the fatal accident, September 1, 2008, and issued a 103(k) order then to preserve the number 6 bedding area accident scene. Tr. 34. As mentioned, Inspector Small began his investigation two days later.

⁴ Exhibit P 2, a photograph, is the best example for one to visualize the accident scene and it displays, generally, where the inspector saw the tape on September 3, 2008. The inspector marked an ‘X’ over the word ‘tape’ on that exhibit. Tr. 32-33. One should take particular note how far back the tape was from the large opening. In the Court’s view, even adopting for the moment the idea that tape can ever be sufficient, the large distance between the tape and the opening, nearly 6 feet, increased the risk that one could pass the tape line and then forget about the location of the opening. The inspector stated that there was no tape between the floor opening and the head pulley door entrance when he was at the site on September 3rd. Tr. 33.

⁵ The conveyor belt appears in back of the yellow tape in the photograph. Ex. P 2, Tr. 24.

⁶ Not to be confused with the yellow tape he identified, the Inspector also observed “tape” or, as it was also described at the hearing, “flagging,” on the catwalk area that leads down to the bedding area, but this tape was red, not yellow, in color. Tr. 40. Greg Arbizio, a management person with the mine, placed the red tape in that area. Tr. 40. Government Exhibit 5 is the signed statement from Mr. Arbizio which acknowledges that he installed the red tape in that area. Tr. 41. Arbizio’s statement reflects that he placed the red tape there right *after* the state mine inspector finished that entity’s inspection of the accident. Tr. 42. The red tape was installed because of the k order’s issuance, in order to prevent others from entering the accident scene. Tr. 42. As noted, although the inspector agreed that there were two access areas to where
(continued...)

doorway and the hole in the walkway was measured as 7 feet 10 inches. Tr. 3.

In sum, when the accident occurred, Mr. Ralph Valenzuela and Mr. Jurado were up where Mr. Saldana was located and Mr. Herrera was on the ground level, 28 feet below and almost directly underneath the hole through which the victim fell. Tr. 26, 57. Herrera was quite fortunate as the victim, in his fall, came within 2 feet of striking him. Tr. 51.

Based on statements received as part of the investigation, Inspector Small concluded that Mr. Jurado knew about the opening in the walkway floor and that he knew about the opening around 6 a.m. on September 1, 2008.⁷ Tr. 43. The witness expressed that, in any event, Mr. Jurado certainly knew by 9:30 that morning that the grating had been removed because he acknowledged that he was up in that area at that time. Tr. 45. At a minimum, the Court finds the latter to be a fact.

Inspector Small participated in the interview of Mr. Valenzuela, which occurred on September 3rd. As noted, when the victim fell, Mr. Valenzuela was located by the head pulley of the BC conveyor, discussing replacement of guards with Mr. Jurado. Tr. 45. According to the inspector, Mr. Valenzuela advised that no other belting or equipment needed to go through the

⁶(...continued)

the belt replacement was being performed, he did not agree that *both* those access areas had been taped off prior to the accident as he did not believe there was tape at the doorway entrance to that area. The Inspector's conclusion was based on Mr. Arbizo's statement that he later put red tape across that doorway area and because that was the only tape that the Inspector saw. Tr. 81. However, per Exhibit P 5, Arbizo indicated that he replaced some yellow tape and placed red tape in its place in the catwalk before one enters the doorway. Tr. 81-82.

Challenged as to whether he "completely discount[ed] Mr. Arbizo's statement that he took down the yellow tape," the Inspector simply stated he didn't know where Arbizo took down the yellow tape. Tr. 84. At any rate, the Inspector added that the red tape was put up by Arbizo to prevent anybody else from going in the area. Tr. 84. It is reasonable to conclude that Arbizo replaced yellow tape in that location with red tape after the state mine inspectors finished their investigation and after the 103 k order was issued. Tr.82-83. The Court observes that, in its view, the problem with the whole "tape" inquiry is that, whether the yellow tape was present before the red tape was put up is beside the point. This is so because tape of any color doesn't constitute a barrier under the standard. Further even if it could be deemed to be a "barrier," it was too far removed from the hole to serve such a purpose. The *opening itself*, not simply a nearby doorway, needed the protection.

⁷Inspector Small reasonably drew this conclusion upon learning that there had been an employees meeting at about that time on that day and the work that was to be done that day was discussed at that time. Tr. 44.

hole after 9:30 a.m. that morning and that he spoke to the victim about 10 to 15 minutes prior to his fatal fall through the hole. Tr. 46.

Pennington also took a formal statement from Mr. Valenzuela as part of his 110(c) investigation. On the day of the fatality, Valenzuela's duties were the same as Herrera's; that is, they were to clean up the area and Mr. Jurado assigned them that task. Tr. 157. Valenzuela stated that he worked with the victim on the day of the fatal accident, September 1, 2008. Tr. 157. Valenzuela stated to Pennington that he had discussed with Saldana the type of guards that needed to be installed on the head pulley and, some 15 to 20 minutes after that discussion, the accident occurred.

Inspector Small was present when Mr. Ronald Jurado was interviewed by Inspector Pennington. As noted, Jurado was the supervisor of the conveyor belts at the mine and he was in charge of replacing the BC conveyor belt Number 6. Tr. 151. Jurado told Pennington that he supervised the H & S contractors that worked on the belt replacement project. Tr. 151. Although the Respondent has tried to suggest that Mr. Saldana was *de facto* in charge, there is no genuine factual dispute about Jurado's position or authority. According to the inspector, Mr. Jurado stated in that interview that he was talking with Mr. Valenzuela about replacing the guards, when the victim fell through the hole. Mr. Jurado did state that he was waiting for a welding truck to arrive. Tr. 47. Neither Mr. Jurado nor Mr. Valenzuela⁸ saw the victim fall through the hole, as they were not facing in the direction of the floor opening at the moment of Saldana's fatal fall. Tr. 49. Mr. Jurado himself admitted that everything had been done on the project except for the waiting for the welding truck to arrive.⁹ Tr. 328. Further, he conceded that, based on his tailgate meetings, he was aware of the fall hazard in the floor opening. Tr. 329.

The testimony of MSHA's Inspector Pennington confirmed Inspector Smith's description. Pennington stated that contract employees of H & S, Juan Herrera and Ralph Valenzuela, were assigned to the area to finish the belt change job. As mentioned before, Herrera was down below the hole through which the victim fell. His job was to roll up the sections of the old belt and load them on a truck. Tr. 153. According to Inspector Pennington, he determined that most of the equipment from the task had been lowered down the hole; all that remained were some small items. Tr. 156. At the time the victim fell through the hole, the welding truck had not arrived. Tr. 153.

⁸ At the time of the accident, the victim, Mr. Saldana, was an employee of Geo Temps Inc.. Jurado was an employee of Freeport-McMoran at that time. Mr. Valenzuela and Mr. Herrera were working for H & S Contracting then. Tr. 49.

⁹ Paul Boman, the mine's safety and health manager at the time of the accident, performed an accident investigation regarding the death of Mr. Saldana. He confirmed that on the date of the fatal accident, Saldana, Valenzuela, Herrera and Jurado, were working at the bedding plant and that they were in the "*final stages* of clean up and replacement of the guards." Tr. 230 (emphasis added).

Determination that the standard was violated.

A yellow ribbon does not satisfy the standard's requirements.

The Respondent¹⁰ contends that there were “barriers” present. These were in the form of yellow tape with a tag affixed to the tape. It is Respondent’s view that both tape and tag warned of the hazard. Respondent also asserts that fall protection was being used when people entered the area where the fall occurred. Suggesting that, at this stage of the work, the tape was sufficient, Respondent further argues that the job, while nearly done, was not completed. In support of this contention, it maintains that the mine was awaiting a welding truck’s arrival. That truck would be bringing the welding leads, which would go up and through the hole so that the guards could be welded back onto the equipment. As noted, the Court finds that welding leads would need to pass through the opening and that small items still needed to be disposed of, as part of the clean-up phase of the project.

Accordingly, the Respondent’s defense variously contends:

- the tape plus the tag constitutes a barrier under the “plain meaning” of the regulation because the opening was still being used to raise and lower equipment at the time of the accident.
- a reasonably prudent person would not have recognized the cited condition as unsafe because the tape and tag warned of the hazard and there was fall protection to use nearby.
- the regulation does not require a railing, barrier or cover when it is not practical to so provide such protective devices.

R’s Br. at 12.

The Court rejects each of these contentions.

Surprisingly, there have not been many cases dealing with this standard that offer insight regarding its construction. However, in *Secretary v. Hanna Mining*, 3 FMSHRC 2045, 1981 WL 141400, (Sept. 1981) the Commission addressed the standard.¹¹ There, openings were present through which miners could fall, though the openings were such that one could not completely

¹⁰ Although there are two respondents in this proceeding, counsel for Freeport acted on behalf of both respondents. Therefore, for simplicity, the Court will use the term “Respondent” to refer to both Freeport and Mr. Jurado.

¹¹ While the wording was the same, in 1981, as it is now, it was then listed as 30 C.F.R. §55.11-12.

fall through them. The Commission rejected the contention that one would have to fall *through* such an opening to constitute a violation, holding that falling *into* an opening was sufficient to trigger the standard. More important, for the purposes of this case, were the Commission's words regarding construction of the such standard, as it noted its "construction is in accord with the well-established rule that remedial legislation and its implementing *regulations are to be liberally construed as long as such an interpretation is reasonable and promotes miner safety.*" (emphasis added).

No case could be found to support the proposition that tape can satisfy the protective purpose of the standard. In *Secretary v. Fann*, 2006 WL 2927266 (Sept. 2006), a 20 inch opening at the top of an elevated jaw crusher was not barricaded, exposing miners to a fall of sixteen feet. There the judge found that "a reasonably prudent person, familiar with the mining industry and the protective purposes of the regulations would have realized that the regulation required that the opening be protected while a miner worked on the platform." The judge also noted that "*standards like that addressing fall protection, [] must be written in simple terms in order to be broadly adaptable to myriad circumstances.*" *Id.* at *27, (emphasis added), citing *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982).

In *Secretary v. Weathers*, 22 FMSHRC 1032, 2000 WL 1683040, August 2000, another judge dealt with the same standard and, as here, a fatality was involved. In that case, chains, were used as a railing or barrier, but they were not in place. The absence of the chains created a 40 square inch opening through which one could fall. While it was implicit that the chains were required, the judge found that contamination of the accident scene by rescue personnel made it impossible to determine if the chains had been present. Although the uncertain state of the evidence controlled the outcome, the key point from that decision was the implicit recognition that a chain railing, as opposed to tape or flagging, was required. So too, in *Imerys Pigments*, 28 FMSHRC 180, 2006 WL 1080230 (March 2006), a judge upheld violations for the same standard, where there were openings on the tops of blending tanks which were not marked, barricaded, or covered or provided with railings. Lids were available to cover the openings, but were not used. The condition was abated by the installation of railings.

As noted, Investigator Small cited 56.11012 as having been violated. He expressed that the standard requires that "[a]nywhere there's a hole in or near a travelway, covers, barriers, or railings shall be provided." Tr. 53. Small determined, and there is no contention otherwise, that there was no cover over the large hole, through which Saldana fell, at any time after Mr. Valenzuela took off the floor grating, which grating had covered the hole, earlier that morning. Again the evidence is that the cover removal occurred at approximately 7:30 a.m. and the accident occurred about 10:02 a.m. It is also undisputed that there was no railing around the hole. Tr. 53.

Respondent takes issue only with the Inspector's determination that there was no "barrier" around the hole on the date of the accident. They do not claim that there was a railing or cover present. As noted, in terms of compliance with the standard, Respondent contends that

the tape constituted a barrier and, alternatively, that it was impractical to do more than provide the yellow tape.

Although there was yellow tape between the head pulley and the opening, Inspector Small did not consider the tape to be a barrier “[b]ecause Freeport-McMoran did not use it [with] the intent of being a barrier.” Tr. 54, 68. Small did believe that the tape was there to “inform persons that there might be a hazard once they pass[ed] that tape.” Tr. 54. He learned from Mr. Valenzuela that the tape had been installed at the beginning of the project on August 28th and this was confirmed by Mr. Herrera. Tr. 56. While Freeport placed the tape to warn persons of the hazard beyond it, the Inspector noted that the tape could not stop anyone from going to the floor opening, as anyone could walk past it. Tr. 56. Mine management’s Mr. Paul Boman also acknowledged the obvious, that anyone could go past the yellow tape, but from his perspective, according to Small, the tape should have caused individuals to recognize the hazard. Tr. 57. The hazard created by the opening was, rather obviously, that persons or material could fall through it.

Regarding the mine’s tape (i.e. flagging) policy, Mr. Boman provided the inspector with “some information” that employees were not supposed to walk past the yellow tape unless they could recognize the hazard. Tr. 58. Boman conceded that while the mine had the tape policy, anybody could cross it. He guessed that the yellow tape is about 3 ½ inches wide, but didn’t know its actual width. Tr. 293. The words “caution” are repeated on the tape. Tr. 293. Boman did not know what the tag on the yellow tape said. Tr. 294. Employees were only supposed to recognize the hazard and then proceed. Tr. 121. This rationale did not change the inspector’s view that the tape did not act as a barrier. Although Inspector Small did agree that yellow caution tape was in place at the time of the accident and that “[c]aution tape can be used as a barrier in certain circumstances,” he stated that the situation here was not one of those circumstances. Tr. 108.

The Court inquired about the Inspector’s assertion that tape can be used as a barrier under certain circumstances. The Inspector explained further that tape can be acceptable only:

[w]hen the company has a policy that they enforce that nobody will go past that caution tape except to correct that condition or to be working around that hole to do a particular job until that job is complete, and then nobody else can cross that tape except the people that’s either working on that condition. The company has to have a policy and has to enforce that policy. It does no good to have a policy if they don’t enforce that policy.

Tr. 117.

The inspector added that this exception was imparted from the agency’s training at its West Virginia facility and his testimony made it clear how limited the “tape exception” is because there must be a “policy that nobody will cross [the] tape for any other reason other than

to work on that condition, the hazard, or if they're over there in this case here lowering or raising material, and nobody else can cross that tape, period, except for them few people. And then, of course, if you're over there by that, you have to be tied off prior to getting to that hole." Tr. 118 Such policies, if present, must be in writing. Oral policies are not acceptable. Written policies allow verification that employees were trained in such policies as well as how they were trained on the policy.

Here, the Inspector stated that the Respondent showed him a policy pertaining to the use of tape but then added that the mine didn't follow its own procedures. The Inspector knew this because he personally observed management people go past caution tape even though it was unnecessary to their travel. Accordingly, while there was a policy and the policy was in writing, it was not being followed. Tr. 119. Importantly, the inspector added that the Respondent's policy provides that, wherever flagging is put up and there's a chance that a person could fall, a barricade has to be provided. The Inspector added: "And a barricade is a lot different than a barrier. That's written right in their policy."¹² Tr. 120. Additional comment is warranted about Respondent's "Flagging Policy," as it expressly provides that "Barricading is used to physically prevent access to significant hazards *and must be installed* when falls or other serious hazards exist. Flagging alone *is not sufficient* where there is potential for falls or other significant hazards, in these cases barricading must be installed *in addition* to flagging." P. Ex. 9 (emphasis added).

¹² The Inspector expanded upon his problems with the mine's flagging policy, explaining "[i]f there's somebody in the area working on a piece of equipment, then yes, you should ask permission to cross that area. But if the yellow tape is just up, you don't have to ask anybody. You can still walk underneath that tape, go about your business, go right past that hazard because I myself observed three times people went past caution tape without - - even one time without recognizing the hazard. So when I've got management also doing this here, it tells me that, even if they got a written policy, the way they enforce that policy is not the way it's actually written because, if you got a written policy, it actually says that, if there's an area where a person can fall, they're suppose to put up a barricade. [However a] [b]arricade is not a piece of caution tape. [A] [b]arricade has to be something that will prevent a person from entering that area, period, like a locked gate. So since I observed at least three times on my visit their management willing to cross caution tape, even though one time they recognized the hazard, next time they didn't recognize the hazard, and then they stood there and watched two other employees walk past the caution tape that could wound up being in imminent danger or another fatality, except that I intervened on that." Tr. 123. The Inspector was referring to the area of the accident. Further, Small confirmed that on September 4, 2008, with Mr. Boman and Mr. Jurado present, he observed people cross the caution tape in the accident area. While they were wearing fall protection, he added *that the protection was not hooked up*, making it useless. Tr. 124. The bottom line for the Inspector was his conclusion that the yellow tape, which he observed between the pulley and the opening through which the victim fatally fell, did not function as a barrier under Section 56.11012. The Court certainly agrees with that conclusion.

Based upon Inspector Small's considerable experience of some 30 years in the mining industry, it was his opinion that a cover (i.e. a grate) or railings should have been installed around the hole.¹³

Inspector Pennington did not agree with the claim that the area where the work was being done stopped being a travelway once it was taped off. Thus he did not accept the notion that tape limited its use as a travelway nor did he accept that tape can be a "barrier" under the standard. Tr. 191. Although Pennington did state that tape can be a barrier if its put up effectively, he added that it must prevent anyone from bypassing it, as, once one passes the tape they would be exposed to the hazard of the floor opening. He made the significant distinction that, while the tape may provide a warning, it will not act as a barrier as it will not impede anyone. Tr. 194. The Court notes that this observation is consistent with the common sense understanding of the function of a barrier.

It is true that in the definition section, at 30 C.F.R. § 56.2, a barrier is defined as "a material object, or objects that separates, keeps apart, or demarcates in a conspicuous manner such as cones, a warning sign, or tape."¹⁴ However, to read the definition in such a manner that it dictates the application of the standard and, by that, produces outcomes inimical to the safety standard, would be to allow a simplistic analysis to prevail. *See, Dyer v. United States*, 832 F. 2d 1062, 1066 (9th Cir. 1987), eschewing absurd results produced by a literal reading, and *Sec'y of Labor v. National Cement Company*, 27 FMSHRC 721, 728 (Nov. 2005). Common sense must be employed in construing a provision. *Casbah, Inc. v. Thone*, 512 F. Supp. 474, 479 (September 26, 1980).¹⁵ Accordingly, under a plain meaning analysis, the standard must be interpreted in the context of the regulation as a whole. *San Juan Coal Co. v. Sec'y of Labor*, 26 FMSHRC 427, 432 (May 2004). The principle of *in pari materia* also seems apt in that to consider a tape as a "barrier" would conflict with the other terms employed in the standard, namely railings and covers, because a tape is completely dissimilar to those. *Erlenbaugh v. U.S.*, 93 S.Ct. 477, 480 (1972), *Essex Mfg., Inc. v. U.S.*, 264 F.Supp.2d 1285, April 29, 2003.

¹³ While Respondent's Counsel noted that the tape was allowed to remain in place while the fatal accident was being investigated and before the grating was reinstalled, the Inspector, though agreeing, added the important fact that "[t]hey also had some employees stationed at both entrances to make sure nobody could walk past them employees." Tr. 120-121.

¹⁴ There are only two other provisions where the term "barrier" appears in these regulations and neither uses the word in a sense that would make sense if the definition section dictated the outcome of their construction. *See*, 30 C.F.R. § § 56.3200 and 56.6904.

¹⁵ "The Supreme Court recognized over ninety years ago that all statutes should be given a sensible construction and judicial common sense requires that '(g)eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.'" *Casbah* at 479, citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 461, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892).

Lending support to this analysis, the standard only allows an exception when it is *impractical* to install “*protective devices.*” In those instances only may one use “adequate warning signals.” That latter language may suggest something akin to tape, if one could consider it to provide an adequate warning signal, but that alternative is only reached when it is determined that the protective devices are not practical. There is no credible evidence in this record that the other protective devices were impractical to install here. A railing could have been easily employed and the grating itself took but a minute or so to replace and provide full protection when not immediately needed to move materials through the opening.

In addition, Pennington maintained that for tape to be a barrier it would have to be “installed properly.” But to so serve that role, the tape would need to be sufficient to *prevent* persons from that hazard. Tr. 198. As the one piece of tape could not prevent anybody from access to the floor opening, it did not serve as a barrier. In response to questions from the Court, Pennington stated that the grating would serve as an effective cover because it *would prevent* one from falling through the hole. Tr. 199. Pennington also agreed that a railing is not unlike the railing one would find in one’s home. That is, it is a substantial device that prevents one, without some effort, from falling through an opening. Tr. 200. Even temporary railings, Pennington advised, would act in such a protective manner. Tr. 200.

With regard to the third type of protection cited in the standard, namely barriers, the Court notes that under the cited standard, openings are to be “protected” by them. Pennington agreed that for tape to serve as a barrier, one would need to have the tape encircle the openings “a dozen times” before one would create any sort of a barrier. Tr. 201. Nor, in Pennington’s considerable years of experience, has he ever heard of a single roll of tape serve as a barrier to an opening. Tr. 201.

As mentioned earlier, Respondent’s Paul Boman was the mine’s health and safety manager in August and September of 2008. Tr. 218. His educational background includes one undergraduate course in toxicology and one such course while in graduate school.¹⁶ Tr. 220. Also, as noted earlier, Mr. Boman performed an accident investigation regarding the death of Mr. Saldana.¹⁷ Tr. 229. Consistent with the Respondent’s theme that the victim was at fault,

¹⁶ Appropriately, the Respondent did not attempt to claim that Mr. Boman was an expert in toxicology.

¹⁷ A lack of conviction accompanied much of Boman’s testimony. This was understandable as he wasn’t at the scene until after the accident. Accordingly, for a great number of his answers, he would begin with uncertainty, advising “I believe” before his response. An example illustrates that his predicate was not a statement of confidence, but a lack of it. Question: “So the day of the accident, you’re not up there looking at the scene depicted in Exhibit 2. It’s the next day or so?” Answer: “I believe that’s correct.” Tr. 236. One of Boman’s remarks demonstrates how tape is an insufficient barrier. Boman, in securing the
(continued...)

either because Saldana was alleged to be impaired from medications he was taking, or because he was the one who was really in charge of the belt change project, Boman stated that the victim was recalled from retirement in order to “teach and mentor [Mr. Jurado].” Tr. 223.

Speaking to the function of the yellow tape, Boman himself conceded, when asked if it was intended to prevent access to the opening in the grating at the time of the accident, that “[t]he tape was intended to serve as a *warning or an indicator* that there was a hazard, that you would have to put on fall protection because of the hazard.” Tr. 249 (emphasis added). Thus, conceding what is obvious, by Respondent’s own admission, the yellow tape did not act as a railing, barrier or cover. Nor did the Respondent offer any testimony to show that it was “impractical” to install such “protective devices.”

Suffice it to say that Mr. Boman believed that the tape prevented access to the area and also acted as warning signal of the hazard. Tr. 254-255. Based on the statements of others, Boman believed that the opening would still be used for the welder, or the welder’s leads, to pass through it. Tr. 255. While Boman conceded that he “may have said” to Inspector Small that anyone can walk past the yellow tape, it was his view that as long as one knows what the hazard is and has the ability to protect oneself from that hazard, that is sufficient. Later, he added that, in some instances, they may have a supervisor’s permission.

Though Boman expressed that a barrier would be impractical because of the items to be passed through it, he admitted that he took no measurements to confirm this belief. Tr. 295. As to the installation of a railing such as that illustrated in P 7, Boman admitted that he was aware that such railing arrangements can have a section removed without removing the other three sides of the barrier. Tr. 296. Boman also agreed that the standard is not limited to addressing persons falling through openings but that it also speaks to materials falling through openings. Tr. 297. When asked what cover protected someone from kicking a tool through the hole on September 1, 2008 and what barrier protected Mr. Herrera who was exposed below the hole on that date, Boman conceded that no cover or barrier was present to deal with that. Tr. 297.

Per the discussion and findings above, the Court does not agree with Respondent’s view that the “notice” the tape provided satisfied the standard. A yellow ribbon may provide notice

¹⁷(...continued)

accident scene per MSHA’s 103(k) order, spoke with Mr. Greg Arbizo, who is part of management with Freeport McMoran and one of Boman’s subordinates. Boman advised that he “talked with Arbizo about . . . “getting a guard posted and also red tape across there so no one could go across into the area.” Tr. 237. Thus, Respondent, itself recognized that tape alone did not prevent access; a person was needed too. Boman’s testimony was inadequate in other aspects as well. For example, when he was asked about Arbizo’s statement that there were “pieces” of yellow tape, Boman stated that he never saw such pieces of tape himself, nor did he inquire with Arbizo what he meant to convey by that remark. Tr. 240-241.

when tied around the “old oak tree” but mere notice is not sufficient to satisfy this safety standard.

Assuming for the sake of argument that yellow tape can satisfy the standard, the Respondent did not employ such practice in an effective manner in any event.

According to Inspector Pennington, Mr. Jurado advised him the victim did not need to ask for permission to pass through the tape. Pennington also stated that Jurado considered himself to be the one who could give permission to pass through the tape. Jurado advised that the tape’s purpose was to *restrict access* into the area. Further, according to Pennington, even Mr. Jurado was not quite sure about the mine’s tape policy. He knew one could pass through a tape area but even he did not know the details of Freeport’s “policy.” Although Jurado claimed there had been some training on the subject, he could not provide any specifics about that either. Nor could Mr. Jurado explain the mine’s policy as to open holes and flagging. Tr. 149. As to the use of handrails, Jurado was similarly vague, stating that he had “seen some at one time,” but he could not remember where they were used and he didn’t know “where any handrails were located for his use.” Tr. 150. Jurado told Pennington that, after the accident, the mine required the use of handrails around holes when grating is removed.¹⁸ Tr. 150

Valenzuela told Pennington that the tape was up when they arrived on September 1st. When asked why the tape was present, Valenzuela didn’t know what the policy was, although usually it was used to keep people away. However, that policy still allowed people to go under or around the yellow tape. Tr. 160.

Mr. Boman told Pennington that, to pass the yellow tape, one had to have permission from the person who installed that tape. Tr. 165. Mr. Jurado stated that the mine uses “yellow [tape] to barricade everything off.” Tr. 314. Mr. Herrera, Jurado agreed, had permission to be *within* the taped-off area on the morning of September 1, 2008. Tr. 316. This admission by itself demonstrates the inadequacy of flagging. Herrera, though permitted to be within the flagging, had no protection, and nearly was struck by the falling Saldana.

Bill Bogart, an employee of H & S Contracting, was also interviewed by MSHA. Bogart stated that the tape had been up for a couple of days before the accident and he advised that the policy at the mine was that people could go past the yellow tape if they had permission from the people working in the area. Tr. 167. Pennington also identified Ex. P 9 as the Boarding and Flagging policy for the mine, dated August 11, 2008. Tr. 169. From reviewing that policy, Pennington determined that the Mine did have a policy but that it was inadequate. Tr. 169. Pennington then read from that policy, which, as noted earlier, provides: “Flagging shall be used to warn persons of hazards and to isolate areas. *Flagging* may be used in conjunction with barricading but *shall not be used in place of barricading*. Red and yellow flagging may only be used as specified below, and no other flagging may be used to designate safety hazards.

¹⁸ In this regard, see n. 19, *infra*.

Flagging does not take the place of physical barriers such as handrails and/or grating.” (Italics added) Tr. 169-170. Accordingly, the Court notes that the mine’s own policy acknowledges that tape, (i.e. “flagging”) is not sufficient.

-The Respondent’s associated claim that it was “impractical” to install the protective devices identified in the standard.

As for the cited standard itself, Respondent’s Counsel agreed that openings above, below, or near travelways through which persons or materials may fall are to be protected by “railings, barriers, or covers.” Respondent’s Counsel then candidly acknowledged that this requirement “impl[ies] I think a handrail.” Tr. 13. However, Counsel then noted that the standard allows that, where it is impractical to install such protective devices, “adequate warning signals shall be installed.” Tr. 13. Given those words, Counsel contended that, as it was impractical to have the holes covered, the protective measures were used, and that such actions satisfied the standard.¹⁹ The Court notes, in reaction, that this reasoning applies only where it is found to be impractical to install such protective devices, a conclusion the Court rejects in this case.

Although the Court inquired whether a railing would have been an impractical alternative, as it would seem to be a cumbersome arrangement to install, Inspector Small explained that “[i]f the company would have set it up in the first place the way you could set up a railing, it could be set up and maintained and still lower and hoist equipment with a minimal amount of delay.” Tr. 76. He continued that “[m]ost companies actually have chain rails on one side that just hook up, and all they do is take them chains; let them dangle over here; hoist or lower their equipment; when they get done, they hook the chain back up.” Tr. 76-77. Small has seen such arrangements on multiple occasions; some have permanent rails on three sides and a chain on the remaining side, but he has also observed arrangements with chains on all four sides. Tr. 77. Thus, it was Small’s testimony that it would not have been impractical to install a railing,²⁰ and the Court finds this to be the fact.

¹⁹ Although a railing was installed after the fatal accident, reference to that is not used to show that the standard was violated. Rather, it is included for the limited purpose of showing that the Respondent’s claim that installation was not impractical is without merit.

²⁰ In fact, upon cross-examination, Small stated that he has never seen an instance when it was impractical to provide a covered barrier or a railing. Tr. 79. Small described fall protection as “always [one’s] last choice.” When asked by the Respondent’s attorney if the standard described fall protection as a “last choice,” the inspector noted that it does not even address fall protection and that a separate standard addresses that subject. While the victim obviously was not wearing fall protection, Small stated that there were other employees using fall protection, but then he added they were not using it inside the taped area. Tr. 79- 80. Asked about Exhibit P 7, the Inspector noted that government exhibit 7 is an example of the type of railing that he believed could have been used around the hole through which the victim fell. Tr. 114-115.

Even accepting, for a moment, Boman's assertion that large items could not be passed through the hole if handrails had been present, the testimony established that such large items; belts, a belt cooker and a large tool box, had already been sent through the hole and that only the welding equipment, which equipment was never precisely identified or described, was left to be passed through the opening.²¹

The lack of "fair notice" claim

Respondent contends that the Secretary's claim that a barrier must prevent access²² to the hazard is at odds with its regulations. While conceding that the regulation refers to railings, barriers or covers, Respondent views this as showing that the mine may make a choice from among those, providing "flexibility" in compliance. R's Br. at 14.

As for Respondent's contentions regarding the "plain meaning" issue, it admits that the words of the provision must be consulted first. However, it then contends that the words in this standard must not be plain, as Inspector Pennington was not sure if the "tape and tag" failed to satisfy the standard, believing that it could be left to judicial interpretation. R's Br. at 13. From that, Respondent asserts that if the inspector was uncertain, that demonstrates that a reasonably prudent person could not be expected to know that the tape was insufficient. The Court notes that the fact that a given inspector may express uncertainty as to the meaning of the words expressed in a standard does not prevent the Court from determining its plain meaning.

²¹ Mr. Boman couched his answer about the impracticality of installing railings, stating "*It was believed by the company* that handrails [] would not have allowed large equipment to get up and over the handrail . . ." Tr. 252 (emphasis supplied). But when the Court asked if that was *Boman's view*, not simply the company's, he demurred, stating only, "I didn't measure it specifically. I didn't go and measure the height of, you know, a 42 inch handrail versus the monorail we have in engineering. . . . I didn't have an opinion." Tr. 253. Boman was told things about the use of handrails and he accepted what he was told, as opposed to reaching his own conclusion in the matter. Tr. 254. Accordingly, Boman's claim about impracticality cannot be credited at all.

²² In a display of attempted creative thinking, Respondent also contends that the belt replacement task caused the area's walkway characteristic to evaporate while that work was ongoing. R's Br. at 16. Relying again upon its "tape and tag" method, Respondent believes that those actions served to suspend the area from being used as a travelway during the time the work was being done. The Court observes that the focus of the standard is openings, not travelways. Based on the acknowledged activity, the area remained a travelway. Besides, focusing upon whether it remained a travelway overlooks that it applies not simply to travelways, but to openings *near* travelways.

Respondent also maintains that the definition section for these regulations contemplates that a “tape and tag” can be considered a barrier.²³

Respondent then moves to its alternate contention, pointing to the provision of the regulation allowing “adequate warning signals” where it is impractical to install “protective devices,” and from there maintains that it was impractical because the hole was being used to raise and lower equipment at the time of the accident and because “clearance issues” with the overhead I-beam precluded the use of a handrail. R’s Br. at 15. Being impractical to do more, Respondent contends that the Secretary must then show that the tape and tag were inadequate warning signals. *Id.*

Responding to the Respondent’s claim that there was no fair notice of the Secretary’s interpretation, the Secretary asserts that the plain language of the standard in fact affords such notice. Sec. Reply at 2, citations omitted. Even if the plain meaning contention is not accepted, the Secretary notes that under *Chevron U.S.A. Inc. v. Natural Resources Def. Council*, 467 U.S. 837 (1984), deference must be afforded to the agency’s interpretation as long as it is reasonable. It adds that in a given situation the issue is whether “a reasonably prudent person, evaluating the purpose of the provision and the situation with which he or she is presented, would know that the provision applies to the situation.” *Id.* at 3. Thus, the Secretary highlights that it is not an inquiry as to whether the mine operator “had *explicit* prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Id.* at 3-4, quoting *Ideal Cement Co.*, 13 FMSHRC 1346, 1351 (September 1991) (emphasis added). With that in mind, the Secretary asserts that such a reasonable mine operator would realize that a “single strand of yellow tape affixed with a tag between the head pulley and one side of the four-sided hole . . .” would not comply with the standard’s design to protect persons from falling through openings. *Id.* at 4. Further, the Secretary observes that even the yellow tape offered no protection, as employees routinely crossed that tape. Rather obviously, the Secretary notes that neither tape nor a tag provided any kind of protection to the opening for those who were working on the project.²⁴ The result here, the horrific fall of Mr. Saldana, is grizzly proof of that.

Accordingly, the Secretary contends that the tape was neither a barrier nor did it provide an adequate warning signal. Sec. Reply at 5. While the Secretary dismisses the Respondent’s contention that the use of fall protection amounts to a cover, railing or barrier, it adds that there was no protection to guard against *material* falling through the hole. Thus, putting aside the

²³R’s Br. at 14.

²⁴ As the Secretary also points out, even the fall protection harnesses were located *between* the flagging and the open hole. Inspector Small testified that he observed miners cross the tape to get to the fall protection. Thus, even that fall protection was *inside* the dangerous area. Sec. Reply at 5.

matter that a person did fall through the hole, the standard speaks to persons *or material* falling through openings.

The Court agrees with the Secretary's analysis; the plain language of the standard applied to the 4 by 5 foot (20 square foot) opening which was both below and near travelways. Railings, covers and barriers require "protection" under the standard's plain wording. Tape clearly cannot supply such protection against persons or material falling through openings.

The "work was not completed" contention and the associated claim that yellow tape satisfies the standard during such times.

To recap, the previous discussion on this aspect, the Inspector agreed that Jurado had requested a welding truck in order to weld some pins back in place in the area of the head pulley. Tr. 91. Respondent's Counsel therefore suggested that the work was not completed as welding leads would need to be sent up through the hole. However, the Inspector stated that the work was completed as far as lowering and hoisting things and that the welding truck would not arrive for some time. Tr. 92. The welding truck was called about 5 to 10 minutes before the accident occurred. Tr. 92. Either Jurado or Valenzuela had to leave the head pulley site and go get the truck. Tr. 93. On the morning of the accident, the belt installation had been completed and all the equipment for that task had been lowered down and they were in the process of reinstalling the guards for the head pulley. Tr. 95.

Accordingly, there are no real factual disputes about the work that was remaining to complete the belt replacement project; some final clean-up was needed and the guards needed to be welded back on. It is Respondent's argument that, as the operator was 'waiting for the welder' to arrive at the location to perform tasks to finish the belt replacement project, the yellow tape satisfied the standard. Thus, Respondent believes that, with those tasks remaining, the opening was somehow exempt from the standard, until those jobs were completed.

This argument may be summarily rejected. The standard does not speak in terms of any exception for work activity. Warning signals only come into play where protective devices are impractical but here there is no credible evidence that the first line measures were impractical.

The fall protection distraction; the Respondent's contentions regarding fall protection are not material to the issues in this proceeding.

Inspector Small agreed that there is fall protection equipment in Ex. 2, a photograph.²⁵ Small also agreed that he learned during his investigation that employees had donned the fall protection equipment when in the area of the fall though he added that only one person, Mr. Valenzuela, had so used that equipment when working around the hole. Tr. 90. However, the Inspector stated that fall protection is a last resort, and that other means could have been provided in this instance. Therefore, the last resort did not have to be employed. Tr. 89, 99, and Ex. 2.

Speaking to Exhibit P 9, a procedure dated August 11, 2008, Inspector Pennington agreed that it doesn't address the use of fall protection. Tr. 182. Pennington also agreed that his investigation revealed that people *had* used fall protection in the area that was taped off and that the only person he *learned of* that did not use fall protection was the victim.²⁶ Tr. 182-183.

The Court concludes that the Respondent's attempt to bring the fall protection standard into this proceeding is not material. This is because the standard does not reference fall protection. That is the subject of another, distinct, standard. Further, the Court finds that the

²⁵ The inspector agreed that he was referring to the green colored item hanging on the wall which was the equipment (i.e. a harness) that one would need to don and then hook oneself to an I beam or a crossbeam. Thus, the harness device, which is the fall protection the inspector was referring to, has to be worn *and secured* in order to provide fall protection. That equipment was present on the day of the fatal accident. Tr. 88.

²⁶ Obviously, that does not mean that all others in fact used fall protection but only that the victim was the only one he learned of that did not use it. This is an appropriate time to take note that the standard cited and at issue in this litigation is *not* about the use of fall protection. All the talk about fall protection could cause one to lose sight of that important fact. Therefore, questions from Respondent's Counsel asserting that, "if fall protection were used, [the] hazard would not exist" are a misdirection, as that is the subject of *another* standard. Wearing fall protection, for example, would not prevent materials from falling through such an opening. For the same reason, the presence of nearby fall protection does not serve to mitigate *the standard cited here*. Although the Court determined that the subject of whether or not people wore harnesses is a distraction and therefore beside the point, even Mr. Boman contradicted himself as to whether others had on harnesses on the day of the accident. Boman stated, for example, that "[w]hen I showed up later in the day [of the accident] they still weren't wearing harnesses, the witnesses." Tr. 250. Trying to repair that unhelpful admission, Counsel for the Respondent asked, "... based upon your investigation, talking to people, viewing documents, did you determine that anyone was wearing fall protection at the time of the accident?" The best Mr. Boman could offer was: "I believe there was a statement that Ralph [Valenzuela] said he had a harness on." Tr. 250-251.

presence of fall protection equipment, which was either unused or improperly used, does not bear at all upon the special findings, the topic to which it now turns.

The issue of unwarrantable failure

The term “unwarrantable failure” is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol.*, 22 FMSHRC at 353.

In defense of the unwarrantable failure charge, the Respondent contends that its conduct was not aggravated and that mitigating circumstances were present. Inspector Small's testimony, on this issue, it contends, was supported only on the basis that the opening existed and that Jurado was present. R's Br. at 18-19. Respondent believes that the tape and tag, along with its nearby fall protection²⁷ equipment mitigates any negligence. They also assert that, because there was more work to be done, namely the welding, and because that work would involve use of the opening, this is a mitigating circumstance. R's Br. at 19. Thus, Respondent believes that the inspector inadequately assessed “what activities were ongoing and the status of the project at the time of the accident.” *Id.* at 19. While Respondent acknowledges that supervisors are held to a heightened standard of care, they maintain that the circumstances here show only inadvertence, inattention or ordinary negligence, and that a lack of care at such levels does not make the failure an unwarrantable one simply because it was attributable to a supervisor. R's Br. at 20. They also contend that the fact that Jurado was present, near the opening and the victim at the time of the accident, is offset by the fact that fall protection was present and that Jurado “enforced” its use. Those considerations, Respondent asserts, refute the claim that the violation was unwarrantable.

²⁷ The Court would note again that the fall protection is not part of the determination of this violation, nor of its unwarrantable dimension. Further, to say that Mr. Jurado “enforced” its use is inconsistent with the facts, since he was present, within feet of and in the same area as the victim, when the fatal fall occurred.

The Court does not agree with the Respondent's perspective. There was a serious lack of reasonable care on Mr. Jurado's part and therefore it is found that the violation was an unwarrantable failure. As noted, Inspector Small concluded that the mine's yellow tape did not function as a barrier. The Court holds that any common sense use of the word "barrier," in the context of this standard, precludes the conclusion that tape can be considered to be a barrier.

The Inspector determined that there was high negligence and unwarrantable failure in connection with the failure to comply with the standard. Tr. 68. Freeport had knowledge of the hazard, as an agent of the company, Mr. Jurado, was in the immediate area prior to, and at the time of, the accident's occurrence. Aggravating that, Mr. Jurado was in charge of the project. Inspector Small's investigation concluded that the work had been completed, and further, he found that Mr. Jurado was not about to use the hole to bring welding equipment through it on the date of the accident. Tr. 69. Although Jurado did tell him that he had contacted the welding truck, Small determined that the hole had been left open since at least 7:30 of the morning of September 1, 2008, when Mr. Valenzuela had removed the grating, and that it remained open until the victim fell through it.²⁸ There is no claim that any railing was present around the hole between the time the grating was removed and the time Mr. Saldana fell through it. Replacement of the grating, and therefore elimination of the hazard, would only have taken a mere 30 seconds to a minute to accomplish. Tr. 71-72.

In sum, with Jurado, Respondent's management person in charge of the project, being right at the scene of the accident before it occurred and fully aware of the large opening, through which a person could, and did, fall, the violation was clearly an unwarrantable failure on the Respondent's part.

The claim that the victim was impaired

Respondent has, in the Court's view, shamelessly suggested that the reason for the fatal fall is attributable to the victim's use of drugs. Although one ought to describe these as prescription medications, which is what they were, Respondent opted to describe the victim as being "at the upper concentration limit of the therapeutic range for both oxycodone and hydrocodone" at the time of his death. They note those medications are "two different types of opiate narcotics." R's Br. at 22. On this basis Respondent blames both the victim and GeoTemps, the company that was the conduit which provided for the victim to return to the mine as a consultant for the belt replacement. GeoTemps failed, Respondent asserts, to alert the mine

²⁸ Small also determined that at the time of Mr. Saldana's fatal fall the welding truck had not arrived at bedding area Number 6. Tr. 73.

that the victim was using medication that “could” produce side effects²⁹ impacting the performance of the job.

The evidence does not support the Respondent’s implications at all.

Herrera, who had seen the victim earlier that morning, when Saldana was up on the catwalk, did not assert to the Inspector that the victim appeared impaired. Tr. 51. Herrera only spoke inferentially to the general subject of the victim’s health, stating that Saldana’s knee was hurting. Tr. 52. The inspector added that Herrera told him that Saldana seemed like himself.³⁰ Nor, when interviewed on September 1, 2008, did Mr. Jurado claim that the victim was impaired. Instead, Jurado told the Inspector that the victim was complaining about his knee on September 1, 2008. Tr. 150. Further, Jurado told Pennington that the victim was in a good mood on the day of the accident and that he did not notice any impairment with Mr. Saldana. Tr. 151. During the inspector’s investigation he never received any information leading him to believe that the victim was impaired. Tr. 52.

Like the others, Mr. Valenzuela also did *not* assert that the victim was impaired in any way. Consistent with all the interviews of those who had useful information on the subject, Valenzuela told the inspector that one of the victim’s knees was hurting. Tr. 46-47. Valenzuela never claimed to Pennington that the victim was impaired on September 1, 2008.³¹ Tr. 162.

²⁹ The Court observes that “could effect” is a long way from “did effect.” Here, there is no evidence that the victim was so adversely affected. Directly stated, he had a sore knee and nothing else.

³⁰ Nor did Herrera ever express to Inspector Pennington that the victim was impaired on September 1st. Tr. 157.

³¹ As part of his investigation, Mr. Small examined the victim’s lunch box contents, finding personal items, a watch, medication and drug testing results therein. Tr. 59. Petitioner’s Ex. 6 reflects the contents of the victim’s lunch box. Tr. 60. This investigative process included asking the victim’s employer about the drug test results. Tr. 61. Small inquired about this to learn whether the victim was on medication which could have “affected his well-being.” Tr. 61. To that end, he inquired of his employer, Geo Temps, about the drug testing, speaking with Ms. Carla Anderson. That individual advised that Geo Temps did quarterly testing because of the medication the victim was using. The victim did “fail” the tests, but only in the sense that his prescribed medications were detected by the testing. That company then required a signed statement from Saldana’s doctor, which attested that the medications did *not* impair him. Tr. 63. To be clear, the investigator determined that the victim was not using any illicit drugs and that he was not impaired. The victim was his “normal self” on the day of his fatal fall. Tr. 65, 109-110, 116.

Despite the foregoing, the Respondent, in pursuit of its claim that Saldana was impaired, points to the contents of the victim's lunch box. Tr. 100 and Exhibit P 6. Without any personal knowledge about Mr. Saldana, not having seen him on the day of the accident, Paul Boman was not deterred from expressing his belief that the victim was impaired on the day of the accident.³² Tr. 164. In contrast, Geo Temps, the company that employed the victim and drug tested him, noted that, as far as illicit drugs, Mr. Saldana passed his drug tests. Tr. 164. Even Boman admitted that was the case.³³ Tr. 164. The victim, in fact, carried his drug test results on his person. Tr. 164.

Inspector Pennington also interviewed Scott Hall, a business manager for Geo Temps, a company that provides temporary employees to mining companies. As noted, that company hired the victim, Mr. Saldana. Tr. 170. Pennington also discussed with Geo Temps' Scott Hall the subject of Mr. Saldana's drug tests. Hall confirmed Saldana was tested and that the results were negative. Tr. 172.

Pennington could not make a determination, *medically speaking*, as to whether the victim was impaired since he is not a doctor or other qualified expert to speak on that issue. Tr. 172. However, he, along with Inspector Small, made appropriate inquiry into the issue, including questioning of those who were working with the victim. Importantly, no individual, other than Mr. Boman, ever suggested that the victim was impaired. Tr. 172. Thus, it was only Boman, who didn't even see the victim at any time before his fall on the day of the accident, that claimed Saldana was impaired.³⁴

³² Counsel for the Respondent tried to elicit from Boman his opinion of the findings of the victim's autopsy report. Tr. 283. The Court sustained the objection. The Court made it clear, despite several attempts by Respondent's Counsel, that Boman was not qualified to express his opinions about the findings of the autopsy report. Tr. 283-285. This incompetence to voice his views extended to items such as whether concentrations of certain prescriptive drugs could affect the victim's decision making skills. Tr. 284-285.

³³ Thus, the Court rejects the Respondent's suggestion that because it was unaware of the medications Saldana was taking, and that it should be able to rely that its subcontractors are complying with drug policies, those claims should be viewed as mitigating circumstances. If not already clear, the basis for this rejection is that Saldana was taking prescribed drugs, but there is no evidence that those drugs impaired him, and there is no evidence that GeoTemps had failed to fulfill its responsibilities.

³⁴ The Secretary also addressed the contention that Saldana's death was impacted by the medications he was taking, noting that the Court struck Boman's attempt to opine about Saldana's health and functioning as an attempt to shift the unwarrantable dimension of the violation upon the victim. The Court agrees with the Secretary's description.

Although the autopsy report reflected positive tests for certain prescribed medications, the Inspector properly noted that all such drugs were prescribed by the victim's physician and that Inspector Small concluded that the doctor would know whether the victim would be able to work while using those prescriptions. Tr. 103. More importantly, the Inspector, operating in the realm in which he had competence, noted that from all the statements he received during his investigation, the victim was his normal self that day, other than having some pain with one knee. Tr. 104.

In sum, there was no indication that Mr. Saldana was impaired and the Court so concludes that to have been the fact. Accordingly, Respondent's claims on the issue are entirely rejected.

Even if, purely for the sake of argument, it were assumed that the victim was impaired, the violations and special findings would be the same.

Respondent persisted with its theme of blaming the victim for his own death. This prompted the Court to comment: ". . . if you're suggesting that this individual was in some sort of hazed state and therefore contributed to his own accident, there's no credible evidence from any perspective at this point [in] time . . . What I heard was that [the victim] had a sore knee . . . all you're establishing from my perspective at this point in time is the importance of having an appropriate railing or cover or barrier, not tape, that because of the vicissitudes of the mining environment and that one can never be 100 percent certain that a given employee will be 100 percent dancing on his toes . . . on a given day, this underscores the importance of having the protection that this standard envisioned to provide." Tr. 288.

The Court also presented a hypothetical to the Inspector, asking him to assume that an individual was at the site of the hole and impaired due to illicit drugs in his system. The Inspector stated he still would have cited the mine, "[b]ecause, even if the employee was impaired, anybody else could have walked through there. The company did nothing to mitigate the circumstances to put a cover or railing over that hole, and they allowed employees to walk past caution tape. [Under the Company's policy,] [t]hey don't even have to put fall protection on if they're going to walk past that hole as long as they recognize the hazard. Now, just because somebody recognizes the hazard, it don't mean they can't trip and fall while they're walking in that area." Tr. 130.

The Inspector's point is well taken. The idea behind the standard is to protect persons or materials falling through openings. Miners, and all workers for that matter, routinely come to work in varying degrees of well-being. Workers may have a cold or flu, or simply be overtired on a given day, and these factors can impact attentiveness. Then too, a person feeling quite well may still slip or lose hold of material, with the effect of either falling through such openings. Covers, railings, or barriers diminish the risk that an injury may occur in such an event.

The claim that the victim was in charge

The Respondent's view of this matter is that the deceased worker had been a long time employee of the company, having employment with it for more than 40 years. He had retired but returned to the mine because his belt conveyor expertise was needed. While Mr. Jurado was the maintenance supervisor when Mr. Saldana returned for the belt replacement job, Respondent still contends that, despite that title, it was Mr. Jurado who was learning from Mr. Saldana. Thus, Respondent blames the victim, because he had long experience at the mine and served in a supervisory role during at least some of that employment. Put another way, it is Respondent's idea that Mr. Saldana was the *de facto* boss of Mr. Jurado. This is based on the fact that Saldana was brought back from retirement because of his expertise regarding the belt changing project. Under Respondent's view, somehow this made the victim in charge of the project and responsible for the accident which took his life. This is an interesting way to shuffle the deck and deal the cards, but it is not instructive in resolving the issues here.³⁵

From there, the Respondent then turns to blaming the victim for the accident. In support of this, they note again that the tape and tag were present and that the victim was "a person directly involved with the decision to place the yellow caution tape and tagging." R's Br. at 21. No citation to the record was included with that claim about the victim's participation in the yellow tape installation. There is a reason for that; the record does not contain testimony to support that claim. Accordingly, it is unsupported. Beyond that, the Court also rejects it as an immaterial contention to the issues in any event. The victim's alleged involvement with placement of the tape, even if assumed to be the case, is not part of the violation, negligence or other findings.³⁶

³⁵ Inspector Pennington also interviewed Scott Hall, a business manager for Geo Temps, a company that provides temporary employees to mining companies. That company hired the victim, Mr. Saldana. Tr. 170. Saldana was supervised by the mine, not by Geo Temps, and in Pennington's opinion, his supervisor was Ronald Jurado. There is no legitimate evidence to the contrary in this record. Still another distraction, Respondent's Counsel asked questions of Pennington suggesting that the victim "did not have any reason to be in the area where he was when he fell." Tr. 188. A further question suggested that the victim "had no work to do in [the] area [where he fell]." Tr. 189. Again, the standard addresses *openings near travelways* through which *persons or materials may fall* and then requires that such openings be protected by railings, barriers or covers, except where it is impractical to do that. The standard does not simply apply to persons who have work to do in an area where such openings exist; its focus is the hazard of an opening through which persons or materials may fall.

³⁶ Continuing with the same theme, Respondent claims that, with the tape and tag, everyone else was aware of the opening, and so they all knew to stay away from that area unless they were tied off. Respondent's post-accident investigation determined all other workers wore the fall protection equipment whenever they were working around the hole. R's Br. at 21. This
(continued...)

Mr. Saldana brought experience and the willingness to come back from retirement to aid his former employer, but he was not in charge of the project. Mr. Jurado was the one in charge. If dominant experience and knowledge were the *sine qua non* to be the supervisor, a large number of supervisors in all walks of life would be in line for immediate demotions.

Docket Number WEST 2009-1329-M

The section 110(c) charge against Respondent Ronald Y. Jurado

Section 110(c) of the Act provides in relevant part that whenever a corporate operator violates a mandatory health or safety standard or knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d). Where violations are found to have been “knowingly” committed by individuals, as agents of a corporate operator, then appropriate civil penalties must be assessed utilizing the relevant criteria under Section 110(i) of the Act. *Secretary of Labor v. Mize* 33 FMSHRC 886, 2011 WL 2441302, April 2011.

The Commission has interpreted the meaning of the word “knowingly” as knowing or having reason to know. “A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.” *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff’d* on other grounds, 68 F. 2d 632 (6th Cir. 1982), *cert denied*, 461 U.S. 928 (1983). To clarify under what circumstances an individual may be personally liable for penalties, the Commission stated “a corporate agent in a position to protect employee safety and health has acted ‘knowingly,’ in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventative steps.” *Secretary of Labor v. Roy Glenn agent of Climax Molybdenum Co.*, 6 FMRSHR 1583, 1586 (July 1984).

The Commission has also held that “judges must make findings on each of the [statutory penalty] criteria [of section 110(i)] as they apply to individuals.” The “relevant inquiry with respect to the criterion regarding the effect on the operator's ability to continue in business, as applied to an individual, is whether the penalty will affect the individual's ability to meet his financial obligations ... [w]ith respect to the ‘size’ criterion, ... as applied to an individual, the relevant inquiry is whether the penalty is appropriate in light of the individual's income and net worth.” *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997), *Ambrosia Coal and Construction Co.*, 18 FMSHRC 819, 824 (May 1997) (Ambrosia I). The Commission further held that, if an individual is married, the judge should consider the individual's share of the

³⁶(...continued)
assertion is not material to the issues.

household net worth, income, and expenses. *Ambrosia Coal & Construction Co.*, 19 FMSHRC 381, 385 (April 1998) (Ambrosia II).

Speaking to the knowing violation issued to Mr. Jurado, Inspector Small agreed that MSHA's Charlie Sleath was a special investigator for the 110(c) matter and the individual to whom the Inspector gave his statement. Tr. 106. Although Respondent's Counsel asked Inspector Small if his statement made no claim that Mr. Jurado's knowingly authorized or carried out the violation, the Inspector responded that his statement does support a conclusion that the violation was knowing because Jurado was in the area, aware of the hole being open, aware there was no cover over the hole, nor any railing present, and he didn't know where one of his employees was, and took no action to address those issues. Tr. 107, Ex. 39. As Inspector Small put it, Jurado "turned his back to the condition," that is, turned his back to the hazard before the accident occurred, as he was over with Mr. Valenzuela looking at the guarding. *Id.*

Addressing the Section 110 (c) charge against Mr. Jurado, Respondent admits that such liability may be established upon showing that the individual "knew or had reason to know of the violative condition." R's Br. at 23. However, it asserts that the record has no evidence of the "requisite knowledge of the alleged violation on the part of Jurado." *Id.* To support this, Respondent states that Mr. Jurado was a credible witness with a history of protecting his employees, and that he was safety conscious. Respondent then adds that on the morning of the victim's fatal fall, Jurado consulted with the victim "on how to get materials up to the project area." Respondent then repeats its familiar themes of defense about the fatal accident. These include that it was determined that a handrail was not feasible, that the work was still ongoing, and that Mr. Jurado observed the tape on the morning of the victim's fatal fall. R's Br. at 23-24.³⁷

Ronald Jurado testified at the hearing in this matter. Tr. 304. In 2006, he was the area supervisor at the Morenci Mine and later became the belt maintenance supervisor. Tr. 307. The victim, Mr. Saldana, had been his boss for 26 years. Tr. 307. Essentially Jurado testified that Saldana was very knowledgeable and he was brought back as a consultant because of his expertise in the belt replacement matter and other issues. Tr. 309-310. Jurado considered that Saldana was in charge of the methods of belt replacement. Tr. 312. Though he admitted to being in charge, Jurado stated that he could not have done the belt replacement without Mr. Saldana's assistance. Tr. 312. Saldana was, after all, the maintenance supervisor for the belts at

³⁷ Respondent also asserts that there can be no 110 (c) violation where there is no unwarrantable failure. This argument needs no further discussion because the Court has found that there was an unwarrantable failure. Other contentions may be quickly disposed. The statement of Ralph Valenzuela, on December 10, 2008, that neither he nor Mr. Jurado saw where Saldana went, is completely refuted by the fact that both men were very near Saldana when he fell through the opening. So too, the idea that Saldana was supervised by Geo Temps, is at odds with the record evidence. Saldana was supervised by the mine and Mr. Jurado was his supervisor.

the mine before his retirement. Tr. 313. Jurado also stated that the opening needed to remain open only to allow the welding leads to be passed through the opening. Tr. 325. Mr. Jurado admitted that everything had been done on the project except for the waiting for the welding truck to arrive and he conceded that, based on his tailgate meetings, he was aware of the fall hazard in the floor opening. Tr. 328-329. Jurado also knew that the grating had been removed that morning. Tr. 150.

As previously noted, Ronald Pennington, was the MSHA supervisory special investigator at the time of the accident.³⁸ He conducted the Section 110(c) investigation related to Ronald Jurado together with MSHA's Charlie Sleath, who is from the Agency's Helena, Montana office. Tr. 136. Ultimately, Pennington recommended to MSHA headquarters that the 110(c) action was warranted. Documents were obtained and a number of people were interviewed as part of the investigation. Ex. P 8 represents the proposed penalty assessment for Mr. Jurado. Tr. 142-145.

Pennington marked on Ex P 2 where he believed Valenzuela was standing when the victim fell through the hole by adding a "V" on it. Similarly, he marked a "J" where he believed Mr. Jurado, the belt foreman, was standing. Mr. Herrera was in the area too, but 28 feet below, on the lower floor. Pennington stated that Jurado and Valenzuela were discussing how to replace guards on the tail pulley on the BC conveyor belt. Tr. 146. Jurado did not see the victim fall through the hole. Jurado was not facing the hole at the time of the accident, was not watching the hole opening at the time the victim fell through it, and consequently did not know where the victim was moments before the fall. Tr. 177. Pennington added that there was no work going on when the victim fell through the hole: "They were just standing around. They were waiting for a welder . . . so they could do some work on the guards." Tr. 147. Pennington noted that there was tape between the head pulley and at the BC Number 6 and the floor opening and he indicated that on Ex. P 3 and the line with the letters A and B and the word 'tape' to identify his references. Tr. 147. Mr. Boman himself admitted that Mr. Jurado was the Freeport supervisor for the belt replacement project, telling the inspector that Mr. Jurado was the person responsible for ensuring that workers used fall protection around the BC conveyor Number 6. Tr. 165, 298.

Pennington also took a formal statement from Ralph Valenzuela as part of his 110(c) investigation. Valenzuela arrived at the mine at the same time as Herrera, as they rode together. On the day of the fatality, Valenzuela's duties were the same as Herrera's; that is, they were to clean up the area and Mr. Jurado assigned them that task. Tr. 157. Valenzuela stated that he worked with the victim on the day of the fatal accident, September 1, 2008. Tr. 157. Valenzuela stated to Pennington that he was discussing with Saldana the type of guards that needed to be installed on the head pulley. Tr. 158. Some 15 to 20 minutes after Valenzuela and Saldana left one another's presence, the accident occurred. People were alerted to the incident because the victim, upon falling through the hole, landed very close to Mr. Herrera, causing the latter to yell. Tr. 159. Herrera did not witness Saldana falling, becoming aware of the accident only upon

³⁸ Mr. Pennington retired in February 2011.

Saldana's impact. Tr. 159. As already noted, the hole was open so that things could be lowered down; the grate had been removed earlier in the morning; and they were waiting for the welder. Tr. 160. Valenzuela told Pennington that the tape was up when they arrived on September 1st. When asked why the tape was present, Valenzuela didn't know what the policy was, adding that usually it is to keep people away but that the policy still allowed people to go under or around the yellow tape. Tr. 160. Valenzuela did not state that the victim had a harness on at any time. Tr. 161. Valenzuela never claimed to Pennington that the victim was impaired on September 1, 2008. Tr. 162.

Also, as noted earlier, Pennington interviewed Paul Boman, the safety director at the mine. A formal statement was taken from Boman by Inspector Sleath and him. Boman stated that Mr. Jurado was the belt maintenance supervisor at the mine and had been so for two years. Pennington's interviews also included that of Scott Hall, a business manager for Geo Temps, a company that provides temporary employees to mining companies. That company hired the victim, Mr. Saldana. Tr. 170. Saldana was supervised by the mine, not by Geo Temps, and in Pennington's opinion, his supervisor was Ronald Jurado. Jurado also conceded that, based on his tailgate meetings, he was aware of the fall hazard in the floor opening. Tr. 329.

Pennington also determined that the floor opening of approximately 4 feet by 5 feet created a hazard to anyone in the area, and that Mr. Jurado was the mine's agent at the accident site. Tr. 173. Further, he determined that Mr. Jurado knew or had reason to know of the hazardous condition. Tr. 173. The condition, that is the opening and the concomitant falling hazard, Pennington noted, was obvious and Jurado was in the area, being only 20 to 30 feet away from the hazard. Tr. 174. It is not disputed that Mr. Jurado was the belt project supervisor. Jurado knew the yellow flagging was present between the head pulley and the floor opening. Pennington also noted that there were harnesses in that area, which was "a good indication that somebody knew there was a fall hazard there." Tr. 175. Pennington also concluded that it was Mr. Jurado who decided to leave the hole open on the date of the accident during the interval between the time the belting and equipment was removed and they were waiting for the welding truck to arrive. Tr. 175. Pennington informed that the time to replace the grating was minuscule, requiring only a minute or less to do that task and the time to terminate the citation supported that conclusion. Tr. 176.

Pennington concluded that it was Mr. Jurado who was Freeport's agent and as such had the responsibility to protect his miners and that it was Mr. Jurado who was charged with enforcing the mine's drug policy at the time of the accident. Tr. 177- 178. After reviewing the information gathered from the investigation, Pennington did recommend that Mr. Jurado be assessed a penalty under section 110(c).

There is no doubt that Mr. Jurado is liable under section 110(c). He knew, as he was right there, only a short distance away, at the location where Mr. Saldana fell through the opening, of the violative condition and failed to act. Accordingly, far beyond the "reason to know" standard, Jurado knew of the violative condition but did nothing.

Appropriate Civil Penalties.

Section 110(i) of the Mine Act sets forth the six criteria to be considered in determining an appropriate civil penalty.

For WEST 2009-442-M, the section 104(d)(1) order, number 6449725, issued to Freeport-McMoran Morenci, Inc., the Court has considered the evidence of record, the gravity, negligence, its finding that the violation resulted from an unwarrantable failure, and that a fatality resulted, together with the mine size, violation history, good faith abatement, and effect on ability to continue in business. There is no recognizable mitigation in this matter and the penalty is appropriately assessed at \$70,000.00 (seventy thousand dollars), although a larger penalty could be justified because a second, very serious, injury was narrowly avoided simply by luck.

For WEST 2009-1329-M, the section 110(c) action brought against Mr. Jurado, each of the parallel penalty factors were considered, as adapted where an individual has been assessed a penalty for a violation and per the earlier discussion of this issue. Respondent offered no evidence to contradict MSHA's finding that Mr. Jurado can pay the assessed penalty regarding his ability to meet his financial obligations nor to challenge the penalty in light of his income and net worth. The proposed assessment of \$7,000.00 (seven thousand dollars) is fully warranted and the Court imposes that amount. As with the violation for WEST 2009-442-M, a higher penalty could be justified because of the narrow avoidance, through sheer luck, of another miner being seriously injured.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), the Court assesses the civil penalties amounts as identified next above. Within 40 days of this decision, the Respondents are **ORDERED** to pay the respective penalties, as imposed. Upon payment of those penalties, this proceeding is **DISMISSED**.

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

Distribution:

Leon Pasker, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700,
San Francisco, California 94103

Laura E. Beverage, Esq. and Dana M. Svendsen, Esq., Jackson Kelly PLLC, 1099 18th Street,
Suite 2150, Denver, CO 80202

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREEN TREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: (412)920-7240
FACSIMILE: (412)928-8689

October 17, 2011

ALBERT F. GAROFALO,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. PENN 2010-471-DM
	:	MSHA Case No. NE MD 2010-04
	:	
PENN BIG BED SLATE CO., INC.,	:	Mine ID: 36-00207
Respondent	:	Mine: Manhattan Quarry

DECISION

Appearances: Steven E. Krawitz, Esq., Krawitz & Krawitz, P.C., 553 Main Street,
Stroudsburg, PA, for Complainant

John P. Karoly III, Esq., The Karoly Law Firm, LLC, 1555 North
Eighteenth Street, Allentown, PA, for Respondent

Before: Judge Andrews

This case is before me on a complaint of discrimination filed by Albert F. Garofalo (“Garofalo”) against Penn Big Bed Slate Co, Inc., (“Respondent” or “Penn”) pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the “Act”), 30 U.S.C. §815(c). A hearing was held in Harrisburg, Pennsylvania on May 12, 2011.

I. Background

Garofalo filed a discrimination complaint on March 18, 2010, alleging that he was fired by Respondent and owner Pete Papay (“Papay”) after complaining about numerous dangerous conditions. By letter dated April 23, 2010, Garofalo was informed that, following an investigation and review of the information gathered, the Mine Safety and Health Administration (“MSHA”) had determined that there was no violation of Section 105(c) and that discrimination within the confines of the Act did not occur. That decision was appealed by letter dated April 27, 2010. Garofalo also filed a handwritten letter dated May 25, 2010.

A hearing was originally scheduled for January 11, 2011; however, since Papay had not perfected an answer to the complaint, an order to show cause was issued on January 3, 2011. Papay submitted an answer to the complaint dated January 5, 2011. The hearing was rescheduled for April 21, 2011, but continued to May 12, 2011, on request of counsel for Respondent.

II. Contentions

Complainant Garofalo contends that he was employed by Respondent from 2005 until November 16, 2009, and his rate of pay at discharge was \$11.80 per hour with a forty-five (45) hour work week. Further, he asserts that he was fired on November 16, 2009, after complaining on November 13, 2009, about another employee burning rubbish and plastics indoors in a stove creating hazardous, acrid and smoky conditions in the building; and, upon notifying Papay he intended to report the conditions to both OSHA¹ and MSHA. Garofalo contends that he had also complained five (5) times since March 3, 2010, and on May 25, 2010, he called an MSHA inspector about dust violations created by machinery in the building. Finally, he argues that he was turned down for unemployment compensation because his employer stated that he was terminated for fighting.

Respondent contends that Garofalo had been laid off before on June 24, 2008, and it attempted to help him by calling him back on September 8, 2009, when work increased. It argues that Garofalo started a fist fight on Friday, November 13, 2009, and was sent home. When Garofalo returned to discuss the incident with Respondent on Monday, November 16, 2009, it asserts that he was insubordinate, loud, and arrogant and, therefore, was terminated for willful misconduct and the safety of the other workers. Respondent further avers that no complaint was made to MSHA for many months; and, it had no reason to believe that Garofalo had called MSHA until January 2011, when his May 25, 2010 letter was received. Finally, it argues that Garofalo's claim that he was fired for threatening to call OSHA and MSHA was fabricated.

III. Stipulations

- A. Complainant was an employee of Penn Big Bed Slate Co., Inc., prior to his termination on November 16, 2009.
- B. Complainant was receiving a rate of compensation of \$11.80 at the time of his termination.
- C. Complainant did appeal the February 18, 2010 decision by the Unemployment Compensation referee denying Garofalo unemployment benefits.
- D. The United States Department of Labor, Mine Safety and Health Administration, Special Investigator, Rodney Rice, conducted interviews of Mr. Garofalo and Mr. Papay as part of an investigation concerning Mr. Garofalo's allegations in and around March of 2010, which resulted in no adverse finding against Penn Big Bed Slate Co., Inc.

¹ "OSHA" refers to the Occupational Safety and Health Administration.

IV. Legal Principles

Section 105(c) of the Act prohibits discrimination against miners for exercising any protected right under the Act. Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

A complainant alleging discrimination under the Act establishes a *prima facie* case of prohibited discrimination by presenting evidence to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd* on other grounds *sub nom.*; *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (Apr. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Robinette* 3 FMSHRC at 818, n. 20. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817; *Pasula*, 2 FMSHRC at 2799-2800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

V. Analytical Framework

Section 105(c) of the Act prohibits discriminating against a miner because of his participation in safety related activities. Congress provided this statutory protection to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S.

Rep. No. 95-181, at 35 (1977), *reprinted* in Senate Subcomm. on Labor, Committee on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). It is the intent of Congress that, “[w]henver protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made.” *Id.* at 624.

Garofalo, as the complainant in this case, has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, Garofalo must establish that he engaged in protected activity, and that termination of his employment was motivated, in some part, by that protected activity. *See Pasula*, 2 FMSHRC at 2797-2800 (Oct. 1980), *rev’d* on other grounds *sub nom.*; *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Robinette*, 3 FMSHRC at 817-818 (Apr. 1981).

Factors to be considered in assessing whether a *prima facie* case exists include the operator’s knowledge of the protected activity, hostility or “animus” towards the protected activity, timing of the adverse action in relation to the protected activity and disparate treatment. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2510 (Nov. 1981).

Respondent may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or, that the termination of Garofalo was not motivated in any part by his protected activity. *Robinette*, 3 FMSHRC at 818 n. 20. Respondent may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity, and that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d at 750 (citing with approval *Eastern Associated Coal Corp v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987)); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-959 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-196 (6th Cir. 1983)(specifically approving the Commission’s *Pasula-Robinette* test).

VI. The Evidence

1. Documentary Evidence

A. Exhibit D-4

A photocopy of a page of Owner Papay’s daily log book contains two entries with the heading of “Albert Garofalo”

11/16 Fired for fighting

11/13 Albert started a fist fight with James German. I sent him home at 8:45 and Jim at 12:00.

Albert picked a fight with Frank on Mon 11/9/09 over a hammer.

He thretended (sic) Chuck and had arguments with Skip, Tom, Antz and Jim several times.

Erik warned them the week before, when Albert picked a fight with Frank. I would have fired Albert right away but I felt that he would have hurt someone under the circumstance. I talk to him on Monday morning and he says everyone is wrong.

B. Exhibit C-1

On the day of his termination, November 16, 2009, Garofalo initiated an Unemployment Compensation claim by calling the Pennsylvania Department of Labor and Industry and, later, filling out his Claimant Questionnaire and Employment Separation Questionnaire. Both the claimant and employer questionnaires were executed on November 19, 2009. The statement of Garofalo is set forth in its entirety:

This Company had a lot of violations and inappropriate (sic) behavior since I started on 9/8/09. To begin with, the building I work in is hanging on the edge of the cliff of the Quarry. It could fall in the hole anytime. I have been harrassed (sic), my tools have been food spit on them. I reported this to the employer, but nothing was done about it. The forklifts have no brakes and gas pedal isn't working. I told my employer and he did nothing. I work in front of a very dusty machine and in front of a big door 12' X 12'.² My employer will not do something to eliminate the dust problems. The employees who run this machine do not wear dust masks and they harrass (sic) me to open the door to let the dust out, instead of complaining to my employer to correct the problem. My employer told me to keep the door open even if it is 25 degrees below zero or if the sun is shining in my eyes. And he didn't care if I got sick. The platforms are broke and falling apart and can cause serious injuries. They are used to transport slate from one building to the building that I work in. One employee - his name is James German has been burning plastic in his stove inside the building where I work with the doors closed and his lid of the stove open. I told my employer about it and he said that he does it all the time. I said to my employer that it is toxic and can kill you and he said if you don't like it, go home. He did it before I started working here and was reported to the labor board by other employees. He was involved in a fight with another employee with broken ribs and was reported to the labor board. On 11/13/09 James German was again burning plastic with the doors closed and the building was being filled with smoke and one of the employees running the dusty machine, his eyes was watering and burning from the smoke was telling me to open my door. Instead of telling James German to stop burning plastic or have other employees to tell him to stop or complain to my

² The facility where Garofalo worked is essentially a large metal garage with four large garage doors of approximately equal size and one entry doorway. Inside, the slate is split, so the interior tends to be somewhat coated with a black dust that comes off of the slate. A large pot belly stove sits in a corner away from the doors. Ex. D-11.

employer about it, they made me open my door. I argued with them and James German stepped in started a fight with me. My employer told me to go home and come back on 11/16/09. I came back to work and after I punched in my timecard, he said any more trouble from you, you are fired. I told him I am not the problem here and I didn't burn plastic. I told him if he does it again I will report both of you to the labor board and he fired me. Currently this Company is under investigation by OSHA and has been given a time period to fix all the faulty wiring throughout the Company. If my employer would have corrected these violations, if he would have stopped the harrassments (sic), if he told James German to stop burning plastic, if he would stop breaking the law, this scuffle would not have happened.

In the Employer's Questionnaire, Papay gave as the reason for separation, "He started a fist fight."

And, in describing the incident that caused the separation, Papay wrote:

He punched James German in the face and they went at it very bad. I had to get between them. It took me and two others to pry them apart. This was on the Friday 11/13/09 at 8:45. I sent them home. And fired Albert on Monday morning.

As the adverse effect suffered by Respondent, Papay wrote, "James German and Albert bloodied each other (black eyes, bloody nose stopped 7 men stopped work."

Papay wrote another statement dated November 20, 2009. This statement, in pertinent part, is as follows:

Albert was layed (sic) off on June 24, 2008. He was called back on September 8th, 2009, when work picked up.

Albert started a fist fight on Friday November 13, 2009. My imediate (sic) reaction was: I broke it up with the help of a few others and sent Albert home to avoid any more trouble.

When he came to work on Monday Nov 16th he loud and arrogant (sic). I fired him. I can not allow this in our work place and he was ready to start trouble all over.

On November 23, 2009, for the employer's reason for separation, Papay again wrote, "Albert punched James German in the face and continued to fight."

In the Notice of Determination, dated December 16, 2009, the Unemployment Compensation Representative found that the Claimant was discharged for fighting, and since

there was insufficient information to show whether he had good cause for fighting, his actions constituted willful misconduct and benefits were denied. This determination was appealed to the Board of Review. In the Petition for Appeal, Garofalo wrote:

An employee was burning plastic in his stove with the lid open inside the building where I worked and started the fight. I asked to stop and he said no. It was dangerous and not safe to breath (sic).

C. Exhibit C-2

The hearing before the Board of Review Referee was held on February 17, 2010. The testimony of both Garofalo and Papay will be summarized.

Papay testified that Garofalo had been employed at another location of the company prior to 2008. He had talked to John Dally, Supervisor and General Manager at that location and was told that it would be a problem if Garofalo was brought back to work since there had been several warnings, two or three fights, and he had been arrested for one of those fights. Papay was also told that Garofalo did not get along with most of the other employees, who would probably refuse to work with him. However, Papay thought he could work this out and, in September 2009, called Garofalo back to work at his location because he was a good splitter. But, Garofalo had a few arguments, requiring the General Manager to go and break them up, and just could not get along with the rest of the guys. He stated that the employees, when starting the fires, would open the doors so smoke would leave the building. He testified that on the morning of November 13th, the doors were open and he was with customers about forty feet away when he heard noise and could tell something was going wrong. By the time he got there, both Garofalo and German were hammering away at each other. He and another employee pushed them out the door and separated them, but Garofalo went back and they had to be separated a second time. He told Garofalo to go to the office. Papay described Garofalo at that time as very obnoxious, hollering, and telling Papay what he was going to do to German - "kick his ass", "clobber him", and "punch him". Papay did not want the fight to start all over and sent Garofalo home. When Garofalo returned on Monday morning, Papay asked if he was going to do his job without a problem, and Garofalo responded that if anything was done to bother him, he would knock [German's] block off. At that point, Papay said he could not tolerate this behavior and fired Garofalo.

Garofalo testified that on the morning of November 13, 2009, German was burning plastic in the building with the doors closed, and the building filled up with smoke. He told German to stop, went over and put the lid on the stove. German grabbed him from behind and they scuffled. Papay sent him home. When he went back to work on November 16, 2009, Papay said that he did not want trouble from him. He told Papay that he was not the one who burned plastic in the stove, and if German burned it again, he would report both of them. Papay replied, "No, you're not, you're fired." Garofalo further testified that he had been harassed every day by people telling him to open the doors and let the dust out.

In further testimony, Papay stated that there were never any discussions about reporting the situation or circumstances, and that German had, to his knowledge, never been in a fight with someone else. Papay recalled that it was Garofalo who had almost gotten into a fight with another employee, Frank, when a part of a hoagie was left in Garofalo's work area. When asked about German, Papay testified that he was a good, reliable employee who keeps to himself, does not talk much, and had never been a problem.

D. General Documentary Evidence

Although the decision made by the Referee was not received by this office, it is apparent from the contentions set forth above that Garofalo's unemployment compensation was once again denied.

The Discrimination Complaint executed by Complainant Garofalo on March 18, 2010, alleged discriminatory action on November 16, 2009, committed by Penn Big Bed Slate Co., Inc., and Owner Peter Papay. The summary is as follows:

I was fired by my employer Penn Big Bed Slate Company, Inc., and Pete Papay, owner, after complaining about numerous, dangerous conditions which my employer has permitted to exist and continue, which included burning rubbish and plastics inside one of the buildings I work in as well as dust created by machinery in the building, bad brakes on the forklift, and other conditions. In particular, on my being fired on November 16, 2009, the particular problem involved James German, another employee, burning rubbish and plastics indoors, creating hazardous, acrid, smoky conditions in the building in which I was trying to work (Papay would not pay or contract for a dumpster). After I notified Mr. Papay, his response was essentially that he refused to correct the situation other than to tell me to "open the doors." I told him that I intended to report the condition to OSHA and MSHA and Papay replied, "Oh no you're not [going to report to OSHA and MSHA], you're fired."

In an attached letter, dated March 17, 2010, Garofalo stated that he did not know that he had a sixty day period to report the conditions and retaliation until he spoke to a lawyer at the end of February. This letter continued:

I was turned down for unemployment because employer claimed I was "fighting," and that was the reason for my discharge, but he did not fire me until I told him that I intended to report the unsafe conditions to OSHA and MSHA. Moreover, the guy I was "fighting" with, who attacked me, was not fired for fighting. I have appealed the decision of the Service Center denying my unemployment benefits on the same basis.

On March 29, 2010, Garofalo gave a statement regarding discrimination in an interview with a Special Investigator for MSHA. The recording was transcribed and is summarized.

Garofalo stated that he was a stone cutter and also ran a forklift and other machines. He admitted that he had received verbal, but not written, warnings from the company. He said he was sent home on November 13th and fired on November 16th. He told Papay about the burning of plastic in the stove, about the dust, and other hazards, but Papay would not fix them. He stated he did not start the fight, and the other person involved was not fired. He said that Papay fired him for reporting to OSHA and MSHA. He told of getting along with everybody else and believed he should have his job back, unemployment, and that he was wrongfully discriminated against. Ex. C-3.

The following day, March 30, 2010, Papay gave a statement to the same Special Investigator. Papay stated that his position with the company is President, with the authority to hire and fire, direct and supervise the workforce, conduct inspections and many duties that go with mining operations at the slate quarry. He rehired Garofalo on September 9, 2009, because Garofalo had been out of work for quite some time and he felt sorry for him; however, Garofalo could not return to the former job location because he did not get along with anybody there. Papay stated that when Garofalo came back to work, he was told that he had to get along with the people he was working with. He testified that he had to give verbal notices to Garofalo, noting that he did not get along with anybody in his roofing department. He said that Garofalo did not talk politely to anybody, including Papay, and used a lot of foul language. Papay further recalled that Garofalo gave everybody nicknames like “asshole” and “jerk,” got into arguments, including an argument with a deaf coworker. He stated that about two weeks prior to the fight, Garofalo had “flipped out” and gotten into a screaming match with two coworkers because one of them had left a hoagie in Garofalo’s work area. He further testified that Garofalo had started the fist fight broken up by Papay and a couple of others and described Garofalo as “totally out of control, screaming, hollering, and threatening.” He stated that Garofalo was not fired at the time, but told to come back on Monday. Papay described Garofalo as loud and arrogant upon his return, telling Papay he was “gonna show that guy.” Garofalo was told he could not come back with that attitude, a man like a loose cannon could not be in the workplace. Papay said Garofalo gave more attitude and was loud, and it was Papay’s decision to terminate him. Papay went on to say that he never heard Garofalo mention OSHA or MSHA until the time of the unemployment hearing. He noted that, in the past, Garofalo had signed a policy letter and was aware of the company’s harassment policies. Ex. D-3.

The Dally Slate Company memo styled as “Workplace Harassment Policy Reminder” was issued to all employees by John T. Dally, Jr., President, on April 24, 2002. The memo sets forth, in pertinent part, the following:

The management of the company considers incidents of harassment of employees by other employees to be a very serious matter. All employees are reminded that any type of verbal or physical harassment of a fellow employee or group of employees will not be tolerated and an employee found to be participating in such conduct will face discipline, including immediate discharge. All employees are also reminded that by participating in acts of harassment brings legal action against the company and/or the employee or employees involved.

By signing the bottom of this memorandum, you acknowledge that you have received and understood the contents of this notice[.]

By letter dated April 23, 2010, Garofalo was notified of the determination of the Special Investigator that the facts disclosed did not constitute a violation of 105(c), and therefore discrimination within the confines of the Act did not occur. On April 27, 2010, through counsel, Garofalo appealed this decision.

The evidence of record shows that prior to March 2009, and as early as May 2007, there were no citations issued to Respondent for dust or smoke. Sampling in August 2008, measured below permissible exposure limits. Further, during the period of employment from September 8, 2009, through November 16, 2009, there were no complaints or inspections documented. After the relevant period of employment, beginning on December 21, 2009, an inspection did result in citations being issued, but none involved dust or smoke. Ex. D-8, attachment No. 3; Ex. D-13; and facsimile submitted by Respondent on June 12, 2011. The five samples taken for respirable dust during the inspection that ended on January 7, 2010, were all found to be in compliance. Ex. C-4, Tr. 115-119, 162.

On February 25, 2010, OSHA received notice of alleged hazards at Penn, identified as forklift brakes not working and damaged slate transport platforms. Ex. C-4; Tr. 59-61. On March 1, 2010, a verbal hazard complaint was called into the MSHA District Office. Seven dust samples were taken on March 4, 2010, and March 9, 2010, and three revealed overexposure resulting in citations being issued. During this inspection, it was determined that the forklift brakes were in good condition, gas monitor readings for toxic smoke were negative, and the building was designed and constructed to be on the edge of a cliff for slate disposal. It was noted that the operator was unaware that a dust problem existed, since there had been sampling before with no overexposure. Thereafter, water was added to control any dust, and sampling for dust after May 10, 2010, was negative. Ex. C-4, Tr. 35-58, 62-81, 84-94, 172-174, 194.

On May 27, 2010, the Federal Mine Safety and Health Review Commission received a hand written letter from Garofalo dated May 25, 2010. He stated that on that day he had called a MSHA inspector and was told of five dust test failures since he had filed his MSHA complaint on March 3, 2010. He had also been told by the interviewer on March 29, 2010, that Penn had a long history of repeated violations. He further wrote that trash was burned inside and outside the building since Papay would not contract for a dumpster, which was an act of willful misconduct in disregarding the health and safety of employees. He reported that an employee had recently been forced to quit because of lung cancer from the dust violations. He believed he had been terminated on November 16, 2009, because he threatened to call MSHA about numerous violations, because of the harassment of the employees regarding the doors, and because coworkers were burning rubbish in the stove inside the building where he worked.

Pursuant to the Order to Show Cause of January 3, 2011, Penn owner Papay promptly submitted an answer consisting of a statement and six "exhibits" considered attachments to the statement. In the statement, he wrote:

- That Garofalo was terminated for fist fighting after he left his work area, went into another room, and started hollering and swinging;
- That Garofalo's quote of him saying, in effect, "oh no you are not going to report to OSHA and MSHA you are fired," is totally fabricated;
- That he did not know of Garofalo's letter of May 25, 2010, until he received a copy in January 2011;
- That the employee Garofalo said was forced to quit had liver cancer; and
- That he tried to help Garofalo by calling him back to work and talking to him about his attitude and ability to get along.

The first attachment to the answer statement consists of the statement of Papay dated November 20, 2009, and set forth above as part of Exhibit C-1. The second attachment to the answer is a copy of Garofalo's letter of May 25, 2010, already summarized, and the third is a Summary Report from the Mine Data Retrieval System for the period of April 8, 2008, through December 21, 2010, showing only twenty-one violations over the thirty-two month period.

In attachment four, Papay noted that Garofalo was unhappy with his job, was constantly boisterous, volatile and agitated, and that "most felt a bit threatened by his tone and demeanor." Garofalo had been terminated because of inappropriate behavior, which was provocative, intemperate, volatile and antagonistic. He stated that no employee has the right to engage in insubordinate and disruptive behavior, and this was definitely not a case of retaliation for raising a safety issue.

Attachment five contains a copy of an email from the wife of the employee with liver cancer about an exchange between Garofalo and a relative. In the exchange, Garofalo said that the employee should sue the quarry, but the employee's wife advised the relative to tell Garofalo "no."

The final attachment, number six, is a statement written in response to and on a copy of the complaint summary of March 18, 2010. As to the alleged dangerous conditions, Papay stated that someone had thrown lunch wrappers in a pot belly stove, and he had made an employee point out the scrap can. This statement continued:

Albert and others work in a room that have (sic) garage doors within 3 feet of their work area. 3 men wanted the door open as they normally did on nice days. Albert would close it, they would open it, Albert would close it.

Albert never threatened to call OSHA or MSHA.

The answer of Papay, as above, was also submitted as Exhibit D-8. The hearing before the undersigned was held in Harrisburg, Pennsylvania, on May 12, 2011.

2. Hearing Testimony

A. Testimony of Albert F. Garofalo, Complainant

Garofalo testified that he worked for Dally Slate Company at the Pen Argyl location beginning in 1977 for two (2) years, and again from 1993 until 2005, when the company merged with Penn, and he was laid off. Tr. 14,15,18. He returned to work for about one-and-a-half years until June 24, 2008, when he was again laid off, and collected unemployment. Tr. 16. He was called back to work at Penn, at a different location, Slatington, on September 8, 2009, and worked there until discharged on November 16, 2009. Tr. 18, 19, 29, 30.

He also testified to many years of experience splitting slate for roofing. This is done by hand, using a hammer and chisel. He also operated a forklift. Tr. 17, 19. At the Penn Slatington location, he worked in a building with a large room and three (3) garage doors opening to the outside, and an adjoining smaller room with both a garage door and an entry door to the outside. The rooms are separated by a wall with an opening. Tr. 20-21, 72; see also Ex. D-11. His work area was close to the garage door next to the adjoining room. Tr. 22. In the adjoining room, there is a potbelly stove with a lid on top used for warmth on cold days. Tr. 24, 71, 78.

As he began to work on Friday, November 13, 2009, he saw through the opening between the rooms that employee James German was starting a fire in the potbelly stove with wood, coal, plastic quart and gallon juice containers, plastic microwave-type food containers and plastic utensils taken from the garbage can. Tr. 23-24, 97-99, 103, 137-138. The lid was off the top of the stove, and this would cause smoke to fill up the room. Tr. 24. There was also dust in the room. Tr. 25. He opened the garage door, walked into the next room and put the lid on the top of the stove to stop the smoke. Tr. 25, 43. German then told him to go back where he belonged, grabbed him from behind by his right shoulder and they wrestled for couple of minutes. Tr. 25. No punches were thrown, they were both held back by other employees and Papay and they did not go outside the building. Tr. 26, 67-68. Papay sent him to the office and talked to him about getting along with other people. Papay then gave him his paycheck, sent him home and told him to return to work on Monday. Tr. 27-30, 110.

When he returned on Monday, November 16, 2009, Garofalo told Papay to correct the smoke problem or he would report it to MSHA. Papay told him he would not, and fired him. Tr. 30. He was not arrogant or belligerent with Papay, and did not say he was going to knock German's block off. Tr. 60-61. He went home and called the unemployment office. Tr. 30-31. He filed a claim in which he wrote that he intended to report Papay to MSHA. Tr. 37. In February 2010, he gave statements to MSHA investigators about dust, smoke, forklift brakes, broken pallets and the building he worked in hanging over a cliff. Tr. 49-50.

In further testimony, he acknowledged that there had been a number of arguments with fellow employees at Dally Slate. Tr. 85. Additionally, in 2006, while at Dally Slate, he received a police citation for assault, plead guilty, and paid a fine. Tr. 78-82. He also had issues at Penn with employees Frank, Tom and Chuck. Tr. 133, 135.

B. Testimony of John Dally

Mr. Dally testified that he was the President of Dally Slate Company from 1998 until the merger, and then became a division manager for Penn. Tr. 159. He believed that Garofalo had been employed since approximately 1993. Tr. 161. He recalled that Garofalo fairly regularly had verbal confrontations with other employees, as well as a physical altercation with employee Davidson. Tr. 162-163. When told of the altercation, Dally went to the area and found Davidson on the ground. Garofalo said that Davidson had just fallen backwards. Tr. 174.

Dally further testified that despite Garofalo's verbal arguments with other employees with whom he came in contact, and even after the altercation with Davidson, Garofalo was not fired because he was a very good splitter. Tr. 166. In 2009, he was re-hired because of his skills. Tr. 181.

C. Testimony of Peter Papay

Papay testified that he has been the President of Penn since 1994 and also has forty-four (44) years of experience in the slating business. Further, he has performed every job in the business. Tr. 186-187. He hired Garofalo back because he needed a splitter due to an increase in orders. *Id.* On the first day, he told Garofalo that he was aware Garofalo had been a troublemaker who had caused a lot of problems with other employees and that his problems would not be tolerated. Tr. 188. However, the problems started about seven (7) days later and Garofalo had to be reprimanded several times for calling other people names. Tr. 189-190. Garofalo was not getting along with anyone and could not get through a day without having a problem. Tr. 222. There were no written reprimands, but many verbal warnings. Tr. 266-267. Garofalo would complain to him about the work of the other employees, but Papay found that these complaints were invalid. Tr. 257-258.

3. Post Hearing

The parties submitted post hearing briefs and Complainant submitted a reply brief after the conclusion of the hearing and receipt of the transcript.

VII. Findings and Conclusions

1. The *Prima Facie* Case

Initially, Garofalo must prove a *prima facie* case of discrimination by establishing that he engaged in protected activity and that Respondent took adverse action against him motivated, in some part, by the protected activity. While reporting, or telling an employer that you are going to report, violations to MSHA (or OSHA) is certainly protected activity, Garofalo cannot prove by a preponderance of the evidence that Papay's decision to fire him was based upon such actions.

This result is necessitated by the fact that I am unable to find Garafalo to be credible either in his writings or his testimony. Many of his statements are inconsistent with the clear weight of the evidence surrounding his employment at Penn and Dally Slate. It is well established that he did not get along with the other employees, and that he was the reason for the conflicted workplace relationships. Yet, on March 29, 2010, to the Special Investigator, he reported that he got along with everyone. Despite Papay's pointed warnings at the time he was hired in September 2009, Garafalo did not make the effort to get along with his coworkers. Indeed, in his testimony at the May hearing, he acknowledged that he had had arguments and an assault citation at Dally Slate, and also had "issues" at Respondent Penn with employees Frank, Tom and Chuck.

Garofalo has authored unreliable claims, and in testimony has been an incredible witness. Throughout the entire process of pursuing the unemployment and discrimination claims, he has made incorrect and unsubstantiated comments about Respondent, owner Papay, and the other employees. His characterization of the fight and his termination both in written statements and testimony is unbelievably benign and has not been consistent. His story that German started the fight is not believable when considering his history of verbal and physical abuse of fellow employees, and the findings of Papay upon questioning witnesses present at the time that Garofalo started the fight. He also made claims that Respondent had a long history of repeated violations. Upon checking the violation history, Respondent's Quarry was cited for only twenty-one violations between April 8, 2008, and December 21, 2010, and multiple violations of a particular safety standard are not shown.

In his discrimination complaint of March 18, 2010, Garofalo alleged that he was fired after complaining about numerous dangerous conditions. However, in earlier statements pursuant to the unemployment claim and appeal, the complaint was of burning rubbish in a stove and he had threatened to report Papay on that basis, not numerous conditions. In his March 29, 2010 statement, he again brought up numerous conditions. But it was after his termination that he began listing various alleged violations at the mine, and on investigation the claimed violations were not substantiated. One example is the statement made on the questionnaire of November 19, 2009, that the company was under investigation by OSHA (meaning MSHA) and had been given a time period to fix all the faulty wiring throughout the company. There is no evidence of such an agency directive regarding widespread electrical problems. In fact, only one citation was issued at the regular MSHA inspection in March 2009, months before his employment, and no other citations until the next regular inspection beginning in December 2009, well after his employment was terminated. Further, Garofalo made claims that an employee was forced to quit when he became ill from lung cancer due to the dusty atmosphere. The employee actually has liver cancer and his family was put in the awkward position of having to turn down suggestions from Garofalo to sue Respondent. Finally, his demeanor at hearing when responding to questions was hesitant with some evasiveness as he appeared to be searching for the answer best suited to his claims.

Papay, however, has consistently stated that Garofalo did not mention reporting him to MSHA, and has opined that this was fabricated. He credibly testified that Garofalo never made

the statement concerning reporting him to OSHA and MSHA, so he was completely unaware that violations would be reported. Although Garofalo claims that he made repeated complaints to Papay about the dust and smoke conditions and threatened to report him to MSHA and OSHA, this claim is unsubstantiated by the record. To the contrary, the inspector for MSHA who issued the citations for dust overexposure months after the termination noted that Papay seemed genuinely surprised that the samples were out of compliance because they had never received a citation for dust or smoke. There is no evidence to corroborate Garofalo's claim that he threatened Papay with reports to MSHA or OSHA. In fact, the only corroborated complaint concerned the throwing of food wrappers into the stove. Papay had an employee point out the "scrap can" to the other employees.

Moreover, Papay's statements regarding the fight have been quite consistent. After the fight was broken up, he first sent Garofalo home to prevent additional fighting, and then sent German home, both to return on Monday. He then investigated the circumstances with employees who were in the building at the time. He learned that Garofalo had started the fight and thrown the first punch. Similarly, Papay's statements regarding the events of Monday morning have been quite consistent. German was counseled first, and agreed to get along, and "shake hands". But when Garofalo was counseled, he displayed loud, threatening and insubordinate behavior. Considering the safety of his employees, Papay could not allow this kind of attitude in the workplace; thus he immediately terminated Garofalo's employment.

Considering the credible evidence and testimony of record, I find that Respondent did not have knowledge of Garofalo's reports to MSHA, or indeed, of any intent by Garofalo to submit a safety complaint until long after the termination and only upon institution of legal proceedings.

Based on the credibility determinations set forth above, I place the greater probative value on the statements and testimony of Papay. Since I am unable to find significant probative value in the statements and testimony of Complainant Garofalo, the weight of the evidence compels the conclusion that the claimed protected activity did not occur.

Second, Respondent does not show any hostility or animus toward MSHA safety procedures and/or standards. In his testimony, Papay clearly states that MSHA inspections and citations are both routine and expected. Rather than displaying anger or hostility, he seemed more resigned that this is what mines must live with in order to operate. In reviewing all of Papay's writings, statements and testimony, I found nothing that would establish even a negative attitude towards complaints of safety at the mine. Also not established is any history of an intolerant attitude toward safety related complaints. Based on the foregoing, I find that Respondent did not display animus or hostility toward MSHA policy or procedures, including protected activity.

Third, the timing of the adverse action is entirely separate from any alleged protected activity. Garofalo was terminated on November 16, 2009. He began reporting to MSHA and OSHA months after this termination. The only way that the timing of the protected activity and

adverse action could be in relationship to one another would be if Garofalo actually threatened to report Respondent to the Labor Board, OSHA or MSHA. Based on the credibility discussion above, I find that Garofalo did not make the threat and, therefore, he engaged in what would have been protected activity after the adverse action occurred.

Finally, Garofalo argues that he was treated differently because of his threat to report Respondent's Quarry to MSHA and OSHA. It is a fact that German was sent home the day of the fight, but then allowed to return to his job even though Garofalo was fired. However, Garofalo had a long history of altercations, both verbal and physical, with other employees, including an arrest for one such altercation. On Monday morning, upon counseling by Papay, German agreed to get along with Garofalo and "shake hands." In contrast, Garofalo displayed aggressive and insubordinate behavior and stated that he would take further violent action if anything was said to him. Although Garofalo has argued that German had the same history of problems with coworkers, there is no evidence to substantiate this claim. Papay testified that he had no knowledge of any such problems with German. Papay's statements include the observation that German was a reliable employee who mostly kept to himself. Based on the differences in the employees' work records and behavior, including their interactions with Papay, I find that the different treatment in this particular situation was justified.

Based on the foregoing, I find that Garofalo has failed to establish a *prima facie* case of discrimination. His request for reinstatement and compensation for the alleged discriminatory action should, therefore, be denied.

2. Rebuttal

Although I have found that Garofalo has not proven a *prima facie* case of discrimination, even if he had, I would have found that Respondent successfully rebutted it. Respondent argues, and I agree, that no protected activity actually occurred here. While reporting safety standard violations is protected activity, Garofalo was no longer Respondent's employee when he complained. This case more resembles that of a concerned citizen or disgruntled former employee reporting violations to an agency. This may be responsible behavior, if the reports are correct, but it is not protected activity in the context of the Mine Act.

It follows that even if complaints raised but not reported for months after termination, and with no employer knowledge of such complaints, could be considered protected activity, I would still find that the adverse action was in no part motivated by the protected activity. Garofalo was terminated for precipitating a fight, failing to agree to make amends, and failing to agree to get along with coworkers or behave appropriately in the workplace. His history of verbal and physical altercations dating back to the first time he was employed by the company strengthens the decision to terminate taken by Papay, acting as owner of the mine and supervisor of its employees.

Finally, the fact that Garofalo precipitated a fight and then began acting aggressively upon returning to discuss the incident with Papay creates a strong affirmative defense as well. It was the fight of Friday morning that was the subject of the supervisor-employee discussion on Monday morning, and even if words to the effect of reporting a safety hazard were injected into this discussion, it was the fight and continuing aggressive behavior that formed the decision to terminate the employment. Therefore, even if I were to find that Papay was motivated somewhat by the threat of a hazardous condition report to MSHA, I would also find that there was justification for terminating Garofalo for the fight alone.

ORDER

Having found that Complainant, Albert F. Garofalo, has failed to prove a *prima facie* case of discrimination, his complaint and this proceeding are hereby **DISMISSED**.

/s/ Kenneth Andrews _____

Kenneth Andrews
Administrative Law Judge

Distribution:

John P. Karoly III, Esq., The Karoly Law Firm, LLC, 1555 North Eighteenth Street, Allentown, PA 18104

Steven E. Krawitz, Esq., Krawitz & Krawitz, P.C., 553 Main Street, Stroudsburg, PA 18360

/kmb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

October 18, 2011

SECRETARY OF LABOR, MSHA	:	TEMPORARY REINSTATEMENT
on behalf of JEROME D. GEORGE,	:	PROCEEDING
Complainant	:	
	:	Docket No. WEST 2011-1423-DM
	:	RM-MD-11-09
v.	:	
	:	
FREEPORT-MCMORAN, BAGDAD, INC.,	:	Freeport-McMoRan
Respondent	:	Mine ID: 02-00137

ORDER APPROVING SETTLEMENT
AND
ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Feldman

This matter is before me based on an application for temporary reinstatement filed by the Secretary, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(2), against Freeport-McMoRan, Bagdad, Inc. (Freeport) on behalf of Jerome D. George. This matter was scheduled for hearing on the merits on October 13, 2011.

Shortly before the scheduled hearing, the parties filed their settlement terms for approval wherein Freeport agreed to economically reinstate George effective September 21, 2011, pending final disposition of George’s underlying discrimination complaint. The terms of the economic reinstatement are that George will receive the same gross pay and all benefits to which he was entitled at the time of his June 16, 2011, termination, less all payroll deductions previously taken, including but not limited to, federal and local taxes, and deductions for any health insurance or life insurance premiums and 401k deductions. The settlement terms include Freeport’s contributions to George’s 401k account, if any, that were made at the time of George’s termination.

ORDER

The parties’ settlement agreement resolving this temporary reinstatement proceeding **IS APPROVED**. Consistent with the above, **IT IS ORDERED** that Freeport-McMoRan, Bagdad, Inc., economically reinstate Jerome D. George by payment, retroactive to

September 21, 2011, of the net pay, as well as all benefits due to George on the date of June 16, 2011, termination. **IT IS FURTHER ORDERED** that payment to George shall be made within seven days of the date of this order. The economic reinstatement will remain in effect until final disposition of the subject discrimination complaint.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

Gregory W. Tronson, Esq., U.S. Department of Labor, Office of the Solicitor, 1999 Broadway, Suite 1600, Denver, CO 80202

Laura E. Beverage, Esq., and Kristin R.B. White, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

/jel

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

October 19, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-712
Petitioner	:	A.C. No. 15-19076-141789
v.	:	
	:	
NALLY & HAMILTON	:	
ENTERPRISES, INC.	:	Chestnut Flats
Respondent	:	

DECISION ON REMAND

Before: Judge Feldman

The Petition for Assessment of Civil Penalty filed in this proceeding by the Secretary of Labor (the Secretary), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), as amended, 30 U.S.C. § 820(a), sought to impose a civil penalty of \$946.00 on Nally and Hamilton Enterprises, Inc. (“N&H”) for Citation No. 7557475. The citation alleged a violation of 30 C.F.R. § 77.410(c) for failure to maintain a reverse warning alarm on a lube truck. The relevant portion of the cited mandatory standard provides that “[w]arning devices shall be maintained in functional condition.”

The initial decision vacated Citation No. 7557475. 31 FMSHRC 689 (June 2009) (ALJ). The citation was vacated because the Secretary neither demonstrated nor alleged that the back-up alarm was inoperative for a significant period of time when the malfunction was first observed by the inspector. Thus, the initial decision concluded that the Secretary had not demonstrated that N&H had failed to maintain the alarm because the Secretary did not establish that the alarm was not repaired in a timely manner. *Id.* at 693.

The Commission reversed the initial decision, reinstated Citation No. 7557475, and remanded for resolution of the issues of whether the subject 30 C.F.R. § 77.410(c) violation was properly designated as significant and substantial (S&S), and, for a determination of the appropriate civil penalty to be assessed. 33 FMSHRC __ (Aug. 2011). Noting that the Mine Act is a strict liability statute, the Commission concluded that the clear meaning of the operative term “maintain” in 30 C.F.R. § 77.410(c) requires “that warning devices shall be capable of performing on an uninterrupted basis at all times.” *Slip op.* at 5. However, the Commission stated that the extent of N&H’s knowledge of the defect based on the duration of the malfunction may be a relevant consideration in determining N&H’s degree of negligence, and its effect on the appropriate civil penalty. *Slip op.* at 6.

The parties were provided with the opportunity to settle this matter consistent with the parameters of the Commission's remand. The parties declined to do so.

S&S

As a general proposition, a violation is properly designated as S&S if, based on the particular facts surrounding the cited condition, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). The Commission resolves whether a violation is properly characterized as S&S based upon the four longstanding criteria initially set forth in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). In *Mathies* the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

The Commission explained its *Mathies* criteria in *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125 (Aug. 1985):

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

7FMSHRC at 1129 (emphasis in original).

Applying *Mathies*, the first element is satisfied by virtue of the Commission's determination that N&H violated the safety standard in section 77.410(c). The second element of *Mathies* is likewise satisfied by the discrete safety hazard posed by the inability to warn persons who are positioned behind, and exposed to, the rear of a moving lube truck under circumstances where the truck operator's view is impaired.

The third and fourth criteria require a showing of a reasonable likelihood that the hazard contributed to by the inoperable warning device will result in a serious injury. The likelihood of such injury must be viewed in the context of continued exposure to the hazard posed by the violation assuming the violation continued unabated in the face of normal mining operations. *Southern Oil Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991); *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1473, 1574 (June 1984).

David A. Faulkner, the issuing Mine Safety and Health Administration (MSHA) inspector, testified that mine personnel frequently traverse the pit area during the course of their duties, and when they walk to and from lunch. There is a considerable degree of noise emanating from the pit equipment which may interfere with a potential victim's ability to hear the approaching truck without a specially designed alarm. Finally, Faulkner determined that the design of the lube truck precluded the truck operator from observing whether individuals were positioned directly behind the vehicle. Under such circumstances, given continued operations with a non-functioning warning device, it is reasonably likely that an injury related accident will occur, and, that such injury will be serious or fatal. Thus, the third and fourth elements of *Mathies* are satisfied. Consequently, the cited condition in Citation No. 7557475 was properly designated as S&S.

Civil Penalty

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

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

30 U.S.C. § 820(i).

The Commission's *de novo* authority to assess civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Rather, the judge must qualitatively analyze each of the penalty criteria to determine the appropriate civil penalty to be assessed. *Cantera Green*, 22 FMSHRC 616, 625-26 (May 2000). The Secretary has proposed a civil penalty of \$946.00 for Citation No. 7557475. As noted by the Commission in this case, the short term duration of a defect may impact on the degree of negligence attributable to a mine operator's failure to maintain equipment in functioning condition. Faulkner testified:

Q: So is it your belief that between 6 a.m. and 2:15 p.m. on January 3rd, 2008, the back-up alarm became dysfunctional?

A: That's correct.

(Tr. 49).

The initial decision recognized that perfunctory pre-shift examinations are not uncommon. 31 FMSHRC at 691. However, the Secretary's witness testified that he believed the malfunction was relatively brief in duration. Although the Secretary attributed N&H's failure to maintain the back-up alarm to a moderate degree of negligence, the evidence supports either strict liability, or, only very low negligence, under the third statutory criterion.

While the cited condition was of serious gravity, the remaining criteria do not significantly impact the civil penalty issue. In view of the mitigating circumstances with respect to negligence reflected by the record, and in recognition of the serious gravity as demonstrated by the potential for serious injury, a civil penalty of \$469.00 shall be assessed for Citation No. 7557475.

ORDER

In view of the above, **IT IS ORDERED** that the S&S designation in Citation No. 7557475 **IS AFFIRMED**.

IT IS FURTHER ORDERED that Nally and Hamilton Enterprises, Inc., **SHALL PAY**, within 45 days of the date of this Decision, a civil penalty of \$469.00 in satisfaction of Citation No. 7557475. Upon receipt of timely payment, **IT IS ORDERED** that the civil penalty proceeding in Docket No. KENT 2008-712 **IS DISMISSED**.

/s/ Jerold Feldman

Jerold Feldman
Administrative Law Judge

Distribution:

W. Christian Schumann, Esq., Robin Rosenbluth, Esq., Office of the Solicitor,
U.S. Department of Labor, 1100 Wilson Blvd., Room 2220, Arlington, VA 22209-2296

Jennifer D. Booth, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street,
Suite 230, Nashville, TN 37219-2456

C. Bishop Johnson, Esq., Stephen C. Cawood, Esq., Cawood & Johnson, PLLC, 108 Kentucky
Avenue, P.O. Box 128, Pineville, KY 40977

/jel

insufficient evidence of discrimination and declined to initiate an action on behalf of Gray. Subsequently, on December 30, 2009, Gray initiated this action by and through his attorneys under section 105(c)(3) of the Act, 30 U.S.C. §815(c)(3).² A hearing was held before me in Big Stone Gap, Virginia at which counsel presented evidence. Subsequent to the hearing, both parties filed briefs which have been received and considered in rendering this decision.

Gray alleges that he engaged in protected activity when he complained that North Fork Number Four (North Fork) ordered him to install roof bolts in an illegal and dangerous deep cut on one occasion, and then he refused to bolt a second similar deep cut several days later. He also alleges he made other safety complaints and as a result, was terminated from his employment on May 15, 2009. North Fork denies that Gray engaged in any activity protected under §105(c), and that his termination was motivated solely by his poor performance.

For the reasons stated below, Complainant's discrimination claim is dismissed.

II. STATEMENT OF THE CASE

Mark Gray, the Complainant, has twenty-nine years of experience in the mines, seventeen of which as a roof bolter. (Vol. I: Tr. 16, 166.)³ Gray has worked for approximately thirty coal mining companies throughout his career. (Vol. I: Tr. 166.) Gray worked as a roof bolter operator for North Fork for approximately seventeen months from the winter of 2007 until

(Continued...)

investigation to be made as [s]he deems appropriate. . . if upon such investigation, the Secretary determines that the provisions of this subsection have been violated, [s]he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, . . . alleging such discrimination or interference and propose an order granting appropriate relief.

² Section 105(c)(3) of the Mine Act, states, in relevant part:

Within 90 days of receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this section have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

³ There are two transcripts related to these proceedings, with each having two volumes. There was a temporary reinstatement proceeding on September 8, 2009 and a hearing on the merits on December 15 and 16, 2010. The citation for the transcript to the hearing is designated either "(Vol. I: Tr.)" or "(Vol. II: Tr.)" For the temporary reinstatement proceeding, the transcript for that proceeding is designated either "(Vol. I: Temp.)" or "(Vol. II: Temp.)"

his discharge on May 15, 2009. (Vol. I: Tr. 171.) There are three shifts in North Fork, the day shift, the second shift, and third shift. (Vol. II: Tr. 53.) The day shift and the second shift produce coal while the third shift is a non-production maintenance shift. (*Id.*) He started on the third shift roof bolting and was eventually moved to the day shift during the summer of 2008. (Vol. I: Tr. 17, 172.) There are two sections in the North Fork Number Four Mine, section 001 and section 002 located one and one half miles apart. Gray and his partner worked in the 001 section of the mine. (Vol. I: Tr. 169; Vol. II: Tr. 53.)

On the day that Mark Gray was discharged, the section foreman was Thomas Cornett and the superintendent of North Fork was Anthony Estevez. Russell Ison was the mine superintendent of North Fork immediately before Anthony Estevez. (Vol. I: Tr. 96.) He [Ison] was superintendent from January 1, 2008 to mid-to-late March, 2009. (*Id.*) At the time Gray was discharged, Steve Countiss was the day shift out by foreman and Thomas Cornett was the day shift foreman. (Vol. I: Tr. 59, 176.) Gray operated a double-headed bolting machine, which has two operators who install bolts simultaneously. (Vol. I: Tr. 173.) Gray's roof bolting partner while on the day shift was Chris Sheeks. (Vol. I: Tr. 174.)

The roof control plan approved by MSHA in effect at the time allowed a maximum of forty foot cuts on four foot patterns. (Vol. I: Tr. 60,180.) The mine is known to have an unstable roof due to the local geologic conditions thereby limiting the depth of each new cut of coal by the continuous miner to a maximum of forty feet to avoid a roof fall. After the miner operator makes the cuts, the roof bolter installs the bolts in the newly cut area to support the roof protecting it from collapsing. It is also the job of the bolter to hang curtains behind the bolting machine to ensure proper air flow and ventilation to the face. (Vol. II: Tr. 69.) The bolting of the roof and hanging of curtains are two critically important safety measures involved in mining out a new area. The two partners that make up the roof bolting team are the "offside," also known as the "pinman," and an "operator." The offside and the operator are both responsible for making sure the curtains are hung, although it is the operator who usually hangs the curtains. (Vol. I: Tr. 231.)

There is a conflict in the testimony from the witnesses as to what position Gray worked during his term as a roof bolter. Estevez testified that Gray worked the offside and that it was his job to keep the curtains hung. (Vol. I: Tr. 69.) Cornett testified that Gray was the operator and that it was the operator who usually hung the curtains. (Vol. I: Tr. 231.) Gray testified, as well, that he worked the operator's side of the roof bolting machine and that he hung most of the curtains. (Vol. I: Tr. 173; Vol. I: Temp. 52.) Sheeks testified that he was the operator while Gray ran the offside and that Gray was primarily responsible for keeping the curtains hung. (Vol. II: Tr. 63.) The conflict in the testimony from the witnesses as to what position Gray worked during his term as a roof bolter is immaterial to the issue of who had the primary responsibility of hanging the curtains since all witnesses testified that it was Gray's primary responsibility to keep the curtains hung and Sheeks testified that he and Gray switched sides once they received a new bolting machine with new safety features. (Vol. II: Tr. 89.)

III. PRINCIPLES OF LAW

Section 105(c)(1) of the Mine Act provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the statutory rights of 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 . . . has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. §815(c)(1).

Under established Commission law, a complainant establishes a *prima facie* case of a violation of section 105(c) if a preponderance of the evidence proves (1) that the complainant engaged in a protected activity and (2) that the adverse action complained of was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 329 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall* 663 F.2d 1211 (3rd Cir. 1981).

The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n. 20 (Apr. 1981). If the mine operator cannot rebut the *prima facie* case, it may defend affirmatively by proving that it would have taken the adverse action based upon the miner's unprotected activities alone. *Driessen*, 20 FMSHRC at 328-29; *Pasula*, 2 FMSHRC at 2800.

In evaluating whether a complainant has proven a causal connection between protected activities and adverse action, the following factors are to be considered: (1) knowledge of the protected activity; (2) hostility or animus towards protected activity; (3) coincidence in time between protected activity and adverse action; and (4) disparate treatment. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The nexus in time between the protected activity and the adverse action can, standing alone, establish a sufficient basis upon which to find improper motive to terminate. *Sec'y of Labor on behalf of Clay Baier v. Durango Gravel*, 21 FMSHRC 953 (Sept. 1999).

In analyzing a business justification as an affirmative defense for an adverse action, the Commission has held that:

[t]he proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities . . . [T]he narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. (Citations omitted).

Chacon, 3 FMSHRC at 2516-17.

The ultimate burden of persuasion is with the Complainant. *Pasula*, 2 FMSHRC at 2800.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The narrow issue before me is whether Gray has established a *prima facie* case of having engaged in protected activity as he claims. Having carefully reviewed the record in the light most favorable to the Petitioner, I find there is no support for Gray's allegations of engaging in protected activity. Having the burden of proof in establishing a *prima facie* case, Gray has failed to produce a single credible witness or tangible evidence in support thereof.

Gray contends that on May 5, 2009, in violation of the roof control plan in effect at the time, a 50 to 60 feet cut of coal was made which he and his partner, Sheeks, were told to bolt. Further he alleges that three days later, on May 8, 2009, a second cut of 50 feet or more was made which he refused to bolt. Gray contends that his termination on May 15, 2009, was in retaliation for this complaint, refusal to bolt the second cut and for making "other safety complaints." (Vol. I: Tr. 194.) Gray alleges that the other protected activity involved hanging ventilation curtains. He asserts that when he stopped his drill to hang curtains, his foreman, Cornett, acted angry and mumbled something under his breath. Thereafter, Cornett was not friendly towards him and acted differently. Ultimately, he was fired after these events took place.

The Deep Cuts

Numerous witnesses testified consistently that there has never been a cut in excess of 20 feet made in this mine due to the extremely adverse roof conditions. (Vol. I: Tr. 73, 90, 126, and 247-248, Vol II. Tr. 7, 22, 33, and 75-76.) Although the approved roof control plan allowed a maximum cut of 40 feet, cuts of 18 to 20 feet were being taken in the 001 section because of the roof conditions.

Cornett, section 001 foreman, testified that he has been a miner for 36 years, 26 of which he has been a foreman. He was Gray's immediate supervisor in May 2009. (Vol I: Tr. 226-227.) In April and May of 2009 the cuts being made in the mine were 18 feet deep because the top consisted of draw rock which presented a discrete danger of falling. No one was taking cuts of 30 feet much less 50 feet or more for that reason. If a deep cut had been made, it would have been noticed by several people – the two pin men, the car drivers, the miner operators and the

foreman. If he had been made aware of anyone making such cuts, he would have notified the superintendent and they would have been disciplined. (Vol. I: Tr. 245-247.)

Cornett testified that Gray never refused to bolt a cut or complained to him about having to bolt a cut. Cornett further testified that Gray was disciplined by him numerous times for bolting too slowly, using the wrong size bolts, not installing 12 foot rope bolts in corners, putting bolts too far apart in violation of the roof control plan, not putting pressure on his drill to drive the bolts into the roof and for not hanging the curtains as required. At one point in time, Cornett admonished Gray on almost a daily basis and made notes of this in his daily log. In fact, on April 14, 2009, Cornett noted that Gray was not putting pressure on his drill to sink his bolts. On April 22, 2009, a note indicates that Gray was making remarks that “the men on section could fuck over a boss and cut coal run down. It took him 25 minutes to spot 1 bolt on corner in good condition.” On April 28, 2009, Cornett’s notes indicate that Gray and Sheets never hung their curtains in the # 4 left and used the wrong size bolt rope. On April 28, 2009, Cornett recorded that he reprimanded Gray for holding up the section and engaging in unsafe activities such as leaving two curtains down and improperly spot bolting with the wrong size bolt. On April 29, 2009, Cornett recorded a second warning to Gray for not hanging his curtains and not using roof bolts to spot bolt. On May 11, 2009, the notebook indicates that it took Gray three hours to install nine bolts. On May 12 and 15, 2009 there were similar entries concerning exceedingly slow bolting. (Vol. II: Tr. 229, 233-248; Ex. R-3.) Gray testified that any such notes were completely made up. (Vol. I: Tr. 212.)

Jerry Lynn Hall, a continuous miner operator of 7 years, was on the 001 section in May 2009. He was the only miner operator on Gray’s shift so he would have made the two alleged deep cuts. He testified that he never took a cut in that period that exceeded 20 feet nor was he aware of any such cut being made in this mine. (Vol. II: Tr. 7- 9.) He had no knowledge of Gray making any safety complaints to anyone and felt that Gray was not keeping up on his bolting after Hall made the cuts. When Gray was replaced, Sheeks and his new partner were keeping up with the other section and were not falling behind according to Hall. Ex. R-10.

Gray testified that Sheeks and he bolted the first deep cut together. Gray testified that he did not make any complaints about this cut to anyone, including Cornett. (Vol. I Tr. 212-214.) When the second cut was made and Gray was told by Cornett to bolt it, he refused. He testified that, again, Sheeks was with him and heard the entire conversation between him and Cornett. (Vol. I Tr. 214.) Sheeks, however, testified that Cornett never told him or Gray to bolt a cut of 50 feet or greater. Sheeks testified that he had never seen such a cut in that section of the mine and he never heard Gray refuse to bolt such a cut. (Vol. II. Tr. 75-76.)

Sheeks testified that Gray told him that he had been disciplined three or four times by management, including once for holding up production by not having enough cable to reach an entry. Sheeks also confirmed that he and Gray were called into Estevez’s office and disciplined for holding up production by bolting too slowly. Sheeks told Estevez that it was Gray that was holding him up and asked for a new partner. (Vol. II: Tr. 72-73.) They were also counseled by Countiss for being too slow. (Vol. II: Tr. 67.) Sheeks further testified that Gray told him the company could not fire him because they could not afford to; no one else wanted to work for them. If they did, Gray would file for unemployment and if he was turned down, he would then

file a discrimination complaint. He said he kept an attorney on retainer for this purpose. (Vol. II: Tr. 69-75.) Gray denied that he made these comments to Sheeks but he did confirm that he filed for unemployment and his claim was denied. He then filed this discrimination complaint. (Vol. I: Tr. 222-223.)

The only other day shift roof bolting crew in the 001 section consisted of William “Snappy” McFarland and Bill Peak who would have had to bolt the cut Gray allegedly refused to bolt. Both of these witnesses denied that they either bolted or saw a cut in excess of 20 feet in this mine. They further confirmed that the cuts were on average 20 feet deep. (Vol. II: Tr. 23, 34.) Peak provided a statement to Investigator Sturgill on July 8, 2009 in which he indicated that the last time he was aware of a cut of 40 feet was about two years earlier in a different seam of coal where the roof conditions were better. He further stated that while Gray had the ability to be a good roof bolter, he was slow and did not do his job causing the other bolters to complain about him. When Gray was replaced by a new roof bolter, the production on the Sheeks team increased. Ex. R-9.

Marty Bates was the second shift foreman for the 001 section in 2009. He testified that his shift was responsible for maintenance following the production shifts. He stated that the entire time he was with North Fork, there were no cuts being made in excess of 18 to 20 feet. He never saw any cuts of 50 feet or more, never heard of any such cuts being made and never had any complaints about such cuts being made. In his opinion, had a cut of 50 feet or more been made, the top would not have held up; the roof would have caved in. (Vol. II: Tr. 43-44.)

MSHA inspector Kevin Doan testified that he was at North Fork on May 15, 2009 to conduct a regular inspection.⁴ At the time of this inspection, he had been an inspector for 11 years and a roof control specialist for approximately five years. He was accompanied by Estevez on his inspection and began by making an imminent danger run across all the working sections to look for dangerous conditions. He specifically checked test holes that were bored into the roof

⁴ During the hearing, Inspector Doan testified that he had only entered section 002 of the North Fork Number Four mine, never section 001. (Vol. I: Tr. 147-148.) He testified that Anthony Estevez accompanied him throughout the inspection and that he recognized the section foreman as a man named Tom. (Vol I: Tr. 153-154, 158.) Anthony Estevez testified that he accompanied Doan to the 001 section of the mine on the day in question. They never went into the 002 section. He testified that he has known of occasions where individuals, including MSHA inspectors, have become confused as to which part of the mine they are in. (Vol. II: Tr. 52.) Additionally, section 002 is 1.5 miles away from section 001 where Tom Cornett, Gray and Sheeks worked. (Vol II: Tr. 53.) Sheeks confirmed through his testimony that Inspector Doan was in the 001 section of the mine on two occasions where he and Gray were bolting on May 15, 2009. (Vol. II: Tr. 75-78.) Doan was there to observe the new overhead deflector shield on a bolting machine. The only one that had such a shield was the one operated by Gray and Sheeks. (Vol. I: Tr. 152-153, Vol. II: Tr. 51.) Estevez further testified that he had the inspector who terminated the violation change the citation to read 001 section instead of 002. (Vol. II: Tr. 57.) It is clear from the evidence that Inspector Doan was mistaken as to which section he visited and it was, in fact, the 001 section.

at each of the intersections to determine the composition of the strata. He also was particularly interested in seeing a new deflector shield that had been installed on one of the Fletcher roof bolting machines. He met with the foreman, named Tom, in the section where this new equipment was located. Doan stated that he never saw a 56 foot deep cut in the coal mine. In fact, he stated "we have no plans in District 7 that allow anything near that depth of cut." Had he seen such a cut, he would have been required to issue a citation. He testified that he never issued such a citation. He also testified that no one approached him complaining about deep cuts being taken at the mine during the time period Gray alleged the safety violations to have occurred. (Vol. I: Tr. 140, 151-155, 161-162.)

Countiss currently works in the safety department for North Fork and was the out by foreman on the day shift in May 2009. He reported directly to the superintendent of the mine and was one level above the day shift section foreman (Cornett). He testified that Gray came to his attention when the other roof bolters in the 001 section complained about Gray being slow and not hanging the curtains. Although the roof control plan allowed for forty foot cuts, it had been a long time since anyone made that deep a cut with the roof being so unstable, he said. At no time did Gray or anyone else complain to him of a deep cut being made in that section nor did he ever see a deep cut. (Vol. I: Tr. 106, 110, 124, 126-128.)

Estevez testified that he accompanied Inspector Doan on his inspection of May 15, 2009 in the 001 section of the mine. Doan was interested in seeing the new deflector shield that had been installed on the bolter used by Gray and Sheeks. They went to the area in which Gray and Sheeks were bolting for a period of time, left and came back approximately 2 ½ hours later expecting them to be finished bolting the 18 foot section. Upon returning, however, they found that Gray and Sheeks had installed only about 10 bolts which was one complete row and the first bolt or two of the second row. Upon his own observations, production reports and comments from the foremen and Sheeks, Estevez determined that Gray was a substandard bolter and was holding up production. He terminated Gray based upon his poor performance on May 15, 2009. (Vol. I: Tr 51-54, 60-69.)

Estevez stated that he held a safety meeting every Monday. In addition, he spoke to miners on each shift either before or after the shift, whenever he was at the mine. He also maintained an open door policy so that any miner could discuss safety issues with him. Although Gray attended these meetings, he never raised any complaints at the meetings or at any other time, including the day he was terminated. (Vol I: Tr. 70-71, 90.) Estevez confirmed that the mine was on a 40 foot plan and anything beyond that would have been illegal and very dangerous. It would likely have caused the roof to fall in and would have exposed numerous miners to danger. Production reports indicated that cuts of 20 feet or less were being taken in May 2009. Inspectors were on the premises almost every day looking for safety hazards such as unsupported top. A cut of 50 feet or greater would have been a very obvious condition and would have been cited, which was not the case. No one had ever reported a cut in excess of 20 feet nor had he heard any rumors of deeper cuts being taken. (Vol. I: Tr. 73-76, Vol. II: Tr. 23, 44.)

Three inspectors who were inspecting North Fork during that time period, William Clark, Kevin Doan, and Silas Brock, were interviewed by Guy Fain (the special investigator assigned to

Gray's discrimination claim) and, according to Fain, none told him that they saw deep cuts in the mine during April and May 2009. (Vol. II: Temp. 128-129.)

Gray confirmed that MSHA inspectors were in the mine almost daily during the time when the alleged deep cuts were taken but he did not know which mine inspectors saw the deep cuts that he claimed existed. (Vol. I: Temp. 77-78.) When Gray testified at the earlier temporary reinstatement hearing, contrary to his testimony on December 15, 2009, he stated that he complained of the first deep cut to Cornett, but no one else:

Q. All right. You, you bolted it up, and you took Mr. Sheeks in there, or he went. He was a member of your crew, the two man crew, and you all went in there together and bolted that up in extreme danger, is that correct?

A. Yes, sir.

Q. And you didn't say a word about it to anyone except Mr. Cornett?

A. Yes, sir.

Q. And then a few days later, you say refused to do essentially the same thing?

A. Yes, sir.

Q. Who did you tell about that?

A. Mr. Cornett.

Q. Anyone else?

A. No, sir.

Q. Did you ever mention it at a safety meeting?

A. No, sir.

Q. Did you ever go to Mr. Estevez?

A. No, sir.

Q. Did you ever go to Mr. Countiss, the mine foreman?

A. No, sir.

Q. Did you ever talk to the other crew members?

A. No, sir.

(Vol. I: Temp. 85-86.)

Gray asserted in his testimony that based on his experience it was not unusual for companies in Kentucky to take deep cuts from time to time. (Vol. I: Tr. 189-190.) However, when asked on cross-examination as to the specifics of other deep cuts being taken in Kentucky mines, Gray could not come up with an adequate response:

Q. Okay. So how, how many of these thirty coal mines were taking deep cuts, that you've told the Judge many of 'em or a lot of 'em, all over the place take deep cuts?

A. I -

Q. How many of 'em are taking deep cuts?

A. I can't recollect that. I -

Q. Pardon?

A. I don't know, I can't recollect that.

Q. Well, did you report any of these people to MSHA for violating safety laws?

A. No.

Q. Did you take the deep cuts?

A. No.

Q. Did you refuse to take the deep cuts?

A. No.

Q. Were you ever asked to bolt up a deep cut in another coal mine?

A. Yes.

Q. Did you do it?

A. Yes.

Q. How many times have you done it in other coal mines?

A. There's not a number comes to mind.

Q. Pardon me?

A. There's not a number comes to mind; I don't know.

Q. You don't know how many?

A. No.

(Vol. I: Tr. 202-203.)

I find the assertions by Gray that two cuts in excess of 50 feet were made in or about May 2009, without merit. Gray did not present any witnesses to corroborate his allegations. Furthermore, it is highly unlikely that in a mine where a 50+ cut would have almost certainly caused a roof fall, that none was seen or cited by any of the inspectors who were in this mine on an average of three to four days per week. It also defies common sense that if Gray had been so concerned with these two illegal cuts that he did not avail himself of the opportunity to make his safety complaints to one of these inspectors, particularly Inspector Doan who was in Gray's section to inspect his bolter twice on the day Gray was terminated. Gray's inability to articulate when, where, by whom or how often he had seen deep cuts being made anywhere in Kentucky or that he had ever reported any of them despite being so concerned for his safety, is extremely telling with respect to his credibility. Furthermore, he testified at the temporary reinstatement hearing that he complained to Cornett after he bolted the first deep cut. At this hearing, he testified that he told no one. He testified that Sheeks was a party to the conversation when he refused Cornett's alleged order to bolt the second cut but Sheeks adamantly denied he ever saw or bolted cuts in excess of 20 feet in the 001 section of the mine. Gray testified that the numerous counseling notes in Cornett's field notes are a pure fabrication although Cornett's notes were admitted into evidence and clearly denote numerous deficiencies by Gray on a frequent basis. Clearly, Cornett noted very specific and frequent unsafe practices engaged in by Gray as well as a hostile attitude held by Gray towards management. The notes speak for themselves. This attitude was clearly expressed by Gray in his comments to Sheeks about what he would do if he were fired for his performance, which I find provides the motive behind Gray's alleging discrimination and falsely reporting illegal deep cuts being taken in the mine. It also explains his inability to specifically enunciate the "complaint" he made about curtains or when, where, by whom, etc other deep cuts were made in the Kentucky mines.

The Curtains/Other Safety Complaints

Gray's complaint regarding curtains is that on one occasion he hung his curtain before getting into a spot to bolt and Cornett acted "like he was mad, started mumbling under his breath, and walked off." (Vol. I: Tr. 179.) Gray testified that he got the impression of Cornett being angry although he admitted that he had no idea what Cornett was mumbling. (Vol. I: Tr. 204.) Moreover, Gray could not explain why Cornett would be angry at him for hanging curtains since he admitted that curtains are critical to the safety of everybody in the section. (Vol. I: Tr. 179, 204.) In fact, when asked on cross-examination whether Gray expected the court to believe that he was fired because he wanted to hang curtains and Cornett did not want him to, he responded: "I don't know, I don't really know." (Vol. I: Tr. 207.) He added that Cornett never told him not to hang curtains. He stated that Cornett never said anything at all to him about curtains. (Vol. I: Tr. 209.) Again, Gray contends that Sheeks was a witness to this event. (Vol. I: Tr. 209). Sheeks did not confirm this in his testimony.

The evidence does show that Gray did not hang his curtains as required and was reprimanded on numerous occasions by Cornett for his failure to do so. (Vol. I: Tr. 229-230, 240; 267 and Vol. II: Tr. 68-69; Ex. R-3.)

The subject of curtains arose in a manner inconsistent with Gray's position that he raised it as a safety complaint. On June 17, 2009, Gray gave a written, signed statement to Special Investigator Fain. In his original written complaint to MSHA, Gray made no mention of a curtains incident. After the initial interview with Gray, Fain interviewed Cornett during which Cornett informed Fain that he had reprimanded Gray on numerous occasions for not hanging the curtains as required. (Vol. I Tr. 272; Ex. R-8). Thereafter Fain, an acquaintance of Gray's of 10 years, went back to Gray's home to interview him a second time on July 31, 2009. At this meeting, Fain brought up the issue of curtains; Fain testified as follows:

Q. All right. Well, did you go back to visit Mr. Gray up in late July, and bring up the subject of curtains?

A. Yes, and other matters.

Q. Let me show you, just to refresh your recollection, a document dated July 31, 2009. Is that a memorandum of interview, written and signed by you?

A. Yes, sir.

Q. And did you go to Mr. Gray's home on that occasion?

A. Yes.

Q. And is that the first time he mentioned any complaint about curtains?

A. Yes.

Q. And is that because you specifically asked him if he had any other complaints, is that what the memo says?

A. Yeah.

(Vol. II: Temp. 88, 123-124.)

When asked at the hearing to explain exactly what complaint was made to Investigator Fain during this second interview regarding the curtains, Gray testified as follows:

Q. Why did he say he wanted to talk with you at that time?
A. He was showing me some papers.
Q. What papers did he show you?
A. I don't recall.
Q. Okay.
A. He just showed me some papers.
Q. And did he ask you whether you made any other safety complaints that you hadn't told him about previously, on that occasion?
A. I don't remember if he asked me that or not.
Q. Did he ask you to sign a paper at that time?
A. I don't remember, I don't remember.
Q. All right, I want you to tell me about the complaints about the curtain. When did you say they occurred?
A. About two weeks prior to my discharge.
Q. And do you remember a specific complaint that you made about the curtains?
A. A specific complaint, I had to hang 'em.
Q. Okay, you were told to do the labor involved in hanging the curtains, is that right?
A. The entire crew, me and my partner both was involved in, you know, we both had to do it.
Q. All right. Now what, what was the complaint about you being told to participate in hanging curtains?
A. The complaint, excuse me? I don't understand the question.
Q. What, did you complain to someone about curtains? Someone in mine management, did you complain to them about curtains? That's my question.
A. I told the section foreman that I had to hang curtains, had to hang my curtains that I had, yes, sir.
Q. Well, is that a complaint, or a statement, or what?
A. It's a complaint, **it says** complaint. (*Emphasis added*)
Q. All right. Tell me what is the complaint about? That you were being made to do the labor?
A. I don't, I don't understand what you said.
Q. Mr. Gray, you say that you can recall some specific event about curtains that occurred about two weeks before you were fired, is that right? Is that what you're telling the Judge?
A. I, I don't remember. I don't understand what you're saying. I don't, could you rephrase the question, because I don't understand. I don't understand what you're saying.
Q. About two questions ago, you said you made a comment about curtains, about two weeks before you were fired.
A. Yes, sir.
Q. All right. What was the complaint? Tell me what you said.
A. The complaint was that I had to stop the drill, get off the drill and hang my curtains into my headings, to ventilate the headings.
Q. And why was that a complaint? What was wrong with that?

A. The complaint was, really, I tell the bo-, when I'm telling the boss to do it, I told Mr. Cornett that I had to do it. He acted like he got angry, and mad at me.

(Vol. I: Temp. 71.)

Gray testified that Sheeks was a witness to the incident described above. (Vol. I: Tr. 208-209.) He further stated that if Cornett's notes which he took on a daily basis indicated that he reprimanded Gray for this or for bolting too slowly or any other issues, Cornett's notes are fabrications. (Vol. I: Tr. 209-212.) Sheeks testified that he never heard Gray complain about the company not keeping curtains up. He did confirm that Gray did not do his part in installing the curtains as required. (Vol. I: Tr. 76.)

Clearly, Fain brought up curtains at the second interview and only then did Gray have "other complaints" about curtains. Even then, Gray could not articulate at either hearing what complaint he had concerning the curtains. He simply stated "it's a complaint, it says a complaint." Gray himself did not characterize the alleged issues he had with curtains as a complaint; Fain had characterized it that way for him. Further, Gray could not elaborate on how his telling Cornett he had to hang his curtains could be considered a complaint. Gray was unable when asked to fully explain what the complaint was and stated that he did not understand the question. In addition, he changed the version of what his complaint was from "The complaint was that I had to stop the drill, get off the drill and hang my curtains into my headings, to ventilate the headings" to "The complaint was, really...when I'm telling the boss to do it, I told Mr. Cornett that I had to do it. He acted like he got angry, and mad at me." (Vol. I: Temp. 71.)

I do not find Gray's allegations credible that he made any complaints about hanging curtains or that he was treated in a hostile manner when he did so. I find, instead, that he was disciplined on several occasions for not hanging his curtains as required, among other deficiencies, and was terminated as a result. He retaliated by filing this discrimination complaint once his unemployment claim was denied.

Credibility of Witnesses for the Respondent

1. Chris Sheeks

I credit Sheeks's testimony because his testimony remained consistent with those of Cornett and Estevez. Sheeks testified that he and Gray received various verbal warnings from Cornett and Estevez and that Gray had told him that he had been written up by Estevez and Ison. (Vol. II: Tr. 67, 71, 90.) Sheeks's testimony was corroborated by the testimony of Countiss, Estevez, and Cornett who testified that Gray had been counseled and received verbal warnings. (Vol. I: Tr. 109, 37-41, 242-244.) His testimony was consistent with that of Estevez in stating that during the first meeting Estevez had with Gray and Sheeks in his office, he showed them production reports and asked them to pick up production. (Vol. II: Tr. 72; Vol. I: Tr. 67-68.) Sheeks's testimony is also consistent with that of Cornett in stating the Gray often failed to hang his curtains and would have to be told to do so often. (Vol. II: Tr. 68-69, 76; Vol. I: Tr. 240-241.) Sheeks also testified consistently with Cornett that he never heard Gray complain about deep cuts and that he never bolted a 56 to 60 feet deep cut. (Vol. II: Tr. 75-76; Vol. I: Tr. 248.)

His testimony was also consistent with other witnesses regarding Gray's reputation for being slow. (Vol. II: Tr. 25-26; 31-32; 64-68; Vol. I: Tr. 41, 125-226, 229.) Therefore, based on the evidence, I find Sheeks to be a credible witness.

2. Thomas Cornett

I find Cornett credible because his and Sheeks's testimony correlated on several material points regarding Gray's performance, specifically regarding Gray's slow bolting, failure to hang his curtains, using the wrong bolts, not having enough cable, and pretending to work on occasion by spinning the drill. I also credit his testimony as more believable due to the fact that he took notes contemporaneously with his observations of Gray's performance which corroborate his testimony. His testimony regarding never having seen a deep cut in the mine between 56 and 60 feet and not telling Gray and Sheeks to bolt two deep cuts is supported by the testimony of Sheeks as well as the other roof bolters in the 001 section and the miner operator, Jerry Hall. His testimony regarding the mine having adverse roof conditions and it being dangerous to take a 50 to 60 foot deep cut in the mine during that time period is supported by the testimony of several witnesses including Estevez and Inspector Doan. His testimony that cuts no deeper than 18 feet were being taken in the mine during that time is supported by the testimony of Estevez, Hall, Peaks, Sheeks and Bates. Therefore, I find Cornett is a credible witness.

3. Anthony Estevez

I find Estevez credible as his testimony remained consistent throughout the hearing and throughout the temporary reinstatement proceeding. In addition, on many material points his testimony correlated with the testimony of the other witnesses. Estevez's testimony regarding his observations of Gray's slow performance and the impossibility of there being 56 to 60 foot deep cuts in the mine since it would have been dangerous correlated with the testimonies of Sheeks, Cornett, McFarland, Peak, Bates, and Hall. Estevez's credibility was confirmed when it was determined that Inspector Doan had put down that he was in section 002 of the mine in his notes on the day Gray was terminated when he was, in fact, in section 001 as Estevez had testified. Estevez's testimony regarding the verbal warnings to Gray and Sheeks is supported by Sheeks who testified that they were told to pick up the pace by Cornett and Estevez.

Estevez testified that he held weekly safety meetings and never received any complaints from Gray. Gray confirmed this with his testimony that he had never complained to Estevez about any safety issues or deep cuts. Hall corroborated Estevez's testimony that there were no safety complaints by Gray because he never heard Gray make a complaint or say he refused to make a deep cut.

4. William "Snappy" McFarland, William Peak, Marty Bates, and Jerry Lynn Hall

I credit the testimonies of "Snappy" McFarland, William Peak, Marty Bates, and Hall as each witness's testimony remained consistent with each other's regarding Gray's performance and the alleged deep cuts. All of these witnesses testified that they saw no deep cuts in excess of 50 feet in the mine, that the typical cuts taken in the mine during the spring of 2009 were 20 feet,

that they never heard Gray complain about a 56 foot cut, or saw a 56 foot cut bolted up. (Vol. II: Tr. 22-23, 33-34, 43-44, 7.) Peak and McFarland testified that Gray had a reputation for being slow and that after Gray was terminated and replaced the roof bolting in the mine picked up. (Vol. II: Tr. 25-26, 31-32.)

V. AFFIRMATIVE DEFENSE

Assuming *arguendo* that Gray was involved in protected activity, North Fork has sufficiently established an affirmative defense showing that Gray was terminated solely for poor performance. The evidence shows that Gray was reprimanded multiple times for putting up wide bolts beyond the 48 inches required by the roof control plan, not hanging his curtains properly, spot bolting corners with a regular six foot bolt instead of a 12 foot rope bolt, using improper bolts, bolting slowly, and slowing down work for the entire section. (Vol. I: Tr. 238, 240-244, Ex. R-3, 76.)

There is evidence that Gray pretended to work at times and multiple witnesses observed him being slow on the job, with Sheeks having to wait for him on more than one occasion. (Vol. I: Tr. 82-83,124; Vol. II: Tr. 25-26, 64-65, 67.) Estevez testified that Gray and Sheeks “were well below every other machine and every other bolting crew were at twice to three times [...] what they were doing.”(Vol. I: Tr. 67.) In addition, Sheeks testified during the hearing that he asked the company to change his bolting partner twice because he did not want to be fired because of Gray’s slow performance on the job. (Vol. II: Tr. 67-68.) Evidence also shows that there were two written complaints, one verbal but put in writing and the other written, issued against Gray in February 2009 and April 2009. (Vol. I: Tr. 37, 96; Compl. Ex. A; Compl. Ex. B.)

In addition, several witnesses testified that the roof bolting work picked up after Gray’s termination on May 15, 2009. William Peak, one of the other two other roof bolting machine operators in section 001 at the time of Gray’s termination, testified that once Jim Pennington replaced Gray, Sheeks and Pennington bolted “place for place” with the other bolting crew and the amount of work completed was comparable for both roof bolting crews in section 001. (Vol. II: Tr. 33.) Cornett also testified that production picked up once Gray was terminated. (Vol. I:Tr. 249.) Steve Countiss testified that once a new roof bolter took Gray's place, Sheeks and the new employee “picked up the pace considerably.” (Vol. I: Tr. 129, 249.)

In weighing the evidence, I determine that North Fork prevails on its affirmative defense and has established that it fired Gray for his unprotected activities alone.

A. CONCLUSION

For all of the reasons discussed above, I conclude that Gray did not meet his burden of proving a *prima facie* case of discrimination. The unsafe activities or conditions he alleges were not proven to have occurred.

V. ORDER

It is hereby **ORDERED** that Complainant's discrimination claim be **DISMISSED**.

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

Distribution:

Tony Oppgard, Esq., P.O. Box 22446, Lexington, KY 40522

Wes Addington, Esq., Application Citizen Law Center, 317 Main Street, Whitesburg, KY 41858

Stephen M. Hodges, Esq., Penn, Stuart, & Eskridge, P.O. Box 2288, Abington, VA 24212

/lo

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001
202-434-9981/tele 202-434-9949/fax

October 21, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2009-134
Petitioner	:	A.C. No. 11-02752-168665 -01
v.	:	
	:	Docket No. LAKE 2009-135
	:	A.C. No. 11-02752-168665 -02
AMERICAN COAL COMPANY,	:	
Respondent	:	Galatia Mine

DECISION

Appearances: Karen Wilcynski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary of Labor;
Jason W. Hardin, Esq., Fabian & Clendenin, Salt Lake City, Utah, for American Coal Company.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petitions allege that American Coal Company (“AmCoal”) is liable for 40 violations of the Secretary’s Mandatory Safety Standards for Underground Coal Mines,¹ and propose the imposition of civil penalties in the total amount of \$224,354.00. A hearing was held in Evansville, Indiana, and the parties filed briefs after receipt of the transcript. Prior to and in the course of the hearing the parties settled 32 of the violations. A Decision Approving Settlement was entered on July 18, 2011, disposing of those violations and 93 other violations in six additional Commission dockets. Remaining at issue are eight violations for which the Secretary has proposed penalties in the amount of \$119,684.00. For the reasons that follow, I find that AmCoal committed seven of the violations, and impose civil penalties in the total amount of \$37,300.00.

¹ 30 C.F.R. Part 75.

Findings of Fact - Conclusions of Law

At all times relevant to these proceedings, AmCoal operated the Galatia Mine, an extremely large underground longwall coal mine, located in Saline County, Illinois.² Galatia is a “gassy” mine, having liberated over one million cubic feet of explosive methane gas in a 24-hour period, and is subject to 5-day spot inspections under the Act.³ For many years, water has drained into areas of the mine, softening the fire clay mine floor, and making it difficult to maintain roadways. Various steps were taken to keep the roadways passable, including pumping water, depositing gravel and rock dust, and installing wooden “bridges.” Bridges have been used for many years. Since about 2005, they have been made of three layers of rough-sawn lumber, bolted together.⁴ Woven steel cable loops are attached to facilitate installation. A photograph of new bridges, ready for installation in the mine, was introduced into evidence. Ex. R-78. Bridges were placed in particularly soft locations, and were often covered with gravel. Over-traveling mobile equipment pressed them into the mine floor.

A piece of heavy mobile equipment, e.g., a ram car hauling supplies, can place considerable stress on a wooden bridge, and is capable of breaking boards or dislodging them from the bridge structure. In 1990, when Kerr-McGee Coal Corporation operated Galatia, a fatal accident involving a dislodged bridge board occurred. A ram car rode over a dislodged 12-foot-long bridge board that was lying in the travelway parallel to the direction of travel. As the car’s forward wheel finished traversing the board, the end of the board was pressed down into the mine floor, cantilevering the opposite end up into the air. As depicted in a photograph, the operator’s compartment of that particular type of ram car was directly behind the wheel, and about 12 feet away from it. Ex. R-79. The elevated end of the board entered the compartment and impaled the operator as the car continued to move forward. MSHA investigated the accident, and issued a report. Ex. R-36.

Pursuant to section 314(b) of the Act, and the Secretary’s regulations, 30 C.F.R. § 75.1403, authorized representatives of the Secretary may issue safeguards to address hazards related to the transportation of men and materials at a particular mine. The mine operator is obligated to comply with a safeguard, violations of which may subject it to citations or orders issued pursuant to section 104 of the Act. As a result of the aforementioned accident, Notice to Provide Safeguard No. 3538483 was issued on August 17, 1990. It states, in pertinent part:

² In 2010, the Galatia Mine was split into two separate mines. The old Mine ID No. assigned by MSHA, 11-02752, was retained by the original mine and preparation plant, which was renamed “The American Coal Company New Era Mine.” The mine that was split off, the “New Future Mine,” was issued Mine ID No. 11-03232. Because the mine continues in operation albeit under its new name, it will be referred to in the present tense.

³ 30 U.S.C. § 113(i).

⁴ Prior to 2005, bridges were made of boards that were attached to wooden runners by spikes. They were considerably more fragile than the newer layered bridges.

The established rubber-tired (off track) haulage roadway located in the No. 1 entry of the 1st East Longwall tailgate entries was not maintained to allow safe passage of miners and material. Numerous pieces of bridging lumber (2-1/2" x 10-1/2" x 12'-14'), which were used to stabilize the mine floor, were dislodged or protruding from the mine floor along the travel entry. This is a notice to provide safeguards requiring all bridging lumber used on the mine floors be secured or that loose and dislodged pieces of lumber be re-secured or removed from the travelway.

Ex. G-A.

Underground coal mines must be inspected by the Secretary's Mine Safety and Health Administration ("MSHA") four times each year.⁵ Two veteran MSHA inspectors were involved in issuing the subject violations, both of whom were familiar with conditions in the Galatia Mine and had considerable experience as inspectors and miners. Steven Miller worked as an MSHA inspector for 18 years before becoming a supervisor in 2009, and worked in the mining industry for 13 years prior to joining MSHA. He began inspecting the Galatia Mine in 1991, and had inspected it many times before the subject inspections in May and July of 2008. Keith Roberts, an MSHA inspector and coal mine health and safety specialist, had worked for MSHA for 12 years, and had also inspected the Galatia Mine. Prior to joining MSHA, he had worked for 15 years as a staff safety engineer at the Galatia Mine for AmCoal's predecessor Kerr-McGee. He also had worked for 11 years as a miner, section foreman and training and labor specialist for Old Ben Coal Company.

At about 7:45 p.m. on May 1, 2008, Miller received a phone call from an unidentified miner at Galatia who related a series of complaints about conditions in the mine, including that the headgate and tailgate travelways at what was then called the New Future portal were nearly impassable because of mud and water. The employee reported that equipment was being pushed through the travelways and he was concerned about the safety of the miners. He also reported that when MSHA was not present, the operation was "run wild."

Miller reported the call, typically referred to as a "code-a-phone," to his supervisors, who instructed him to get Roberts and investigate the complaint.⁶ Roberts had been at the mine that day, and had returned to the MSHA field office to complete some paperwork. They proceeded to the mine, reviewed the books and mine map, dressed, and went underground about 10:20 p.m. As they were walking the main travel road they encountered two members of AmCoal's

⁵ 30 USC § 113(a).

⁶ Under section 103(g) of the Act, persons can make anonymous safety complaints to MSHA, which are promptly investigated. Such complaints are reduced to writing, any information that could potentially identify the caller is redacted, and a copy is given to mine management when the complaint is investigated. 30 U.S.C. § 113(g).

management team, and gave them a copy of the “sanitized” code-a-phone complaint. They proceeded inby and encountered Gary Hamby, an AmCoal shift manager, on his way out of the mine, and gave him a copy of the complaint. Hamby continued outby to take two miners to the bottom, and said that he would return and give Miller and Roberts a ride. They continued to walk inby on the South Sub-Main primary intake escapeway/travelway and arrived at an “underpass,” between crosscuts 11 and 13 where the roadway dipped down approximately four feet to clear an overcast for the belt.⁷ The general area of the mine was wet, and standing water had collected in the underpass to a depth of nearly a foot. Miller and Roberts observed loose bridge boards in the travelway, in apparent violation of the previously mentioned safeguard, and initiated enforcement action. Miller issued an order pursuant to section 104(d) of the Act, closing the travelway until the hazard presented by the boards was abated.⁸

Order Nos. 6673958 and 6673961

Order No. 6673958 was issued at 11:30 p.m., on May 1, 2008, pursuant to section 104(d)(2) of the Act.⁹ It alleges a violation of 30 C.F.R. § 75.1403, and charges Respondent with failing to comply with Notice to Provide Safeguard No. 3538483. The violation was described in the “Condition and Practice” section of the Order as follows:

⁷ AmCoal was in the process of setting up equipment to mine a new longwall panel, the 9th West Longwall Panel. Part of that process involved transporting up to 230 shields, each weighing approximately 15 tons, some four miles from the mine shaft, up the Main West roadway, making a left turn onto the South Main or the South Sub-Main roadway, and then a left turn onto the 9th West Headgate travelway. The underpass was located on the South Sub-Main roadway, just before the turn onto the 9th West Headgate travelway. Tr. 302-05; Ex. R-38.

⁸ AmCoal argues that determinations by Miller and Roberts are not entitled to deference because they exhibited casual attitudes and “approaches to the conditions that they designated as highly likely to cause a fatal injury.” Resp. Br. at 10-12. The argument is rejected. AmCoal confuses the response to an anonymous phoned-in complaint that included a remark that “someone is going to get killed” with the inspectors’ actions when they observed conditions that they determined to present a serious hazard. As an example, AmCoal apparently would have the inspectors call the mine to notify the operator that an imminent danger existed, based solely on an anonymous telephone call. *Id.* at 11. When Miller and Roberts observed conditions that they deemed presented serious hazards, they promptly issued orders prohibiting further exposure of miners to the conditions.

⁹ The parties stipulated that the underlying section 104(d)(1) citation and order became final orders of the Commission when AmCoal paid the assessed civil penalties. Tr. 21; Proposed Stipulation No. 14, Sec’y. Prehr. Rpt. at 6.

The South Sub-Main Primary Intake Escapeway/Travelway was not being properly maintained. Bridging lumber being used on the mine floor, from crosscut number 11 to crosscut number 13 were not secured nor removed from the mine floor. The lumber was protruding up out of the mine floor and ranged in length from 7 feet to 2 feet, width 6 inches to 12 inches and 2 inches to 6 inches in thickness. The travelway is traveled by management personnel each operating shift. This condition is a violation of a Notice to Provide Safeguard(s) No. 3538483 dated, 8/17/1990, requiring that all bridging lumber used on the mine floors to be secured or that loose and dislodged pieces of lumber be resecured or removed from the travelway. This condition should have been observed by mine management who travel this area. Loose lumber was floating on top of the water in some of these areas.

Ex. G-A.

Miller determined that it was highly likely that the violation would result in a fatal injury, that the violation was significant and substantial (“S&S”), that one person was affected, and that the operator’s negligence was high. The citation was issued pursuant to section 104(d)(2) of the Act, and alleged that the violation was the result of the operator’s unwarrantable failure to comply with the mandatory standard. A civil penalty, in the amount of \$21,993.00, was proposed for this violation.

AmCoal challenges the order on a number of grounds. It contends that: the safeguard is invalid for lack of specificity and that it was misapplied to the alleged conditions; there was no hazardous condition; an injury was unlikely to result; the violation could not be reasonably expected to result in a fatal injury; its negligence was low such that the orders should not have been issued pursuant section 104(d); and the assessed penalty is excessive.

The Validity of the Safeguard

In *Cyprus Cumberland Res. Corp.*, 19 FMSHRC 1781, 1784-85 (Nov. 1997), the Commission reiterated the law applicable to a determination of the validity of a safeguard.

Under section 314(b) of the Mine Act, the Secretary may issue “[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials.” 30 U.S.C. § 874(b). In order to issue such a safeguard, an inspector, must determine that there exists an actual transportation hazard not covered by a mandatory standard and that a safeguard is necessary to correct the hazardous condition. *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (January 1992). (*SOCCO II*). He must also specify the corrective measures an operator must take. The Commission reviews the Secretary’s issuance of a safeguard under an abuse of discretion standard.

The inspector's decision to issue a safeguard must be based upon "his evaluation of the specific conditions at a particular mine and on his determination that such conditions create a transportation hazard in need of correction." *SOCCO II*, 14 FMSHRC at 11-12. A safeguard "must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard." *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) (*SOCCO I*). It is the Secretary's burden to prove the validity of a safeguard. *SOCCO II*, 14 FMSHRC at 13-14. While the language of a safeguard, which may be issued without consulting with representatives of the operator, must be narrowly construed, the Secretary's authority to issue a safeguard is interpreted broadly. *Cyprus Cumberland*, 19 FMSHRC at 1785; *SOCCO I*, 7 FMSHRC at 12.

AmCoal argues that the safeguard does not identify with specificity the particular hazards it was intended to address. It contends that an operator needs clear notice of an inspector's rationale in issuing a safeguard and the specific hazards that might befall miners so that it can ensure that it does what is necessary to comply. These same arguments, and others, were raised by AmCoal in cases pending before other Commission Administrative Law Judges. Those Judges rejected AmCoal's arguments and affirmed the validity of Notice to Issue Safeguard 3538483.¹⁰ I also reject AmCoal's challenge to the safeguard.

AmCoal seizes upon language from *SOCCO I* and argues that a safeguard must identify particular and specific hazards, e.g., specify the precise mechanics of how a piece of loose bridging lumber could result in an injury to a miner. I reject that argument. While the language imposing required conduct on an operator must be narrowly construed, the Secretary's authority to issue a safeguard is interpreted broadly. This safeguard identifies the hazardous condition it was designed to address; "Numerous pieces of bridging lumber (2-1/2" x 10-1/2" x 12'-14') . . . were dislodged or protruding from the mine floor along the travel entry" rendering it unsafe for the passage of miners and material. Nothing more is required. I find that the Secretary has established that issuance of the safeguard was not an abuse of discretion.

Much of AmCoal's argument is grounded on familiar due process concepts, i.e., that it must have fair notice of what is required to enable it to do what it necessary to comply with the safeguard. These arguments are more properly addressed to the interpretation of the safeguard, not its validity. However, the requirements of the safeguard could hardly be clearer. It directs that "all bridging lumber used on the mine floors be secured or that loose and dislodged pieces of lumber be re-secured or removed from the travelway." I find no ambiguity in that language and, with limited exceptions, AmCoal points to none.

I find that Notice to Issue Safeguard No. 3538483 is valid.

¹⁰ Docket No. LAKE 2001-171, et. al., Order Denying the American Coal Company's Motion for Summary Decision, December 17, 2010 (ALJ Manning); Docket No. LAKE 2007-139, et al., Order Denying Respondent's Motion for Summary Decision, September 20, 2010 (ALJ Miller).

The Violation

There is no significant dispute about the presence of loose bridge boards in the travelway, ranging in length from two to seven feet. AmCoal does not contend that the boards were not present, as described in the order and by Roberts and Miller in their testimony and notes. Hamby, who was with Miller and Roberts when the order was issued, testified that he didn't see any boards sticking up, and the boards that he saw didn't present a hazard. Tr. 390-91, 409. He confirmed that there was a seven-foot board, but said it was laid up on a rib. Tr. 409-10. I find that there were loose and dislodged bridge boards in the travelway, as described by Miller and Roberts.

AmCoal argues that the safeguard was written too broadly, has been enforced inconsistently, and should not have been applied to those particular boards because they did not present the same hazard as the condition that led to the issuance of the safeguard.¹¹ Essentially, it argues that the safeguard should be interpreted restrictively as applying only to loose or dislodged bridge boards that are the approximate length of the board involved in the 1990 fatality, i.e., 10-12 feet.¹² Stephen Willis, AmCoal's manager of health and safety, did not see

¹¹ AmCoal complains that the broadly written safeguard subjects it to inconsistent interpretations by different MSHA inspectors. However, the "inconsistencies" described by Stephen Willis, AmCoal's manager of health and safety, related to the nature of MSHA's enforcement actions, not interpretation of the safeguard. He testified that MSHA placed increased emphasis on travelway and escapeway standards in 2007 after passage of the MINER Act, which was prompted by major mine disasters. As examples, he stated that violations that had been issued as section 104(a) citations were issued as more serious section 104(d) orders, and that examination violations were routinely added. Tr. 281-85. He made reference to, but did not explain, a citation for "exposed" bridge boards. If a safeguard violation had been issued for bridge boards that were not loose or dislodged, but were merely exposed, it would most likely not have survived a challenge under *Cyprus Cumberland* and *SOCCO I*.

¹² Miller also observed ends of the steel cable bridge transportation loops protruding from the water. He did not refer to the cables in the body of the order, but did reference them in his notes, and described them as a tripping hazard. Tr. 36-38, 104; Ex. G-A. AmCoal argues that the safeguard does not apply to cables, or slipping, tripping or falling hazards. Resp. Br. at 16, Resp. Rpl. Br. at 5. The safeguard refers only to bridging lumber. Under *Cyprus Cumberland* and *SOCCO I*, it can not be read to include loose ends of steel cables. Whether the safeguard could be read to cover tripping hazards presented by loose or dislodged lumber is a closer question. The safeguard certainly was the outgrowth of a fatal accident involving mobile equipment, but is not restricted by its terms to hazards posed to persons riding in mobile equipment. Miners do not normally walk the travelways. Only if it were necessary to evacuate the mine, and use of mobile equipment was prohibited, e.g., by smoke, would miners walk in that area. Tr. 48-49. Reading the safeguard narrowly, and considering the limited exposure presented to miners on foot, neither the cables nor tripping hazards will be considered in

(continued...)

the condition as cited, but opined that the boards referred to in the order did not pose the type of hazard that resulted in the 1990 incident. Tr. 287. He also described the configurations of different types of mobile equipment that used the travelway, and expressed his opinion that an incident like the 1990 fatality was highly unlikely to result from the presence of the cited boards. Tr. 288-93.

The safeguard was, indeed, written broadly. It covers all loose or dislodged bridge boards, and requires that they be secured or removed from travelways. The hazards presented by loose boards in travelways are not restricted to the specific circumstances of the 1990 incident. Miller and Roberts explained that there were several ways that a board could cause serious injury, including becoming wedged against a rib, or flipping up into an operator or passenger compartment. These were not fanciful speculations. Especially at the underpass, mobile equipment was subject to considerable sideways movement, both intentional and unintentional. Vehicles had to travel up a grade, gaining approximately four feet in elevation before reaching the established roadway height at the next crosscut, roughly 100 feet away. In watery/muddy/slurry conditions, heavy equipment such as ram cars had to be maneuvered side-to-side to gain enough traction to climb the grade. Tr. 44. Hamby agreed that in such conditions equipment had to “worm and squirm” to get through. Tr. 380. Willis confirmed that heavy equipment would have to be maneuvered side-to-side. Tr. 277-78. Roberts testified that equipment had to make a 90-degree turn where the South Sub-Main travelway met the 9th West headgate travelway, and that equipment operating in wet, soft, muddy conditions can “fishtail a lot or slide a lot.” Tr. 213. That movement, particularly in slippery, deeply rutted conditions, could result in loose pieces of lumber being pushed against a rib, into the side of a deep rut, or into mud built up along a rib, a condition he observed six days later, as noted *infra*. Such pieces of lumber, of any appreciable length, e.g. four-seven feet, could enter the operator or passenger compartment of a piece of mobile equipment resulting in injury to a miner.

There were several different pieces equipment that used the travelway, including, ram cars, scoops, tractors, golf carts, mantrips and shield movers. The varying configurations of the vehicles, particularly, the locations of operators and/or passengers, presented different potentials for injuries to miners caused by loose lumber. Tr. 45, 88, 97, 230-32. Mantrips, carrying as many as 16 miners, have open sides. A piece of lumber stuck in mud on the miner floor, or along a rib or the side of a rut, could enter the operator or passenger area of such a vehicle, especially if it was sliding or turning in slippery conditions. Tr. 88, 236. Similarly, miners riding in golf carts are exposed to injuries from loose lumber. While they most likely would not suffer an impalement like in the 1990 incident, the carts could slide around in ruts left by heavier, larger equipment, exposing the occupants to pieces of lumber that had been pushed against a rib, or embedded in mud. Tr. 92, 96. A smaller board could be flipped up by a wheel. Tr. 92-93.

¹²(...continued)
determining the violation, gravity or any other issue related to the safeguard violation.

Moreover boards considerably shorter than 12 feet could present an impalement hazard, as in the 1990 incident. One end of a board seven feet in length, for example, could be pressed down into the fire clay bottom and the opposite end could remain elevated after the wheel passed over the board. Roberts testified, and I agree, that he could not rule out the occurrence of an accident similar to the 1990 incident caused by a smaller board. Tr. 229-30, 236. Following the 1990 accident, steel bar “lips” were welded along the top edge of ram car operator’s compartments in an effort to prevent boards from riding up the side and entering the compartment. Tr. 274; Ex. R-79. While the bars might catch a board that was sliding up the low front wall of the compartment and prevent it from contacting the operator, a board could still pose a risk of serious injury, and the lip would not catch the end of a board that was at or above its height.

As noted above, Hamby and Willis expressed opinions that the boards cited in the order did not present hazards. However, they also agreed that “anything can happen,” that the potential injuries described by Roberts and Miller were possible, and that neither boards nor other objects should be in travelways. Tr. 276, 292-93, 298, 390.

To the extent that AmCoal’s “overly broad” argument is addressed to the validity of the safeguard, I find that it was well within the Secretary’s discretion to issue a safeguard that addressed the breadth of hazards presented by loose boards in travelways. To have restricted the safeguard to 10-12-foot-long boards, would not have provided the protection to which miners were entitled.

AmCoal’s argument that the boards in question did not present hazards, and that the safeguard should be restricted to only cantilever hazards presented by boards of approximately 12 feet in length, is rejected. It would entail a substantial and unjustified re-writing of the safeguard. I find that the loose and dislodged boards in the travelway violated the safeguard.

Significant and Substantial

The Commission recently reviewed and reaffirmed the familiar *Mathies*¹³ framework for determining whether a violation is S&S. As explained in *Cumberland Coal Res.*, 33 FMSHRC ___, ___ (October 5, 2011):

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:

In order to establish that a violation of a mandatory safety

¹³ *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984) .

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.

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984).

....
....

The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“*PBS*”) (affirming an S&S violation for using an inaccurate mine map). The Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury.” *Id.* at 1281. Importantly, we clarified that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* The Commission also emphasized the well-established precedent 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); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The fact of the violation has been established. A measure of danger to safety, a discrete safety hazard, was contributed to by the failure to re-secure or remove loose and dislodged pieces of lumber from the travelway, i.e., that a person using the travelway would be injured by the boards. While some injuries resulting from the violation, e.g., a contusion resulting from a small piece of lumber being flipped up, might not be reasonably serious, the majority of the injuries posed by the presence of more lengthy boards that could impale an operator or passenger would be reasonably serious. As is often the case, the primary issue in the S&S analysis is whether the hazard contributed to by the violation was reasonably likely to result in an injury.¹⁴

¹⁴ I have previously held that, because safeguards are not mandatory standards, violations of safeguards cannot be cited as significant and substantial violations under section 104(d). *Big Ridge, Inc.*, 30 FMSHRC 1172 (Nov. 2008) (ALJ); *Cumberland Res. LP*, 30 (continued...)

Miller determined that the hazard was highly likely to result in a fatal injury. AmCoal challenges both determinations, and argues that the hazard was unlikely to result in an injury and that any injury would not have been fatal.

Miller and Roberts measured six pieces of bridging lumber that were in the travelway. The lengths of the pieces were seven feet, six feet, 42 inches, 40 inches, 36 inches and two feet. Tr. 38; Ex. G-A (notes at 7). The cross-section of the six-foot piece was six inches by six inches. The two longest pieces presented the more serious hazard. As noted above, under certain specific conditions, they could result in an impalement injury similar to the 1990 incident, i.e., either a fatality or a reasonably serious injury.

As to the likelihood of an injury causing event occurring, the Secretary argues that there was heavy traffic through the area and that the condition had existed for more than one shift and would have continued to exist for some time. AmCoal was setting up to mine a new longwall panel. Mining crews were being transported on mantrips and golf carts and numerous trips to the set-up area were being made by heavy equipment, all of which had to traverse the wet slippery conditions at the underpass. AmCoal used shield movers or heavy ram cars to move up to 10 shields per shift, each weighing 15 tons. There is no dispute that there was a high volume of traffic through the area during the set-up process.

As to the length of time that the condition had existed, there is insufficient evidence to establish that it had existed for any appreciable length of time prior to the issuance of the order. However, there is evidence that it would have continued to exist for some time, had it not been cited.

There is no evidence as to exactly when the boards became dislodged from the bridges. Miller did not know when the boards had become dislodged. Tr. 49. He testified that, judging from the number and appearance of the boards, that the damage did not occur on the previous shift, but had existed for “some time.” Tr. 49, 68-69. However, it is apparent that his conclusion that the subject condition had to have deteriorated over a period of time greater than a shift or two was more a reference to the generally poor condition of the travelway at the underpass than to the presence of the boards. Tr. 49-50, 65. In responding to a question about the length of time the condition existed, Miller first referred to the road, and then corrected to the boards, before

¹⁴(...continued)

FMSHRC 1180 (Dec. 2008) (ALJ). However, the Commission subsequently held that section 75.1403 is a mandatory standard and that violations of safeguards are violations of that standard subject to enforcement under section 104(d). That decision is not yet final. *Wolf Run Mining Company*, 32 FMSHRC 1228 (Oct. 2010), *appeal docketed*, No. 10-1396 (D.C.Cir. Nov. 22, 2010). AmCoal has not argued that section 75.1403 is not a mandatory standard or that violations of safeguards cannot be enforced under section 104(d).

stating that the condition existed for some time and did not just occur.¹⁵ Likewise, in addressing the companion examination order, he explained that the bridge board condition had existed for “quite some time,” in part by noting that the longwall foreman had told him that conditions were “too bad to travel out of the [set-up] area,” presumably observations he would have made on his way into the set-up area at the beginning of the shift. Tr. 62. The conditions that the foreman had referred to were muddy, rutted roadways, not the presence of loose bridge boards. Tr. 63-64.

There was general agreement that heavy equipment, e.g., a ram car moving a shield or loaded with rock dust, could do considerable damage to a bridge. Tr. 67, 240, 277-78, 306, 343. Earlier on the shift, five shields had been moved through the underpass, and four ram cars loaded with rock and rock dust had traversed it. Tr. 318-20, 400. Any of those pieces of heavy equipment could have dislodged the boards. While it may have been reasonable to conclude from the number of board pieces that more than one piece of heavy mobile equipment caused the damage, the nine ram cars could easily have dislodged and broken those pieces of lumber during the 4:00 p.m. to 12:00 midnight shift.

As to the appearance of the boards, Miller testified that he recalled that none of the boards appeared to have been freshly broken. Tr. 68-69. However, it is apparent that Miller had virtually no recollection about the appearance of the boards, and that his conclusion about their appearance was, essentially, a deduction from the fact that he had commented in his notes that the condition had existed for some time. Tr. 66-69. He conceded that there is no reference to the appearance of the boards in his notes. Tr. 67-69. Hamby testified that he had been through the area several times earlier on the shift, the last time about two hours before the order was issued, and had not seen any loose boards. Tr. 390-92. He also opined, referencing notes made by Paul Vuljanic, an AmCoal project engineer, who was also at the scene and helped to investigate the alleged violation, that the boards appeared to have been freshly broken. Tr. 385-87; Ex. R-67. I have serious doubts that even a seasoned inspector like Miller or Roberts could reliably determine whether a broken piece of wood had been lying in those muddy conditions for one hour, 12 hours, or longer, based solely on its appearance. The conditions were extremely muddy, and a freshly broken board that had been lying in the mud could easily be judged to have not been freshly broken. It is more plausible that a recent break might appear to have been fresh. I find that there is insufficient evidence to justify a finding that the boards had been dislodged on an earlier shift.

It is likely, however, that the boards would have remained in the travelway for some time. AmCoal was intent on completing the longwall set-up, and would have continued to send equipment through the underpass. AmCoal’s examiners conduct a visual inspection; they do not probe for sub-surface objects. Tr. 359. Muddy boards in those conditions would be very difficult to see, particularly by an equipment operator who was attempting to navigate the borderline passable travelway. While the pieces that were “protruding” would have been easier to spot, passing equipment could push them down into the mud. Following the 1990 incident,

¹⁵ Miller’s response, in pertinent part, was: “For the road to – for the boards to get in that shape, that existed for some time. It didn’t just occur.” Tr. 50

Kerr-McGee, and now AmCoal, continuously train all employees to look for and remove loose or dislodged bridge boards from travelways. Tr. 224-25, 279, 349. However, it would not be unreasonable to assume that an operator of mobile equipment attempting to navigate the heavily-rutted, water-filled, muddy slopes at the underpass would be reluctant to stop, or wade back on foot, to retrieve a loose board, particularly a smaller piece of board that might not be perceived as a hazard.

To establish the severity of injury, i.e., that it would be fatal, the Secretary relies on the fact of the 1990 accident, a generalized statement by Roberts that “there have been similar types of accidents in the industry, not always associated with lumber, but with other types of rigid or semi-rigid materials,” and Willis’ acknowledgment of an incident in 2003, where a scoop operator was fatally injured by a piece of PVC water pipe. Tr. 215, 356. AmCoal maintains that the 2003 incident, which involved a 20-foot long segment of 4-inch diameter PVC water pipe, with a metal coupling on the end, bears no resemblance to the 1990 incident or the risks presented by the much shorter pieces of lumber at issue here.¹⁶ It also points to the fact that there have been no lost-time accidents attributable to bridge boards at Galatia in the past 20 years, despite the utilization of hundreds of bridges that suffer continuous, ongoing damage. Tr. 98, 278, 367.

It is apparent that Miller’s determination as to the severity of injury was based, almost exclusively on the occurrence of the fatality in 1990. As he recorded in his notes: “If an injury [were] to occur it would be fatal as this mine has had a fatal because of this type of condition.” Tr. 39; Ex. G-A (notes at 12). The 1990 accident was a highly unusual incident that occurred under very specific conditions. A 12-foot board was lying parallel to the line of travel of a ram car, the operator’s compartment of which was directly behind the lead wheel by about 12 feet. Steel bar “lips” were subsequently welded on the operator’s compartments of all ram cars in an effort to prevent such boards from entering the compartment. None of the other types of mobile equipment traversing the area share that ram car’s configuration. The boards at issue here were no longer than seven feet. Roberts testified that the shorter boards did not present the same hazard as a 12-foot board, but that one could not “rule out” a fatal accident caused by a shorter board. Tr. 228-31. I find that, while it is possible that a fatal impalement-type injury might occur with a seven-foot board, it is unlikely that such an event would occur. The general, unexplained reference to similar types of accidents, and the dissimilar 2003 incident, do not alter that conclusion.

Miller and Roberts identified several other potential means by which a board might cause injury to an operator or passenger, including becoming wedged against a pillar by a sliding or turning piece of equipment and bowing or bending and snapping into a vehicle such as a mantrip or golf cart. Again, it would be possible that such an incident could occur. However, it seems

¹⁶ AmCoal submitted a copy of MSHA’s accident report for the 2003 incident as an attachment to its reply brief. The document is publicly available, and the Secretary has not objected to its submission. It will be considered part of the hearing record, to clarify the incident that was generally acknowledged by Willis in response to a question on cross-examination.

unlikely that those lighter vehicles would bow or bend a six or seven foot board, especially one with the cross section of the six-foot piece, i.e., six-by-six inches. Such a piece of lumber would more likely hold the vehicle away from the pillar and, if it entered the side of the vehicle, would not result in a fatal injury.

Because of the high volume of traffic, the fact that the boards had been in the area for part of a shift and were likely to remain for several hours, and the underpass was an area where mobile equipment struggled to get through very difficult conditions, I find that under continued mining conditions it was reasonably likely that a board could enter a vehicle and strike the operator or a passenger, resulting in a reasonably serious injury.

I find that the violation was S&S, but that it was not highly likely to result in a fatal injury. Rather it was reasonably likely to result in an injury requiring lost time or restricted duty.

Unwarrantable Failure - Negligence

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); *see also Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and

circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. 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. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary argues that the violation was the result of AmCoal's unwarrantable failure because, despite being aware of the condition, it continued mining operations and made no effort to address or remedy the hazard. The Secretary also maintains that AmCoal had been put on notice that greater efforts were necessary for compliance. AmCoal counters that it was not aware of the dislodged bridge boards at the underpass, and that, prior to issuance of the orders, it had taken steps to address travelway conditions, including pumping down water accumulating at the underpass.

The Secretary is correct in pointing out that there was considerable notice to AmCoal that conditions on the travelways were deteriorating because of the large volume of heavy equipment traffic associated with the longwall move. When Roberts was at the mine earlier in the day, he observed numerous pieces of heavy equipment including the longwall stage loader, being moved toward the set-up area. Tr. 200-01. He pointed out to an AmCoal shift mine manager that substantial damage was being done, and would likely be done, to the travelways and bridges, and asked him to follow-up with the oncoming shift. Tr. 201-02, 208. In addition, MSHA had met with AmCoal safety personnel in an effort to secure better maintenance of travelways and reduce the number of citations and orders issued for such violations. Tr. 50-51. However, most, if not all, of the Secretary's "need for greater compliance effort" evidence pertains to general roadway conditions affecting the ability of equipment and personnel to use the travelways, not to hazards presented by loose or dislodged bridge boards. While such general maintenance evidence is relevant to the issue of whether AmCoal was on notice that greater compliance efforts were needed, it does not establish that AmCoal was on notice that it needed to pay closer attention to the somewhat unique hazards presented by loose or dislodged bridge boards.¹⁷

As to general roadway conditions, AmCoal introduced credible evidence that it was attempting to address deteriorating roadway conditions, including the condition at the underpass. The preshift examiner for the oncoming 4:00 p.m. to midnight shift, had noted water build-up at the underpass and indicated that road work was needed on the 9th West Headate travelway. Tr. 394-96; Ex. R-43. Hamby had reviewed the report and noted the entries when he started his shift

¹⁷ General deterioration of the travelways presented more of an impediment to continued operations than a hazard to miners. However, a serious hazard could be presented if the travelway, which also served as the primary escapeway, became impassable. It should be noted that after Miller issued his order at the underpass, he and Roberts walked inby to the longwall set-up unit, and Roberts issued a section 104(d)(2) order for conditions of the 9th West Headgate travelway/escapeway, related at least in part, to complaints by the longwall boss. Tr. 40; Ex. G-A (notes at 8-9).

and made work assignments. At his direction, the water in the underpass was pumped down and grading was done on the roadway from crosscuts 17-23. Tr. 324, 395-97, 402-04; Ex. R-43. On the previous shift, work had been done on the 9th West Headgate roadway, and that set-up road had been shut down for the entire shift for road work. Tr. 310-16; Ex. R-53.

The evidence on the issue of whether AmCoal was on notice of the dislodged bridge boards is not nearly as strong as the Secretary asserts. Miller believed that AmCoal was on notice of the condition because he concluded that it existed for more than one shift and that management personnel, including the longwall boss he talked to after issuing the order, would have traveled through the area during the preshift examination for the second shift and during the shift change at the beginning of the second shift, i.e., around 4:00 p.m.¹⁸ Tr. 47, 62. As he recorded in his notes, the condition was “on the travelway used by man trips that are operated and/or supervised by section foremen,” and that management had been in the area on the shift before the order was issued. Ex. G-A (notes at 14). In his testimony, Miller also opined that the preshift examiner for the oncoming midnight shift, who would have traveled the area between 9:00 p.m. and 11:30 p.m. when the order was issued, should have seen the condition. Tr. 62-63.

As noted in the S&S discussion, there was insufficient evidence to justify a finding that the boards had been dislodged on an earlier shift. Consequently, the primary “notice” evidence relied upon by the Secretary, and the only notice evidence recorded by Miller in his notes, is unavailing. It is likely that at least some of the boards had been dislodged by the time the preshift examination was conducted, after 9:00 p.m. on May 1, and possibly could have been seen by the examiner. However, it is also likely that at least some of the nine pieces of heavy equipment that traversed the area during the shift did so after the preshift examination had been conducted, and could have dislodged some of the boards and/or rendered them more visible. The report of the preshift examination that was conducted between 9:00 p.m. and 12:00 a.m. on May 1, does not note the presence of dislodged bridge boards at the underpass, but does note rutted and muddy conditions on the 9th West Headgate travelway. Ex. R-43. On the whole, while it is possible that AmCoal should have been on notice that there were dislodged bridge boards in the travelway, I find that the Secretary did not carry her burden of proving that AmCoal had actual knowledge of the conditions.

On the factors relevant to the unwarrantable failure determination, I find that the following considerations weigh against a finding of unwarrantable failure: AmCoal did not have knowledge of the hazardous condition; the condition did not exist and was not obvious for a significant period of time and was most likely caused by one or more of the nine ram cars that traveled through the underpass on the 4:00 p.m. to midnight shift; the condition was confined to the area of the underpass and was not extensive; while it was S&S, it did not pose a high degree of danger; and, AmCoal’s abatement efforts were prompt and effective. I find the need for

¹⁸ As previously noted, Miller cited the statement of Kevin Coleman, the longwall boss on the second shift, describing the poor condition of the travelway, in support of his conclusion that the condition had existed for “quite some time,” even though Coleman was not referencing loose or dislodged bridge boards. Tr. 62-65.

greater compliance efforts factor weighs in favor of a finding of unwarrantable failure, but not strongly. While AmCoal was on notice that hazardous travelway conditions were occurring and were likely to occur, and that such conditions could include dislodged bridge boards, it had taken steps to address deteriorating roadway conditions, including pumping of accumulated water at the underpass. The previous violations that prompted the meetings with MSHA to discuss remedial action appear to have been directed to the wet conditions and resulting deterioration of the roadways.¹⁹ Because of the nature of the use of bridges, continued attention to such problems should have been, and apparently was, a focus of AmCoal's travelway maintenance efforts.

I find that the violation was not the result of AmCoal's unwarrantable failure, and that its negligence was moderate.

Order No. 6673961

Order No. 6673961 was issued by Miller at 4:15 a.m. on May 2, after exiting the mine and re-checking the preshift examination records for references to the dislodged bridge boards at the underpass. It alleges a violation of 30 C.F.R. § 75.363(a), which requires that hazardous conditions found during required examinations "be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected." The subject order alleges that the hazardous condition identified in Order No. 6673958 was, or should have been, observed by AmCoal managers and was not immediately corrected or posted with a conspicuous danger sign. Miller determined that the violation was highly likely to result in a fatal injury, that it was S&S, that one person was affected, and that the operator's negligence was high. A civil penalty in the amount of \$21,993.00 was proposed for this violation.

The Violation

As noted in the discussion of the unwarrantable failure issue with respect to the safeguard order, I have found that AmCoal did not have actual notice of the conditions. There is insufficient evidence to justify a finding that the condition existed for more than one shift, as Miller believed. Consequently, the management personnel who would have traveled through the area during and prior to the 4:00 p.m. shift change cannot be charged with observing and reporting the condition. As also noted in that prior discussion, the Secretary failed to carry her

¹⁹ MSHA violation history report for the Galatia mine reports 33 violations of Section 75.1403 or its subparts for the period February 1, 2007 through April 30, 2008. Ex. G-T. However, there is no indication as to which safeguard was involved in those violations, and references to subparts of the section appear to indicate that 20 of the violations would not have involved the safeguard at issue. Roberts' determined that AmCoal had been placed on notice for increased compliance when he wrote another safeguard order six days later, on May 7, 2008. Ex. G-D. At that time he noted that three orders for violations of the subject safeguard had been issued in the previous month. Two of those were issued on May 1.

burden of establishing that the condition existed and was visible during the preshift examination that was conducted between 9:00 p.m. and 11:30 p.m., such that AmCoal should have had knowledge of the condition.

Because the Secretary failed to prove by a preponderance of the evidence that the hazardous condition that allegedly should have been observed, reported, and dangered-off or remedied, i.e., loose or dislodged bridge boards, had existed and was visible when the examinations were made by AmCoal managers, I find that Order No. 6673961 must be vacated.

Order Nos. 6673588 and 6373589

Roberts returned to the mine on May 7 to complete the investigation of the code-a-phone complaint by inspecting the 9th West longwall's tailgate entries that he and Miller could not get to on May 1.²⁰ In the course of the inspection, he issued Order No. 6673588 for an alleged violation of the previously discussed safeguard for loose and dislodged bridge boards near a feeder. He also issued Order No. 6373589, for AmCoal's failure to identify and correct the bridge board hazard during on-shift examinations.

Order No. 6673588

Order No. 6673588 was issued by MSHA inspector Keith Roberts at 10:40 a.m., on May 7, 2008, pursuant to section 104(d)(2) of the Act. It alleges a violation of section 314(b) of the Act and 30 C.F.R. § 75.1403, and charges Respondent with violating the previously discussed Safeguard No. 3538483. The violation was described in the Condition and Practice section of the Order, as amended, as follows:

Loose, broken, unsecured and dislodged bridge boards are present in the 9th West Tailgate (MMU 005-0) working section at the feeder breaker location, the No. 3 Entry between 5550' W and the connecting cross cut between No. 3 & No. 4 entries at 5625' W.

At the feeder location five (5) bridge boards have been dislodged and are exposed and/or loose and unsecured. These exposed/dislodged bridge boards range from 12" to 36" [long] x 5" - 11" [wide] x 2" [thick].

In the No. 3 entry, a bridge board approximately 44" [long] x 5" [wide] x 2" [thick] is present in the shuttle car haulage road. Four (4) splintered bridge boards ranging from 5' - 8' [long] x 6" [wide] x 2" [thick] are present on a ledge above and adjacent to the road along the south rib.

²⁰ AmCoal criticizes the fact that the investigation of the code-a-phone complaint was not resumed until several days later. Resp. Br. at 12. However, Roberts had worked the entire day on May 1, and had left the mine after 4:00 a.m. on May 2. He and Miller reasonably decided to defer inspection of the tailgate travelway, which was also a subject of the complaint. One or both of the inspectors apparently exceeded their allowable number of work hours for the week, and there was an intervening weekend. Tr. 458-59.

Loose, unsecured, broken and splintered bridge boards are present in the connecting cross cut between entry No. 3 and entry No. 4 at 5625' W. A splintered board approximately 4' [long] x 1 1/2" [wide] x 1 -2 " [thick] is protruding from the "wind row" of mud/gob along the east rib line. Bridge boards approximately 44" [long] x 4" [wide] x 2" [thick], 5.5' [long] x 1 - 5" [wide] (tapered) x 2" [thick], and 8' [long] x 6" [wide] x 2" [thick] have been run over by mobile equipment as evidenced by tire tread markings on the boards and the boards being depressed into the floor. A Wagner diesel-powered coal scoop, Co. No. CS-11, has traveled over the bridge boards and is still located in the cross cut. This condition is a violation of Section 314(b) of the Mine Act and the Notice to Provide Safeguard(s) No. 3538483, dated 08/17/1990 requiring that all bridging lumber used on the mine floor be secured or that all dislodged pieces of lumber be re-secured or removed from the travelway.

This condition represents a distinct power haulage hazard to a miner operating the coal scoop or the ram car using the travel road or connecting cross cut.

The mine operator has a repeated history of citations and orders for violation of the standard, including three 104(d)(2) orders issued since 04/11/2008 for similar conditions.

Ex. G-D.

Roberts determined that the violation was highly likely to result in a fatal injury, that it was S&S, that one person was affected, and that the operator's negligence was high. A civil penalty in the amount of \$21,993.00 was proposed for this violation.

AmCoal challenges this order on the same grounds that it challenged the previous safeguard order. Aside from the previously rejected challenge to the validity of the safeguard, it contends that: the safeguard was misapplied to the alleged conditions; there was no hazardous condition; an injury was unlikely to result; the violation could not be reasonably expected to result in a fatal injury; its negligence was low such that the order should not have been issued pursuant section 104(d); and the assessed penalty is excessive.

The Violation

While traveling the 9th West tailgate, Roberts observed loose and dislodged bridge boards and pieces of boards at several locations in the area of a feeder used in development of the tailgate entries as a travelable bleeder for the longwall panel. The sizes and locations of the boards are described in the Order and Roberts' notes. Ex. G-D. Bob Hatcher, at the time a member of AmCoal's safety department, accompanied Roberts and assisted in measuring the boards. Hatcher, who began working for MSHA prior to the hearing, also took notes, and prepared a report on the alleged violation.²¹ Ex. R-69, R-70. While Hatcher purportedly

²¹ Roberts testified that Hatcher did not offer any mitigating facts to the violation, (continued...)

disagreed with Roberts' assessment of the hazards presented by the boards, his description of the location of the boards largely comports with Roberts'. I find that the loose and dislodged bridge boards were present in the travelway, as described by Roberts, and that the safeguard was violated.

S&S - Gravity

As with the boards that were the subject of the previously discussed orders, AmCoal disputes the gravity of the violation, and contends that the boards did not present hazards, especially hazards that were highly likely to result in a fatal injury.

While some of the boards did not present serious hazards, there were several loose boards of significant length that were located in the portion of the travelway actually used by mobile equipment. Both Roberts and Hatcher identified boards of 44 inches, eight feet, and five and one-half feet that were lying in the travelway, and a splintered board protruding from a window. Ex. G-D, R-69, R-70. Some of the boards were removed by being pried up from the floor, but that was simply an indication that they had been pressed down into the mine floor, not that they were still secured or attached to a bridge. Tr. 512-13.

AmCoal argues that several of the boards did not present hazards. The five boards near the feeder were relatively short, the longest was three feet, and did not pose an impalement hazard. Roberts testified that he would not cite "just small boards;" they had to have some size to pose a hazard to mobile equipment operators. Tr. 454-55. There also were boards located in the travelway that were worn or "serrated," close to where a five-and-one-half-foot board was laying. Roberts' notes reflect that they were "exposed but secured," i.e., still attached to a bridge, and he explained that they were not included in the order. Tr. 456, 466-67; Ex. G-D. At Hatcher's direction, a scoop was used to pull some of those boards free using a chain. Others were sawed through to allow their removal. Roberts commended Hatcher for removing them as a means of preventing them from becoming loose, like the other boards that resulted in the violation. Tr. 456, 466-67. There apparently were also some boards that may have been secured to a bridge in the area where the approach wheel of a shuttle car would stop when dumping on

²¹(...continued)

although he noted that Hatcher was upset, possibly because of the order. Tr. 456-57. The Secretary argues that Hatcher's actions indicate that no mitigating circumstances existed, and makes a similar argument with respect to other violations. AmCoal argues that, since Hatcher was taking notes ostensibly to counter Roberts' determinations, he can not be presumed to have acquiesced in the issuance of the order and Roberts' findings. It is not unusual for an operator's agent to reserve comment on an inspector's actions, and later prepare a defense. I draw no adverse inferences from AmCoal's representatives' failure to challenge violations as they were being cited.

the feeder. It is unclear whether those boards were included in the order.²² Four boards had been placed on a “windrow,” a build-up of mud along the rib that was three feet high and four feet wide. Those boards were in the travelway, but they were not located where mobile equipment would encounter them, at least while they remained on the windrow. Roberts acknowledged that they did not present a hazard in that location, but believed that they had been improperly stored and could fall down onto the traveled part of the roadway. Tr. 452.

Accepting AmCoal’s arguments, the fact remains that there were several loose boards of significant length in the travelway. There is no material difference between the hazards presented by the boards at issue in Order No. 6673958 and those that were the subject of this order.

Roberts was unable to state when the boards had been dislodged. Tr. 440. He knew, and AmCoal’s production reports confirm, that coal had not been mined on the day shift prior to his arrival. Tr. 453; Ex. R-53. He concluded that the boards had become dislodged during the 12:00 a.m. to 8:00 a.m. shift, when coal had been produced in development of the tailgate entries and shuttle car and other traffic would have occurred in the area. Tr. 435-37. As he explained, there were no shuttle car runs for production on the day shift, consequently, the boards “would have had to have been dislodged on the midnight shift.” Tr. 440. AmCoal contends that even though no coal was being produced, mobile equipment was operating in the area on the day shift and could have dislodged the boards. A crew was working in by the feeder installing bridges, and bridging material would have been brought through the travelway and connecting crosscut by a scoop, or, possibly a ram car. Roberts confirmed that the bridging crew was working in by the feeder on the day shift. Tr. 419, 422. Roberts also believed that mechanics were traveling in the area to attend to disabled equipment. Tr. 419.

Chris Ferrell, AmCoal’s mine foreman on the 12:00 a.m. to 8:00 a.m. shift, has 31 years of experience in the mining industry. He would have conducted the on-shift examinations that were the subject of the companion order issued by Roberts for a failure to identify and correct the hazardous condition. The report of his on-shift examination reflected that conditions were “safe.” Tr. 244; Ex. R-43. He testified that he examined the area of the feeder five-to-six times per shift, and was last in that area between 7:00 and 7:30 a.m. Tr. 245, 261. He was aware of the hazards posed by loose bridge boards and the 1990 fatality, took care to identify and remove dislodged boards, and was certain that there were no unsecured boards in the cited area when he last examined it. Tr. 250-55.

²² Hatcher’s notes and report are inconsistent with respect to the boards near the feeder. The report initially states that “there were 5 boards that were exposed and dislodged at the feeder.” Ex. R-69 at 1. The next section of the report, however, states that the boards at the feeder were not a hazard because they “were exposed and were not loose or dislodged as the order states.” Ex. R-69 at 1. Hatcher’s notes likewise indicate that some boards were not loose, but a sketch of the area near the feeder appears to indicate loose boards. Ex. R-70.

While I found Ferrell to have been a credible witness, I find that at least a majority of the boards had been dislodged during the 12:00 a.m. to 8:00 a.m. shift, or earlier. A scoop or ram car delivering bridges and supplies to the crew working inby may have caused some of the damage during the day shift. However, there is no evidence that a significant amount of mobile equipment traffic was associated with the bridging effort. There was considerably more traffic in the area during the midnight shift when coal was being produced by mining in the bleeder entries. The condition would also have existed for some time, had it not been cited by Roberts. It had not been discovered and/or corrected during previous examinations, and it could well have continued to exist through and, possibly, into the following shift.

As with the previously discussed boards, I find the probability of a fatal injury occurring to have been remote. However, Miller and Roberts described several scenarios whereby boards that were 44 inches to eight feet in length could produce a reasonably serious injury. The floor of the mine in the area was soft and equipment needed to maneuver to access the feeder. I find that under continued mining conditions it was reasonably likely that a board could enter a vehicle and contact the operator or a passenger resulting in a reasonably serious injury.

I find that the violation was S&S, but that it was not highly likely to result in a fatal injury. Rather it was reasonably likely to result in an injury resulting in lost time or restricted duty.

Unwarrantable Failure - Negligence

Whether the violation was the result of AmCoal's unwarrantable failure is a close question. Factors weighing against such a finding are: the condition was not extensive; while it was S&S it did not pose a high degree of danger; and AmCoal's abatement efforts were prompt and effective. Factors weighing in favor of an unwarrantable failure determination are: the condition had existed for more than one shift; AmCoal was or should have been aware of the condition; and AmCoal had been put on notice that increased compliance efforts were necessary.

The most significant factor is that AmCoal had been put on notice that increased compliance efforts were necessary. Roberts noted that AmCoal had been issued three section 104(d)(2) orders for safeguard violations since April 11, less than one month earlier. Tr. 433; Ex. G-D. One of those was the previously discussed Order No. 6673958, issued on May 1 for a violation of the dislodged bridge board safeguard. The particular safeguard violated in the other two orders was not identified. However, the two orders related to loose and dislodged bridge boards issued on May 1, coupled with the other evidence of prior notice discussed previously, should have alerted AmCoal to the need for increased efforts to comply with the subject safeguard. Dislodged boards can be difficult to see. As noted previously, and as pointed out by Ferrell, if they have been pressed down into the mud "sometimes you can't see them," and they can be exposed or "pulled up" by another passing vehicle. Tr. 256.

As noted in the discussion of the examination order that follows, while I do not find that Ferrell had actual notice of the condition during the midnight shift, AmCoal is chargeable with notice of the condition. Because it had been put on notice that increased compliance efforts were required, it should have initiated more rigorous examination procedures to identify and remove loose or dislodged bridge boards.

I find that the violation was the result of AmCoal's unwarrantable failure to comply with the standard.

Order No. 6673589

Order No. 6373589 was issued by Roberts at 3:00 p.m. on May 7, 2008, the same day as Order No. 6673588, and alleges a violation of 30 C.F.R. § 75.362(a)(1), which requires that on-shift examinations be conducted at least once during each shift to, *inter alia*, identify and correct hazardous conditions in areas where miners are assigned to work. Ex. G-E. The subject order alleges in the Condition and Practice section that:

An inadequate on-shift examination of the 9th West Tailgate working section (MMU 005-0) was conducted on the 12:00 a.m. - 8:00 a.m. shift of 05/07/2008 in that the hazardous condition detailed in Mine Order No. 6673588 was neither immediately corrected nor posted with a conspicuous danger sign where anyone entering the area would pass and recorded in a book maintained for that purpose.

Ex. G-E.

Roberts determined that the violation was highly likely to result in a fatal injury, that it was S&S, that one person was affected, and that the operator's negligence was high. The order was issued pursuant to section 104(d)(2) of the Act, and alleges that the violation was the result of AmCoal's unwarrantable failure to comply with the standard. A civil penalty in the amount of \$21,993.00 was proposed for this violation.

The Violation

Roberts testified that he does not issue examination orders "lightly." Tr. 436-7. He believed that an on-shift examination was done, but that it was inadequate, and did not understand how the "readily visible" boards in that "relatively small area" could not have been seen by an examiner. Tr. 434-37, 440. Ferrell, who conducted the on-shift examinations on the midnight shift, the latest around 7:00 a.m., did not see dislodged boards and reported that the area was safe. Tr. 244; Ex. R-43. As noted in the discussion of Order No. 6673588, a majority of the boards had most likely been dislodged during the midnight shift and were present during one or more of Ferrell's examinations. However, they may not have been as "readily visible" as when Roberts saw them. Mobile equipment servicing the bridging crew could have altered the location and/or appearance of the boards, e.g., it is highly likely that the board protruding from

the windrow was put in that position after the examinations had been done, otherwise Farrell would have seen it.

As explained with respect to the previous order, AmCoal should have been on notice that increased efforts to comply with the bridge board safeguard were required. It should have imposed a more rigorous examination procedure, whereby even loose boards that had been pressed into the muddy mine floor, but were not completely covered with mud, would have been detected and removed or re-secured. AmCoal maintained that it is always vigilant for loose bridge boards, and that they are routinely removed from travelways when observed. It also points to the fact that it has experienced no lost time accidents as a result of loose bridge boards for at least many years. That may be accurate. However, it had been the recipient of two section 104(d)(2) orders on May 1 as a result of loose and dislodged bridge boards, and it had received two other (d)(2) orders for safeguard violations within the past month. Yet it took no additional measures to identify and remove loose bridge boards. Willis cited AmCoal's continuing efforts to comply with the safeguard, but conceded that he "couldn't say that [AmCoal] did anything differently after the May 1 orders were issued." Tr. 488.

I find that a majority of the boards cited by Roberts had been dislodged during the midnight shift and were present when Farrell made one or more of his examinations. They should have been detected and removed from the travelway, or the area should have been dangered-off until the condition could be corrected. I find that the standard was violated.

S&S - Unwarrantable Failure

The inadequate on-shift examination resulted in the hazardous bridge board condition continuing to exist, at least for the remainder of the shift and most likely well into the oncoming shift. There is no evidence that the examination was otherwise deficient. For the reasons identified above with respect to the safeguard violation, and considering that this violation would have existed for a somewhat shorter period of time, I find that the violation was not highly likely to result in a fatal injury, but that it was reasonably likely to result in a reasonably serious injury, i.e., a lost work days or restricted duty injury, and that it was S&S.

The violation of the on-shift examination standard does not lend itself to straightforward application of the traditional factors applied in the unwarrantable failure analysis. The inadequate examination was not "extensive," and, like the safeguard violation, did not pose a high degree of danger. The order was terminated promptly after AmCoal was reminded of the requirements of the standard. The violation did not exist for any appreciable length of time, although its continuing effects would have extended into the next shift. AmCoal did not have knowledge of the inadequacy of the examination, although it is chargeable with knowledge of the underlying hazardous condition. The factor that weighs most heavily in favor of an unwarrantable failure finding is prior notice. The inadequacy of the examination was Farrell's failure to detect dislodged bridge boards, at least some of which were most likely not as readily visible as they were when Roberts saw them. Farrell explained, as Willis had before, that a passing vehicle can pull/push up loose boards that previous vehicles had pressed down into the

mud where they could not be seen. Tr. 256. Farrell knew about the safeguard and the 1990 fatality and paid particular attention to bridge boards. He should have been aware of the May 1 orders, and should have taken care to closely examine for such boards, including boards that may not have been readily visible.

I found Farrell to be a credible witness, and find that he made a good faith effort to identify hazardous conditions, including dislodged bridge boards, when he conducted his on-shift examinations. I also find that with extra effort prompted by heightened awareness of problems with bridge boards, he should have identified the hazardous condition. However, I find that his negligence in failing to do so did not rise to the level of unwarrantable failure, but was moderate.

Aside from its agent Farrell's inadequate examination, AmCoal was also culpable. Because of the previous safeguard violations, it should not have relied on its normal examination procedures to identify dislodged bridge boards, but should have instituted more rigorous inspections designed to detect boards that had been loosened or dislodged, even those that were not readily visible. I also find that AmCoal's negligence in failing to institute more rigorous examination procedures did not rise to the level of unwarrantable failure, but was moderate.

Considering Farrell's and AmCoal's negligence together, I find that they did not rise to the level of unwarrantable failure, but that AmCoal's negligence with respect to the violation was high.

Citation No. 6674229

Citation No. 6674229, was issued by Roberts on May 30, 2008, pursuant to section 104(a) of the Act, and alleges a violation of 30 C.F.R. § 75.1403. It charges Respondent with violating the previously discussed bridge board safeguard, No. 3538483. The violation was described in the "Condition and Practice" section of the Citation as follows:

A 2" x 8" x 5' section of bridge board, unsecured and parallel to traffic flow is present on the 9th West Headgate/Longwall set-up unit travel road at XC-20. This condition presents a distinct powered haulage hazard to mobile equipment operators traveling along this road in that the unsecured bridge board can foul against the frame of equipment and be forced into the operator's compartment.

Ex. G-J.

Roberts determined that the violation was reasonably likely to result in a fatal injury, that it was S&S, that one person was affected, and that the operator's negligence was high. A civil penalty in the amount of \$8,893.00 was proposed for this violation.

In defense of this citation, AmCoal asserts virtually all of the arguments made with respect to the previous safeguard orders, including its previously rejected challenge to the validity of the safeguard.

The Violation

Roberts was continuing the regular quarterly inspection of the mine on May 30, 2008. At 9:00 a.m., shortly after an 8:00 a.m. “hot seat” shift change from the midnight to the day shift, he observed a partially dislodged bridge board in the roadway.²³ He issued the instant citation for the safeguard violation, and also issued a citation for the poor conditions of the travelway/escapeway in that area.

Roberts’ field notes reflect that the five-foot section of bridge board was “unsecured” and that it was “not completely dislodged.” Ex. G-J (notes at 3, 15). He testified that one end of the board was “kind of secured” but the other was not; it moved when it was hit. Tr. 524-25. The citation was terminated because the board had been removed when Roberts returned to the area 25 minutes later. Roberts did not know how the board was removed or how long the removal effort had taken. Tr. 531-34. AmCoal argues that the safeguard does not apply to partially dislodged five-foot long boards, which would not present a cantilever hazard like the 12-foot long completely dislodged board that resulted in the 1990 fatality.

The safeguard requires that “loose and dislodged pieces of lumber be re-secured or removed from the travelway.” Ex. G-A. The board in question was loose, and would eventually have been completely dislodged by another piece of mobile equipment. Tr. 525. I find that the loose five-foot long board was present in the travelway in violation of the safeguard.

S&S - Gravity

With respect to the two previous safeguard violations, I found that multiple completely dislodged bridge boards that had remained in a travelway for at least part of a shift, and were likely to have remained in the travelway for some time thereafter, were reasonably likely to result in a lost time or restricted duty injury, and were S&S. Here, there was one loose, but not dislodged, bridge board. If it were to have become completely dislodged from the bridge, its five-foot length was sufficient to present a hazard to mobile equipment operators. However, while it remained attached, it presented a minimal hazard.²⁴ Roberts reasoned that the board had most likely been loosened by a heavier piece of mobile equipment, such as one of the ram cars

²³ A hot seat shift change is accomplished by bringing the next shift miners underground to their work positions before the previous shift miners leave, so that they can immediately continue tasks being performed by the departing miners, i.e., the seats of the equipment remain “hot.”

²⁴ The semi-detached bridge board would not appear to present a hazard of a cantilever/impalement type injury, as in the 1990 incident. It is unlikely that a tire riding on the loose end would lift the attached end, and a tire on the attached end could not push it down into a soft mine floor, precluding lifting of the loose end. Other hazards presented by completely detached boards, e.g., flipping up into a vehicle, were also not presented by this board, at least while it remained attached to the bridge.

that had hauled cribbing material and rock dust on the previous shift. He did not think that the lighter vehicles involved in the just-completed shift change, would have caused the damage. Tr. 528-29. However, he also acknowledged that he observed the loose board “early in the shift right after equipment may have passed through” the area. Tr. 521. Whether, or when, the board would have become completely dislodged, and how long it would have remained in the roadway thereafter, are unclear.

While I find Roberts’ determination that the board was loosened on the previous shift to be reasonable, it most likely was loosened toward the end of the shift. As Roberts noted, equipment that could have loosened the board may have passed through the area just before the citation was issued. In addition, AmCoal had been removing bridge boards from the travelway in the same location on the previous shift and, if the board had been loose or partially dislodged, it most likely would have been removed at that time. Tr. 537-40. Considering AmCoal’s increased compliance efforts, including its attention to bridge boards at crosscut #20 on the previous shift, I find that had the board become completely dislodged, it would have been removed from the travelway relatively promptly.

While the loosened board existed for part of a shift, it did not present a significant hazard. Had it become completely dislodged, it would have been removed promptly. I find that the loose bridge board was unlikely to result in a lost time or restricted duty injury, and that the violation was not S&S.

Negligence

As Roberts noted, AmCoal had enhanced its efforts to comply with the safeguard after issuance of the May 1 and 7 safeguard orders. Tr. 521-22. AmCoal’s Production & Delay and on-shift examination reports for the 12:00 a.m. to 8:00 a.m. shift, which ended shortly before the citation was issued, reflect that loose bridge boards at crosscut #20 were removed, trash was removed and the roadway at that location was rehabilitated by the placement of bridges and other measures. Tr. 537-40; Ex. R-46, R-53. One end of the single board in question was still secured to the bridge and it may well have appeared to have been properly attached, especially in the muddy conditions. When Roberts saw it, the loose end of the board had been displaced. Tr. 524. While it was reasonable for Roberts to conclude that one of the heavier pieces of equipment, possibly a ram car, had detached one end of the board on the previous shift, it may not have been displaced enough to make it appear loose until struck by one of the lighter vehicles traversing the area for the shift change.

Roberts believed that AmCoal should have been on heightened awareness for loose bridge boards and “should check all bridge locations each shift and repair as needed.” Tr. 523. He later added that “fairly frequent” checks of roadway conditions should have been performed. Tr. 527-28. It is apparent from AmCoal’s efforts on the immediately preceding shift that it was monitoring the conditions of the travelway at least once a shift, and probably more frequently. Considering that this one bridge board was loose for only a small part of a shift, and may not

have been displaced until shortly before the citation was issued, it was not the result of AmCoal's high negligence.

I find that AmCoal's negligence with respect to this violation was low.

Citation No. 6674228

Citation No. 6674228 was issued pursuant to section 104(a) of the Act and is the escapeway violation issued by Roberts on May 30, 2008, in conjunction with the safeguard citation discussed above. It alleges a violation of 30 C.F.R. § 75.380(d)(1), which requires that escapeways be "maintained in a safe condition to always assure passage of anyone, including disabled persons." The violation was described in the "Condition and Practice" section of the Citation as follows:

The primary escapeway for the 9th West Headgate/Longwall set-up unit is not being maintained to always assure the safe passage of anyone, including disabled persons. Standing, muddy (clay) water and slurry-like clay mud, ranging from 8" - 14" in depth, is present on the mine floor, rib-to-rib, extending from XC-17 to XC-19, XC-20 to XC-21 and the intersection of XC-24. The water and mud covers bottom irregularities (ruts and "pot holes") throughout these areas.

Ex. G-H.

Roberts determined that the violation was reasonably likely to result in a lost workdays or restricted duty injury, that it was S&S, that eight persons were affected, and that the operator's negligence was high. A civil penalty in the amount of \$7,578.00, was proposed for this violation.

Respondent does not dispute the fact of violation or the gravity, except to challenge the number of persons affected. It also challenges the degree of negligence and the amount of the penalty. Tr. 560.

Persons Affected

The location of the violation was the main travelway for the 9th West longwall, which also served as the primary escapeway. Roberts determined that eight persons would be affected by the violation because a typical crew for the longwall consisted of eight miners, and he believed that it was reasonably likely that all eight would be injured in the event that evacuation through the escapeway was required.²⁵ Respondent argues that, because the longwall was not operating (it was being set up), and Roberts did not confirm that eight miners were inby at the

²⁵ Eight miners would also be assigned to a continuous miner crew engaged in developing bleeder entries for the longwall panel, although there was no continuous miner crew inby at the time of the violation. Tr. 572, 587.

time, that the Secretary did not establish that eight persons would be required to use the escapeway, and that it is not reasonably likely that all persons using the escapeway would be injured.

Roberts determined from his experience that eight miners would be on the longwall set-up crew. Eight occupations/positions for a typical longwall crew had been listed in AmCoal's records, and names had been entered for the various positions. Tr. 589. Because those miners were not operating the non-functional longwall, he concluded that they were working on the longwall set-up. Roberts also believed that additional persons might be in by, e.g., equipment operators or mechanics. In the absence of evidence to the contrary, I find that eight persons would have been required to use the escapeway in the event that evacuation was required.

The number of persons affected by a violation is part of the gravity assessment. As stated in the Secretary's penalty assessment regulations; "Gravity is determined by the likelihood of the occurrence of the event against which a standard is directed; the severity of the illness or injury if the event has occurred or was to occur; and the number of persons potentially affected if the event has occurred or were to occur." 30 C.F.R. § 100.3(e). MSHA's Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines, provides a further explanation of the term persons affected: "The number of persons affected is the number of persons who would be expected to be injured if an accident or overexposure occurred as a result of the violation."²⁶

Roberts determined that all eight crew members were affected by the violation because he believed that it was reasonably likely that all eight miners would suffer injuries in the event that they were forced to use the escapeway. Tr. 574-75, 591. Respondent argues that it is not reasonable to assume that all eight miners on a crew would fall and be injured while exiting the mine, even under emergency conditions.

The conditions described in the citation, water and slurry 8 to 14 inches deep, covering an irregular surface, certainly presented treacherous footing and a high likelihood that a person traversing the areas on foot in an emergency situation would fall. It is possible that a person falling in soft-muddy conditions could suffer a reasonably serious injury. The question is: was it reasonably likely that all eight crew members would not only fall, but suffer an injury that would require lost work days or restricted duty?²⁷ The conditions existed in three areas of varying

²⁶ U.S. Department of Labor, Mine Safety and Health Administration, Coal Mine Safety and Health, Metal and Nonmetal Mine Safety and Health, Handbook Number PH08-I-1, March 2008, at 17.

²⁷ Roberts also expressed a concern that the conditions would delay miners attempting to evacuate the mine. Tr. 575. It is unclear whether, or how, that consideration entered into his assessment of gravity, and there was no further mention of it.

lengths; 300 feet, 150 feet and 20 feet.²⁸ While it is possible that the entire crew could have been injured, I find it unlikely. While I find it reasonably likely that a majority of the crew, e.g. six miners, would fall in the soft, muddy conditions while using the escapeway in an emergency, I find it unreasonable to assume that all of those miners would suffer a reasonably serious injury. It is more likely that no more than half of those falling would suffer a reasonably serious injury, and I find that three persons were affected by this S&S violation.

Negligence

Roberts had had several discussions with AmCoal's safety personnel about serious and ongoing problems with travelways, specifically the 9th West Headgate travelway. Tr. 576-77. Numerous citations had been issued for similar conditions. Tr. 581. Chronic water problems had continued to plague the mine, making it extremely difficult, if not impossible, to properly maintain travelways, particularly during the longwall move when there was a high volume of heavy equipment traffic. Roberts was frustrated with AmCoal's employment of short-term measures to deal with the water, e.g., dumping rock dust or gravel to abate escapeway or travelway violations, only to have the conditions quickly reoccur. Tr. 565-68. Air pumps were used for de-watering. Aside from lengthy air supply lines, the pumps' intake hoses were typically placed into the water/slurry mixture, where the screen on the hose end quickly became clogged. AmCoal personnel would, occasionally, clean the screen, but would then place the hose end back into the slurry where it would soon clog again. The pumps could have been more effective if a culvert-type basin, with filtering screens, had been constructed to keep the heavier slurry away from the pumps' intakes. Tr. 565-66. A member of AmCoal's engineering department had characterized its efforts to address water problems at the underpass as "futile." Tr. 580-81. Roberts believed that additional efforts should have been made to address the water problems, and that numerous management personnel were well aware of the problems because mine managers, shift foremen, and other agents of AmCoal had traveled through the area, which had been deteriorating over more than one shift. Tr. 576-78, 580.

AmCoal argues that the conditions had not existed for several shifts because it had done considerable work on the travelway in that area on the previous shift. As noted in the discussion of Citation No. 6674229, it had removed loose bridge boards, placed new bridges and worked to improve conditions in the area cited. In conjunction with those efforts, it also points to the fact that nine pieces of heavy equipment had recently traveled the roadway, and that the cited conditions were most likely largely caused by that recent traffic. Roberts conceded that "some efforts were being made" to address the problems. Tr. 605.

While AmCoal's failure to effectively address the chronic water problems contributing to deterioration of the travelways could establish that its negligence was high, I find that its efforts on the previous shift to remedy adverse conditions in and near the area cited is a mitigating factor sufficient to lower its negligence to moderate.

²⁸ Crosscuts were typically on 150-foot centers and entries were 18-20 feet wide. Tr. 57, 575.

Citation No. 6674230

Citation No. 6674230, was issued by Roberts on May 30, 2008, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.400, which requires that: “Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not allowed to accumulate in active workings, or on diesel-powered and electric equipment therein.” The violation was described in the “Condition and Practice” section of the Citation as follows:

Combustible material, in the form of broken/splintered wooden pallets, empty rock dust sacks, empty cardboard boxes and several large sections of plastic shrink wrap, has been stockpiled in cross cut #39 (Right) of the 9th West Headgate travel road. The stockpile is approximately 10' L x 4' W x 5' H.

Ex. G-N.

Roberts determined that the violation was unlikely to result in a lost workdays or restricted duty injury, that it was not S&S, that eight persons were affected, and that the operator’s negligence was high. A civil penalty in the amount of \$2,678.00, was proposed for this violation.

Respondent does not challenge Roberts’ assessment of gravity, but does contest the fact of violation, the number of persons affected, the negligence assessment and the amount of the assessed penalty.

The Violation

As stated in the citation, Roberts observed approximately 200 cubic feet of paper, wood, and other combustible materials in crosscut #39 off the 9th West Headgate travelway. The material had a coating of dust on it which, because of its location and conditions in the area, led Roberts to conclude that it had been there for a considerable period of time, estimated at “several shifts.” Tr. 616; Ex. G-N.

Respondent’s challenge to the violation is two-pronged. It argues that the “small” trash pile was not combustible material within the meaning of the standard, and that the material had not been allowed to accumulate. As to the first point, the materials – broken, splintered wooden pallets, empty paper rock dust sacks, empty cardboard boxes and plastic shrink wrap – were obviously combustible. Respondent notes that, while in use, pallets with supplies on them, bags filled with rock dust, and boxes containing supplies, are not considered combustible materials that need to be removed from the mine. It argues that inspectors, like Roberts, use a subjective standard to determine when such materials transition from inventory to trash accumulation violations, “which makes it difficult for operators to know exactly what may trigger a citation or order.” Resp. Br. at 35. The argument rings hollow. The substantial amount of material was clearly combustible trash that was required to be removed from the mine.

It is also apparent that the material had been allowed to accumulate. Roberts explained that mines typically use a large amount of supplies that generate trash, and it is essential that operators employ a system for managing the removal of such trash. Supply cars travel into and out of the mine on practically every shift. Collection of trash, typically depositing it next to travelways for pick up by exiting supply and other vehicles, should ensure that combustible trash does not accumulate in active workings. Respondent had an ongoing trash removal program, and there is some evidence that efforts to remove trash had been made on the previous shift. Tr. 635, 641; Exh. R-53. However, the material in question was relatively deep in the crosscut, which was not a location consistent with it's being staged for removal. Tr. 637. In addition, there was a layer of dust on the material, indicating that it had been there for some time, several shifts by Roberts' estimate. Tr. 616; Exh. G-N. While, as noted below, there is some uncertainty about the length of time that the material had been in the crosscut, the evidence establishes that it had been there for more than one or two shifts, was not being handled in an effective execution of Respondent's trash control program, and had been allowed to accumulate within the meaning of the standard.

Respondent's challenge to the number of persons affected is also unavailing, as explained in the discussion of Citation Nos. 6674228 and 6674229.

Negligence

Roberts' assessment of Respondent's negligence was predicated on a number of factors. He had had recent discussions with safety department personnel about trash accumulation problems, and had emphasized the need to remove trash. Tr. 613-15. The mine had been cited for 400 violations of the accumulations standard in the previous 24 months. Tr. 616. Judging from the dust layer, the materials had been allowed to remain in the crosscut for some time.

The most significant of these factors is Roberts' discussions with management officials about the need for increased diligence in implementing its trash removal program, which put Respondent on heightened awareness of trash accumulation problems. The overall number of accumulations citations is of limited significance because accumulations of coal most likely accounted for the vast majority of those citations. Roberts' estimate of the time that the materials had been in place was based on the coating of dust. There was no evidence as to the rate at which dust would accumulate at that location, although Roberts thought that it would be slow because of the depth of placement of the materials in the crosscut. He acknowledged that the dust probably resulted from mobile equipment traffic in the travelway. As noted previously, in general there was considerable traffic during the set-up operation. Relying on the shift report, Respondent argues that its efforts to remove trash along the travelway on the immediately preceding shift should be considered a mitigating factor.

Considering the uncertainty of the amount of time that the materials had been allowed to remain in the crosscut, and Respondent's documented trash removal efforts on the previous shift, which indicated a degree of responsiveness to concerns about trash removal issues, I find that its negligence with respect to the violation was moderate, rather than high.

Order No. 6673981

Order No. 6673981, was issued by Miller at 11:00 a.m. on July 31, 2008, and alleges a violation of 30 C.F.R. § 75.361(a) which requires that "within 3 hours before anyone enters an area in which a preshift examination has not been made for that shift, a certified person shall examine the area for hazardous conditions, determine whether the air is traveling in its proper direction and at its normal volume, and test for methane and oxygen deficiency." The violation was described in the "Condition and Practice" section of the order as follows:

Two miners and a mine foreman were observed working in an area of the mine where no preshift examination or supplemental examination had been conducted. The miners were working at crosscut number 38B, between the number 1 and number 2 entries of the 9th West tailgate entries. The mine foreman stated that he did not know who conducted an examination in the area. These miners had also worked just outby this area on an airlock. The only pre-shift examiner certification was near the airlock, and was dated 7/30/2008.

Ex. G-C.

Miller determined that the violation was highly likely to result in a permanently disabling injury, that it was S&S, that three persons were affected, and that the operator's negligence was high. The order was issued pursuant to section 104(d)(2) of the Act and alleges that the violation was the result of Respondent's unwarrantable failure to comply with the cited standard. A civil penalty in the amount of \$12,563.00 was proposed for this violation.

AmCoal does not contest the fact of the violation, or that it was the result of its unwarrantable failure, i.e., it concedes that the order was properly issued pursuant to section 104(d) of the Act. It challenges the number of persons affected and the gravity, contending that an injury was unlikely and any injury would not have been permanently disabling.

Miller was conducting a ventilation survey of the longwall. The members of the inspection party had traveled up the intake side of the longwall, and were walking out the tailgate bleeder entries when Miller observed two miners and a foreman working in an area that had not been the subject of a preshift or supplemental examination. The miners had previously been working near an airlock just outby where Miller encountered them, also an area where no preshift or supplemental examination had been done. Notations at that location indicated that the last examination had been conducted on the previous day. The foreman acknowledged that he did not know if the area had been examined. The same foreman had previously been the subject of a citation for working in an un-examined area.

The order was terminated at 11:15 a.m., after a supplemental examination was completed by Joseph Myers, AmCoal's safety director, who accompanied Miller, and no hazardous conditions were found. Tr. 165, 183-84. In addition, no hazardous conditions had been identified during the preshift examinations of the working sections or by Miller during his ventilation survey. Tr. 162-63, 188-91.

Miller's assessment of gravity was based on his experience and knowledge that conditions can change quickly in a mine, especially in a large longwall operation's bleeder system and where the mine liberates large quantities of methane. The location in question was about mid-way in the longwall panel. He did not know where the face was at the time. Tr. 155. The mine had "gassed out" that week, i.e., mining had to be curtailed because of excessive methane. Tr. 158. Miller also was aware of prior incidents at the mine, "ignitions, fires and so forth," although the only such incident discussed was a fire that had occurred several years earlier when the mine was operated by Kerr-McGee. Tr. 166, 172. While the foreman carried a multi-gas detector that constantly monitored the atmosphere, the miners did not, and they had been working several crosscuts away from the foreman. Tr. 171.

AmCoal's challenge to gravity is largely based on the fact that no hazards were discovered in the supplemental examination, the ongoing ventilation survey, or the preshift examinations of the working sections. It points to a similar preshift examination violation issued by another inspector who determined that an injury was unlikely, and argues that, where no hazards are found in a supplemental examination, an injury of a reasonably serious nature should be found to be unlikely.

The Secretary counters that the evidence supports Miller's S&S determination, that the preshift examination is a critically important and fundamental safety practice in the industry, and that because of changing conditions subsequent examinations may have little relevance to conditions at the time of the violation, citing *Jim Walter Resources, Inc.*, 28 FMSHRC 579, 603 (Aug. 2006); *Manalapan Mining Co.*, 18 FMSHRC 1375, 1382 (Aug. 1996); and *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995).

In *Buck Creek* the Commission described the preshift examination requirement as one of fundamental importance in assuring a safe working environment underground. Commission decisions have also made clear that a preshift examination violation can be S&S despite the fact that an inspector's subsequent examination of the area discloses no hazardous conditions, in part because many hazardous conditions are transient in nature and the S&S determination must be made as of the time of the violation. *Buck Creek*, 17 FMSHRC at 13-15; *Manalapan*, 18 FMSHRC 1382 (opinion of Commissioners Holen and Riley), 1396 (opinion of Commissioners Jordan and Marks); *Jim Walter*, 28 FMSHRC at 603-04.

In *Jim Walter*, factors pertinent to sustaining an S&S finding for a preshift violation included the following; the mine was gassy and, prior to the shift, had experienced an interruption to ventilation due to a fan check; the mine had a history of fires and ignitions, including on the same section as recently as two weeks before the violation; and, the mine had a history of roof falls, including one in the same week on the subject section. If normal mining

operations had continued, power would have been restored, and electric and diesel powered equipment was present. 28 FMSHRC at 603. In *Manalapan*, where a finding that a preshift violation was not S&S was reversed by the Commission, four miners had been in an unexamined area for four hours. The mine had been out of production for several days, and methane accumulations and other hazardous conditions can develop during idle periods; the mine liberated methane, as established by bottle samples; the equipment used by the miners included welding and cutting torches, and the roof bolter they were repairing was energized, also a potential ignition source; the area was adjacent to a mined-out area and there was a possibility of low oxygen in the atmosphere; the mine roof had a tendency to fall, and there had been several roof falls. 18 FMSHRC at 1382-83. In *Buck Creek* the Commission reversed a finding that a preshift violation was not S&S where the mine had been idle the previous two days and the subject miners were the first ones entering after the idle period; methane can build up during such periods; during idle periods failures in stoppings can interrupt ventilation; the mine had prior ventilation problems; and, the mine had a history of methane accumulations and roof falls. The fact that two of the miners were certified examiners and the area they were in had been examined did not alter the result, because hazards in other unexamined areas could have affected them. 17 FMSHRC at 13-14.

In *Buck Creek* and *Manalapan* the Secretary urged the Commission to establish a presumption that every failure to conduct a preshift examination was S&S. The Commission declined to do so, although in *Manalapan* two Commissioners argued persuasively for such a presumption. 18 FMSHRC at 1388-95. Here, the Secretary argues that in the absence of a preshift examination, it is impossible to rule out the existence of hazardous conditions, and that Miller “determined that it was highly likely that an injury of a reasonably serious nature would occur because no pre-shift or supplemental exam had been conducted to rule out potential hazards in the area.”²⁹ Sec’y. Br. at 27. While he disavowed a “cookie cutter” approach, Miller responded affirmatively when asked whether he believed that a serious injury would always be highly likely where there has been a failure to conduct a preshift examination, although he added that it was “even more so” considering the mine’s history.³⁰ Tr. 159, 166.

The Secretary’s argument, and Miller’s explanation of his S&S designation, bear some resemblance to the unsuccessful argument that preshift violations should be presumed to be S&S. Most of the factors noted by the Commission as supporting S&S findings in *Jim Walter*, *Manalapan* and *Buck Creek* were not present here. However, Galatia was a gassy mine, subject to 5-day spot inspections for methane, and had “gassed out” that week. Tr. 158. The miners had

²⁹ In explaining why he had designated the violation S&S, Miller noted that the mine was gassy, that conditions can change rapidly, and “without doing a preshift examination you don’t know how much methane is there. You don’t know what kind of roof or rib conditions are there.” Tr. 154.

³⁰ Miller’s notes reflect that he concluded that the violation was “likely” to result in a injury. Ex. G-C (notes at 14). Yet he designated the order as “highly likely” to result in a permanently disabling injury.

been working in the unexamined area since the beginning of the shift, and most likely would have continued working for several more hours. The area had last been examined the previous day, possibly during the required weekly examination. While the working sections had been examined, they were considerably removed from the area of the violation. The fact that Miller did not identify any hazards during his nearly contemporaneous ventilation survey of the longwall cannot inure to AmCoal's benefit, because under normal mining operations MSHA would not have been conducting a ventilation survey of the longwall's bleeder system. In any event, the area of the violation had not been surveyed prior to issuance of the violation. Nor does the after-the-fact supplemental examination that disclosed no hazards at that time preclude a finding that the violation was S&S.

While this is a close case, I credit the assessment by Miller, a highly experienced inspector, and find that the violation was reasonably likely to result in a permanently disabling injury and that it was S&S.³¹ I also sustain Miller's determination that three persons were affected, in that many of the significant hazards that might have been encountered, particularly those associated with methane accumulations, would have resulted in injuries to all three persons.

The Appropriate Civil Penalties

The Galatia mine was a very large mine, the sole mine operated by its controlling entity. Its history of violations from February 1, 2007 to April 30, 2008, a printout from MSHA's computerized database, was introduced into evidence. Ex. G-T. The report indicates that AmCoal had 695 paid violations in the subject time period and that approximately 237 of those were S&S. Neither party urges AmCoal's history of violations as a factor that should increase or decrease the amount of any civil penalty imposed for the subject violations, and it appears unremarkable, considering that the Galatia mine was extremely large and was being inspected by multiple MSHA inspectors on most business days year round. The parties stipulated that the proposed penalties would not affect AmCoal's ability to continue in business, and that AmCoal demonstrated good faith in abating the violations.

Order No. 6673958 is affirmed as an S&S violation. However, it was not the result of AmCoal's unwarrantable failure. Rather its negligence was moderate. In addition, the violation was reasonably likely to result in a lost work days or restricted duty injury, not highly likely to result in a fatality. A civil penalty of \$21,993.00 was proposed by the Secretary. Considering the reductions in the level of negligence and gravity, and the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$5,000.00.

³¹ The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995).

Order No. 6673588 is affirmed as an S&S and unwarrantable failure violation. However, the violation was reasonably likely to result in a lost work days or restricted duty injury, not highly likely to result in a fatality. A civil penalty of \$21,993.00 was proposed by the Secretary. Considering the reduction in the level of gravity, and the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$12,500.00.

Order No. 6673589 is affirmed as an S&S violation. However, it was not the result of AmCoal's unwarrantable failure. Rather its negligence was high. In addition, the violation was reasonably likely to result in a lost work days or restricted duty injury, not highly likely to result in a fatality. A civil penalty of \$21,993.00 was proposed by the Secretary. Considering the elimination of the unwarrantable failure designation, and the reduction in the level of gravity, and the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$7,500.00.

Citation No. 6674229 is affirmed. However, AmCoal's negligence was low rather than high, and the violation was not S&S, rather it was unlikely to result in a lost work days or restricted duty injury. A civil penalty of \$8,893.00 was proposed by the Secretary. Considering the reductions in the levels of negligence and gravity, and the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$500.00.

Citation No. 6674228 is affirmed as an S&S violation. However, AmCoal's negligence was moderate rather than high and the number of persons affected was reduced from 8 to 3. A civil penalty of \$7,578.00 was proposed by the Secretary. Considering the reductions in the level of negligence and the number of persons affected, and the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$2,500.00.

Citation No. 6674230 is affirmed. However, it was the result of AmCoal's moderate rather than high negligence. A civil penalty of \$2,678.00 was proposed by the Secretary. Considering the reduction in the level of negligence, and the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$1,300.00.

Order No. 6673981 is affirmed as an S&S and unwarrantable failure violation. However, the violation was reasonably likely, not highly likely, to result in a permanent injury. A civil penalty of \$12,563.00 was proposed by the Secretary. Considering the reduction in the level of gravity, and the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$8,000.00.

ORDER

Order No. 6673961 is **VACATED**. Order Nos. 6673588 and 6673981, and Citation Nos. 6674229, 6674228, 6674230 are **AFFIRMED as modified**. Order Nos. 6673958 and 6673589 are **modified to citations issued pursuant to section 104(a) of the Act, and are AFFIRMED, as modified**. Respondent is **ORDERED** to pay civil penalties in the total amount of \$37,300.00 within 45 days.

/s/ Michael E. Zielinski

Michael E. Zielinski

Senior Administrative Law Judge

Distribution (Certified Mail):

Karen Wilcynski, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver. CO 80202-5710

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

October 21, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner,	:	Docket No. LAKE 2009-710
	:	A.C. No. 11-03193-195113
v.	:	
	:	
PRAIRIE STATE GENERATING CO.,	:	Lively Grove Mine
Respondent.	:	
	:	

DECISION

Appearances: Emily B. Hays, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, CO, on behalf of the Secretary of Labor;
R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, PA, on behalf of Respondent, Prairie State Generating Co.

Before: Judge L. Zane Gill

Procedural History

This case involves a Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). It alleges that Prairie State Generating Company (Prairie State) is liable for a single violation of the Secretary's Mandatory Safety Standards for Underground Coal Mines, and seeks a civil penalty of \$687.00. A hearing was held on January 11, 2011, in St. Louis, MO; the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that Prairie State committed a violation of 30 C.F.R. § 50.10, but I reduce the negligence to “moderate” and the gravity to “no lost work days.” Further, I conclude that although 30 C.F.R. § 50.10 is a mandatory standard that could support the enhanced enforcement elements of S&S and unwarrantable failure, the violation was neither significant and substantial, nor did it constitute an unwarrantable failure to comply with the mandatory standard. Thus, I impose a civil penalty in the amount of \$112.00.

On June 25, 2010, Inspector Edward Law (“Law”) issued Citation No. 8417269 to Prairie State¹, alleging a violation of 30 C.F.R. § 50.10 (Exhibit S-3), relating to an alleged failure to immediately notify MSHA of an incident at the Lively Grove mine on June 8, 2009, which involved flooding of a portion of the mine during a heavy rain storm.

Stipulations

The parties submitted the following stipulations at the hearing, (Joint Exhibit 1):

1. In June 2009, Prairie State was constructing the Lively Grove Mine (Lively Grove) in Washington County, Illinois.
2. Lively Grove is an underground coal mine.
3. In June 2009, work on the slope from the surface to coal seam was in progress. The work was being conducted by a contractor to Prairie State, Pittman Mine Service, LLC.
4. By June 8, 2009, the slope had advanced approximately 1,270 feet.
5. On June 8, 2009, there was a rainstorm in the area of the Lively Grove Mine.
6. As a result of [the] storm, water accumulated in the pit around the slope area.
7. On June 25, 2009, MSHA issued to Prairie State Citation No. 8417269 alleging a violation of 30 C.F.R. § 50.10 as follows:

On 6/08/09 at 19:00 hours the mine experienced an inundation of water. Torrential rains occurred causing the water to overtake the sumps and pump system located at the bottom of the box cut.² A large volume of water flowed into the slope that is being developed currently at the 1270 Foot mark and inundated the slope. There was no immediate notification of the inundation to MSHA as required with in the 15 Minute time frame. The citation was

¹ Pitman Mine Services contracted with Prairie State to perform the mining services relevant to this citation. (See, Stipulation Nos. 3 and 9) Inspector Law also cited Pitman for the incident in question here, however Pitman did not contest the citation.

² According to Michael D. Rennie (“Rennie”), Law’s direct supervisor from the Benton, Illinois MSHA field office, a “box cutout” is a mining technique which involves digging down to rock where coal is located, creating a shaft structure, and then the refilling the resulting pit to cover the shaft. Lively Grove is a “box cutout.” (Tr. 168:20-24)

designated as significant and substantial, "high" negligence, seven persons affected and "lost work days."

8. On July 23, 2009, MSHA issued a subsequent action to 8417269 to Prairie State, No. 8417269-02. Subsequent Action No. 8417269-02 states as follows:

MSHA was notified on the inundation on 6/8/09. The parties agree that the inspector did not mean, through this text, that Prairie State or Pittman notified MSHA on June 8, 2009 of the accumulation of water from the rains that occurred on June 8, 2009. The parties agree that MSHA became aware of the accumulation of water on June 9, 2009.

9. On June 25, 2009, MSHA issued to Pittman Citation No. 8417271 alleging a violation of 30 C.F.R. § 50.10 as follows:

On 6/08/09 at 19:00 hours the mine experienced an inundation of water. Torrential rains occurred causing the water to overtake the sumps and pump system located at the bottom of the box cut. A large volume of water flowed into the slope that is being developed currently at the 1270 Foot mark and inundated the slope. There was no immediate notification of the inundation to MSHA as required within the 15 Minute time frame. The citation was designated as significant and substantial, "high" negligence, seven persons affected and "lost work days."

10. Prairie State is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Act"), 30 U.S.C. § 803(d), at the coal mine at which the Citation at issue in this proceeding was issued.

11. Operations of Prairie State at the coal mine where the Citation was issued in this proceeding are subject to the jurisdiction of the Act.

12. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Act.

13. The individual whose signature appears in Block 22 of the Citation at issue in this proceeding [Exhibit S-3] was acting in the official capacity and as an authorized representative of the Secretary of Labor when the Citation was issued.

14. A true copy of the Citation at issue in this proceeding [Exhibit S-3] was served on Prairie State as required by the Act.

Fact Summary

This case involves an alleged mine inundation resulting from a significant rain storm on June 8, 2009, at the Lively Grove Mine site, an underground coal mine under construction in Washington County, Illinois (Stipulation Nos. 1 and 2). In June 2009, Prairie State was in the process of constructing the Lively Grove Mine (Lively Grove), but was not yet actively mining coal. (Tr. 195:14)³ Pittman Mine Services, LLC was doing the mine construction work under contract with Prairie State on the single entry slope from the surface down to the coal seam. (Stip. 3; Tr. 20:1-22; 22:14-23:1; 188:1-6; 192:1-16; 234:1-7)⁴

By June 8, 2009, Pittman had driven the slope from an open surface pit downward at an angle of eight degrees some 1,270 feet. (Tr. 22:14-23:10; 78:9-79:17; 102:5-103:3; Exhibit PSGS 2, and Stip. 4) Pittman was also in the process of installing a belt structure in the upper half of the slope shaft as it progressed downward toward the coal seam. (Tr. 202:2-15; and Exhibit PSGS 5) The surface pit was open, but Pittman had done some backfill work around the slope shaft, (Tr. 22:14-21; 255:19-257:7) and was doing concrete work around structural arches that were still exposed to the outside. (Tr. 22:22-23)

June 8, 2009 - The Storm

The worst part of the storm hit around 5:00 PM on June 8, 2009. According to Victor H. Daiber (“Daiber”), Engineering Manager for Prairie State Generating Company Lively Grove Mine, the storm produced approximately 2.36 inches of rain in a short period of time, a number confirmed by data from a weather station at the site. (Tr. 227:24-228:2; 246:19-247:6; 253:5-254:5 and Exhibit PSGC-10). Daiber did not believe that it was “that big an event,” just a “simple rainstorm,” not an inundation. (Tr. 246:12-247:6; 253:16-254:5) In contrast, John Snowden (“Snowden”), Pittman’s Safety Manager, later described the rainstorm as “torrential” and estimated that it produced “6-8 inches per hour.”⁵ (Tr. 72:1-3; 113:13-21; and Exhibit S-5)

Conditions At The Surface

The slope down to the coal seam originated in a pit at the surface. (Exhibit PSGC 1 and 2) Various diesel pumps, sump lines, and power control panels were situated in the surface pit, along with a ventilation air portal and fan. (Tr. 199:2-201:2; and Exhibit PSGS 2) There is a dispute as to how much rain water accumulated in the surface pit and how the water made its

³ Prairie State claims in its post-hearing brief that mining operations in the coal seam commenced on September 10, 2009. Even though this is not evidence, it is included in this summary for clarity of context.

⁴ During the construction period, the only Prairie State employees on the site were office personnel. (Tr. 196:6-11)

⁵ I note that this evidence describes the rate of rainfall, not the cumulative amount.

way down the slope (and other openings) to the face area.⁶ For purposes of this decision, exactly how the water got down the slope is of secondary importance to the fact that there was flooding at the face and the ultimate issue of whether the operator had an obligation to report the flooding within fifteen minutes of its discovery.⁷ Nonetheless, it is uncontested that at least some of the water entered the slope shaft along its sides in the surface pit area where portions of the shaft structure had yet to be completely backfilled. (Tr. 246:1-11)⁸ I credit the evidence that the water at the surface pit did not rise to the level of the electrical equipment located in the pit, including the fan motor. (Tr. 215:5-216:4; 248:3-25; 249:4-13; and Exhibit S-8)⁹ The water seeped into the mine behind the liner of the slope and accumulated at the face of the slope. (Tr. 246:1-14) It did not flow into the mine by means of the slope opening but came in around the side and possibly around the ventilation tubing which was on the pit floor. (Tr. 209:20-210:16) Once inside the slope, it flowed steadily down the slope at about one inch in depth. (Tr. 244:23-246:10)

⁶ Exhibit S-8, Page 2 shows a 480-volt electrical panel that the Secretary alleged had been under water. It feeds power to a number of devices, including pumps. It clearly was not submerged from its appearance in the photo, despite Law's suspicion that it had. (Tr. 91:14-21; 92:23-93:3) It is stipulated that this photo was taken on June 9, 2009 - the day after the storm. (Tr. 94:5-7) The photos were taken by inspector Charles Jones.

⁷ There is no dispute that the flooding was not reported within fifteen minutes, even though it is impossible to determine from the evidence in the record when enough water had accumulated at the face area to trigger a duty to report.

⁸ Evidence presented at trial suggests that the water in the pit might have risen to a depth sufficient to allow it to run down the ventilation shaft and into the face area at the bottom as well. However, this theory is less than convincing. (Tr. 72:12-21; 91:12-92:5; 137:22-138:17; 176:3-10; 239:6-16; 248:6-22)

⁹ Law concluded that the volume of water was so great that it rose above the fan intake in the surface pit area and allowed water to rush down through the ventilation tubing, overtaking the sump system at the face. (Tr. 72:10-21; 74:10-18) I do not share this conclusion. No watermarks can be seen in photographs of the fan motor or other structures in the pit. Although the inspector did not record it in his notes, he testified that Chris Cross, a maintenance foreman for Pittman, said he saw water swirling at or around the fan. (Tr. 72:10-21). It is unclear and unconvincing what that might have meant because the photographs in evidence do not indicate the water was up to the fan motor or the ventilation tubing. (Tr. 215:1-216:4; 248:3-13; and Exhibit S-8, p. 2). Moreover, Daiber was actually present that night and testified credibly that he saw no whirlpool or swirling around the fan (Tr. 248).

Conditions Underground

Seven Pittman men were working underground during the shift when the flooding started. (Tr. 103:3-7) Preponderant evidence shows that the men noticed water running down the eight percent slope at a depth of about one inch (Tr. 245:14-25) and accumulating at the face at a rate exceeding the capacity of sump pumps to evacuate it (Tr. 83:2-12; 207:21-208:3; 228:24-229:6). The water came in steadily, but it did not rush in with enough force to knock anything down. (Tr. 211:3-7; 247:15-21) The miners became concerned that the ventilation pump in the surface pit might flood and shut down. (Tr. 205:19-206:1) They had time to confer, make the decision to leave the mine, turn off the power underground (Tr. 224:11-16), and reposition some larger equipment to protect it from the rising water (Tr. 209:7-11) before exiting the mine at about 7:00 PM in an orderly manner in a permissible battery-operated transport vehicle. (Tr. 206:3-5; 228:23) No miners were entrapped. (Tr. 245:10-16)

When they reached the surface, the ventilation fan was still operating, but the decision was made to shut it off as a precautionary move since no one was left in the mine. (Tr. 205:19-25) The ventilation fan was shut off at about 7:00 PM and turned on again about 10:00 PM. (Tr. 71:6-14) The water accumulation at the surface did not shut the ventilation pumps down, as alleged by the Secretary. (Tr. 205:6-8) With the ventilation fan off, no one could be (and no one was) underground. (Tr. 205:6 -206:19; 228:19-22) Pittman miners returned underground at about 10:30 PM, after the mine had been examined. (Tr. 71:6-21; 73:23-75:6; 208:4-20; 229:13-22), and began pumping water out of the mine. (Tr. 71:6-14; 74:5-9) Then, between 3:00 AM and 6:00 AM on June 9, 2009, the ventilation fan motor shorted out (Tr. 72:4-9; 75:14-21; 92:6-15), shutting it off again, which meant that anyone underground would have to come back to the surface.¹⁰ All the miners at the site when the ventilation fan shorted out, except two, went home early, before the end of their shift and before the day shift miners had arrived. Two men stayed at the site to monitor the water situation and pump the pit area. (Tr. 75:22-76:9) Pittman placed an air-driven pump underground near the belt's tail to catch any water that was accumulating.¹¹ The water that accumulated underground at the face was pumped out. The flooding prevented mining for approximately two days. (Tr. 76:16-22)¹²

Paul Krivokuca ("Krivokuca"), Vice President of Mining for Prairie State, was at the Lively Grove site when the storm happened. He called Daiber at around 8:00 PM. Daiber arrived at the site around 8:30 PM. (Tr. 244:17-245:16) Daiber testified that he believed the

¹⁰ It is unclear whether there were any men underground when the ventilation fan shorted out and shut down.

¹¹ An air pump runs off compressed air and does not require electricity. (Tr. 238:9-25)

¹² There is no evidence on this record as to how long it actually took the water to accumulate or the extent to which it did (Tr. 209). The only direct testimony about the rate of flow is Mr. Daiber's, which would suggest it took some period of time to accumulate (Tr. 245-46).

crew was out of the mine when he arrived. (Tr. 245:14-15) Krivokuca, Bill Jankousky (“Jankousky”), Prairie State's Safety Director, and John Snowden, Pittman's Safety Director, conferred and decided that the circumstances did not fit the definition of an immediately reportable accident because they did not believe the event was an “inundation.” (Tr. 203:15-22; 204:23-207:12; 212:9-213:2) Therefore, they concluded that there was no need to report the event to MSHA within fifteen minutes under 30 C.F.R. Part 50.¹³

June 9, 2009 - Inspector Jones' Visit To The Mine

The next day, June 9, 2009, MSHA Inspector Charles Jones (“Jones”) was at the Lively Grove mine to conduct a six-month roof control evaluation unrelated to the events of the prior day. (Tr. 95:3-20) He was accompanied during his inspection by Jankousky.¹⁴ Jankousky told Jones that they could not go down into the mine because the ventilation fan was turned off. (Tr. 119:15-120:9; 213:21-214:7 and Exhibit S-9) Jones asked Jankousky why the fan was off; Jankousky told him that there had been a rainstorm the previous night, the fan motor had shorted out, and was taken away for repair. Jankousky also mentioned that the roof bolter had been under water. (Tr. 213:24-214:14) Jones did not conduct the underground portion of his inspection. He took pictures of the surface pit area, but he did not issue any citations related to the storm water. (Tr. 96:3-16; 120:15-121:12; 214:15-21 and Exhibit S-8) The residual storm water in the pit had been pumped down and the pit was muddy. (Tr. 120:8-22; 214:22-215:4; 251:17-23; and Exhibit S-8) Jones was a Designated Authorized Representative of the Secretary.¹⁵ Jones told his supervisor about the water issue, but did not issue a citation. (Tr. 96:7-16).

June 11, 2009 - Meeting At MSHA District 8 Office

On June 11, 2009, Jankousky met with a number of MSHA representatives in the MSHA District 8 Office to talk about Lively Grove's roof control and ventilation plans, again unrelated to the storm. (Tr. 236:1-8) During the meetings, Mark Odum (“Odum”), MSHA Roof Control Supervisor in District 8, and David Whitcomb (“Whitcomb”), Assistant District Manager and the head of enforcement in the district (and Odum's boss), mentioned that they heard that there was a large amount of rain and subsequent water issues on June 8, 2009. They talked about Jones' visit to the mine on June 9, 2009, and the fact that the mine could not be inspected because of the water, and that the roofbolter was submerged. (Tr. 220:13-223:7) According to Jankousky,

¹³ The miners had all exited the mine before the discussion regarding whether the event was reportable occurred. (Tr. 205:6-13)

¹⁴ Mark Odum apparently accompanied Inspector Jones as well. See the discussion of the follow-up investigation below.

¹⁵ Jones had retired prior to the hearing and was not called as a witness.

neither Odum or Whitcomb told him that the incident should have been reported. (Tr. 220:8-222-24)¹⁶

June 23, 2009 - Law's Visit To The Mine And Discussion With Rennie

On June 23, 2009, MSHA Inspector Law was at the Lively Grove mine to conduct a regular E01 inspection. (Tr. 24:1-9; 28:20-29:13) He was accompanied by Snowden and Jankousky. (Tr. 29:21-31) During the June 23rd inspection, Law observed several things that made him suspect that a large volume of water had gotten into the mine:¹⁷

- The fan at the bottom of the surface pit, which sat at ground level on his previous visit a few weeks prior, now appeared to be raised approximately five feet off the ground . (Tr. 44:1-25; 171:18-172:8) Law was told the move was "to keep the fan motor dry" because of "water in the motors." (Tr. 44:1-21; 63:15-66:17)
- What appeared to be new "dams" were being built in the pit area. (Tr. 45:6-46:5; 67:14-17)
- Down the slope in the face area, the continuous mining machine and shuttle car were stuck in mud. (Tr. 32:6-33:12)
- A roofbolter appeared to have been damaged by water at the level of its trays - about twenty-four inches from the ground. Its junction boxes were open and its motors were missing, indicating repairs had been required. (Tr. 35:6-36:10)
- The roofbolter had been backed away from the face and moved to the side of the slope. (Tr. 33:16-34:2).
- When Law asked Snowden what had happened to the roofbolter, Snowden responded that it "got some water on the motors, but it's just a little rain." (Tr: 35:23-36:3)
- There was water in the trays on the roofbolter, over four feet off the ground. (Tr. 36:16-37:17)
- There was a water line on a ventilation duct approximately seven-and-a-half feet above the mine floor, about twenty feet from the face of the mine. (Tr. 38:14-41:8; 173:16-24)

At this point, Law had not concluded that what he saw constituted a violation, even though it raised questions in his mind. (Tr. 43:18-22) He issued some citations on June 23, 2009, but nothing pertaining to the flooding. (Tr. 43:14-22) These observations concerned him

¹⁶ By stipulation (Stipulation No. 8), the parties have agreed that MSHA became aware of the flooding at Lively Grove on June 8, 2009. The evidence does not support their agreement as to the date. MSHA became aware of the flooding on June 9, 2009, when Jones was prevented from conducting his inspection and took the photographs referred to in this decision.

¹⁷ The following bullet-point allegations are presented as Law believed to be true and to illustrate the beliefs which motivated him to cite Prairie State for violating 30 C.F.R. § 50.10. They are not findings of fact.

enough that he discussed them on the evening of June 23, 2009, with Rennie, his supervisor. (Tr. 43:18-22; 46:10-49:1; 159:5-25) Law was unaware that Jones had been at the mine on June 9th until after he saw the pictures mentioned below. (Tr. 94:19-25)

June 23 - 25, 2009 - Follow-Up Investigation

Following the conversation with Law, Rennie independently investigated the water issues with MSHA management. (Tr. 169:8-162:25) Rennie called Mary Jo Bishop, Assistant District Manager of Enforcement and Rennie's immediate supervisor, and asked her if she knew anything about an incident involving water at Lively Grove. (Tr. 180:13-15) She had Odum call Rennie back later. Odum told Rennie that he and MSHA Jones had taken pictures at Lively Grove on June 9, 2009, showing the results of a heavy rain storm the previous night. Odum then emailed the photos to Rennie. (Tr. 160:2-162:4 and PSGC Exhibit 8) Upon learning that Odum and Jones had not done anything after seeing and obtaining evidence of a possible inundation, Rennie decided that further investigation was necessary. He accompanied Law to Lively Grove on June 25, 2009, to complete the E01 inspection. (Tr. 50:1-53-4; 53:2-8; 160:5-161:18).

June 25, 2009 - Inspection Performed And Citations Issued

On June 25, 2009, Law and Rennie re-visited and re-inspected the surface pit area and slope face, factoring into their analysis the photographs showing the water and mud resulting from the rain storm on June 8th. (Tr. 54:8-67:18; 163:1-17) When Rennie, Law, Snowden and Jankousky went down the shaft on June 25, 2009, construction had resumed on the belt structure (Tr. 55:23-56:4), however, a shuttle car was still stuck in mud, which impeded their permissibility inspection. (Tr. 56:10-25) As he inspected at the slope face, Law noticed a water mark on a ventilation air tube approximately seven feet above the ground that would account for the water in the roof bolter motor compartments and trays that he had seen during his earlier inspection. (Tr. 38:14-41:8; 57:5-58:23; 173:16-24) In Law's experience, it was very unusual for there to be water that deep near the face of a mine, even if the sump pumps had failed. (Tr. 58:24-59:5)

What Law saw led him to suspect that there had been an inundation rather than a slow flooding of the mine face. He surmised that had the flooding been slow, the men would have had time to find another sump pump to handle the water. (Tr. 59:8-15) Law and Rennie saw the flooded roof bolter, and the shuttle car and mining machine stuck in the mud. Water still remained in the bolter's four-foot-high trays two weeks after the flood. (Tr. 35:20-22; 37:11-17) Law also inspected the surface ventilation fan, which he believed had been raised after the storm, and brought it to Rennie's attention. (Tr. 64:1-65:3; 171:18-172:8) Law sensed a disconnect between management's claim that there had been a "little rain" and what he saw in the mine. (Tr. 60:3-9) He continued with the inspection, but had not yet formed an understanding of what had happened. (Tr. 60:12-63:10).

Law and Rennie then met with mine management to discuss the water evidence. (Tr. 67:20-70:21; 163:18-164:8) Chris Cross ("Cross"), Pittman's Maintenance Manager, explained that a storm began about five o'clock on the evening of June 8th, and that it rained so hard that a ventilation fan in the surface pit area shorted out and was shut down between 3:00 and 6:00 AM. (Tr. 71:2-14; 72:1-21) Cross stated further that water was "swirling" by the surface fan such that the fan became an inlet for the water to rush into the mine. (Tr. 72:10-21) Law concluded that the slope itself also allowed water to flow into the mine, entering on the sides of the slope in the open pit, which had not yet been sealed with concrete or backfilled. (Tr. 77:16-79:17; 78:10-25) Law concluded that, at some point, water had overtaken the surface sump pumps to the point where the water was uncontrolled and entering the mine faster than the mine systems could pump it out. (Tr. 72:10-21; 74:10-18; 81:19-25) As Snowden summarized in the Mine Accident Report (Exhibit S-5), the "rain and run-off water eventually flooded the face of the slope." (Tr. 113:13-21)

After inspecting Lively Grove twice, analyzing the photographs taken the day after the flood, and interviewing mine management, Law and Rennie determined that the flooding events at Lively Grove Mine on June 8, 2009, constituted an inundation (Tr. 80:5-83:12; 164:9-21; 179:11-17; 182:19-184:20) and decided to cite Prairie State for failing to report the alleged inundation within 15 minutes.

The Citations

On June 25, 2009, Law issued to Prairie State Citation No. 8417269 alleging a violation of 30 C.F.R. § 50.10 as follows:

On 6/08/09 at 19:00 hours the mine experienced an inundation of water. Torrential rains occurred causing the water to overtake the sumps and pump system located at the bottom of the box cut. A large volume of water flowed into the slope that is being developed currently at the 1270 Foot mark and inundated the slope. There was no immediate notification of the inundation to MSHA as required within the 15 Minute time frame. (Exhibit S-3)

The citation was designated as significant and substantial, "high" negligence, seven persons affected and "lost work days." This was the first citation Prairie State had received since the mine was opened. (Tr. 141:11-18; and Exhibit S-3)

Also on June 25, 2009, Law issued Citation No. 8417271 a to Pittman alleging a violation of 30 C.F.R. § 50.10 as follows:

On 6/08/09 at 19:00 hours the mine experienced an inundation of water. Torrential rains occurred causing the water to overtake the sumps and pump system located at the bottom of the box cut. A large volume of water flowed into the slope that is being developed currently at the 1270 Foot mark and inundated the slope. There was no immediate

notification of the inundation to MSHA as required within the 15 Minute time frame. (Exhibit S-4)

The citation was designated as significant and substantial, "high" negligence, seven persons affected and "lost work days." (Exhibit S-4)¹⁸

According to Law, his decision to cite the violation at the level discussed above, was based on the following factors and conclusions. Snowden stated that there were seven miners in the mine during the incident. Law concluded that the miners would be confronted with rushing water and debris coming from the face, fan intake, and sides of the slope. Law also believed that there would have been electrical hazards from the equipment powered at the bottom of the shaft, including pumps, lights and the shuttle car (Tr. 102:5-103:10). Law concluded that the two miners who stayed on site to monitor the water were in danger from the electrical hazards in the pit - specifically the electrical panel and pumps in the pit (Tr. 103:18-104:3). Law believed that it would be hazardous for the miners to exit the mine up the eight-degree slope for approximately 1,270 feet with water rushing into the mine (Tr. 104:16-25). Law designated the gravity as reasonably likely to cause injuries because the workers in the area could have been injured either by the rush of water, by the debris the water is carrying, or by the electrocution hazards. (Tr. 106:7-20). Law concluded that the flooding could reasonably be expected to cause lost workdays and restricted duty because while attempting to exit the mine, a miner could have slipped or been hit by debris which could have caused a sprain or broke a bone. (Tr.106:25-107:7) Law designated the violation as significant and substantial because the inundation was reasonably likely to cause an accident and the operator failed to call MSHA, which allowed the condition to persist. (Tr. 108:1-10)

Analysis

The Secretary approaches liability from two alternate angles: (1) The flooding that occurred at Lively Grove mine satisfies the definition of "inundation" and is, by reference to 30 CFR § 50.2(h)(4), an "accident" that must be reported, and/or; (2) If the flooding does not meet the definition of "inundation," the circumstances of the event still make out an "accident" that must have been reported. This analysis harmonizes the two theories and concludes that Prairie State should have reported the flooding that happened on June 8-9, 2009.

A. Was there a reportable inundation?

Inspector Law cited Prairie State for an alleged violation of 30 CFR § 50.10 which requires a mine operator to notify MSHA within 15 minutes of determining that an "accident"

¹⁸ Pittman did not contest Citation No. 8417271.

has occurred.¹⁹ “Accident” is a term of art specifically defined at 30 CFR § 50.2(h) (1 through 12) by reference to a list of twelve situations, which includes “inundation.”²⁰ Specific to this case, 30 CFR § 50.2(h)(4) makes "an unplanned inundation of a mine by a liquid or gas" a reportable “accident.” The lynchpin question for this decision is whether the flooding that occurred at the Lively Grove mine was a reportable event, not just whether it meets the definition of an inundation.

It is tempting to limit the analysis by searching for a definition of “inundation” that passably fits the facts of the case and then shoe-horning those facts into the definition to reach

¹⁹ 30 CFR § 50.10 Immediate notification.

The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving:

- (a) A death of an individual at the mine;
- (b) An injury of an individual at the mine which has a reasonable potential to cause death;
- (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or
- (d) Any other accident.

²⁰ 30 CFR § 50.2(h) Accident means[:]

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

the conclusion that the event should have been reported.²¹ But, these facts do not lend themselves to this ungraceful approach. The problem is that this approach relies too heavily on the connotation of emergency associated with the term “accident” in 30 CFR § 50.10 and tends to blur its technical meaning with the vernacular understanding of the word. In many instances, there is an emergent situation that can easily be described as an “accident” and in which there is no discord between the apparent emergency and the need to report. However, in this case the slow pace of water accumulation at the face and the deliberate, calm, and orderly manner in which the miners dealt with the developing situation make it difficult to treat this as an emergency or to characterize it as an “accident” for purposes of deciding whether it should have been reported.²² Such was the dilemma faced by Prairie State management as the events unfolded on June 8 and 9, 2009, and such is the case in writing this decision. Use of the term “accident” in 30 CFR § 50.10 is subtly misleading in cases like this. As a result, I will broaden the analysis to consider whether the flooding in this case was a reportable event, first because it fairly meets the definition of the term “inundation” and, second because additional policy reasons require reporting.

1. **The Definition Approach**

Reference to 30 CFR § 50.2(h)(4) does not explain clearly what can constitute an inundation other than to specify that it must be “unplanned.” The uncertainty about what is meant by “inundation” is the same here as it was for Judge Zielinski in *MSHA v. Randy Pack, Employed by ICG Knott County, LLC*, 2011 WL 840799 (FMSHRC), Docket No. KENT 2009-517, February 9, 2011, where he quoted from *Island Creek Coal Co.*, 20 FMSHRC 14 (Jan. 1998), and discussed the Commission’s interpretation of the accident notification standard in the context of an inundation:

In the absence of an express definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word to be construed. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff’d*, 111 F.3d 963 (D.C.Cir. 1997) (table). “Inundate” and “Inundation” are defined as “a rising and spreading of water over land not usu[ally] submerged: FLOOD ... DELUGE” and “SUBMERGE ... to overwhelm by great numbers or a superfluity of something: SWAMP[.]” *Webster’s Third New Int’l Dictionary (Unabridged)* 1188 (1986). “Flood” is in turn defined, in relevant part, as “an outpouring of considerable extent ... a great stream of something ... that flows in a steady course ... a large quantity widely diffused:

²¹ This is the tack taken by the parties in their post-hearing briefs.

²² It could be argued that MSHA also downplayed the urgency of the situation by failing to act on the knowledge of the flooding as soon as it became aware that something out of the ordinary had happened. (Stip. 8) Regardless of why MSHA took no immediate action, there is arguable congruity between Prairie State’s decision not to immediately report the event and MSHA’s lack of reaction to the first evidence of flooding on June 9, 2009.

superabundance[.]” *Id.* at 873. “Deluge” is defined as “an irresistible rush of something (as in overwhelming numbers, quantity, or volume) . . . a forceful jet of water (as from a fire hose)[.]”

Id., at 598. 20 FMSHRC at 19.

Judge Zielinski interpreted the common meaning of “inundation” in reference to the conditions in that case. He ultimately concluded that there had been an inundation and determined an approximate time from which to count the 15-minute mandatory reporting time.

I agree with the result of Judge Zielinski’s analysis and take it one step farther. “Inundate” generally means to cover with water. There is no certainty in the definition found at 30 CFR § 50.2(h)(4) that the flooding must occur with force or immediacy to constitute an inundation, although it does imply that it must be unplanned. While the flooding in this case was more pronounced than in the *Randy Pack* case, that is only one factor. The more critical factor for purposes of the reporting requirement at play here is whether a measure of urgency is implied, which lies at the heart of Prairie State’s defense, or whether any unplanned flooding in a mine is a reportable event.

It is understandable from reading the language of 30 CFR § 50.10 and 30 CFR § 50.2 that one would believe that an event’s urgency is the dominant factor in deciding whether a flooding event should be reported. This is consistent with the overall tone of the definitions in 30 CFR § 50.2(h), which define “accident” in terms of an urgency to evacuate personnel or key equipment.²³ It is also consistent with the overall emphasis on emergency response at the core of the 2006 Miner Act. However, as the facts of this case illustrate, too much emphasis on urgency can result in a myopic assessment of the need to report a non-urgent event. First, it can detract from the one clear guideline found in the language of 50.2(h)(4), i.e., that the flooding be “unplanned,” whether it is urgent or not. Second, it tends to short circuit consideration of an independent, policy-based and non-emergency rationale for event reporting. De-emphasizing the emergency element allows us to evaluate more clearly whether unplanned flooding in a mine must be reported under 30 CFR § 50.10. I conclude that it must.

With proper emphasis on the unplanned nature of the flooding and the policy underpinnings (discussed below), the differences in the competing definitions of “inundation” become less important. A gradual flooding event which allows for deliberate and calm response on the part of the miners is not an emergency, but it is nonetheless a reportable, unplanned event, which we are constrained by 50.10 and 50.2(h) to call an “accident.” This is important because,

²³ 30 CFR § 50.2(h) uses language that focuses on the elements of danger to miners, urgency, emergency, and disruption, e.g., “death” 50.2(h)(1); “potential to cause death” 50.2(h)(2 and 3); “unplanned” 50.2(h)(4 through 8); “causes withdrawal of miners [. . .] or disrupts [. . .] mining activity” 50.2(h)(9); “requires emergency action” 50.2(h)(10); “endangers an individual” 50.2(h)(11); “causes death or bodily injury” 50.2(h)(12).

when viewed in light of the confusion that comes of using only the definition approach, I am convinced that Prairie State management acted in good faith when they evaluated the circumstances at Lively Grove on June 8 and 9, 2009, and concluded that the flooding was not an inundation and, therefore, need not be reported. This conclusion has bearing on my assessment of liability, S&S, and unwarrantable failure, but it does not affect my conclusion that the flooding should have been reported.

2. **The Policy Approach**

(a) **The Two-Tier Penalty Protocol**

The Miner Act of 2006²⁴ modified 30 CFR § 50.10 to create a two-tier accident reporting protocol.

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. *For purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred.* In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

30 USC 813(j) [*Italics added.*]

A cursory reading of 30 USC 813(j) or 30 CFR § 50.10 can create confusion about whether the 15-minute reporting requirement applies only to lethal or potentially lethal accidents, or as implied in 30 CFR § 50.10(d), “any other accident.” The legislative history for Section 5 of the 2006 Miner Act²⁵ does little to resolve the confusion when it speaks of creating a new 15-minute reporting requirement only for a new subset of lethal or potentially lethal accidents corresponding to the definitions at 30 CFR § 50.2(h)(a), (b), and (c). However, the MSHA Procedure Instruction Letter (“PIL”), No. I10-III-01, effective date April 23, 2010, and expiration date March 31, 2012, provides some clarification by explaining how the 15-minute rule works in the context of the new two-tier penalty mechanism.

²⁴ Miner Act of 2006, PL 109-236 (S 2803), June 15, 2006, Sec. 5.

²⁵ S. Rep. No. 109-365, 109th Cong., at 9, (2006)

The 2006 Miner Act included a change in the 15-minute rule by which the penalty for failure to report an accident within 15 minutes could be enhanced with a minimum penalty of \$5,000.00 for accidents covered by 50 CFR § 50.10, subparts (a), (b), or (c), which correspond to accidents defined in subparts (1), (2), and (3) of 30 CFR § 50.2(h). Under the old enforcement scheme, all accidents defined under Sec. 50.10(h) were either handled under the general penalty assessment protocol or manually processed for special assessment if a higher penalty was sought. The changes in the 2006 Miner Act made it so that deadly accidents, i.e., those defined at 50 CFR § 50.10, subsections (1), (2), and (3), could be cited as Sec. 50.10(a), (b), or (c) violations and trigger the higher minimum penalty without the need for special assessment. All other accidents are still subject to the general and traditional penalty process and should be cited as Sec. 50.10(d) violations. MSHA's case management systems should now be able to automatically detect Sec. 50.10 (a), (b), or (c) violations, thus obviating the need, as before the 2006 Miner Act, to manually separate, process, and specially assess the more lethal incidents in order to seek higher penalties.²⁶ As a result of this change, MSHA can now seek greater minimum fines for those accidents or entrapments causing death or entailing a reasonable potential to cause death, without having to treat them as special assessments.

(b) **The 30 CFR § 50.11 Policy Statement**

It is obvious why lethal and potentially lethal accidents must be reported and why it is imperative to report them within 15 minutes. As for the other accident types defined in 30 CFR § 50.2 (h) (4) through (12), another regulation, not directly implicated in this case, helps explain why they must also be reported, even if they lack the element of obvious urgency:

30 CFR § 50.11(a) After notification of an accident by an operator, the MSHA District Manager will promptly decide whether to conduct an accident investigation and will promptly inform the operator of his decision. If MSHA decides to investigate an accident, it will initiate the investigation within 24 hours of notification.

The MSHA District Manager has the authority and responsibility to decide which events should be investigated, including non-emergency but reportable events. Thus, the reason for the two-tier penalty protocol comes into focus. By law, all lethal or potentially lethal accidents must be reported and investigated. They can also now be processed for enhanced penalty without special assessment. All other accidents must also be reported to the MSHA District Manager in order that he/she may exercise his/her review-for-investigation authority. If a mine operator, as in this case, makes an erroneous on-the-scene decision that a mine event is not reportable, the decision can interfere with the statutory duty of the MSHA District Manager to review all accidents for potential investigation. And, in this case this is the crux of the violation the

²⁶ The citation in this case was erroneously written as a general Sec. 50.10 violation instead of Sec. 50.10(d), which nonetheless makes it subject to the lower and customary fine rules.

citations seek to address. Prairie State's management decision that these facts did not make out an inundation was wrong because it focused on the narrow definitional analysis rather than the broader question of whether this unplanned flooding should have been reported to MSHA for the policy reasons discussed here. MSHA's approach was similarly limited to an attempt to shape these facts to match the definition of inundation, which also failed to factor in the broader policy question.

For these reasons, I conclude that the decision whether an event is reportable must take into account the broader policy mandate expressed in 30 CFR § 50.11(a) in addition to the customary urgency and definitional assessment implied in 30 CFR § 50.10. This is a supplemental and independent basis to conclude that Prairie State should have reported the flooding and failed to do so.

(c) **Deference To The Secretary's Interpretation**

The Secretary argues that in the absence of clear guidance as to how to define and interpret the term "inundation," her interpretation should be given deference. *Island Creek Coal Co.*, at 18-19. Even though the definitions of "inundation" cited in the Commission case precedent fall short of a clear, comprehensive, and compelling elucidation, when "inundation" is interpreted in light of both its dictionary definitions and the policy evident in the Secretary's broad mandate to evaluate all reportable incidents for possible investigation, the deference argument becomes more compelling, albeit for reasons not argued by the Secretary. A debate limited to which definition best fits the facts of a given case can lead to confusion rather than clarity. However, when the discussion is broadened to consider the "why" along with the "when" of the reporting requirement, it becomes easier for the operator to make the report-or-not-report decision in the field and easier for MSHA officials to evaluate that decision after the fact. Thus, as I view the Secretary's argument from this broader perspective, I am presented with another, and in this instance convincing, reason to defer to the Secretary's interpretation. I agree that this was a reportable event.

The flooding at the Lively Grove mine on June 8 - 9, 2009, should have been reported. Because it fits generally under the definition of "inundation," it should have been reported within 15 minutes, not because of any emergency created by the inundation, but because of the unplanned nature of the flooding and the underlying public policy favoring more - rather than less - reporting to MSHA in order to allow it to properly carry out its duties under 30 CFR § 50.11. The Secretary has proved a violation of 30 C.F.R. § 50.10.

B. **Does Prairie State's Violation of 30 C.F.R. § 50.10 Support a Finding of Unwarrantable Failure or S&S?**

1. **Is 30 CFR § 50.10 A Mandatory Standard?**

The Secretary seeks a ruling that this violation constitutes an unwarrantable failure to comply with 30 C.F.R. § 50.10 and is significant and substantial ("S&S"). If an inspector finds,

"based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature," then the violation must be classified as significant and substantial ("S&S"). *National Gypsum Co.*, 3 FMSHRC 822, 825 (1981). To establish that a violation of a mandatory safety standard is S&S, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard, i.e., a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (1984).

Prairie State takes the position that 30 CFR § 50.10 is regulatory only - true to its Part 50 pedigree - despite MSHA's efforts in the wake of the changes in the 2006 Miner Act to elevate it through rule-making to the status of a mandatory standard. As a result, Prairie State argues that a violation of § 50.10 cannot support a finding of S&S or unwarrantable failure because § 50.10 was not "promulgated" in the Final Rule, but merely "revised," and, since it was not a mandatory standard prior to the 2006 rule making, it was not converted into one.

Prairie State argues in particular that there was no clear indication in either the Emergency Temporary Standard ("ETS"), issued on March 9, 2006, 71 Fed. Reg. 71430 (2006), or the December 2006 Final Rule, 71 Fed. Reg. 71452 (2006), to convert § 50.10 from a regulatory provision into a mandatory standard. Prairie State also argues that the Secretary did not provide actual notice that she intended to apply § 50.10 as a mandatory standard subject to enhanced penalty assessment under section 104(d)(1). Prairie State argues that the ETS's revised statement of authority for the Part 50 regulations cites only the Secretary's general rule making authority, and the primary change to § 50.10 was described as a modification that did "not change the basic interpretation of §50.10." 71 Fed. Reg. 12256, 12260 (2006). Although acknowledging that the citation to section 101 was added to the statement of authority for the Part 50 regulations in the Final Rule, Prairie State argues that the change was made without explanation, and as a result, the rule making was ineffective and did not convert the regulatory provision into a mandatory standard.

The Secretary argues that the rule-making after passage of the 2006 Miner Act was effective to convert what had previously been a Part 50 regulation that would not support S&S or unwarrantable failure findings into a mandatory standard that would. In support, the Secretary makes reference to the unpublished decision by Judge Zielinski in *Wolf Run Mining Co.*, WEVA 2008-1417, Order Denying Respondent's Motion for Partial Summary Judgment, (July 2, 2010).

The Secretary asserts that the ETS and Final Rule were published pursuant to section 101, the Secretary's statutory authority for the issuance of mandatory standards. The ETS included findings that delays in notification of accidents subjected miners to grave danger, a prerequisite to issuance of a temporary mandatory health or safety standard. 71 Fed. Reg. 71431 (2006). The Secretary further argues that the December 8, 2006 Final Rule was the culmination of the rule making proceeding initiated pursuant to section 101. In fact, a reference to section 101 as authority for the Part 50 regulations was included in the Final Rule. Consequently,

because §50.10 was promulgated pursuant to Title I of the Act, the Secretary contends that it is a mandatory standard that can be enforced as an unwarrantable failure pursuant to section 104(d).

Prairie State counters that the Final Rule's addition of a "passing reference" to section 101 in the citation to authority is insufficient to transform § 50.10 into a mandatory standard. But it is not the addition of the reference to section 101 in the Final Rule that rendered the new reporting requirements in § 50.10 a mandatory standard. Rather, the fact that the current text of § 50.10 was promulgated pursuant to a section 101 rule making proceeding brings it within the Act's definition of a mandatory standard. *Wolf Run*, unpublished Order at 5.

I am not convinced by Prairie State's arguments. I find that the Secretary made § 50.10 a mandatory standard by promulgating it pursuant to section 101. I concur with Judge Zielinski's ruling on this issue in *Wolf Run*, supra and rely heavily on Judge McCarthy's thorough treatment of this issue in *Sec'y of Labor (MSHA) v. Pine Ridge Coal Co., LLC*, 33 FMSHRC 987, April 29, 2011, 2011 WL 1924269:

Carried to its logical extreme, Respondent's argument would mean that the Secretary could never promulgate any new requirement as a "standard" if the Secretary carried over any existing requirements from the regulation. As Senior Judge Zielinski observed, both the ETS and the Final Rule set forth a complete revised text of § 50.10, not piecemeal amendments to the wording of the earlier regulatory provision. *Wolf Run*, unpublished Order at 5. The ETS and Final Rule incorporated a definitive standard into § 50.10 of what is meant by "immediately contact," i.e., "at once without delay," and "within 15 minutes," which sets a maximum time within which notification to MSHA of a reportable accident must be made. 71 Fed. Reg. 12260.

Id. at 1008.

I conclude that § 50.10 is a mandatory standard and will support a finding of S&S or unwarrantable failure.

2. **Negligence, Gravity And Enhanced Enforcement (S&S And Unwarrantable Failure)**

Concepts of negligence and gravity apply to all citations and orders under the Miner Act, irrespective of whether the Secretary pursues enhanced enforcement. They are codified and reduced to table form at 30 C.F.R. § 100.3 and form a defined and integral part of the penalty assessment mechanism used by MSHA and its inspectors. The concepts of "significant and

substantial” and “unwarrantable failure” are applied, primarily to 104(d) orders²⁷, as part of the enhanced enforcement mechanism set forth in the Miner Act.

Section 110(i) of the Miner Act requires that in assessing penalties the Commission must consider, among other criteria, “whether the operator was negligent.” 30 U.S.C. § 820(i). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard. An operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.

Negligence

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Miner Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* “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.” *Id.* Reckless negligence is when “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” *Id.* High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence is when “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.*

The Secretary alleges that the degree of negligence associated with Prairie State’s violation in this case is “high.” (Exhibit S-3, Citation 8417269) There are two aspects to the violative condition in this case, the flooding itself and the decision not to report it. Facts more closely related to the flooding event are more relevant to the issue of gravity than negligence in this case, and will be discussed more thoroughly below. There is no question that Prairie State’s management knew of the flooding. There is also no question that MSHA officials knew of or had reason to know of the flooding independent of Prairie State’s decision not to formally report it. (Stipulation 8) I am convinced that Prairie State’s decision not to report the flooding was the result of an honest assessment and seemingly reasonable, though incomplete, analysis of whether the facts dictated a formal report to MSHA per § 50.10. This and MSHA’s imputed knowledge of the violating conditions are mitigating factors which reduce the degree of negligence to “moderate” under the guidance of 30 C.F.R. § 100.3(d), Table X. Other mitigating facts bear on the severity of the violation and are discussed below.

²⁷ The Miner Act also contemplates that “any citation given to the operator under this Act” may form the basis for enhanced enforcement if the elements of “significant and substantial” and “unwarrantable failure” can be proved. 30 U.S.C § 814(d)(1)

Under the two prong analysis of both the definition and policy considerations underlying the obligation to report an unplanned inundation, it is relevant that MSHA is imputed with knowledge of the flooding as expressed in the stipulation. While it is of greater overall significance that Prairie State decided not to report the incident, it is nonetheless of some importance to my decision making that MSHA had reason to know of the events that, if properly reported, would have triggered its mandate to decide whether or not to launch a formal investigation. MSHA cannot claim to have been prevented from properly making that decision under these facts. In keeping with the broader analysis applied to whether Prairie State should have reported these events, it is appropriate to address the fact that MSHA's imputed knowledge from Inspector Jones' visit to the mine on June 9, 2009 (including photographs used as exhibits in this case), mitigates any harm associated with MSHA's loss of opportunity to timely decide whether to investigate the flooding. Prairie State's responsibility or negligence is mitigated to the narrower issues of whether it should have reported and whether the report should have been made within the 15 minute window, not whether its failure to report cause any loss of opportunity on MSHA's part. I conclude that Prairie State's uncontested failure to report at all supports a finding of "moderate" negligence under these circumstances.

Gravity ("Seriousness")

The gravity penalty criterion under section 110(i) of the Miner Act, 30 U.S.C. § 820(i), is often viewed in terms of the seriousness of the violation. *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 (April 1987). However, the gravity of a violation and its S&S nature are not the same. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996). The gravity analysis should focus on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The analysis should not equate gravity, which is an element that must be assessed in every citation or order, with "significant and substantial," which is only relevant in the context of enhanced enforcement under Section 104(d). See *Quinland Coals Inc.*, 9 FMSHRC, 1614, 1622, n.1 (September 1987).

Gravity is "often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Miner Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986).

The gradual process of the flooding on June 8 - 9, 2009, and the deliberate, calm, and controlled response of the seven underground miners undercut the Secretary's allegation that injury to the miners was reasonably likely. It is appropriate in assessing gravity to consider the reasonable likelihood of serious injury as limited by the actual facts of this case. The assumptions on which Inspector Law based his decision to charge this violation as he did are set out above at footnote 17 and elsewhere. My findings of fact do not agree with most of the assumptions on which Law based his decision to allege this level of gravity. For instance, the only evidence in the record other than Law's thoughts about the gravity assessment, that relates to the volume of water coming into the mine at the time the miners were still in the mine was that the flow was limited to about one inch down an 8 percent incline. This is not a sufficient inrush to subject the miners to any significant risk of injury as they exited the mine. In fact, the miners were able to ride out of the mine on a mechanized transport vehicle. Law surmised that there would have been increased electrical hazard, but there is no evidence to support that or to support a reasonable inference. Law concluded that the men who stayed after their shift to monitor the pumping of the surface pit would be subject to increased electrical hazard as well, but the facts do not support his assumption. He believed that the water level in the surface pit had risen above the intake grate on the ventilation fan housing, but the photographic evidence simply does not bear this out. He also believed that the ventilation fan had been raised after the storm to make it less likely that storm water would flow into the mine through the ventilation tube. However, the evidence does not show that the water in the surface pit rose to that level, or that it entered the mine through the ventilation tube at all, or that the ventilation tube was in fact even raised.

In light of these facts, I conclude that injury to the seven miners was unlikely, therefore there would be no lost work days.

2. **Do The Facts Support A Finding Of S&S?**

Significant and Substantial ("S&S")

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Federal Mine Safety and Health Review Commission ("Commission") explained that:

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.

Id., at 3-4.

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125 (Aug. 1985), the Commission held:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.”... We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial.

Id., at 1129 (internal citations omitted) (emphasis in original).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. See *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory standards. *Cyprus Emerald Res. Corp. v. FMSHRC*. 195 F.3d 42 (D.C. Cir. 1999)

As discussed above, § 50.10 is a mandatory standard and will support the enhanced enforcement measures of S&S and unwarrantable failure. In applying the four elements of the *Mathies Coal* test, *supra*, it becomes apparent that under these facts and the logic of this decision this violation was not S&S. First, there was a violation of § 50.10 as discussed above. Second, the violation must contribute to a measure of danger to miners. Depending on how one reacts to the facts of this case, it is possible to conceive how such gradual flooding in a mine could result in a dangerous situation. However, such a danger is far from concrete. It is in the gray area in which a fact finder must reach to infer a danger and hypothesize how such a danger could exist. These facts do not convince me that I should lean that far. It is understandable how Inspector Law reached the conclusions on which this citation was based. The evidence he saw was stale, incomplete, and confusing to interpret. The evidence presented at trial was somewhat clearer and easier to comprehend, but it still leaves this fact finder wishing for a clearer picture. As a result, I cannot find that the flooding here resulted in a concrete and discrete danger to the miners involved. Nor can I find that the failure to report caused any concrete and discrete danger. Failure to report is a violation of the standard, but it does not translate into a concrete danger to the miners in the Lively Grove mine. The third element of the test requires a finding that the danger or hazard created by the violation will likely result in injury. The fourth element requires that the injury will be of a reasonably serious nature. Because the second element of the *Mathies* test is not satisfied, it follows that the third and fourth elements will also fail. In sum, the Secretary has failed to prove that this violation was significant and substantial.

3. **Do The Facts Support A Finding Of Unwarrantable Failure?**

Unwarrantable Failure

The term “unwarrantable failure” comes from section 104(d) of the Act and, taken together with “significant and substantial,” creates a standard for enhanced enforcement procedures, including so-called “D-Chain” withdrawal orders and potential enhanced liability, if

a pattern of violations is eventually proved. Existing Commission authority is less than clear in defining the terms and tends to imply that they refer simply to more serious conduct by an operator in connection with a violation.

In *Emery Mining Corp.*, 8 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.*, at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.*, at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has examined various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. e.g., *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

It is clear in the Miner Act that since negligence and gravity, which are clearly delineated in 30 C.F.R. § 100.3 and related tables, apply to all citations and orders, the enhanced enforcement provisions set out in Section 104(d) contemplate something distinct and “more,” when talking about “significant and substantial” and “unwarrantable failure.” The Secretary must prove negligence and gravity for all citations and orders and, in order to invoke the enhanced enforcement plan in Section 104(d)(1), also must prove that the circumstances of the violation satisfy both the “significant and substantial” and “unwarrantable failure” standards. If the Secretary fails to prove both, there can be no enhanced enforcement. The Secretary has to prove four distinct elements²⁸ when the enhancement scheme in Section 104(d) is alleged: (1) negligence; (2) gravity; (3) “significant and substantial;” and (4) “unwarrantable failure.” As a result of this, I generally treat the two groupings and each element in each grouping separately. In the interest of clarity, I see no advantage in blurring the distinctions between and among the concepts, the groupings, or the elements.

²⁸ The Secretary must also prove the existence of the underlying strict liability violation of a health or safety standard.

I will not address unwarrantable failure inasmuch as I have concluded that this violation was not significant and substantial, and according to Section 104(d)(1) of the Miner Act, a finding of S&S is a condition precedent to a finding of unwarrantable failure.

C. **What Penalty Is Appropriate?**

Applying the penalty regulations found at 30 C.F.R. § 100.3 and related tables, I conclude that an appropriate penalty for this violation is \$112.00.

Order

It is **ORDERED** that Citation No. 8417269 be **MODIFIED** to reduce the negligence assessment from “high” to “moderate,” the gravity assessment from “reasonably likely” to “unlikely,” and to remove the S&S and unwarrantable failure designations.

It is further **ORDERED** that Prairie State pay a penalty of \$112.00 within 30 days of this order. Upon receipt of payment, this case will be **DISMISSED**.

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

Distribution: (CERTIFIED MAIL)

R. Henry Moore, Jackson Kelly PLLC, Three Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA 15222-1000

Emily B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor, 1999 Broadway, Suite 800, Denver, Co 80202-5708

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th Street, Suite 443
DENVER, CO 80202-2500
303-844-3577/FAX 303-844-5268

October 24, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2007-172
Petitioner	:	A.C. No. 11-02752-122978-08
	:	
v.	:	Docket No. LAKE 2008-526-A
	:	A.C. No. 11-02752-153962-02
	:	
	:	Docket No. LAKE 2008-624
THE AMERICAN COAL COMPANY,	:	A.C. No. 11-02752-160144-01
Respondent	:	
	:	Galatia Mine

DECISION

Appearances: Karen E. Wilczynski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Jason W. Hardin, Esq., and Mark E. Kittrell, Fabian & Clendenin, Salt Lake City, Utah, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against The American Coal Company (“AmCoal”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Benton, Illinois, and filed post-hearing briefs.

AmCoal operates the Galatia Mine, an underground coal mine in Saline County, Illinois. At the time the citations and orders in this case were issued, the mine was very large. It had three portals: the Main Portal, Galatia North Portal, and the Millennium Portal, which is now known as the New Future Portal. Miners would sometimes rotate between portals and equipment would sometimes be moved to different portals. The Main Portal and Galatia Portal were connected underground but, due to a fault line, the Millennium Portal was separate. All three portals had one identification number issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) and were considered to be one mine for enforcement purposes. This mine employed a little over 1,000 people in 2007 and produced 7,009,160 tons of coal in 2007. In 2007, the mine liberated a little over four million cubic feet of methane a year and it was on a five day spot inspection cycle.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Notices to Provide Safeguard

The citations at issue in these cases allege violations of notices to provide safeguards (“safeguard notices”) issued under 30 C.F.R. § 75.1403. AmCoal challenged the legality of the underlying safeguard notices by filing a motion for summary decision. The Secretary opposed the motion. In an order dated December 17, 2010, I denied AmCoal’s motion for summary decision.¹ My findings and conclusions in that order are incorporated into this decision by reference. In its motion, AmCoal argued that the safeguard notices involved here, and in the other dockets for which I am issuing a decision granting settlement on this date, are invalid because “they do not identify specific hazards, and/or they do not identify the conduct required of the mine operator to remedy such hazards, and/or they do not address hazards that are not covered by a mandatory standard.” (AmCoal Motion 5). Among other rulings in my order, I found that each contested safeguard notice identified a specific hazard and specified a remedy with sufficient precision to provide AmCoal with fair notice of what was required. In its post-hearing brief in these cases, AmCoal reiterates some of these arguments on this issue.² (AmCoal Br. 4-8).

B. Citation No. 6667032; LAKE 2007-172

On May 30, 2007, Inspector Michael Rennie issued Citation No. 6667032 under section 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.1403. The citation alleges the following:

The walkways along the active 8th North longwall face were not being maintained free of all extraneous materials that would affect the safe travel of miners. When inspected, the walkways, shield bases, and the area between the face conveyor and shields [were] observed with large amounts of rock and coal spilled in the walkway. The extraneous materials were observed from the headgate to the tailgate at various locations. The accumulations ranged from a small amount to as high as the pan line hand rail.

¹ My order of December 17, 2010, was not published by the Commission. It will be published contemporaneously with this decision.

² AmCoal was represented by the law firm of Rajkovich, Williams, Kirkpatrick & True at the time the motion for summary decision was filed. The law firm of Fabian & Clendenin has represented AmCoal since that time.

(Ex. G-A). Rennie determined that an injury was reasonably likely and, if an injury did occur, it could reasonably be expected to result in a permanently disabling injury. He determined that the violation was of a significant and substantial nature (“S&S”), that one person would be affected, and that the violation was the result of the moderate negligence of the operator. The Secretary has proposed a civil penalty of \$5,080.00 for this violation.

The cited safety standard provides that “[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.” 30 C.F.R. § 75.1403. This citation was issued based on Notice to Provide Safeguard No. 7582643 issued January 26, 2006. The safeguard notice was issued because a longwall working section had not been provided with a clear travelway between the longwall face conveyor and the shield bases for the entire length of the longwall face. (Ex. G-T). Coal and gob material were observed in the walkway and on the shield bases at various depths. The safeguard notice requires that “all longwalls at this mine shall maintain the walkways and shield bases between the face conveyor and the shields, free of all extraneous materials that would affect the safe travel of miners.” *Id.* Inspector Rennie, who issued the safeguard notice, testified that the safeguard notice requires AmCoal to keep the longwall shield bases and walkways along the longwall face free of coal and gob or other debris so that miners can safely travel up and down the longwall face. (Tr. 20).

1. Summary of the Evidence

When Rennie arrived at the mine he reviewed the preshift and onshift examination books. He testified the he saw entries in these books that indicated that coal and gob had been present on the longwall face for three shifts. (Tr. 26). At that time, the mine operated with three eight-hour shifts. The preceding shift change occurred at about 8:00 a.m. that morning. (Tr. 43). Rennie testified that when he inspected the subject longwall section “there was coal and rock that had spilled over into the walkway that was at various depths along the longwall face, and in some areas, all the way up and to the top of the panline or the face conveyor.” (Tr. 29). He estimated that the face conveyor was about three feet high and that the longwall face was about 1,000 feet in length. (Tr. 30). He observed this material along the entire length of the face. Between shield Nos. 150 and 144 he observed coal and rock to the top of the cable trough.³ He believed that each shield was about 8 to 10 feet wide. (Tr. 31). About eight miners work on a longwall crew and these miners must walk up and down the longwall face during their shift.

Inspector Rennie determined that the violation was S&S because the accumulations of coal and rock created serious stumbling hazards to miners working on the longwall section. He testified that there is a limited amount of space for miners to travel on the longwall when the panline is pushed up. (Tr. 33). He determined that, with the amount of spillage, a miner could

³ A “cable trough” is a trough into which the electric cable for the shearer is laid down as it moves along the longwall face. (Tr. 32). When the shearer moves in the other direction, the cable is picked back up. This cable tray is higher than the face conveyor. (Tr. 32).

trip and get into the running face conveyor, which is made of steel, as he was trying to maneuver through the area. A very serious injury would likely result from this condition. In addition to the regular mining crew, miners performing repairs would face the same hazard. A miner could also trip and fall into the structure of the longwall shields and sustain serious injuries. (Tr. 34-35). Because of the depth of the spillage in some locations, it would be difficult for miners to see the rams underneath that connect the panline with the shields. The shields and the panline move forward as mining progresses with the result that miners may not be able to observe this movement when material is covering the rams and shield bases. (Tr. 35). The inspector testified that some spillage is to be expected along a longwall face, but the amount of spillage he observed was beyond that which should be allowed to accumulate. (Tr. 35, 49).

Inspector Rennie determined that the condition had been allowed to accumulate for three shifts based on what he observed in the preshift and onshift books. (Tr. 36, 52-53). The longwall was operating when he traveled underground. The preshift examiner for the shift, the foreman, or the longwall coordinator should have shut down the section when he observed the spillage. In his notes, Inspector Rennie wrote that an injury was “[r]easonably likely due to the 3rd shift had been running the longwall [which] caused people to crawl over this rock directly next to the moving face conveyor.” (Tr. 37; Ex. G-A, p. 11 of notes). He believed that any injuries resulting from the conditions observed could have been permanently disabling. The inspector determined that the operator’s negligence was moderate because he “couldn’t place a foreman . . . along the longwall face at that time to designate any higher, and [he] hadn’t been having a problem until this time with [AmCoal] not keeping the longwall clean” (Tr. 39). He did not observe anyone cleaning up any of this spillage and, if some effort had been made to remove the spillage, these efforts were not very effective. (Tr. 39, 58). Typically spillage along the longwall would be removed using shovels. (Tr. 56). Inspector Rennie gave AmCoal 24 hours to remove the material. (Tr. 57).

Bill Crittendon is a safety specialist with AmCoal and accompanied Inspector Rennie during the subject inspection. (Tr. 64). He testified that when he went to the longwall face before the citation was issued, he observed a couple of miners shoveling the spillage. (Tr. 67, 86). He was not sure whether Inspector Rennie was with him at that time. He believes that the longwall was down at that time. *Id.*

Crittendon testified about the preshift examination for May 30, 2007, that was performed between 5:00 a.m. and 8:00 a.m. (Tr. 69-70). The preshift examiner’s report for that examination states as follows: “feet dirty 57, 77, 86, 116, 137 to 146.” (Tr. 70; Ex. R-48 p. 10). Under the heading “Action Taken,” the report states “Preshifted and Reported (work in progress).” *Id.* Crittendon testified that these entries make clear that the preshift examiner discovered the conditions, reported the conditions, and that work was being done to correct the conditions. (Tr. 71). The foreman and mine manager on the oncoming shift would have reviewed these entries.

Crittendon also reviewed the preshift examination report for May 29, 2007, that was performed between 9:00 p.m. and 12:00 p.m. (Tr. 72; Ex. R-48 p. 8). The entry on that report

states that no hazardous conditions were observed by the preshift examiner. *Id.* The onshift examination record for May 30 for the 12:00 a.m. to 8:00 a.m. shift does not show any entries for spillage along the longwall face. (Tr. 73-74; Ex. R-48 p. 9). The preshift examination on May 29 that was performed between 1:00 p.m. to 4:00 p.m. shows no observed hazardous condition on the longwall face. (Tr. 74; Ex. R-48 p. 6). The onshift examination record for the 4:00 p.m. to 12:00 midnight shift on May 29 also does not indicate that there was spillage in the longwall face area. (Tr. 76; Ex. R-48 p. 7). Crittendon testified that these are the same books that Inspector Rennie would have reviewed and that the books would not have been altered. (Tr. 75).

The midnight to 8:00 a.m. shift on May 30 was the shift just prior to the shift during which Inspector Rennie issued his citation. The "Production and Delay Report" ("P&D Report") for this shift shows that the shearer started cutting coal at 12:40 a.m. and cutting was completed for the shift at 6:42 a.m. (Tr. 78; Ex. R-45 p. 1). Under a section entitled "Equipment Status/Problems," this report states, in part: "Cleaned Rock off Shield Feet, Washed Shields." (Tr. 80; Ex. 45 p. 1). This report also shows that the shearer was shut down ("delayed") during much of the shift. (Tr. 80-81; Ex. 45 p. 1). One delay recorded on the P&D Report was from 6:40 a.m. until 8:50 a.m. (Ex. 45 p. 1). Another delay recorded on this report was between 8:50 a.m. and 9:30 a.m. The notation for this delay states: "Spragging Shields/Cleaning Rock Up." (Tr. 81; Ex. R-45 p. 1). The subject citation was issued by Inspector Rennie at 9:45 a.m.

At 9:30 a.m., Inspector Rennie issued an order under section 104(b) of the Mine Act on the headgate entries leading up to the subject longwall face because muddy conditions that were the subject of a previous citation had not been completely abated. The inspector ordered everyone on the section to be withdrawn from the area, including miners working on the longwall face. Crittendon testified that the men, who had been removing the spillage along the longwall face, were ordered withdrawn by Inspector Rennie when he issued the section 104(b) order. (Tr. 82-83). He testified that mine management knew that there was a problem with accumulated material on the face and that AmCoal was taking steps to rectify the conditions. (Tr. 83). The P&D Report shows that the shearer had not been cutting coal since 6:42 that morning. (Tr. 83).

The delays for the following shift show that the shearer was not cutting coal between 8:40 a.m. and 3:25 p.m. (Ex. R-45 p. 2). The longwall was down between 8:40 a.m. and 1:00 p.m. because of the section 104(b) order. The delay between 1:00 p.m. and 2:45 p.m. was a result of miners shoveling up the spillage cited by the MSHA inspector. (Tr. 85; Ex. R-45 p. 2). Crittendon was not sure how long it took for the conditions cited by the inspector to accumulate, but he believed that, if the top were bad, such material could quickly accumulate. (Tr. 89-90).

2. Brief Summary of the Parties' Arguments

The Secretary argues that the evidence supports the findings and conclusions of Inspector Rennie and she contends that the citation should be affirmed. She maintains that the evidence substantiates the inspector's S&S determination. She goes on to argue that the evidence shows that AmCoal's negligence was high rather than moderate. She contends that the court should not credit the testimony of Bill Crittendon because he had little independent recollection of the events of May 30, 2007. (Tr. 65).

AmCoal contends that the testimony of Inspector Rennie should not be credited because he erroneously concluded that the cited condition had existed for three shifts. He admitted that, because the preshift books are kept on the surface, he relied on his memory when he reached this conclusion. (Tr. 50-51). The books actually show that the condition was reported once during the examination that occurred just before his inspection. In addition, AmCoal argues that the inspector's determinations as to gravity, negligence, and S&S are clearly incorrect when compared with the evidence presented at the hearing. Inspector Rennie overstated the amount of the material that was present, the length of time it was present, and the length of time it took for the material to be cleaned up.

3. Discussion and Analysis

I find that the Secretary established a violation. In my order of December 17, 2010, I determined that Safeguard Notice No. 7582643 was validly issued. (Attachment 10-11). In addition, I find that the safeguard notice was applied by Inspector Rennie to hazardous conditions that were specifically identified in the safeguard notice. *See Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (April 1985). The safeguard notice provided fair notice of what AmCoal was required to do to comply.

AmCoal argues that I should neither credit Inspector Rennie's testimony nor defer to his judgment. It notes that the inspector testified that the condition had existed for three shifts based on his review of the preshift examination books. It maintains that the objective evidence establishes that the cited condition was only reported once in the preshift books, just prior to the shift when it was cited. Inspector Rennie's recollection was incorrect and his inspection notes were incorrect as well. Inspector Rennie was also incorrect when describing the conditions he observed. He claimed that the deepest section of spillage was about 80 feet in length. During cross-examination, he admitted that distance was just an estimate. AmCoal argues that the objective evidence demonstrates that the condition could not have extended for more than 35 to 42 feet. In addition, the inspector believed that the longwall had been running when these conditions were present, but the objective evidence shows that the longwall had not operated since about three hours prior to the issuance of the citation.

Although I agree with AmCoal that Inspector Rennie was mistaken about some of the matters he observed, I find that his misunderstandings were in good faith and that the objective evidence establishes a violation. I also find that the evidence does not establish that the violation

was S&S. An S&S violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 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 Commission has explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel*, 6 FMSHRC at 1574. 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).

I have already found a violation of the cited mandatory standard. Further, I find that there was a discrete safety hazard created by the violation. Furthermore, I find that the fourth element of the *Mathies* test has been satisfied. If an injury were to occur as a result of the cited conditions, it would have been of a reasonably serious nature. However, the evidence does not support a conclusion that there was a reasonable likelihood that the hazard contributed to would have resulted in an injury assuming continued normal mining operations. I reach this conclusion

because I credit the testimony of Mr. Crittendon that the cited condition had not existed for a very long period of time, miners were exposed to the hazard for a limited period of time, and AmCoal employees were in the process of cleaning up the accumulations. Moreover, the P&D Report and the various preshift and onshift examination reports corroborate Crittendon's testimony. Indeed, he based his testimony, in large part, on the information in these reports. I primarily rely on the P&D reports and the preshift examination reports in making my findings on this issue. The shearer was down much of the previous shift and miners were not exposed to the cited hazard while it was operating. When he arrived on the section, Inspector Rennie was mostly concerned with AmCoal's failure to abate the citation that had been issued in the headgate entries. He did not observe the longwall face area until most of the miners had been withdrawn. He would not have had any opportunity to observe whether miners were cleaning up the accumulated material. I credit the testimony of Crittendon that the material could have accumulated in a relatively short period of time if roof conditions were not optimal. The violation was serious, however, because a miner could have been seriously injured by the cited conditions.

I find that AmCoal's negligence was low. The condition had been observed by the preshift examiner, the condition was noted in the book, and AmCoal was taking steps to eliminate the hazard. A penalty of \$1,000 is appropriate for this violation.

C. Citation No. 6668530; LAKE 2008-526-A

On November 9, 2007, Inspector Steven Miller issued Citation No. 6668530 under section 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.1403. The citation alleges the following:

The diesel shield mover, company No. 7, was observed transporting a shield in the No. 3 entry of the 1st West Flannigan Longwall Panel. The shield was not secured in all directions to prevent movement during transport. The shield was only secured by rope on a winch and had slid on the duckbill to the side.

(Ex. G-G). Miller determined that an injury was highly likely and, if an injury did occur, it could reasonably be expected to result in a permanently disabling injury. He determined that the violation was S&S, that one person would be affected, and that the violation was the result of the high negligence of the operator. The Secretary has proposed a civil penalty of \$45,000.00 for this violation.

This citation was issued based on Notice to Provide Safeguard No. 7490527 issued June 14, 2007, by Inspector Miller. The safeguard notice provided, in part:

A serious accident occurred on May 24, 2007, at the mine during recovery of the 3rd East Longwall. A miner was pinned between two longwall shields in the Main South storage area at Station

5+90 in the No. 5 Entry. One shield had been placed in the storage area and another shield had been transported there and was being unloaded. The shield had been moved there by a battery-powered “duckbill” shield mover. The shield had been secured to the “duckbill” shield mover by a hook fastened to a winch. During the process of unloading the shield the miner stepped between the two shields. The shield being unloaded slid toward the previously placed shield, pinning the miner.

This is a notice to provide safeguards. Shields being transported shall be secured in all directions to prevent movement during transport. Straps, hooks, chains, etc. shall be used in addition to the winch provided on the shield mover. In addition, safe work procedures shall be established and incorporated into the mine’s training plan which will address safe methods of shield loading and unloading, and safe locations for miners performing these duties.

(Ex. G-W).

1. Summary of the Evidence

Inspector Miller testified that he issued the safeguard notice because a longwall shield slid during the process of trying to remove it from the shield mover, which caused a nearly fatal accident. (Tr. 98). At the time of the accident, the mine was in the process of moving the longwall equipment to a new panel. The next panel was not ready for the installation of the longwall equipment, so the individual shields were being stored in an entry. As each shield was brought in, there was a miner present to help remove each shield from the shield mover and place it in the entry. When the accident happened, a shield was being removed in an area where the mine floor was at an angle. (Tr. 99). As a consequence, the left side of the shield mover was higher than the right side. The area was wet and slippery and the duckbill on the shield mover was wet with oil. When the miners started to remove the shield from the shield mover, one of the miners was standing between the shield on the shield mover and the shield that had been previously delivered to the area. The shield on the duckbill slid and pinned that miner between the two shields. The other miners had to drive wedges between the two shields to remove the pinned miner. (Tr. 100). He suffered serious injuries as a result of this accident.

Inspector Miller issued the safeguard notice after MSHA investigated this accident. He testified that he based the safeguard notice on conditions that existed at the mine at the time of the accident. He admitted that the hook attached to the wire rope on the winch had been removed from the shield when the shield slid on the duckbill. (Tr. 131). He testified that the shield would not have slid so far if the shield was hooked to the winch, but it still would have slid. (Tr. 134). He also testified that a pin connecting the knuckle to the relay bar was sticking out about two to three inches, which forced the nose of the shield up so that it was not flat

against the duckbill. (Tr. 138). He admitted that this knuckle pin may have helped the shield slide off the duckbill. *Id.* Inspector Miller believes that additional chains or straps would have prevented this accident. In order to abate the safeguard notice, Inspector Miller required AmCoal to change its training plan to instruct miners on the proper procedures for shield loading, transport, and unloading. The safeguard notice was abated after the training plan was changed and the miners had been retrained. (Tr. 111).

Joseph Myers testified for AmCoal. He is the safety compliance manager at the mine. He has about 25 years working with longwall operations. (Tr. 233). Myers was the company representative when the safeguard notice was issued. He testified that, at the time of the accident, the shield mover operator and his helper were unhooking the shield from the hook on the winch rope. (Tr. 240). The helper positioned himself between the shield on the duckbill and another shield on the ground when he unhooked the winch rope. The shield on the duckbill slid, pinning him between the two shields. (Tr. 241). Myers testified that the safeguard notice specifically states that it covers the “transport” of shields on shield movers. In his opinion, unloading a shield from the duckbill should not be included in the definition of transport. (Tr. 242). Miners and supervisors were trained that additional methods to secure shields to the duckbill of the movers were required during transport. (Tr. 245). Miners were also trained not to place themselves in tight locations when the shields are moved and offloaded. This was the only accident that has ever occurred at the mine arising out of the relocation of longwall shields to a new panel since at least 1983. (Tr. 247-48). The safeguard notice covered all three portals of the mine. (Tr. 256).

Inspector Miller testified that he issued Citation No. 6668530 based on the requirements of the safeguard. The shield described in the citation was only secured by the hook attached to the winch line on the shield mover. The shield had not been strapped to the shield mover to prevent it from sliding off the side of the duckbill. (Tr. 106). The safeguard notice required AmCoal to use a chain or nylon strap to secure the shield near the front end so that it could not slide left to right.⁴ The winch prevented movement from front to back. This citation was issued about six months after the safeguard notice had been in place.

Miller testified that, when he talked to the section foreman, the safety representative, and the miners helping move the shield, they were unaware of the safeguard notice. Inspector Miller testified that, as the shield mover transports the shield, it travels over uneven surfaces and around tight corners. Without being properly secured, the shield could easily slide on the duckbill and pin a miner against a rib or another piece of equipment. (Tr. 110). If the shield were to slide off the duckbill, it could also crush a miner’s foot or leg. He admitted, however, that if a shield is secured to the winch and it were pulled up tight against the shield mover, it could not slide very

⁴ The duckbill extends to the front of the shield mover much like the forks on a fork lift. The wire rope on the winch secures the shield at the back next to the body of the mover. The safeguard notice required the shield to also be secured closer to the front of the duckbill using a chain, a strap, or other means.

much on the duckbill. (Tr. 153-54). In addition, if shields have to be moved long distances, AmCoal often uses ram cars to move the shields. (Tr. 167).

Inspector Miller agreed that when the shield is loaded, it is pulled up onto the duckbill of the shield mover by using the winch to pull it up tight to the frame of the mover. (Tr. 145). Mine operators attach the shield to the winch using different methods, some use a tow bar and others simply use a clevis on the shield. (Tr. 144). Once the shield is properly positioned on the shield mover, the duckbill is raised for transport like the forks on a forklift. After the shield has been transported to the desired location, the duckbill is lowered and positioned in such a way that, as the wire rope on the winch is let out, the shield mover is pulled back and the duckbill is pulled out from under the shield. The area should be relatively flat. The duckbill should be tilted slightly forward as it is lowered so that the front end of the shield touches the ground when the shield mover is backed out, leaving the shield on the ground. Miller testified that the shield should extend out beyond the snout of the duckbill so that the weight of the shield is on the ground as the duckbill is pulled out. (Tr. 146-47). At some point in this process, the straps are loosened so that the shield remains on the ground as the shield mover is backed out. (Tr. 114-15).

Inspector Miller believes that the cited condition created a serious safety hazard that was S&S. During transport, the shields were maneuvered around corners and along uneven mine floors full of slopes, angles and inclines. (Tr. 106, 110). If the shield moved while being transported, it could pin someone between it and the rib or another piece of equipment.

Keith Medley, a longwall production foreman, testified that there are typically 189 shields on a longwall face. The citation issued by Inspector Miller concerned the final shield that needed to be set. (Tr. 201). At the start of the shift, the shield was on the shield mover, but the mover was not manned and it was shut off. Medley asked a miner to get on the mover and start it up. At that moment, Inspector Miller arrived and told him to shut it down. (Tr. 202). Miller asked him, "What is wrong with this picture?" When Medley could not answer, the inspector asked why the shield was not chained to the duckbill so it would not move from side to side. Medley replied that he did not know that he had to do this. *Id.* He was not aware that the safeguard notice had been issued. (Tr. 218, 223). Medley testified that the shield mover was parked and that the duckbill was down on the ground. (Tr. 203). The shield was secured to the mover with the winch rope. The only step left was to move the shield to set it into position. He estimated that it was only about 75 feet from the face. (Tr. 204, 221). Medley testified that the shield was a little "cocked" on the duckbill, which was not an unusual occurrence and did not present a safety hazard. (Tr. 227-28). All of the shields were transported to the face in the same manner without the use of any additional straps or chains. (Tr. 220-21).

Medley testified that he has worked on longwalls for almost 13 years. He testified that he knows of no other accidents or near accidents involving moving shields other than the accident that resulted in the safeguard notice. All that was going to be done to install the last shield was move it about 75 feet to the longwall face and set it into place. (Tr. 209). The shield is fully secured by the winch rope until you "slack off on the winch rope, raise your duckbill,

push the shield in [place, and] unhook it.” (Tr. 210). He has never observed any problem with the shield being secure on the duckbill when it is held in place with the winch rope. (Tr. 211-12, 227). Medley has participated in about 30 longwall moves during his career. (Tr. 212). Ram cars are generally used to move shields long distances and they typically bring the shields close to the longwall face. (Tr. 226-27, 229). The roadways at the mine were muddy and uneven and ram cars cannot be used to move shields if the roof is too low. (Tr. 230-31).

Medley also testified that, during annual safety training and on a regular basis, miners are trained not to place themselves between equipment and a rib or another piece of equipment. These are danger zones and equipment operators are trained to look out for anyone in their area of operation.

Joseph Myers accompanied Inspector Miller on this inspection. When Miller told him that he was going to issue a citation based on the safeguard notice, he could not immediately recollect the safeguard notice. (Tr. 236-37). Myers testified that he does not have occasion to deal with safeguard notices frequently enough to remember them all. About 50 to 60 safeguard notices had been issued at the mine at that time. (Tr. 237, 248-49). In addition, the longwall shields are only moved once or twice a year. When he called the surface office, the safety department verified that the safeguard notice that Miller referenced had been issued. When this citation was issued, Myers made sure that mine management understood what was required when moving shields on shield movers. (Tr. 243-44; Ex. S-G, p. 3). Longwall moves are very safe at the mine because of the heightened awareness of the potential hazards. (Tr. 249-50).

2. Summary of the Parties' Arguments

The Secretary argues that Inspector Miller observed the shield at an angle on the duckbill so he reasonably concluded that the shield had slid as it was being transported. The shield was only secured by the winch. The safeguard notice clearly requires that a shield also be secured with a strap or other device to prevent it from moving from side to side. This was a clear violation of the safeguard notice. In addition, the Secretary argues the evidence established that the violation was S&S and very serious. At the hearing and in her brief, the Secretary argues that AmCoal's blatant disregard for and failure to comply with the safeguard notice constitutes high negligence and rises to the level of aggravated conduct constituting an unwarrantable failure.

AmCoal argues that the underlying safeguard notice is invalid because it lacks the requisite specificity, is overly broad, and has been enforced in an inconsistent and unpredictable manner. AmCoal first maintains that the safeguard notice failed to address the hazards that caused the accident. The safeguard notice should have focused on requiring further training on where and how to lower a duckbill onto the mine floor, how to check for stuck knuckle pins, and the proper positioning of miners during the unloading of shields. (AmCoal br. 22). The safeguard notice only addressed “shields being transported” and required the attachment of chains or straps. The phrase “being transported” is ambiguous and, indeed, Inspector Miller interpreted it in two different ways at the hearing. (Tr. 102, 156-57). The inspector also

recognized that any supplemental chains or straps would have to be removed or loosened prior to actually unloading the shield from the duckbill. (Tr. 114). For that reason, AmCoal argues that the safeguard notice would not prevent the same accident from occurring again. AmCoal concludes that the safeguard notice does not apply to the alleged conditions because the circumstances that gave rise to citation “are so starkly different from what led to the accident in May 2007.” (AmCoal Br. 25).

AmCoal also concludes that those portions of the safeguard notice “related to the extra measures to secure a shield during transport are overly broad, do not appear to be related to any hazard actually identified during the accident investigation or thereafter and, in and of themselves, would not have protected miners from the same hazard that led to the accident in May 2007.” (AmCoal Br. 23). Consequently, the safeguard notice failed to “identify with specificity the nature of the hazard at which it is directed.” *Id. quoting SOCCO*, 7 FMSHRC 509, 512 (April 1985).

AmCoal argues that no deference should be given to Inspector Miller’s testimony because it was “inconsistent, ever-changing and contradictory and because his designation of gravity (degree of injury) varied between Citations 6668530 and 6683959 for no justifiable reason.” (AmCoal Br. 14-15). AmCoal states that the inspector opined that the conditions that caused the accident in May 2007 were also present when Citation No. 6668530 was issued, yet the Secretary only offered general, non-specific evidence to back up this claim. The accident report was not introduced, nor were any of the notes taken during the accident investigation. It is quite clear that the shield involved in the accident slid on the duckbill after the shield had been released from the winch. In addition, the duckbill was lowered onto a very uneven floor at the time of the accident. The inspector also admitted that a knuckle pin that was sticking out from the relay bar kept the shield from lying entirely flat on the duckbill because it was holding the nose of the shield up, and that this might have helped the shield slide off the duckbill. AmCoal contends that this evidence demonstrates that the circumstances that led to the accident were entirely different from the circumstances that existed at the time Inspector Miller issued the citation. That shield was firmly attached to the winch, the duckbill was not slick with oil, the duckbill was not resting on an uneven surface, and there was no knuckle pin present to prevent the shield from lying flat.

AmCoal also argues that, on direct, Inspector Miller gave the impression that the shield was teetering on the edge of the duckbill, when the drawing that he made at the time he issued the citation showed that the shield was only slightly off-center. (Tr. 155; Ex. G-G, p. 7 of notes). Keith Medley testified that it is not uncommon to load a shield slightly “cocked.” AmCoal maintains that this is the more rational explanation of the condition the inspector observed and that he incorrectly jumped to the conclusion that the shield had slid on the duckbill.

AmCoal maintains that, if the citation is not vacated, the court should find that an injury was unlikely because the mine is on heightened awareness during a longwall move and there was no reasonable likelihood that the conditions would result in an injury. The shield was secured to the shield mover via the winch. There is no evidence that the shield mover was placed in an area

where there was uneven ground, tilted, or pitched. Setup rooms for a longwall section are typically dry, rock dusted, and flat. There simply was no potential for the shield to fall off or shift on the duckbill while it was moved to the setup room and off-loaded. The evidence establishes that shield had not slid on the duckbill, but it was a little crooked when it was loaded. In addition, there was no evidence that a knuckle pin was protruding on the shield or that there was any oil, mud, or grease on the duckbill.

As to the negligence criteria, AmCoal argues that there were mitigating circumstances. AmCoal does not dispute that neither Medley nor Myers could recall the safeguard notice when Inspector Miller asked them about it. But Myers confirmed its existence within minutes. AmCoal, however, repeatedly reminded its employees not to place themselves in potential pinch points or in equipment danger zones. The safety department briefed management about the requirements of the safeguard notice following its issuance. As stated above, the provisions of the safeguard notice would not have prevented the May 2007 accident and that accident was a very unusual event at this mine.

In her reply brief, the Secretary contends AmCoal's attempt to have the safeguard notice invalidated should be rejected for the reasons set forth in my order of December 17, 2010. Similarly, she argues that AmCoal's "as-applied" challenge should be rejected as well. The safeguard notice was issued "to prevent multiple hazards related to the transportation of shields." (Sec'y Reply Br. 4). The conditions faced by Inspector Miller when he issued the citation need not be exactly the same as the conditions that existed when the safeguard notice was issued. The evidence shows that AmCoal chose to ignore the requirements set forth in the safeguard notice and continued to transport shields without adequately securing them to the shield mover. Finally, the Secretary argues that there is no evidence to support AmCoal's contention that the cited shield had been loaded on the duckbill so that it was crooked. Inspector Miller has extensive mining experience and the drawing in his notes corroborates his testimony that the shield slid on the duckbill during transport.

AmCoal maintains in its reply brief that the Secretary "presented no evidence in relation to the prior accident or any other accident (or even a near miss) that suggests a shield loaded on a duckbill – while still secured by the winch – posed any hazard whatsoever." (AmCoal Reply Br. 6). Although AmCoal is not suggesting that a safeguard notice can only cover identical circumstances, it argues that it is clear that, "in interpreting a safeguard, a narrow construction of the terms of the safeguard and its intended reach is required" and that the safeguard must "identify with specificity the nature of the hazard at which it is directed." *SOCCO*, 7 FMSHRC at 512.

3. Discussion and Analysis

I find that the safeguard notice at issue is valid for the reasons set forth in my order of December 17, 2010. (Attachment 15-16). The safeguard notice identifies the hazards that it was drafted to protect against and the steps the operator must take to reduce those hazards. In addition, the fact that a different, more narrowly drafted safeguard notice could have been issued does not invalidate the safeguard notice that was issued by Inspector Miller. I do not agree that the evidence establishes that the May 2007 accident would have occurred even if the extra measures required by the safeguard notice had been present. If a chain or strap were present to secure the shield in May 2007, it would have been loosened when the shield was offloaded but it may have prevented the shield from sliding so far as to crush the miner on the ground. The fact that other steps, such as only off loading a shield in a flat area, also helps reduce the risk of an accident does not negate the importance of the requirements set forth in the safeguard notice. It is also important to note that the safeguard notice also required AmCoal to ramp up its training program to recognize the risks involved in moving shields and to take precautions to reduce this risk. I find that the safeguard notice is not overly broad and that it identified with specificity the nature of the hazard at which it was directed.

The record does not establish that the safeguard notice lacks the required specificity or that it has been enforced in an inconsistent manner. It is quite clear that the Secretary has consistently interpreted the requirement to secure a shield on the duckbill to commence when the shield is first loaded onto the shield mover and that this requirement continues until the shield is offloaded. Although it is true that the supplemental straps or chains need to be loosened when the shield mover is backed out, they are required in order to help prevent slippage during the off-loading process.

The conditions that existed on November 7, 2007, when the citation was issued were not exactly the same as existed at the time of the accident in May 2007. As noted by AmCoal, the ground was relatively flat, a knuckle pin was not present, the duckbill was relatively clean of oil or grease, and the shield was attached to the line on the winch. One common element, however, is that in both instances there was not a supplemental chain or strap present to prevent the shield from sliding to one side or the other. I credit the testimony of Inspector Miller as to the reasons why having additional measures to secure the shield reduces the risk of injury. I also credit his testimony describing the types of accidents that can occur if the shields are not secured as required by the safeguard notice. There is no doubt that having the shield attached to the hook on the winch line with the winch line taut is the most important factor in keeping the shield stable on the duckbill, but I find that the Secretary established that having an extra chain or strap provides additional support that prevents the shield from sliding on the duckbill. A shield is a very heavy piece of equipment and keeping it secure on the shield mover helps ensure that no injuries will occur during transport.⁵

⁵ The Secretary contends that I should credit the testimony of Inspector Miller that the
(continued...)

Based on the foregoing, I find that the Secretary established that AmCoal violated Safeguard Notice No. 7490527 when it failed to secure the shield “in all directions to prevent movement during transport” by using straps, hooks, or chains. There is no dispute that these additional measures were not taken when the shields were relocated to a new longwall panel.

I also find that the violation was S&S. The Secretary clearly established the first, second, and fourth element of the *Mathies* S&S test. The question is whether she established the third element, *i.e.*, whether there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury, assuming continued normal mining operations. I find that this element was established. This case does not present a situation in which the operator inadvertently failed to comply with a mandatory safety requirement. The operator’s representatives were not even aware of the requirements of the safeguard notice. All of the other shields had been transported without taking the required steps to ensure that they were secure in all directions through the use of straps or other devices. Given the credible testimony of the inspector, I find that it was reasonably likely that the hazard contributed to by the violation would have resulted in an injury. I have considered the evidence presented by AmCoal that there has been only one known accident involving the transportation of shields. This fact, however, does not establish that another accident may not occur that would have been prevented if AmCoal complied with the requirements of the safeguard notice. In addition, shields may have shifted on duckbills and “near misses” may have occurred that would not necessarily be reported to management.

I find that AmCoal’s negligence was very high. Its safety compliance manager and the longwall production foreman were unaware of the requirements of the safeguard notice. A mine operator cannot possibly comply with a safeguard notice if its managers and miners are unaware of its requirements. I agree with the Secretary’s argument that AmCoal’s blatant disregard of the requirements of the safeguard notice warrants a high negligence finding. Nevertheless, I find that there is insufficient evidence in the record to modify the section 104(a) citation to include an unwarrantable failure finding. Commission case law sets forth a number of elements that must be examined in reaching a finding of unwarrantable failure including whether the operator has been placed on notice that greater efforts are necessary for compliance, for example. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

In reviewing the statutory criteria for assessing a civil penalty, I find that a penalty of \$60,000 is appropriate. I have raised the assessed penalty from the Secretary’s proposed \$45,000 penalty based on the high degree of negligence exhibited by the mine operator.

⁵(...continued)

shield had previously slid on the duckbill when he observed it. AmCoal contends that it is quite likely that when the shield was loaded it was slightly crooked on the duckbill and that I should not credit the inspector’s testimony. I find that the evidence is too vague on this issue. Based on the record before me, I cannot make a finding that the shield had moved on the duckbill as it was being transported.

C. Citation No. 6673959; LAKE 2008-624

On May 1, 2008, Inspector Miller issued Citation No. 6673959 under section 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.1403. The citation alleges the following:

A shield was observed being transported on the New Future bottom area without being secured in all directions to prevent movement. The shield was setting on the duckbill of Shield Mover, company number 777, and was only secured on the rear of [the] shield. The shield was not fastened down on the head end of the duckbill and could have shifted off the duckbill very easily.

(Ex. G-H). Miller determined that an injury was highly likely and, if an injury did occur, it could reasonably result in a fatal injury. He determined that the violation was S&S, that one person would be affected, and that the violation was the result of the high negligence of the operator. The Secretary has proposed a civil penalty of \$19,793.00 for this violation. This citation was based on the same safeguard notice as the previous citation.

1. Summary of the Evidence

Some of the evidence presented with respect to the previous citation relates to this citation. On May 5, 2008, Inspector Miller was at the mine investigating a complaint filed under section 103(g).⁶ (Tr. 121-22). During his investigation, the inspector was at the bottom of the New Future section of the mine when longwall shields that had been rebuilt on the surface were being lowered into the mine in a small cage one at a time. Inspector Miller testified that he observed a shield on a shield mover that was only secured with the winch. (Tr. 123, 168-69). Apparently, no other fastening devices were wrapped around the shield to prevent it from sliding off the duckbill. Barry Burgess, the manager supervising the movement of shields into the mine, was one crosscut away from the subject shield mover. (Tr. 178). Given the recent history at the mine, the inspector believed that mine management should have been on “heightened awareness” that the shields needed to be fully secured to the shield movers. Securing shields to the duckbill is not difficult. Most operators put holes in the duckbills so that chains or straps can be looped around the shield as it is moved. (Tr. 125).

Inspector Miller determined that the violation was S&S and that a fatal accident was reasonably likely. He made this determination because the shield mover was at the bottom on an incline and it was in an area where miners frequently travel. (Tr. 126). This created a higher degree of danger to miners. Miller testified that a miner was standing within 3 to 4 feet of the shield when the inspector arrived. (Tr. 179). The shield could slide and pin a miner to a rib.

⁶ This complaint apparently concerned the condition of the roadways and it did not allege any problem with shield movers. (Tr. 167).

(Tr. 165). The roadways in this section of the mine were in poor condition in many places. He also determined that the company's negligence was high.

On cross-examination, Inspector Miller was presented with a drawing that he made when he issued this citation. (Tr. 170; Ex. R-69). The drawing was not in his notes related to the issuance of the subject citation, rather it was in the notes he made during his investigation of the 103(g) complaint. *Id.* Inspector Miller had not reviewed this drawing in preparation for the hearing. (Tr. 192). When counsel for AmCoal showed him the drawing, counsel suggested that it indicated that the shield was secured by both the winch and a chain wrapped across the shield. The inspector replied that the drawing indicated that the wire rope for the winch was not actually connected to the shield with the hook. (Tr. 171). Based on the drawing, he concluded that the chain shown on the drawing was the only device securing the shield to the duckbill of the shield mover. The drawing shows the chain, which is marked "chain," and a caption states, "Only secured to the mover on the front."⁷ (Ex. R-66, p 5 of notes). Inspector Miller stated that the drawing shows that the winch line was not connected to the shield. He testified, as follows:

If you look at the drawing, it's showing that winch, that breaking line right there must not have been connected. I mean, if you see where I've drawn the winch, there's a void between the coupling and that there . . . so that [chain] must have been the only way it was secured.

(Tr. 171). The writing around the drawing does not indicate whether the winch line was connected; the inspector relies strictly on the fact that the line he drew between the shield and the body of the shield mover has a break in it. (Tr. 171-72). He does not state, in either set of notes, whether the winch was connected to the shield with the wire rope and hook. When asked whether he was saying that the chain was connected but the winch was not connected, he replied:

That's what I'd have to say looking at this drawing. If my notes don't say anywhere that it is secured with the winch as I've said in the two previous citations that it was secured with the winch, then I've got to believe that the only way it was fastened was on these two corners of the shield [with the chain].

(Tr. 172-73).⁸

⁷ This caption adds confusion because the chain is shown drawn near the rear of the shield.

⁸ His reference to "two previous citations" must refer to the safeguard notice and Citation No. 6668530, discussed above.

2. Summary of the Parties' Arguments

The Secretary argues that the citation should be affirmed for many of the same reasons as set forth in the previous citation. The failure to secure the shield in all directions shows a “pattern of indifference” with respect to the requirements of the safeguard notice. (Sec’y Br. 23).

AmCoal makes all of the same arguments with respect to this citation as it did with respect to the other two, discussed above. In addition, AmCoal argues that Inspector Miller changed his testimony when presented with his drawing of the shield mover to say that the winch was not connected to the shield because of small gap in the drawing. The accompanying notes make no mention of the winch not being connected. He went on to testify that he would have issued the citation whether the chain or the winch was the sole means of securing the shield. It contends that the citation should be vacated because the Secretary failed to prove a violation. AmCoal also makes the same arguments with respect to gravity, negligence, and the inspector’s S&S determination.

In her reply brief, the Secretary notes that the citation was issued several years prior to the hearing and the inspector’s notes for the complaint investigation (E03) were separate from the notes for his regular inspection (E01), during which he issued the subject citation. It was a “difficult task for Inspector Miller to interpret the significance of the nuances of the drawings in the E03 investigation notes having seen them for the first time in three years at the hearing.” (Sec’y Reply Br. 8). The evidence establishes that the cited shield was not secured in all directions as required by the safeguard notice. The evidence did not establish that the shield was secured by both the winch and the chain.

3. Discussion and Analysis

I find that this citation must be vacated. The Mine Act imposes on the Secretary the burden of proving an alleged violation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). The preponderance standard requires proof that something is more likely than not so. *Id.* 17 FMSHRC at 1838.

Here it is not clear just how the cited shield was secured to the shield mover. The citation just states that the shield was not “secured in all directions to prevent movement.” Inspector Miller first testified that only the winch was attached to the shield. When he was presented with his drawing of the shield mover, he testified that only a chain secured the shield to the shield mover. He based this conclusion on a small gap in the line he drew between the body of the shield mover and the shield on the drawing that he prepared at the time he issued the citation. He also relied on the fact that both the safeguard notice and Citation No. 6668530 specifically state that the shield was connected to the winch. Because he did not mention the winch in the present citation, he concluded that it must not have been attached. None of his notes affirmatively state that the winch was not attached to the shield, which is a fact that one

would expect the inspector to highlight in his notes. His specific testimony on this issue was that “I’ve got to believe that the only way it was fastened was on these two corners of the shield [with the chain].” (Tr. 173) (emphasis added). Although the citation itself asserts that the shield was not adequately secured to the duckbill in violation of the safeguard notice, the evidence is not clear on this point. I find that the evidence is much too speculative to find a violation of the safeguard notice.

I also find it unusual that AmCoal would transport a shield without having it attached to the winch because the winch is generally used to help pull the heavy shield onto the duckbill when it is being loaded.⁹ There would be no reason to disconnect the winch until the shield was off-loaded. Based on the evidence presented at the hearing, I cannot affirmatively find that the shield was not secured in all directions to prevent movement. Consequently, Citation No. 6673959 must be vacated.

II. SETTLED CITATIONS

A number of the citations at issue in these cases settled, either prior to the hearing or at the conclusion of the hearing. The terms of the settlements are set forth below:

LAKE 2007-172

By order dated November 5, 2009, I approved the Secretary’s motion for partial settlement for 19 of the 20 citations at issue in this docket in the amount of \$64,505.

LAKE 2008-526A

This docket contains Citation Nos. 6668529 and 6668530, both of which were issued based on a safeguard notice. The parties agreed to settle Citation No. 6668529 for \$20,000. This citation was issued based on a safeguard notice.

LAKE 2008-624

6668207	\$4,000.00	\$4,000.00	Lost work days, 3 miners affected
6672814	\$4,000.00	\$4,000.00	
6674136	\$4,000.00	\$176.00	104(a); moderate negligence
6672875	\$807.00	\$605.00	Citation based on safeguard notice
6672877	\$687.00	\$687.00	

⁹ Because this shield had been loaded onto the shield mover on the surface of the mine, it is possible that the loading technique differed from what is typical.

6672878	\$634.00	\$634.00	
6673565	\$2,901.00	\$1,304.00	3 people affected
6673567	\$687.00	\$687.00	
6673583	\$21,993.00	\$10,000.00	Citation based on safeguard notice
6674271	\$540.00	\$540.00	
6674273	\$873.00	\$873.00	
6674275	\$1,026.00	\$1,026.00	
6674276	\$2,678.00	\$807.00	Gravity - Lost workdays
6674281	\$8,209.00	\$8,209.00	
7493253	\$8,893.00	\$2,678.00	
7493711	\$1,026.00	\$207.00	Gravity - unlikely
7572872	\$3,689.00	\$3,689.00	
7572873	\$1,111.00	\$0	Vacated
7572875	\$2,678.00	\$2,678.00	
	\$70,432.00	\$42,800.00	Total Settlement in Lake 2008-624

With respect to the three settled safeguard citations, AmCoal is not waiving its right to file a petition for discretionary review of my order of December 17, 2010, denying its motion for summary decision as applied to these citations.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have reviewed the Assessed Violation History Reports, which are not disputed by AmCoal. (Sec'y Ex. AA). AmCoal is a large mine operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on AmCoal's ability to continue in business. The gravity and negligence findings are discussed above.

IV. ORDER

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

<u>LAKE 2007-172</u>	<u>30 C.F.R. §</u>	<u>Penalty Amount</u>
6667032	75.1403	\$1,000.00
<u>LAKE 2008-526-A</u>		
6668530	75.1403	\$60,000.00
<u>LAKE 2008-624</u>		
6673959	75.1403	Vacated
Total Penalty for Litigated Citations		\$61,000.00
Total Penalty for Settled Citations		\$62,800.00
TOTAL DUE		\$123,800.00

For the reasons set forth above, Citation No. 6673959 is **VACATED** and the other citations and are **AFFIRMED** or **MODIFIED** as set forth in this decision. The American Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$123,800.00 within 40 days of the date of this decision.¹⁰

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

¹⁰Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

Karen E. Wilcynski, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202 (Certified Mail)

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

Jason Witt, Esq., Assistant General Counsel, Coal Services Group, 56854 Pleasant Ridge Road, Alledonia, OH 43902 (First Class Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001
(202) 434-9973

October 25, 2011

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 2008-189
Petitioner, : A.C. No. 36-05018-136171-02
v. : Mine: Cumberland
CUMERLAND COAL RESOURCES, LP, :
Respondent. :

DECISION ON REMAND

Before: Judge Weisberger

I. Introduction

On September 2, 2009, a decision was issued in the above proceeding finding, inter alia, that Cumberland Coal Resources LP ("Cumberland Coal") violated 30 C.F.R. § 75.380 (d)(7)(iv) as alleged in the four citations at issue, that the violations were not significant and substantial ("S&S"), and that a penalty of \$3,000 was appropriate for each of the violations. Cumberland Coal Resources, LP ("Cumberland Coal I"), 31 FMSHRC 1147 (Sept. 2009). Subsequently, the Secretary filed a petition for discretionary review which was granted by the Commission.

On October 5, 2011, the Commission issued a decision which reversed the above decision regarding S&S, and remanded "for reassessment and reevaluation of the penalties." (Cumberland Coal ("Cumberland Coal II") 33 FMSHRC ___, slip. op., at 15, (October 5, 2011).

II. Reassessment and reevaluation of the penalties

A. The initial finding in Cumberland Coal I, supra regarding the level of gravity¹

¹In Cumberland Coal II, the Commission set forth the following regarding the gravity finding in Cumberland Coal I, supra:

Significantly, the judge's gravity finding credited the inspector's testimony with respect to the likelihood of serious injury as a result of miners not escaping quickly in an emergency. 31 FMSHRC at 1164. The judge found that the level (continued...)

Cumberland I, supra, discussed the gravity of the violation, as follows:

As set forth above, . . . , I found that the violations were not significant and substantial based on the lack of evidence that an injury-producing event was reasonably likely to have occurred. As such, an injury of a reasonably serious nature was not reasonably likely to have occurred. However, I note [the inspector's] testimony that, in the event of a [fire] or explosion, due to the manner in which the lifeline was located, miners would either be delayed or prevented from using it to escape, which could result in a fatal injury due to carbon monoxide poisoning. (See Tr. 158) This opinion was not impeached or contradicted. Thus, within this context, I find that the level of gravity was more than moderate. 31 FMSHRC *supra* at 1164

B. Reassessment and reevaluation of gravity

I take cognizance of the Commission's holding in *Cumberland Coal II, supra*, that the violation was S&S. This would appear to include a finding that an injury producing event, and an injury of a reasonably serious nature were reasonably likely to have occurred. Thus, in light of the Commission's holding, I am constrained to find, upon reconsideration, that the level of gravity was high.

C. Discussion regarding the remaining penalty factors

Cumberland Coal II, supra, does not discuss any of the other penalty findings in *Cumberland Coal I, supra*. I, thus, find that *Cumberland Coal II, supra*, does not mandate me to reconsider any of the penalty findings in *Cumberland Coal I, supra*, other than gravity. As such, I reiterate the findings and rationale set forth in *Cumberland Coal I, supra* regarding all penalty findings except gravity, especially the placement of "considerable weight on the low level of the operator's negligence." *Cumberland Coal I, supra*, at 1166. Considering all the above, especially the finding, upon reevaluation, of the increased level of gravity, I find that a total penalty of \$4,000 is appropriate for each of the violations found in *Cumberland Coal I, supra*.

¹(...continued)

of gravity was "more than moderate" because the inspector testified that "*in the event* of a fire or explosion, due to the manner in which the lifeline was located, miners would either be delayed or prevented from using it to escape, which *could result in a fatal injury due to carbon monoxide poisoning*." *Id.* (emphasis in original). *Cumberland Coal II, supra*, slip, op. at 10

ORDER

It is **ordered** that Respondent shall within 30 days ,pay a penalty of \$4,000.00 for each of the violations of Section 75.380(d)(7)(iv), reduced by any amounts previously paid for these violations in compliance with the Order issued in *Cumberland Coal I, supra*.

/s/ Avram Weisberger

Avram Weisberger

Administrative Law Judge

Distribution (via Certified Mail Returned Receipt Requested):

Paul A. Marone, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA 15222

/cmj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N. W., SUITE 9600
WASHINGTON, DC 20001

October 26, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2010-336
Petitioner	:	A.C. No. 44-04856-216343
v.	:	
	:	
CONSOLIDATION COAL COMPANY	:	Mine Name: BUCHANAN MINE # 1
Respondent	:	

DECISION

Appearances: A. Scott Hecker, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Petitioner

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, Kentucky, for the Respondent

Before: Judge Koutras

STATEMENT OF THE CASE

This civil penalty proceeding pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802, et. seq. (2000), hereinafter the “Mine Act,” concerns two Section 104(a), significant and substantial, hereinafter “S&S,” citations served on the respondent on February 2, 2010, and one Section 104(d)(1) S&S unwarrantable failure order served on February 18, 2010.

The parties agreed to settle the two Section 104(a) citations and I have approved it. The hearing regarding the contested order was held in Abingdon, Virginia, on June 14, 2011. The parties waived the filing of written briefs and made closing arguments on the record after the close of testimony and I have considered arguments in the course of this decision.

The issues presented are whether a violation of the cited mandatory safety standard has been established by a preponderance of the credible evidence, and if so, whether the cited condition or practice presented a reasonable likelihood that the hazard contributed to or will result in an injury of a reasonably serious nature, S&S; and if so, whether it resulted from the respondent’s unwarrantable failure to comply with the cited regulation.

The Alleged Violation

MSHA Inspector Buddy Jack Stanley issued the Section 104(d)(1) S&S Order No. 8170840, on February 18, 2010, during an inspection at the No. 1 entry of the active 14-right mining section of the mine (Ex. P-1). He cited a violation of mandatory safety standard 30 C.F.R. § 75.370(a)(1), which requires a mine operator to develop and follow a ventilation plan approved by the MSHA district manager. The regulation further requires that the plan be designed to control methane and respirable dust and be suitable to the mine conditions and mining system.

Inspector Stanley testified that the specific ventilation plan requirement he cited as a violation is safety precaution No. 5, listed on an addendum to the plan submitted on MSHA's district manager for approval on November 30, 2009, (Tr. 22; Ex. P-5). That precaution requirement is part of the exhausting auxiliary fan tubing scheme used to ventilate the mine working faces, and states, "*A reliable indicator (ribbon) will be positioned to alert persons if the fan stops*" (emphasis added). He confirmed that the approved plan was actually put in place shortly before February 1, 2010, when he issued his first citation (Tr. 35).

Mr. Stanley described the indicator he found when he issued the order as a five-inch heavy plastic ribbon reflector hanging approximately one inch above the top of the ventilation tubing at the second row back from a 20 foot cut of coal that had been taken. He did not consider the indicator to be effective because "it was not moving and did not indicate anything" while the ventilation was in place (Tr. 26 - 27).

Mr. Stanley stated that the use of a plastic indicator is permitted as long as it was installed closer to the end of the tubing. However, when he observed the indicator he did not consider it to be reliable because it had no movement. In the absence of any movement, the indicator does not provide a reliable means of alerting anyone of any fan stoppage. A reliable indicator must show movement at all times regardless of whether the area is active or idle (Tr. 54, 59-61, 70).

In his closing argument, respondent's counsel did not rebut the inspector's testimony that at the time he observed the cited indicator it was not moving. Counsel relied on the uncontradicted testimony of section foreman, Keith Smith, that when he viewed the indicator he observed movement and considered it to be reliable. Counsel did not assert that the violation should not have been issued, but took the position that it should not have been issued as an unwarrantable failure order (Tr. 172).

I conclude and find the evidence establishes that the absence of any indicator movement, when Inspector Stanley observed it, when he initially arrived at the idle place where the equipment was parked, supports his conclusion that the indicator was not at that time a reliable indicator, as required by ventilation plan precaution No.5 and constituted a violation of 30 C.F.R. § 75.370(a)(1). Accordingly, the violation **IS AFFIRMED**.

Significant and Substantial Issues

A significant and substantial (“S&S”) violation is described in Section 104(d)(1) of the Mine Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 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 Commission has explained that:

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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); see also, *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *US Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-1575 (July 1984).

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial 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).

Inspector Stanley testified that he was appointed as an MSHA inspector in October, 2009, and when he issued the order on February 18, 2010, he only had three months of experience in that position. He confirmed that most of his inspection time was at the same mine location, and that he had no prior experience regarding working face exhaust fans like the ventilation plan he cited. He confirmed that the new approved plan process was put in place shortly before he issued his February 1, 2010, citation (Tr. 34-35).¹

Mr. Stanley testified that he conducted his February 18, 2010 inspection during the “owl shift” between 11:30 PM and 7:30 AM. He stated that the time 0121, (1:21 AM), shown on the face of the order as the time it was issued is in fact the time that he observed that the cited indicator was not moving, and that he actually issued the order two or three hours later (Tr. 49).

In explaining why he did not issue his order when he immediately observed the cited condition, Mr. Stanley explained that he needed to gather all of the mitigating circumstances and that section foreman Smith “was a little bit on the hostile side,” and since he was trained to “walk away from hostile environments,” he left the area to continue his inspection and returned when Mr. Smith “calmed down.” He denied the incident with Mr. Smith influenced his decision to issue an order (Tr. 50).

Mr. Stanley stated that after returning to the area, he discussed the matter with Mr. Smith and considered the criteria for issuing the order that he learned during his MSHA training. He believed that the cited condition was obvious and extensive, that Mr. Smith was an agent of the operator and had examined the area, and that the condition had extended “for a period of time.” Taking into account the prior citations and Mr. Smith’s statement that he intended to continue using the cited indicator that he believed was reliable, Mr. Stanley concluded that he had no other choice but to issue the order (Tr. 20-21, 33). He confirmed that he did not issue a citation for any inadequate examination of the area (Tr. 93).

Mr. Stanley testified that at the time he issued the order the miner machine was backed out of the area and parked. He stated that “this place had the full amount of ventilation that it had when the miner was cutting” (Tr. 88). The indicator was not moving and Mr. Smith did not inform him that he had observed the indicator moving (Tr. 89). Mr. Stanley assumed that there was more than 3,500 C.F.M. of air in the idle places that are usually ventilated more than the minimum requirement and usually more than 5,000 C.F.M. of air (Tr. 38, 50-51).

Although Mr. Stanley stated that the prior shift had cut most of the coal, and that Mr. Smith’s crew finished the cut (Tr. 50), the fact remains that the mining machine was backed out and parked when he arrived at the area, and Mr. Stanley previously testified that “the entire cut was taken” (Tr. 27). I credit the testimony of section foreman Smith that no remaining coal was

¹ It should be noted that the record reflects that the plan was approved by the MSHA district manager on December 17, 2009 (Exhibit P-5).

cut on his shift and that the mining machine was already backed out and the cut was completed (Tr. 111-112).

Mr. Stanley stated that he did not take an air velocity reading at the ventilation tube when he arrived at the area. He took a methane reading at the last row of roof bolts, and while he could not recall the results, he stated that they were generally from .3 to .4 percent. He agreed that the mine is well maintained and that the methane monitors installed on the miner machines and roof bolters will sound an alert at a 1.0 percent methane level and will shut down the equipment at the 1.5 percent methane level, and that procedures were in place to ensure that the warning devices would provide warnings in the event of elevated methane levels (Tr. 51-52).

The parties stipulated that the mine is a gassy mine, and petitioner's counsel stated that it liberates 12 million C.F.M. of methane in a 24-hour period (Tr. 75). Inspector Stanley testified that a reliable indicator ribbon is an important part of the ventilation plan because it is the only method to determine whether ventilation may be interrupted and inundate the face areas with methane gas (Tr. 22). He explained that the methane monitors are located ten feet from the continuous miner ripper head and that methane can inundate the area in front of the monitors without being detected (Tr. 26).

Mr. Stanley described the hazards that he believed existed as a result of the conditions described in his order as "Burns," explosion type severe injuries (Tr. 33). He also explained that his gravity finding of "lost work days or restricted duty" was based on "the least probability of what would happen" (Tr. 91).

Mr. Stanley's testimony regarding incidents of mine ignitions is inconsistent without further explanations. He testified that the mine has had 76 ignitions and "just recently had an ignition" (Tr. 52), "a month or two ago" (Tr. 85). He also confirmed that prior to the issuance of his order, the most recent ignition prior to that time was three or four years prior to the current exhausting fan ventilation system that assists and increases airflow into both active and idle mine areas and provides a benefit that did not previously exist as it relates to the potential for any ignition (Tr. 53). His inspection notes of February 18, 2010, reflect at least four ignitions in the last four years (Ex. P-2). In the absence of any information or evidence regarding these events, the existence of an ignition, in and of itself, without regard to the existing circumstances or conditions is of little, or no, evidentiary value with respect to the conditions that existed at the time the order was issued.

Mr. Stanley confirmed that he found no problem with hanging the cited indicator at the second row of roof bolts, or use of a plastic reflector, as long as it was located closer to the end of the ventilation tubing. However, his principal concern was that the indicator was hanging above the tubing and that the indicator material was heavy and only five inches long, and even though it was intact, he observed no movement when he observed it at the idle area. Since there was no movement, he concluded that it was not a reliable effective indicator according to the ventilation plan (Tr. 26, 55-56). He made this determination notwithstanding his agreement that

the two word “reliable indicator” safety precaution does not specify any particular type of material, its dimensions, or where it should be located (Tr. 38-39).

Mr. Stanley stated that he did not take an air velocity reading at the ventilation tube when he arrived at the area. He took a methane reading at the last row of roof bolts, and while he could not recall the results, he stated that they were generally from .3 to .4 percent. He agreed that the mine is well maintained and that the methane monitors installed on the miner machines and roof bolters will sound an alert at a 1.0 percent methane level and will shut down the equipment at the 1.5 percent methane level, and that procedures were in place to ensure that the warning devices would provide warnings in the event of elevated methane levels (Tr. 51-52).

With respect to the inspector’s testimony that the absence of an indicator will not enable the miner operator to know that the ventilation has been interrupted, I take note of the fact that Mr. Stanley’s February 1, 2010, citation was issued because of the absence of any indicator, and his February 2, 2010, citation was issued because the indicator ribbon was installed inside the ventilation tubing where it could not be seen by the miner operator (Ex. P-3 and P-4, Tr. 64). Both citations were issued as non-S&S violations. In view of Mr. Stanley’s testimony that the only method for determining when the ventilation may be interrupted is to locate the indicator where it can be observed by the miner operator, I find his non-S&S finding in those instances to be contradictory. In both instances, since the indicators were not located where they could be observed, they were in effect useless.

Inspector Stanley’s order also includes a reference to a prior citation of February 3, 2010. However, this date appears to be erroneous and there is no evidence of any citation with this date. Mr. Stanley’s 104(a) non-S&S citation of February 2, 2010, was served on a member of the respondent’s safety department and the violation occurred on the 15-right section and is totally unrelated to the 14-right section and foreman Smith. Further, both of the prior citations include “moderate” negligence findings.

There is no evidence of any reliable indicator violations that may have been issued during the interim period between February 1, and 18, 2010. Indeed, Mr. Stanley confirmed that he spent most of his inspection time at the mine and was unsure as to whether he may have inspected the 14-right section during that time or whether foreman Smith would have been present or in a position to install an indicator (Tr. 42-43). He also confirmed that he issued no citations during that time and agreed that the absence of any citations would indicate that the mine was in compliance with the cited ventilation plan, and that his February 2, 2010, 15-right section citation related to an area with a different foreman and crew (Tr. 44-45).

I take note of one recent violation issued by an inspector on January 11, 2011, on the 18-right section of the mine concerning the same reliable indicator ventilation plan was issued because “the indicator was not positioned to alert persons if the fan stops” (Ex. R-4). However, there is no explanation where the indicator was located or why the inspector believed the location was unacceptable. Further, even though the inspector noted that the respondent was

cited with 91 unexplained violations of the general requirements of 30 C.F.R. § 75.370(a)(1), and made a gravity finding of “unlikely,” with reasonably expected “fatal” injury exposure to ten (10) persons, he nonetheless issued the violation as a non-S&S Section 104(a) citation.

Section foreman Dallas Keith Smith testified that he has fifteen years of mining experience, including the operation of shuttle cars and scoops, and has first class mine foreman certifications from the states of Virginia and West Virginia, and a Federal dust sampling card (Tr. 104-105). He confirmed that Inspector Stanley issued a prior violation on February 1, 2010, because the indicator ribbon was not present at the exhaust fan tubing, and the violation was terminated when the indicator was replaced with engineering ribbon or a piece of reflective ribbon (Tr. 107).

Mr. Smith stated that he arrived at the 14-right section at 12:00 AM, midnight, on February 18, 2010, and after conducting a twenty minute safety meeting with his crew, he inspected the four entries and found no hazardous conditions. He confirmed that he did not hang the cited indicator, and did not know who did. No remaining coal was actually cut at that time from the number one entry because the continuous miner was backed out and the cut was completed (Tr. 111-112).

Mr. Smith described the cited indicator as a blue colored ribbon that was five and three-quarter inches long. He detected slight movement of the ribbon during his inspection. The fan was operating properly and the place was being ventilated. Since the indicator was in an idle place, the ventilation would be 3,000 C.F.M., to a maximum of 7,500 C.F.M. if it were an active place. If he had not observed any indicator movement, he would have taken an air reading to determine whether to replace the indicator or change its location. During his examination of the faces, before the inspector arrived, he took an air reading of “maybe five-thousand” ventilating the idle area, and any active place could have 7,500 to 12 to 13 thousand C.F.M. of air (Tr. 114).

Mr. Smith stated after the inspector arrived in the area, he told the inspector that he had inspected the face areas, and after proceeding to the number one entry, the inspector found that the indicator ribbon itself was not reliable, and Mr. Smith disagreed with him and told him that if that were the case he would have changed it. The inspector did not inform him that he was issuing an order at that time, but did so two or three hours later into the shift (Tr. 115).

Mr. Smith stated that he was upset because he believed the ventilation plan was followed and reasonable efforts were being made to comply, and it took five to ten minutes to replace the indicator with engineering tape to terminate the violation, and he observed slight indicator movement at that time because the place was idled and the inspector accepted that abatement (Tr. 118-119).

Mr. Smith believed that there are other ways to determine whether an exhaust fan shuts down or is not working properly. He explained that the fan could be heard over noise of cutting and loading machines, and the absence of dust that may be sucked into the tubing or circulating

around it (Tr. 116-117). He testified that he was new to the section and that the ventilation plan utilizing auxiliary fan tubing was a new system that replaced the prior ventilation curtain system and was a new experience for him and everyone else at the mine. During this time, mine management was dealing with issues concerning the consistency of the materials to be used for indicators and their location in order to deal with problems that may arise from indicator damage or indicators being sucked into the ventilation tubing by the air (Tr. 107-109).

General mine foreman Eric Smith testified that he has twenty-one years mining experience, and has State of Virginia mine foreman and electrical repair certifications, and supervises approximately 35 foremen and 630 miners (Tr. 127-129). He stated that the current exhausting auxiliary fan ventilation plan is the first one at the mine and it replaced the previous line curtain system because it is easier to maintain and to keep the working area clean and rock dusted (Tr. 130-131).

Mr. Smith believed that the term “reliable” is vague and could refer to indicator durability or whether it clearly shows movement that “jumps out and gives an alert that a fan may be off (Tr. 133). He stated that the plan requirement for a “reliable indicator” is a Virginia State requirement required to be included in any proposed mine plan submitted to MSHA for approval, and he speculated that MSHA would approve a plan without that provision because miners can feel when ventilation is interrupted, and can observe whether rock dust is moving in the air or accumulating on their clothing. He was aware of the fact that MSHA has approved ventilation plans for mines in other states that do not require indicator ribbon (Tr. 134-137).

Mr. Smith disagreed with Inspector Stanley’s designation of the violation as a Section 104(d) order because the underground mining environment is subject to many changes that affect the location of an indicator, including the time interval when a place is cut, bolted, or idled, movement of the miner cutting machine from place to place, and the fan air adjustments that must be made to meet such changes in order to determine whether an indicator may be moving more, or less, or not at all (Tr. 143-144).

I conclude and find that the respondent is expected to comply with the provisions of the specific approved ventilation plan, for the mine in question. I so conclude even though no requirement for a reliable indicator is included as part of auxiliary exhaust fan ventilation plans for three gassy mines operated by the respondent in Pennsylvania and West Virginia, as testified to by the respondent’s compliance manager, Craig Aaron (Tr. 156-159). I am mindful that MSHA’s actions have been inconsistent with regard to its approval of ventilation plans and acknowledge that its choice to ignore reliable indicator requirements in other mines presents a serious safety requirement contradiction that merits MSHA’s attention.

The respondent presented testimony that there are other means of detecting whether or not a fan has shut down, namely sound, the feel of airflow changes, and “smoking the air” to detect any movement or presence of rock dust and other particles in mitigation of the S&S gravity level made by the inspector (Tr. 71 - 73). These suggested alternative methods for

detecting fan failure are rejected. They are not included as part of the plan, and while they may be used as a customary method of detection, the approved reliable indicator plan requirement must be followed.

With respect to Mr. Stanley's testimony that the absence of an indicator will not enable the miner operator to know that the ventilation has been interrupted, I take note of the fact that his February 1, 2010 citation was issued because of the absence of any indicator, and his February 2, 2010 citation was issued because the indicator ribbon was installed inside the ventilation tubing where it could not be seen by the miner operator (Ex. P-3 and P-4, Tr. 64). Both citations were issued as non-S&S violations. In view of his testimony that the only method for determining when the ventilation may be interrupted is to locate the indicator where it can be observed by the miner operator, I find his non-S&S finding in these citations to be contradictory. In both instances, since the indicators were not located where they could be observed, they were in effect useless.

The fact of violation has been established pursuant to the first prong of the *Mathies* test. With respect to the second prong, requiring a discrete safety hazard contributed to by the violation, I find that the ventilation plan requirement for a reliable indicator is a critical safety precaution that is necessary to provide an alert in the event of any ventilation interruption, and that the failure to position an indicator to provide such an alert presented a discrete safety hazard.

With respect to the third prong of the *Mathies* test, requiring the establishment of a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury, I take note of the assertion by petitioner's counsel in the course of the hearing that the failure to provide a reliable indicator "carries far-reaching consequences" (Tr. 169). That being said, I fail to comprehend why the inspector waited two or three hours after he observed the indicator and found that a violation occurred with an expectation of resulting in severe ignition, explosion, or fire type injuries before issuing his order (Tr. 33). Although he explained that he waited to gather more information, I find that had more to do with his unwarrantable failure decision rather than the conditions that prevailed when he initially established a violation.

The expectation of the hazardous events that Inspector Stanley believed would have been the result of the cited condition does not *ipso facto* establish that the violation was significant and substantial. The reasonable likelihood of the results of the hazardous conditions described by the inspector as "burns or explosion type severe injuries" must be based on the confluence of factors that were present at that time, and in the context of continued mining operations. The relevant time frame for such a determination includes the time that a condition existed prior to the violation and the time it would have existed if normal mining operations were to continue.

Mr. Stanley confirmed that his S&S determination was based on the fact that in the absence of an indicator, there is no way of knowing that ventilation is interrupted. He stated that he and his supervisor, and MSHA's district manager, have seen ventilation tubing torn down that interrupts ventilation, and if mining were to continue the miner operator would be unaware of

any interruption (Tr. 32). However, no further explanations were forthcoming with respect to these alleged events, and there is no evidence in this case of any torn tubing that may have affected the reliability of an indicator, or whether any of those alleged incidents actually involved indicators that were rendered inoperable by torn tubing.

The ventilation plan's reliable indicator precaution is but one safety precaution that includes additional requirements for a gas check prior to starting the ventilation fan. Other requirements include: procedures to be followed in the event of a fan shut down or failure; the grounding of the ventilation tubing; procedures in the event of damage to the tubing system, including de-energizing all face equipment during repairs; and installing ventilation line curtains if methane levels reach 1%. I assume that all of these procedures were in place and followed when the violation was observed by Mr. Stanley. I further note a comment that he entered in his notes that a baffle curtain was installed at the No. 2 entry where a roof drill was located "to keep the gas out" (Ex. P-2, Pg. 2).

Mr. Stanley's testimony regarding incidents of mine ignitions is inconsistent. He testified that the mine has had 76 ignitions and "just recently had an ignition" (Tr. 52), "a month or two ago" (Tr. 85). The most recent ignition prior to his order was three or four years before the installation of the current exhausting fan ventilation system that assists and increases airflow into both active and idle mine areas and provides a benefit that did not previously exist as it relates to the potential for any ignition (Tr. 53). His inspection notes of February 28, 2010, reflect at least four ignitions in the last four years (ex. P-2). In the absence of any information or evidence regarding these events, the existence of an ignition, in and of itself, without regard to the existing circumstances or conditions is of little, or no, evidentiary value. Although incidents of past ignitions may be relevant to any S&S determination, the most recent ignition prior to his order of February 18, 2010, was three to four years earlier when the added safety features of the existing ventilation plan were not in effect. With regard to Mr. Stanley's statement regarding a recent ignition that allegedly occurred "a month or two ago," approximately sixteen months after the issuance of his order, no further explanations were forthcoming concerning the circumstances of that alleged event.

Mr. Stanley confirmed that he took a methane reading at the last row of roof bolts but could not recall the results. However, he stated that they were generally from .3 to .4 percent and agreed that the mine was well maintained. He further confirmed that the methane monitors on the miner machines and roof bolters will sound alerts at a 1.0 percent methane level and will shut down the machines at a 1.5 percent level and that procedures were in place to ensure that the warning devices would provide warnings in the event of elevated methane levels (Tr. 51-52).

Mr. Stanley testified that the prior shift had cut most of the coal, and that section foreman Keith Smith's crew finished the cut (Tr. 50). He earlier testified that "the entire cut was taken" (Tr. 27). I credit the testimony of Mr. Smith that no remaining coal was cut on his shift and that the mining machine was already backed out and parked when the inspector arrived and determined that there was a violation (Tr. 111-112). Mr. Stanley confirmed that the miner

machine was backed out of the entry and parked when he arrived at the area (Tr. 89). He also confirmed that the area was fully ventilated as required by the ventilation plan (Tr. 88-89).

The facts in this case establish that during the interim 17 day period between the issuance of Mr. Stanley's February 1, 2010, non-S&S citation and his order of February 18, 2010, no reliable indicator violations were issued for the 14-right section and Mr. Stanley agreed that the absence of any citations would indicate that the mine was in compliance with the ventilation plan requirement for a reliable indicator (Tr. 44).

I conclude and find that when Inspector Stanley arrived at the area and initially observed that a violation had occurred, all active mining was completed and the miner machine was backed out of the entry and parked. It is also clear that all of the required air ventilation was in place and operational, that the methane monitors located on the continuous miner machine and roof bolter were operational, that no hazardous methane levels were present, and Inspector Stanley agreed that the mine was well maintained. It is also clear that the cited indicator condition was corrected within 15 minutes by changing the ribbon and re-positioning the indicator. At that point in time, I conclude and find that the evidence establishes the lack of any indicator movement for a relatively short period of time, from the end of the prior shift when the active cutting of coal was completed until Mr. Stanley's arrival at the place that was idle.

The petitioner has asserted that the prior shift mined with the cited indicator in place and that section foreman Keith Smith planned to do the same thing. Petitioner's counsel argued that Mr. Smith planned to continue mining "despite the indicator's demonstrated inadequacies," and that its "lack of movement was obvious to Inspector Stanley" (Tr. 168-169). While it is true that coal was cut on the prior shift with the cited indicator in place, the question of whether it showed no movement at that time, thereby rendering it unreliable, must be established by a preponderance of the credible evidence and the burden of proof lies with the petitioner. The petitioner must also establish by a preponderance of the credible evidence that section foreman Smith would have continued to mine with an inadequate and unreliable indicator in the absence of any intervention by the inspector's action in issuing the violation and order.

Petitioner's argument that the prior shift mined with the cited indicator in place, and that foreman Smith planned to do the same thing despite being present when Inspector Stanley issued one of the two prior similar violations, both of which were issued within three weeks before the subject order, during which time the violations and the ventilation plan requirements were discussed with foreman Smith must be taken in context. There is no evidence to establish any lack of indicator movement on the prior active shift. The violation in this case was issued because Inspector Stanley observed the lack of indicator movement when he observed it while the miner machine was idled and parked.

Mr. Stanley confirmed that he could not determine whether the cited indicator was moving during the active mining cycle because he was not present when the area was in compliance with the required amount of ventilation. Further, Mr. Stanley confirmed that the

amount of available ventilation flow through the tubing will determine whether a ribbon indicator or plastic reflector device will show movement with 7,500 C.F.M. of air (Tr. 41). When he initially observed the indicator of the idle place, he assumed that there was more than 3,500 C.F.M. of air (Tr. 38, 50-51). However, he confirmed that he took no air velocity readings at the ventilation tubing to determine the actual amount of air ventilating the place (Tr. 51-52).

Mr. Stanley's belief that the cited indicator would not show any movement even if the air velocity was from 10,000 to 20,000 C.F.M. of air was based on his mining experience, his study of ventilation, and the tubing that was in use (Tr. 57). His ventilation studies included two weeks of courses at the Beckley Mine Academy and his industry ventilation training (Tr. 17-18). There is no evidence of any defective tubing.

Mr. Stanley acknowledged that when he issued his first citation on February 1, 2010, he had only been on his own inspecting mines for three months, had no prior experience with the newly approved exhaust fan face ventilation at the mine which is the only one with such a system in the District. I find Mr. Stanley's testimony in support of the violation to be credible with respect to his observation that the indicator showed no movement when the area was idled. However, I cannot conclude that his belief that the cited indicator was incapable of any movement under any circumstances, including the prior shift when coal was cut in the active places is credible. Mr. Stanley could have readily taken an air velocity reading, but did not do so, and it is clear that he had no experience with respect to the newly approved ventilation system which he first encountered when he initially assumed his inspection duties at the mine.

Mr. Stanley agreed that Mr. Smith told him that the cited indicator was his indicator, and he agreed that Mr. Smith knew enough about the ventilation plan to understand that if there was no indicator movement it would not be adequate. He further confirmed that assuming Mr. Smith was truthful about observing indicator movement during his inspection, that fact could be a mitigating factor (Tr. 58). He then stated that even if Mr. Smith told him that he observed indicator movement when he performed his inspection he would still find a violation because the plan provision required the indicator to show movement at all times in both active and idle places, and it was not moving when he observed the violation in the idle place (Tr. 59-60). I also take note of the fact that even though the petitioner asserted that the cited indicator was at all times unreliable, the inspector never issued a citation for any inadequate pre-shift examination of the active section by Mr. Smith.

I credit section foreman Keith Smith's testimony that during his inspection of the face area, prior to Inspector Stanley's arrival, he observed slight movement by the cited indicator which he described in detail, which led him to believe that the area was properly ventilated and that the fan was operating properly (Tr. 111-112). I also credit his testimony that he was confident that the indicator was reliable since an air reading that he took while inspecting the faces before Inspector Stanley's arrival reflected a minimum of 5,000 C.F.M. of air which would increase as the ventilation increased (Tr. 113-114), and that he told Mr. Stanley of his belief that

the indicator ribbon was reliable and that he would have changed it if he believed otherwise (Tr. 115).

I have affirmed the violation in this case based on the inspector's un rebutted testimony that when he first observed the indicator after active mining was completed and the equipment was backed out and parked and saw no indicator movement that was required in that idle area. However, based on the aforementioned findings and conclusions, I cannot conclude that the petitioner has established by a preponderance of any credible evidence that the cited indicator was incapable of any movement during the preceding shift while coal was cut in the active mine area.

Based on section foreman Smith's credible testimony that he observed some indicator movement in the active area and informed Mr. Stanley that it was his belief that it was reliable, and the fact that Mr. Stanley did not issue any citation for any inadequate inspection by Mr. Smith, I conclude and find that Mr. Smith had a reasonable belief that he could continue to use the indicator. Further, I doubt that Mr. Smith would have continued to use the indicator after Mr. Stanley informed him that he would issue a violation when he first observed the indicator at the idle place before he continued his inspection and issued the order two to three hours later.

After careful consideration of all of the evidence in this case, I cannot conclude that the third and fourth prongs required by the *Mathies* test have been established by a preponderance of the credible evidence. Given the conditions that prevailed at the idle place where the inspector initially observed the indicator, including the fact that active mining had ceased, the equipment was backed out and parked, the place was well ventilated and maintained, the absence of any ignition sources or unusual levels of methane, and workable methane detectors on the equipment, I find it unlikely that the condition of the indicator would contribute to, or result in, an injury of a reasonably serious nature. I find no credible evidence of any confluence of factors in both the active and idle places that could have come together to produce any ignition, combustion, fire, or other injury producing hazards described by the inspector. Accordingly, his significant and substantial, (S&S) violation finding **IS MODIFIED** to non-significant and substantial, (non-S&S).

The Unwarrantable Failure Issue

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

The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). These include the extent of the violative condition, the length of time that it has existed, the operator's efforts at abating the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, whether the violation is obvious, and whether the violation poses a high degree of danger. *Id. See also San Juan Coal Co.*, 29 FMSHRC 125, 128 (Mar. 2007).

One key factor for determining whether a violation is the result of an operator's unwarrantable failure is whether or not the violation poses a high degree of danger. In the instant case, I have concluded that the violation was not S&S, and I have modified the violation to a non-S&S violation. Under the circumstances, the unwarrantable failure question need not be addressed and the contested order **IS MODIFIED** to a Section 104(a) non-S&S citation.

History of Prior Violations

The parties stipulated that the information pertaining to the respondent's history of previous violations is contained in Exhibit A to the petition for assessment of civil penalty filed in this matter.

Exhibit A reflects six prior Section 104(c) citations for alleged violations of the general mine ventilation plan and approval process requirements of 30 C.F.R. § 75.370(a)(1), issued in February, 2010, three of which are non-S&S, and three of which are S&S. However, there is no evidence of record in this case that any of these citations were issued for alleged violations of the reliable indicator plan requirement, other than the three citations of January and February, 2010 (Exhibits P-3, P-4, and R-4).

Exhibit A reflects a reference to the contested Section 104(d)(2) order no. 8170840, indicating 33 repeat violations of Section 75.370(a)(1), and 744 violations in 1,132 inspection days, which resulted in the proposed penalty assessment of \$4,099 for that order.

No further explanations were forthcoming with respect to the aforesaid information, and the petitioner has advanced no argument or suggestion that it warrants any increased civil penalty assessment as a result of the violation. I assume that all of this information was taken into account when the proposed mandatory penalty of \$4,000, for the contested order, was increased by \$99. In any event, given the size and scope of the respondent's mining operation, and in the absence of any arguments to the contrary, I cannot conclude that the respondent has such a poor compliance record warranting any additional increase in the civil penalty assessed by me for the violation which has been affirmed.

Good Faith Compliance

The record establishes that the respondent timely abated the violation in good faith. Inspector Stanley's order reflects the violation was corrected within fifteen (15) minutes and section foreman Keith Smith's credible testimony reflects that he replaced the existing ribbon with engineering tape within five to ten minutes and the inspector accepted this and terminated the violation (Tr. 117-118).

Gravity

Based on my non-S&S ruling, I conclude and find that the violation was minor.

I find that the inconsistent and subjective "significant and substantial" findings made by Inspector Stanley and other MSHA inspectors with respect to their prior "reliable indicator" non-S&S violations is the result of a vague and subjective ventilation plan addendum that is devoid of any criteria or explanatory information for determining the reliability of an indicator in an underground mining environment with many variances and changed circumstances that routinely occur during the mining process. The inspectors are placed in the difficult position of making judgment calls with little or no regulatory guidance.

Negligence

The ventilation plan requirement for a reliable indicator was approved on or about December 17, 2009 and Inspector Stanley confirmed that it was actually put in place shortly before February 1, 2010, when he issued his first citation (Tr. 35).

Mine foreman Eric Smith testified credibly that the newly installed ventilation system was the first one at the mine and he was engaged in discussions with MSHA and the inspectors after the citation of February 1, 2010, was issued, and that mine management was dealing with the problems of indicator locations and materials and were making adjustments in order to find the best way to comply with the plan (Tr. 132-133). Mr. Smith believed that the term "reliable" is vague and could refer to indicator durability or whether it clearly shows movement that "jumps out and gives an alert that a fan may be off" (Tr. 132-133). Inspector Stanley agreed that the cited plan provision does not specify any particular type of material, its dimensions, or where it should be located (Tr. 38).

Inspector Stanley confirmed his discussions with section foreman Keith Smith and mine foreman Eric Smith, and while I conclude that they both understood that a reliable indicator was required, I cannot conclude that they clearly understand what was specifically required in terms of the construction and location of a reliable indicator. Indeed, the petitioner's counsel characterized the discussions as a consultation about how to resolve the problem (Tr. 169), and lends support to the respondent's argument that it was making a concerted effort to find a method that would meet the requirements of the plan, as well as the expectations of the

inspectors. Mr. Stanley confirmed that his discussions with mine foreman Eric Smith concerned the use of engineering ribbons or plastic reflector material, the various lengths, the appropriate indicator locations, including hanging them with the second row of roof bolts, and whether they should be hung closer to the end of the tubing (Tr. 54-55). I conclude and find that the discussions were ad hoc discussions rather than specific criteria established for future compliance.

Based on the aforesaid circumstances, and taking into account the vagueness of the cited plan safety precaution, I conclude and find that the respondent's mine management made a reasonable effort to develop and find a way to construct and position an indicator that would meet the expectations of the inspectors, as well as the plan requirement, and efforts in this regard mitigate the high negligence finding made by Inspector Stanley. Accordingly, his initial finding of high negligence **IS MODIFIED** to moderate negligence.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Remain in Business

The parties stipulated that the respondent is considered a large mine operator and that the subject mine is a large mine. Exhibit A to the petition for assessment of civil penalty reflects that as of April, 2010, the subject mine employed 621 miners, working three production shifts, seven days a week, with a coal production of 2,845,556 tons, and the respondent's tonnage is shown as 56,251,603. The parties further stipulated that the maximum civil penalty which could be assessed for the violations will not affect the respondent's ability to remain in business.

Proposed Settlement of Two Remaining Violations

The parties filed a motion for approval of a proposed settlement of the following two remaining Section 104(a) S&S violations in this docket.

Citation No.	30 C.F.R. Section	Assessment	Settlement
8173641	77.1301(a)	\$11,000	\$7,500
8173642	77.1303(d)	\$11,000	\$7,500

In support of the proposed settlements, the parties are in agreement that due to legitimate questions of fact regarding whether the citations were properly the subject of special assessments, reductions of the proposed civil penalties are appropriate and serve the purposes of the Mine Act. The citations otherwise remain as issued.

I have considered the arguments and documentation submitted by the parties in support of the proposed settlements, and I conclude and find that they are appropriate under the criteria set forth in Section 110(i) of the Mine Act. Accordingly, they are **APPROVED**.

ORDER

In view of the foregoing findings and conclusions, **IT IS ORDERED** that Section 104(d)(1) S&S Order No. 8170840, February 18, 2010, citing a violation of mandatory safety standard 30 C.F.R. § 75.370(a), **IS MODIFIED** and **AFFIRMED** as a non-significant and substantial Section 104(a) citation.

It is **FURTHER ORDERED** that the initial high negligence finding with respect to the violation **IS MODIFIED** to moderate negligence.

The respondent **IS ORDERED** to pay a civil penalty assessment of \$500 for the violation that has been affirmed.

Consistent with the settlement agreement regarding Section 104(a) Citation No. 8173641, and Citation No. 8173642, the respondent **IS ORDERED** to pay a civil penalty assessment of \$15,000, for both citations.

Finally, the respondent **IS ORDERED** to pay the aforementioned civil penalties of \$15,500, within thirty (30) days of the date of the decision², and upon receipt of payment this matter is **DISMISSED**.

/s/ George A. Koutras_____

George A. Koutras
Administrative Law Judge

Distribution:

A. Scott Hecker, Esq., Office of the Regional Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

Billy R. Shelton, Jones, Walters, Turner & Shelton, PLLC, 151 N. Eagle Creek Drive, Suite 310, Lexington, KY 40509

² 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

601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021
Telephone No.: 202-434-9933
Telecopier No.: 202-434-9949

October 28, 2011

MINING & PROPERTY SPECIALISTS,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. VA 2010-585-R
v.	:	Citation No. 8170070;09/07/2010
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Derby Wilson Mine
Respondent	:	Mine ID 44-07127
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. VA 2011-251
Petitioner	:	A.C. No. 44-07127-244720
v.	:	
MINING & PROPERTY SPECIALISTS,	:	Derby Wilson Mine
Respondent	:	

DECISION

Appearances:

M. RosAnn Beaty, US Department of Labor/MSHA, Post Office Box 560, Norton, VA 24273

Benjamin D. Chaykin, Esquire, U.S. Department of Labor, Office of the Solicitor,
1100 Wilson Boulevard, 22nd Floor West, Arlington, Virginia 22209-2247

Harry Meador, Mining and Property Specialists, Inc., 1912 Wildcat Road, Big Stone Gap,
Virginia 24219

Before: Judge William Moran

A hearing was held in this matter in Big Stone Gap, Virginia on September 29, 2011. At the conclusion of the sides evidentiary presentations in the hearing, the Court suggested, and the parties accepted, that it was able to issue an immediate oral decision, addressing all aspects of the case. In accepting the Court's suggestion, the parties waived the right to submit post-hearing briefs. In short, the Court upheld the single violation involved in this matter and imposed a

\$1.00 (one dollar) civil penalty. The Court explained on the record the basis for its findings and advised that a written decision would be issued commemorating the oral decision. While the Court advised that this written decision would, hopefully, be more polished than its oral decision, it assured the parties that the former would not distort the essence of the oral decision.¹

A single violation, a section 104(a) citation, listing the gravity as “unlikely” and the negligence as “moderate” and described as not “significant and substantial,” was issued to Mining & Property Specialists on August 12, 2010, for an alleged violation of 30 C.F.R. Section 75.512 was cited. That section provides that:

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.**

(emphasis added).

The last sentence of the standard was emphasized because it is the *only* aspect involved in this case. It is uncontroverted that on August 12, 2010, MSHA Inspector Richard Whitt issued the citation at issue in this case. Citation Number 8170070 describes the cited condition or practice as follows:

The Electrical Examination Record book for the c/n 2 four-wheel personnel carrier being used to transport miners to and from the 001 MMU could not be made available to an Authorized Representative of the Secretary of Labor or to the miners at this mine.

Mining and Property Specialists, Contestant and Respondent in these proceedings (hereinafter, “MAPS”) contended that it had not violated the cited standard, asserting that the Record Book was “made available.” It is MAPS’s position that, as the Record Book was at all times available at its offices, an off-mine site location, which is only 9.1 miles from the mine, it was in compliance with the standard.

¹ Subsequent to the hearing, the Court inquired of the Court Reporter as to how long the transcript recording was kept. This inquiry was made because the Court decided there was no need to have a transcript created but wanted to learn how long the recording would be kept, in the event that a reviewing body wanted a transcript. The Court Reporter advised that the recording was kept for many years.

At the hearing, there were no factual disputes in need of resolution. MAPS concedes the record book was not at the mine site itself. It contended that all the inspector had to do was to drive to MAPS' office where it would be made immediately available for the inspector's review, or that it was willing to send a facsimile of the record book to the mine when requested by the Inspector. MAPS stated that keeping the record physically on the personnel carrier had caused problems because it was subject to weather and other factors which caused deterioration of it. It contended that the issuing Inspector's residence was directly along the route from his home to the mine and that therefore the Inspector would not need to go out of his way to see the record book.

The Secretary acknowledged MAPS representations, next above, however it contended that the requirement that "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" must mean that the records be located at the mine site, not at a nearby, but off mine site, location. The Secretary also identified practical problems and concerns with MAPS' interpretation. It noted that an inspection could occur at any time, including evening or weekend hours, and MAPS' witness Ms. Dillon, administrative manager for MAPS' office, agreed that the office was not open at such times.

The Secretary, while not asserting that any falsification was present here, expressed that, it was necessary that books be immediately available. A delay in presenting records could present the risk that such books could be edited before being provided to the Secretary's duly authorized representative. The Secretary also pointed out that it has no authority to go the MAPS office and demand production of the record book because the MAPS office is not a mine and accordingly it has no mine identification number. Thus, the Secretary is without jurisdiction to enter MAPS office. Also, as the standard also requires that the records be made available to the miners, maintaining the record book some 9 miles from the mine would, as a practical matter, make the records unavailable.

In closing remarks, the Secretary asserted that a fair reading of the text of the standard implicitly requires that the record book be available at the mine site and not simply at a nearby location. The Secretary also pointed out that, even if the language itself does not direct this conclusion, per the *Chevron* analysis, 467 U.S. 837 (1984), deference must be afforded to the Secretary's reasonable interpretation of the standard. The Court agrees on both counts; the language, while not explicit, fairly can be read to require that the record book be at the mine. Further, even if it is not so viewed as an inherent requirement of the standard, the Secretary's interpretation is certainly reasonable under a *Chevron* analysis.²

² Although MAPS cited some administrative law judge decisions that it believed supported its interpretation of the standard, the Court noted on the record that each was either distinguishable or not on point and therefore did not advance MAPS' contention. *See, Woodring* (continued...)

In issuing its oral decision affirming the violation, the Court noted that MAPS position would create interpretation problems. For example, if per MAPS's contention, putting aside for a moment the significant issue of jurisdiction to inspect a property which is not a mine, the Court noted that if one were to conclude that 9 miles was close enough to be consider that the records were "available," the next question would be whether 10 miles was also sufficient. Under that approach, there would be no reasonable yardstick to determine how far off a mine site record books could be kept.

ACCORDINGLY, the Court determined that the violation was established and the Citation was AFFIRMED.

Addressing the civil penalty aspect, the Court noted that the Secretary sought a proposed penalty of only \$100.00 (one hundred dollars), and, as noted at the outset, there was no contention by the Secretary that the equipment had not been frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. The Citation was strictly about availability of the record book. Accordingly, the gravity was listed as "unlikely," the negligence as "moderate" and it was listed as not "significant and substantial." Upon consideration of each of the statutory penalty criteria, the Court has taken the above into account and has further considered that MAPS had a good faith, though erroneous, interpretation of the standard's requirements. For this first instance of this violation and having taken into consideration MAPS earnest belief that it was in substantial compliance, the Court believes that a penalty of \$1.00 (one dollar) is appropriate.

ORDER

Citation No. 8170070 is AFFIRMED. Contestant/ Respondent MINING & PROPERTY SPECIALISTS is ORDERED to pay the civil penalty imposed in this matter of \$1.00 (one dollar) within 30 days of this decision.³

/s/ William B. Moran

William B. Moran

Administrative Law Judge

²(...continued)

Company, WEST 94-84M, 16 FMSHRC 1716, (1994)and *Lakeview Rock Products*, WEST 94-308 M, 17 FMSHRC 83 (1995) both distinguishable administrative law judge decisions, which decisions are not binding in any event.

³ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

Benjamin D. Chaykin, Esquire, U.S. Department of Labor, Office of the Solicitor,
1100 Wilson Boulevard, 22nd Floor West, Arlington, Virginia 22209-2247

M. RosAnn Beaty, U.S. Department of Labor/MSHA, Post Office Box 560, Norton, Virginia
24273

Harry Meador, Mining and Property Specialists, Inc., 1912 Wildcat Road, Big Stone Gap,
Virginia 24219

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N.W., SUITE 9500
WASHINGTON, D.C. 20001
Telephone (202) 577-6809 and (202) 434-9933
Facsimile (202) 434- 9949

October 18, 2011

JOHN GARY JARVIS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2011-64-D
	:	MADI CD 2009-17
v.	:	
	:	
HIGHLAND MINING COMPANY, LLC,	:	Highland No. 9 Mine
Respondent	:	Mine ID 15-02709

ORDER ON HIGHLAND'S MOTION FOR SUMMARY DECISION

Before: Judge Moran

Introduction:

In this discrimination proceeding, Complainant John Gary Jarvis, acting *pro se*, has alleged that, in his attempt to demonstrate that he was sufficiently proficient to be hired as a roof bolter by Respondent Highland Mining Company, LLC, (Highland), he was tested under more rigorous conditions and standards than others who took the roof bolter proficiency test and that the harsher testing was applied to him because he is a member of the United Mine Workers of America (UMWA). Highland has filed a Motion for Summary Decision asserting that, as no protected activity has been claimed, the action must be dismissed. Accordingly, this Order addresses the question of whether union membership, and alleged disparate treatment by a mine operator of an applicant for employment because of such union membership, can constitute protected activity for a claim of discrimination brought under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (Mine Act). For the reasons which follow, the Court concludes that, because a claim on such grounds has not been recognized by the Federal Mine Safety and Health Review Commission as a basis for protected activity, the complaint must be **DISMISSED**.

Legal Framework:

The Commission's Procedural Rules set forth the grounds for evaluating a motion for summary decision. The applicable provision of those Rules, Section 2700.67, provides: A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows that there is no genuine issue as to any material fact; and that the moving party is entitled to summary decision as a matter of law.

As the Commission observed in *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, (Jan. 2007), ("*Hanson*") it "has long recognized that [] '[s]ummary decision is an extraordinary procedure,'" and [it] has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which "the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). *Hanson* at *9. Further, the Commission looks "at the record on summary judgment in the light most favorable to ... the party opposing the motion," and that "the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Mindful of the procedural rule and the Commission's words, the Court concludes that there is no genuine issue of material fact and that Highland is entitled to summary decision as a matter of law.

Complainant's contention

The present complaint needs to be placed in context. Mr. Jarvis is proceeding *pro se* in this matter.¹ This is Mr. Jarvis' second Section 105(c) complaint arising out of the same issue,

¹ The Commission stated in *Jaxun v. ASARCO, LLC* ("*Jaxun*"), 29 FMSHRC 616, August 2007, that "[t]he Mine Act, the Administrative Procedure Act ("APA"), and the Commission's Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation. More specifically, section 105(c)(3) of the Mine Act provides that if the Secretary of Labor determines that a violation of section 105(c)(1) has not occurred, "the [C]omplainant shall have the right ... to file an action in his own behalf before the Commission, charging discrimination." 30 U.S.C. § 815(c)(3). The APA, which in part governs the requirements for the opportunity for a hearing under section 105(c)(3) (see 30 U.S.C. 815(c)(3)), provides that a party may appear at a hearing without representation, although the party is entitled to obtain representation. 5 U.S.C. § 555(b) ("A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding."). Finally, under the Commission's procedural rules, a miner who has filed a complaint with the Commission under section 105(c)(3) is accorded party status and, as such, may represent

(continued...)

namely the testing which he took in connection with his application for a roof bolter position at Highland's mine. That first complaint was filed on March 26, 2009 and, like the current matter, it stemmed from Mr. Jarvis' failure to satisfy, during the job test, the performance requirements for that position. Mr. Jarvis filed a response to Highland's motion and it is accurate to sum up that three page response as essentially asserting that he was "tested differently" for the roof bolter performance test. It is not necessary here to review the details of his complaint that he was tested differently because such details do not shed light on the issue presently before the Court.

When one examines Mr. Jarvis' statement of September 2, 2009, initiating his discrimination complaint, he similarly asserted that he was treated differently and unfairly so. Although Jarvis' complaint lacks a plain and clear statement of the basis of his claim, two aspects of it reveal his contentions. Mr. Jarvis first asserts that Terry Miller, the UMWA Local Union President, told Jarvis that it was his (i.e. Miller's) *belief* that Jarvis failed the test because Jarvis had filed a 105(c) discrimination complaint. However, the heart of Mr. Jarvis' claim is that "nobody has failed this [roof bolter] test except for UMWA members that have come off the panel [and that this is] disparate treatment"

This assertion, forming the basis of his discrimination complaint, is consistent with Mr. Jarvis' statement during the conference call the Court conducted on March 14, 2011. That call was transcribed. As pertinent here, the Court inquired of Mr. Jarvis, ". . . it seems to me that the essence of your claim is that [] Highland discriminated against you in that they applied a tougher test to see if you will qualify to be a roof bolter and that the reason they made it tougher on you was because you're a member of the UMWA." Mr. Jarvis responded: "That's correct." The Court wanted to be sure that was Mr. Jarvis' position, so it asked again, "Is that the essence of what your claim is?" Again, Mr. Jarvis responded, "Yes sir." Although the Court made no ruling then, it did call to Mr. Jarvis' attention that the basis of his claim could present an obstacle, noting

¹(...continued)

himself. See 29 C.F.R. §§ 2700.3(b)(1), 2700.4(a). at * 4. It also spoke to "a miner's ability to represent himself or herself in Commission proceedings, noting that "[f]or approximately 30 years, the Commission has facilitated the participation of parties appearing pro se, or not represented by counsel, in Commission proceedings. Such facilitation is apparent in Commission practice and in the Commission's procedural rules. See, e.g., *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (noting special considerations for pro se litigants); 29 C.F.R. §§ 2700.3(b), 2700.4 (permitting participation in Commission proceedings without counsel). As such, the Commission "has generally held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys." *Tony M. Stanley, emp. by Mgt. Consultants, Inc.*, 24 FMSHRC 144, 145 n.1 (Feb. 2002); see also *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (pro se litigant's complaint held to less stringent standard than formal pleadings drafted by lawyers). In *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992), the Commission also noted that "[i]n general, courts take into account the 'special circumstances of litigants who are untutored in the law.'" The Court has applied those precepts in considering Mr. Jarvis' claim and in his response to Highland's Motion.

“there are some things that are not recognizable as a cause of action for discrimination proceedings under the Mine Act.”

In its Reply to Jarvis’ Response, Highland asserts that the Complainant provided no affidavits, cited no authority and does not address the Respondent’s contention that Section 105(c) of the Mine Act “does not protect against the union-membership discrimination”

For purposes of resolving the motion for summary decision, the Court assumes that Mr. Jarvis was tested differently than others.

Discussion

As Respondent notes, in its Memorandum in Support of its Motion for Summary Decision (“Respondent’s Memorandum” or “R’s Memorandum”) Respondent Highland Mining Company LLC (“Highland”) operates a coal mine in Waverly, Kentucky. Mr. Jarvis, the Complainant, is a former UMWA-represented employee who holds “panel rights” at the mine “pursuant to the 1998 National Bituminous Coal Wage Agreement, as a former employee of Peabody Coal Company affiliates.” R’s Memorandum at 2.

Because the heart of Mr. Jarvis’ discrimination claim is based upon his claim that “he was denied the position [of roof bolter] because of his union membership,” only the briefest background needs to be provided.² R’s Memorandum at 1. As will become apparent, the background is not determinative of the outcome. It is provided here simply for context. In January 2009 Mr. Jarvis applied for a position as a roof bolter operator at Highland. To attain such a position, applicants must be tested and show a particular level of proficiency. It is not disputed that Mr. Jarvis took this test on March 11, 2009, but did not pass. Following that, Mr. Jarvis filed a discrimination complaint and a grievance, alleging “disparate treatment.” The upshot of this was that an arbitrator required that Mr. Jarvis be re-tested and the complaint became moot. However, Mr. Jarvis did not pass the second testing for the roof bolter position.

² Regrettably, the Respondent interjected many additional claims about the case with the apparent intent of showing that Mr. Jarvis was both unqualified and unreasonable in connection with his testing. For example, it included that Mr. Jarvis had not worked in a coal mine for nine years, that he did not list “roof bolter” as a job he could perform on his panel form, that MSHA declined to bring a case on Jarvis’ behalf in connection with his second complaint of discrimination, and a host of other assertions, all apparently designed to diminish the Court’s assessment of Jarvis’ qualifications to perform the roof bolter position. However, that is not the issue and the Court does not accept the assertions as fact at this point in time. Those claims were, in the Court’s view, improper for the Respondent to include in its Motion. Consequently, the Court has *totally ignored* all this extraneous, and potentially prejudicial, material because none of it bears upon the limited issue to be decided, to wit, is a discrimination action based upon a claim that a mine operator has treated union workers differently, that is, more stringently, than testing of non-union applicants, cognizable as protected activity under the Mine Act?

This prompted the filing of his second discrimination complaint, which complaint is the subject of this proceeding.

As Mr. Jarvis reiterated during his April 28, 2011 deposition, it is his belief that he was unfairly tested for the roof bolter position and that the reason for that unfair testing was that Highland did not want to have a union man obtain the job.

As Counsel for Highland asked Mr. Jarvis during the deposition:

And the basis you think this is Highland is saying this guy's coming off the union panel and we don't want this guy to have the job?

Mr. Jarvis responded:

Correct.

Jarvis Deposition at 118.

As Highland correctly notes, section 105 of the Mine Act “does not provide redress for discrimination (even otherwise wrongful discrimination) unless it occurred in response to the exercise of a protected activity.” Respondent's Memorandum at 9.³ Highland observes that Jarvis does not claim that his application for the roof bolter job was rejected because he had previously filed a discrimination complaint, nor does he claim there was any safety or health hazard attendant to the filing of his action. Instead, it notes that Jarvis' complaint is *not* related to a claim of any safety or health hazard. Instead the core of the basis for his discrimination complaint is that it arose solely from his union membership. *See* Jarvis' deposition at 74-75 and 118.

³ Citing an administrative law judge's decision for this proposition, Highland cites it incorrectly, as 4 FMSHRC 1283(1987). In fact, the decision cited, *Eddington v. Falcon Coal Company*, appears at 9 FMSHRC 99 (1987), 1987 WL 272089. Counsel should take care to correctly cite its authority so that the Court can avoid spending its time tracking down the correct citation. That aside, Judge Maurer stated in that case that section 105(c) “does not provide for a wrongful disqualification for a particular job that may have been unfair if that disqualification was not caused in any part by an activity protected by the Act. Accordingly, the complaint herein must be denied and the case dismissed.” *Id.* at * 101. Opinions of fellow administrative law judges are not binding upon other judges. Only the persuasiveness of their reasoning may be influential. In this case, the Court agrees with Judge Maurer's interpretation about the present breadth of a discrimination complaint under the Mine Act.

Highland states that “protected activity” under the Mine Act can only arise where the complaint alleges that the adverse action stemmed from a danger or a safety or health violation or from the filing of an action under the Act, but that “adverse action” resting upon membership in a union is not cognizable under the Mine Act. The Court agrees that, under the present state of the law, that is an accurate statement.⁴ Highland also notes that MSHA itself has indicated that such a claim is not a recognized basis for discrimination under the Mine Act. Respondent observes that MSHA has stated that “Discrimination on the basis of race, sex, religion, handicap, etc., is not covered by Section 105(c) of the Mine Act.” R’s Memorandum at 11, Exhibit K, quoting MSHA Handbook PH 05-I-4, August 2005. A second source, MSHA’s Guide to Miners’ Rights, is even more explicit, expressly adding that “union activity” is not covered by Section 105(c), while reiterating that discrimination on the basis of race, sex, age, religion, or handicap are also not covered by that provision. R’s Memorandum at 12, Exhibit L, citing MSHA 3116 (Rev. 2010), p. 7 and at: <http://www.msha.gov/S&HINFO/minersrights/minersrights.asp>. Respondent submits that case law is such that deference must be afforded to the agency’s interpretation. *Id.*, citations omitted.

Respondent continues that Jarvis’ claim must be rejected because non-safety concerns must not be recognized. It adds that Congress’ intent was to promote the safety and health of miners, and not, under the Mine Act, other forms of alleged discrimination. *Id.* at 13. Although the Court agrees that the law does not presently recognize a claim founded upon the basis advanced by Mr. Jarvis, it does not subscribe to the Respondent’s additional assertion that interpreting the Mine Act to include such a claim would foil the Act’s aim and undermine its safety goals.⁵

⁴ Having said that union membership is not a recognized basis to claim protected activity, and agreeing with the premise that the law does not currently recognize such a basis for a complaint of discrimination, in the Court’s view it does not seem to be too far a leap for the Commission to potentially reach a conclusion that a claim, such as a Jarvis’ makes here, is cognizable. The reasoning would be that, given that unions, such as the UMWA are all about wages, hours and working conditions, and that working conditions necessarily involve safety concerns, it would seem that, if a complainant could in fact demonstrate that a mine systematically denied employment to any union member, the connection to safety would be ineluctable and that, if proven, such a concerted practice would be sufficiently linked to the Mine Act to show protected activity. The Court has offered this comment in the spirit of complying with the Commission’s instructions when dealing with *pro se* litigants’ contentions.

⁵ This argument is another example of the Respondent’s improper attempt to interject claims which are extraneous to the issue before the Court in this motion. This is because, beyond the pure legal question of whether a Mine Act discrimination action can include a claim that a mine operator treated union applicants for employment more rigorously than non-union applicants, the Respondent also tries to have the Court conclude that Jarvis was unsafe to perform the position of roof bolter. Again, it is the Court’s position that, were such a claim as
(continued...)

Respondent's last contention is another stretch beyond what is appropriately before the Court in this motion. Under this argument Highland assumes, for the sake of argument, that union activity is a basis for protected activity and then proceeds to claim that Jarvis has failed to show that he suffered an adverse action which was motivated by his union membership. This argument continues with whether the mine operator's refusal to hire Jarvis was based on his failure to satisfy bona fide occupational qualifications for that position. As explained earlier, this is not purely a question of law and the factual underpinnings are far from conceded. Therefore, summary judgment would not be appropriate at this time.

The starting point of the issue analysis begins with the statutory provision itself. That section suggests that Mr. Jarvis' Complaint is not cognizable under the Mine Act. Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act. 30 U.S.C. § 815(c)(1) (2006).

As applied here, the provision can be abbreviated to its applicable essence:

No person shall in any manner discriminate against or cause discrimination against or otherwise *interfere with the exercise of the statutory rights* of any applicant for employment in any mine subject to this Act *because such applicant for employment has filed or made a complaint* under or related to this Act, *or because such applicant for employment has instituted any proceeding* under or related to this Act *or because of the exercise by such applicant for employment of any statutory right afforded by the Act.*

⁵(...continued)

Jarvis has brought to be recognized as a basis to claim discrimination by the Commission under the Mine Act, and if Jarvis were able, at hearing, to show that the Respondent systematically rejected applicants for the position of roof bolter where such applicants were union members, Jarvis would have established a prima facie case, on the theory that unions are all about working conditions for its members and that this necessarily includes safety matters.

In *Consolidation Coal Company* (aka the Commission's "Pasula" decision), 2 FMSHRC 2786 (1980), the Commission held that a complainant, in a discrimination proceeding alleging a violation of section 105(c)(1) of the Mine Act, has the burden of establishing a prima facie case. In carrying out that burden, a complainant must show by a preponderance of the evidence that he engaged in a protected activity and that the adverse action was motivated in any part by the protected activity. *Id.* at 2799-2800. There is more to the test for resolving discrimination claims, but there is no need to have a discussion about those other aspects here, because out of the starting gate one must establish engagement in protected activity.⁶

In many subsequent cases, including *Gilbert v. Sandy Fork Mining*, 9 FMSHRC 1327 (August 1987), the Commission has noted again that the "complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir.1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). It added that the operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity.

The Commission's stance about the essential requirement that there must be protected activity has never varied. In its most recent discrimination decision, *Turner v. National Cement*, 2011 WL 2286883 (May 20, 2011), the Commission repeated that, to establish "a prima facie case of prohibited discrimination [a complainant must present] evidence sufficient to support a conclusion that the individual engaged in protected activity" *Id.* at *4.

Accordingly, having found that Mr. Jarvis' complaint of discrimination is not founded upon a cognizable basis for such a claim, Highland's Motion for Summary Decision is **GRANTED** and Mr. Jarvis' complaint of discrimination is hereby **DISMISSED**.

SO ORDERED.

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

⁶ It is noted that in *Pollock v. Kennecott Copper*, 26 FMSHRC 52, 2004 WL 868064, (2004), Judge Manning ruled, in a discrimination proceeding similar in some respects to the present case, that the complainant's problems stemmed from his union activities rather than any protected activities under the Mine Act and the judge concluded that the complainant was not offered employment by the mine for reasons that are not protected by the Mine Act.

Distribution:

John Gary Jarvis, *pro se*
1362 State Route 2551
Breman, KY 42325

Jeffrey K. Phillips, Esq.
D. Eric Lycan, Esq.
Steptoe & Johnson PLLC
1010 Monarch Street, Suite 250
P.O. Box 910810
Lexington, Kentucky 40591-0810

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 18, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. VA 2009-211
	:	A.C. No. 44-04856-178738-02
v.	:	
	:	Buchanan Mine #1
	:	
CONSOLIDATION COAL CO.,	:	
Respondent	:	

ORDER DENYING MOTION TO AMEND PETITION FOR ASSESSMENT OF CIVIL PENALTY

This case is before me on a *Petition of the Secretary of Labor for Assessment of Civil Penalty* (“Petition”) issued against Consolidation Coal Company (“Consol”), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§815 and 820 (“the Act”). The Secretary proposed assessing penalties against Consol totaling \$199,300 for five alleged violations of mandatory safety standards at Consol’s Buchanan #1 coal mine (“Buck 1”). Consol challenged both the occurrence of the violations and the severity of the assessed penalties.

A formal hearing was held in Jonesborough, Tennessee on July 12 and 13, 2011. At the hearing, the parties were given until September 13, 2011 to file their post-hearing briefs. Subsequently, the briefing deadline was extended 30 days. Late in the afternoon of October 3, the *Secretary’s Motion to Amend Petition for Assessment of Penalty* (“Secretary’s motion” or “motion to amend”) and accompanying memorandum of law was faxed to this office. In a conference call held on October 4, Respondent stated that it opposed the Secretary’s motion, and was given until October 7 to file a response. That response was timely filed. Having considered the parties’ positions, the Secretary’s motion is denied.

First, by way of clarification, although the Secretary entitled her motion *Secretary’s Motion to Amend Petition for Assessment of Penalty*, the Secretary is not seeking to modify that document. Rather, she is seeking to amend Order No. 8157102, one of five orders and citations on which the Petition is based. The standard listed as violated in Order No. 8157102 is 30 C.F.R. §75.1103-3. The Secretary seeks to change that to §75.1100-1(a).

Order No. 8157102 alleges that Respondent, in the course of repairing a water line which supplied water to be used to fight fires on the beltline, shut off the water while the beltline was running. The order further alleges that defective belt rollers created a potential fire hazard, and there was no fire protection for the affected belts. The order concludes that “[t]his violation is an unwarrantable failure to comply with a mandatory standard.” The standard cited was §75-1103-3. Thus the alleged violation contains several elements: the lack of operational waterlines; lack of any other effective fire protection; and the fire hazard posed by stuck belt rollers.

Section 75.1103-3 states:

Automatic fire sensor and warning device systems installed in belt haulageways of underground coal mines shall be assembled from components which meet the minimum requirements set forth in §§75-1103-4 through 75-1103-7

This regulation is clearly inapplicable to the facts surrounding the alleged violation. Apparently, this incorrect citation had not been noticed by the Secretary prior to the hearing, since no amendment to Order 8157102 was sought at that time. But this error clearly was brought to the Secretary’s attention at the hearing, when the mine inspector was being cross-examined by Respondent’s counsel specifically regarding §75.1103-3. *See* July 12, 2011 transcript at 154-55. Yet the Secretary did not move to amend the Petition to allege a violation of a different standard at that time, waiting until just before the parties’ briefs had to be filed. Further, as Respondent points out, the Secretary offers no explanation for filing the motion to amend almost three months after the hearing and days before the briefs were due to be filed.

Accepting for purposes of argument that the case law cited by the Secretary would permit me to grant the motion to amend,¹ I find that, under the circumstances above, it would be inequitable to do so. Filing the motion to amend at so late a date, months after the inspector’s error of citing an inapplicable standard in the order must have become known to the Secretary, and without explanation for the unwarranted delay, should not be sanctioned. Further, Respondent contends that amending the order at this time would be prejudicial because it was denied the opportunity to cross-examine the mine inspector regarding the specific standard the Secretary now alleges was violated. Since Respondent’s counsel effectively cross-examined the mine inspector regarding the alleged violation of §75.1103-3, this contention is credible. Accordingly, I find that the Respondent would be prejudiced if the untimely motion to amend the order is granted, and therefore it must be denied.

As an additional point, permitting the Secretary to amend the order to reference §75.1101-1(a) rather than §75.1103-3 would not aid the Secretary’s case, and would be a waste

¹ The Secretary primarily relies on *Wyoming Fuel Co.*, 14 FMSHRC 1282 (August 1992), and *Cyprus Empire*, 12 FMSHRC 911 (May 1990), in support of her position that it is permissible to permit a party to amend an order at this stage of a proceeding. But these cases are inapposite. Both concern motions which were filed prior to trial and were based on Fed. R. Civ. P. 15(a), which specifically applies only to motions filed prior to trial.

of both Respondent's and the Court's time, for §75-1101-1(a) also is inapplicable to the facts of this case.

Section 75.1100, essentially the preamble to 30 C.F.R. Part 75, Subpart L – Fire Protection, states that “[e]ach coal mine shall be provided with suitable firefighting equipment adapted for the size and conditions of the mine. The Secretary shall establish minimum requirements of the type, quality, and quantity of such equipment.” Section 75.1101-1(a), titled “Type and quality of firefighting equipment”, sets a standard for the size and capacity of water lines being placed in a mine. It states that “[w]aterlines shall be capable of delivering 50 gallons of water a minute at a nozzle pressure of 50 pounds per square inch.” It does not deal with the actual operation of that equipment; and whether the waterline is capable of delivering 50 gallons of water a minute at a nozzle pressure of 50 pounds per square inch was never at issue. In addition, whether Respondent committed a violation of a safety standard simply because a waterline was not operational was not an issue which was tried at the hearing.² The violation was always indicated to be the combination of an inoperable water line, the absence of other effective firefighting equipment and the hazardous condition of the beltline. *See, e.g.*, GX 3. In any event, although there might be a section of the regulations that would make the operation of a beltline with an inoperable waterline, by itself, a violation of the Act, neither §75.1103-3 nor §75.1101-1(a) is it. Accordingly, amending Order 8157102 to allege a violation of §75-1101-1(a) rather than §75-1103-3 would serve no purpose, and would result in unnecessary delay.

Therefore, not only would it be improper to permit the Secretary to amend the order because it was filed too late without explanation and would be prejudicial to Respondent, the amendment the Secretary seeks to make must be rejected because it concerns an issue which was not tried and in any event is not relevant to the facts of the case.

In conclusion, ***IT IS ORDERED*** that the *Secretary's Motion to Amend the Petition for Assessment of Penalty* is denied. The parties are ***FURTHER ORDERED*** to file their briefs not later than October 28th.

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

² Fed. R. Civ. P. 15(b)(2) states that “[w]hen an issue not raised by the pleadings is tried by the parties’ express or implied consent, it must be treated in all respects as if raised in the pleadings.”

Distribution:

Angela Gregory, Esq., U.S. Department of Labor, Office of the Solicitor, 211 7th Avenue North,
Nashville, TN 37218

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, 151 North eagle Creek drive, Suite
310, Lexington, KY 40509.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th Street, Suite 443
DENVER, CO 80202-2500
303-844-3577/FAX 303-844-5268

October 30, 2011

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

v.

THE AMERICAN COAL COMPANY,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2007-171
A.C. No. 11-02752-122978-08

Docket No. LAKE 2007-172
A.C. No. 11-02752-122978-09

Docket No. LAKE 2007-202
A.C. No. 11-02752-125002-01

Docket No. LAKE 2007-205
A.C. No. 11-02752-125002-04

Docket No. LAKE 2008-004
A.C. No. 11-02752-127021-01

Docket No. LAKE 2008-080
A.C. No. 11-02752-131664-01

Docket No. LAKE 2008-082
A.C. No. 11-02752-131664-02

Docket No. LAKE 2008-120
A.C. No. 11-02752-133868-02

Docket No. LAKE 2008-138
A.C. No. 11-02752-136300-01

Docket No. LAKE 2008-139
A.C. No. 11-02752-136300-02

Docket No. LAKE 2008-140
A.C. No. 11-02752-136300-03

Docket No. LAKE 2008-141
A.C. No. 11-02752-136300-04

Docket No. LAKE 2008-143
A.C. No. 11-02752-136300-06

Docket No. LAKE 2008-231

: A.C. No. 11-02752-139912-01
:
:
: Docket No. LAKE 2008-232
:
: A.C. No. 11-02752-139912-02
:
:
: Docket No. LAKE 2008-234
:
: A.C. No. 11-02752-139912-04
:
:
: Docket No. LAKE 2008-235
:
: A.C. No. 11-02752-139912-05
:
:
: Docket No. LAKE 2008-239
:
: A.C. No. 11-02752-139912-09
:
:
: Docket No. LAKE 2008-526
:
: A.C. No. 11-02752-153962-02
:
:
: Docket No. LAKE 2008-528
:
: A.C. No. 11-02752-153962-04
:
:
: Docket No. LAKE 2008-529
:
: A.C. No. 11-02752-153962-05
:
:
: Docket No. LAKE 2008-531
:
: A.C. No. 11-02752-153962-07
:
:
: Docket No. LAKE 2008-582
:
: A.C. No. 11-02752-157112-01
:
:
: Docket No. LAKE 2008-583
:
: A.C. No. 11-02752-157112-02
:
:
: Docket No. LAKE 2008-584
:
: A.C. No. 11-02752-157112-03
:
:
: Docket No. LAKE 2008-585
:
: A.C. No. 11-02752-157112-04
:
:
: Docket No. LAKE 2008-624
:
: A.C. No. 11-02752-160144-01

:	Docket No. LAKE 2008-625
:	A.C. No. 11-02752-160144-02
:	
:	Docket No. LAKE 2008-626
:	A.C. No. 11-02752-160144-03
:	
:	Docket No. LAKE 2009-007
:	A.C. No. 11-02752-162890-02
:	
:	Docket No. LAKE 2009-008
:	A.C. No. 11-02752-162890-03
:	
:	Docket No. LAKE 2009-206
:	A.C. No. 11-02752-171747-01
:	
:	Docket No. LAKE 2009-445
:	A.C. No. 11-02752-182275-02
:	
:	Docket No. LAKE 2009-546
:	A.C. No. 11-02752-188266

**ORDER DENYING THE AMERICAN COAL COMPANY’S MOTION
FOR SUMMARY DECISION**

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against The American Coal Company (“American Coal”) 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”). American Coal filed a motion for summary decision pursuant to section 67 of the Commission’s Procedural Rules. 29 C.F.R. § 2700.67. The Secretary filed a response in opposition to the motion and American Coal filed a reply brief.

The parties entered into joint stipulations that set forth the 14 safeguard notices at issue in these cases and the 73 citations that were issued alleging violations of these safeguard notices. American Coal contends that, because the safeguard notices at issue are invalid as a matter of law, all 73 citations should be vacated. As described in more detail below, the Secretary argues that the safeguard notices were validly issued and that the citations should be affirmed.

Section 2700.67 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.

I conclude that there is no genuine issue as to any material fact but that American Coal is not entitled to summary decision as a matter of law.

Section 314(b) of the Mine Act authorizes MSHA inspectors to issue a notice to provide safeguard (“safeguard notice”) “to minimize hazards with respect to the transportation of men and materials.” 30 U.S.C. § 874(b). In order to issue a safeguard notice, an inspector must determine that there exists an actual transportation hazard not covered by a mandatory standard and that a safeguard notice is necessary to correct the hazardous condition. *Cyprus Cumberland Resources Corp.* 19 FMSHRC 1781, 1784-85 (Nov. 1997). The inspector must specify in the safeguard notice the corrective measures that the operator must take to remedy the hazard.

I. ARGUMENTS OF THE PARTIES

A. General Position of American Coal

American Coal argues that, because section 314(b) grants the Secretary “an unusually broad grant of regulatory power” without regard to rulemaking procedures, the Commission rightfully concluded that this exercise of power “must be bounded by a rule of interpretation more restrained than that accorded promulgated standards.” *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (April 1985) (“*SOCCO I*”). American Coal states that it is important to recognize that mine operators are denied certain rights when MSHA holds them to a standard set forth in a safeguard notice in lieu of a promulgated safety standard. These rights are set forth in the notice-and-comment provisions of the Mine Act and the Administrative Procedure Act. (See 30 U.S.C. § 811(a); 5 U.S.C. 553). American Coal points out that whenever MSHA governs an operator’s conduct via a safeguard notice, it does so “without giving the operator (and the public) prior public notice of, and an opportunity to comment on, the resulting standard.” (AmCoal Mot. 4). As a consequence, the Commission has held that safeguard notices must be strictly construed. *Cyprus Cumberland*, 19 FMSHRC at 1785. “A safeguard must be interpreted narrowly in order to balance the Secretary’s unique authority to require a safeguard and the operator’s right to fair notice of the conduct required of it by the safeguard.” *BethEnergy Mines, Inc.*, 14 FMSHRC 17, 25 (Jan. 1992).

American Coal argues that the safeguard notices at issue here are invalid because “they do not identify specific hazards, and/or they do not identify the conduct required of the operator to remedy such hazards, and/or they do not address hazards that are not covered by a mandatory

standard.” (AmCoal Mot. 5). It maintains that, when issuing safeguard notices, MSHA is “governing” a mine “not by rules fashioned through a careful rulemaking process, nor even by the dictates of the agency’s leaders in Arlington, but, rather, by the raw, ad hoc regulatory edicts of MSHA inspectors in the field.” *Id.* at 6. This “extensive patchwork of ad hoc regulatory edicts - that inspectors have dribbled out over decades of their subjective judgments - is abhorrent to the due process clause and the Mine Act’s procedural safeguards.” *Id.* The court should not “countenance the wholesale abdication of rulemaking demonstrated in this case.” *Id.*

B. General Position of the Secretary

The Secretary contends that the safeguard notices at issue here “provide sufficient information to the mine operator regarding the hazardous conditions covered by the safeguard and the manner in which to abate those hazards.” (Sec’y Response 4). Section 314(b) of the Mine Act specifically authorizes the Secretary to issue safeguard notices to mine operators “to minimize hazards with respect to transportation of men and materials.” This provision is designed to give the Secretary the “authority to use safeguards to create mine-specific safety standards outside the scope of normal notice-and-comment rulemaking procedures.” *Id.* at 4-5. As the Commission has stated, “the Act does not require mandatory standards to be promulgated pursuant to notice-and-comment rulemaking.” *Wolf Run Mining Co.*, 32 FMSHRC ___, slip op. at 9, No. WEVA 2008-804 (Oct. 21, 2010), *appealed docketed*, No. 10-1396 (D.C. Cir. Nov. 22, 2010). In the present cases, MSHA inspectors determined that a transportation hazard existed that was not covered by a mandatory standard and issued the subject safeguard notices.

The Secretary argues that a safeguard notice is valid if it identifies with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard. *SOCCO I* at 512. The Secretary is not required to “anticipate and articulate in detail any and all potential consequences of a hazardous condition.” (Sec’y Response 6). The inspector who issues the safeguard notice is also not required to describe in detail the best method for remedying the hazardous condition. The Secretary noted that American Coal has been issued numerous citations for violations of these safeguards. This enforcement activity should have provided the operator with sufficient information regarding how the Secretary interprets these safeguard notices. (Sec’y Response 24).

II. ANALYSIS WITH CONCLUSIONS OF LAW

American Coal’s basic position is two-fold. First, it argues that, because safeguard notices are tailor-made by individual inspectors, they are not mandatory standards and should be reviewed using a different analysis than would be applied to standards promulgated through notice-and-comment rulemaking. As a consequence, safeguard notices must be interpreted very strictly and such notices are invalid if they are too vague. American Coal believes that if there is any ambiguity in a safeguard notice, the notice is invalid. (AmCoal Mot. 11). In *Wolf Run*, a majority of the three Commissioners who participated in the decision held that safeguard notices are mandatory standards. The Commission stated that “[b]ecause section 314(b) [of the Mine Act] is one of the subsections contained within sections 302 through 318 of title III, we conclude

that the clear language of the Act dictates that the provisions of section 314(b) constitute a mandatory safety standard.” (Slip Op. at 6). The Commission also concluded that a violation of a safeguard notice issued by an MSHA inspector constitutes a violation of section 314(b) and is therefore a violation of a mandatory safety standard. The Commission noted that the Mine Act does not require that mandatory safety standards be promulgated pursuant to notice-and-comment rulemaking. Mandatory standards are only required to fit within the statutory definition set forth in section 3(l) of the Mine Act. (Slip op. at 9). Safeguard notices clearly fall within that definition. Based, in part, on this decision, I reject American Coal’s argument that safeguard notices must be so strictly construed that any ambiguity renders them invalid. Such an interpretation would put an impossible burden on MSHA inspectors and would contravene the intention of Congress when it included section 314(b) in the Mine Act.

Second, American Coal contends that each contested safeguard notice is invalid because it (1) did not identify with specificity the nature of the hazard and (2) did not specify the conduct required of the operator to remedy such hazard. It is clear that each MSHA inspector determined that there existed an actual transportation hazard not covered by a promulgated safety standard and that a safeguard notice was necessary to correct the hazardous condition. I conclude that the Commission’s decision in *Wolf Run* did not change the general principle that, because section 314(b) of the Mine Act gives MSHA inspectors an “unusually broad grant of regulatory power,” safeguard notices must be bound by a rule of interpretation “more restrained than that accorded promulgated standards.” *SOCCO I*, at 512. As discussed in more detail below, I find that each contested safeguard notice identified a specific hazard and specified a remedy with sufficient precision to provide American Coal with fair notice of what was required. The Commission reviews the Secretary’s issuance of a safeguard notice under an abuse of discretion standard. *Cyprus Cumberland*, 19 FMSHRC at 1785; *Southern Ohio Coal Co.*, 14 FMSHRC 1, 9 (Jan. 1992) (“*SOCCO II*”). As discussed below, I find that the inspectors did not abuse their authority when they issued the contested safeguard notices. As shown below, American Coal would interpret the Secretary’s authority so narrowly that each safeguard notice could only address one particular type of injury that resulted from one very specific type of accident. In addition, under its interpretation, the inspector would be required to provide rather detailed instructions in the safeguard notice as to how the hazard must be eliminated. Neither the Mine Act nor Commission precedent supports such an interpretation. I find that all of the safeguard notices are valid.¹

American Coal relies to a great extent on the Commission’s decision in *SOCCO I* to support its argument that the subject safeguard notices should be invalidated. In *SOCCO I*, the

¹ In *American Coal Co*, LAKE 2007-139, etc., an unpublished order dated Sept. 20, 2010, Judge Margaret Miller also determined that some of the same safeguard notices at issue here are valid. Although I reach the same result as Judge Miller, I independently analyzed the issues and did not rely on her decision. I agree with her conclusion that the term “hazard” in section 314(b) of the Mine Act refers to unsafe conditions in a mine rather than to the potential outcomes that could result from these unsafe conditions. (Unpublished Order at 3).

Commission did not invalidate the subject safeguard notice for failing to identify with specificity the nature of the hazard of concern to the MSHA Inspector. Instead, the Commission vacated the citation issued for a violation of the safeguard notice. The Commission determined that the conditions observed by the inspector who issued the citation for the alleged violation of the safeguard notice were not actually addressed by the original safeguard notice. In *SOCCO I*, the original safeguard notice was issued because fallen rock and cement blocks were in a travelway and obstructing travel. The citation was issued for the presence of water in the travelway. The Commission held that the accumulation of water in the travelway “was neither specifically identified in the safeguard notice, suggested thereby, nor in our opinion even contemplated by the inspector when he issued his safeguard notice.” *SOCCO I*, at 513. The Commission stated that, “rather than bootstrapping dissimilar hazards into previously issued safeguard notices,” the Secretary is required to issue new safeguard notices specifically addressing these additional hazards. *Id.* The safeguard notice in that case was valid; it just did not address the alleged hazardous condition set forth in the citation. The Commission vacated the citation but the safeguard notice remained in effect. Whether any citations that were issued for alleged violations of the safeguard notices at issue in the present cases should be vacated based on the principles set forth in *SOCCO I* is not before me in this motion for summary decision.

In *Southern Ohio Coal Company*, 14 FMSHRC 748, (May 1992) (*SOCCO III*), the Commission vacated a decision of former Commission Judge James Broderick and remanded the case so that he could evaluate the validity of an underlying safeguard notice in light of recent Commission decisions. 14 FMSHRC at 752. On remand, the judge determined that the safeguard notice at issue was invalid because it “did not specifically identify the hazard at which it was directed.” 14 FMSHRC 1404, 1407 (Aug. 1992). The safeguard notice was issued because there was not a total of 36 inches of clearance on the sides of a rubber-tired scoop being operated along a supply track where supplies were being loaded into the scoop bucket. (*See* 30 C.F.R. § 75.1403-10(h)). The safeguard notice simply stated that only 6 inches of side clearance was provided for the scoop and stated that 36 inches must be provided. The judge on remand determined that the inspector’s failure to specify in the safeguard notice how miners could be injured by the condition described therein invalidated the notice. He vacated both the safeguard notice and the citation issued for a violation of the notice. 14 FMSHRC at 1407. Decisions of other administrative law judges are not binding on me and, to the extent that Judge Broderick’s holding is inconsistent with mine, it is rejected.

A. Safeguard Notice No. 7568565.

Safeguard Notice No. 7568565, issued August 3, 1998, provides:

Bottom irregularities, debris in the form of rock that had fallen from the roof, and wet and muddy conditions were present on the mine travelways at the following locations: This notice to provide safeguards requires that all mine travelways be kept as free as practicable of bottom irregularities, debris and wet and muddy

conditions that could affect the control of mobile equipment traveling these areas.

American Coal contends that this safeguard notice is invalid because, although it describes the conditions the inspector found along the travelways, it does not describe a hazard. (AmCoal Mot. 7). American Coal asks, what was the hazard that the inspector was attempting to prevent? Was it the possibility that a piece of mobile equipment would slide against a rib and strike a miner? Was the hazard the possibility that miners would be thrown from the equipment or thrown around inside the equipment? The safeguard notice does not give the operator fair notice of what hazard it is trying to prevent. American Coal also argues that the safeguard notice does not specify what corrective measures are required of the operator. There is no indication of how to comply because it simply states that American Coal must keep travelways “as free as practicable” of bottom irregularities. The operator is left to guess at a remedy.

American Coal avers that this lack of specificity will only lead to future debates between it and MSHA over what the safeguard notice requires. “That, by definition, does not pass muster as a safeguard.” *Id.* at 8. If, on the other hand, the Secretary proposes a new safety standard that is vague, the mining community has the opportunity to address the problem during the notice-and-comment period. There is no opportunity for a mine operator to clarify the meaning of a safeguard notice, “which is why Commission scrutiny must be more demanding.” *Id.* A “safeguard should leave no doubt about (1) when it applies and (2) what the operator must do to comply.” *Id.* The phrases “free as practicable,” “bottom irregularities,” “debris,” and “could affect the control of mobile equipment,” for example, are highly subjective. Thus, different MSHA inspectors would be free to issue a citation based on this safeguard notice that is “outside the context of the immediate set of facts that existed when this safeguard was written.” *Id.*

The Secretary argues that “it is both illogical and impractical to insist that the Secretary anticipate every possible consequence of the presence of bottom irregularities in a travelway.” (Sec’y Response 14). The Secretary issued this safeguard notice to guard against a specific hazard in specific areas of the mine and the inspector has clearly outlined the problem to be fixed and the manner in which to fix it.

I find that this safeguard notice is valid. It specifies the nature of the hazard, which was the presence of bottom irregularities, debris in the form of rock that had fallen from the roof, and wet and muddy conditions. These conditions created a risk that the operator of mobile equipment driving through the travelways could lose control of the equipment. It is true that there are a number of scenarios in which miners could be injured if the equipment operator were to lose control. The mobile equipment could slam into a rib either injuring miners in the equipment or miners walking along the entry. Miners could also be thrown from the equipment. Injuries could occur in other ways as well. Yet, the nature of the hazard is quite clear. The impediments in the travelway could affect the ability of mobile equipment operators to maintain control of their equipment.

It is also clear what must be done to correct the hazard. Travelways must be kept as free as practicable of bottom irregularities, debris and wet and muddy conditions. The “as free as practicable” language enures to the benefit of American Coal because it makes clear that the travelway is not required to be completely flat and smooth. By using the term “bottom irregularities,” the Secretary will be required to establish that the cited mine bottom was so “irregular” that it presented a hazard to mobile equipment traveling through the roadway. Only those irregularities that affect the ability of equipment operators to maintain control of their equipment would be in violation of the safeguard notice. I find that Safeguard Notice No. 7568565 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.²

B. Safeguard Notice No. 3538483.

Safeguard Notice No. 3538483, issued August 17, 1990, provides:

The established rubber-tired (off-track) haulage roadway located in the No. 1 entry of the 1st east longwall tailgate entries was not maintained to allow safe passage of miners and materials. Numerous pieces of bridging lumber (2 ½” x 10 ½” x 12' - 14') which were used to stabilize the mine floor, were dislodged or protruding from the mine floor along this travel entry. This is a notice to provide safeguards requiring all bridging lumber used on the mine floor be secured or that loose and dislodged pieces of lumber be re-secured or removed from the travelway.

American Coal argues that the safeguard notice does not describe a hazard. Was the hazard that miners walking through the area could trip on the bridging lumber or that a piece of mobile equipment could lose control of steering? (AmCoal Mot. 9). Without receiving notice of the actual hazard of concern to MSHA, a mine operator could fail to address the real issue. The safeguard notice also does not specify the corrective measures to be taken. American Coal asks how large must the piece of lumber be to create a hazard? American Coal states that the safeguard notice is so vague that it would be uncertain how to comply to avoid future citations. “Since the safeguard does *not* ‘identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard,’ the safeguard is invalid

² The Secretary also promulgated a safeguard provision specifically addressing this hazard, which is virtually identical to the safeguard notice at issue. This provision gave notice to the mining community that such a safeguard notice could be issued. Section 75.1403-10(i) provides:

Off-track haulage roadways should be maintained as free as practicable from bottom irregularities, debris, and wet or muddy conditions that affect the control of the equipment.

and the citations issued pursuant to the safeguard must be vacated.” (AmCoal Mot. 10) (*quoting SOCCO I*, at 512) (emphasis in original).

The Secretary contends that the safeguard notice clearly describes a hazard, which was bridging lumber that has been dislodged or was protruding from the mine floor in travelways. The safeguard notice also states what remedies the mine operator must take to correct the condition. American Coal must secure all bridging lumber used on mine floors or remove all loose and dislodged pieces of lumber from the roadway.

I find that the safeguard notice was valid. The presence of dislodged or protruding pieces of bridging lumber on the mine floor along this travel entry created a number of risks, some of which were identified by American Coal. The fact that there were multiple hazards created by a single condition does not invalidate a safeguard notice. In addition, the safeguard notice clearly provides that all bridging lumber used to stabilize the mine floor must be secured or removed. Thus, the safeguard notice provided fair notice of what is required to comply with the notice. I find that Safeguard Notice No. 3538483 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

C. Safeguard Notice No. 7582643.

Safeguard Notice No. 7582643, issued January 26, 2006, provides:

The active 13th West Longwall working section . . . was not provided with a clear travelway between the longwall face conveyor and the shield bases for the entire length of the longwall face. Coal and gob was observed deposited in the walkway and on the shield bases at various depths. This is a notice to provide safeguards requiring that all longwalls at this mine shall maintain the walkways and shield bases, between the face conveyor and the shields, free of all extraneous materials that would affect the safe travel of miners.

American Coal maintains that the safeguard notice does not describe a hazard. The condition itself is not a hazard. The notice does not state how much “extraneous material” could create a possible hazard and it does not even delineate what such extraneous material can consist of. As a consequence, the notice does not provide fair notice of what is required to eliminate the hazard. American Coal contends that vague, sloppily-drafted safeguard notices would “pass the buck to the operator to guess as to the inspector’s meaning, and leave it to the Commission to sort it out if MSHA and the operator disagree.” (AmCoal Mot. 12).

The Secretary maintains that the safeguard notice is clear. Coal and gob material was found on the walkway beside the pan line and on bases for the shield supports on the longwall system. It requires that extraneous material that would affect the safe travel of miners along the longwall be removed. The term “extraneous material” is sufficiently specific.

I agree with the Secretary. The safeguard notice clearly and concisely requires American Coal to keep the walkway along the longwall free of extraneous material that would pose a hazard to miners walking through the area. Such material would present a slipping and tripping hazard to miners. The safeguard notice covers materials such as loose coal and materials from the gob. The MSHA inspector did not require that the area be kept in pristine condition, so the safeguard notice would only apply to conditions which posed a tripping and slipping hazard to miners. By necessity, there must be some level of subjectivity involved and there is no question that disputes could arise in the future. But the risk of future disputes is not sufficient to render the safeguard notice invalid. I find that Safeguard Notice No. 7582643 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

D. Safeguard Notice No. 4268263.

Safeguard Notice No. 4268263, issued April 18, 1995, provides:

A clear travelway at least 24 inches wide was not provided on the No 4 Galatia belt for approximately 100 feet due to water and slurry conditions in an excess of 16 inches. This is a notice to provide a safeguard for a clear travelway at least 24 inches wide shall be provided on both sides of all belt conveyors and kept free from water and/or slurry conditions that would affect safe travel of miners.

American Coal contends that the safeguard notice describes the conditions found by the inspector but that it does not state a specific hazard. The condition itself was not a hazard. “Was the hazard the possibility of miners stumbling and falling due to the depth of the water?” (AmCoal Mot. 13). In the alternative, “was the hazard an interference with travel by persons because of difficulty in viewing the mine floor?” *Id.* Was the hazard “the possibility of water and slurry causing alignment problems with the belt?” The operator is left to guess what hazard was created and what it must do to comply with the notice.

The Secretary argues that the hazard is clearly set forth in the safeguard notice and it more than meets the “nature of the hazard” standard outlined in *SOCCO I*. The safeguard notice clearly states that the presence of water and slurry affects the safe travel of miners and it requires that the area be kept free of such material.

I find that this safeguard notice is quite clear. The hazard is obvious. Trying to walk through 16 inches of water and slurry exposes miners to falling, tripping, stumbling hazards. The water and muck make the area slippery and it would be difficult to see obstructions on the mine floor. Again, the fact that the condition that creates a hazard presents multiple scenarios for injury does not invalidate a safeguard notice. I find that Safeguard Notice No. 4268263 was

sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.³

E. Safeguard Notice No. 4054826.

Safeguard Notice No. 4054826, issued September 8, 1993, provides:

Accumulations of rib rash, rock, crib ties, belt rollers, and other extraneous material [were] observed along both sides of the 1st section main east belt conveyor, These accumulations were at various locations and were not continuous. This is a notice to provide safeguard requiring a clear 24 inch travelway be maintained free of debris and extraneous material, along both sides of all belt conveyors.

As before, American Coal contends that this safeguard notice does not identify a hazard and is therefore invalid. The presence of “debris and extraneous material” does not constitute a hazard. (AmCoal Mot. 14). Was the hazard that this material could be “picked up and thrown by an explosion?” Was the hazard that miners could stumble and fall? Or, was the hazard “the possibility of the extraneous material being caught in the moving belt and creating a friction point?” *Id.* American Coal contends that an operator “*must be aware of* what is deemed to be the hazard in order to prevent future occurrences.” *Id.* (emphasis in original).

The Secretary maintains that the safeguard notice provided fair notice of its requirements. “It is an obvious and reasonable interpretation” of the safeguard notice that the presence of rib rash, rock, crib ties, belt rollers, and other extraneous material “in a 24-inch travelway constitutes a significant tripping hazard.” (Sec’y Response 8). American Coal’s suggestion that a “valid safeguard must also identify and describe any and all conceivable safety hazards presented by the accumulation of these materials completely misreads the Commission’s ‘nature of the hazard’ standard and places an impossible burden on the Secretary.” *Id.*

I find that the safeguard notice is straightforward and clear. One must use common sense when reading a safeguard notice. Section 314(b) of the Mine Act authorizes MSHA inspectors to issue safeguard notices “to minimize hazards with respect to transportation of men and materials.” Thus, only hazards that relate to the transportation of men and materials can be addressed by a safeguard notice. The Commission’s decisions in *SOCCO I* and other safeguard

³ The Secretary also promulgated a safeguard provision addressing this hazard, which is similar to the safeguard notice at issue. This provision gave notice to the mining community that such a safeguard notice could be issued. Section 75.1403-5(g) provides:

A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970.

cases make clear that safeguard notices must be interpreted in a restrained manner with the result that any citations based on a safeguard notice must address hazards that were identified in the safeguard notice or contemplated therein. As stated above, an inspector is not required to include all the possible ways in which a miner could be injured by the conditions he observed. I find that Safeguard Notice No. 4054826 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

F. Safeguard Notice No. 4272082.

Safeguard Notice No. 4272082, issued July 23, 2002, provides:

Construction tractor (CT10) was not provided with a proper coupling device. The construction tractor was en route to the 8th west headgate unit pulling a material trailer loaded with crib ties coupled only by a belt chain. This is a notice to provide safeguard requiring that a proper coupling device be used on CT10 and all other mobile equipment used at this mine to transport materials and equipment.

American Coal argues that the safeguard notice does not identify a specific hazard. Was the hazard that the chain was too small and, if it broke, the trailer could break away and run into the mine or was the hazard that the trailer was not securely attached and might run into the tractor? In addition, the safeguard notice does not specify the corrective measures required. What is a proper coupling device?

The Secretary maintains that the hazard was the “improper coupling of mobile equipment used in the mine to transport material and equipment.” (Sec’y Response 17). The remedy is to use a coupling device on tractors and other mobile equipment rather than belt chains. American Coal is in the best position to know what a proper coupling is for its mobile equipment.

I agree with the Secretary. Using a belt chain to couple a trailer carrying crib ties to the tractor pulling the trailer presented a transportation hazard. The safeguard notice covers events that naturally flow from that hazard, including the risk that the chain would break or that the trailer would slam into the back of the tractor. I incorporate the analysis I used with respect to the other safeguard notices, discussed above, to validate this safeguard notice. I find that Safeguard Notice No. 4272082 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

G. Safeguard Notice No. 7576399.

Safeguard Notice No. 7576399, issued November 12, 2002, provides:

As a result of an investigation of the recent hoisting accident that occurred September 28, 2001, it was determined that 4 persons were being transported in the slope brake car while a shearer trailer loaded with a shearer was being pulled up the slope. The single 1½ inch steel wire sling was looped around a pin of the shearer trailer without the use of a thimble and both ends were attached to the brake car. The trailer hung and the rope broke at the middle where it looped the pin. This is a notice to provide safeguards at this mine requiring all cars or conveyances be coupled with proper couplings, attachments, and additional safety devices (chains or ropes) rated for the purpose and maintained in good shape shall be used.

American Coal states that the language of the safeguard notice describes the occurrence of an accident, but it does not “identify with specificity a future hazard.” (AmCoal Mot. 16). Was the hazard the possibility that the slope brake car could become uncoupled and injure miners on the slope brake car, or was the hazard the possibility of the shearer trailer running over miners if the coupling device failed? In addition, the safeguard notice does not specify the corrective measures required and it “does not set forth a definite method of compliance.” *Id.* The safeguard notice does not give the operator any guidelines that set forth the “type or size of the required couplers, attachments, and additional safety devices.” *Id.* As a consequence, this safeguard notice does not identify with specificity the nature of the hazard and the conduct required of the operator.

The Secretary states that the safeguard notice clearly sets forth the nature of the hazard. A single 1½ inch of steel wire was looped around a pin on the shearer trailer without the use of a thimble. As a result of this condition, the rope broke when the trailer hung up. The safeguard notice also identifies the remedies that the operator must take. American Coal is in the best position to know what type of coupling should be used on its own equipment and what other safety devices would work the best to provide safe operation.

I find that the safeguard notice is valid. The future hazard is that a 1½ inch steel wire sling is not sufficient when pulling a loaded shearer trailer up the slope while four miners are in the slope brake car. Without proper couplings, there is a significant risk that a wire rope will break, thereby creating a hazard to miners. The MSHA inspector was not required to list all of the potential accident scenarios in the safeguard notice. I agree with the Secretary that American Coal is in the best position to know what coupling devices work best on its mobile equipment and what additional chains or ropes should be attached to ensure the safe transportation of miners and equipment. MSHA cannot be dictating the type and size of couplings to be used on the equipment of mine operators. The fact that disputes could possibly arise does not invalidate

an otherwise valid safeguard notice. I find that Safeguard Notice No. 7576399 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

H. Safeguard Notice No. 7490527.

Safeguard Notice No. 7490527, issued June 14, 2007, provides:

A serious accident occurred on May 24, 2007, at this mine during recovery of the 3rd East Longwall. A miner was pinned between two longwall shields in the Main South Storage Area at Station 5+90 in the No. 5 entry. One shield had been placed in the storage area and another shield had been transported there and was being unloaded. The shield had been moved there by a battery-powered “duckbill” shield mover. The shield had been secured to the duckbill shield mover by a hook fastened to a winch. During the process of unloading the shield the miner stepped between the two shields. The shield being unloaded slid toward the previously placed shield.

This is a notice to provide safeguards. Shields being transported shall be secured in all directions to prevent movement during transport. Straps, hooks, chains, etc. shall be used in addition to the winch provided on the shield mover. In addition, safe work procedures shall be established and incorporated into the mine’s training plan which will address safe methods of shield loading and unloading, and safe work locations for miners performing these duties.

American Coal contends that the injury referenced in this safeguard notice was the result of an unsafe act by a miner who placed his body in a pinch point area while unhooking a shield from the scoop mover. The safeguard notice should have addressed unloading procedures which would include body positioning and other similar safe work practices. Instead, the safeguard notice addresses securing the shields while being moved, but “does not identify with specificity the proper method to unload a shield.” (AmCoal Mot. 17). The safeguard notice states that shields are to be loaded and unloaded safely but it does not give “specific parameters or describe what conduct is required for compliance.” *Id.* The command that “safe work procedures shall be established” leaves it to another MSHA inspector to determine whether American Coal had done everything that the inspector who issued the safeguard notice required. “There is no escaping the probability that a different inspector will construe the safeguard differently.” *Id.* at 18.

The Secretary argues that the language of the safeguard notice provides sufficient guidance to the mine operator to remedy the identified hazard. The safeguard notice states that the operator should use “straps, hooks, chains, etc.” to secure shields to prevent movement

during transport.” (Sec’y Response 20). Such language is certainly specific enough to comply with Commission precedent and to provide fair notice.

I agree with the Secretary that this safeguard notice adequately describes what is required when transporting shields on the shield mover. The notice requires that shields being transported be secured in all directions to prevent movement during transport. The provision regarding the establishment of safe work procedures when loading and unloading shields is, by necessity, less specific. A safeguard notice cannot possibly establish a detailed training program for the operator. American Coal is better able to develop such a program and, indeed, its current training program may only need to be modified a little to put more emphasis on safe methods of shield loading and unloading and safe work positions for miners performing these duties. I find that Safeguard Notice No. 7490527 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

I. Safeguard Notice No. 7576054.

Safeguard Notice No. 7576054, issued May 9, 2002, provides:

The Galatia North Portal automatic elevator has been experiencing trouble with the doors at each landing. Several times over the past month, the doors were opened by miners while the elevator was not at a landing. This is a notice to provide safeguard requiring that the Galatia North elevator doors cannot be opened unless the elevator is at the landing where the doors are opened.

American Coal again maintain that the safeguard notice does not identify a specific hazard. It raises several potential hazards, such as a miner falling down the shaft or materials falling down the shaft and striking a miner. Because the safeguard notice does not identify with specificity the nature of the hazard, the safeguard notice is invalid. It also argues that the condition addressed by the safeguard notice is covered by section 75.1725(a), a mandatory standard that was promulgated by the Secretary. Consequently, this safeguard notice is unnecessary and should be invalidated. *Cyprus Cumberland*, at 1784-85.

The Secretary contends this safeguard notice provides very specific information as to the hazard and remedy necessary to eliminate the hazard. She states that if such language does not provide the mine operator with notice of the nature of the hazard, then “no language will ever suffice.” (Sec’y Response 10). The safety standard at 75.1725(a) is a general “safe operating condition” standard. This standard has never been applied to elevators in mines and there is no legal basis from which to conclude that the condition described in the safeguard notice is covered by section 75.1725(a).

I find that this safeguard notice provides very specific information as to the nature of the hazard. The fact that miners could be injured in several different ways by the hazard presented does not invalidate the safeguard notice. I also reject the argument that this hazard is covered by

an existing mandatory safety standard. Section 75.1725(a) simply states that mobile and stationary equipment and machinery shall be maintained in safe operating condition. Under American Coal's logic, any safeguard notice that alleges that mobile machinery or equipment is unsafe would be invalid. That safety standard is very general and the safeguard notice is very specific in that it addresses doors on elevators. Indeed, the Secretary promulgated a safeguard provision as a guideline that specifically addresses the hazard presented here.⁴ I find that, although section 75.1725(a) can be construed to extend to elevator doors that operate in an unsafe manner, the hazard here was not specifically covered by a mandatory standard and is therefore valid. Moreover, Safeguard Notice No. 7576054 was sufficiently specific to provide fair notice of what is required.

J. Safeguard Notice No. 7577893.

Safeguard Notice No. 7577893, issued January 21, 2004, provides:

A material trailer was observed parked along the 4th North Headgate at crosscut No. 24. The cable roof bolts on the trailer extended outby the rib line approximately four feet into the travelway. A continuous mining machine was also parked along the Main West Travelway at crosscut No. 36 with the tail extending outby the rib line approximately three feet. This is a notice to provide safeguards requiring all trailers and mine equipment be parked inby the rib line at all times.

American Coal contends that the safeguard notice does not describe a hazard. It says that it cannot determine what hazard was of concern to the inspector who wrote the safeguard notice. Was the hazard that other mobile equipment would run into the parked equipment and injure miners riding in the mobile equipment or was there some other hazard that was of concern to the inspector? Because the safeguard notice does not specify the nature of the hazard, it is invalid.

The Secretary maintains that the hazard is the extension of mine equipment outby the rib line and that the safeguard notice clearly outlines this hazard. I agree and I find that this safeguard notice is valid for all the reasons set forth with respect to the other safeguard notices.

⁴ This provision gave notice to the mining community that a safeguard notice could be issued for this condition. Section 75.1403-4(a) provides, in part:

The doors of automatic elevators should be equipped with interlocking switches . . . arranged so that such door or doors cannot be inadvertently opened when the elevator car is not at a landing.

K. Safeguard Notice No. 7576398.

Safeguard Notice No. 7576398, issued November 12, 2002, provides:

As a result of an investigation of the recent hoisting accident that occurred on September 28, 2002, it is determined that 4 persons were being transported in the slope brake car while a shearer trailer loaded with a shearer was being pulled up the slope. This is a notice to provide safeguards at this mine requiring that no persons are allowed to ride or be transported in the brake car or other conveyances while any material is transported, other than with normal hand tools.

American Coal raises the same argument that the safeguard notice does not describe the hazard that was of concern to the inspector. The hazard could range from a concern that miners might fall off the brake car and get run over or that the material being hoisted could break loose and run over miners. The inspector could also have been concerned that the weight of the loaded trailer and the miners on the brake car could put too much strain on the hoist rope. This lack of specificity should invalidate the safeguard notice.

The Secretary contends that the safeguard notice should not be invalidated simply because it does not articulate all conceivable risks associated with the condition described. I agree with the Secretary and, for the reasons discussed above with respect to other safeguard notices, find that this safeguard notice to be valid.⁵

L. Safeguard Notice No. 7576913.

Safeguard Notice No. 7576913, issued May 28, 2003, provides:

One of the balance ropes on the Millenium Portal man and material hoist was observed running in water and mud at the bottom of the man and material shaft. The balance ropes on this cage have been damaged as a result of running in water. This is a notice to provide safeguards requiring the area at the bottom of the shafts be kept clear of mud and water in depths that allow contact with the balance ropes.

⁵ The Secretary also promulgated a safeguard provision addressing similar types of hazards. This provision gave notice to the mining community that a safeguard notice could be issued in similar circumstances. Section 75.1403-7(k) provides, in part:

Supplies or tools, except small hand tools or instruments, should not be transported with men.

American Coal notes that this safeguard notice states that the balance rope was damaged as a result of running in water but it does not describe what type of damage occurred or what type of hazard existed. “Was the hazard that the hoist could become wedged inside the shaft and expose miners on the hoist to a high volume of cold air coming down the shaft, with the possibility of hypothermia?” (AmCoal Mot. 21).

The Secretary believes that the safeguard notice clearly describes the nature of the hazard. I agree. Having the balance ropes running in water will subject them to damage that could affect the ability of the hoist to operate safely, although I doubt that hypothermia was on the inspector’s mind. As the Commission stated in *SOCCO I*, the safeguard notice must be construed rather narrowly so that hazards not identified in the notice are not bootstrapped into it during future MSHA inspections. I find that Safeguard Notice No. 7576913 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

M. Safeguard Notice No. 7581083.

Safeguard Notice No. 7581083, issued June 3, 2005, provides:

A suitable crossing facility was not provided for the energized 6th North Conveyor Belt in the belt drive area where miners are routinely crossing under the energized belt conveyor. A bridge has been built under the belt in this area for miners to cross under the moving belt. This is a notice to provide safeguards requiring where persons cross moving belt conveyors that a suitable crossing facility shall be provided.

American Coal states that this safeguard notice does not describe a hazard or what must be done to remedy the presumed hazard. “The language is too subjective to give the operator any meaningful notice of how it is to comply with this safeguard.” (AmCoal Mot. 22). Is guarding required at the crossover, how strong should the guarding be, and what materials would be acceptable to MSHA? “The conduct described in this safeguard is too vague to notify the operator of a definite method of compliance.” *Id.*

The Secretary states that the safeguard notice describes the hazard associated with miners routinely crossing beneath an operating belt conveyor. The mine operator is in the best position to determine what constitutes a “suitable” crossing facility, given the unique and specific characteristics of the mine.

I find that this safeguard notice is valid. It does describe the hazards associated with miners passing under an operating conveyor. It mandates that a suitable crossing facility be established. It is true that it does not describe how this should be done and what materials should be used. Conveyor crossing facilities are frequently built in underground mines so American Coal will not have to start from scratch or take a wild guess as to what MSHA will find acceptable. A safeguard notice does not have to spell out in detail how every hazard must

be addressed by the operator. I find that Safeguard Notice No. 7581083 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.⁶

N. Safeguard Notice No. 7572630.

Safeguard Notice No. 7572630, issued December 7, 2000, provides:

The north gate at the collar of the Main North man and material shaft was open and the cage was at the bottom of the shaft. This notice to provide safeguards requiring that the landing gates be kept closed except when the cage is at the landing.

American Coal argues that this safeguard notice does not provide any description of hazard. The Secretary maintains that American Coal “attempts to conflate the ‘nature of the hazard’ standard with a requirement that the Secretary anticipate and articulate any and all risks associated with an identified condition.” (Sec’y Response 13).

I find the safeguard notice to be valid for the same reasons set forth above. This safeguard notice is similar to Safeguard Notice No. 7576054, discussed above. The risks are obvious and the remedy is obvious. I find that Safeguard Notice No. 7572630 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.⁷

⁶ The Secretary also promulgated a safeguard provision addressing this hazard, which is similar to the safeguard notice at issue. This provision gave notice to the mining community that such a safeguard notice could be issued. Section 75.1403-5(j) provides:

Persons should not cross moving belt conveyors, except where suitable crossing facilities are provided.

⁷ The Secretary also promulgated a safeguard provision addressing this hazard, which is similar to the safeguard notice at issue. This provision gave notice to the mining community that such a safeguard notice could be issued. Section 75.1403-11 provides, in part:

All open entrances to shafts should be equipped with safety gates at the top and at each landing. Such gates should be self closing and should be kept closed except when the cage is at such landing.

III. ORDER

I find that the subject safeguard notices are **VALID**. For this reason, American Coal Company's motion for summary decision is **DENIED**.

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

Distribution:

Travis W. Gosselin, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604

Karen Wilcynski, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5708

Marco M. Rajkovich, Esq., and Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

Thomas C. Means, Esq., and Daniel W. Wolff, Esq., Crowell & Moring, 1001 Pennsylvania Ave., NW Washington, DC 20004-2595

Jason Witt, Esq., Assistant General Counsel, Coal Services Group, 56854 Pleasant Ridge Road, Alledonia, OH 43902

RWM