

November and December 2017

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No case was granted during the month of November 2017.

No cases were granted or denied during the month of December 2017.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 15, 2017

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

v.

OLMOS CONTRACTING 1, LLC

Docket No. CENT 2017-166-M
A.C. No. 41-04108-386782

Docket No. CENT 2017-167-M
A.C. No. 41-04108-403245

Docket No. CENT 2017-168-M
A.C. No. 41-04108-417522

Docket No. CENT 2017-169-M
A.C. No. 41-04108-419904

Docket No. CENT 2017-170-M
A.C. No. 41-04108-422215

Docket No. CENT 2017-171-M
A.C. No. 41-04108-424371

Docket No. CENT 2017-172-M
A.C. No. 41-04108-426561

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On January 17, 2017, the Commission received from Olmos Contracting 1, LLC (“Olmos”) a motion seeking to reopen seven penalty assessments¹ that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).²

¹ For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers CENT 2017-166-M, CENT 2017-167-M, CENT 2017-168-M, CENT 2017-169-M, CENT 2017-170-M, CENT 2017-171-M, and CENT 2017-172-M involving similar procedural issues. 29 C.F.R. § 2700.12.

² On May 15, 2017, Robert Wachsmuth & Associates (“RWA”) moved to withdraw itself as counsel for Olmos. According to RWA, Olmos has ceased all communication and has failed to pay for professional services rendered since January 12, 2017. After review of the motion, the motion is granted, and RWA is hereby relieved of any and all further duties and responsibilities for Olmos in these cases.

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that six proposed assessments in Docket Nos. CENT 2017-166-M, CENT 2017-167-M, CENT 2017-168-M, CENT 2017-169-M, CENT 2017-170-M, and CENT 2017-172-M were delivered to Olmos between July 2015 and December 2016. The proposed assessment in CENT 2017-171-M was issued on November 15, 2016, but was returned unclaimed. With the exception of the proposed assessment in CENT 2017-172-M, which was timely contested, the proposed assessments became final orders 30 days after they were received or had been returned unclaimed.³

Olmos asserts that it had never been inspected by MSHA prior to July 2015 and that its employees were unaware that MSHA intended to issue penalties in association with violations that had been terminated. In addition, Olmos argues that the proposed assessments were mailed to the company’s director—who Olmos contends was more akin to an “office manager” or “executive secretary”—and that, with the exception of CENT 2017-166 and 2017-167, these proposed assessments were not brought to the attention of Olmos management until MSHA emailed the company on November 29, 2016. Olmos also contends that the economic impact of the penalties could adversely affect the company’s ability to stay in business.

³ The proposed assessment in Docket No. CENT 2017-166-M was delivered on July 17, 2015 and became a final order of the Commission on August 17, 2015. The assessment in Docket No. CENT 2017-167-M was delivered on February 22, 2016 and became final on March 23, 2016. The assessment in Docket No. CENT 2017-168-M was delivered on August 22, 2016 and became final on September 21, 2016. The assessment in Docket No. CENT 2017-169-M was delivered on September 19, 2016 and became final on October 19, 2016. The assessment in Docket No. CENT 2017-170-M was delivered on October 17, 2016 and became final on November 16, 2016. The assessment in Docket No. CENT 2017-171 was returned unclaimed and was deemed a final order by MSHA on December 19, 2016.

The Secretary opposes the motion, arguing that Olmos failed to adequately explain why the proposed penalties were not contested. The Secretary points out that, while Olmos implicates its director as responsible for mismanaging Docket Nos. CENT 2017-168-M, CENT 2017-169-M, CENT 2017-170-M, and CENT 2017-171-M, the operator provides no such explanation for its failure to timely contest the proposed penalties in CENT 2017-166-M and CENT 2017-167-M. In addition, the Secretary argues that Olmos' economic hardship is not a valid ground for reopening.

Due to the extraordinary nature of reopening a penalty that has become final, the operator has the burden of showing that it should be granted such relief through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening. The Commission considers the entire range of factors relevant to determining mistake, inadvertence, excusable neglect, or other good faith reason for reopening. Further, Rule 60(c) of the Federal Rules of Civil Procedure provides that a motion to reopen shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c).

The motion to reopen the assessment in Docket No. CENT 2017-166-M was filed more than one year after the proposed penalties became a final order of the Commission. Therefore, under Rule 60(c), Olmos' motion is untimely with respect to this case. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

In Docket Nos. CENT 2017-167-M, CENT 2017-168-M, CENT 2017-169-M, and CENT 2017-170-M, Olmos has failed to adequately establish a basis for reopening. *See E. Associated Coal, LLC*, 30 FMSHRC 392, 394 & n. 2 (May 2008) (operators filing a motion to reopen must "provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment" and "disclose with specificity its grounds for relief."). The operator contends that it directed all proposed assessments to Olmos' director, but that the director was so unfamiliar with the MSHA citation process, she thought that abatement of the citations would prevent MSHA from assessing any penalties.⁴ While unfamiliarity with contesting procedures may be grounds for reopening a final order, the Commission has generally required the operator to clearly demonstrate that it intended to contest the citations prior to filing the motion to reopen. *See Harriman Coal Corp.*, 23 FMSHRC 153, 154-55 (Feb. 2001); *J.P. Donmoyer, Inc.*, 24 FMSHRC 665, 666 (July 2002). In the present case, there is no indication that Olmos took any actions to manifest its desire to contest the penalties. To the contrary, Olmos has not claimed to have had any further discussions with MSHA about the citations after they were abated, and has paid \$981 of the \$990 penalty proposed in Docket No. CENT 2017-166-M.

Even if we were to excuse the director's unfamiliarity with the basic tenets of the Mine Act, Olmos' explanation does not fully explain the apparent lack of attention to a series of citations alleging serious safety and health violations. Olmos implies in its initial motion that the company director *did* notify Olmos' principals of the penalties assessed in Docket Nos. CENT

⁴ Even if Olmos's director initially believed that no penalties would be assessed, it is unclear how she could have maintained this belief after receiving multiple proposed assessments which place operators on notice of the penalties and provided instructions for contesting the penalties to the Commission.

2017-166-M and CENT 2017-167-M. Olmos did not contest either of these proposed penalties and partially paid the first assessment, which MSHA issued in May 2015. Moreover, in its motion Olmos states that it received no citations from MSHA during an inspection in December 2015. To the contrary, however, CENT 2017-167-M involves three citations written to the mine on December 21-22, 2015.

With respect to the penalties issued following a set of MSHA inspections in July 2016, Olmos management was aware that MSHA had found significant safety concerns at its Vogel Pit mining operation. In a sworn affidavit, Larry Struthoff, Manager of Olmos and operator of the Vogel Pit, avers that he was made aware on July 13, 2016 that MSHA had “shut down the mining operation” because of hazardous ground conditions.⁵ Despite Olmos’ assertions of its dire financial state, the operator failed to abate the violations, allowing the withdrawal order to stay in place for 56 days during the “peak summer construction period.” Olmos’ principals never attempted to inquire if such a drastic enforcement action by MSHA would result in any civil penalties and did not timely contest the penalties that were assessed.

It is thus clear from the record that Olmos lacked even the most basic internal system for processing penalty assessments. As the Commission has consistently held, explanations for failures to timely contest a proposed penalties founded upon a lack of internal procedures constitute inexcusable neglect and are an insufficient basis for reopening an assessment. *See, e.g., Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3346 (Nov. 2013); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588 (Dec. 2010).

Beyond the fatal lack of effective internal procedures, we find other bases which compel us to deny Olmos’ motion to reopen the aforementioned four cases. Under Rule 60(c), a motion to reopen, regardless of its merit, is only granted if it is filed within a reasonable time. In the context of penalty assessments, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator’s receipt of a notification from MSHA and the operator’s filing of its motion to reopen. *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009). Once Struthoff was made aware that he had failed to timely contest the proposed penalties, he did not take prompt action to try to rectify the situation. According to Struthoff’s own account, he received an email from MSHA on November 29, 2016 notifying him that the proposed assessments had become final. The present motion to reopen was filed on January 17, 2017, 49 days later. Olmos has provided no explanation for this delay. This alone is reason enough to deny the motion. *See id.*

With respect to Docket No. CENT 2017-171-M, the Secretary states that the proposed assessment was returned undelivered. However, the Secretary offers no evidence that the assessment was mailed to the operator’s address of record or if an alternate means of delivery was attempted.

MSHA must attempt to mail proposed penalties to the operator’s correct address in order to constitute valid service. *See, e.g., Brahma Group, Inc.*, 31 FMSHRC 527 (May 2009). If the

⁵ According to MSHA’s Mine Data Retrieval System, MSHA issued two section 107(a) imminent danger withdrawal orders on July 13, 2016.

proposed penalty is sent to an incorrect address, the operator has not been notified pursuant to 30 U.S.C. § 815(a) and the 30-day contest deadline was not triggered. *Id.* As Olmos was not notified of the proposed assessment, the penalties never became a final order of the Commission. The motion to reopen, as it pertains to CENT 2017-171-M, therefore is moot.

Although Olmos has moved to reopen CENT 2017-172-M, the Secretary states that the proposed assessment in that case was timely contested. Subsequent to the filing of the motion to reopen, the Secretary filed a petition with the Commission, and the case was docketed as CENT 2017-178-M and assigned to Administrative Law Judge Margaret Miller. On June 20, 2017, Judge Miller approved a settlement resolving all of the contested penalties. As this matter was timely contested and has now been resolved, the motion to reopen this case is moot.

Accordingly, we deny the motion to reopen Docket Nos. CENT 2017-166-M, CENT 2017-167-M, CENT 2017-168-M, CENT 2017-169-M, and CENT 2017-170-M. The motion to reopen Docket No. CENT 2017-172-M is dismissed, since that case has been settled.

We find that the motion to reopen Docket No. CENT 2017-171-M is moot. Because Olmos was not notified of the proposed assessment, it never became a final order of the Commission. Therefore, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

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November 2, 2017

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

v.

PEABODY MIDWEST MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2016-0120
A.C. No. 12-02295-397991

Mine: Francisco Underground Pit

DECISION APPROVING AMENDED MOTION TO APPROVE PARTIAL SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Act” or “Mine Act”). On October 4, 2017 the Secretary filed a motion to approve partial settlement. Upon review of the motion, the Court sent an email to the parties advising that it was unable to approve it because the Secretary failed to specify facts which were genuinely in dispute. In response, the Secretary then filed an amended motion to approve partial settlement on October 19, 2017 (“Amended Motion”). The original motion and the amended motion are discussed below.

Three citations and one order are in this docket. Order No. 9036624, with a proposed penalty of \$4,000.00, is not part of this settlement motion.¹ The three citations which are the subject of this settlement motion are proposed for penalty reductions, and Citation No. 9036832 is also proposed for modification. The originally proposed penalty for Citation No. 9036832 was \$35,500.00 and the proposed settlement amount is \$21,300.00. Another citation, Citation No. 9036721, was assessed at \$10,700.00 and is proposed for settlement at \$7,000.00. Finally, Citation No. 9036722 had an original proposed penalty of \$8,000.00 and the proposed settlement amount is \$5,000.00. Thus the total proposed penalty amount for these three citations was \$54,200.00, and the proposed settlement totals \$33,300.00.

Following a review of the parties’ initial settlement motion, on October 13, 2017 the Court contacted the parties via e-mail, advising that it was unable to grant the motion. The Court informed the parties that “where the facts support settlement motions,” it is pleased to approve them. Court’s October 13, 2017 E-mail to the Parties. The Court added that it has “no predisposition to deny such motions and [that] this view applies to all cases before [it]. However, as [the Court has] obligations under 110(k), [it] need[s] to have motions that are adequately supported.” *Id.*

¹ As this matter has been consolidated with Docket No. LAKE 2016-0140, Order No. 9036624 remains set to be heard beginning November 7, 2017.

The Court went on to explain that its “overall problem [with the motion] is that the Secretary has failed to specify the facts which are genuinely in dispute. Instead the Secretary only asserts, repeatedly, that ‘[t]he reduced civil penalty on this citation is appropriate in light of the factual disputes raised by the parties.’ See, e.g., Motion at 4, 6 (emphasis added).” *Id.*

To illustrate the inadequacy, the Court explained that “[f]or Citation No. 9036721, an alleged violation of 75.220(a)(1), the suitable roof control plan standard, the motion, after reciting the alleged conditions, states ‘[t]he Respondent argues that the excess width did not result in any adverse roof conditions. According to the Respondent, the entries are allowed to exist at this width with supplemental support, so there is nothing inherently unsafe about the width. The Respondent also argues that the negligence should have been reduced because the entire rib was not wide, only a portion at the bottom due to rashing, and it occurred because of a mud separation in the coal seam, which could have occurred at any time. Respondent further argues that it did not know and did not have reason to know of the cited conditions.’” Motion at 4-5 (emphasis added).

In response, the Motion advises, “MSHA disagrees with Respondent's characterization of the widths being safe without supplemental support, as was found during this inspection. Further, MSHA disagrees with Respondent's argument that it was not negligent because only a portion of the rib was wide and that it had no reason to know of the conditions.” Motion at 5 (emphasis added).

Yet, inexplicably in the Court’s estimation, the Motion then continues “[n]evertheless, after further review of the substantial factual disputes, MSHA determined that the citation should be removed from Special Assessment and a modified penalty is in order. The reduced civil penalty on this citation is appropriate in light of the factual disputes raised by the parties.” *Id.*

The Court, then informed that it “is aware of and read the narrative findings for the special assessment in its entirety [and that] [t]he assertions in paragraphs 4 and 5 were particularly noted.” Court’s October 13, 2017 E-mail to the Parties. Summing up the motion’s shortcoming, the Court stated, “[t]o put it very simply, as alluded to above, after disagreeing with each of the Respondent’s contentions, the Secretary only asserts there are ‘substantial factual disputes,’ but he identifies none. It is insufficient to simply infer that the Secretary views the Respondent’s assertions as creating legitimate factual disputes. Accordingly, to be approved, the Secretary will need to identify the legitimate, substantial, factual disputes which are genuinely in issue.” *Id.*

The Court’s email then addressed Citation No. 9036722, which presented the same problem as Citation No. 9036721. Involved with Citation No. 9036722 is an alleged violation of 75.360(b)(3), the preshift exam in working sections provision. The Court noted that “[a]fter reciting the alleged conditions, the motion states ‘[t]he Respondent argues the preshift examination was not inadequate because excess width did not result in any adverse roof conditions, and there is insufficient evidence to prove the condition existed at the time of the most recent preshift examination. Respondent also argues that it did not know of the cited condition and had no reason to know of its existence.’” Motion at 5-6 (emphasis added).

In response, MSHA states that it “disagrees with Respondent's characterization of there not being sufficient evidence to support the fact that the conditions existed at the time of the most recent preshift examination. Further, MSHA disagrees with Respondent's argument it was not negligent because it did not know nor had reason to know of the wide entries. Nevertheless, after further review of *the substantial factual disputes*, MSHA determined the citation should be removed from Special Assessment and a modified penalty is in order. The reduced civil penalty on this citation is appropriate in light of the factual disputes raised by the parties.” Motion at 6 (emphasis added).

As it did with Citation No. 9036721, the Court noted that it was “aware of and read the narrative findings for the special assessment in its entirety [and that] the assertions in paragraphs 8, 9, and 10 of that narrative were particularly noted.” Court’s October 13, 2017 E-mail to the Parties. Thus, the Court concluded that “as with Citation No. 9036721, the Secretary fails to identify in his motion the legitimate, substantial, factual disputes which are genuinely in issue.” *Id.*

Finally, for Citation No. 9036832, an alleged 75.202(a) inadequate support or control to provide protection from falls of roof, face and ribs violation, the Court noted that, after reciting the alleged conditions, the motion set forth the Respondent’s contentions. The motion recounted that *the Respondent argued* “that the gravity is excessive because the bolts at issue were fully grouted resin bolts that continue to provide protection against a major roof fall even if the bolt or the immediate roof is damaged. Once installed, the resin bolts provide a ‘beam effect’ in the roof that continues to provide support. Additionally, Respondent argues exposure to the cited condition was minimal, as the bolts were in a worked out area only accessed by a weekly examiner and the majority of loose material present was confined to the roof screening.” Motion at 7.

In response, MSHA stated that it “disagrees with Respondent's argument that the bolts were such that even with the exposure of 10 inches of the bolt, they still provide protection against a major roof fall. Furthermore, MSHA argues that the unsupported roof could have fallen without any warning, and caused serious injury.” *Id.* However, the Secretary, despite its disagreements, then stated, “[a]fter further review of *the substantial factual issues*, MSHA determined that the cited gravity should be modified from fatal to permanently disabling. The reduced civil penalty on this citation is appropriate in light of the modification of the gravity.” *Id.* (emphasis added).

As it did with the first two citations in the motion, the Court informed that it was “aware of and read the narrative findings for the special assessment in its entirety [and that] [t]he assertions in paragraphs 5 and 6 were particularly noted.” Court’s October 13, 2017 E-mail to the Parties. Again, the Court explained that “the Secretary’s Motion fails to identify the legitimate, substantial, factual disputes which are genuinely in issue.” *Id.*

Given the above-described deficiencies, the Court stated that “absent a new, adequately supported motion, in which the Secretary identifies the substantial factual issues that are in dispute, these matters presently remain scheduled to be heard in the upcoming hearing.” *Id.*

The Secretary then filed the aforementioned amended settlement motion. (“Amended Motion”) That Amended Motion largely recounted the initial motion, presenting additional information concerning the parties’ differing perspective of the facts but, significantly, for Citation No. 9036721, the Secretary added,

in reply to Respondent's statements and contentions, [the Secretary stated] that he recognizes that these facts are in dispute and raise factual and legal issues which can only be resolved by a hearing before the Commission, or by the parties reaching a compromise of the penalty proposed by the Secretary, or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary recognizes that the ALJ may find some merit in the facts and contentions raised by Respondent. The Secretary agrees to accept a reduced penalty.

Amended Motion at 4-5.

In a similar fashion, for the other two citations constituting the partial settlement motion, the Secretary’s Amended Motion cured the deficiencies identified by the Court in the initial motion.

To the Secretary’s credit, in the Amended Settlement Motion, the Secretary did not merely offer an incantation for each of the three citations. Instead, the Secretary’s Counsel informed, for Citation No. 9036722,

at hearing would present evidence that by failing to recognize the entry width exceeded the roof control maximum, that the Examiner conducted an inadequate pre-shift examination. The Secretary would also present evidence that by failing to identify entryways which exceeded the maximum width according to the roof control plan required additional two-foot long bolts in order to support the roof, the Examiner failed to conduct an adequate pre-shift examination at crosscut 93. The Secretary, in reply to Respondent’s statements and contentions, states that he recognizes that these facts are in dispute and they raise factual and legal issues which can only be resolved by a hearing before the Commission, or by the parties reaching a compromise of the penalty proposed by the Secretary, or by a modification of the characterization of the Order to reflect a lower level of gravity or negligence or both. The Secretary recognizes that the ALJ may find some merit in the facts and contentions raised by Respondent. The Secretary agrees to accept a reduced penalty.

Amended Motion at 5-7.

Using the same, now informative approach, for Citation No. 9036832 the Amended Motion stated,

MSHA has reviewed Respondent’s additional mitigating arguments, especially regarding the loose material being confined to the roof screening and the effect, if

any, on material falling on passing miners. The Secretary recognizes that Respondent’s statements and contentions raise factual and legal disputes and also recognizes that the ALJ may find some merit in the facts and contentions raised by Respondent. The Secretary agrees that the cited gravity should be modified from fatal to permanently disabling. The reduced civil penalty on this citation is appropriate in light of the modification of the gravity. Therefore, the parties have agreed to settle the matter amicably without further litigation.

Amended Motion at 7-8

As detailed above, the amended motion now provides significantly more information in support of the proposed penalty amounts and the proposed modification by identifying the areas of factual dispute. With the additional information, the Court considered the representations submitted in this case and now is able to conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The amended partial settlement motion, now having provided the needed information, is approved.

The settlement amounts are as follows:

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement Amount</u>
9036721	\$10,700.00	\$7,000.00
9036722	\$8,000.00	\$5,000.00
9036832	\$35,500.00	\$21,300.00
<hr/>		
TOTAL:	\$58,200.00	\$33,300.00
<u>Order No.</u>	<u>Assessment</u>	<u>Settlement Amount</u>
9036624	\$4,000.00	not settled

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

It is **ORDERED** that Citation No. 9036832 be **MODIFIED** from “fatal” to “permanently disabling.”

Upon resolution of Order No. 9036624, the Court will issue a final Order disposing of the four matters in this docket and ordering payment.

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

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November 21, 2017

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

v.

BRODY MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 2009-1000
A.C. No. 46-09086-178774-01

Docket No. WEVA 2009-1306
A.C. No. 46-09086-181457-01

Mine: Brody Mine No. 1

DECISION ON REMAND

Appearances: J. Matthew McCracken, Esq., and Amos H. Presler, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;

Jason M. Nutzman, Esq., Dinsmore & Shohl, LLP, Charleston, West Virginia, for Respondent.

Before: Judge L. Zane Gill

This case is before me on remand from the Commission. 37 FMSHRC 1687 (Aug. 2015). On May 23, 2011, I issued a decision after hearing for the eight section 104(d)(2) orders contained in these two dockets. 33 FMSHRC 1329 (May 2011) (ALJ). On appeal, the Commission remanded determinations made for seven of these orders.¹ 37 FMSHRC at 1707.

I. PROCEDURAL BACKGROUND AND ISSUES ON REMAND

The seven orders at issue were written by MSHA Inspectors Charles H. Ward and James Jackson on five different dates between January 15 and March 3, 2009, at Brody Mine No. 1. A hearing was held on December 16 and 17, 2010, in Beckley, West Virginia. In my May 23, 2011 decision, I found a violation in each instance and made various findings and determinations. On August 25, 2015, the Commission remanded one or more determinations for each of the seven orders. Specifically, the Commission concluded that I erred in finding certain facts mitigating and I failed to consider certain arguments and facts in my analyses.

¹ Neither party appealed the determinations made regarding the section 104(d)(2) Order No. 8068033.

Regarding the tail piece accumulations violation, I determined it was not significant and substantial (“S&S”)² or an unwarrantable failure³ and concluded that moderate negligence was appropriate. The Commission remanded both the S&S and unwarrantable determinations. With regard to the two ventilation related violations, I determined that neither was unwarrantable and reduced the level of negligence assessed. For the inadequate pre-shift examination violation, I determined it was not unwarrantable and reduced the gravity assessed. The Commission remanded the unwarrantable determinations in these three orders, along with the gravity determination for the pre-shift examination violation and the negligence determinations for the other two. The remaining three violations I determined were unwarrantable and concluded moderate negligence was appropriate for each. The Commission remanded the negligence determinations for all three. The Secretary⁴ proposed a total penalty of \$218,354 for the seven orders. I concluded that a total penalty amount of \$32,500 was appropriate. On appeal, the Commission remanded penalty determinations as necessary.

Consequently, the issues before me on remand are: (1) whether the tail piece accumulations violation in Order No. 8079179 was S&S and unwarrantable; (2) whether the ventilation plan violations in Order Nos. 8075863 and 8075874 were unwarrantable and the appropriate level of negligence of the operator; (3) whether the pre-shift examination violation in Order No. 8075864 was unwarrantable and the appropriate gravity; (4) what are the appropriate degrees of negligence for the escapeway (Order No. 8079178), missing guard plate (Order No. 8075906), and feeder accumulations violations (Order No. 8079224); and, (5) whether the proposed penalty assessments are appropriate where my earlier determinations are modified.

II. PRINCIPLES OF LAW

A. Significant and Substantial

A violation is S&S “if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a

² The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a [. . .] mine safety or health hazard.”

³ The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by an “unwarrantable failure of [an] operator to comply with [. . .] mandatory health or safety standards.”

⁴ At the time of the petition and original decision, the Secretary of Labor was Hilda L. Solis. The current Secretary of Labor is R. Alexander Acosta.

reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103–04 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has recently explained that in analyzing the second *Mathies* element, Commission Judges must determine “whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In evaluating the third *Mathies* element, the Commission assumes the hazard identified in the second *Mathies* element has been realized and determines whether that hazard is reasonably likely to cause injury. *Id.* at 2045 (citing *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 161–62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135). The Commission has further found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010) (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

B. Negligence

Negligence is not defined in the Mine Act. The Commission determines negligence under a traditional analysis rather than relying on the Secretary’s regulations at 30 C.F.R. § 100.3(d). *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (quoting *Brody Mining*, 37 FMSHRC at 1702). Each mandatory regulation carries a requisite duty of care. *Id.* In making a negligence determination, the Commission takes into account the relevant facts, the protective purpose of the regulation, and what actions would be taken by a reasonably prudent person familiar with the mining industry. *Id.* In evaluating these factors, the negligence determination is based on the “totality of the circumstances holistically” and may include other mitigating circumstances unique to the violation. *Id.* (quoting *Brody Mining*, 37 FMSHRC at 1703). Because Commission Judges are not bound by the negligence definitions in Part 100, a Judge may find “high negligence” in spite of mitigating circumstances or may find “moderate” negligence without identifying mitigating circumstances. *Id.* In this respect, the Commission has recognized that the gravamen of high negligence is that it “suggests an aggravated lack of care that is more than ordinary negligence.” *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (citation omitted).

C. Unwarrantable Failure

The Commission has held that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). It is characterized by “indifference,” a “serious lack of reasonable care,” or “reckless disregard.” *Id.* at 2003–04; *see also Buck Creek Coal*, 52 F.3d at 136 (approving the

Commission's unwarrantable failure test). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. *IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009). The Commission has identified several such factors, including: the length of time a 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 was obvious, whether the violation posed a high degree of danger, and the operator's knowledge of the existence of the violation. *Id.* All relevant facts and circumstances of each case must be examined to determine whether an actor's conduct is aggravated or if mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

III. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Brody Mine No. 1 is located in Boone County, West Virginia. At the time the orders were issued, it had nine working faces and extracted 2,250,965 tons of coal per year. (Tr.308:15–17; Pet., Ex. A) The mine is classified as "gassy," as it emits approximately 1.5 million cubic feet of methane per day. (Tr.28:20–29:10) Gassy mines are inherently dangerous due to the higher risk of an explosion from rapid methane build up. (Tr.34:5–15, 96:16–97:6) The Mine Act requires that MSHA conduct spot inspections at least every five working days at irregular intervals for mines liberating more than 1 million cubic feet of methane. 30 U.S.C. § 813(i).

A. Order No. 8079179 – Tail Piece Accumulations Violation

Inspector Jackson issued Order No. 8079179 on January 22, 2009, for a violation of 30 C.F.R. § 75.400, which provides that "[c]oal dust [. . .] shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." He estimated the accumulations to be 31 feet long, 4 feet wide, and 6 to 17 inches deep. (Ex. S–10) They were located on the offside⁵ of a belt line tail piece, in contact with the belt and tail piece rollers. *Id.*

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated reckless disregard. (Ex. S–10) She proposed a penalty of \$70,000. I held that the violation was not S&S based on the presence of redundant fire safety measures. 33 FMSHRC at 1356–57. I held it was not an unwarrantable failure based on finding that the coal spillage had not accumulated in the hours between the pre-shift exam and MSHA inspection. *Id.* at 1354–55. I concluded that the operator demonstrated only moderate negligence because I found the wetness of the mine to be mitigating and did not credit the inspector's testimony regarding the accumulations drying out on the roller. *Id.* at 1355. On appeal, the Commission faulted my decision for failing to clearly and consistently explain my findings (1) for the second *Mathies* step of the S&S analysis; (2) on whether rock dust was present on the accumulations; (3) on the duration of the violation; and, (4) on the operator's history of accumulations violations. 37

⁵ The offside of a belt is the side miners do not travel on. (Tr.143:4–17) The offside of a vehicle is the side opposite the driver. (Tr.52:20–24, 100:17–21)

FMSHRC at 1690–94. The Commission also faulted the decision for failing to consider or note all relevant factors—including danger, extent, knowledge, and obviousness—and for failing to discuss certain evidence—including the notation in the pre-shift exam that the tailpiece needed spot cleaning. *Id.* at 1691–94. The Commission further held that I erred by finding that redundant safety measures mitigated the likelihood of an injury in my S&S determination. *Id.* at 1691. The Commission therefore remanded to me the S&S and unwarrantable determinations.⁶

1. Further Findings of Fact

Inspector Jackson described the accumulations as compacted, dry, and in contact with the front and rear rollers of the belt. (Ex. S–10; Tr.119:2–15) He also noted that the coal at the front roller had turned gray to white in color, indicating significant heat that could lead to a fire, despite the wet conditions in that area of the mine. (Tr.119:16–120:15) Glenn Fields, superintendent at Brody, suggested it was possible that rock dust could account for the white color of the coal accumulations at the roller.⁷ (Tr.210:4–10) However, Fields also acknowledged that Brody avoids spreading rock dust onto mined coal and conveyor belts. (Tr.219:7–21) Furthermore, Jackson testified that the rest of the coal accumulations were black, indicating they were untouched by rock dusting. (Tr.142:19–24) Upon re-examination of the record, I credit Jackson’s testimony that heat from the roller accounted for the lighter color of the coal accumulation contacting it. (Tr.119:2–120:15) Though Jackson did not touch the accumulations to confirm they were dry and hot, I credit his testimony over the alternative Brody presented—that miners accidentally spread rock dust only at the exact location where the belt roller contacts the accumulations. (*See* Tr.142:19–24) On that basis, I further find that there was no rock dust on the accumulations to mitigate the danger of a fire.

2. Significant and Substantial

I previously found a violation of 30 C.F.R. § 75.400, satisfying the first *Mathies* element. 33 FMSHRC at 1354. The second *Mathies* element requires the Secretary to show that the violation created a reasonable likelihood that the hazard section 75.400 aims to prevent would occur. Section 75.400 mandates that an operator prevent coal dust and other combustible materials from accumulating in active areas of the mine. Its purpose is to prevent the specific hazard of an explosion or an ignition, causing a mine fire. *Old Ben Coal Co.*, 1 FMSHRC 1954, 1956–57 (Dec. 1979) (noting that Congress included standards in the Mine Act aimed at eliminating ignition and fuel sources for explosions and fires when discussing 30 C.F.R. § 75.400) Though this area of the mine was very wet, the coal accumulations at issue were in contact with a roller and were drying out due to friction. (Tr.119:2–15) I previously noted that there is “an articulable and credible danger that even wet coal accumulations can be heated by

⁶ The Secretary did not appeal the moderate negligence determination and it was not reviewed by the Commission. 37 FMSHRC at 1692 n.7.

⁷ Rock dust is a non-combustible powder used to suppress coal dust and reduce its combustibility. (Tr.209:3–14) Though Inspector Jackson stated that rock dust is black in his testimony, I find the Commission’s suggested explanation that he simply misspoke persuasive. 37 FMSHRC at 1690 n.6.

belt friction to the point of ignition.” 33 FMSHRC at 1356. I also previously credited Jackson’s testimony that the roller could act as an ignition source. (Tr.119:19–120:11) Furthermore, I concluded above that the white color of the coal accumulations, where they contacted the roller, was not due to rock dust but from the coal heating up and drying out.

Brody suggests using *Cumberland Coal*, an ALJ case, as a guiding precedent, but that case is not controlling and the circumstances at issue here are markedly different. *Cumberland Coal Res., LP*, 31 FMSHRC 137 (Jan. 2009) (ALJ). The accumulations in that case were widespread but were only one-half to four inches deep and were not near the belt rollers, nor was there a likely ignition source present. *Id.* at 144–52. I also reject Brody’s argument that the temporary absence of methane provides any significant mitigation against the likelihood of a fire. I note that the likelihood of a hazard occurring is analyzed assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC at 1574. I therefore find it reasonably likely that, under continued normal mining operations, friction from the belt roller would ignite the dried out coal accumulations, starting a fire.

With regard to the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood that the hazard contributed to will result in an injury. As noted by the Commission, the likelihood of injury is not mitigated by redundant safety measures. *Buck Creek Coal*, 52 F.3d at 136. A belt fire would generate significant smoke, requiring evacuation of the mine and necessitating firefighting activities by miners. (Tr.120:12–15) Thus, the consequences of a fire pose additional significant risks of injury to miners. Discounting the safety measures in place, I find it reasonably likely that a belt fire would result in an injury. Finally, under the fourth *Mathies* element, there must be a reasonable likelihood that the resulting injury will be of a reasonably serious nature. The most likely resulting injuries would be smoke inhalation or asphyxiation, which are reasonably serious injuries and would minimally result in lost workdays or restricted duty. *See, e.g., Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1140–41 (May 2014) (affirming the ALJ’s finding that smoke inhalation or asphyxiation constitute a serious injury)

The Secretary has satisfied all four elements of the *Mathies* test. I hold that Order No. 8079179 was appropriately designated as S&S. For the same reasons, I conclude the violation was reasonably likely to result in lost workdays or restricted duty for eight miners.

3. Unwarrantable Failure

An unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC at 2004. Here, the Secretary did not appeal, and the Commission did not review, the determination that Brody demonstrated only moderate negligence. 37 FMSHRC at 1692 n.7. The D.C. Circuit Court has suggested that a moderate negligence determination “does not foreclose a finding of an ‘unwarrantable failure’” when that conclusion is based upon MSHA’s section 100.3(d) definitions of negligence. *Excel Mining, LLC v. Dep’t of Labor*, 497 Fed. Appx. 78, 79–80 (D.C. Cir. 2013). In my original decision, I cited 30 C.F.R. § 100.3 extensively and concluded that, based upon those definitions, “[a] finding of high negligence requires a finding of no mitigating circumstances.” 33 FMSHRC at 1355. On appeal, the Commission has clarified that under the Mine Act, a traditional negligence analysis is

required that examines the requisite duty of care imposed by a standard and reaches a conclusion based on the totality of circumstances holistically. 37 FMSHRC at 1701–03.

In my decision, I reached the conclusion of moderate negligence based upon the wetness of the mine and by discounting the inspector’s testimony as to whether the accumulations in contact with the roller were white from drying out or due to rock dust. On re-examination of the evidence, I credited the inspector’s description of the accumulations as drying out due to the heat caused by the friction of the belt roller and concluded there was no rock dust present. Though this area of the mine was very wet, potentially reducing the effect of a fire, the wetness does not significantly reduce Brody’s required standard of care when complying with MSHA safety standards. If the issue were before me now, under a traditional negligence analysis, I would conclude that Brody’s negligence is toward the low-end of “high negligence.” However, as the negligence issue is not before me, I will proceed in light of the D.C. Circuit Court’s suggestion that an unwarrantable failure determination is not precluded by moderate negligence. An unwarrantable failure analysis must examine all relevant facts and circumstances and consider all of the Commission’s unwarrantable factors. *See* discussion *supra* Section II.C.

The degree of danger posed by a violation is determined by an examination of the relevant facts and circumstances. I concluded above that the violation was S&S and reasonably likely to result in lost workdays or restricted duty. Brody alleges that this was a very wet area of the mine and the coal accumulations were “completely saturated [and] muddy.” (Tr.200:22–201:8, 210:9–10) In contrast, Jackson described Section No. 3, where the accumulations violation occurred, as “fairly wet.” (Tr.123:2) However, he also cited Brody for flooding 175 feet of the Section No. 3 primary escapeway with 12–20 inches of water. (Tr.122:20–23, 132:3–6, 138:4–15) Nevertheless, the coal accumulations were drying out from contact with the roller and turning white, indicating heat was being generated, and “even wet coal accumulations can be heated by belt friction to the point of ignition.” (Tr.119:2–120:11); 33 FMSHRC at 1356. I therefore find that the violation posed a high degree of danger and that danger is an aggravating factor.

In terms of the duration, the Secretary alleges that the accumulations were present for more than one shift. Inspector Jackson testified that, based on the amount of coal accumulations and the fact only 30 feet of coal had been mined up to that point in the shift, there would have been “some accumulations” present when the shift started. (Tr.121:10–122:1) Indeed, the pre-shift exam conducted between 4:00 a.m. and 7:00 a.m. noted that the tail piece needed to be “spot cleaned.” (Ex. R–4, at 20; Tr.206:7–12) While Fields dismissed this notation as not indicative of a hazard, on remand I credit Jackson’s testimony and infer from this record that some small quantity of coal accumulations was present for the pre-shift exam. (Tr.121:22–122:1, 206:7–18) I therefore find that the violation existed for at least seven hours based on Jackson issuing the order at 11:30 a.m., approximately seven hours after the pre-shift examination began. (Exs. S–10, R–4) I find the length of time the violation existed aggravating. *See, e.g., Buck Creek Coal*, 52 F.3d at 136 (finding unwarrantable failure where cited accumulation must have been present since at least previous shift); *Old Ben Coal Co.*, 1 FMSHRC at 1959 (holding unwarrantable failure where accumulation had existed for less than one shift).

Regarding the extent element, the accumulations were 31 feet long, 4 feet wide, and 6 to 17 inches deep, and located alongside the belt, and in contact with the belt rollers. (Ex. S-10; Tr.118:7-119:15) I therefore find the extent of the violation to be an aggravating factor. Due to the extent of the accumulations, they should have been obvious to an examiner even though they may not have been obvious to miners passing by as they were on the off-side of the belt. (Tr.207:18-208:4; *see* Tr.139:13-15) Furthermore, the pre-shift exam noted that the tailpiece was dirty, suggesting the examiner saw the accumulations. I therefore find that obviousness was an aggravating factor. I find further that the pre-shift exam provided Brody with a sufficient basis to know of the violation at 7:00 a.m. Its knowledge was an aggravating factor.

Brody was cited 29 times in the previous four months for violations of 30 C.F.R. § 75.400. (Tr.122:2-9; Ex. S-10) In accord with my previous determination under Order No. 8079224, I reiterate that Brody was on notice that greater efforts were required for compliance, as Brody had shown that it was “generally indifferent” towards accumulations violations. 33 FMSHRC at 1385. I therefore find notice to be an aggravating factor and accord it significant weight in my determination. Although Brody had noted the dirty condition of the tail piece in its pre-shift report, it had not begun to address it. I conclude that the lack of abatement was an aggravating factor.

On remand, I find Brody’s notice the most significant aggravating factor. Due to the facts and circumstances of this violation, I find the danger, duration, obviousness, knowledge, extent, and abatement factors to be aggravating but accord them less weight in my determination. After weighing all the evidence as a whole, I conclude that the violation was an unwarrantable failure.

B. Order No. 8075863 – Flypad Ventilation Violation

Inspector Ward issued Order No. 8075863 on January 15, 2009, for a violation of 30 C.F.R. § 75.370(a)(1), which provides, in part, that “[t]he operator shall develop and follow a ventilation plan approved by the district manager.” Ward observed that the flypads⁸ in the last crosscut before the working faces were held up horizontally by the air current. He measured the air flow at 1,974 cubic feet per minute (“CFM”) at the nearby No. 6 working face and 1,462 CFM at the nearby No. 5 working face. (Tr.27:1-8; Ex. S-2) Brody’s ventilation plan required 3,000 CFM at both locations. (*Id.*)

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated high negligence. (Ex. S-2) She proposed a penalty of \$5,211. (Pet., Ex. A) Prior to hearing, the Secretary stipulated that the violation was not S&S. (Tr.12:2-10) I held that the violation was not an unwarrantable failure based on the absence of methane at the face and the inspector’s focus on the airflow rather than the methane present. 33 FMSHRC at 1338-39. I concluded that the operator showed only moderate negligence based on the absence of methane. *Id.* at 1337. On appeal, the Commission faulted my decision for failing to address certain evidence, including the inspector’s meeting with mine management, the gassy status of

⁸ Flypads are wide, flat, semi-clear plastic strips hung vertically in an overlapping pattern to act as a curtain that allows equipment and personnel to pass through while still controlling airflow. (Tr.34:21-35:10, 291:2-18)

the mine, the prior ventilation plans, the Secretary's stipulation that the violation was not S&S, and the reduction in gravity, which was not appealed. 37 FMSHRC at 1697–704. The Commission also faulted the decision for failing to consider or note all relevant unwarrantable factors, including duration and obviousness. *Id.* at 1697–700. It faulted the decision for failing to clearly and consistently explain findings for duration and knowledge. *Id.* at 1698–99. It also held that I erred by discounting the operator's history of prior violations and by finding the absence of methane mitigating in my unwarrantable failure and negligence analyses. *Id.* at 1699–700. The Commission therefore remanded to me the unwarrantable failure and negligence determinations.

1. Negligence

A negligence analysis under the Mine Act involves an evaluation of the relevant facts in light of a regulation's requisite duty of care in order to reach a conclusion based on the totality of circumstances. *See Mach Mining*, 809 F.3d at 1264. Here, 30 C.F.R. § 75.370(a)(1) requires the operator to adhere to its approved ventilation plan. In particular, Brody's plan required 3,000 CFM of air flow at all idle working faces. (Tr.27:1–8) Importantly, this mine is classified as "gassy," as it emits 1.5 million cubic feet of methane per day. (Tr.28:20–29:10) Compliance with the ventilation plan is critical in gassy mines to prevent the buildup of methane, raising the standard of care expected of Brody. (Tr.34:5–15) Brody therefore had a high standard of care to meet in adhering to its ventilation plan.

Brody failed to meet the requirements of its ventilation plan, falling short by roughly 50% at the No. 5 face and 33% at the No. 6 face. (Tr.27:1–8; Ex. S–2) This violation would have been obvious to anyone who saw the flypads blown up into a horizontal position, as their position would suggest that the air flow to nearby faces was being short-circuited. (Tr.35:4–24, 42:24–43:6) Nevertheless, the condition was not reported in the pre-shift examination conducted two hours prior to the MSHA inspection. (Tr.43:12–24, 69:3–11; *see* Exs. R–2, S–4) Brody argues that the condition could have been created by a passing scoop, sometime after the examination was finished but before the MSHA inspection. (Tr.301:4–15, 313:18–314:6) However, properly installed flypads should fall back into place after being pushed aside by machinery. (Tr.73:6–16, 81:10–24; *see* Tr.315:1–13, 316:7–24) Furthermore, to abate the violation and reinforce the flypads, one or two additional layers of material had to be added to provide enough weight to control the air flow. (Tr.73:17–22, 316:7–10) Brody did not offer a credible explanation as to why such significant measures were required to abate the violation. I conclude that the conditions claimed by Ward were present, at a minimum, for the entire previous shift, which was idle for maintenance. As the conditions were present for the pre-shift exam, Brody should have known that the air flow to nearby faces was being short circuited, violating its ventilation plan.

Brody argues that there were mitigating circumstances. It first points to the lack of methane detected at the time of the inspection, which the Commission held is irrelevant to a negligence analysis. 37 FMSHRC at 1703. Brody next points to the lack of activity at the mine faces as a factor that mitigates the level of danger present. However, because the previous shift still had miners conducting maintenance tasks, and the miners on the shift after the inspection were actively mining, any mitigation is minimal. Finally, Brody points to the absence of any violations recorded by the pre-shift examiner as evidence that this violation occurred after the

exam and was therefore short-lived. However, Inspector Ward concluded from this omission that the pre-shift exam was inadequate, and cited Brody for it. Based on the previously discussed evidence that the violation was present at the time of the pre-shift exam, I credit Ward on this point.

Further elevating Brody's negligence is its failure to better supervise and train miners to report and abate ventilation violations despite considerable prior notice that it was failing to abide by its ventilation plan. *See Consolidated Coal Co.*, 35 FMSHRC 2326, 2345–46 (Aug. 2013) (finding the operator's failure to properly train and supervise miners after repeated ventilation plan violations, in a gassy mine, relevant to negligence). Brody was cited 31 times for the same standard in the 10 weeks prior to the order, and an explicit warning was given to mine management. (Tr.30:16–31:2, 32:3–19, 33:5–14) Based on the high standard of care required for a gassy mine, the obviousness of the violation, Brody's implied knowledge, and its failure to better train miners after extensive prior notice, I conclude that Brody demonstrated high negligence.

2. Unwarrantable Failure

Brody demonstrated high negligence through its failure to abide by the requirements of its ventilation plan. The Commission has “recognized that a finding of high negligence suggests unwarrantable failure.” *Eagle Energy, Inc.*, 23 FMSHRC 829, 839 (Aug. 2001). As previously discussed, an unwarrantable failure analysis must examine all relevant facts and circumstances and consider all of the Commission's unwarrantable factors. *See* discussion *supra* Section II.C.

The Commission noted in its decision that “significant weight” should be placed on a mine's gassy status in determining the degree of danger posed by a violation. 37 FMSHRC at 1697. It further noted that an absence of methane at the time of the inspection does not mitigate the danger posed by a gassy mine, as methane can accumulate quickly. *Id.* As previously discussed, Brody Mine No. 1 is a gassy mine. (Tr.28:20–29:10) I credit Inspector Ward's testimony regarding the potential dangers of a rapid buildup of methane under low airflow conditions leading to an explosion. (Tr.34:5–15, 96:16–97:6) Thus, a violation of the ventilation plan in a gassy mine suggests a higher level of danger.

Brody argued that the level of danger was mitigated by several factors. First, Brody argues that the purpose of the ventilation plan was to flush out methane, so its absence at working faces suggests a properly functioning system. (Tr.76:20–77:14, 359:13–21) In support, Brody points to Ward's testimony that he would not cite the same conditions under the new ventilation plan that was in place at the time of the hearing. (Tr.85:15–86:13, 359:9–12) However, Brody's ventilation plan in place at the time of the order is controlling. There is insufficient evidence before me to evaluate how an alternative airflow requirement that was adopted under potentially dissimilar circumstances might reflect on the level of danger posed by the circumstances at issue. Though the 3,000 CFM air flow requirement was removed for idle working faces, other changes in the plan may have compensated for that reduction.

Second, Brody suggests *Consolidation Coal*, an ALJ case, as a guiding precedent. *Consolidation Coal Co.*, 23 FMSHRC 270 (Mar. 2001) (ALJ). However, the case is not

controlling. Furthermore, in *Consolidation Coal* the air flow was 12% lower than was required by the operator's ventilation plan. *Id.* at 271. Here, by contrast, Brody's air flow was 33% and 50% lower than was required. Finally, Brody argues that the lack of miners or equipment at the face is a mitigating factor. I find it somewhat mitigating. I note that the Secretary conceded the S&S designation before trial and did not appeal the gravity determination that the violation was unlikely to result in lost workdays for five miners. Furthermore, though this was a gassy mine, Brody has no history of methane ignitions. (Tr.102:16–103:5) Considering all of the foregoing, I conclude the level of danger neither aggravating nor mitigating.

I next consider the obviousness and knowledge factors. The position of the flypads made it obvious that the air flow to the working faces was being short-circuited. (*See* Tr.35:4–24, 81:14–24; Ex. S–2, at 4) Though Brody's safety foreman Blankenship argued that the flypads were not an "indication" that the faces were not getting enough air, he acknowledged that the condition suggested that "possibility." (Tr.385:3–86:2) I conclude the violation was obvious to any miner passing by and therefore its obviousness is an aggravating factor of significant weight. Above, I found that the violation lasted for at least the duration of the previous maintenance shift. I therefore conclude that time was an aggravating factor and, due to the obviousness of the violation, accord it significant weight. Furthermore, due to the obviousness of the violation, the length of time it existed, the underlying improper setup of the flypads, and the pre-shift exam, I concluded above that Brody should have known that the violation existed. I find that Brody's implied knowledge of the violation was an aggravating factor and accord it significant weight as well.

The extent of the violation was evident in a decrease in air flow of 33% at one face and 50% at another. (Tr.27:1–8; Ex. S–2) I find that the extent of the violation was an aggravating factor based on the significant deviations from Brody's ventilation plan at two working faces for at least one shift. Brody's failure to abate the violation for an extended period of time was an additional aggravating factor. Finally, Brody was cited 31 times for violations of the same standard in the ten weeks before this order and Brody's management had been issued an explicit warning by Inspector Ward. (Tr.30:16–31:2, 32:3–33:14) As the Commission noted on appeal, previous citations for a violation do not need to involve identical circumstances to put an operator on notice. *IO Coal*, 31 FMSHRC at 1353–54. I therefore find Brody's notice to be an aggravating factor and give it significant weight.

On remand, I find that the obviousness, time, knowledge, and notice factors were all significant aggravating factors. Extent and abatement are also aggravating factors that I accord moderate weight. As noted above, I do not accord the danger factor any weight in my determination. After weighing the evidence as a whole, I conclude that the violation of section 75.370(a)(1) was an unwarrantable failure to comply with a mandatory safety standard.

C. Order No. 8075864 – Pre-shift Examination Violation

Inspector Ward issued Order No. 8075864 on January 15, 2009, for a violation of 30 C.F.R. § 75.360(b)(3), which requires that pre-shift examinations of working sections include the ventilation controls. Based on the obvious condition of the flypads in Order No. 8075863 and

Brody's failure to record the violation in its pre-shift report, Ward concluded that the pre-shift examination was inadequate. (Tr.41:18–43:24; *see* Ex. S–4)

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated high negligence. (Ex. S–4) She proposed a penalty of \$7,774. (Pet., Ex. A) Prior to hearing, the Secretary stipulated that the violation was not S&S. (Tr.12:2–10) Based on treating this violation as derivative of the flypad violation, I concluded it was not an unwarrantable failure and was unlikely to result in an injury. 33 FMSHRC at 1344. I also concluded that the operator had demonstrated high negligence based on the lack of any mitigation. *Id.* On appeal, the Commission faulted my decision for basing the analyses of unwarrantable failure and gravity solely on the associated flypad ventilation violation (Order No. 8075863). 37 FMSHRC at 1700. The Commission therefore remanded to me the unwarrantable failure and gravity determinations.

1. Gravity

Inspector Ward noted that 14 miners worked in the section and alleged that the violation was reasonably likely to cause an injury resulting in lost workdays or restricted duty. (Ex. S–4, at 4) I held that the violation was unlikely to result in an injury. On appeal, the Commission remanded the issue of gravity due to my reliance upon the associated flypad violation for the determination. The Commission held that “[t]he seriousness of a pre-shift violation is evaluated apart from any seriousness of any hazard that may have been detected by an adequate pre-shift examination.” 37 FMSHRC at 1700 (citing *JWR Res. Inc.*, 28 FMSHRC 579, 603–04 (Aug. 2006)).

Section 75.360(b)(3) requires pre-shift examinations of working sections for ventilation, accumulations, maintenance, and roof control violations, among others. 30 C.F.R. § 75.360(b). Here, the inspector determined that the pre-shift examination missed an obvious violation of Brody's ventilation plan. He did not find any additional violations. Importantly, the Secretary stipulated before hearing that the violation was not S&S, suggesting the violation was unlikely to result in a serious injury. I therefore again conclude that the inadequate pre-shift exam was unlikely to cause injuries resulting in lost workdays or restricted duty for 14 miners.

2. Unwarrantable Failure

I previously concluded that Brody demonstrated high negligence by conducting an inadequate pre-shift examination of its ventilation controls. 33 FMSHRC at 1343. The Commission has “recognized that a finding of high negligence suggests unwarrantable failure.” *Eagle Energy*, 23 FMSHRC at 839. As previously discussed, an unwarrantable failure analysis must examine all relevant facts and circumstances and consider all of the Commission's unwarrantable factors. *See* discussion *supra* Section II.C. On appeal, the Commission noted that the unwarrantable analysis for this inadequate pre-shift exam violation is not derivative of, and must be considered separately from, the associated flypad violation. 37 FMSHRC at 1700.

The degree of danger posed by a violation depends on the facts and circumstances of the violation. Here, the inspector has alleged that one violation was missed by Brody's examiner.

Above, I concluded the violation was unlikely to result in lost work days or restricted duty. In light of the foregoing, I conclude that the violation did not pose a high degree of danger and was not aggravating.

The obviousness of an inadequate examination can be established by the circumstances of unreported violations. The short-circuiting of the air flow to working faces was made obvious by the condition of the flypads. (Tr.42:24–43:6) The horizontal position of the flypads should have alerted the examiner, and passing miners, that the pre-shift examination of the area had been inadequate. I therefore determine the obviousness of the violation to be an aggravating factor. Based on the obviousness of the violation, the examiner should have known that his examination was inadequate. As an agent of Brody, the examiner's knowledge can be imputed to Brody. *Pocahontas Fuel Co.*, 8 IBMA 136, 146–48 (Sept. 1977), *aff'd*, 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (holding that the knowledge of a pre-shift examiner was imputable to the mine operator). Brody therefore should have known of the inadequate pre-shift exam upon its completion. I conclude its knowledge an aggravating factor.

Though Brody argues it was not on notice with regard to examinations, it had been warned that more effort was required in order to comply with its ventilation plan requirements. (Tr.30:16–31:2, 32:3–13, 33:5–14) As the Commission noted, this warning should have increased Brody's "overall vigilance" with respect to all related activities, including pre-shift examinations of the ventilation controls. 37 FMSHRC at 1700 n.14. I therefore find that notice was an aggravating factor.

The extent of the violation included two faces with insufficient air flow and the displaced flypads. This factor is neither aggravating nor mitigating. I find the duration of the violation to be a mitigating factor, as the inadequate pre-shift exam was discovered by the inspector approximately one hour after it was conducted. Furthermore, I also find that abatement was of minimal relevance because of Brody's limited opportunity to address the violation.

On remand, I find that notice, knowledge, and the obviousness of the violation are aggravating factors and accord them moderate weight. I also accord the danger, extent, and abatement elements minimal weight. Though I find the duration mitigating, it is significantly outweighed by the aggravating factors. I therefore conclude that the violation of section 75.360(b)(3) was an unwarrantable failure to comply with a mandatory safety standard.

D. Order No. 8075874 – Ventilation Obstruction Violation

Inspector Ward issued Order No. 8075874 on February 11, 2009, for a violation of 30 C.F.R. § 75.370(a)(1), which provides, in part, that "[t]he operator shall develop and follow a ventilation plan approved by the district manager." Ward found a debris pile pushed up against an idle working face, behind a ventilation curtain, which he suspected was obstructing air flow. (Tr.46:4–8) He measured 1,050 CFM of air flow at the face, where the ventilation plan requires 3,000 CFM. (Tr.46:9–12; Ex. S–6)

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated high negligence. (Ex. S–6) She proposed a penalty of \$4,440.

(Pet., Ex. A) Prior to hearing, the Secretary stipulated that the violation was not S&S. (Tr.12:2–10) I held that the violation was not an unwarrantable failure based on: my finding that Brody had no knowledge of the violation; a finding of high danger was impossible to infer without methane present; the limited relevance of prior citations under the same standard; and, the violation’s short duration. 33 FMSHRC at 1367–68. I found that the operator demonstrated no negligence based on: the absence of methane at the face; Brody’s lack of knowledge of the violation; and by discounting the relevance of previous citations. *Id.* On appeal, the Commission faulted my decision for failing to address certain evidence, including the inspector’s meeting with mine management, the gassy status of the mine, the operator’s argument regarding the other ventilation plans, the Secretary’s stipulation that the violation was not S&S, and the reduction in gravity, which was not appealed. 37 FMSHRC at 1697–704. The Commission also faulted the decision for failing to consider or note obviousness and to clearly explain the findings relating to knowledge. *Id.* at 1698–99. It also held that I erred by discounting the operator’s history of prior violations and by determining the absence of methane mitigating in my unwarrantable failure and negligence determinations. *Id.* at 1699–700. The Commission therefore remanded the unwarrantable failure and negligence determinations.

1. Negligence

A negligence analysis under the Mine Act involves an evaluation of the relevant facts in light of a regulation’s requisite duty of care in order to reach a conclusion based on the totality of circumstances. *See Mach Mining*, 809 F.3d at 1264. The standard at issue, 30 C.F.R. § 75.370(a)(1), requires the operator to abide by the mine’s approved ventilation plan. In particular, the plan requires 3,000 CFM of air flow at idle working faces. (Ex. S–6) Importantly, this mine is classified as “gassy,” as it emits 1.5 million cubic feet of methane per day. (Tr.34:8–15) Compliance with the ventilation plan is critical in gassy mines to prevent the buildup of methane, raising the standard of care expected of Brody. (Tr.34:5–15, 48:20–49:10) Brody therefore had a high standard of care to meet in adhering to its ventilation plan.

Brody fell short of its ventilation plan’s air flow requirements by roughly 66% at the No. 4 working face. (Tr.46:9–12; Ex. S–6) The parties generally agreed that the violation did not exist for long: Inspector Ward testified that the foreman on site told him that Brody had scooped the debris pile against the face shortly before Ward arrived. (Tr.47:15–21) Ward pointed to the presence of loose debris next to the face as an indication that the air flow behind the curtain was obstructed and did not meet the requirements of Brody’s ventilation plan. (Tr.46:4–12) I conclude that the responsible Brody foreman should have known of the air flow obstruction based on the positioning of the ventilation curtain in relation to the pile of debris as well as the significant reduction in air flow. Upon re-examination of the evidence, I therefore conclude that because the foreman’s knowledge is imputed to it, Brody should have known the violation existed.

Brody argued the same mitigating factors as with the previous section 75.370(a)(1) ventilation violation. *See* discussion *supra* Section III.B.1. Brody points to the lack of methane detected at the time of the inspection, the lack of activity at the mine face, and the lack of hazards recorded by the pre-shift exam as mitigating. *Id.* As previously discussed, the lack of methane is not mitigating. 37 FMSHRC at 1703. I determine the lack of activity at the No. 4 face

to be only slightly mitigating. The pre-shift reports support the conclusion that the violation did not exist for long, which is somewhat mitigating. (See Tr.84:2–4)

In accord with the previous section 75.370(a)(1) violation, Brody was on notice that it was failing to properly follow its ventilation plan. Brody was cited 31 times for the same standard between October 28, 2008, and January 15, 2009, and an explicit warning was given to mine management that more needed to be done. (Tr.32:3–13, 33:5–7, 46:13–18, 48:1–12; Ex. S–3, at 4) Brody’s failure to better supervise and train its miners to prevent ventilation plan violations after explicit warnings warrants a higher level of negligence. See *Consolidated Coal*, 35 FMSHRC at 2345–46. Based on the high standard of care required for a gassy mine, Brody’s implied knowledge, and its extensive prior notice of ventilation plan issues, I conclude that Brody demonstrated high negligence.

2. Unwarrantable Failure

Brody demonstrated high negligence through its failure to abide by the requirements of its ventilation plan. The Commission has “recognized that a finding of high negligence suggests unwarrantable failure.” *Eagle Energy*, 23 FMSHRC at 839. As previously discussed, an unwarrantable failure analysis must examine all relevant facts and circumstances and consider all of the Commission’s unwarrantable factors. See discussion *supra* Section II.C.

As previously discussed, Brody Mine No. 1 is a gassy mine, increasing the level of danger, and the absence of methane at the time of the MSHA inspection is not mitigating. 37 FMSHRC at 1697. I credit Inspector Ward’s testimony regarding the potential danger of a rapid buildup of methane under low airflow conditions leading to an explosion. (Tr.34:5–15, 96:16–97:6) I again dismiss alternative ventilation plans that are not before me with regard to mitigating the level of danger and also discount the relevance of *Consolidation Coal*, 23 FMSHRC 270, for the previously discussed reasons. See discussion *supra* Section III.B.2. The low level of activity in the area provides some mitigation. I note that the Secretary conceded the S&S designation for this violation before trial and did not appeal the gravity of the violation that there was no likelihood of injury resulting in any loss of workdays for zero miners. In light of the foregoing, I find that the violation posed some degree of danger but was neither aggravating nor mitigating.

I found above that the violation existed for a relatively brief period of time, as the debris had been moved against the face only shortly before the inspector arrived.⁹ (Tr.47:15–21) The duration of the violation is therefore a mitigating factor. The extent of the violation was a 66% decrease in the air flow at one working face. (Tr.46:9–12; Ex. S–6) Brody argues that the scope of the violation was minimal, pointing to the fact it took only six minutes to abate the violation. (Tr.362:13–16, 363:1–5) I find that the extent of the violation is a mitigating factor based on the limited area affected, the brief existence of the violation, and the minimal effort required to abate it. Brody was on notice that greater efforts were required to comply with its ventilation plan. It was cited 31 times for the same standard between October 28, 2008, and January 15, 2009, and an explicit warning was given to mine management. (Tr.32:3–13, 33:5–7, 46:13–18, 48:1–12;

⁹ To clarify, I note that the amount of time required for Brody to abate the violation is not relevant to how long the violation existed. See 37 FMSHRC at 1698.

Ex. S-3, at 4) I find that the extensive prior notice provided to Brody was an aggravating factor and accord it significant weight.

On remand, I find that the violation should have been obvious to Brody, based on the pile of debris obstructing air flow, the position of the ventilation curtain, and the significant decrease in air flow. The violation's obviousness is an aggravating factor that I accord moderate weight. Furthermore, given that it was the foreman responsible for the area who informed Inspector Ward as to when the violation was created (Tr.47:15-21), I find that Brody should have known of the violation. Brody's knowledge is an aggravating factor that I give moderate weight. Finally, I do not find abatement a relevant factor here, due to the short time the violation existed and lack of abatement efforts by Brody.

I conclude that notice is the most significant aggravating factor. Knowledge and obviousness are also aggravating factors that I accord moderate weight. The degree of danger is neither mitigating nor aggravating. I accord it no weight in my determination. Though duration and extent are mitigating factors, they are significantly outweighed by the numerous aggravating factors present. Furthermore, without the intervention of the inspector, Brody would have begun mining at that face shortly after the inspection. Weighing the evidence as a whole, I conclude that the violation of section 75.370(a)(1) was an unwarrantable failure to comply with a mandatory safety standard.

E. Order No. 8079178 – Water in Escapeway

Inspector Jackson issued Order No. 8079178 on January 22, 2009, for a violation of 30 C.F.R. § 75.380(d)(1), which provides that “[e]ach escapeway shall be [. . .] [m]aintained in a safe condition to always assure passage of anyone, including disabled persons.” Inspector Jackson discovered that Brody's examination reports indicated water at Break 7 for the No. 3 section. (Tr.108:12-14; Ex. S-9) On reaching the area, he found the primary escapeway was not passable, as it was flooded with water approximately 12 to 20 inches deep, from rib to rib, for 175 feet. (Tr.109:23-110:3; Ex. S-8)

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated reckless disregard. (Ex. S-8) She proposed a penalty of \$56,929. (Pet., Ex. A) I held that the violation was S&S and an unwarrantable failure, but concluded that the operator demonstrated moderate negligence based on the existence of a second escapeway and Brody's prompt abatement of the violation. 33 FMSHRC at 1350-51. On appeal, the Commission faulted my decision for basing the negligence analysis upon 30 C.F.R. § 100.3(d) definitions, which do not govern Commission proceedings. 37 FMSHRC at 1706. It further held that I erred by finding that an alternative escapeway mitigated Brody's negligence. *Id.* The Commission therefore remanded to me the negligence determination.

1. Further Findings of Fact

The presence of water in the escapeway was first recorded on January 21, 2009, in a weekly examination and was listed under “Hazards Noted.” (Exs. R-3, at 4, S-9; *see* Tr.108:12-14, 177:9-178:3) The subsequent pre-shift and on-shift reports on January 22, 2009, failed to

note any water in the escapeway, though Brody alleges it was in the process of pumping the water out. (Ex. R-3, at 5-7; Tr.159:1-11, 167:5-16) Nevertheless, Inspector Jackson discovered an idle pump in the flooded escapeway, without a power cable or drain line attached. (Tr.113:4-13, 151:2-13, 215:23-216:4) Brody alleges that the power to the pump was disconnected because it had just moved the rest of the mining equipment forward and the pump's power cable was not long enough. (Tr.161:18-162:5, 178:16-179:14) However, Brody did not explain why the drain line, necessary to remove water, was detached from the pump if it had been operating earlier. In fact, Brody Superintendent Fields testified that he "took it for granted" that the drain line was still attached. (Tr.216:1-4) Furthermore, after the order was issued, Brody was unable to abate the violation using a pump due to the amount of sediment in the water—it had to build a bridge over the area. (Tr.112:5-16) Based on the foregoing facts, particularly the absence of a drain line and Brody's inability to abate the violation using a pump, I find that Brody had not started pumping water out of the escapeway prior to being issued an order.

2. Negligence

The Secretary alleges that Brody showed more than ordinary negligence and demonstrated reckless disregard by its actions.¹⁰ A negligence analysis under the Mine Act involves an evaluation of the relevant facts in light of a regulation's requisite duty of care in order to reach a conclusion based on the totality of circumstances. *See Mach Mining*, 809 F.3d at 1264. The standard at issue, 30 C.F.R. § 75.380(d)(1), requires the operator to maintain the mine's escapeways in a passable and safe condition. Here, Brody could have met the required standard of care by abating the escapeway violation as soon as it was discovered.

Brody first reported water in the escapeway on January 21, 2009, in its weekly report and subsequently left an unpowered pump at that location. (Exs. R-3, at 4, S-9) Brody did not start pumping water out until it was issued an order by the inspector on January 22, 2009. The weekly report and the presence of the idle pump establish that Brody knew of the hazard no later than January 21, 2009. (*See* Tr.159:1-11, 195:3-12) Though Brody disputes whether the escapeway was traversable, as well as the depth of the water, the 175 foot length and rib-to-rib width of the flooded escapeway was not disputed. (Tr.211:13-22) The water was 12-20 inches deep, opaque, and concealed an uneven surface that made passage challenging, even for an uninjured person under normal conditions. (Tr.109:21-110:8, 150:10-151:1) I reiterate my previous finding that the flooded escapeway impeded travel for disabled miners and for those assisting disabled miners. 33 FMSHRC at 1349. Escapeway violations are particularly significant as there may be an increased risk of serious injury or fatality during emergency evacuations. *See, e.g., Big Ridge, Inc.*, 36 FMSHRC 1115, 1119 (May 2014) ("The hazard of a delayed escape or no escape at all [. . .] in an emergency is reasonably likely to result in serious or fatal injuries."); *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 563-64, 64 n.5 (Aug. 2005) (noting that the potential for slips

¹⁰ As Judge Paez noted in *Stillhouse Mining*, "[a]s a legal term, "reckless" has been described as conduct—[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do." *Stillhouse Mining, LLC*, 33 FMSHRC 778, 803 (Mar. 2011) (ALJ) (citing *Reckless, Black's Law Dictionary* (8th ed. 2004)).

and falls would be greater during a mine evacuation). In the event of an emergency, incapacitated miners on a stretcher could not be set down, even momentarily, for the length of the flooded escapeway without the risk of drowning them in 12–20 inches of water. (See Tr.113:19–114:3) Furthermore, miners are tethered together during evacuations, which would create additional difficulties for them in navigating the uneven surface of this flooded escapeway. (Tr.114:4–10)

As the Commission noted on appeal, the existence of a second escapeway does not mitigate Brody’s negligence. 37 FMSHRC at 1706. In an emergency, miners would attempt to use the nearest escapeway and may not be aware of the flooding. Brody also argued, as a mitigating factor, that this area was mined primarily for the purpose of reaching a borehole¹¹ in order to address the mine’s water removal and ventilation issues. (Tr.159:12–24, 214:19–215:11) However, Brody’s general safety-promoting purpose of removing water and increasing ventilation did not absolve it from its duty to maintain safe, passable escapeways while it advanced this section of the mine. Furthermore, restoring power to every other piece of mining equipment at the nearby face, without properly setting up the pump, clearly indicated Brody’s priority. (Tr.151:14–152:1, 179:2–23)

Brody could have met its duty of care by setting up an energized pump with a drain line connected as soon as a significant amount of water was detected in this escapeway. In contrast, Brody placed an unenergized pump at the location, indicating it was aware of the problem, but nevertheless failed to begin pumping water out of the escapeway until cited by MSHA. Brody’s conduct displayed disregard for the substantial risk of harm created by the flooded escapeway and was a gross deviation from what a reasonable miner would do. After re-examination of the foregoing evidence and discounting the alternative escapeway, I conclude that Brody demonstrated reckless disregard by failing to address this known, extensive, obvious, and egregious safety violation.

F. Order No. 8075906 – Missing Guard Plate

Inspector Ward issued Order No. 8075906 on March 3, 2009, for a violation of 30 C.F.R. § 75.1722(a), which provides, in part, that “exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.” Ward noticed that a shuttle car was missing a guard plate over a one-foot-by-one-foot opening, which left moving machine parts exposed. (Tr.53:1–13; Ex. S–7) Ward’s subsequent discussions with Brody employees revealed that the plate had been missing for two weeks. (Tr.53:19–21, 54:6–24, 400:13–18)

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated high negligence. (Ex. S–7) She proposed a penalty of \$4,000. (Pet., Ex. A) I held that the violation was S&S and an unwarrantable failure but concluded that the operator demonstrated moderate negligence based on mitigation provided by the company “offside” policy and the impossibility of contact by the shuttle operator. 33 FMSHRC at 1374–78. On appeal, the Commission faulted my decision for basing the negligence analysis upon 30

¹¹ A borehole is a shaft drilled down vertically from the surface.

C.F.R. § 100.3(d) definitions, which do not govern Commission proceedings, and for failing to properly weigh the two week duration of the violation. 37 FMSHRC at 1706. It further noted that Brody's company policies did not mitigate its negligence when it had knowledge of the violation. *Id.* at 1706–07. The Commission therefore remanded to me the negligence determination.

1. Negligence

A negligence analysis under the Mine Act involves an evaluation of the relevant facts in light of a regulation's requisite duty of care in order to reach a conclusion based on the totality of circumstances. *See Mach Mining*, 809 F.3d at 1264. The standard at issue, 30 C.F.R. § 75.1722(a), requires the operator to provide guards over moving machine parts that could be contacted by miners. Here, Brody could have met the required standard of care by repairing the missing guard plate when it was first discovered two weeks prior, or by pulling the shuttle car from service until repairs could be made.

The opening for the missing guard plate was located on the offside of a shuttle car at about waist height. (Tr.55:1–21) The shuttle car was about 18–20 feet long, 12 feet wide, and was used every working shift to haul coal from the continuous miner to the feeder. (Tr.326:17–24, 330:18–23) Brody's records did not note the hazard during the two weeks before the order was issued, though the shuttle car was subject to pre-shift inspections and examined several times. (Tr.94:10–14, 342:20–343:6, 411:13–412:11) I previously discounted Brody's examination records and found that the totality of the evidence supports the conclusion that the guard plate had been missing for two weeks. 33 FMSHRC at 1377–78. I also found that Brody had ample reason to know about the violation. *Id.* at 1378. The Commission noted on appeal that the two week period when Brody management knew of the violation was an aggravating circumstance and that the company's safety policies were not relevant to its negligence in the face of this knowledge. 37 FMSHRC at 1706–07. I reiterate my previous determination that “[t]he weight of mitigation here is quite low” and, under a traditional negligence analysis, find that Brody demonstrated high negligence. 33 FMSHRC at 1375.

G. Order No. 8079224 – Feeder Accumulations

Inspector Jackson issued Order No. 8079224 on February 26, 2009, for a violation of 30 C.F.R. § 75.400, which provides that “[c]oal dust [. . .] shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.” Jackson discovered an accumulations violation consisting of loose coal and coal dust that was 12 feet long, 2 to 3 feet wide, and 18 inches deep, located on top of a feeder.¹² (Ex. S–11; Tr.125:8–11, 274:9–19) Jackson alleged that the accumulations were saturated with hydraulic oil and that some parts of the machinery were “extremely hot to the touch.” (Tr.125:2–19)

¹² A feeder is a large piece of stationary equipment where shuttle cars dump loads of coal to be crushed and fed onto a conveyor belt. (Tr.254:10–22)

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated reckless disregard. (Ex. S-11) She proposed a penalty of \$70,000. (Pet., Ex. A) I held that the violation was not S&S but was an unwarrantable failure. 33 FMSHRC at 1385. I concluded that the operator demonstrated moderate negligence based on mitigation provided by the wetness of the coal and after discounting the Inspector's testimony that the accumulation existed for more than one shift. *Id.* at 1383-84. On appeal, the Commission faulted my decision for basing the negligence analysis upon 30 C.F.R. § 100.3(d) definitions, which do not govern Commission proceedings. 37 FMSHRC at 1706. The Commission therefore remanded to me the negligence determination.

1. Negligence

A negligence analysis under the Mine Act involves an evaluation of the relevant facts in light of a regulation's requisite duty of care in order to reach a conclusion based on the totality of circumstances. *See Mach Mining*, 809 F.3d at 1264. The standard at issue, 30 C.F.R. § 75.400, requires the operator to prevent the accumulation of coal and other combustible materials.

Inspector Jackson found coal accumulations on the oil tank, oil filters, valve chest, hydraulic hoses, and electrical components of an energized feeder, with the oil tank and oil filters hot to the touch. (Tr.125:2-19) He believed the coal accumulations were saturated with hydraulic fluid due to their appearance and location on the feeder, but did not take any affirmative steps to confirm this. (Tr.125:2-7, 145:13-146:3) The Secretary alleged reckless disregard based on Inspector Jackson's belief that the accumulations were saturated with hydraulic oil, which one could reasonably assume to be flammable. Ultimately, however, I concluded that the accumulations were wet with water, based on the totality of the evidence. 33 FMSHRC at 1382-83. Nevertheless, wet coal is still dangerous. As the Commission has long held, even "accumulations of damp or wet coal, if not cleaned up, can dry out and ignite." *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1230 (June 1994) *citing Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 969 (May 1990), *aff'd*, 951 F.2d 292 (10th Cir. 1991); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (Aug. 1985).

I further found that the hot, energized feeder machine, as well as an electrical cable splice¹³ located on the feeder, could both act as ignition sources, though the presence of water mitigated against ignition. 33 FMSHRC at 1383. Based on the absence of any hazards in its pre-shift examination reports, Brody argues that the accumulations developed after its pre-shift exam and before the MSHA inspection. (Tr.261:6-262:14; Ex. R-7, at 2-5) On remand, I credit Jackson's testimony that the accumulations were present for approximately one shift, based on the presence of a cover on the feeder over some of the accumulations that would slow the rate at which coal spillage built up. (Tr.128:24-129:12) Accordingly, Brody should have discovered the accumulation during its pre-shift examination and cleaned it immediately. Furthermore, as mentioned above, Brody was cited 29 times in the previous four months for violations of 30 C.F.R. § 75.400 (Tr.122:2-9; Ex. S-10) and was on notice that greater efforts were required for compliance. 33 FMSHRC at 1385. Brody's failure to discover and subsequently clear the

¹³ Citation No. 8079225 was issued for a cable splice made without suitable connectors that was located on the feeder. (Ex. S-12; Tr.127:22-128:8)

coal accumulations while on heightened notice suggests that it was highly negligent in this instance. *See, e.g., Mach Mining*, 809 F.3d at 1264–65, 1268 (holding that substantial evidence supported ALJ’s determination of “high negligence” where operator had history of section 75.400 violations and coal accumulations were wet).

Brody argues that the redundant fire safety measures near the feeder mitigate its negligence. (Tr.256:9–257:2) It also points to the regular inspections and daily cleaning, which failed to prevent the accumulations in this instance. (Tr.257:3–16) The CO detector, water hose, and fire extinguisher, all required by MSHA regulations, would not prevent a fire from occurring but could be used to reduce the severity of any resulting fire. The nature of the feeder machine’s “fire suppressants” was not made clear. I find that the redundant safety features provided no mitigation, as they did not prevent this accumulations violation from arising and could not prevent a fire from starting. Finally, though I found the accumulations wet with water and not hydraulic oil, I determine the general wetness of the mine only slightly mitigating, as this section of the mine was not nearly as wet as Section No. 3.

Had the coal accumulation been saturated with hydraulic oil, as Inspector Jackson believed, I may have concluded that Brody acted with reckless disregard. *See* discussion *supra* Section III.E.2. However, based on the record before me, I conclude that Brody’s failure to clean the coal accumulation displays high negligence.

IV. PENALTY

When assessing a civil penalty, section 110(i) of the Mine Act requires that I consider six criteria: (1) the operator’s history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator’s business; (3) the operator’s negligence; (4) the penalty’s effect on the operator’s ability to continue in business; (5) the violation’s gravity; and, (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

I credit the Secretary’s records pertaining to the operator’s history of previous violations as accurate for each order. Brody Mining, LLC, was a large business, mining 2,250,965 tons at the time of the orders. (Pet., Ex. A) Brody did not allege that the proposed penalties would adversely affect its ability to continue in business. The Commission has held that “[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator’s] ability to continue in business, it is presumed that no such adverse [e]ffect would occur.” *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983) (citing *Buffalo Mining Co.*, 2 IBMA 226, 247–48 (Sept. 1973)). I further find, and the Secretary did not dispute, that Brody acted in good faith to rapidly abate each order.

For Order No. 8079179, my previous holding that Brody demonstrated moderate negligence stands. 33 FMSHRC at 1356–57. On remand, I have further determined that the violation was reasonably likely to cause an injury resulting in lost workdays or restricted duty for eight miners and was S&S. I also determined on remand that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for

which the Mine Act mandates a minimum penalty of \$4,000. 30 U.S.C. § 820(a)(3)(B). In light of the foregoing, I conclude that a penalty of \$5,500 is appropriate.

For Order No. 8075863, my previous holding that the violation was unlikely to result in lost workdays or restricted duty for five miners stands. 33 FMSHRC at 1339. The Secretary stipulated that the violation was not S&S before trial. (Tr.12:2–10) On remand, I have further determined that Brody demonstrated high negligence. I also determined on remand that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for which the Mine Act mandates a minimum penalty of \$4,000. 30 U.S.C. § 820(a)(3)(B). In light of the foregoing, I conclude that the statutory minimum penalty of \$4,000 is appropriate.

For Order No. 8075864, my previous holding that Brody demonstrated high negligence stands. 33 FMSHRC at 1344. The Secretary stipulated that the violation was not S&S before trial. (Tr.12:2–10) On remand, I have reweighed the evidence and determined that the violation was unlikely to result in lost workdays or restricted duty for 14 miners. I also determined on remand that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for which the Mine Act mandates a minimum penalty of \$4,000. 30 U.S.C. § 820(a)(3)(B). In light of the foregoing, I conclude that a penalty of \$6,500 is appropriate.

For Order No. 8075874, my previous gravity determination that reduced the number of miners affected to zero, the likelihood of occurrence to “no likelihood,” and the severity of injury to “no lost workdays” stands. 33 FMSHRC at 1368. The Secretary stipulated that the violation was not S&S before trial. (Tr.12:2–10) On remand, I have further determined that Brody demonstrated high negligence. I also determined on remand that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for which the Mine Act mandates a minimum penalty of \$4,000. 30 U.S.C. § 820(a)(3)(B). In light of the foregoing, I conclude that the statutory minimum penalty of \$4,000 is appropriate.

For Order No. 8079178, my previous holding that the violation was reasonably likely to result in fatal injuries to eight miners and was S&S stands. 33 FMSHRC at 1351. I also previously determined that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for which the Mine Act mandates a minimum penalty of \$4,000. 30 U.S.C. § 820(a)(3)(B). On remand, I have further determined that Brody demonstrated reckless disregard. In light of the foregoing, I conclude that a penalty of \$50,000 is appropriate, particularly considering that the Secretary’s proposed penalty failed to discount the raw penalty point assessment by 10% for good faith abatement.

For Order No. 8075906, my previous holding that the violation was reasonably likely to result in a permanently disabling injury to one miner and was S&S stands. 33 FMSHRC at 1378. I also previously determined that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for which the Mine Act mandates a minimum penalty of \$4,000. 30 U.S.C. § 820(a)(3)(B). On remand, I have further

determined that Brody demonstrated high negligence. In light of the foregoing, I conclude that the statutory minimum penalty of \$4,000 is appropriate.

For Order No. 8079224, my previous holding that the violation was unlikely to result in lost workdays or restricted duty for 14 miners and was not S&S stands. 33 FMSHRC at 1385. I also previously determined that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for which the Mine Act mandates a minimum penalty of \$4,000. 30 U.S.C. § 820(a)(3)(B). On remand, I further determined that Brody demonstrated high negligence. In light of the foregoing, I conclude that a penalty of \$11,000 is appropriate.

V. ORDER

The Commission decision states:

[W]e vacate and remand the following issues in Docket No. WEVA 2009-1000: (1) the unwarrantability of the violation and the negligence of the operator in connection with the violation in Order No. 8075863; (2) the unwarrantability and gravity of the violation in Order No. 8075864; (3) the negligence in connection with the violation in Order No. 8079178; and (4) whether the violation in Order No. 8079179 was S&S and unwarrantable

[W]e also vacate and remand the following issues in Docket No. WEVA 2009-1306: (1) the unwarrantability of the violation and the negligence of the operator in connection with the violation in Order No. 8075874; (2) the negligence in connection with the violation in Order No. 8075906; and (3) the negligence in connection with the violation in Order No. 8079224.

37 FMSHRC at 1707.

In conformance with the Commission's remand instructions, I hereby enter the following orders:

It is **ORDERED** that Order No. 8079179 be **MODIFIED** to reduce the level of injury expected from "Fatal" to "Lost Workdays or Restricted Duty."

It is **ORDERED** that Order No. 8075864 be **MODIFIED** to reduce the likelihood from "Reasonably Likely" to "Unlikely."

It is **ORDERED** that Order No. 8079224 be **MODIFIED** to reduce the level of negligence from "Reckless Disregard" to "High."

It is **ORDERED** that Order Nos. 8079178 and 8075906 be **AFFIRMED** as written.

In its decision, the Commission did not reach the following modifications I ordered in my original decision to Order Nos. 8079179, 8075863, 8075864, 8075874, and 8079224, which are reiterated as follows:

It is **ORDERED** that Order No. 8079179 be **MODIFIED** to reduce the level of negligence from “Reckless Disregard” to “Moderate.”

It is **ORDERED** that Order No. 8075863 be **MODIFIED** to reduce the likelihood from “Reasonably Likely” to “Unlikely” and to remove the “S&S” designation.

It is **ORDERED** that Order No. 8075864 be **MODIFIED** to remove the “S&S” designation.

It is **ORDERED** that Order No. 8075874 be **MODIFIED** to reduce the likelihood from “Reasonably Likely” to “No Likelihood,” to reduce the level of injury expected from “Lost Workdays Or Restricted Duty” to “No Lost Workdays,” to reduce the number of miners affected from “5” to “0,” and to remove the “S&S” designation.

It is **ORDERED** that Order No. 8079224 be **MODIFIED** to reduce the likelihood from “Reasonably Likely” to “Unlikely,” to reduce the level of injury expected from “Fatal” to “Lost Workdays or Restricted Duty,” and to remove the S&S designation.

WHEREFORE, it is further **ORDERED** that Brody Mining **PAY** a total penalty of \$85,000.00 within forty (40) days of the date of this Decision on Remand.¹⁴

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

¹⁴ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 29, 2017

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

v.

SOLAR SOURCES, INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2017-0052
A.C. No. 12-02372-422572

Mine: Antioch Mine

DECISION DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The docket involves three citations, with each relating to an accident which occurred on July 25, 2017 when a miner fell nearly 14 feet, while trying to exit the cab of the equipment he had been operating. The Secretary has filed a motion to approve settlement. The originally assessed overall amount, as set forth in the Secretary of Labor's Petition for the Assessment of a Penalty, was \$77,396.00, an amount derived in large measure through MSHA's special assessment provision to one of the three citations. The proposed settlement is \$13,644.00, which is more than an 82% penalty reduction.

Here, the Secretary simply discarded the special assessment of its client, MSHA, and reverted to the Part 100 regular assessment formula to arrive at the \$13,644.00 figure. However, the Secretary provided *no facts* to support the change. Borrowing from its tack in settlements of all stripes, to wit, the Secretary of Labor need not explain its settlements to anyone, he now extends this authoritarian approach to his client's special assessments. This attitude may come as a surprise to Congress, as it would seem that august body does not include statutory provisions idly, especially where that legislative branch of government provided, regarding settlements, that "[n]o proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). To be clear, this matter *is* before the Commission.

In view of the fact that the Secretary's 82% reduction offers no facts to support its settlement – indeed, the Secretary expressly refused to provide facts requested by the Court, the settlement motion is **DENIED**. The Secretary is directed to make himself available for a conference call, so that this matter may be set for a prompt hearing.

Background

As noted, three Section 104(a) are involved in this docket. Citation Nos. 9102709 and 9102711 are settled at the amounts originally proposed – each at \$4,548.00. However, the other citation, No. 9102710, was specially assessed at \$68,300 and now the Secretary seeks to have that citation reduced to the same \$4,548 assessed for the others. Thus, for the one specially assessed citation, the reduction is more than 93%.

Before focusing on the citation involving the 93% reduction, it is important to appreciate the nature of the other two citations because they are of a piece, as they all relate to the same piece of equipment. Citation No. 9102709 speaks to

[a] handrail chain with defects affecting safety [which] was not corrected before equipment was used on the company number 1199 end dump in the 001 pit. An accident occurred on 7/8/2016 in which a miner fell through the chain and caused it to break. The miner fell 13 feet and 10 inches to the ground. The handrail chain has severe corrosion from rust and a minimum of 4 links are corroded together and are no longer flexible links.

Citation No. 9102709.

So too, for Citation No. 9102711, the same piece of equipment was involved. That citation asserted,

[e]quipment defects affecting safety were not recorded on 7/7/16 2nd shift. Defects were reported to a mechanic but were not recorded in the pre op record book. The pre op record book shows no defects for the shift. The defects are in the form of a corroded handrail chain that has severe rust and thin links that provides fall protection from a miner on the catwalk of the end dump on the company number 1199.

Citation No. 9102711.

The specially assessed citation, No. 9102710, a section 104(a) citation, citing 30 C.F.R. § 77.1101(c), and issued on 7/25/2016, asserts that

[p]lans for escape and evacuation do not include proper maintenance of adequate means for exit of all areas where persons are required to work or travel including buildings and equipment and in areas where persons normally congregate during the work shift. An accident occurred on 7/8/2016 where a miner was attempting to get out of the cab on company number 1199 end dump when a rope tied from the cab to the mirror impeded his exit and caused him to lean against a chain which broke and allowed him to fall 13 feet and 10 inches to the ground. The rope was 57 inches to 59 inches high across the entire 14 inch catwalk. A CB antenna cord

is routed along the catwalk that also creates a tripping hazard when accessing the ladder on the front of the end dump.

Citation No. 9102710.

The issuing inspector marked the citation as significant and substantial, of moderate negligence, with an injury reasonably expected to result in lost workdays or restricted duty. *Id.* As noted, the injury was marked as “occurred.” *Id.*

An extension was allowed so that the operator could make modifications to its plan and resubmit it to MSHA and, on 8/02/2016, the operator having submitted a modified plan, the citation was terminated.

The Secretary’s Motion

The Secretary’s Motion acknowledges, as it must, that “The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.” Motion at 2.

After first proclaiming that in settlements he need not provide any facts to the Commission,¹ the Secretary then “presents the following information in support of the penalties agreed to by the parties”

Citation No. 9102710² – The \$4,548 penalty is appropriate for this citation because there are factual and legal issues in dispute. The citation was issued in response to a non-fatal accident at Respondent’s Antioch mine. A miner fell from a catwalk on an end dump due to an obstruction on the catwalk and a defect in a corroded handrail chain. Respondent asserts the cited standard is not applicable to an end dump because catwalks on an end dump cannot be considered areas where persons work or travel, as those terms are used in the standard and in practice. Respondent also asserts that the special assessment for the citation was not justified. The Secretary asserts that the citation is valid as written, but agrees that *the facts* do not support the special assessment and the citation should have been regularly assessed pursuant to Part 100. In light of the parties’ interests in settling

¹ As with virtually all of his settlement motions, the Secretary’s initial, fact-free, position is repeatedly invoked that *he* has weighed the matter, considered the cost of going to trial, formed the belief that *he* has maximized his prosecutorial impact, and settled the matter, which in *his sole judgment*, is on appropriate terms, and which ends with his unusual conclusion that *even if he won at trial*, and *even if the judgment were greater than the settlement*, such a result would not necessarily be a better outcome. Motion at 2-3.

² The first page of Citation No. 9102710 was missing from the file and the Court then instructed the Secretary to provide that document. That missing page has now been inserted into the official file. Also, the official file contained a citation, number 9102712, which is not part of this docket, but perhaps could have been because it was issued to the same mine on the same date as the other three citations.

this matter amicably without further litigation and in recognition of the nature of the citation and the uncertainties of litigation, the parties wish to settle the matter as follows: (a) The negligence and gravity determinations for this citation are unchanged and remain as issued. (b) Removing the special assessment from the citation, and applying the penalty factors found in Part 100, the penalty assessment for the citation, as modified herein, is reduced from \$68,300 to \$4,548. Respondent agrees to pay the total, revised penalty of \$13,644, and agrees that Citation Nos. 9102709 and 9102711 are not modified by this agreement.

Motion at 3-4 (emphasis added).

On November 6, 2017, the Court, through its Attorney Advisor, advised the parties that it was “reviewing the settlement motion for this matter [and] would like to look at a copy of the inspector’s notes, and any photographs that may be included with those notes.” Court’s November 6, 2017 E-mail to the Parties. The Secretary responded the same day that he “respectfully declines to provide the requested documents and rests on his settlement motion.” Secretary’s November 6, 2017 E-mail.

The Court then advised the parties that it was “unable to properly review the settlement motion until the inspector’s notes and the accompanying photographs are sent to [the Court]. If the Secretary continues to decline submitting these materials, [the Court] will simply issue a published denial of the settlement motion.” November 13, 2017 Email From the Court To the Parties. The Secretary responded that he “has reconsidered the Court’s request for the inspector’s notes and photographs, but still respectfully declines to provide those documents. We rest on the settlement motion filed in this matter.” November 15, 2017 Response From the Secretary.

MSHA’s Special Assessment

One starts with the premise that MSHA’s invoking the Special Assessment process under 30 C.F.R. § 100.5 is both a thoughtful and fact-based analysis. If either of these presumptions are not true, then the entire special assessment process is suspect. In this case, MSHA presented its “Narrative *Findings* for a Special Assessment.” Petition Ex. B (emphasis added) (“Narrative”). That Narrative begins by noting that MSHA can elect to waive its regular assessment formula, “if it deems that *conditions* concerning the violation warrant.” *Id.* Here, the Narrative advises “MSHA *carefully evaluated* the *conditions cited* and the inspector’s *relevant information and evaluation*. The proposed penalty reflects the results of an appraisal of *all the facts presented*.” *Id.* (emphasis added).

Of the three citations involved in this docket, only one, Citation No. 9102710, was specially assessed. The mine was cited for a violation of 30 C.F.R. §77.1101(c) “because the plans for escape and evaluation did not include proper maintenance of adequate means for exit

from all areas where persons are required to work or travel including buildings and equipment and in areas where persons normally congregate during the work shift.”³ *Id.*

The Narrative then addressed the gravity, stating that it “was considered serious and the violation contributed to the cause of a fall of person accident. A mobile equipment operator received serious injuries resulting from an accidental fall from a haul truck.” *Id.*

Speaking to the negligence, the Narrative related that the

violation resulted from the operator’s moderate degree of negligence. A serious accident occurred which resulted in non-fatal injuries to an equipment operator who fell from a Euclid 3500 haul truck. The equipment operator was attempting [to] exit the cab of the haul truck when a rope, which was tied from the cab to the mirror, impeded his exit. The rope was approximately 57 inches to 59 inches high and spanned the 14 inch catwalk. The miner was ducking underneath the rope in order to dismount the truck when the rope caught the miner’s hard hat. While trying to retrieve his hard hat, the operator leaned against a badly corroded handrail safety chain which subsequently broke and allowed him to fall 13 feet and 10 inches to the ground.⁴ A CB antenna cord was also routed along the catwalk that could have created a tripping hazard for the operator as he attempted to exit the haul truck via the access ladder on the front of the haul truck. The severity of the corrosion observed on the handrail safety chain suggested that the corrosion had existed for an extended period of time and management knew or should have known of the hazardous condition and made no effort to correct the violation. . . . [t]he violation was cited during an investigation of a serious fall of person accident that occurred at the [Antioch Mine] on July 8, 2016.

Id.

Discussion

The Code of Regulations’ Provision addressing special assessments is, to put it mildly, concise, stating “*MSHA* may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment,” and “[w]hen *MSHA* determines that a special

³ The language employed in the Special Assessment tracks that of the cited provision, section 77.1101 at subsection (c), which provides: “Plans for escape and evacuation shall include the designation and proper maintenance of adequate means for exit from all areas where persons are required to work or travel including buildings and equipment and in areas where persons normally congregate during the work shift.” 30 C.F.R. § 77.1101(c).

⁴ To visualize a fall of 13 feet 10 inches, think of falling into the deep end of an empty swimming pool. Typically such pools are not more than 10 feet deep. Then add nearly another 4 feet and you will get a sense of the magnitude of the fall. In this instance, the official file does not reveal the extent of the miner’s injuries, but it does note that a month after the fall the miner had not returned to work. Official file at 18; related Citation 9102712-01, August 24, 2016.

assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a). All findings shall be in narrative form.” 30 C.F.R. §100.5 (a), (b) (emphasis added).

However, the process for approving a special assessment is noteworthy. Beginning with the inspector who issues a violation, if appropriate, that individual completes part of a special assessment form and the operator is notified that a special assessment may ensue. Next, upon the inspector’s supervisor’s review of the information in the form, it is sent to the District Office. At that point the information is in suspension for ten days. During that interval the mine may request a “Manager’s conference.” Requested or not, the Assistant District Manager of Inspections then reviews the matter. Following that, the District Manager makes a recommendation about whether to proceed with a special assessment. It does not end there, because the Administrator then signs the special assessment form together with that individual’s recommendation as to the proper course of action. *See*, MSHA’s Program Policy Manual, Volume III, 100.5; MSHA’s Special Assessment Review Form, 7000-32, Revised August 2006, and Chapter 4 of the General Coal Mine Inspection Procedures and Inspection Tracking System Handbook.

Settlement motions, whether the proposed penalties are initially derived via the regular or special assessment process must be supported by facts. In this instance, the Secretary’s Motion provides no facts and therefore it must be denied. Instead, the Secretary employs a “he decides – the Commission follows” approach to Mine Act settlement motions. Associated with the lack of supporting facts, as part of its Congressionally delegated responsibility under 30 U.S.C. § 820(k), it is within the Court’s prerogative to require the Secretary to submit the MSHA’s inspector’s notes and photos, if the Court believes that such information is necessary in determining if a compromise or mitigation in a settlement motion is appropriate.

It is important to note that this was not an instance when there was no special assessment and the Court essentially elected to create one. Here, following the fairly elaborate process, a special assessment was issued. Thus, this matter is quite distinct from the situation in *Secretary v. Mechanicsville Concrete*, which involved an instance when a judge made an “S&S” finding, *sua sponte*, though the citation made no such allegation. 18 FMSHRC 877 (June 1996).

It is also clear that, special assessment or not, all settlement motions are subject to review by the Commission, and in the first instance this review is by the administrative law judge to whom the docket has been assigned. As Judge Margaret Miller noted in *Teichert Aggregates*, 39 FMSHRC 1098 (May 2017),

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges ‘authority to assess all civil penalties provided in [the] Act.’ 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The Secretary calculates penalties using the penalty regulations set forth in 30 C.F.R. § 100.3 or following the guidelines for special assessments in 30 C.F.R. § 100.5. When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary then petitions the Commission to assess the

penalty. 29 C.F.R. § 2700.28. Commission judges are not bound by the Secretary's penalty regulations or his special assessments. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion 'bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme.' *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

39 FMSHRC 1098, 1103. *See also, Warrior Coal*, 39 FMSHRC 509, 526 (March 2017)(ALJ), *The American Coal Co.*, 2017 WL 4230949, at *3 (Sept. 2017)(ALJ).

In disputing the Commission's role in reviewing settlements, the Secretary has frequently invoked his claim that there be "transparency" with the process. However, the Secretary apparently employs what can be generously described as an unusual construction of that term, as he declines to show the Court the notes made and any photographs taken concerning this citation. One would think that, especially in instances where a 93% reduction from the initial proposal is being advanced, the Secretary would be, not merely willing, but anxious and insistent to fully, and yes, transparently, show the inspector's notes and photographs associated with the alleged violation. Further, the Secretary's approach seems to turn the attorney client relationship on its head. Typically, counsel advises, rather than directs, a client, especially where, as here, the client, MSHA, is charged in the first instance with protecting the safety and health of miners.

It seems antithetical to the mission of MSHA when, after thoughtfully employing the special assessment process, a process which, as noted, ultimately requires approval by the Administrator, that without explanation, the Secretary may simply discard that process, provide *no* new facts, and essentially say "nevermind," while simultaneously not changing any of the underlying findings in the citation. The effects of such a practice would be inherently discouraging to inspectors who, in carrying out their enforcement obligations in the name of protecting miners' safety and health, follow the process in place and, by that process, where the facts warrant it, urge that a special assessment be employed. It must also be discouraging to those at the management level who then apply that process, thinking in good faith that it is not a useless exercise. Further, in light of the thoughtful process employed by MSHA in determining that the conditions found warrant a special assessment, the Secretary's autocratic approach, telling the Court that – *no, you can't see the inspector's notes nor any photographs pertaining to the violation* – is antithetical to the overriding objective of the Mine Act.

Accordingly, based on the foregoing reasons, the Secretary's Motion to Approve Settlement is **DENIED**. This case is now to be set for a prompt hearing. Alternatively, the Secretary may submit a properly supported motion, along with the requested photographs and inspector's notes for the Court's review.

SO ORDERED.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 29, 2017

THOMAS LEE KREIMIER,
Complainant

v.

COEUR ALASKA, INCORPORATED,
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEST 2017-80-DM
WE-MD-2016-12

Kensington Mine
Mine ID: 50-01544

DECISION

Appearances: Thomas Lee Kreimier, P.O. Box 90, Hot Sulphur Springs, Colorado, *pro se*;

Donna Pryor, Esq., Husch Blackwell LLP, Denver, Colorado, for Respondent.

Before: Judge Bulluck

This case is before me upon a Complaint of Discrimination (“Complaint”) filed by Thomas Lee Kreimier against Coeur Alaska, Incorporated (“Coeur Alaska”), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815(c). Kreimier contends that Coeur Alaska unlawfully discharged him on May 9, 2016, in retaliation for having reported a safety breach to management. Coeur Alaska denies that it discriminated against Kreimier, and asserts that he was discharged for sleeping on the job and ignoring his job responsibilities.

On July 11, 2016, Kreimier filed the Complaint with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2).¹ In a letter to Kreimier dated September 28, 2016, MSHA notified him that, based on its investigation of the allegations contained in his Complaint, it had concluded that a

¹ 30 U.S.C. § 815(c)(2) states, in relevant part:

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

violation of section 105(c) had not occurred, and advised him of his right to proceed on his own. Kreimier, *pro se*, initiated this proceeding before the Commission on November 2, 2016, under section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).²

A hearing was held in Juneau, Alaska. Kreimier testified on his own behalf, Coeur Alaska called six witnesses to testify, and the parties filed post-hearing briefs. For the reasons set forth below, I conclude that Kreimier has established a *prima facie* case of discrimination, that Coeur Alaska has successfully rebutted Kreimier's *prima facie* case, and that, ultimately, Kreimier has failed to prove that he was terminated, in any part, for his protected activity.

I. Factual Background

Coeur Alaska operates the Kensington Mine, an underground gold mine employing approximately 320 miners in 2016, operating on 12-hour shifts, 7 days a week, and accessible from Juneau, Alaska by a 45-mile commute by boat and bus. Tr. 33-34, 136, 192. The mining process at Kensington begins underground with the extraction of ore, which is hauled to the surface and processed into pyrite concentrate, then sold to other plants for gold extraction. Tr. 136-37.

With over 36 years of mining experience, Kreimier was hired by Coeur Alaska on May 17, 2010 as a mill operator, and two years later became a mill control operator/lead man, a position he held until May 9, 2016. Tr. 9, 24-28; Ex. C-4 at 5. He worked as an hourly employee according to a five-week cycle: two weeks on the 12-hour day shift, followed by one week off, then two weeks on the 12-hour night shift. Tr. 33. Kreimier's office, the control room of the mill building, overlooked the entire pyrite concentration process. Tr. 29-30. His core duties included monitoring two radios tuned to several frequencies and seven computers displaying equipment and processes that he was able to manipulate, as needed; he also had oversight responsibility for five to six mill workers in the absence of management on duty. Tr. 30-33, 140-41, 205, 231. More broadly, Kreimier served as the communications hub for the mine, a capacity which included responsibilities during emergencies such as coordinating medical care and notifying underground miners to evacuate. Tr. 141, 199.

Kreimier's immediate supervisors alternated between Dennis Sullivan, Scott Fisher, and Adam Finkbonner, depending upon the shift; his second-line supervisor was senior supervisor of operations Jody Karasch; his third-line supervisor was process superintendent Roy Lee; and, at the top of the hierarchy was vice-president and general manager Wayne Zigarlick, who oversaw the maintenance, safety, environmental, human resources, and process management departments. Tr. 35-37, 43, 135, 192; Ex. C-4 at 5.

² 30 U.S.C. § 815(c)(3) states, in relevant part:

If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission. . . ."

The circumstances underpinning Kreimier's Complaint emanated from an event occurring during the day shift on March 23, 2016, when Karasch and Kreimier were on duty and the ball crusher could not be started. Tr. 38-39; Ex. C-4 at 13. Karasch verbally instructed Coeur Alaska employee James Fortune to jump over a locked, three-foot-high gate to retrieve a key that, when inserted in the main circuit breaker, would start the crusher. Tr. 39-42. Fortune complied, and the crusher soon resumed normal operation. Tr. 42. The next day, Fortune reported the ball-crusher incident to Roy Lee, and quit the job for reasons unclear from the record, but, by reasonable inference, reasons that involved some degree of animosity between Fortune and Karasch. Tr. 144, 184-85. Lee suspended Karasch with pay and, pending a three-week internal investigation that concluded in a finding that no safety breach had occurred, Karasch was returned to duty. Tr. 70, 144-45, 185. A few days after Fortune had reported the ball-crusher incident, Kreimier also reported it to Lee, and learned of Karasch's suspension and the investigation at that time. Tr. 44-45, 47, 184; Ex. C-4 at 8.

At some point during Karasch's suspension, Kreimier and process trainer Dustin Peltier got into a verbal altercation concerning a work-related matter unrelated to the ball-crusher incident, in the presence of maintenance supervisor Mike Hegna and the chief lab chemist. Tr. 56-60, 66, 234-35. On March 26, Peltier reported the incident by email to Lee, complaining that Kreimier had been disrespectful to him and Hegna. Tr. 235; Ex. R-2 at 6. Subsequently, on March 27, geologist Theresa Jeske lodged another complaint against Kreimier, also alleging coworker disrespect. Tr. 146-47; Ex. R-2 at 5. Based on these allegations and prior incidents of disrespectful conduct in his personnel file, Kreimier was issued a Final Written Warning, which put him on notice that any further offenses might result in his termination. Tr. 146-48; Ex. R-2 at 4.

During the day shift on May 8, Coeur Alaska's blasting contractor, Redpath, in the process of developing a new portal, made several routine, but unsuccessful, attempts by radio to contact Kreimier so that he could give the "all clear" for an imminent blast. Tr. 141-43; Ex. R-2 at 2. Peltier, who was also monitoring the radio station when Redpath was attempting to contact Kreimier, walked over to the mill control room and, as a result of observing Kreimier apparently sleeping at the computer monitors, photographed him with his mobile phone. Tr. 150, 237-40; Ex. R-1; Ex. R-2 at 2. On the following shift, May 9, Wayne Zigarlick, enroute to a meeting in the mill building and passing by the control room, also observed Kreimier apparently asleep, and reported the incident to Lee. Tr. 154-55, 194-95. Later that day, Zigarlick, Lee, and human resources manager Christina Gilbert met to discuss the matter of Kreimier sleeping at his desk and, in accord with Lee and Gilbert's recommendations, Zigarlick decided to terminate Kreimier, effective immediately. Tr. 83-85, 155-56, 193, 196, 216-19; Ex. R-2 at 1.

II. Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complainant must prove by a preponderance of the evidence "(1) that he engaged in a protected

activity, and (2) that the adverse action was motivated in any part by the protected activity.”³ *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev’d on other grounds sum nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The Commission has noted that “direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds sub nom Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence may include: 1) coincidence in time between the protected activity and the adverse action; 2) knowledge of the protected activity; 3) hostility or animus toward the protected activity; and 4) disparate treatment. The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* at 2510. The Commission has also held that an “operator’s knowledge of the miner’s protected activity is probably the single most important aspect of a circumstantial case” and that “knowledge . . . [may] be proved by circumstantial evidence and reasonable inferences.” *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999).

Once the complainant has established a *prima facie* case, “[t]he operator may attempt to rebut [it] by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity.” *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). The operator may also affirmatively defend its actions by proving, by a preponderance of the evidence, that it was motivated by both the miner’s protected and unprotected activities, and would have taken the adverse action for the unprotected activity alone. *Id.* at 818. The Commission has explained that an affirmative defense should not be “examined superficially or be approved automatically once offered.” *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must “determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.” *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). Indicia of legitimate non-discriminatory reasons for an employer’s adverse action include evidence of the miner’s unsatisfactory work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Id.*

At this stage, the complainant has the opportunity to demonstrate that the operator’s non-discriminatory reason for its actions is a mere pretext for discrimination. *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). The Commission has explained that “pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator’s normal business practices.” *Id.* However, the Commission has also stated that “[its] judges should not substitute for the operator’s business

³ 30 U.S.C. § 815(c)(1) states, in relevant part:

No person shall discharge or in any manner discriminate . . . against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this chapter, 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 of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this chapter.

judgement [their] views on ‘good’ business practice.” *Chacon*, 3 FMSHRC at 2516. Finally, the Commission has noted that the ultimate burden of proving discrimination always remains with the complainant. *Robinette*, 3 FMSHRC at 818 n.20.

A. Prima Facie Case

Kreimier contends that he engaged in protected activity when he reported the ball-crusher incident to Roy Lee.⁴ Tr. 69. Coeur Alaska counters that Kreimier’s report is not protected because he reported the incident only after Lee initiated a conversation with him, Lee already knew of the incident from Fortune’s report, and the investigation had already begun. Resp’t Br. at 11-13. Regardless of who initiated the dialogue between Kreimier and Lee, or who first reported the incident to Lee triggering the investigation, it is uncontested that Kreimier did report the incident and, while his report may be redundant, it is, nonetheless, protected by the Act. *Sec’y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1922 (Aug. 2016) (citing *Sec’y of Labor on behalf of Jones v. Kingston Mining, Inc.*, 37 FMSHRC 2519, 2523 n.3 (Nov. 2015)) (“[a]lthough other miners and foremen may have raised similar concerns, [a miner’s] safety complaints are no less protected as a result.”). Therefore, Kreimier has established that he engaged in protected activity when he reported Karasch to Lee.

It is clear that Kreimier’s termination constitutes an adverse action and, as is most often the case, the circumstantial evidence involved in Kreimier’s discharge must be examined in order to determine whether Coeur Alaska was motivated, in any part, by his protected activity.

The Commission has found that a discharge occurring four months after protected activity is sufficiently coincidental in time to support a finding of discriminatory motive. *Riordan*, 38 FMSHRC at 1924; *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000) (finding that a four-month gap between protected activity and termination was probative of a discriminatory nexus). In this case, the temporal nexus is even stronger, since Coeur Alaska discharged Kreimier less than seven weeks after he had reported Karasch and the ball-mill incident.

Zigarlick’s decision to terminate Kreimier was the result of consultation with Lee and Gilbert. By Lee’s own account, Kreimier reported Karasch’s alleged safety breach directly to him, and Lee recommended Kreimier’s termination to Zigarlick. Tr. 155-56, 196. Since Lee’s input obviously influenced Zigarlick, I find it reasonable to impute Lee’s knowledge of Kreimier’s protected activity to Zigarlick. See *Turner v. Nat’l Cement Co. of California*, 33 FMSHRC 1059, 1068 (May 2011) (finding that a supervisor’s knowledge of an employee’s protected activity can be imputed to an upper-level decision-maker if the supervisor influenced the decision-maker’s termination decision); *Metric Constructors, Inc.*, 6 FMSHRC 226 (Feb. 1984). Accordingly, I find that Kreimier has established a *prima facie* case based on the temporal nexus between his safety complaint and termination, and Coeur Alaska’s knowledge of his protected activity.

⁴ At hearing, Kreimier hinted that he considered the heated discussion in Peltier’s office to be protected also, but ultimately retreated from this contention. Tr. 67, 69.

B. Coeur Alaska's Rebuttal of Kreimier's Prima Facie Case

Coeur Alaska contends that it terminated Kreimier for violating its policy prohibiting sleeping on the job, an action that it would have taken even if Kreimier had no prior disciplinary record, as demonstrated by its termination of other employees who had clean disciplinary records, for sleeping on duty. Resp't Br. at 13-14, 17. In the alternative, it argues, even if it has failed to establish that it was in no way motivated by Kreimier's protected activity, it would have terminated Kreimier solely for sleeping on the job. Resp't. Br. at 22.

Zigarlick, Lee, and Gilbert all testified that Kreimier was fired because he had been found sleeping on the job. Tr. 156, 196, 219-20. Lee testified that as a result of Peltier informing him that he had observed Kreimier asleep in the control room and showing him a photograph of Kreimier appearing to be asleep, he immediately initiated an investigation and solicited statements from Redpath and Dennis Sullivan. Tr. 152, 167. It was during the next shift, Lee explained, in the midst of his investigation, that Zigarlick reported to him that, while walking past the control room, he had also witnessed Kreimier sleeping. Tr. 154, 194. Shortly thereafter, Lee testified, he received the written statements of Redpath and Sullivan, which corroborated Peltier's account that Kreimier had been unresponsive to Redpath's radio calls. Tr. 155-56; Ex. R-2 at 2. Consequently, Lee stated, he recommended that Zigarlick terminate Kreimier. Tr. 156.

Zigarlick, Lee, and Gilbert also testified to Coeur Alaska's long-standing policy prohibiting "[s]leeping or lying down on duty or otherwise neglecting the job," and Gilbert stated that it was in effect in May of 2016 and is included in the Employee Handbook. Tr. 156, 193, 208; Ex. R-8. Gilbert noted that Kreimier had certified, by his signature in 2010 and 2016, that he had received and read the Handbook. Tr. 210-11; Ex. R-4 at 1, 4. She further testified that Coeur Alaska follows a progressive discipline policy, i.e., disciplining miners according to a sliding scale of severity ranging from verbal coaching to termination and that, for sufficiently egregious misconduct, management may elect to skip intermediate steps to terminate a miner lacking prior discipline. Tr. 208-09; Ex. R-8 at 4-5.

Lee recalled that he and former human resources manager Terry Lloyd had spoken to Kreimier in 2014 about Kreimier's disrespectful treatment of his coworkers, and noted that Kreimier's personnel file had contained two instances of verbal coaching. Tr. 146-47, 156; Ex. R-2 at 7-8; Ex. R-6. In his opinion, Kreimier's behavior had improved after he had been disciplined, but only until he received emails from Peltier and Theresa Jeske on March 26 and 27 of 2016, respectively, complaining about unrelated instances in which Kreimier had treated them disrespectfully. Tr. 146-47; Ex. R-2 at 5-6. These accounts of inappropriate conduct, Lee stated, formed the basis of the Final Written Warning issued to Kreimier on March 28. Tr. 147-48; Ex. R-2 at 4.

Lee testified that Coeur Alaska terminated Cody Cowart for sleeping on the job, Shawn Trulove for sleeping on the job and defacing company property, and Dennis Lorange for failing to report Cowart, whom he knew to be sleeping on duty. Tr. 158-60. Gilbert testified that Coeur Alaska fired Nathan Lipski and Corey Piper, also for sleeping on duty. Tr. 211-13. According to Gilbert, when asked about Trulove, Lipski, and Piper, all had clean disciplinary records. Tr. 213-14; R-7. In Kreimier's case, Gilbert testified credibly, while she considered Kreimier's prior

disciplines, she would have recommended his termination had his record been clean because sleeping on the job is a terminable offense. Tr. 219-20.

Based on the strength of the credible evidence of Kreimier sleeping on the job, as well as Coeur Alaska's prohibition against sleeping on duty and evidence of its uniform enforcement of that policy, I find that Coeur Alaska has successfully rebutted Kreimier's *prima facie* case.

C. Pretext

Kreimier argues, in essence, that Coeur Alaska's stated justification for terminating him is pretextual based on a conspiracy between Peltier, Karasch, and Lee. In advancing this theory, Kreimier argues that the operator lacks actual proof that he was sleeping, and that he was subjected to disparate treatment. Comp. Br. at 1-2.

Kreimier contends that Lee, Karasch, and Peltier were friends, and that they colluded to terminate him because he had reported Karasch's safety breach. Tr. 84; Comp. Br. at 2. Lee and Peltier, the two who testified, confirmed their friendship outside of the job. Tr. 174, 245. Kreimier's contention includes the suggestion that Peltier falsely accused him of sleeping on duty, and that the false accusation that he had been disrespectful during their heated discussion is responsible for the trumped-up Final Written Warning. Peltier's motivation in reporting Kreimier for sleeping or being disrespectful, or his animus toward Kreimier, is inconsequential to this analysis because Peltier is not a supervisor, had no authority to affect Kreimier's employment, and had no involvement in the decision to terminate him. Also, it is noteworthy that Kreimier's contention that Peltier was out to get him fails to account for the overwhelming evidence of Kreimier sleeping, or the fact that Jeske's similar complaint formed the basis, in equal part, of the Final Written Warning. There is also no indication that Karasch was involved in reporting Kreimier for sleeping on either shift, or in the circumstances giving rise to the Final Written Warning, or in the decision to fire Kreimier. Finally, the record is simply bereft of any evidence that Karasch's friendship with Lee motivated Lee to recommend Kreimier's discharge, or otherwise conspire to get rid of Kreimier in retaliation for reporting the ball-crusher incident.

Kreimier points out that Peltier's photograph does not show that his eyes are closed, and that no one entered the mill control room to check whether he was sleeping or whether the radio was tuned to channel 7, the frequency on which Redpath communicates with mill control. Comp. Br. at 2. The photograph depicts Kreimier seated at his work station, facing away from the computers with his head lowered and resting in the palm of his hand; indeed, it does not show his eyes or the radio. Ex. R-1 at 2. However, Peltier testified credibly that he saw Kreimier's eyes closed when he took the photograph from his view through the window, and that when he entered the control room thereafter, Kreimier "came about." Tr. 238-39. In addition, according to Peltier and health and safety manager Jeff Murray, Kreimier is required to monitor channel 7. Tr. 205, 231. It is notable that Peltier's eyewitness account is consistent with Redpath's and Sullivan's independent reports of Kreimier's unresponsiveness, and also Zigarlick's observation of Kreimier sleeping on the next shift. Even Kreimier acknowledged that he may have "appeared" to be asleep in the photograph. Tr. 120. Accordingly, based on eyewitness accounts, the photograph, and the internal investigation, I find that Kreimier was sleeping and, therefore,

that it was reasonable for Coeur Alaska to believe that he had violated its policy, which, incidentally, also prohibits “neglecting the job.”

Finally, Kreimier asserts that he was treated more harshly than similarly situated employees under similar circumstances, by referencing employees who were not disciplined for sleeping on the job. Comp. Br. at 2. For example, he testified that he had seen Karasch and Lucas Johnson asleep, that Karasch had told him that he had awakened Trevor Sutcliffe multiple times, that James Fortune had been caught sleeping, that he had heard the crew tease Sunia Klapi for falling asleep, and that these employees were not disciplined. Tr. 114-18, 164. However, Kreimier’s self-serving testimony is deeply flawed because it lacks corroborative evidence, either documentary or testimonial, considering that he called no witnesses to testify and introduced no probative exhibits. In fact, Kreimier only referenced these comparison employees as an afterthought at the end of his testimony, pursuant to questioning from the bench about the bare allegations in his Complaint. He even conceded that he did not report the alleged sleeping incidents to management, nor was he able to establish that they had been reported by anyone else. Tr. 114-18. The evidence, on the other hand, makes clear that where Coeur Alaska has found employees asleep at the switch, it has terminated them.

Having reviewed all the evidence, the record in its entirety shows that Kreimier was sleeping while on duty during two consecutive shifts, conduct that the operator has repeatedly found sufficiently egregious to merit immediate termination, notwithstanding its progressive discipline policy. It is clear that Coeur Alaska was motivated by Kreimier’s sleeping on the job, alone, and that Kreimier has failed to show that its reasons were pretextual, or that his reporting of Karasch’s alleged safety breach in any way motivated his termination.

ORDER

ACCORDINGLY, it is **ORDERED** that the Complaint of Discrimination of Thomas Lee Kreimier against Coeur Alaska, Incorporated, is, hereby, **DISMISSED**.

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

Distribution:

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December 15, 2017

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

v.

N.J. WILBANKS CONTRACTOR, INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2012-275-M
A.C. No. 09-01204-278900 (W276)

Mine: Warren County Quarry

DECISION AND ORDER

Appearances: Jean C. Abreu, Esq., Shelly Anand, Esq., and Sophia Haynes, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for Petitioner;

Douglas Flint, Esq., and Kristyn Atkinson, Esq., Flint, Connolly & Walker, LLP, for Respondent.

Before: Judge L. Zane Gill

This proceeding is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. § 815. This case involves one section 104(d)(1) citation and two section 104(d)(1) orders issued by the Secretary to Respondent N.J. Wilbanks Contractor, Inc. (“N.J. Wilbanks”).

I. STATEMENT OF THE CASE

On August 25, 2010, the Secretary issued Citation No. 8546331 and Order Nos. 8546333 and 8546335 following MSHA’s investigation into a hazard complaint lodged against N.J. Wilbanks. Citation No. 8546331 and Order Nos. 8546333 and 8546335 each allege a violation of 30 C.F.R. § 56.14101(a)(1) for failing to have a functioning service brake system on three separate Caterpillar 631E scrapers.¹ The Secretary proposed a specially-assessed penalty of \$26,600.00 for each violation for a total combined proposed penalty of \$79,800.00.

On April 15, 2016, the Secretary filed a Motion for Adverse Inference and Exclusion of Testimony Due to Respondent’s Spoliation of Evidence. (Mot. at 1–14) The Secretary alleges

¹ Section 56.14101(a)(1) provides that “[s]elf-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.” 30 C.F.R. § 56.14101(a)(1).

that Respondent failed to produce and possibly destroyed inspection logs noting the condition of the mobile equipment involved in this matter. (*Id.* at 2) The Secretary states that the company's superintendent showed the inspection logs to MSHA Inspector Raymond Dubics at the time of the inspection. (*Id.* at 3) The Secretary requests that an adverse inference be drawn against Respondent with respect to the content of the inspection logs and that any testimony from Respondent's witnesses regarding the condition of the mobile equipment on or before the date of the inspection be excluded from the record. (*Id.* at 4) Respondent offered its response to the motion at hearing, asserting that Respondent was unaware of the existence of such logs, that the Secretary delayed in requesting these logs, and that the adverse inference requested by the Secretary would actually support Respondent's case. (Tr. 14:8–16:9) At hearing, I informed the parties that I would issue my ruling on the motion with the decision. (Tr. 22:8–24:15) For the reasons provided below, the Secretary's motion is **DENIED**.²

I held a hearing on April 19, 2016, in Atlanta, Georgia. The Secretary presented testimony from N.J. Wilbanks President Chris Wilbanks and MSHA Inspector Raymond Dubics. Respondent presented testimony from Chris Wilbanks and former N.J. Wilbanks Project Manager Justin Crowe. The parties each submitted post-hearing briefs and reply briefs.

II. ISSUES

For each of the three violations, the Secretary asserts that N.J. Wilbanks violated 30 C.F.R. § 56.14101(a)(1) by failing to have functioning service brakes on three Caterpillar 631E scrapers. (Sec'y Br. at 10–11) The Secretary asserts that the violations were significant and substantial ("S&S"), inasmuch as they were highly likely to result in a fatality, and a result of the

² Spoliation refers to "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Oil Equipment Co. v. Modern Welding Co.*, 661 F. App'x 646, 652 (11th Cir. 2016) (citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)). Sanctions for spoliation of evidence are intended "to prevent unfair prejudice to litigants and to insure the integrity of the discovery process." *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005). When a party does not preserve evidence in its control, a judge can draw an adverse inference that the evidence destroyed would have been unfavorable to the destroying party. *See IO Coal Co.*, 31 FMSHRC 1346, 1359 & n.11 (Dec. 2009). Excluding evidence is an extreme sanction not to be imposed absent a showing of willful deception or flagrant disregard. *Gray v. N. Fork Coal Corp.*, 35 FMSHRC 2349, 2360 (citations omitted). To determine what sanctions are warranted for spoliation of evidence, factors to consider are the extent of prejudice caused by the spoliation based on the importance of the evidence, whether that prejudice can be cured, and the culpability of the spoliator. *Oil Equipment Co.*, 661 F. App'x at 652.

Here, because the condition of the mobile equipment was the subject of MSHA's inspection and alleged violations, I find that N.J. Wilbanks had a duty to preserve the inspection logs in anticipation of litigation. However, because the MSHA inspector can testify to the content of the inspection logs, the prejudice suffered to the Secretary can be cured and does not warrant the severe sanctions requested. Respondent's inability to produce the inspection logs may be factored into my weighing of the evidence and assessing credibility in the final decision. Accordingly, the Secretary's motion is **DENIED**.

operator's reckless disregard and unwarrantable failure. (*Id.* at 12–17) In contrast, Respondent argues that the work site where MSHA issued the violations was not subject to MSHA's jurisdiction. (Resp't Br. at 8–11) Respondent further asserts that the scrapers were equipped with functioning brakes and challenges the Secretary's negligence and gravity determinations. (*Id.* at 3–8, 12–15)

Accordingly, the following issues are before me: (1) whether MSHA had jurisdiction over the work site where MSHA cited N.J. Wilbanks; (2) whether N.J. Wilbanks violated 30 C.F.R. § 56.14101(a)(1) as alleged in Citation No. 8546331 and Order Nos. 8546333 and 8546335; (3) whether the Secretary's gravity determinations are properly designated for the three violations, including the S&S designations; (4) whether Respondent's negligence for the violations is properly designated as "reckless disregard" and constitutes an unwarrantable failure; and, (5) whether the proposed penalties are appropriate.

III. FACTUAL BACKGROUND

A. N.J. Wilbank's Work at APAC Mid-South Project

On June 21, 2010, N.J. Wilbanks entered into a subcontract with general contractor Brasfield & Gorrie to perform site development work at a site owned by APAC Mid-South in Camak, Georgia. (Tr. 41:12–20, 44:15–45:9; Ex. S–3) The project was listed as the "APAC Plantation Quarry" project per Brasfield & Gorrie's contract with N.J. Wilbanks. (Ex. S–3) The location, now known as Warren County Quarry,³ would eventually be used to extract and process granite. (Tr. 64:20–65:18) Hence, owner APAC Mid-South was issued a state surface mining permit on December 15, 2009, and an MSHA Identification Number on August 25, 2010, for the site. (Exs. S–4, S–5)

N.J. Wilbanks commenced work at the Warren County Quarry site on August 15, 2010. (Tr. 45:10–21; Ex. S–3) The contracted project involved N.J. Wilbanks performing tasks such as site grading, drilling and blasting rock, and constructing dams, as well as laying down belt structures, crushers, and shakers, and hauling clean rock to designated locations. (Tr. 65:1–18; Ex. S–3) The work took approximately two years to complete. (Tr. 171:6–8)

B. MSHA Inspection: August 25, 2010

In August 2010, MSHA received a telephone complaint alleging several safety issues at the Warren County Quarry, including a broken air conditioner, defective equipment brakes, document falsification, and inadequate employee training. (Tr. 54:21–55:11) MSHA assigned Inspector Raymond Dubics to investigate the allegations. (Tr. 55:19–24) Dubics traveled to the mine on August 25, 2010, to perform an inspection and found subcontractor N.J. Wilbanks working on the property. (Tr. 55:19–56:9; Exs. S–7, S–8, S–9, S–10) Upon arriving at the site, Dubics asked for a supervisor and was directed to plant supervisor Steve Bishop. (Tr. 56:10–24)

³ In addition to Plantation Quarry, Warren County Quarry has also been referred to as Camak Quarry. (Tr. 53:23–54:2, 206:11–207:4)

Dubics explained to Bishop that MSHA received a hazard complaint and would need to inspect the site. (Tr. 57:2–12) Dubics then traveled with Bishop around the site and observed some equipment moving dirt in addition to foot traffic in the area. (Tr. 57:10–64:19; Ex. S–6) Dubics asked Bishop about their activities at the site and testified that Bishop explained that N.J. Wilbanks was building a plant to be used for mining and processing granite, which would go into operation approximately three years later. (Tr. 64:20–65:18)

Dubics informed Bishop that he needed to test the brakes on the site’s mobile equipment. (Tr. 57:5–6) Bishop allowed, but informed Dubics beforehand that he would find that the brakes on some of the equipment did not work. (Tr. 65:19–22, 66:3–5) Dubics tested all the mobile equipment on site in a slightly downhill gully, which Dubics estimated to be at a one percent grade. (Tr. 66:6–16, 68:3–23) The rest of the work site was relatively flat. (Tr. 127:21–25, 202:3–5; Ex. S–6) Dubics tested the mobile equipment empty because he was told the brakes did not work and did not want to create an additional hazard by adding a load. (Tr. 66:17–24) To conduct the tests, Dubics asked each equipment operator to apply the equipment’s brakes at the top of the gully to see if the brakes would hold the equipment on the grade. (Tr. 66:8–13)

One type of mobile equipment Dubics tested was the Caterpillar 631E scraper. (Tr. 67:1–14; Ex. S–7) N.J. Wilbanks used Caterpillar 631E scrapers to perform cut and fill operations on the land. (Tr. 171:18–23) A scraper (also called a “blade”) works by moving forward and scraping dirt inside its bowl. (Tr. 172:1–173:5) The scraper’s gate is then closed, and the bowl is raised to a leveled position. (Tr. 173:6–25) The gate is then opened, and the dirt is dropped and raked out. (Tr. 174:1–175:5) A scraper can weigh anywhere from 15 to 35 tons and typically travels at a speed of approximately six to eight miles per hour. (Tr. 80:14–81:5, 82:21–23, 176:4–7) Because of their weight, scrapers must be pushed by dozers to have enough power to move the dirt. (Tr. 175:14–176:16)

Caterpillar 631E scrapers are equipped with pedal brakes. (Tr. 129:24–130:3, 131:5–13, 177:12–14) The scrapers also come to a stop when the scraper’s bowl contacts the ground. (Tr. 175:6–8) Project manager, Justin Crowe, and N.J. Wilbanks President, Chris Wilbanks, testified that pedal brakes are not strong enough to stop scrapers carrying a load and that the only way to brake in those cases would be to drop the bowl. (Tr. 183:16–20, 225:21–226:2) Crowe testified that pedal brakes would only be used in limited situations, such as loading them onto trailers, moving them around a yard, spotting them, or washing them. (Tr. 177:17–22, 183:8–15)

Dubics first tested scraper Unit 109. (Tr. 66:25–70:1) Prior to the test, the unit’s operator informed Dubics that the scraper’s pedal brakes did not function. (Tr. 67:3–11) Dubics asked the unit’s operator to demonstrate and observed for himself that the equipment did not stop when the operator depressed the foot pedal. (Tr. 67:7–11) Dubics asked the equipment operator how long the brakes had not been working and whether they had been reported. (Tr. 69:5–10) The equipment operator told Dubics that the pedal brake had never worked during the time the equipment operator used the machine. (Tr. 69:7–10) Dubics then told Bishop that Unit 109 had to be tagged out of service. (Tr. 69:16–70:1)

Dubics also tested scraper Unit 110. (Tr. 70:2–4) When the unit’s operator pulled up and dropped the bowl to stop the scraper, Dubics explained to him that he needed to check the

scraper's pedal brake. (Tr. 70:7–12) The equipment operator told Dubics that the pedal brakes had not worked for two weeks, which the equipment operator had reported to Bishop personally and recorded on a pre-shift examination. (Tr. 70:11–18) Dubics testified that the equipment operator marked “NA” for no action on the pre-shift examination because the equipment operator had informed the company about the brakes before and the company took no action to repair them. (Tr. 70:19–71:3) Dubics had the equipment operator test the pedal brakes, which did not work. (Tr. 72:17–22) Dubics told N.J. Wilbanks that the scraper needed to be taken out of service and allowed the operator to drive the scraper out of the way and tag it out of service. (Tr. 71:4–9)

Lastly, Dubics tested scraper Unit 117. (Tr. 71:10–15) Similar to the other two tests, the pedal brakes on the scraper did not function and the equipment only stopped when the unit's operator dropped the scraper's bowl. (Tr. 71:17–22, 72:12–16) The unit's operator informed Dubics that he did not report the brakes in a pre-shift examination because it was his first day on the job. (Tr. 71:21–25) Dubics testified that the unit's operator told him that the company was teaching him to drive the scraper with no pedal brakes, which Bishop confirmed. (Tr. 71:25–72:11) Dubics then had Unit 117 tagged out of service as well. (Tr. 72:25–73:2)

As a result of the tests, Dubics issued three imminent danger orders on August 25, 2010, to N.J. Wilbanks, stating that the company was operating the three scraper units without service brakes and placing them out of service until the company made the proper repairs.⁴ (Tr. 73:2–74:9; Ex. S–7)

In addition, Dubics issued Citation No. 8546331 and Order Nos. 8546333⁵ and 8546335, separately alleging that the brakes on scraper Units 109, 110, and 117, respectively, “would not stop the scrapper [sic] on the normal grade traveled empty,” in violation of 30 C.F.R. § 56.14101(a)(1). (Tr. 77:14–92:2; Exs. S–8, S–9, S–10) Dubics designated each of the three violations as “S&S” and “reasonably likely” to result in a “fatal injury” to “one miner.” (*Id.*) The following day, on August 26, 2010, he modified the likelihood of injury for each of the violations to “highly likely.” (Tr. 81:13–82:7, 87:17–21, 91:8–12; Exs. S–8, S–9, S–10) Dubics also modified the violations to classify each as an “unwarrantable failure” on August 26, 2010. (Exs. S–8, S–9, S–10) Dubics originally designated each of the three violations as a result of the company's “high negligence,” but approximately one month later, on September 16, 2010, modified the violations to increase the level of negligence to “reckless disregard.” (Exs. S–8, S–9, S–10; Tr. 91:22–92:2) Dubics modified the violations' negligence designations after returning to his office and reviewing the violations with his supervisor. (Tr. 138:4–141:4)

N.J. Wilbanks abated Citation No. 8546331 and Order Nos. 8546333 by removing scraper Units 109 and 110 from the work site. (Exs. S–8, S–9) N.J. Wilbanks abated Order No. 8546335 by repairing the brakes on Unit 117, which stopped the unit on the steepest grade at the work site when re-tested. (Ex. S–10) N.J. Wilbanks also had its supervisor reinstruct each scraper

⁴ Dubics issued imminent danger Order Nos. 8546330, 8546332, and 8546334, for the three Caterpillar 631E scrapers, Units 109, 110, and 117, respectively. (Ex. S–7)

⁵ Dubics initially issued Order No. 8546333 as a section 104(d)(1) citation, but later modified the violation to a section 104(d)(1) order. (Ex. S–9)

unit's operator on proper pre-shift examinations for mobile equipment. (Exs. S-8, S-9, S-10) Consequently, Dubics terminated each of the violations. (*Id.*)

IV. LEGAL PRINCIPLES

A. Mine Act Jurisdiction

Section 4 of the Mine Act provides, in part, that “[e]ach coal or other mine, the products of which enter commerce . . . shall be subject to the provisions of this Act.” 30 U.S.C. § 803. Section 3(h)(1) of the Act defines “coal or other mine” to include “lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property . . . used in, *or to be used in*, or resulting from, the work of extracting such minerals from their natural deposits in non-liquid form . . . or used in, *or to be used in*, the milling of such minerals[.]” 30 U.S.C. § 802(h)(1) (emphasis added).

Section 4 unambiguously expresses Congress’ intent to regulate the mining industry to the full extent under the Commerce Clause, which includes the power to regulate mines whose products are sold entirely intrastate. *D.A.S. Sand & Gravel, Inc. v. Chao*, 386 F.3d 460, 464 (2d Cir. 2004). In the legislative history of the Act, Congress instructed “that what is considered to be a mine and to be regulated under this Act be given broadest possibl[e] interpretation” and that “doubts be resolved in favor of . . . coverage of the Act.” S. Rep. No. 95-181, at 14 (1977).

B. Significant and Substantial

A violation is S&S “if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish a S&S violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has recently explained that in analyzing the second *Mathies* element, Commission Judges must determine “whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In evaluating the third *Mathies* element, the Commission assumes the hazard identified in the second *Mathies* element exists and determines whether that hazard is reasonably likely to cause injury. *Id.* at 2045 (citing *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 161–62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135). The Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574

(July 1984)). Finally, it is well settled that redundant safety measures are not to be considered in determining whether a violation is S&S. *Cumberland Coal Res. LP*, 717 F.3d at 1029 (D.C. Cir. 2013); *Knox Creek Coal Corp.*, 811 F.3d 148, 162 (4th Cir. 2016); *Buck Creek*, 52 F.3d at 135; *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015); *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011).

C. Negligence

The Commission evaluates negligence using “a traditional negligence analysis.” *Am. Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017) (quoting *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted)). Because the Commission is not bound by the Secretary’s regulations set forth in 30 C.F.R. Part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Id.* (citing *Mach Mining, LLC*, 809 F.3d at 1263–64). Under a traditional negligence analysis, an operator is negligent if it fails to meet the requisite standard of care. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). In determining whether an operator met its duty of care, the Commission considers what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *Id.* at 1702 (citation omitted). In making a negligence determination, a Judge is not limited to an evaluation of allegedly “mitigating” circumstances, but may consider the totality of the circumstances holistically and thus find “high negligence” in spite of mitigating circumstances or “moderate” negligence without identifying mitigating circumstances. *Id.* In this respect, the Commission has recognized that the gravamen of high negligence is that it “suggests an aggravated lack of care that is more than ordinary negligence.” *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (citation omitted).

The Commission has not opined specifically as to what constitutes “reckless disregard.” However, Commission judges have noted that the term “reckless” describes conduct characterized by “the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk[.]” *Stillhouse Mining, LLC*, 33 FMSHRC 778, 803 (Mar. 2011) (ALJ) (citing *Reckless, Black’s Law Dictionary* (8th ed. 2004)). “Deliberate action contrary to the Mine Act with the conscious knowledge that such activity may seriously endanger worker constitutes reckless disregard.” *Winn Materials LLC*, 36 FMSHRC 1430, 1435 (May 2014) (ALJ) (citing *Roxcoal, Inc.*, 36 FMSHRC 625, 634 (ALJ) (Mar. 2013)).

D. Unwarrantable Failure

The Commission has held that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). It is characterized by “indifference,” a “serious lack of reasonable care,” or “reckless disregard.” *Id.* at 2003–04; *see also Buck Creek Coal*, 52 F.3d at 136 (7th Cir. 1995) (approving the Commission’s unwarrantable failure test). Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. *IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009). The Commission has identified several such factors, including: the length of time a

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 was obvious, whether the violation posed a high degree of danger, and the operator's knowledge of the existence of the violation. *Id.* Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) (citing *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998)). All relevant facts and circumstances of each case must be examined to determine whether an actor's conduct is aggravated or if mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

V. ANALYSIS AND CONCLUSIONS OF LAW

A. Mine Act Jurisdiction

Respondent asserts that MSHA did not have jurisdiction over the work site where Dubics issued the disputed violations and that the company lacked fair notice that MSHA would exert jurisdiction. (Resp't Br. at 8–11) Respondent reasons that the work site was not yet a mine at the time of the violations and that the company had not yet been given an MSHA ID number at the time of inspection. (*Id.*) In contrast, the Secretary maintains that the work site falls within the Mine Act's definition of "mine" and that N.J. Wilbanks did have fair notice that it would be subject to MSHA's jurisdiction based on the contract the company signed. (Sec'y Br. at 8–10)

Here, N.J. Wilbanks entered into a subcontract to perform site development work for a project identified as "APAC Plantation Quarry." (Ex. S–3) The quarry would be used to extract and process granite. (Tr. 64:20–65:18) N.J. Wilbanks' contract stated that its work on the site included tasks such as "blasting in pit area," "delivery of all clean rock to the portable crusher" that would be set up, and "adherence to MSHA regulations." (Ex S–3) N.J. Wilbanks' current president, who signed the subcontract, also testified that per the contract, the company knew MSHA regulations would "come [in]to play at some point in time." (Tr. 230:22–231:4, 73:20–22; Ex. S–3) However, the company was under the impression that MSHA regulations would not apply to every stage of the project, but only after the date when crushing operations began on site. (Tr. 193:10–195:4, 209:3–210:5) General contractor Brasfield & Gorrie told N.J. Wilbanks that the date would be in early November 2010, and thus, N.J. Wilbanks assumed that the work site fell under OSHA's jurisdiction until that date. (Tr. 195:19–196:23)

The Mine Act defines "mine" as any land or property "used in, or to be used in . . . extracting such minerals from their natural deposits[.]" 30 U.S.C. § 802(h)(1) (emphasis added). Considering Congress's intent that the statute be interpreted broadly in favor of MSHA jurisdiction, courts have held that the "to be used in" language would include properties that are not yet producing mine products, but are preparing to begin production. *See Cyprus Indus. Minerals Co. v. Fed. Mine Safety & Health Admin.*, 664 F.2d 1116, 1117–20 (9th Cir. 1981) (holding that activities conducted in preparation for future mining may bring a site within the definition of a "mine" if the activities were in contemplation of mining); *see also Lancashire Coal Co. v. Sec'y of Labor*, 968 F.2d 388, 390 (3d Cir. 1992) (recognizing that the Mine Act

refers to three time frames in section 3(h), including the term “to be used in” meaning contemplated use).

Despite Respondent’s arguments, the terms of N.J. Wilbank’s contract explicitly gave notice from the project’s onset that the subject work site would be a “quarry” and used in mineral extraction, thus falling squarely into the statutory definition of a “mine” subject to MSHA’s jurisdiction. Respondent had knowledge that its activities on site were conducted in contemplation of future mining. Thus, Respondent’s mistaken belief that MSHA’s jurisdiction would not apply to every stage of the project is not reasonable given that the plain language of the statute clearly and unambiguously encompasses any property to be used in mineral extraction, even when such mineral extraction has not commenced. Moreover, N.J. Wilbanks had received an MSHA ID in 2008 for work at another quarry and therefore should have known the extent of MSHA’s jurisdiction permitted by statute given this prior experience. (Tr. 241:8–242:9; Ex. S–5)

Because the statute must be interpreted broadly in favor of the Mine Act’s jurisdiction, I conclude that MSHA had jurisdiction over the site where N.J. Wilbanks performed work at the time of Dubic’s inspection.

B. Citation No. 8546331, Order Nos. 8546333 and 8546335 – Service Brakes

1. Fact of the Violations

For Citation No. 8546331 and Order Nos. 8546333 and 8546335, the Secretary asserts that N.J. Wilbanks violated 30 C.F.R. § 56.14101(a)(1) by failing to have functioning service brakes on three Caterpillar 631E scrapers that could stop and hold the machines with their typical load on the maximum grade they travel. (Sec’y Br. at 10–11) According to the Secretary, the pedal brakes on each scraper are its “service brakes” and did not work when tested. (*Id.*) In contrast, Respondent argues that it did not violate the standard because each scraper could stop by dropping its bowl, a method which Respondent considers to be each scraper’s primary service brake system. (Resp’t Br. 3–7)

In this case, the pedal brakes on each of the three scrapers did not function from the moment they arrived on the site. (Tr. 221:24–222:3) Inspector Dubics considered these pedal brakes to be each machine’s “service brakes.” (Tr. 67:5–11, 69:5–10) To confirm, Dubics contacted the manufacturer, Caterpillar, who informed Dubics that the foot pedal, which applies brake pads to the scraper’s four wheels, is what the manufacturer considered to be the service brake. (Tr. 131:5–20) N.J. Wilbanks’ manager of the project, Justin Crowe, testified that although the scrapers were equipped with pedal brakes, the primary way to stop these machines was to lower the bowl, which was the industry’s standard. (Tr. 177:4–22) According to Crowe, this method would stop the scraper immediately. (Tr. 183:21–184:4) N.J. Wilbanks President, Chris Wilbanks, also testified that in his experience working in the grading business, he had always used the bowl to stop the scrapers. (Tr. 222:4–223:23) Both Crowe and Wilbanks explained that the pedal brakes would not be strong enough to stop the scrapers if they carried a load and the only way to stop the machines in those situations would be to drop the bowl. (Tr. 183:16–20, 225:21–226:2) Crowe testified that the pedal brakes would only be used in limited

circumstances, such as loading or unloading the scrapers onto trailers, moving the scrapers around a yard, spotting the scrapers, or washing the scrapers. (Tr. 177:17–22, 183:8–15)

The cited standard, 30 C.F.R. § 56.14101(a)(1), provides: “Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.” 30 C.F.R. § 56.14101(a)(1). The Commission has previously considered the “service brakes” on a Caterpillar 631 scraper to be its installed wheel brakes, which are “activated with a pedal in the operator’s compartment.” *Missouri Rock, Inc.*, 11 FMSHRC 136, 137 (Feb. 1989). The Commission has also upheld determinations that dropping a scraper’s bowl is not always a safe and reliable braking method, noting that the bowl “alone may not effectively stop the scraper in all instances.” *Id.* at 140; *see also Knife River Constr.*, 38 FMSHRC 1289, 1293 (June 2016) (holding that a judge did not err in relying on an inspector’s testimony that lowering the cutting tool to stop a scraper could put an operator at risk of injury in certain situations).

Based on the above, I reject Respondent’s argument that dropping the bowl on each scraper qualified as a “service brake system.” Rather, I determine that the Secretary has offered a reasonable interpretation of the standard that the scrapers’ foot pedal brakes are its “service brakes” given that this interpretation is consistent with the Commission’s prior findings. I also note that although Respondent demonstrated that the scrapers had an alternative method of braking, this method would not be ideal in all instances as Crowe testified to a number of situations where the pedal brakes would be used instead of dropping the bowl, including loading the scrapers onto a trailer. Given that N.J. Wilbanks subcontracted to work on the site for only a specific period of time, it can reasonably be inferred that the company would eventually have to move the scrapers and load them onto trailers — a task that could potentially lead to an accident if the scraper lacked a reliable braking method. It is undisputed that the pedal brakes on each of the scrapers did not function. Accordingly, I determine that the N.J. Wilbanks failed to have functioning service brakes on the three scrapers.

For the reasons stated, I conclude that Respondent violated 30 C.F.R. § 56.14101(a)(1) as alleged in Citation No. 8546331 and Order Nos. 8546333 and 8546335.

2. S&S and Gravity

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. N.J. Wilbank’s three violations of section 56.14101(a)(1) establishes the first element of an S&S violation.

In regard to the second *Mathies* element, the Secretary must show that the violations created a reasonable likelihood the hazard that section 56.14101(a)(1) aims to prevent would occur. Section 56.14101(a)(1) requires mobile equipment to be equipped with a service brake system capable of stopping and holding the equipment in order to prevent the equipment from accidentally rolling and hitting miners. In this case, Dubics testified that there was some foot traffic in the area where the scrapers were operating. (Tr. 57:10–19) However, Respondent claims that the three scrapers would have been unlikely to hit a person because dropping the bowls could stop the machines on demand. (Resp’t Br. at 14; Tr. 183:21–184:4) In addition, the

area was relatively flat, and the scrapers typically traveled at six to eight miles per hour. (Tr. 80:14–81:5, 127:21–25, 202:3–5) Nevertheless, Crowe, the project’s manager, testified about a number of situations in which the scrapers would use pedal brakes instead of dropping the bowl, including loading them onto trailers, moving them around a yard, spotting them, or washing them. (Tr. 177:17–22, 183:8–15) Assuming continued normal mining operations, I find that there was a reasonable likelihood that N.J. Wilbanks would eventually perform some, if not all, of these tasks that utilize the scrapers’ pedal brakes instead of bowl dropping. For example, as noted previously, N.J. Wilbanks would eventually have to move the scrapers and load them onto trailers when it finished its contract. Given that the pedal brakes did not function, I conclude that the hazard of miners being hit by the scrapers was reasonably likely because the scrapers performed various tasks where the pedal brakes were primarily used. Consequently, I determine that the Secretary has satisfied the second element of the *Mathies* test. However, taking into account Respondent’s arguments, I conclude that the Secretary has not proven that the gravity should be designated as “highly likely,” but should instead be designated as “reasonably likely.”

With regard to the third and fourth *Mathies* elements, the Secretary must demonstrate a reasonable likelihood the hazard will result in a serious injury. In analyzing the third element, I must assume the hazard identified in the second *Mathies* element has been realized. *Newtown Energy, Inc.*, 38 FMSHRC at 2045. If a scraper hit a miner because the service brake did not function, the miner would likely be crushed given that each scraper weighed anywhere from 15 to 35 tons. (Tr. 82:19–25, 176:4–7) Consequently, I determine that the hazard of a scraper hitting a miner would be reasonably likely to result in injuries, thus satisfying the third *Mathies* element. Furthermore, I determine that such injuries would be reasonably likely to be fatal given the size and weight of the mobile equipment, thus satisfying the fourth *Mathies* element.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 8546331 and Order Nos. 8546333 and 8546335 were appropriately designated as S&S. For reasons stated above, I determine the gravity for each of the violations to be “reasonably likely” to result in “fatal” injuries to “one miner.”

3. Unwarrantable Failure and Negligence

The Secretary asserts that N.J. Wilbanks’ conduct amounted to reckless disregard and an unwarrantable failure in each of these three violations. (Sec’y Br. at 13–17) In support, the Secretary argues that Respondent admitted to bringing the equipment onto the work site knowing their pedal brakes were defective and allowed the condition to exist for ten days. (Sec’y Br. at 13) The Secretary notes that the condition was highly dangerous and the operator made no effort to abate the condition. (*Id.* at 14–17) In contrast, Respondent claims it was unaware of MSHA’s jurisdiction and the applicable regulations. (Resp’t Br. at 15) Respondent also asserts that while it knew the pedal brakes were defective, Respondent did not display any lack of care because it knew the machines would be able to stop by dropping the bowl. (Resp’t Reply Br. at 4)

In analyzing an unwarrantable failure, I must consider the Commission’s factors for determining aggravated conduct. *See IO Coal Co.*, 31 FMSHRC at 1350–51. The record reveals multiple aggravating factors regarding these violations.

In term of knowledge and obviousness, N.J. Wilbanks acquired the scrapers knowing that the pedal brakes were defective. (Tr. 221:24–222:3) Crowe admitted that he would not have chosen the three scrapers had the company realized MSHA regulations applied because their pedal brakes did not work. (Tr. 197:16–24) I have previously determined that the company should have known MSHA regulations applied.⁶ See discussion *supra* Part V.A. The work site’s supervisor, Bishop, also trained workers to operate the equipment without using pedal brakes. (Tr. 71:25–72:11) Therefore, I conclude that N.J. Wilbanks had knowledge of the violation and its duty to maintain the service pedal brakes under the standard. The involvement of supervisors Crowe and Bishop also supports an unwarrantable failure determination. See *Lopke Quarries, Inc.*, 23 FMSHRC at 711. Furthermore, multiple employees reported the defective conditions to a supervisor and on pre-shift examinations. (Tr. 70:13–71:3, 75:7–76:3) Given the reports and the company’s knowledge, I thus conclude that the conditions were obvious.

Regarding the length of time and abatement, the conditions lasted approximately ten days as N.J. Wilbanks commenced work on site on August 15, 2010. (Tr. 45:10–21, 70:10–12, 220:12–15) In terms of abatement, the Commission focuses on compliance efforts made prior to the issuance of the violation. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Although problems with the scrapers’ pedal brakes had been noted to a supervisor and on pre-shift examinations, the company took no action to repair the brakes. (Tr. 70:13–71:3, 75:7–76:3)

Finally, the violations posed a high degree of danger because they were reasonably likely to cause a serious or fatal accident as discussed above. See discussion *supra* Part V.B.2. Further, the condition affected three scraper units, which I consider to be extensive. (Exs. S–8, S–9, S–10)

The other unwarrantable failure factor appears neither mitigating nor aggravating. The Secretary did not present evidence that N.J. Wilbanks had been placed on notice by MSHA that greater efforts were required for compliance with the service brake standard. Accordingly, I afford this factor no weight in the unwarrantable failure analysis.

After considering all the factors, particularly the violation’s obviousness, the company’s knowledge, and the involvement of multiple supervisors, I conclude that Citation No. 8546331 and Order Nos. 8546333 and 8546335 were a result of N.J. Wilbanks’ unwarrantable failure.

However, I do not find that N.J. Wilbanks’ negligence rose to the level of reckless disregard. Reckless disregard has been characterized by deliberate action, conscious knowledge of substantial risk, and disregard or indifference to that risk. See *Stillhouse Mining, LLC*, 33 FMSHRC at 803; *Winn Materials, LLC*, 36 FMSHRC at 1435; *Roxcoal, Inc.*, 36 FMSHRC at 634. Here, I do not find that the company displayed complete disregard or indifference to the risk of miners being injured by the mobile equipment given that the company trained scraper operators to use an alternative braking method that would be effective in many, but not all,

⁶ I also find the company’s claim that it did know the defective pedal brakes constituted a violation because it did not know MSHA regulations applied suspect given that OSHA’s regulation regarding service brakes nearly mirrors that of MSHA, providing that scrapers “shall have a service braking system capable of stopping and holding the equipment fully loaded[.]” 29 C.F.R. § 1926.602(a)(4).

instances. Nevertheless, the company failed to meet the duty imposed by the standard to maintain functioning service brakes on the mobile equipment. Considering all the facts and circumstances, I conclude that N.J. Wilbanks' negligence should be designated as "high" for the three violations.

C. Penalty

Under Section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and, (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary has proposed a specially-assessed penalty of \$26,600.00 for each violation for a total combined proposed penalty of \$79,800.00. Respondent is a small contractor of approximately 20 to 25 employees. (Sec'y Br. at 19; Resp't Reply Br. at 6) Respondent operates under multi-million dollar contracts, as demonstrated by the contract it signed with Brasfield & Gorrie. (Sec'y Br. at 19; Ex. S-3) However, Respondent notes that their contract prices include business costs and that its actual net profit is less than their contract prices. (Resp't Reply Br. at 6) Respondent asserts that the proposed penalty would affect its ability to continue in business, but has not provided any additional information regarding its ability to pay. (Resp't Br. at 15) The violations in this docket were issued to N.J. Wilbanks when it first began operations at the Warren County Quarry, and thus N.J. Wilbanks had no history of violations prior to Dubics' August 25, 2010, inspection. Respondent's history of violations show no other violations of 30 C.F.R. § 56.14101(a)(1) from August 25, 2010, to August 25, 2012, and only six other citations were issued to N.J. Wilbanks at the mine during that period. (Ex. S-1)

In regard to the violations themselves, I have affirmed the Secretary's S&S and unwarrantable failure determinations. However, I have lowered the gravity from "highly likely" to "reasonably likely" and the negligence from "reckless disregard" to "high." Additionally, N.J. Wilbanks demonstrated good faith abatement by removing two of the cited scrapers from service and having the other scraper repaired. (Exs. S-8, S-9, S-10) The company also worked with Inspector Dubics to implement further safety plans. (Tr. 230:6-15)

Based on the criteria above, I conclude that the Secretary's proposed penalty is inappropriate. The Secretary's special assessment was based on the Secretary's alleged gravity and negligence designations. However, I have lowered both these gravity and negligence determinations. The record therefore does not support the Secretary's special assessment.

The minimum penalty under the Mine Act for an unwarrantable failure section 104(d)(1) citation or order is \$2,000.00. 30 U.S.C. § 820(a)(3)(A). Taking into account N.J. Wilbanks' small size, its lack of a history of violations, its good faith efforts to abate the violations, modifications to the violations' gravity and negligence, as well as considering all the facts and circumstances set forth above, I hereby assess a civil penalty of \$2,000.00 for each of the three violations, or \$6,000.00 in total.

VI. ORDER

Based on the above discussion, it is hereby **ORDERED** that Citation No. 8546331 and Order Nos. 8546333 and 8546335 be **MODIFIED** to reduce the likelihood of injury or illness from “highly likely” to “reasonably likely” and to reduce the negligence from “reckless disregard” to “high.”

WHEREFORE, it is **ORDERED** that Respondent pay a total penalty of \$6,000.00 within forty (40) days of the date of this order.⁷

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

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/ivn

⁷ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 21, 2017

MICHAEL K. McNARY,
Petitioner,

v.

ALCOA WORLD ALUMINA LLC,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. CENT 2015-0279-DM
MSHA Case No. SC-MD-2014-05

Mine: Bayer Alumina Plant
Mine ID: 41-00320

DECISION AND ORDER

Appearances: Tony Opegard, Esq., Lexington, Kentucky, and Wes Addington, Esq.,
Whitesburg, Kentucky, for the Complainant

Christopher V. Bacon, Esq., Houston, Texas, for the Respondent

Before: Judge Moran

This case is before the Court upon a complaint of discrimination, brought by Michael K. McNary, alleging interference with his rights under Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (“Mine Act,” or “Act”). A hearing was held on August 15, 2017, in Victoria, Texas. For the reasons which follow, examining the totality of the circumstances, the Court finds that there was no cognizable interference against Michael McNary, nor any other Mine Act discrimination against him.

Procedural Background

Docket No. CENT 2015-0279-DM was assigned to this Court on May 6, 2015. After the parties had begun discovery, the Respondent filed a Motion for Summary Decision on August 12, 2015, citing alleged procedural errors on the part of the Complainant, as well as arguing that no adverse action had taken place. The Complainant opposed this motion, arguing that he had experienced discrimination and interference while working for the Respondent. After considering the evidence presented by both parties, this Court granted the Respondent’s motion for summary decision on September 28, 2015, and dismissed the proceedings.

Thereafter, on October 27, 2015, the Complainant filed a pro se Petition for Discretionary Review, arguing that the summary decision was issued in error. The next day, Attorney Tony Opegard noticed his appearance on behalf of Mr. McNary. The Commission granted the petition for discretionary review on November 5, 2015, and heard oral arguments on November 17, 2016. On March 28, 2017 the Commission issued a decision finding that Alcoa was not

entitled to summary decision as a matter of law, and remanded the matter for further consideration. A hearing before the Court then ensued.

Findings of Fact

Carlos Delgado was called as Complainant's first witness. Delgado has an associate's degree in occupational safety and health and another such degree in instrumentation and electrical, which he described as "I & E." Tr. 40; 42. In July 2000 he began working for Alcoa, and he is presently employed by that entity as well, working as an electrical technician. Tr. 43. Starting in his first year with Alcoa, he also joined the emergency response team, and he has remained on that team ever since then. Tr. 44. In that role, he has been a lead instructor for the team, and he continues to "instruct the team on confined space rescue, high angle rescue, industrial fire-fighting, first aid[], and CPR." Tr. 44. In addition, as of December 2011, he took over the role of a lead miners' rep, that is to say he was a MSHA miners' rep. Tr. 43-44. "Miners' rep" is a shorthand reference to "miners' representative." With that new role, as the United Steel Workers Safety and Health rep, it is "a 40 hour job of basic safety and health." Tr. 44. After assuming that miners' rep role, a full time role, Delgado's I & E work would only occur in the context of overtime. Though unnecessary to resolve this matter, as background, Delgado briefly explained the mining process at Alcoa's Bayer Alumina Plant, which was also referred to as the Alcoa Point Comfort facility.¹ Tr. 46.

It is fair to state that Alcoa's involvement in and commitment to safety is extensive. Delgado explained that as the miners' rep, he and others on related committees met daily with safety and health management. Tr. 44. The committees tried to have a person from each of the four crews.

Delgado added,

They had the DSC coach there for the area and then you had salary people, which would be superintendents, safety and health coordinators for the area, process area supervisors. Everybody was involved in that area meeting. And then we also have had a plant-wide departmental safety committee, which consisted of myself, Mr. McNary, Mr. Luis Medina, who was our scope representative.

Tr. 45.

¹ The facility is an aluminum refinery. The facility takes "red dirt," which is bauxite, and it refines it, extracting alumina from it. Tr. 46. The bauxite is transported on belts up to the digestion area, where it is stored in bins and from there it is fed into rod and ball mills. At that point, the bauxite is crushed into a fine, powdery dirt. It then goes to the "25A area," which is also part of the digestion area, where it is introduced into caustic, by being mixed in slurry tanks. Then it is pumped over to the dirt area, where the incident involved here occurred. Tr. 47. At that location, the material is heated up to a very high temperatures, in the range of 400 to 450 degrees. Tr. 47. There is no dispute that extracting alumina is hazardous in the sense that very high temperatures are involved in that process.

In fact, Delgado and Medina shared an office. *Id.* Medina “was part of the meeting along with the management lead team, which would be the plant manager, all the superintendents of the area, a human resource person was in the meeting.” Tr. 45. Delgado was not the only miners’ rep; the plant had a miners’ rep in every area, and he had a backup rep, the “Number 2” rep, who was Mr. McNary. McNary would act in Delgado’s place if he was away. McNary was also a miners’ rep in the digestion area. Tr. 50.

In sum, Delgado is still in I&E, the MSHA rep for the plant, the lead instructor for the emergency response team, and vice president of the union. Tr. 46. Presently the plant is not producing alumina. When it was active, some 500 hourly employees and about 200 salaried employees worked there, but now there are about 30 hourly employees and 18 to 20 salaried people. Tr. 49-50.

Turning to the date of the incident in question, January 8, 2014, Delgado was accompanying an MSHA inspector, Brett Barrick, who was at the plant because of a complaint regarding a urinal in the mine’s training facility. On their way back from viewing the urinal issue, they observed an ambulance at the digestion area. This area was a concern because six months earlier, there was a serious injury to an employee, Mike Brown. Tr. 52. Arriving at the area, Delgado saw McNary and Emig in the alleyway and other employees suited up in Tychem Suits. Tr. 53. As he recounted it, Delgado stated that when he approached “Mr. Emig was telling Mr. McNary in an aggressive manner, ‘I will have you removed as MSHA rep. I will have you removed from digestion, and I will have you removed from this plant.’”² Tr. 53.

Delgado continued with his version of the events, stating,

at that point, I looked at him and I said -- and I got kind of in between them. I said, ‘You’re not going to remove anybody from anywhere. What’s going on?’ Emig then said, ‘Well, I’m done with him.’ And he’s pointing at Mr. McNary. And Mr. McNary says, ‘So you’re done with me, Steve [Emig]? So you’re done with me?’ And Steve says, ‘I’m done with you for now.’

Id.

² Later, McNary’s counsel would ask of Delgado, when he heard Emig say to McNary that he was going to remove him as a miners’ rep, remove him from digestion, remove him from the plant, how did he *interpret* that, and Delgado responded that “when [Emig] started talking about the fact [of] removing [McNary] from the plant, to [Delgado] that meant termination, okay. So at that point is when I said, ‘[y]ou’re not removing anybody from anywhere. What’s going on?’” Tr. 60. The Court is not sure that the question, and consequently the response, is appropriate to consider because, as explained in the discussion of the case law, below, the “totality of the circumstances” inquiry is to be based on the reasonable miner reaction, not a personal opinion. Further, even if Delgado’s response, offering *his personal interpretation* of the words he alleged Emig to have uttered, may be considered, that interpretation cannot be considered in isolation. That is, Delgado’s opinion was made without the benefit of knowing one whit about McNary’s prior conduct nor Emig’s claim that McNary was seeking to take command of the event by attempting to have Grones replace Emig.

Accordingly, according to Delgado's recounting, Emig virtually immediately had moved back from his words that he was "done with" McNary.

Delgado continued,

[s]o at that point I told Kevin McNary . . . to go ahead and go stand over [] with the other employees, okay, that I will have [sic] handle the situation. And I looked at Mr. Emig and I said, 'What's going on? Why do we have an ambulance over here?'³ What's going on?' And we go over to the area -- the L5 area to -- to look at the situation closer and the packing-on [the] valve is blowing out. It's blowing out pretty good. You see a bunch of heavy steam around the area. It's a very dangerous area because it's high pressure and high temperature.⁴ So Mr. Emig says, 'We need to access that area because we've got to get that valve isolated so we can get the pressure off of them and change the packing.' And I looked at him, I said, 'We're not sending anybody in there.' I said, 'It's too dangerous.' I said, 'What are the other options other than sending people in there?' And he says, 'The only other option is shut the unit down.' And I said, 'Well, we're not -- we're going to shut the unit down 'cause we're not going to send people in there.' And he says, 'No, we're not going to shut the unit down. That's not an option right now. We have to access this area.' So at that time [MSHA inspector] Barrick, I guess, is standing behind me. . . . I believe he's, the whole time, just listening. He hasn't intervened yet. And me and Mr. Emig were kind of getting into an

³ It was Delgado's understanding that Emig called the ambulance, which is a company ambulance that is kept on site, just in case an employee was burned or something happened. Tr. 73. Delgado assumed that an injury of some sort had occurred, as he saw the ambulance's lights were on. Tr. 73-74. In response to the Court's comment that it assumed that Delgado would not be critical of the ambulance being present, he responded that in fact he was critical of it. Tr. 74. As he saw it, if one has an ambulance on standby, that means the mine was doing something they should not. Tr. 74. The Court wanted to be sure it understood Delgado's perspective; that he did not view it as proactive on the mine's part. Rather, he confirmed that he saw the ambulance presence to indicate there was a "highly dangerous" situation. Tr. 74.

⁴ Delgado explained what he meant when expressing that the packing was blowing out of the valve. The valve has a stem and a plug; the plug is to close the valve, stopping the flow. The stem, when turned, opens it. Tr. 57. The stem has packing material and this is designed so that one is protected from the process coming out when one is working on the valve. Tr. 57. With regular maintenance, including changing the packing, a blowout should not occur. *Id.* He emphasized that because there is a high temperature and high pressure, "[i]t's the most dangerous spot in the plant." *Id.* Further, the material itself is caustic and very corrosive. *Id.*

He added that it will "peel your skin off." Tr. 57-58.

argument about shutting the unit down because he's clearly stating that that's not an option, that we have to do something else and get in there. And I'm arguing with him, 'No, we're not. We're not sending anybody in there. It's too dangerous.'

Tr. 54-55.

The Court notes that, in contradistinction to McNary's behavior, as described later herein, Delgado *did raise his safety concerns directly to Emig*. Further, and illuminating in the Court's view, Delgado made no claim that Emig interfered with him. Only McNary makes that claim.

Delgado continued,

[s]o Mr. Barrick, I guess, finally had enough and he intervened. And he looked directly at Mr. Emig and he said, "When are you going to get it? At what point are y'all going to get it? That unit right there doesn't mean nothing. Those people you've got standing over there suited up in suits, that's what means something." And then he looks at Mr. Emig and he says, "Six months ago, we just got somebody seriously injured over here. What are you guys doing?" And he's pretty hot. He's hollering, okay. So at that point Ms. Grones and Mr. Medina walk up. They could have already been standing there while Mr. Barrick was talking but that's when I noticed them, okay. And we all kind of backed up and Mr. Barrick, I believe, took over the situation at that point. I think he issued a "k" order, which meant that there wasn't going to be anything going on in there until he was okay with it. Okay. So we stepped back and we talked about a plan of action on how to enter that area safely, and there was all kinds of things brought up. And I believe Mr. Medina is the one that brought up a company called Team Industries who specialize in that kind of thing, okay. They have other type of material, injectable packing, clamps that they can put on, other things that they can do to mitigate that situation. That way, our employees could get in there and do the job safely. That was brought up. The fact of bringing the unit down was brought up. So we kind of all got together and regrouped to get a plan together on how to mitigate the situation but the miners were withdrawn from that area.

Tr. 55-56.

The Court further notes that Delgado, unlike McNary, engaged in a safety dialogue and otherwise behaved in the designed, appropriate, manner. It is also noted that Emig behaved in a like manner. As just alluded to, Emig's behavior is instructive in understanding, within the totality of the circumstances, his momentary expression of exasperation with McNary. Last, it is noted that Emig's outburst was unique, expressed only to McNary.

According to Delgado, McNary did not re-engage his conversation with Emig. Tr. 56. Asked how he concluded that Emig was speaking to McNary in an aggressive manner, Delgado stated that Emig was pointing at McNary and his voice was elevated and one could tell by Emig's face that he was very upset. Tr. 56. It is worth re-emphasizing that, with Delgado behaving professionally and engaging in the robust debate that Alcoa management and

employees utilized when disputes arose, Delgado experienced no similar behavior from Emig. Both were comporting themselves appropriately – Delgado was expressing his safety concerns to Emig and interacting about the best approach to deal with the incident.⁵

It was Delgado’s view that, other than sending operators to the problem area, the only other option was to shut the unit down. “Operators,” in this context, refers to a miner, not the mine operator. Then a process would need to be followed: locking it out; draining the unit; and replacing the packing. Tr. 59. He also expressed that if the repairs are done expeditiously, that is, they are accomplished before the unit’s temperature has dropped, one can then start the unit back up. 59-60. Because of his view that there was an unsafe risk to employees in having them go in and try to fix it, the only realistic option from his perspective was to shut the unit down. Tr. 60. While this view of Delgado’s is interesting,⁶ it is not part of the totality of the circumstances – those circumstances being whether Emig interfered with McNary’s rights.

Following the incident, there was a formal investigation in order to determine what happened and to prevent a recurrence. Tr. 68. The investigation determined that the tarps did not hold; rather, they blew off. Tr. 69. While one photo showed the tarp on the valve, that was taken after the pressure had been relieved. *Id.*

In terms of learning, through the investigation, who placed the tarps on the valve, Delgado stated that some of the

senior operators went in and tried to close⁷ the valve off and isolate the valve. And they used these tarps that they threw over the packing leak and they were

⁵ As a bit of history, Delgado was present when McNary got burned. Tr. 58. Delgado also asserted that the Tychem suits are not rated for temperature, but only for chemicals. *Id.* He stated that, at 400 degrees, such suits would’ve melted on the employees. *Id.*

⁶ In a similar vein, Delgado’s reference to photo 2, Ex. P 2, and testimony that the mine tried to throw a tarp over the valve, but that the pressure was so high that it threw the tarp off, is interesting, but not central to whether Emig interfered with McNary. Tr. 67. The same observation applies to Delgado’s confirmation that, on the day in question, he observed the tarps being used in that fashion. Tr. 68. Photo 3, also from Ex. P 2, was identified by Delgado as the valve in issue, “blowing out the processed material, the steam, the liquor blowing straight out of the packing.” Tr. 68. Photo 4 depicts the tarps around the valve, and the tarps are deflecting the material down. Again, the parties do not dispute that the event was serious. However, the Court notes that a serious event does not establish, per se, an interference claim. To the contrary, an interference claim can be established even in non-serious matters. The point is that seriousness alone does not end the inquiry into whether interference occurred.

⁷ Though the dictionary does not support such use, another term used during the hearing to describe closing the valve was to “seep” it. Tr. 20-21. It is likely that the term intended is to “seat” a valve. This could’ve been an error on the court reporter’s part.

unsuccessful because the pressure was too much and the heat was too much and there was too much steam they couldn't see and it actually blew the tarp off.

Tr. 70.

The Court notes that in this description Delgado *did not* claim that Emig sent the operators in to close the valves.

Delgado also spoke to the investigation's remarks about Emig, stating that "Emig was there on scene, he was witnessing what was going on. *He didn't pull the people out.* They pulled themselves out because it was too much pressure, but he did see and witness what was happening." Tr. 70. Again, it is noted that Delgado *did not* claim that Emig sent the operators in. Rather, his complaint was that Emig did not pull them out. Delgado then added, "And you know, there's a little intimidation factor there, okay. It happens all the time at Alcoa." *Id.* He asserted that "[w]hen you have a superintendent out there standing and looking at you, *even though he didn't direct you to go into the area, [but] he's not telling you to get out of the area,* so there's a little intimidation factor."⁸ Tr. 70-71 (emphasis added). The Court again notes it should not be lost that, while Delgado was talking about his claim of an "intimidation factor," he conceded that Emig *didn't direct* the operators to go into the area. Clearly, Delgado, unable to state that Emig ordered miners into the area, was inferring that Emig's presence indirectly prompted the operators to go in, a suggestion for which there is no support.

Delgado was then directed to Exhibits P 3 and P 4, which he identified as the MSHA citations⁹ issued to Alcoa. Tr. 71. The Court then noted that the citations [that is, *the orders*] were not going to be tried in this proceeding, as they were beyond the scope of this matter. Tr. 71. It is the Court's view that the issuance of citations or orders cannot be a substitute for establishing interference. Such an approach would amount to determining interference by

⁸ Delgado was later asked about his remark on direct examination that some miners were hesitant to refuse performing a job, even when they felt it was unsafe because they held concerns about possible retaliation. Delgado then expressed that their concern was they might not get flex time. Tr. 105. However, he then acknowledged that flex time is governed by the collective bargaining agreement. Tr. 106. He added that management retains some discretion on granting flextime, but acknowledged that denial of vacation would be a contractual and grievance issue. Tr. 107. Delgado concluded with the admission that it's complicated because management has the right to direct the workforce. *Id.* The Court considers this to be an excursion from the issues to be resolved and therefore a distraction.

⁹ Though sometimes referred to as "citations," they were actually "orders."

association. That kind of an emotional appeal has no place in examining the totality of the circumstances.¹⁰

Delgado was also asked about the demeanor of the workers when he arrived at the scene and he obliged, expressing that “they looked like they were glad to see [him] there, but they looked like they didn't want to go in, they looked scared. Okay. You could see it in their eyes, all right. They just didn't -- it looked like they didn't want to have no part of that.” Tr. 74-75. In a similar vein to the distraction of whether citations were issued, Delgado’s being asked about the demeanor of the workers, is at odds with the scope of the analysis under the totality test.

Another approach used by the Complainant to establish his interference claim was through character assassination of Emig. Delgado stated that he had prior instances of dealing with Emig on plant safety issues. In this regard, he stated that during walk-throughs, upon identifying hazards, on “just about [] every occasion” when such matters were raised to Emig, there would be a confrontation, meaning an argument. Tr. 75. He asserted that Emig “didn't like to shut down equipment to fix the leaks, okay, to fix the holes in piping, to fix the packing leaks.” Tr. 75. Delgado, it is fair to state, did not have good things to say about Emig. He asserted that Emig would “get heated pretty quick,” that “he didn't have a middle,” and that he “was zero to a hundred.” Tr. 76.

The Court would comment that this is an interesting claim by Delgado, as he made no claim of Emig going from zero to a hundred when the two of them were discussing the matter involved in this case. Further, to put his claim about Emig’s alleged temperament in context,

¹⁰ Complainant’s Brief at 14-15 recites most of the text from the section 104(d)(2) order (Order No. 8769213) and the 104(g)(1) order (Order No. 8769214). Unfortunately, Complainant’s recitation of those orders applies bold print to some portions of those orders. The Court understands that the nature of advocacy can sometimes involve emphasis of certain words, as Complainant did here. However, the Court notes that, for Order No. 8769213, that had the effect of deemphasizing that the Order stated that the “Miners state that Mr. Emig gave the order of withdrawal from the area after the tarp was in place and the valve seated.” Thus Emig’s name appears in the Order only with regard to giving the order of withdrawal, *not for any order to have the miners enter the area*. Driving home this point it is further noted that, earlier in the text of that same Order, the inspector alleged, “The miners attempted to tarp the leak but a sudden release of pressure resulted in the tarp being blown off of the pump forcing the miners out of the area. The miners then requested additional PPE so they could return to the pump and attempt to tarp the pump again as well as seat the valve causing flow to the packing. Management provided the equipment and oversight for re-entering the area of the leak.” It should be noted that Mr. Emig’s name was not identified for this. *Emig’s name specifically appears in the Order only to state that he gave the order of withdrawal*. The Court notes that this is consistent with Emig’s testimony on this. In addition, Complainant’s Counsel inaccurately stated at the hearing that Barricks’ citation accused McNary of allowing employees *to go into that area*. Tr. 263.

That is not true. Most important, the Court believes that it is fundamentally unfair to Emig and Alcoa to let the orders operate to taint Respondent’s defense to the interference claim, because those orders have nothing to do with that claim.

Delgado agreed that, *on both sides*, voices were raised during disagreements at safety meetings and he allowed that everyone tried to “stay professional” during those meetings. Tr. 76-77. Trying to draw a distinction between this incident and the safety meetings, Delgado asserted that no hourly employee was ever threatened in the meetings, nor threatened with removal as a miners’ rep, nor threatened with removal from their department, nor removal from the plant. Tr. 77. In the Court’s view, Delgado’s acknowledgement about the conduct of meetings underscores that the focus of this decision must be upon the events leading up to Emig’s words and the determination of what those words were and the context in which they were uttered and how, under the totality of those circumstances, a reasonable miner would have taken them. Thus, the Court finds that the alleged prior history of Emig when dealing with other disputes is both seriously questionable and, in any event, not properly part of the totality of the circumstances in this claim of interference.

The direct examination completed, the Court asked some questions of Delgado, inquiring how common an instance it was at the plant, wherever these valves were located, to have a blow out and the need for repair. Delgado responded that it was not very common, as normally one could address the issue when they were just starting to leak. Tr. 78-79. Asked to be more precise about the number of blowout occurrences, Delgado answered that since December 2011 it had happened perhaps five to six times. Mere leaking valves were more common. Asked if he was at the scene during those five to six events, he responded he had *not* been present on those occasions. However, a lot of times, he was part of the investigations following those events. Tr. 80.

The Court also inquired if the L5 area was a location where McNary would commonly be; Delgado answered yes, as he did the PDM group, for which digestion was his area. Delgado also confirmed that when he arrived at the scene at the time of the event in issue here and he witnessed the exchange between Emig and McNary, that Delgado took over and so informed McNary of that and the exchange between McNary and Emig ended and the interaction was then between Delgado and Emig. Tr. 81.

Under cross-examination, Respondent’s Counsel asked Delgado if, when he arrived at the scene on January 8, 2014, he began engaging with Emig and others about how to deal with the situation. Delgado stated that first he interacted with Emig, and then Inspector Barrick took over, and others then came to the scene and it became a group effort. Tr. 82. Kelly Grones was a part of that group effort. *Id.* Delgado stated that he learned *only later*, during the subsequent investigation of this matter, that Grones was called to the scene after McNary called Luis Medina and asked him to get her there. Tr. 83. Delgado *did not know* that Emig had also called Grones. Subsequently there was a discussion, with him, Grones, and Emig involved. He agreed that the discussion involved how to best deal with the situation and that such a discussion was the procedure that was to be employed. Tr. 83-84. He also agreed that there were different ways to address the situation, but he did not view all of ways as necessarily being safe. Tr. 84. For example, throwing a tarp on the upset was identified by Delgado as a non-safe approach. *Id.* However, Delgado agreed that none of the miners told him that Emig directed them to use the tarp-throwing approach. *Id.*

When asked if he learned that Emig in fact pulled the workers out of the area when he saw them in it, Delgado's memory failed him as he responded that he was "not sure on that." Tr. 84. However, Delgado agreed that when he arrived at the scene, the workers were out of the line of fire. Tr. 84. *Therefore, importantly in the Court's estimation, Delgado agreed that he wasn't present to see what Emig did, nor what the miners did.* Tr. 85. Instead, Delgado conceded that his knowledge was based on talking with people during the investigation phase. Tr. 85. However, though no one claimed that Emig told them to go in, Delgado replied that no one stated that Emig told them to get out either. *Id.* Delgado repeated his unsupported claim that the workers were "pretty intimidated" by Emig being present. Tr. 85. Against that claim of worker intimidation, Delgado then conceded that he has had many, many conversations with Alcoa workers "about their right to refuse to do something that they think is unsafe." *Id.* Though he made that admission, he insisted that despite Alcoa's policy, workers still are hesitant that speaking up may work against them. Tr. 86.

Returning to the subject of how to deal with the problem that existed, Delgado agreed that there were options besides using a tarp. Tr. 86. It was his view that the best option was to shut the unit down and he agreed there was discussion about that option. He did not agree with the assertion that shutting down a unit and then starting it up again creates increased safety risks. Tr. 87. Instead, it was his view that while it involves "a lot of extra work" and "could take more time," he didn't know, that is, he did not believe, there were extra risks, if it's done correctly. Tr. 87. It was his view that the motives opposing shutting down were time and production. Tr. 87. Respondent's Counsel then asked if Delgado would agree "that if a unit -- the whole unit has to be shut down for a long period of time, there is an increased risk when you have to start up again," and Delgado responded that he agreed with that. Tr. 88. Therefore, with that concession, Delgado agreed that if Emig or Grones had concerns about that option, there was a genuine basis for those concerns. Tr. 88.

Another option, Delgado agreed, was to have a third-party contractor, who specialized in such problems, brought in to deal with it. Tr. 88. Mr. Medina, who is the scope representative and another full-time MSHA representative, along with Delgado, Emig and Grones, was part of the discussion for that option. Tr. 88-89. Delgado also acknowledged that Medina, like himself, was another paid-by-Alcoa, full-time, 40 hours a week, safety person. Tr. 89.

Still another option was simply to wait and see if things calmed down. In fact, that is what happened, and Delgado agreed that the upset died out. Tr. 90. Delgado also conceded that three or four hours later it became safe to enter the scene and repair the problem. Tr. 90. However, Delgado added that certain steps were required before it became safe to enter the area. He admitted both that he was comfortable with the decision to see if things calmed down and was a party to the decision to not shut it down. *Id.* Thus, the Court observes, apart from McNary's interaction with Emig, Alcoa's designed miner/management process for resolving issues worked – Delgado was an active player in that process and he was a participant in the decision to not shut the unit down. The Court finds this is instructive in determining what actually transpired between McNary and Emig, as Emig was a participant with Delgado immediately after his exchanges with McNary and, there is no dispute that he comported himself professionally with Delgado.

Delgado also conceded that there was some history between him and Emig; in the past they had argued robustly about how to deal with particular situations. Tr. 91. Delgado did not feel that Emig listened to him or at least that they weren't agreeing. *Id.* However, in this instance, the instance the Court must analyze, a time out was then called and Grones, Emig, Medina, Delgado and others then talked about the situation and they reached a solution. Tr. 92.

Although Delgado reaffirmed that, upon approaching the site, the first thing he heard was Emig's words – that Emig would have McNary removed as a rep and from the plant, *Delgado agreed that he did not know what had transpired before he arrived, and therefore could not know what had prompted Emig to say those things.* Tr. 93. Delgado also agreed that Emig, as the superintendent of digestion, was in charge of the area in issue. Tr. 93. Delgado further admitted that MSHA would view Emig as the operator's agent with responsibility for the area and, if something went wrong, the blame would have been on Emig's shoulders. *Id. Significantly, Delgado then agreed that, if McNary had told Emig, that Emig couldn't tell him what to do, this would have been a reason for Emig to have been upset with McNary.* Tr. 93-94.

Probing further on Emig's and McNary's interaction, Delgado agreed that while miners have a right to point out things they believe are unsafe and they have a right to refuse to do things they believe are unsafe, on the other side of the equation, an Alcoa manager would have the right to remove a worker from an area if he determined that the person was being disruptive. Tr. 94. However, Delgado added that one's definition of "disruptive" is important. *Id.*

Respondent's Counsel, correctly in the Court's view, described the worker/management relationship in such circumstances as a "balancing act." Tr. 94. Again, it was pointed out that Delgado had no knowledge of what preceded his hearing Emig's words to McNary. Delgado also agreed that at that moment, Emig had "a lot on his hands." *Id.*

Respondent's Counsel asked whether in such a situation, with "serious stuff" going on, the focus should be on dealing with the stuff, as opposed to an employee complaining about the manager's authority. Tr. 95. Delgado responded "yes." Tr. 95.

Illustrative of Alcoa's attitude towards safety, Delgado agreed that "Alcoa has never objected to paying for more than one to accompany an MSHA inspector when he's doing [an] inspection." Tr. 99.

Delgado agreed that McNary was second-in-command as a miners' rep to accompanying an MSHA inspector. Tr. 100. In selecting McNary as second-in-command, Delgado conceded that McNary was not someone who would be intimidated easily and was comfortable in speaking up. Tr. 100-101. Consistent with that view, Delgado acknowledged that McNary would not be intimidated by Grones, Emig, or the plant manager, Ben Cars. Tr. 101. Delgado also agreed that he was not intimidated to visit the plant manager and complain about safety issues. Tr. 102. Thus, the Court observes that Delgado's *own words* on the subject of intimidation by Alcoa management contradicted themselves.

Further, of relevance in the Court's estimation in understanding the context of this matter, Delgado informed that, at the twice monthly safety meetings, *McNary and everyone else felt*

comfortable speaking up. Tr. 104. Emig was present at such meetings. *Id.* These admissions by Delgado also undercut his earlier claim of employees being intimidated.

Delgado agreed that when he arrived at the scene “there was tension between Mr. Emig and Mr. McNary.” Tr. 104. Delgado made the decision that it was better for him to handle the situation than McNary, but added, “[e]specially when Mr. Emig hollered at me, I’m done with [McNary].” Tr. 104. However, Delgado also agreed that his biggest concern at that moment was the safety of the miners and accordingly he wanted to talk with Emig about the danger he was observing. Tr. 104-105.

When asked if he recalled Emig offered to remove himself from the situation, Delgado responded that he did not remember that. However, Delgado acknowledged that Emig could have said that, but that he simply did not remember it. Tr. 105.

The investigation regarding the January 2014 incident was a joint company/union investigation. Tr. 109. Delgado never restrained McNary in this matter; instead he asked him to move to a nearby location and McNary did that, without incident. Tr. 110. Delgado responded “no,” when asked if, prior to this incident he had never heard Emig threaten to remove a miners’ rep from their role, or from the plant. Tr. 110-11. Thus, the Court notes that Delgado conceded Emig had never made such a threat prior to this incident. Further, Delgado admitted that Emig never asserted that it was insufficient for McNary to move where Delgado directed him; that is, Emig never uttered, “no, he [McNary] needs to get out of here.” Tr. 112. Nor did Emig assert to Delgado that McNary needed to get out of the plant. In fact, as discussed herein, in the Court’s view, McNary seemed to be goading Emig into saying something more, asking if Emig was done with him. Emig responded that he was done with him for now. *Id.*

Following Delgado, the Complainant, Michael Kevin McNary testified. Tr. 115. At the time of his testimony in this proceeding he was not employed and his last employment was with Alcoa at the Point Comfort plant. In June 2016, he was among the large majority of employees that were laid off from the plant.¹¹ Tr. 117. He worked at the Point Comfort plant for about eight years. *Id.* During his employment he had always been an hourly employee. Tr. 120.

When he started working at the plant, McNary was an “area operator,” and was classified as such, working in the preventative maintenance group, known as “PDM.” Tr. 118. McNary described his job then as one who worked the valves, opening and closing them, as part of controlling the process. *Id.* He agreed with Delgado’s earlier testimony, which testimony, as the Complainant and therefore not sequestered, he heard, about “the process, digestion, clarification, precipitation, calcination.” Tr. 118-19. During his employment, he worked in each of those processes, except for calcination. Tr. 119. He estimated spending about two to three years in each of those departments. Tr. 120.

¹¹ The layoff was not peculiar to McNary as he admitted that “the majority of the people was laid off. [sic]” Tr. 117. Only a skeleton crew remained. *Id.* A lot of management was laid off too. Tr. 118.

At the time of the incident in issue, he had been in the digestion department for about three years. Tr. 120. He added some description to his “area operator” title, stating while

classified as an area operator [he was] working the job of gland manager and gland manager¹² is the individuals [sic] that goes out into the area and do the maintenance on pumps, check out the pumps, make sure everything is going good with the pumps, troubleshoot the pumps, like a pump specialist pretty much.

Tr. 120.

In his role as gland manager, he would make daily rounds¹³, “troubleshoot pumps that had problems. We'd go out and we identified bad actors [with bad actors referring to machinery, not personnel]. A bad actor is a pump that is continuously having problems.” Tr. 121-22. This was, as he described it, all part of maintenance, “keeping the pumps running well.” Tr. 122.

McNary is a union member, with the United Steel Workers, and in that role he was a worker’s compensation representative for individuals injured on the job. Tr. 122. He was also a MSHA rep. Tr. 123. The terms “miners rep” and “MSHA rep” are used synonymously at the plant. Tr. 123. He was a miners’ rep “plant-wide,” as the “number 2 in charge,” after Delgado. Tr. 125. It is fair to state that McNary’s duties as the miners’ rep and his involvement in investigations and Department Health and Safety meetings composed the wealth of his work time.

McNary also informed that, in December 2011, he was injured on the job in the clarification department when standing next to a drain valve. That valve failed, spraying hot slurry on him. Tr. 127-28. He received burns on 30% of his head and his whole right side. The injuries caused him to be hospitalized for a month. Tr. 129. In total, it took him slightly more than a year to recover before he returned to work. *Id.* It was after that return to work that he became a miners rep. *Id.*

¹² For what it’s worth, McNary explained that a “gland is actually two pieces of metal that -- that holds the packing back. You know, just -- the same way of the valve that [Delgado] was explaining the packing is what holds the product from coming out, a pump is the same way. It has packing in the stuffing box. It's called the stuffing box. And you have a shaft that goes into the stuffing box. And the packing is around the shaft and you have two pieces of metal. You know, most of the pumps are ideally the same, you know. These two pieces of metal holds the packing in and you tighten the packing to keep the product from coming out of the pump.” Tr. 121. He added that, “[i]f that packing fails, then, you know, you have a pump blowing out the same way the valve blew out at the L5 area.” *Id.*

¹³ By “making rounds,” McNary meant checking the pumps. Tr. 123. McNary was making such daily rounds at the time of the January 2014 event in issue. Tr. 124.

The January 8, 2014 Incident

As noted, the January 8, 2014 incident, which is the subject of this litigation, occurred about eight (8) months after McNary became a miners' rep. Tr. 131. At that time McNary's job title was gland manager. On that day, as part of his duties, he was checking pumps and making adjustments on them. In the course of that work, he came to the L5 area, where there are some seven or eight large pumps. It was then that he saw steam, that is to say, slurry, spraying out everywhere. At that time he also saw supervisor Donnie Broussard and Joe Nevlud, a contractor. Those two individuals were looking at the valve which McNary had observed spewing and blowing out. Broussard and Nevlud exchanged words with one another and then walked back towards the office area. Tr. 133. Then, McNary saw Marty Montes and Robert Serna walking towards him. Serna, McNary informed, is a 6A operator and an hourly employee. As a reference, an 8A is a superior, or main, operator. Tr. 133-34. Montes is also an hourly employee. Tr. 134. The two approached McNary who observed that both men were covered in slurry. *Id.* Montes told McNary that a valve went out and that it continued to get worse, to the point that he thought they would need to shut the unit down. *Id.* McNary added that Serna told him he didn't want to go back over there. Tr.134. The Court observes that, at that point, based upon McNary's own testimony regarding the information from Montes and Serna, McNary could've invoked a stop job order.

Next, McNary got a call from Miguel Gonzalez. Gonzalez is an hourly employee that worked temporarily as a supervisor. Tr. 135. While McNary, according to his recounting, continued to *just observe* the situation, Gonzalez arrived and then Donnie Broussard with Steve Emig arrived right after Gonzalez. *Id.* At that point, McNary stated, Broussard, Gonzalez, and Emig began handing out Tychem suits to the operator.¹⁴ Tr. 136. Then, Delton Luhn, a general mechanic, and another MSHA miners' rep, arrived at the scene, and asked McNary what was occurring.

¹⁴ McNary contended that the Tychem suits were inappropriate for the situation being confronted, as they are useful only for chemical exposures, not for situations involving hot temperatures, as here. Tr. 136-37. This assertion, the Court notes, was yet another basis for McNary to invoke a stop job, yet he did not do that.

Including Emig, and McNary, and with Broussard, Gonzalez, and Luhn also present, all there with McNary, when McNary was asked by Luhn about the situation, his response was “*Man, I don't know. I'm just looking.*” Tr. 136-37 (emphasis added). While he told Luhn that a “valve was going out and there’s a lot of people moving around,” he added “but just basically ‘I’m just watching, just observing.’” Tr. 138. Thus, McNary stated that his role was passive.¹⁵

At that point McNary stated that he observed Emig assisting Marty Montes putting on a Tyvech suit and that Emig, who brought Montes with him, approached McNary and Luhn, asking if they had any tape. Tr. 138. Both responded that they had no tape but then McNary asked Emig why he needed tape. Tr. 139. Emig responded, according to McNary, that he needed the tape for Montes’ wrist. *Id.* Emig then asked McNary if he would get some tape from the tool room. McNary thought to himself, “*I better go get this tape.*” *Id.* (emphasis added). McNary acknowledged that Emig had the authority to give such directions to him. Tr. 139. The Court finds McNary’s testimony to be dubious on this claim – that he thought, “I better go get this tape,” as he would later claim that the search for tape was a ruse on Emig’s part to remove him from the area. The Court notes that if McNary believed Emig’s real purpose was to get him away from the area, he then had his second opportunity to invoke a stop job directly to Emig.

According to his testimony, McNary then went to the tool room, but there was no tape there. However, as he departed the tool room, he thought “this is a bad situation . . . those guys need[] some help over there.” Tr. 140. The Court notes that, by his own testimony, when McNary formulated this thought, he did so *without any new information*. This underscores that he passed up the opportunity to invoke the stop job when directly before Emig.

Acting upon his claim of his then-arrived-upon concern, McNary decided he needed to have Kelly Grones involved. To that end, he asked Luis Medina to request for “Kelly [Grones] to come over to the L5 area as quick as she could.” Tr. 140. He sought Ms. Grones’ involvement because she is an environmental health and safety (“EHS”) manager. As McNary saw it, he determined that “she can help us assess the situation and come to a decision and help come to a formal decision without putting the miners at risk, without putting the operators at risk.” Tr. 140.

In the Court’s view, McNary’s action, surreptitiously seeking to bring in Grones and therefor attempting, covertly, to usurp Emig’s authority, was improper. McNary’s actions were

¹⁵ Shortly thereafter in his testimony, McNary then contradicted his asserted general passivity, stating that when Gonzalez told him “about that pump that was supposedly to have been blowing out [he] wanted to see what pump [Gonzalez] was talking about. So [he, McNary] veered off -- I veered off from going directly back to the L5 area and [] went through the 25 area . . . looking for steam and slurry blowing out, and I’m looking through the whole area. I don’t see anything. There’s nothing blowing out.” Tr. 141-42. Not seeing anything blowing out, McNary then went back to the L5 area. In the Court’s view, this calls into question how pressing McNary viewed the L5 situation to be, as he was able to make a side trip to view a claimed issue with a different pump.

an attempt to override Emig. It was clear that *McNary had determined* that Grones had to take over the situation, expressing that Grones,

was a very critical thinker and she had empathy and compassion for the operators and she made the decisions for us. That tended to change a little after she become [sic] safety manager, but I was still hoping that she had that compassion to make the right decision when she did come out there.

Tr. 141.

Clearly, McNary was expressing that the traits he believed Grones might still possess were not Emig's traits. Although, the Court acknowledges that McNary could believe whatever he wished regarding the traits of Emig or Grones, he still acted outside of his authority by attempting to direct how management should address the problem, by his deciding which management official should be in control.

Upon returning to the L5 area, McNary described Emig as "standing off by himself. He was tending -- seems like he was walking in circles." Tr. 142. McNary then walked up to Emig and gestured with his head to signal for Emig to "come over here." Tr. 143. Emig then acceded to McNary's gesture and began to follow McNary. They walked, according to McNary, "a pretty good distance away" so that they could speak away from the noise in the pump area. Tr. 144. Delton Luhn, who was right behind McNary, joined this meeting, a meeting which was initiated by McNary. Arriving at a location where it was quiet enough to speak, McNary informed Emig that he

called Kelly [Grones] and [she] should be on her way to help us assess the situation." And [Emig], he looked at [McNary], [and] said, 'You did what?' And I started to explain it to him again. And [Emig] says, 'You should not have called anyone. This is my department. I direct the work force. I make the decisions.' [McNary then] said, 'Well, Steve [Emig], . . . Why did you direct those operators into that hot slurry -- that hot slurry after you sent me off to get tape?' [Emig] said, 'I didn't send them in there.' [McNary then] said, 'Well, how did they get in there?'

Tr. 145.

McNary continued his recounting of the event, stating that he asked Emig,

'How did they get in there?' [McNary then] said, 'they've been in there already.' And [Emig] said, 'Well, they volunteered.' Tr. 146. McNary then responded to Emig's remark, stating, 'Well, you watched them go in there. You didn't stop them?' Again, according to McNary's recounting, Emig then stated that he had 'called them out.'

Tr. 146.

McNary challenged Emig's remark, responding "You [i.e. Emig], called them out after they went in there. You helped them -- you helped them suit up. You had intentions of them to go in there. If you didn't have intentions of them going in there, you wouldn't have helped them suit up." *Id.*

The Court also considers McNary's words towards Emig to have been entirely inappropriate. McNary, apart from directing Emig to follow him, then engaged in what was essentially a dressing down by McNary's assertions of what he claimed Emig had done. Thus, McNary *was not* directly making safety complaints to Emig, an option he knew about and could have invoked. Instead, he was challenging, and disputing, Emig's responses.

By McNary's retelling of the interaction, Emig responded that he didn't like McNary's actions, informing McNary, using those words, that he "didn't like McNary's actions," and adding the remark that McNary "shouldn't be involved in these matters." Tr. 146. McNary challenged that statement too, questioning Emig's assertion, by remarking, "I shouldn't be involved? I should be involved. I'm the MSHA rep and I'm concerned for their safety." *Id.* Because the sequence of the events is important, the Court notes that, even by McNary's version of the events, during his testimony at the hearing, *this was the first moment in time when McNary expressed a safety concern to Emig.*

Next, according to McNary's testimony, Emig then said "Well, I will remove you as MSHA rep. [sic] I will remove you from this department, and I will remove you from this plant." Tr. 146. It was McNary's testimony that when Emig made those remarks, Carlos Delgado and MSHA inspector Brett Barrick were present. Tr. 146. McNary then turned around and told Delgado and Barrick that Emig had just threatened him. McNary stated, effectively, that he was stunned by Emig's words, asserting "at that point, you know, my head was kind of reeling. You know, it was kind of like 'I know this didn't just happen. I just -- I just got threatened. It's not supposed to happen.'" Tr. 147. McNary interpreted that Emig's words meant "[a] termination automatically." *Id.*

McNary's testimony continued, stating that Delgado, Barrick and Emig then walked off about ten or fifteen feet from him. Tr. 148. At that point McNary could not hear completely what the three were saying, as he was able to understand only "bits and pieces" of the conversation. However, McNary apparently heard enough "bits and pieces" of the conversation for him to walk over to the three and assert "Steve [Emig], you know it didn't happen that way. Why don't you tell them you sent those operators in that slurry while you sent me away to get tape." Tr. 149. After that remark by McNary to Emig, by McNary's account, Emig then told him "Kevin [McNary] I'm done with you." Tr. 149.

At this point, McNary, apparently his head no longer reeling, regained his bearings, as he replied to Emig, "You're done with me or you're done with me for good?" *Id.* To which, again by McNary's accounting, Emig said, "No, just for now." *Id.* At that point, the two had no further conversations. Thus, in the Court's view, even accepting for the moment the veracity of McNary's testimony, something which the Court ultimately declines to do, McNary admitted that Emig had walked back his earlier remark. Therefore, by McNary's own accounting, Emig had almost immediately walked back his improper remark, whatever it exactly was.

McNary's attorney, describing the exchanges between McNary and Emig as "interaction," asked McNary if he ever told Emig that he, McNary, was "in charge here. You're [i.e. Emig] not in charge." McNary denied making those remarks. Tr. 149. Asked again, but with a more expansive question, whether he ever told "Emig in any way that he wasn't in charge of the situation," McNary responded, "[n]o." Tr. 150. Nor, McNary asserted, did he ever tell Emig that he [McNary] was "conducting an investigation" or that "This is [McNary's] investigation." *Id.* Further, McNary denied telling Emig that Emig doesn't direct the work force, that he, McNary, directs the work force. Tr. 150. McNary also denied that he told Emig that he "didn't have to listen to what [Emig] said." Tr. 151.

Instead, McNary stated, "[t]he only thing I told [Emig] was Kelly [Grones] was coming out there to help him assess the situation and he blew up." Tr. 150. Thus, again by McNary's testimony, he admitted that he had done an end run around Emig, an act that was beyond his charter as a miners' rep and as a miner. Further, McNary's earlier testimony reveals that he sought out Grones, not to help Emig assess the situation, but rather to replace Emig, because, while he also had doubts about Grones, he believed she would be the more concerned person to deal with the issue. McNary also denied that Emig ever said anything to him to the effect that he, Emig, had already contacted her. Tr. 151.

Although McNary, per his request, hoped that Medina had contacted Grones, he testified that he could not be sure that Medina had been successful in reaching her. While he stated that he could not be sure if Grones ever got the message which he directed Medina to deliver, in his next breath McNary then stated "*But I told Steve [Emig] that she was called and she was on her way out there.*" Tr. 151 (emphasis added). The Court observes that something does not fit with that claim. McNary, if he truly did not know whether Medina had reached Grones, as he claimed, could not have asserted that he told Emig that Grones was on her way.

In any event, Grones did arrive. At the time of Grones' arrival, McNary stated that Delgado and Barrick were present, and he, McNary, "was already walking off." Tr. 151. The Court would comment that McNary's claim that he would walk off when Grones arrived is quite odd, given his expressed concern and the steps he took to have Grones arrive at the site of the problem. Thus, one would think that, as he was the initiator to have Grones come to the site, McNary would stay.

Although McNary's Counsel asked "[h]ad anybody at the plant in management ever told you before *in discussing a safety situation* that 'This is not your business' or 'You shouldn't be involved in this,'" McNary responded that he had never been in a situation like that ... [it was] the first time that [he'd] ever been in that situation with management." Tr. 153. Thus, McNary admitted it was more than unusual; it had never happened before. This prompts the question what were the unique circumstances which brought this about? As set forth below, the Court concludes that, under the totality of the circumstances, *it was McNary's own conduct* which brought about the exchange with Emig.

The Court would note again that, in its view, it is a mischaracterization to label McNary's actions and statements with the words used by his Counsel, as *discussing* a safety situation. McNary was not discussing a safety situation. Rather, he was making assertions about Emig's

conduct and attempting to orchestrate which management official would control the event. This was far beyond his legitimate purview.

McNary also stated that no one had to physically restrain him during this event and he denied swearing or cussing. Tr. 153. McNary's Counsel asked about Delton Luhn and McNary confirmed that Luhn died a few months before this hearing. Tr. 154. McNary was presented with Complainant's Exhibit P 5, an affidavit made by Luhn. McNary stated that he and Luhn "put these affidavits together," as McNary knew Luhn was a witness who "heard everything ... from the beginning to the end." Tr. 155. Thus, McNary stated that Luhn was present, along with Delgado and Emig, during the interaction which is the subject of this proceeding. Tr. 155. McNary identified the affidavit as bearing Luhn's signature. The affidavit was then sent to the Court and this occurred at a time before McNary had legal counsel. Tr. 157. The Court comments upon this affidavit below.

Respondent, Alcoa's, cross-examination began with Luhn's affidavit, Ex. P 5. McNary stated that he and Luhn drafted the affidavit together, along with the secretary at the union office. Tr. 158. Alcoa's Counsel noted that Delgado prepared an "almost identical affidavit," and McNary acknowledged that to be true, advising that he, McNary, Delgado, and the union secretary did Delgado's affidavit too. Tr. 159. Presenting R's Ex. 17 to him, McNary acknowledged that was the affidavit they prepared with Delgado. Tr. 159. Though not certain, McNary, who noted again that he was acting pro se at that time, believed the two affidavits were created in separate meetings, stating, "I believe so. I'm not too sure but I know they came over two different times because *we had to talk about the -- the details about what they actually heard and whatever, you know.*" Tr. 159 (emphasis added). McNary did state that Delgado was not present when Luhn and McNary prepared the Luhn affidavit and, similarly, Luhn was not present when Delgado and McNary prepared the Delgado affidavit. McNary could not recall which affidavit was created first. He also could not state whether the language from the first affidavit was used for the second one. Tr. 161.

The Court has reviewed the Luhn and Delgado affidavits. In addition to the fact that they bear the same issuance date, it is true that they largely mimic one another and therefore have an air of being rehearsed. Both affidavits state "Said operator Agent Steve Emig, in a loud aggressive tone did threaten to terminate Mr. McNary from the Alcoa Alumina Point Comfort Mine. Steve Emigs [sic] demeanor and verbal communication displayed threats of reprisal, intimidation, discrimination, and interference with the miner's statutory rights." Ex. P 5; Ex. R 17. The mimicking also represents the substance of Luhn's and Delgado's claims. Beyond that, the Court observes that it has the hearing testimony of Delgado, which is more valuable than his affidavit in terms of evaluating the totality of the circumstances. Luhn, now deceased, was not subject to examination of his claim by Alcoa. Perhaps of greatest concern, McNary's testimony about the creation of the affidavits is simply not credible, as one does not by mere happenstance arrive at the common language shared in them. Finally, drawing back from the words in the affidavits, though there are differences in exactly what was said, there is no dispute that McNary and Emig had words with one another. The key is the Court's determination of what words were exchanged and how those should be understood within the totality of the circumstances.

Directing McNary to January 8, 2014, McNary confirmed that his first conversation with Emig involving this matter, was when he gestured with his head for Emig to come over to McNary was located. Tr. 163. McNary then agreed that *the first thing* he told Emig was that he had called Kelly Grones. *Id.* McNary next agreed that Emig's response was "You did what? You shouldn't have called anyone." *Id.* McNary then agreed that Emig *seemed* very upset that he had called Grones. *Id.* However, McNary would not agree that Emig was upset about McNary's act of calling Grones, stating that, as he could not read Emig's mind, he could not know that. Tr. 163.

McNary denied that Emig told him that McNary was not directing the work force, and denied that Emig told him "that they were, in fact, in the process of assessing the issue to determine what to do next." Tr. 164. McNary also denied that he told Emig that Emig could not tell him what to do. Tr. 164-65. However, McNary acknowledged that *if* he had said that, *Emig would have been justified in being annoyed at him.* Tr. 165.

McNary agreed that Emig was the superintendent of digestion, and as such McNary's supervisor. Therefore, while McNary agreed that it would have been inappropriate for him to tell Emig that Emig couldn't tell him what to do, McNary denied having said that, stating, "it didn't happen." Tr. 165. *Over the objection of McNary's Counsel*, the Court permitted Alcoa's Counsel to ask, if McNary had made that remark, *whether Emig would have been justified in telling McNary to get out of the area.* McNary's response was,

"[t]hat depends, Mr. Bacon.¹⁶ I think when -- when you have a situation -- when miners' safety and health is put in a position and on the same token you have management that's putting those miners or the operators in that position, as an MSHA rep it's not exactly my job to turn my face and act like I've never seen something like that happening. But the way you're explaining it, it didn't ever happen that way.

Tr. 166.

The Court then questioned whether McNary had been responsive to the question. Tr. 166. Upon review, the Court finds that McNary was not responsive.

Another attempt to get a responsive answer from McNary was then made. McNary was asked, "*if you had told him that he did not -- he could not tell you what to do, would he have been in his right, in your mind, to have asked you to leave the area.*" McNary responded, "Yes." Tr. 167 (emphasis added).

¹⁶ As a reminder to the reader, Christopher Bacon is Alcoa's attorney in this case.

McNary then confirmed that it was his belief that Emig's request for McNary and Luhn to get tape for the Tyvech suits was motivated to get McNary out of the area. McNary admitted that it was Emig's purpose was "to keep me away from what was getting ready to happen."¹⁷ Tr. 167-68. However, McNary acknowledged that Emig asked him to get the tape *before* McNary later beckoned Emig to come over to speak with him, answering, "He asked for the tape before I called him." Tr. 168. Further, McNary admitted that at that point he had not had any conversation with Emig "about what was going on," agreeing that up to that point, he was only observing. Tr. 168-69. The Court finds that if McNary truly believed that Emig's aim was to remove him from the area, or that what "was getting ready to happen" was hazardous to miners, he again had the opportunity invoke the stop job.

McNary stated that he observed that they were trying to suit people up with Tyvech suits. Tr. 169. He agreed that once Delgado and MSHA inspector Barrick came to the scene, those individuals were talking with Emig about the situation, assessing it. Tr. 170-71. In fact, McNary then approached them, interrupting their discussion, in order to tell them that he believed Emig had sent him away in order to get the tape.¹⁸ Tr. 170.

When McNary was asked if, when he approached the three and interrupted them, he said, "*He [Emig] tried to get me out of here by going to get tape,*" McNary, in his response, took issue with the question's use of the term "assessing the situation," asserting that, while he was only able to hear bits and pieces of the trio's conversation, it seemed

like he [Emig] was talking to them about the -- the threats that he had just made to me. And I went to them -- it was Carlos Delgado, Brett Barrick and Steve Emig, they were standing about 10 or 15 [the Court presumes feet] away from me. And I told them, "Tell them about the threats you just made after you sent me to get tape.

Tr. 171 (emphasis added).

¹⁷ At that point McNary's Counsel commented that he would like to note that McNary raised this issue when he was acting pro se and that the Complainant, now with counsel, had withdrawn that issue. Therefore, McNary's Counsel, unsure where Alcoa's attorney was going with that issue, asserted this was no longer an issue before the court in this case. Tr. 168. The Court acknowledged the remark from McNary's Counsel, but overruled the contention that the matter was not an issue. *Id.* As McNary continued to assert during his testimony his theory that Emig had sent him on a "wild goose chase," the Court finds that, under the totality of the circumstances, the claim certainly remained relevant to appreciating what transpired in his interactions with Emig. Therefore, whether strategically claimed to be withdrawn or not, it reflected McNary's view and is instructive in appreciating the totality of the circumstances.

¹⁸ Alcoa's Counsel asked McNary, "[y]ou, in fact, went up to them and interrupted them to tell them that you felt that you had been sent away in order to get the tape?" McNary responded, "[y]es, I did." Tr. 170.

The Court remarked that McNary had not answered the question. Tr. 171. Alcoa's attorney then took a different approach, inquiring whether McNary agreed that "the most important thing at that moment was to assess the safety of the situation." Tr. 172. McNary responded, "I think so." *Id.* Thus, McNary agreed that at that point the greatest concern was with the upset and keeping miners safe, remarking "[t]hat's what the whole argument was about." Tr. 172. However, despite McNary's agreement that the most important thing at that moment was safety, he did not agree that the subject of whether McNary had sent him on a wild goose chase was a matter that could wait. Tr. 172. Pressing the issue, Alcoa's Counsel inquired of McNary, "You thought that was more important to address with Mr. Delgado than the safety incident that was occurring." *Id.* McNary, relying upon the "bits and pieces" he heard, answered

"When -- when I -- when I went back and started talking with them, they wasn't talking about assessing the situation. They were -- Steve [Emig] was trying to explain to them that he hadn't threatened me. That's what they were talking about. They weren't talking about assessing the situation. They weren't talking about the valve. They were talking about what they had just walked up to.

Tr. 172-73.

McNary agreed that Delgado told him to go over to where the other operators were, and agreed that in Delgado's testimony earlier during the hearing he heard Delgado tell Emig that they were not going to be sending people in.¹⁹ Tr. 173. When Alcoa's Counsel submitted to McNary that, based on Delgado's testimony, the big issue of concern was the safety emergency they were facing, McNary's Counsel objected to the question because it pertained to events *after* Emig's threat to McNary. Therefore, expressly, McNary's Counsel's stated point was that "*the only issue in this trial is, were the threats made and did it violate 105(c). What happened ten minutes later, you may want to hear it but it's really not relevant to the issue before [t]he Court.*" Tr. 174 (emphasis added).

The Court understands that McNary's Counsel would prefer to have the issue so simply circumscribed. If accepted, it is the Court's view that mere utterance of the words allegedly used by Emig would, in a talismanic manner, carry the day for McNary. Certainly, McNary's Counsel has never suggested that there could be any other result but interference upon such an utterance. However, the Court explained that, in applying the "totality of the circumstances" approach, it is looking "at events immediately prior to the events where the alleged remarks were made by -- by Mr. Emig and to the events afterwards. So I'm getting a ... continuum." Tr. 174.

Alcoa's Counsel then turned to McNary's accusation that Emig was "directing the miners to go into the line of fire," a characterization to which McNary agreed. Tr. 175. McNary also agreed that Emig took offense at McNary's accusation. However, McNary agreed that Emig told him he "did not direct them to go in," but McNary did not agree that Emig informed him that he

¹⁹ Because McNary is the Complainant, he was present for all the testimony. There is no suggestion by the Court of anything improper by that fact, but simply to note that it is also a fact that McNary heard Delgado's testimony before providing his own testimony.

told the miners *to come out*. Instead, McNary parsed the words used in the question, stating that Emig's statement to him was that he "*called them out* after they went in." Tr. 175 (emphasis added). Asked whether he felt that it was Emig's fault that the miners were in that area, McNary responded that "Emig was in charge of that area. He was in charge of the safety of those miners at that time." Tr. 175-76.

Asked if Emig really was not responsible for the miners going in, if in fact they went in without his consent and without his control, whether that would have been a reason for Emig to be upset with McNary's accusation, McNary acknowledged that would be a reason, but countered that Emig "was already upset." Tr. 176.

Next, McNary acknowledged that, following the incident, he was part of the investigation into the incident. Tr. 176. In connection with that investigation, *when McNary was asked the important question whether any of the miners told him that Emig directed them to go into the line of fire, McNary's Counsel objected that the question was overbroad and without a proper foundation*. That objection was overruled. Tr. 177. With the question repeated, that is, whether "any of the miners who were there working that day [told] [him, McNary], 'Mr. Emig instructed me to go in,'" McNary responded, "No one told me that that day." Tr. 178. Very oddly, in the Court's view, and given McNary's earlier answer that none of the employees told him during the investigation that Emig had directed them to go into the slurry, when McNary's Counsel asked McNary on redirect if he asked anyone, as part of the investigation, whether Emig had directed employees into the slurry, McNary responded, "*No. I did not ask any of them that.*" Tr. 185 (emphasis added).

When asked if Delgado requested McNary to move out of the area while he continued to talk with Emig, McNary stated that was not exactly what happened. Instead, McNary demonstrated with a gesture that Delgado raised his hand and moved it a little, while telling McNary to "cool off." Tr. 178-79. McNary did follow the instruction from Delgado, and moved away from the area and then headed back to the breakroom to write his statement. Tr. 179.

Over objections from McNary's Counsel, McNary answered that he was never terminated, nor disciplined and that after the incident he continued to work with Emig on a regular basis. Tr. 180.

On redirect, McNary affirmed that when he interrupted Emig, Delgado, and Barrick, Emig had already threatened him. In fact, McNary stated that Emig had just threatened him, only a matter of five to seven seconds earlier. Tr. 183-84. As noted earlier, McNary's "head reeling" condition did not last long.

The Complainant having rested, the Respondent called Ms. Kelly Grones as its first witness. Grones has a "master's degree in business administration, MBA and a bachelor's degree in safety." Tr. 191. At the time of the hearing she was no longer working for Alcoa, her current employment being with South Texas Electric, as a safety and health manager. That work began in November 2015. *Id.* As for her employment with Alcoa, that began in October 2012 as their environmental health and safety coordinator. Tr. 192.

Turning to the events of January 8, 2014, Grones stated that somewhere between 8:30 and 9:00 a.m. that morning, while she was in a production meeting, she received a call from Emig, notifying her that there was an upset condition and that he needed some advice on “some safety things that was going on in the area.” Tr. 193. She then left the meeting and headed to the site of the condition. Tr. 193-94. Upon arriving she saw MSHA’s Barrick, who was talking with Delgado and Emig. Barrick was raising his voice and screaming at Emig. She also observed that there was a lot of steam coming off of the pumps and she described it as “pretty messy.” Tr. 194. There were a lot of employees gathered there too. She then approached Emig, notifying him that she was there. According to Grones, the exchanges between Emig, Delgado and Barrick were intense. This included Delgado stating,

You’re not sending people in there. Brett’s [Barrick] like, ‘You’re not going to send people in there because you -- you almost fucking killed people last time,’ and really, it was very heated. And honestly, [Emig] was very quiet which, you know, I have a lot of history with [Emig] as well. [Emig] is -- at times, he definitely says his opinion and he's very open. He’s very confident and he’s going to tell you if you're wrong. And he makes the decisions in that department and he was very quiet. And I could tell that he was really, really upset, that he -- you know, these individuals, ... Delgado, [and] Barrick were saying these mean things to him.

Tr. 195-96.

Grones stated that she did not participate in the heated exchanges. Instead, she told them she needed to learn more about the situation. To that end, that is, to learn from production what was going on, before making any safety decisions, she proceeded inside and spoke to Richard Ratliff, an engineer, and JP Strickland, the latter being the production engineer. Tr. 196-97. Grones was also aware that there was a prior such incident in the area, and that the unit was shut down. She advised that shutting down is not a panacea; that action brings its own set of problems. Tr. 197. Ironically, there was no need to make a decision in the instance associated with this hearing, as the flow stopped. Tr. 197. Had a decision been required, Grones stated that she would have brought Delgado into that. Tr. 197-98.

Regarding MSHA’s Inspector Barrick yelling at Emig, Grones related that the inspector asserted, “[l]ast time this occurred, you injured Mike Brown.” Tr. 198. Brown, Grones informed, “was the individual that was hurt in the last incident in September.” *Id.*

On cross-examination, Grones acknowledged that she did not hear any conversation between Emig and McNary. Tr. 200. Therefore, she could not testify about events prior to her arrival at the site. *Id.* When, on direct, Grones referred to Emig stating that “there are things going on, we’re discussing things,” that was her interpretation of Emig’s remark, not a quote from him. Tr. 200. Grones did remember that Barrick and Delgado were yelling at Emig. Tr. 200. Recapping, Grones agreed that the event which brought her to the site involved, as expressed by McNary’s Counsel, a spewing valve that was shooting caustic in the L5. Tr. 201.

McNary's Counsel's made the point on cross-examination that Grones came on the scene after the exchange between McNary and Emig and that this was also after the attempt to control the valve by putting a tarp over it. Tr. 206. As discussed below, the Court does not accept such a narrow construction of the totality of the circumstances. After all, McNary's Counsel had no problem inserting into the record citations that were issued by MSHA after the exchange between McNary and Emig, nor with bringing up the prior burn incident. Unsurprisingly, the perspective of what should be included within the totality will differ between the advocates.

Grones stated that the inspector, Barrick, was asserting "mean things" to Emig, accusing him of nearly killing Mike Brown in a prior incident. Tr. 202. Grones agreed that Brown's injuries were significant, involving significant burns over 60% of his body due to spewing hot caustic material. Tr. 203. Grones agreed that it would not be a good idea to send an employee into such a condition without being outfitted with PPE. Tr. 204. As to whether a Tychem suit would provide protection in that environment, Grones stated it would depend on how that suit was rated. Tr. 205. On the day involved with this litigation, Grones did not recall seeing any employee in either a Tyvech or a Tychem suit. Tr. 206. Grones did agree that while Alcoa could make a decision as to how to deal with the event at hand, the MSHA Inspector, Barrick, could overrule that decision. Tr. 206. However, she could not recall if Barrick issued such an order that day. Tr. 207. Grones also agreed that the Inspector accused Emig of almost getting an employee killed in a similar situation. Tr. 207. While she admitted that Emig never denied the inspector's accusation, her response was that Emig instead remained calm in reaction to the inspector's words. Tr. 207.

Grones agreed that, at Alcoa, any employee can invoke a "stop job," with that term meaning any employee can assert, "Stop this job, it's unsafe." Tr. 207. She also agreed that Emig, under such circumstances, should, in the words used by McNary's Counsel, "accept Mr. McNary's advice to stop that job -- stop it and let's figure out what to do." Tr. 208. However, as has been noted, *the problem for McNary is that he did not invoke the stop job option, though he knew full well about its availability, nor did he make such advice to stop and figure out what to do.*

When asked if a supervisor who doesn't like a miners' rep's opinion has a right to say, "I don't want you anymore. You leave. I'm going to bring another miners' rep in? You've never been trained that a supervisor can do that, have you," Grones responded that "it depends," such as "if the person is being disruptive or if it's in some sort of harassing behavior." Tr. 209. However, if the matter simply involves a miners' rep who disagrees with an action, then Grones agreed that is not cause for a supervisor to replace that miners' rep with another rep. Tr. 209. The Court notes that the problem with this hypothetical is that it did not occur here.

Grones was then shown two orders, Exhibits P3 and P4, which were issued at the relevant time. There was Order Number 8769213, in which MSHA alleged that safe access was not provided to the L5L pump under 32 in digestion. MSHA alleged that miners who entered the area were exposed to being burned by spraying slurry or engulfed in the material. Grones agreed that the citation reflects the inspector's opinion in that regard. Tr. 213-14. Further Grones agreed that the citation also alleges, per Inspector Barrick words, that Emig had "engaged in aggravated conduct because he failed to initiate appropriate actions, provide safe access to the area." Tr.

214. Grones then agreed that Emig was in charge of the digestion department and responsible for the safety of miners who went into the hot slurry. Tr. 214. Grones did not know if Alcoa ever challenged the citation reflected in Ex. P3, nor if it paid a \$5,000 civil penalty for that. Tr. 215.

Referring to Ex. P4, Order No. 8769214, which alleges that Alcoa failed to instruct miners regarding what to do should the packing on a pump being brought down if it began to surge or fail, McNary's Counsel asked if Alcoa had trained any operators on how to handle a valve that's spewing slurry, and her response was "no," as "that would be an emergency and we would decide at that moment if we needed to develop a special procedure." Tr. 216.

Addressing McNary's action to contact her, Grones agreed that she never told any miners' rep that they did not have a right to contact her and that she would encourage a miners' rep to contact her if her assistance was needed. Tr. 215. Thus, she agreed seeing nothing wrong with McNary contacting her to come to the L5 area. Grones did not accept the premise of McNary's question as to whether Alcoa did any specialized training after the Brown burn incident, responding that was a different case, involving a lock out issue and a different task. Tr. 217. However, there was some training in the department, following that incident. Tr. 218.

As to Grones' remark that Barrick was "mean" to Emig, she expressed that there are ways to bring up issues of past accidents. She added that the inspector later apologized for his behavior of cussing and getting mad. Tr. 218-19.

Based on the inspector's remarks, in Order No. 8769214, Ex. P4, under the Condition and Practice section, he required that the "five particular miners are to be withdrawn from pump swaps of this type until they have received required training." Tr. 219. Grones agreed that this meant that they couldn't go into such a situation again until they were given adequate training. Tr. 220. McNary's counsel also debated with Grones that one person's view of "disruptive behavior" could be different from another's view of such behavior. Tr. 220.

Reminded that she discussed with Emig the issue of whether to shut down the digestion unit, she then agreed with the words used by McNary's Counsel that since she "raised the issue of shutting down the digestion unit, Mr. Delgado's raising the issue would not have been inappropriate." Tr. 223.

Audio testimony of Mr. Steve Emig²⁰

Emig briefly reviewed his educational background; he has a degree in engineering. Following that, he began working for Alcoa, in January 2007, and he has remained with that employer since that time. Tr. 234. His work with Alcoa began at its Point Comfort facility. Tr. 234. At Point Comfort, Emig was first with the clarification department as a liability mechanical engineer, a position he held for three years. He then became a maintenance coordinator in the digestion department, working at that job for nearly two years. Following that, he was promoted to the department superintendent role within the digestion department and again worked in that capacity for three years. A promotion then followed as the west side manager role. He remained in that job until he transferred, in August 2015, to Alcoa's western Australia facility where he was working at the time of his testimony in this case. Tr. 234-35.

Turning to the events of January 8, 2014, when Emig was the department superintendent for digestion, his immediate supervisor was then Michael Hersoff, the production manager at the site. Tr. 235-36. Emig spoke to the problem with the valve in the L5 digestion area, stating that Joe Nevlud, who was a retired contractor, but working at the support department, told him about a leak in the unit. Tr. 236. This occurred at some time between 7:30 and 8:30 that morning, when Nevlud arrived at Emig's office, reporting the issue. Tr. 236. Upon being informed of the matter, Emig went straight to the area. On his way to the area he called Donnie Broussard, who was at that time the production area supervisor or "PAS." Upon arriving at the site of the problem he came into contact with other people who were responding to the situation. Tr. 237. He then saw operators putting on gear, and a supervisor directing the crew. Tr. 238. Emig also could see the problem, noting that "there was a considerable amount of slurry/liquor and spewing, spraying out in the valve area behind the pumps that are located there. The -- the area seemed quite inundated with that material at the time." Tr. 238. As noted, he saw some operators donning suits. Though he couldn't be sure, he thought they were donning paper suits or Tyvech²¹ suits. Some might have been using rain coats. *Id.* Also, some operators were assembling canvass material for use in draping the leak, to contain the spray. When he arrived, the attempt to drape the leak with canvass had already not been successful. Tr. 239.

²⁰ At the time of the hearing, Mr. Emig was working in Australia. Therefore, by the parties' agreement, his testimony was taken via telephone on August 15, 2017. Emig had also been deposed earlier. His first deposition, taken by Alcoa's Counsel, Mr. Bacon, was videotaped and that DVD was entered into the record. Tr. 228. A separate deposition, taken by McNary's Counsel, was also entered into the record. Tr. 228-29. McNary's Counsel requested that the Court view the DVD in-chambers, as they had already viewed it. Tr. 230. Although *McNary's Counsel then offered* that the Court could view the DVD *with Alcoa's Counsel* present but with McNary's Counsel absent, the Court declined the offer, advising that it would view the DVD, but by itself, with *neither* counsel present. Tr. 230. The Court viewed the DVD privately, with neither counsel present.

²¹ Emig stated that a Tyvech suit is more appropriate to protect from chemicals

Following this initial view of the situation, Emig stated that he

just tried to get involved to understand what they were doing to keep themselves protected from any of the caustic or slurry. It would have been at temperature as well [as] making sure that when they were putting on gloves and suits that they – that would be, you know, a sealed area, to not let anything pass through. I would have had conversations with the supervisor to understand how the unit was operating. So I would have a conversation also with Donnie Broussard when he arrived to the area to make sure that the unit was pressured up or in a state that it was -- it was going to shut itself down basically.

Tr. 240.

Asked if he knew “if there had been any efforts to shut down the valve” before he arrived, Emig responded that he could not remember clearly about that, but thought that the valve had been partially closed. *Id.* No one could work the valve until the pressure had died off, so he expressed that the valve would have been partially closed prior to his arrival. *Id.*

A critical question posed to Emig was whether “during the time that he was there, did [he] instruct any of the miners who were there to try to access the valve?” Tr. 241. Emig responded that he “did not.” Tr. 241. However, while he was there he did observe miners trying to access the valve. He saw that the operators had some protective equipment on and were trying to get close enough to the valve to drape the canvas on it, an attempt which, as he noted earlier in his testimony, did not succeed. At that point, Emig stated, they were in “a somewhat of a stand down position.” *Id.*

Asked again if he instructed the operators to go in, Emig responded that he

was present. So in the middle of a time-out session to regroup and think about what we were going to do, they had turned the pump back on to try to reduce the pressure, which was successful but that was after I had already said that we weren't going to do anything until we all agreed on the steps. When that happened, they had proceeded into the area in a very quick response because the pressure had died off. But, no, I did not direct them into there. I even -- but then after that -- after I pulled them back out, I said, you know, ‘We did not agree to that.’

Tr. 241-42.

Emig stated that after he pulled them out, no operator went in again, adding that “they did not go back in there, but that was because I became more forceful in my language to say, ‘We cannot continue to access the area.’” Tr. 242.

Asked if he contacted anyone else, besides Broussard, when on his way to the site, Emig responded,

“[y]es ...[he] called Kelly Grones who was the health and safety manager at the time. .. [he] made her aware of the situation and told her ...[and] [a]s [he] was doing the – the time-out session to not proceed any further, [he] asked for her [Grones] support, to come down and help us assess the area so we could put a plan together.

Tr. 242.

Emig added that around that same time he also spoke with Jeff Jimenez, who was the former PAS (process area supervisor), and told him about the situation in order to get his support. Tr. 243. After Emig spoke with him, Jimenez then came to the area. *Id.*

Regarding the presence of an ambulance at the site of the problem, Emig informed that when mechanic Tim Ables came by the area and inquired if it would be a good idea to have the ambulance there on standby, Emig agreed. Tr. 243.

Speaking to the central, but not exclusive, issue in terms of the totality of the circumstances in this matter, Emig was asked when he first saw McNary that morning. Emig responded that it was not long after he, that is to say, Emig, arrived at the scene. Tr. 244. He recalled his conversation with McNary at that time occurred when “the operators were putting their suits on, I had gone to – [McNary] and Mr. Delton Luhn, who was next to him, and asked if either one of them had any duct tape.” Tr. 245. The duct tape was for the purpose of sealing the glove and arm section of the suits. *Id.* Both advised that they did not have any tape and so Emig asked if “either one of them would possibly get some duct tape for the operators.” *Id.* He could not recall if either acknowledged his question. *Id.* The purpose of the tape was to seal up the PPE. Emig stated that he did not instruct the operators to wear the Tyvech suits. *Id.* Instead, he said it was probably Broussard who issued that direction. *Id.* In fact, Emig stated that the tape was not his idea either. Someone else mentioned it and Emig did not disagree. *Id.*

Emig’s next conversation with McNary occurred “after [he, Emig] finally got the full time-out session to where nobody was finally going back into the area, [and] Mr. McNary c[a]me over and asked to speak to[him, Emig]. So -- so from there, [he, Emig] walked away from the group and had a one-on-one conversation [with McNary].” Tr. 246. According to Emig, McNary’s “first approach was that he [McNary] had contacted some people to come down and assess the situation to instruct [Emig] on what to do.” *Id.* Emig stated that, in response, he let McNary

know that, Hey, we were in a full stand down mode and that [he, Emig] had contacted [Grones] as well to come down. We were assessing it. [Emig] then -- because [he] had felt that [McNary] was trying to control the situation, [Emig] let

him know that -- that [he, Emig] was directing the group, [but that McNary] could be involved if he [McNary would] like.

Tr. 247.

Again, by Emig's recounting, McNary's

first response was he didn't have to listen to me [Emig], which caught [him, Emig] by surprise. [Emig] wasn't quite sure why [McNary] said that, and [he, Emig] asked him what he [McNary] meant by that. And [McNary] said, 'Well, not in this role,' and [Emig] still didn't know what [McNary] was referring to. And [he, Emig] said, 'What role is that?' He [McNary] said, 'The MSHA representative role.' So from there, [he, Emig] began to explain to [McNary] -- [telling him] 'Well, you have to listen to me [Emig] as an employee of my [Emig's] department and the department superintendent.' So from there, he -- he [McNary] didn't appreciate that comment and still reiterated, he [McNary] didn't have to listen to [him, Emig]. [He, Emig] told [McNary] -- [he] explained to him [McNary] that, yes, he [McNary] did. And, ultimately, his behavior became unsuitable and irate and [he, Emig] hustled him [McNary] up and had him [McNary] removed from the area.

Tr. 247.

Alcoa's Counsel asked if, upon learning from McNary that he had called people to come and assess the situation, if he told McNary that he should not have done that or that he had no business doing that. McNary responded, "No, not at all." Tr. 249.

The Court believes this interaction between McNary and Emig was a critical moment in understanding the totality of the circumstances. Yes, a miners' representative has rights, significant rights, but they are not boundless. Here, having considered the testimony of McNary and Emig, the Court finds that McNary overstepped those bounds and Emig's statement to him, made in the heat of the moment, and at a point where McNary had been insubordinate, must be understood in that context. Further, very shortly thereafter, only moments after Emig's spontaneous remark in reaction to McNary's improper remarks, (a mere five to seven seconds later, according to McNary), Emig regained his composure and did not take what was essentially baiting on McNary's part, to get Emig to reaffirm his excited utterance. To be specific, for this moment, which involves an important credibility determination, and having heard Emig's and McNary's versions of their interaction, the Court finds Emig's recounting to be the more credible telling.

Continuing with his testimony, Emig related that after he had McNary removed from the area, there was

a brief argument regarding whether or not [he, Emig] had a right to do that, and [Emig] told [McNary] that, Well, [he, Emig] did ... have the right if [he, Emig] felt it necessary, [Emig] explained to him, to have him removed from the area.

And if it came down to it, I'd have to have stood down fully and even from the plant as we would have done for anybody else, but it created a hostile environment.

Tr. 248.

From there, "the conversation kind of abruptly" ended about the time three other individuals, Delgado, Barrick and Medina, showed up. *Id.*

Before McNary entered that conversation, Emig stated that he was replaying the context of the situation up to that point with the other three. Tr. 249. Emig expressed that, because of the "way that the conversation ended between [himself] and Mr. McNary, [he, Emig] began to fill Carlos Delgado in on the situation, which he was the site MSHA rep." *Id.* By Emig's characterization of that interaction, the conversation with those three "didn't end well."²² *Id.* Primarily, he was addressing Delgado during this conversation but telling all of them "what [he, Emig] knew at that point as far as the valve and it was spraying out, how the -- how we got to where we were as far as the operators responding to that and depressurize the area by the pump coming online." Tr. 250. Emig stated that Delgado said he was "sorry." Tr. 250. Emig added that, after explaining the situation, Delgado "very quickly just said to shut down the unit." *Id.* Emig saw matters differently, expressing that shutting down those units can present "quite a few safety risks in and of itself, not the operator's task but also the mechanics. ... [Emig] had started an explanation with [Delgado] but [he, Emig] didn't get very far in that at all." Tr. 251.

Further, McNary jumped into the conversation too and this occurred before Grones showed up. Thus, Emig stated that McNary interjected himself into that conversation and made some accusations about his, Emig's, behavior. Tr. 251. This included McNary alleging to those assembled that Emig had sent him on a wild goose chase to get duct tape. McNary, according to Emig, said, that Emig "had directed [McNary] specifically to leave the area. He [McNary] had

²² When Delgado, Barrick, and Medina arrived, Emig confirmed that Delgado was the person talking at the outset. However, Barrick then spoke and Emig stated that Barrick "presented himself to be very angry [about] the situation. He [Barrick] had made accusations toward ... [him, Emig asserting] that [Emig] had already burned five other people from an incident that had happened the prior year. He was pretty irate. He used some very strong language." Tr. 253. Emig could not recall verbatim what Barrick said at that moment, but it was "something to the effect of, you know, 'I don't know what you're talking about but you're not going to send anybody in there.' And he used some profanity. He said he wanted to know how the canvass material got onto the valve and then that's when he stopped. That was pretty much what he said." Tr. 253-54. Emig acknowledged that the incident Barrick was referring to was the event in September 2013 involving Mr. Brown in which employees had been burned. Tr. 254. In that regard, Emig was asked if he was supervising or directing Mr. Brown at that time when that accident occurred. Emig answered that he "was the department superintendent" but he "was not directing Mr. Brown." Tr. 254. Further, Emig stated that he had not directed Brown to do the task which injured him. *Id.* Emig was present that day, but responded that the "task would have been one of many involving the restart of that unit." Tr. 254. On the day of Brown's injury, Emig "was standing inside of the unit some distance away from where Mr. Brown was." *Id.*

also accused that [he, Emig] directed the operators into the valve area.” Tr. 252. Emig responded that he “did neither” of those things. *Id.* At that point, by Emig’s telling, McNary argued back “Yes, you did.” McNary argued back in his own defense. *Id.* Emig then determined that the

conversation escalated to a point where [he, Emig] made the decision that [he] didn't want -- I felt -- I felt it was an extremely bad shelling. As we were trying to handle this crisis, so to speak, [and he is] sitting there taking accusations [from] McNary. Because of that, [he, McNary] removed [him]self and Mr. McNary from the area at the time.

Id.

Thus, it was Emig’s testimony that, as the conversation was “going nowhere,” he put Jimenez in his, Emig’s role, to assess the situation and complete the assessment once Grones arrived. *Id.*

Emig acknowledged that he also made a statement to McNary directly that he “was through with him at that time ‘cause he had -- he had pushed me to a point that I did not think it was going further in a positive direction anyway.” Tr. 252. Emig elaborated that McNary

had said, ‘Oh, you're through with me for good? I said, ‘No, I’m not through with you for good. I'm just through with you for right now’ because of the point it had gotten to. He [McNary] said, [again] ‘Oh, you’re through with me for good?’ And that constant reiteration was extremely frustrating and I said, ‘No, just right now.’

Tr. 253.

Emig related that Grones arrived at a time not long after he had begun his discussion with Delgado and Barrick. Tr. 255. When Grones arrived, he filled her in as to what had transpired and she asked about the options in shutting down the unit. Tr. 255. The conversation did not proceed much further because Barrick became irate and that had the effect of preventing Emig from continuing his conversation with Grones. Tr. 255.²³ After Barrick walked off, those remaining watched “the last activities those operators had taken to seed off the valve. The pressure was dying off and there -- there really wasn't much discussion beyond that. It appeared that it was becoming resolved.” Tr. 256. Emig’s direct exam concluded with his statement that he

²³ Emig expressed that he did not have much of a chance to respond to Barrick’s words, but he, Emig, “listened intently and respectfully” and then at the end, his [Barrick’s] last comment was forcefully made as he said, ‘Before you leave here today’ -- He said he -- the canvass had gotten on that valve on accident or whatever. He said, ‘Before I leave today, I will find out how that got there.’” Tr. 256. Emig started to explain, but Barrick didn’t actually want to hear Emig’s explanation and Barrick ended the conversation. Tr. 256. To be blunt, the Court observes that the MSHA inspector’s unfortunate interaction with Emig is not pertinent to resolving this interference claim.

never removed McNary from the site. Tr. 257. The Court notes that no one, McNary included, contends otherwise.

Under cross-examination, Emig was questioned about his conversation with McNary after he “suggested about the duct tape.” Tr. 260. Per the words used by McNary’s Counsel, Emig agreed that McNary accused him of *allowing*²⁴ employees to go into the valve that was spewing the hot slurry. Emig conceded that he held the supervisory position and was the chief person in the digestion department and that the employees that entered the slurry were under him in the chain-of-command. Tr. 261. McNary’s Counsel then stated, “you could have directed them not to go back into that hot slurry, couldn't you?” *Id.* Emig responded, “I did.” *Id.* That is, Emig stated that he instructed the employees not to go back in. Tr. 261-62. Emig explained, “After I seen [sic] that they were not going to be able to safely access that area, I then told them that we were going to take a time-out and not go back in that area until we figured out the appropriate solution.” Tr. 262.

McNary’s Counsel’s point was that when Emig arrived at the scene, employees were putting on Tychem suits and that, at least initially, he did not tell them they were not going to get into the hot slurry. Tr. 262. Emig did not agree that inspector Barrick’s accusation was the same as McNary’s, asserting that Barrick accused Emig of “forcefully directing them into that area.” Tr. 263. Emig then added that McNary accused him of *both allowing and directing* the employees into the area. *Id.* As noted above, Emig’s claim on that point is accurate. Emig asserted that allowing and directing are different things.²⁵

Turning to the events when McNary returned and McNary’s testimony that he looked for duct tape, Emig confirmed that McNary told him at that time that “there would be a group of people coming to assess the situation.” Tr. 265. Challenged on whether McNary actually only said that Grones would be coming to the site, Emig repeated that McNary stated there would be a group of people and that Grones was coming too; Emig responded, “He did also say he had contacted Kelly Grones, but he did say to me [Emig] that a group of people would come.” Tr. 265. Emig agreed that the only specific name mentioned was Grones. Tr. 266. McNary’s

²⁴ Although Emig agreed that McNary so accused him, McNary’s actual words were *not* that Emig *allowed* the operators into the slurry, but rather he alleged that Emig “*direct[ed]* those operators into that hot slurry.” Tr. 145.

²⁵ Regarding the presence of the ambulance, a subject the Court considers to be another side issue of no value to the interference claim, Emig agreed that it was Mr. Able’s idea to call the ambulance. Able is an hourly employee. Tr. 264. McNary’s Counsel, with Emig agreeing, noted that Emig was in charge of Able and that if he had declined Able’s idea, no ambulance would have come to the site. Tr. 264. Then, essentially challenging Emig’s decisions, McNary’s Counsel noted that if Emig had decided to shut down the unit, (*which the Court notes, turned out to be unnecessary*), there would have been no need for an ambulance, nor any need for McNary to go look for tape. Emig responded that the Tychem suits still would have been needed for a shutdown and restart. Tr. 265. The Court reminds that one should not lose sight of the fact that no ambulance services were needed, and that, essentially, Complainant’s Counsel was criticizing Emig’s decision to be proactive when the suggestion for the ambulance was offered to him.

Counsel asked how an hourly employee like McNary would have the authority to get a group of people to the site, Emig responded that he did not inquire how McNary would gather a group and so he could only speculate that McNary could have phoned people. Tr. 266.

Addressing Emig's view that McNary was trying to tell him what to do, apart from Emig's impressions, Emig agreed that McNary never used the words to Emig that "I'm conducting my own investigation" nor that he told Emig that he was "in charge of this investigation." Tr. 267. However, Emig maintained that McNary implied those things. *Id.* Emig added, as distinct from McNary asserting that he, McNary, had the power to tell him what to do, McNary "did refer to the group that was coming down would tell [him, McNary] what to do." *Id.*

McNary's Counsel then asserted that Emig didn't mind Grones coming down to assess the situation, but rather his problem was that McNary had asked her to come down, an assertion which Emig denied, stating, "[t]hat's not correct." Tr. 268. Emig responded further that his issue was that, by the words he, McNary, used, McNary "was assuming to take control and then direct." *Id.* Though he could not be sure if McNary said "they" or "we," he was inclined to say that McNary said "we," stating that McNary said, "'We'll direct you as to what to do with the situation.' It was that approach that, yes, made me a little upset." Tr. 268.

Turning to Alcoa's "stop job" policy, Emig agreed with the words used by McNary's Counsel that "any employee, whether or not you're a miners' rep or just a regular hourly employee, has the right to stop a job if they think there's an unsafe condition present." Tr. 269. Therefore, Emig agreed that McNary could have said to Emig that he was "stopping this job and you [Emig] are not sending anybody into that L5 valve area." *Id.* Emig qualified his agreement, stating, "[y]es. If he had approached it that way, yes." *Id.*

Elaborating, Emig stated that

[t]he reason [he, Emig] did not like it was because [he, Emig], in the moment, had already stopped and was pulling everybody out trying to control the crisis. He [McNary] appeared to be oblivious to that, even though he was close enough, and then approached it as if he was getting the people down to then stop and -- and direct. . . . [t]hat's why.

Tr. 269-70.

Further, Emig denied the suggestion by McNary's Counsel that he, Emig, didn't like McNary taking credit for the action, responding,

No, not a credit. It -- from a -- being involved perspective. I had -- I told him that we had stopped and we were assessing it and I had also spoken to [Grones] to come down and to be a part of that. That's why I extended my offer to him to be involved with that as well.

Tr. 270.

Since Emig agreed that McNary, or for that matter, any operator, could have invoked the stop job right, the suggestion was then made by McNary's Counsel that what Emig objected to about McNary's words and actions, accepting for the moment Emig's version of the events, was really no different than if McNary had simply invoked the stop job right. Tr. 271. Understandably, the Court notes that while Complainant's Counsel may wish to equate the two, they are quite different.

Getting to the language that constituted a focal point in this dispute, McNary's Counsel asserted to Emig that he [Emig] "told Mr. McNary [that he, Emig] could remove [McNary] as a miners' rep and bring in another miners' rep in his place." Tr. 271. Emig responded that he "said to him that if [he, Emig] felt the need because of his [McNary's] behavior, even as a miners' rep, [he, Emig] could assume someone like Carlos Delgado as his assistant miners' rep, yes, I told him that." Tr. 271-72.

McNary's Counsel then asked if Emig told McNary that he could remove McNary as a miners' rep and replace him with another miners' rep, and that he told him he could remove McNary from the plant. Emig answered, "yes" to both questions. *Id.* This admission, an indicator of Emig's honesty, is but one part in the analysis of the totality of the circumstances. It is not, in the Court's view, the "be-all and end-all" of this interference claim.²⁶

Critically, McNary's Counsel, having established that Emig agreed that an operator and or a miners' rep has the right to express that a situation is unsafe, then asserted, "And he did tell you that that day, did he not? He thought it was dangerous to send anybody into that area?" Tr. 275. Emig's response was plain and direct, "I don't believe he ever expressed that to me." *Id.* Emig knew that McNary was concerned about the safety of the operators, but he stated, "[t]hat's different. I assumed he was concerned as I was for the operators but never once said that he was concerned about them going in there." *Id.* McNary's own testimony supports Emig in this regard; McNary never expressed such a concern *before* he informed Emig of his end run.

²⁶ McNary's Counsel then assumed for the moment that McNary did say that he didn't have to listen to Emig, and, in a fanciful question, asked if McNary had called a stop job when the valve was spewing slurry whether that would also be not listening to him. Emig, responded, "Not necessarily." Tr. 272-73. Trying a similar make-believe scenario, McNary's Counsel asked if Emig had directed employees to go into the area and then McNary had said, right in front of Emig, "No, you can't go in, I'm stopping the job," whether that would be going over Emig's direction, Emig again disagreed, responding that "[w]e don't view that as going over my direction but the intent behind a stop job is that you insert exactly that, a stopping point, to then potentially do something different. ... we do not view anybody actually exercising these stop job, as we call that as an action, as going over my head. Tr. 273. Turning to yet another scenario, McNary's Counsel asked and Emig agreed that a miners' rep does not have to agree with Emig's assessment of a situation. Emig also agreed that if McNary thought a situation was unsafe and Emig did not feel it was unsafe, McNary still has the right to express his view of the situation. In fact, Emig took it further, responding that such a right extends to an operator, not just to miners' reps. Tr. 274.

The Parties' Post-Hearing Briefs²⁷

Both sides presented their respective view of the facts. While the respective views of the parties were considered, the Court's findings of fact, as set forth above, control.

Complainant's Post-hearing Brief

Complainant's Post-hearing Brief summarizes McNary's contention that Alcoa violated McNary's section 105(c) rights

“when Emig verbally threatened to remove McNary as a representative of miners, threatened to remove him from the digestion unit, and threatened to remove him from the plant, on January 8, 2014, after McNary asked a safety and health manager to assess a hazardous situation in the digestion unit and criticized Emig's handling of that situation.

C's Br. at 1.

The Court, based on the testimony at the hearing, as set forth in this decision, does not adopt the Complainant's characterization of the events.

In the “Arguments” section of Complainant's Brief, Complainant asserts that Alcoa violated section 105(c)(1) of the Mine Act under both a discrimination analysis and an interference analysis. *Id.* at 23. As this case involves an interference claim, the Court will apply the interference analysis and applicable case law for such a claim. However, a discrimination analysis does not yield a different result for McNary.

Complainant brings attention to the fact that “Alcoa had a **stop job policy**, which allowed miners' reps and even hourly employees to override the decisions of supervisors - if they felt that a hazardous condition existed - until all parties could meet and discuss the situation.” *Id.* at 24. Complainant notes that “There is a long line of Commission cases - dating back 35 years - that hold that a **threat of reprisal** is an unlawful adverse action under §105(c)(1).” *Id.* (Bold type in Complainant's Brief). The Court does not take issue with that contention but the analysis does not end there. Instead, where claims of interference are asserted, a “totality of the circumstances” analysis must take place.

In the Court's view, while not expressly making the assertion, McNary implicitly suggests that, if made, the utterance of the words ascribed to Emig is the beginning and end of

²⁷ This portion of the decision represents the Court's comments on some of the contentions raised in the Parties' Post-Hearing Briefs. The briefs were considered in their entirety. The Court's findings of fact, which deal with many of the contentions, have been set forth earlier in this decision.

the case; that is, McNary should prevail in his *interference claim* without the need to consider anything else. Thus, as Complainant expressed it

the Commission made clear that, if true, Emig's comments to McNary - i.e., that he would remove McNary as a MSHA rep, remove him from the digestion department, and remove him from the plant - were threats of reprisal. ... Indeed, the Commission ruled that, 'At least two of the three threats were not vague. It may be said that 'removal from the plant' is susceptible to different meanings depending on the length of time of the removal. However, the threats to remove McNary as a miners' representative and to remove him 'from the department' were quite specific.'... Because it is clear that Emig threatened McNary because of his protected activity of calling Grones to the scene of the hazardous leaking valve, and because of his safety complaint regarding Emig's handling of the situation, Emig's actions violated §105(c)(1) under the traditional *Pasula-Robinette* discrimination analysis.

Id. at 25.

Complainant sets up a straw man by claiming

[w]hen a miners' rep, who is charged with being involved in health and safety matters in order to improve health and safety on the job, is threatened with disciplinary action **for speaking out on the unsafe practices of mine management**, of course that *tends to interfere* with his exercise of his safety rights. It also has a chilling effect on other miners and miners' reps who may be fearful to speak out for safety if they think they will be threatened by mine management as a result.

Id. at 26 (bold text added).

The Court views the Complainant's assertion in this manner because that is not what occurred. McNary did not speak out to Emig about alleged unsafe practices, nor did he invoke his right – a right of which he was quite aware – to assert the mine's stop job policy. Therefore, the Court agrees that, yes, as Complainant notes, McNary had a right to "express a contrary opinion." *Id.* at 27. The problem is that he did not do so.

McNary's Reply Brief

As with the contentions raised in the parties' initial briefs, the Court's findings of fact overtake the factual contentions made by the parties' reply briefs.

McNary's Reply begins by taking issue with Alcoa's claim that McNary waived his discrimination claim, asserting that,

"McNary was pro se when [the Court] issued [its] summary decision. Mr. McNary filed his own petition for discretionary review with the Commission, and

then [Complainant's attorney] filed ... [an] Amended Petition for Discretionary Review, which the Commission granted. In [Complainant's Counsel's] view, this is a discrimination/interference case and we do not agree with [Alcoa's view] that the Commission remanded it for a 'discrete' issue.

C's Reply at 3-4.

Thus, Complainant repeats the argument made in its initial brief, contending that "Emig's threats of reprisal against him violated §105(c)(1) of the Mine Act both under a discrimination analysis and under an interference analysis." *Id.* at 4.

As noted above, the Court has addressed this contention, however a few additional points will be made. In trying to have McNary's Counsel particularize the difference between McNary's discrimination complaint and his interference claim, if there is any difference in this matter, the Court noted that its understanding was that "there was no classic adverse action in the sense that Mr. McNary was not disciplined, he did not have a reduction in pay. There was nothing in the classic tangible sense." Tr. 10. McNary's Counsel replied,

"If that's what [the Court] consider[s] classic tangible [adverse action], but what the Commission said is that based on the legislative history of the Mine Act and on case law, **a threat of reprisal is an act of discrimination, and you don't have to prove that it was acted upon or carried out. Just the threat of reprisal is discrimination.**

Tr. 10-11; C's Reply at 4 (bold and brackets in Reply.)

Complainant then blurs an important distinction, contending that "Alcoa repeatedly states that Emig only threatened to 'remove' McNary, which is inaccurate." C's Reply at 4 (capitalization and underscoring removed). However, the claimed "inaccuracy" is difficult to identify with any accuracy. McNary's ire seems to be that Alcoa did not state that Emig *admitted* to making threats to McNary. Complainant then cites to its view of Emig's admissions, followed by Complainant's review of McNary's version of what was said between him and Emig. For good measure, Complainant adds that Delgado confirmed McNary's testimony. *Id.* at 4-5.

Ultimately, as noted, what was actually said is for the Court to determine, a determination which is made upon consideration of the parties' arguments in their briefs, the testimony of the witnesses, and the Court's credibility determinations about that testimony.

Moving to a different contention, speaking to the words between Emig and McNary, the Complainant asserts that,

"[i]t is one thing for a miners' rep and foremen to engage in a 'robust discussion' about safety and health issues on the job. It is quite another *for a supervisor to threaten a miners' rep for disagreeing with his assessment of a hazardous situation and whether or not miners should be exposed to dangers. That is what*

happened in this case, and it is a critical distinction that is apparently lost on Alcoa . . . per its posthearing brief.

Id. at 2 (emphasis added).

As discussed above, the Court considers McNary's claim that Emig threatened a miners' rep *for disagreeing with his "assessment of a hazardous situation and whether or not miners should be exposed to dangers"* to be a gross mischaracterization of the exchange and one that is very much at odds with the facts. C's Reply at 2.

McNary's Counsel also offers its take on what should properly be within the ambit of the "totality of the circumstances." Counsel urges that McNary's prior burn injury from slurry and Mike Brown's burn injury and MSHA's issuing citations regarding the conditions on the date of the incident should all be part of that totality. *Id.* at 6-7. McNary also states that there must be a complete factual account. *Id.* With that last remark at least, the Court agrees and it believes that the findings of fact present such a complete account.

McNary then transitions from the totality issue to its summary of the essence of the case, asserting, "What this case boils down to is that McNary criticized Emig for endangering the safety of his fellow workers - whom he represented as a miners' rep - and, in response, Emig threatened him. That is classic discrimination, as well as interference, under §105(c)(1)." *Id.* at 7. As discussed above, the Court does not buy into this characterization by Complainant; it does not accurately portray what occurred.²⁸

Alcoa's post-hearing brief

Referring to the January 8, 2014 event, Alcoa asserts that, while Emig was trying to deal with the incident, McNary "attempted to direct Emig and take control of the situation." R's Br. at 1. Just as the Court refrained from specifically addressing the Complainant's particular take on the facts, it does so for Respondent as well, leaving the finding of facts to the Court, as set forth above. Alcoa contends that, under the totality of the circumstances, McNary did not prove interference. That contention consists of three parts: that "Emig's statements probably had no effect on McNary, a seasoned MSHA representative accustomed to having heated and robust discussions with Alcoa's management," with Alcoa noting that McNary "stayed in the area after Emig shouted at him, suggesting that he did not really take Emig's statements seriously;" that "Emig had a legitimate and substantial reason for taking the position that McNary should leave the area since Emig was in the midst of handling a crisis situation and McNary's behavior was disruptive;" and that "Emig's decision to order McNary removed was motivated not by McNary's protected activity, but by McNary's difficult, hot-headed, and insubordinate behavior during an emergency situation." Alcoa Br. at 1.

²⁸ Where portions of the briefs descend into competing versions of what witnesses said, and counsels' retelling of what was said, there is a simple response – the Court's findings of fact recount what was said and, having considered the testimony, it then makes findings of credibility where the narratives are competing.

Alcoa also submits that

“McNary offered no evidence to rebut Emig’s testimony. In fact, although lead MSHA representative Carlos Delgado was not present when the miners attempted to access the valve, he did participate in the subsequent incident investigation and testified that no miner had told him that Emig had instructed them to access the valve.

R’s Br. 2, n.1.

Alcoa asserts that McNary’s action “proceeds only under a theory of interference, and McNary’s only claim is that Emig’s unfulfilled threats to have him removed from the area interfered with the exercise of his rights under the Mine Act.” *Id.* at 6. As noted, McNary’s Counsel disputes that this case only proceeds on an interference claim.

Speaking to the totality test, Alcoa cites *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (Aug. 1982) *aff’d*, 770 F.2d 168 (6th Cir. 1985), (“*Moses*”) and *Sec’y of Labor o/b/o Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 7 (Jan. 2005) (quoting *TRW, Inc. v NLRB*, 654 F.2d 307, 313 (5th Cir. 1981), (“*Gray*”) for the proposition that “[w]hether an operator’s actions amount to interference, however, ‘must be determined by what is said and done, and by the circumstances surrounding the words and actions.’ 4 FMSHRC at 1479 n.8.” and that

[i]n determining whether a statement is an impermissible threat . . . language used by the parties . . . must not be isolated nor analyzed in a vacuum, but must be considered in light of the circumstances existing when such language was spoken.” [and further that] [d]eterminations regarding interference must take into account not just what was said, but also when it was said, how it was said, and how often it was said.

R’s Br. at 7 (internal citation omitted).

Noting the views of two Commissioners in *United Mine Workers of America o/b/o Mark A. Franks and Ronald M. Holy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088 (Aug. 2014), (“*Franks*”), Alcoa remarks that those Commissioners expressed that an interference claim is to be examined by whether the challenged actions can be reasonably viewed under the totality of the circumstances as interfering with the protected right and whether the actions can be justified as sufficiently legitimate and substantial to outweigh the harm from the interference. *Id.* at 8.

Alcoa urges that,

“a reasonable miner would have taken into account the fact that Emig was under tremendous stress when McNary insisted on confronting him. No one would dispute that Emig was dealing with a serious crisis when McNary confronted him. A reasonable miner would have taken this into account or, at least, would not have been surprised when Emig lost patience with him and was no longer willing to deal with his distracting commentary and unhelpful interactions, not to mention

his insistence that he did not have to follow Emig's directions. Anyone who continued the confrontation given the circumstances should not have been surprised if his supervisor ordered him removed.

Id. at 16.

Addressing the second aspect of the interference test, Alcoa contends that “[e]ven if McNary could show interference with his rights, Emig had a legitimate and substantial reason for threatening to remove him, and that reason outweighs any harm caused to the exercise of protected rights.” *Id.* at 17 (italics and bold text removed). Alcoa asserts that “Emig did not try to remove McNary from the scene because of his actions as an MSHA representative, as McNary contends, but rather because of his actions as an employee—McNary had become disruptive and confrontational at the very moment when Emig needed to focus on a crisis situation.” *Id.* Alcoa concludes that “McNary has failed to show that Emig’s threat to remove him constituted interference under the Section 105(c) and, even assuming some level of interference, legitimate and substantial reasons vastly outweigh it.” *Id.* at 18. The Court agrees with Alcoa.

Alcoa’s Response Brief

Alcoa contends that Delton Luhn’s affidavit should be given minimal weight, because “much of the language in Luhn’s affidavit was identical to an affidavit prepared by Carlos Delgado.” R’s Reply at 1, citing C’s Exhibit 5 and Respondent’s Exhibit 17. Luhn died a few months before the trial. Respondent adds that the nearly identical statements also “sound much more like they were either ghost-written by an experienced advocate who was unofficially helping the pro se McNary or pulled verbatim from some brief that McNary had been given.” R’s Reply at 2. The Court has spoken to these affidavits, above, but adds that, given the level of erudition displayed by Delgado and McNary at the hearing, the Court finds that something was going on with these affidavits and that it is appropriate to give Luhn’s affidavit only the most minimal of weight.

Alcoa’s Reply also asserts that the interference cases cited by McNary are distinguishable. Alcoa Response Br. at 2. In this regard, Alcoa views the *McGary* decision as quite different from this matter. *Id.* The Court agrees; factually the two are not comparable in any useful sense. Alcoa reaches the same conclusion regarding the administrative law judge decision in *Secretary of Labor o/b/o Greathouse, et. Al. v. Monongalia County Coal Co., et. al.*, 38 FMSHRC 942 (May 2016) (“*Greathouse*”) and the Court agrees that *Greathouse* is not comparable to the facts here at all. The same observation applies to the *Reuben Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 2352 (ALJ, Aug. 2014) and *Pendley v. Highland Mining Co. and James Creighton*, 37 FMSHRC 301 (ALJ, Feb. 2015) decisions. Beyond the maxim that decisions of fellow administrative law judges have no precedential value, and therefore are useful only for whatever persuasive observations they may contain, the Court finds that, as to that latter potential value, those decisions are not helpful to this matter.

Applicable Case law

Mine Act Discrimination Claims

Section 105(c) of the Mine Act states, in relevant part: No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner [or] representative of miners . . . because such miner [or] representative of miners . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine. 30 U.S.C. § 815(c). Protected activity often takes the form of complaints made to the operator or its agent of an “alleged danger or safety or health violation. 30 USC § 815(c)(1). Section 105(c)(2) permits the filing of a discrimination complaint by a miner, applicant, or representative of miners “who believes that he has been discharged, interfered with, or otherwise discriminated against,” and states that the Secretary’s complaint to the Commission may allege ‘*discrimination or interference.*’ 30 U.S.C. § 815(c)(2) (emphasis added). Section 105(c)(3) also permits an individual to file a complaint charging “discrimination or interference” in violation of section 105(c)(1). 30 U.S.C. § 815(c)(3). *McGary v. Marshall Cnty. Coal Co.*, 38 FMSHRC 2006, 2009 (Aug. 26, 2016).

The legal framework for assessing discrimination claims brought under the Act is well-established. A complainant may establish a prima facie case by showing “(1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity.” *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). The complainant bears the ultimate burden of proving these elements by a preponderance of the evidence. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). The Court has found that McNary did not prove his case under the preponderance standard.

An adverse action is any “act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship.” *Sec’y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). An adverse action must be material, meaning that the harm is significant rather than trivial. In determining whether adverse action has occurred, the Commission applies the test articulated in *Burlington North v. White. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); see also *Sec’y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012).

If a complainant establishes the required elements, the burden shifts to the operator to 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.” *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998).

An operator who cannot rebut the prima facie case may still raise an affirmative “mixed motive” defense by proving that the adverse action was motivated only in part by protected activity, and it “would have taken the adverse action for the unprotected activity alone. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982). The operator must prove this defense by a preponderance of the evidence. *Id.*, see also *Pasula*, 2 FMSHRC at 2799-800. When evaluating an affirmative defense, the Court follows the two-step analysis outlined by the Commission in *Chacon v. Phelps Dodge. Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981). The first step of the Chacon analysis directs the Court to determine whether “the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive.” 3 FMSHRC at 2516. If the Court finds that the justification is not pretextual, it then moves to the second step, which is a “limited examination” of the justification’s substantiality, and assesses the narrow question of “whether the reason was enough to have legitimately moved that operator” to engage in the adverse action.” *Id.* at 2516-17.

Interference Claims are to be examined under the totality of the circumstances

Just as in this matter, *Wilson v. Fed. Mine Safety & Health Review Comm’n*, 863 F.3d 876, D.C. Cir. 2017 (“*Wilson*”), involved a claim of interference with a miner’s statutory rights. The right invoked in *Wilson* was interference with the right to inspect the mine’s examination books. There are notable factual differences between *Wilson* and McNary’s claim – with the former involving an hourly miner who was alleged to have interfered with Wilson’s right as a miners’ representative to review the mine’s preshift and onshift examination books. Among other things, the miner told Wilson that reviewing those books in order to find violations was interfering with his livelihood and that he should go home. Management then intervened in that confrontation, removed the hourly miner, telling the miner not to interfere with Wilson again. The hourly miner was also suspended for the rest of the day and lost a day’s pay. Wilson’s interference claim failed.²⁹

Despite the significant differences between these cases, *Wilson* is valuable because it articulates the appropriate factors to consider for interference claims, as well as those factors which are not appropriate. The D.C. Circuit noted in *Wilson* that “[t]he Commission has instructed that ‘rather than considering only [the respondent’s] intent, the [ALJ] should ... analyze[] the totality of circumstances surrounding [the] statements’ to determine whether a violation of Section 105(c) occurred.” *Wilson* at 881 (citing *Gray*, 27 FMSHRC at 10).

The Court also noted with approval that “the Commission has instructed, whether ‘interference’ occurred does not turn ‘on the [respondent’s] motive or on whether the coercion

²⁹ The D.C. Cir. rejected Wilson’s claims, except for one, holding that considering that the miners’ rep continued his work after the incident occurred was in error because the Secretary’s interference test is objective. The Court did acknowledge that it is appropriate to consider the “‘nature of [the parties’] relationship’ and whether the respondent holds a ‘supervisory position.’” *Wilson* at 882 (citing *Gray*, 27 FMSHRC at 10–11). In *Wilson*, the employee who challenged the miner’s rep did not hold a supervisory position. Here, Emig did hold a management position.

succeeded or failed.” *Id.* (citing *Gray* at 9). The Court then noted, with similar approval, that the Secretary’s test calls for an objective evaluation of how a reasonable miners’ representative would view the alleged interfering conduct, and not whether the person allegedly interfering had a subjective intention to interfere with the miner’s statutory rights. *Id.* at 881-82. With that in mind, the Court noted that the encounter lasted only a few minutes. *Id.* at 882. Thus, the D.C. Circuit agreed with the Commission view that “*the relevant perspective on the issue is that of the reasonable miner [or miners’ representative], not the subjective perspective of the complainant.*” *Id.* (italics added). Accordingly, even though the judge did not view the miners’ rep’s behavior as dispositive, it was still error to consider it at all, because that miners’ rep’s subjective reaction to the allegedly threatening or coercive remark made by the hourly miner is not to be considered, as that is inconsistent with the objective standard to be applied.

Addressing the context of the incident, in *Wilson* the incident occurred in a *public setting*, and the Court approved the administrative law judge’s view that such a setting is a mitigating factor, noting that,

[u]nder the totality of the circumstances, the Commission has observed that a public interaction with witnesses at the mine could be less intimidating than one that occurs in private, for example, through an at-home telephone call [or] a meeting outside the mine office. Here, that was true because the public nature of the incident enabled another employee, who was also a miners’ representative, to report the altercation and prompt the mine supervisor to intervene.

Id. at 882 (internal citation omitted).

The D.C. Circuit determined that the judge correctly applied the factors set forth in *Multi-Ad Servs. Inc. v. NLRB*, 255 F.3d 363, 372 (7th Cir. 2001). Although the judge was incorrect in considering the subjective reaction from the miners’ rep, that did not result in a remand because the judge did correctly apply the *Multi-Ad* factors in concluding that no interference occurred, and the judge’s improper consideration of actual response of the miners’ rep was harmless because that conclusion was made only to reinforce his earlier conclusion, applying the *Multi-Ad* factors. Accordingly, here, McNary’s *subjective reaction* to Emig’s remarks is not to be considered – the correct test is the perspective of a reasonable miner to those words, with the words being considered in the totality of the circumstances.

Wilson, though not prevailing overall, won the assertion that, under the totality of the circumstances test, a judge *should not* consider that, following an incident, the miners’ rep continued to act in that representative capacity. Again, the DC Circuit emphasized that as the ‘interference’ test is objective, and “the Commission has instructed that ‘the relevant perspective on the issue is that of the reasonable miner [or miners’ representative],’ not the subjective perspective of the complainant.” *Wilson* at 882. Thus, even though the judge did not consider it to be dispositive, he erred in considering the “subjective perspective of the complainant.” *Id.*

One aspect of the *Wilson* decision helps McNary, while another aspect does not. Helping McNary is that, in his case, management does bear responsibility for the conduct involved. Indeed, the alleged violative conduct came directly and only from management, through Mr.

Emig. Hurting McNary's side of the argument is that, in *Wilson*, only a single isolated incident was involved. That is what happened to McNary; there was but a single, isolated, *and quite brief*, instance. Evaluating the totality of the circumstances also means considering that Emig's words occurred in the heat of the moment, as the mine was trying to deal with a serious equipment failure.

Wilson did refer, approvingly, to the Commission's decision in *McGary*³⁰ v. *Marshall Cnty. Coal Co.*, 38 FMSHRC 2006 (Aug. 26, 2016). *McGary* involved complaints of interference brought by the Secretary of Labor on behalf of six miners pursuant to section 105(c) of the Act, which pertained to meetings Respondents held with their miners. The meetings included the subject of miners contacting MSHA about perceived safety issues. The Secretary alleged that Respondents interfered with the exercise of miners' rights at each of the mines by coercively imposing a requirement that miners who make section 103(g) complaints report the same complaint to management. Of value to this matter, the Commission set forth in *McGary* the "Appropriate Test for Interference." *Id.* Referring to the views of Chairman Jordan and Commissioner Nakamura, as expressed in *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2104-19 (Aug. 2014) ("Franks"), the Commission in *McGary* concluded that the *Franks* two-step test is consonant with the Commission's decisions in *Gray and Moses*.

That test

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

McGary at 2011.

In this matter, the Court finds that McNary did not establish the first element and that Alcoa did establish the second.

In *McGary* a Commissioner noted "that an operator may have legitimate and substantial reason for its conduct in question," and, consistent with that, rejected the idea that an operator may never question or comment upon a miner's exercise of a protected right.³¹ *McGary* at 2012 (citing *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985)).

³⁰ To avoid any understandable, potential, confusion, the Court wishes to highlight that this case involves McNary, while the name of the Complainant was McGary in Commission's August 2016 decision. What were the chances!

³¹ Though mentioned before, the Court believes that it is important to bear in mind that in the present case McNary *did not* exercise his stop job right.

It is fair to state that the Commission and the D.C. Circuit agree that the first prong of the test is to inquire “whether Respondents actions can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights.” *Id.* at 2015. As just noted, the Court finds that, applying the first prong, McNary failed to establish it. Further, also as just noted, the Court finds here that such legitimate and substantial reasons were present for Alcoa and, of equal importance, that McNary had not yet exercised a protected right at the time when Emig reacted. Accordingly, consistent with the Court’s findings of fact, the Court concludes that McNary failed to establish the first prong.

McGary also noted, quoting *Moses*, “[w]here an interference claim is made, *examining in isolation the literal meaning of the language used is contrary to the totality of the circumstances test.*” *McGary* at 2016 (emphasis added)(quoting *Moses*, 4 FMSHRC at 1479 n.8); *see also*, *Gray*, 27 FMSHRC at 8; 10 (“Whether an operator’s... comments concerning a miner’s exercise of a protected right constitute coercive... harassment proscribed by the Mine Act must be determined by what is said and done, and by the circumstances surrounding the words and actions.”). The Court has adhered to this. It did not examine Emig’s words in isolation.

It should also be noted that, in evaluating this case, the Court is aware of, and fully considered, the Commission’s remark in *McGary* “that one of the most important circumstances in any interference analysis is the position within the company that the communicator of the statements alleged to constitute interference holds relative to the recipients of the communications.” *Id.* at 2017. However, the Court observes that although the position of the communicator is one of the most important circumstances, that does not supplant the required analysis of the totality of the circumstances.³²

The Commission then addressed the second prong of the interference test. Under the second prong of the *Franks* interference opinion, it was remarked that an operator may defend against an otherwise valid interference claim if it offers a “legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.” Citing *Franks*, 36 FMSHRC at 2108. Thus, *Franks* stated that “an operator may comment upon a miners’ exercise of a protected right when it is ‘necessary to address a safety or health problem.’” *Id.* at 2019. That statement, in *McGary*, doesn’t fit exactly in this case, but under the circumstances of McNary’s behavior and his words, which informed Emig about McNary’s behavior, it does explain and, in the Court’s view, permitted Emig’s understandable ire. However, that ire was not directed at any protected activity by McNary, but rather the ire was aimed at McNary’s insubordinate actions.

Therefore, as the Court has found, McNary did not invoke his protected right to address any safety issue vis-à-vis Emig. Further, even assuming for the moment that he did invoke a safety issue, Emig, focused as he was on a safety issue surrounding the event, was justifiably

³² In fact, the Commission reiterated the “totality of the circumstances” approach three paragraphs after its remark about the position of the communicator. *Id.*

angered when McNary told him that he had engineered a de facto takeover of the incident by seeking to have Grones supplant Emig. Further, Emig rapidly regained his composure.

Further Discussion

While McNary asserts that his 105(c) discrimination claim is distinct from his 105(c) interference claim, his post-hearing brief speaks almost exclusively in terms of interference. There is only a gauzy, indistinct, additional discrimination claim. Thus, while Complainant states that a prima facie 105(c)(1) claim must show engagement in protected activity and an adverse action motivated in any part by such protected activity, matters about which the Court does not take issue, the question here still comes down to examining those elements vis-à-vis McNary's claim of interference.³³ As set forth in the findings of fact, the Court has determined that McNary did not exercise a protected right in his interaction with Emig. Rather, he attempted to commandeer which management official would be in charge of dealing with the incident.

As mentioned, nearly all of McNary's post-hearing brief, following the brief's "Facts" section,³⁴ deals with his claim of interference. Thus, while McNary speaks of "threats of reprisal" as within section 105(c) protection, in this case the elements in an interference claim control. McNary seems to recognize this, noting that

[t]he existence of a distinct cause of action for interference was explicitly recognized ... by the Commission in the plurality opinion of Chairman Jordan and Commissioner Nakamura in *UMWA o/b/o Franks & Hoy v. Emerald Coal Resources*, 36 FMSHRC 2088 (August 2014) ... vacated and remanded 620 Fed Appx. 127 (3rd Cir. 2015).

C's Br. at 19 (italics in brief).

Complainant then identifies from *Franks* the two part test for interference – that a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights and [that] [t]her person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

C's Br. At 20, citing *Franks* at 2108.

As noted, the Court has determined that McNary failed to establish such interference and that Alcoa justified Emig's brief outburst.

³³ While the Court believes that the distinction McNary now attempts to make is without a real difference, at the hearing it was ruled in effect that both theories would be examined. Tr. 13. They were so examined.

³⁴ McNary's Post-hearing Brief pages 18-27.

Although McNary then notes that the Commission's decision in *Sec of Labor o/b/o McGary & Bowersox et al. v. Marshall County Coal Co. et al.* overtook *Franks* because it represented the view of the full Commission, *McGary* essentially reiterated the *Franks* interference test.³⁵ Complainant asserts that "the 'harassment proscribed by the Mine Act 'must be determined by what is said and done and by the circumstances surrounding the words and actions.'" *Id.* The Court agrees and, in line with that approach, it has determined what was said and done and it also considered the surrounding circumstances, all in concluding that McNary's claim is deficient and, beyond that, Alcoa's action, through Emig's words of exasperation, was justified.

When McNary's brief turns to its "Arguments" section, the distinction between the discrimination claim and the interference claim remains blurred, as McNary states that "the Act's anti-discrimination/interference provision" is part of the remedial nature of the Mine Act and therefore must be "liberally construed to effectuate the Act's safety-enhancing purpose." *Id.* at 21-22. In the Court's assessment, the Complainant is implicitly asserting that Emig's words alone are fatal to Alcoa. It does so indirectly, because it realizes it is too much to claim this directly.

Although McNary asserts that Alcoa violated 105(c) under both a discrimination and interference analysis, this part of its brief is simply a repetition of its view of the facts. C's Br. at 23-24.³⁶ The Brief then transitions to citing a string of cases which stand for the proposition that "hold that a **threat of reprisal** is an unlawful adverse action under §105(c)(1)." *Id.* at 24 (bold in original). The problem with that is no one is asserting that threats of reprisal are okay. Clearly they are not. Again, Complainant's argument seems to infer that a threat of reprisal carries the day. However, under Commission and Federal Court of Appeals law, the matter is more involved, as threats must be analyzed under the totality test.

Concluding Remarks

As the D.C. Circuit stated, a judge is to analyze the totality of the circumstances *surrounding the statements*. Such an analysis is not to be open-ended. For that reason, looking to past events, that another miner had been burned at the mine and that McNary himself had been injured, though discussed *supra*, are not part of *the circumstances surrounding the statements*. Instead, the circumstances began that day when the incident occurred and from that point the

³⁵ *McGary* is useful only for the application of the interference test because the facts in that case are worlds' apart from those in *McNary*.

³⁶ At the hearing, the Court asked Complainant's Counsel what damages or remedies he is seeking should he prevail. He responded, "[a] posting, probably, at that store. Because, for instance, there are still miners' reps at the plant right now. Mr. McNary was a miners rep, and, of course, anytime there's a violation of 105(c), there has to be a fine." Tr. 12. Attorney Oppogard agreed that the remedy would include having the Secretary seeking a civil penalty, should Complainant prevail. *Id.* Complainant would also seek "an order that management personnel would have to undergo training on miners' rights; particularly the rights of representatives of miners." Tr. 13.

actions and words of McNary and Emig are to be measured. The Court, in a close analysis of those events, upon examining that totality, has found that McNary failed to carry his burden as he did not establish his interference claim. Nor has any other independent theory of discrimination been established by the Complainant. In contrast, applying the same totality test, the Court has found that Alcoa provided justification for Emig's brief words.

Accordingly, consistent with the foregoing, the Court finds that Complainant McNary failed to establish by a preponderance of the evidence that Alcoa discriminated against him in any manner under section 105(c) of the Mine Act, including under his predominant theory of interference. Therefore this matter is **DISMISSED**.

SO ORDERED.

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

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December 27, 2017

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

v.

REVELATION ENERGY, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2017-0118
A.C. No. 15-18198-426021

Mine: D-11 Panther

DECISION DENYING SETTLEMENT MOTION

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. (“Mine Act”) The parties have filed a joint motion to approve settlement. The originally assessed amount was \$2,665.00, and the proposed settlement is for \$2,265.00, a 15% reduction.

The provision cited in the section 104(a) citation is from the Mine Act, 30 U.S.C. § 876(b)(2)(F)(ii). Section 876 speaks generally to the requirement that there be “Telephone service or equivalent two-way communication facilities, approved by the Secretary or his authorized representative, shall be provided between the surface and each landing of main shafts and slopes and between the surface and each working section of any coal mine that is more than one hundred feet from a portal.” The particular cited subsection, addressing “Accident preparedness and response, provides at (b)(2)(A) that “Not later than 60 days after June 15, 2006, each underground coal mine operator shall develop and adopt a written accident response plan that complies with this subsection with respect to each mine of the operator, and periodically update such plans to reflect changes in operations in the mine, advances in technology, or other relevant considerations. Each such operator shall make the accident response plan available to the miners and the miners’ representatives.” As for subsection (F)(ii), while (F) deals with “Plan content-specific requirements,” (ii) speaks to Post accident communications and requires

Not later than 3 years after June 15, 2006, a plan shall, to be approved, provide for post accident communication between underground and surface personnel via a wireless two-way medium, and provide for an electronic tracking system permitting surface personnel to determine the location of any persons trapped underground or set forth within the plan the reasons such provisions can not be adopted. Where such plan sets forth the reasons such provisions can not be adopted, the plan shall also set forth the operator’s alternative means of compliance. Such alternative shall approximate, as closely as possible, the degree

of functional utility and safety protection provided by the wireless two-way medium and tracking system referred to in this subpart.

30 U.S.C. § 876 (b)(2)(F)(ii).

Keeping this statutory provision in mind, it is noted that the issuing inspector was quite precise in listing 8 (eight) separate deficiencies:

The operator has failed to follow his approved Emergency response plan approved 10/15/2015. When checked the operator has failed to maintain the AMR MN -6000 mine wide tracking and communication system for this mine fully functional at all times when miners are underground. The following deficiencies are observed. (1) 3 miners one third shift and two day shift are not being tracked at all by the system or manually (2) 5 tracking pads located on the 004 MMU are showing dead no communication (3) The pad for the 004 MMU refuge alternative is showing dead no communication (4) The data repeater located in the intake at #10 belt drive is showing dead no communication this means only the roadway branch alternate escapeway is functioning inby this point so there is no redundancy for the system. (5) only 3 text pagers can be found in use that had enough charge left in the batteries to send and receive a text message. These pagers should last 12 hours.(6) The operator do[esn't] have any spare tracking tags or text pagers for visitors at this mine.(7) The operator do[esn't] have a current record of the weekly examinations of the system (8) The operator has no record of system or component failures or immediate corrective actions taken for these failures. This condition exposes miners required to work in this mine to delayed rescue and escape in the event of a mine disaster. The operator immediately began manually tracking miners in the affected areas and started making repairs to the system.

Citation No. 8383648.

The *entirety* of the Secretary's Motion provides:

Basis of compromise: This citation was issued for a failure to follow the approved emergency response plan with regard tracking and communication. Respondent contends that it would present evidence that only some equipment was nonfunctional and therefore not all 19 persons on the section would be affected. The Secretary does not necessarily agree with the Respondent's position, but the Secretary recognizes a legitimate factual and legal dispute and believes that settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act. Therefore, the Secretary agrees to accept a reduced monetary penalty for this violation.

Motion at 3.

While the Secretary simultaneously asserts that he “does not necessarily agree with the Respondent’s position,” he states that he “recognizes a legitimate factual and legal dispute and believes that settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act.” The problem with the Secretary’s response is twofold. First, while the mine operator contends that “only some equipment was nonfunctional,” the citation does not assert otherwise. Beyond that, the motion does not identify the equipment which was functional and how that would impact, if at all, the equipment identified by the inspector as not being maintained. Second, the Secretary does not inform the factual dispute as to the number of people who would be affected; “not all 19 persons” could mean 18 or some other number. In this regard it is noted that the Part 100 “number of persons potentially affected” Table provides for 18 penalty points if the number of persons is 10 or more. Even if the number were, for example, 9, the penalty points allotted would be 16 and the motion, beyond not claiming what the contended reduced number is, does not inform how that number would translate to a penalty reduction.

The Court recognizes that the penalty reduction is modest, but as it has explained before, Commission approval under section 110(k) is not simply about dollars. In this instance, the Secretary has merely regurgitated the Respondent’s contention that it “would present evidence that only some equipment was nonfunctional and therefore not all 19 persons on the section would be affected.” Motion at 3. However, the Secretary, upon informing that he “does not necessarily agree with the Respondent’s position,” puts forth two reasons in support of the reduction. First, he advises that he “recognizes a legitimate factual and legal dispute,” but without identifying what the factual dispute is, nor explaining how it would impact the penalty. *Id.* The second offering to justify the settlement, that the Secretary “believes that settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act,” is a nullity because it is meaningless in the context of a section 110(k) settlement approval and

merely another way of echoing his initial stance that the Secretary knows best in settlements, and need not provide the Commission with a substantive factual basis for the motion.¹

Accordingly, the parties are directed to either submit an amended motion providing the needed information, as explained above, or to prepare for a hearing. The parties are directed to advise the Court within 10 (ten) days of their intentions.

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

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/JM

¹ “In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to and even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all alleged violations are resolved and violations that are accepted can be used as a basis for future enforcement actions. A resolution of this matter in which all violations are resolved is of significant value to the Secretary and advances the purposes of the Act.” Motion at 2.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 28, 2017

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

v.

BLUE DIAMOND COAL COMPANY,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2017-0141
A.C. No. 15-09636-428765

Mine: No. 77

DECISION DENYING SETTLEMENT MOTION

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Conference and Litigation Representative (CLR) has filed a joint motion to approve settlement. (“Motion”) Because the CLR has not complied with the practice provisions of the Commission’s Procedural Rules,¹ and also because the motion is insufficiently supported and also because the math doesn’t add up, it must be DENIED.

Six citations are involved in this docket. One citation, No. 8410728, was assessed at \$615.00 and is proposed for settlement at \$350.00, with a modification to low negligence. Another citation, No. 8410730, was assessed at \$484.00 and is proposed for settlement at \$300.00, with no modifications. The Respondent has agreed to pay the remaining four citations in full, with no modifications.² Per Exhibit A, the total proposed penalty amount was \$3,198.00. and the proposed settlement, according to the CLR, is for \$2,699.00. However, adding the settlement amounts produces a total of \$2,749, not the figure the CLR derives.³

¹ The Secretary has delegated a number of civil penalty petitions to Conference and Litigation Representatives (“CLRs”). Per 29 C.F.R. §2700.3 (b)(4), addressing non-attorneys, “Other persons” may practice before the Commission “with the permission of the presiding judge or the Commission.” According to the official file, the CLR, Mr. Oliver, never filed a notice of limited appearance. Therefore, the Secretary has not complied with this practice provision.

² Citation Nos. 8410429 and 8318993 alleged violations of 30 C.F.R. § 75.202(a); Citation No. 8410721 alleged a violation of 30 C.F.R. § 75.517; and Citation No. 8410722 alleged a violation of 30 C.F.R. § 75.400.

³ The Motion’s math is wanting at page 4 of the submission as well. There, in a table listing four of the six citations, the CLR calculates a total of \$800.00, but the assessed penalties actually add up to \$2,099.00.

The CLR presents the following bases for the proposed reductions and modification:

Regarding Citation No. 8410728, which alleged a violation of 30 C.F.R. § 75.604(b),

Basis of compromise: A reduction in the level of negligence on behalf of the operator. There are factual disputes regarding the likelihood of an injury producing event and the level of negligence on behalf of the operator. The Respondent asserts there was unlikely [sic] for an accident to occur that would result in any injuries and there was no negligence on behalf of the operator. The Respondent argues the shuttle car is equipped with a cable reel so that miners do not have to handle the cable by hand during normal mining operations and there was no damage to the inner insulated conductors. The Respondent further argues that the damaged splice was not present during the previous weekly electrical examination, that it was located on the cable reel where it would not have been easily seen, no one had any knowledge of the condition and would not have had a reason to believe it was present until the cable was pulled off of the reel and checked during the next scheduled weekly electrical examination. Therefore the Respondent concludes it was unlikely for an accident to occur that would result in any injuries and there was no negligence on behalf of the operator given the aforementioned facts. For the purpose of settlement, the Petitioner proposes and the Respondent accepts a reduction in the level of negligence from “Moderate” to “Low”. The parties have discussed the citation and the surrounding circumstances and in light of these considerations the Secretary has reevaluated the 110(i) factors, and the parties propose a revised penalty of \$350.00, which is sufficient to ensure future compliance with the Act.

Motion at 5.

Regarding Citation No. 8410730, which also alleged a violation of 30 C.F.R. § 75.604(b),

Basis of compromise: A reduction in the proposed penalty amount by the Office of Assessments. There are factual disputes regarding the likelihood of an injury producing event and the level of negligence on behalf of the operator. The Respondent asserts there was unlikely for an accident to occur [sic] that would result in any injuries and there was no negligence on behalf of the operator. The Respondent argues the bolt machine is equipped with a cable reel and that miners wear rubber gloves in accordance with written company policy when moving or hanging the cable. The Respondent further argues that the damaged splice was not present during the previous weekly electrical examination and that no one had any knowledge of the condition or have had a reason [sic] to believe it was present until the cable was checked during the next scheduled weekly electrical examination. Therefore the Respondent concludes it was unlikely for an accident to occur that would result in any injuries and there was no negligence on behalf of the operator given the aforementioned facts. For the purpose of settlement, the Petitioner proposes and the Respondent accepts a reduction in the proposed penalty amount by the Office of Assessments. The parties have discussed the

citation and the surrounding circumstances and in light of these considerations the Secretary has reevaluated the 110(i) factors, and the parties propose a revised penalty of \$300.00, which is sufficient to ensure future compliance with the Act.

Motion at 6.

Discussion

As noted, six citations are at issue in this docket. Four were settled for the amount originally proposed by the Secretary, and the other two are proposed for reduction and/or modification, as detailed above. Apart from the twice incorrectly stated math, substantively, in support of the proposed changes for both of these citations, the Secretary states: “The parties have discussed the citation and the surrounding circumstances and in light of these considerations the Secretary has reevaluated the 110(i) factors, and the parties propose a revised penalty...which is sufficient to ensure future compliance with the Act.” Motion at 5, 6. The Motion is insufficient to meet the Court’s obligations under section 110(k) of the Mine Act.

The Court has previously advised the Secretary that in most instances it cannot make the leap to infer that he acknowledges the plausibility of a Respondent’s representations in support of proposed reductions in civil penalties. It is not burdensome, assuming that such acknowledgements are accurate, for the Secretary to include language to the effect that the Respondent’s contentions present legitimate, substantial, factual disputes which are genuinely in issue and which disputes can only be resolved through the hearing process. For example, in WEVA 2017-0458, the Court advised the Secretary on December 22, 2017 that it

needs an acknowledgement, if appropriate, with words to the effect that the Respondent’s arguments are at least plausible. For [a] frame of reference, but not in any way intended as a directive as to the substance of the Secretary’s response, this is sometimes achieved through a statement from the Secretary, employed in previous motions, that the Secretary ‘recognizes that these facts are in dispute and raise factual and legal issues which can only be resolved by a hearing before the Commission, or by the parties reaching a compromise of the penalty proposed by the Secretary, or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary recognizes that the ALJ may find some merit in the facts and contentions raised by Respondent [and accordingly] [t]he Secretary agrees to accept a reduced penalty.’ The Court also notes that a key line in such submissions is the Secretary’s remark that “the ALJ may find some merit in the facts and contentions raised by Respondent.’ While the Court does not prescribe specific language that is needed, in this instance the Secretary offers little to help the Court determine whether to accept or reject the instant motion. Short of language along these lines, the Court is left only with making an inference about the Secretary’s view of the Respondent’s arguments. The Court does not believe that it is too much to ask for the Secretary to acknowledge, again if that is the Secretary’s genuine view, that the Respondent’s

contentions have plausibility and therefore are not in the realm of being farfetched and completely unsupportable factual contentions.

November 22, 2017 email from the Court to the parties in WEVA 2017-0458.

The same principles apply in this instance. Accordingly, for the reasons set forth above, the Joint Motion is **DENIED**. The parties are directed to either submit an amended motion providing the needed information, including the correct math, a notice of appearance, with a request for permission to practice in this matter, and substantive support, all as explained above, or to prepare for a hearing. The parties are directed to advise the Court within 10 (ten) days of their intentions.

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

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/JM

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 22, 2017

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

v.

BLANCHARD MACHINERY COMPANY,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2017-236-M
A.C. No. 38-00600-443931 (IBU)

Mine: Haile Gold Mine

ORDER DENYING SECRETARY'S MOTION FOR RECONSIDERATION OF ORDER DISCONTINUING SIMPLIFIED PROCEEDINGS

This case is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. On November 1, 2017, Chief Administrative Law Judge Robert J. Lesnick notified the parties that Docket No. SE 2017-236-M had been designated for Simplified Proceedings and assigned the docket to me.

On November 13, 2017, Respondent filed a Motion to Discontinue Simplified Proceedings, stating its reasons why this case is inappropriate for Simplified Proceedings. On November 14, 2017, I issued my Order Granting Motion to Discontinue Simplified Proceedings pursuant to 29 C.F.R. § 2700.104(a) based on Respondent's expressed need to conduct discovery in this matter. On November 14, 2017, the Secretary filed a Motion for Reconsideration stating his opposition to discontinuing Simplified Proceedings. On November 16, 2017, Respondent filed a memorandum in opposition to the Secretary's motion for reconsideration.

The Secretary asserts that this case was properly designated for Simplified Proceedings because it does not involve fatalities, injuries, or illnesses; complex issues of law or fact; or expert witnesses. (Sec'y Mot. at 2.) In addition, this case involves two section 104(a) citations, and the proposed penalty of \$232.00 is not specially assessed. (*Id.*) The Secretary also notes that the hearing in this case would be of limited duration. (*Id.*) The Secretary states that he made the disclosures required by 29 C.F.R. § 2700.15(a) on September 5, 2017, but did not receive Respondent's disclosures, and also denied responding to further discovery requests from Respondent. (*Id.* at 2-3.) The Secretary claims that "the parties must give the Simplified Proceedings process [time] to work before discontinuing the process" in order to reduce time and expense, and that "[n]o party should be allowed to circumvent this process." (*Id.* at 3.)

In contrast, Respondent asserts that the violations at issue require Respondent to conduct written discovery and depositions in order to effectively present the company's case. (Resp't Mot. at 2.) Specifically, Respondent states that issues of law and fact must be explored through the deposition of the MSHA inspector involved. (*Id.*; Resp't Mem. at 1-2.) Respondent alleges that the inspector did not base the violations on a thorough investigation or on the language of

the standards. (Resp't Mem. at 2.) Respondent asserts that the deficiencies in the Secretary's allegations compel Respondent to pursue discovery to determine what basis, if any, the Secretary has for the alleged citations. (*Id.*) Respondent also notes that it may retain and present an expert witness and anticipates filing a motion for summary decision in this matter. (Resp't Mot. at 2–3.) Respondent claims the Secretary attempts to avoid his obligation to support his allegations through normal discovery and to deny Respondent its right to due process. (Resp't Mem. at 1.)

The Commission's rules governing conventional proceedings permit broad discovery of any relevant, non-privileged matter, which may only be limited for good cause shown to prevent undue delay, oppression, burden, or expense. 29 C.F.R. § 2700.56(a)–(c). Similarly, the Federal Rules of Civil Procedure allow a party to discover “any non[-]privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]” Fed. R. Civ. P. 26(b)(1).¹ Discovery serves as a key tool “to narrow and clarify the basic issues between the parties” and “for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues.” *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). Therefore, the scope of discovery under the Federal Rules is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

The Commission's Procedural Rules for Simplified Proceedings recognize a basic purpose—to provide a mechanism “so that parties before the Commission may reduce the time and expense of litigation while being assured of due process and a hearing that meets the requirements of the Administrative Procedure Act.” 29 C.F.R. § 2700.100(a) (citations omitted). Such rules were promulgated primarily to assist the Commission in handling a temporary caseload increase beginning in 2006. 75 Fed. Reg. 28,223 (May 10, 2010). Cases designated for Simplified Proceedings cannot involve fatalities, injuries, or illnesses, and will generally have certain characteristics, such as involving “only citations issued under section 104(a) of the Mine Act” and not involving “complex issues of law or fact.” *Id.* § 2700.101. Yet discretion exists.

Although the Commission's Procedural Rules for Simplified Proceedings limit discovery, the Commission did not intend to deny parties access to information but rather to expedite the means for exchange through mandatory disclosure. *See* 75 Fed. Reg. 81,459, 81,461 (Dec. 28, 2010) (“Rather than requiring . . . discovery, the Commission proposed a more expeditious means for disclosure through the mandatory exchange of documents and materials . . .”); 29 C.F.R. § 2700.105. For Simplified Proceedings to achieve its goal of streamlining litigation, “the parties must be willing participants in the process.” *Cactus Canyon Quarries of Texas, Inc.*, 35 FMSHRC 715, 717 (Mar. 2013) (ALJ).² Hence, Commission Judges may discontinue

¹ Commission Judges may look to the Federal Rules of Civil Procedure for guidance on any procedural question not governed by the Mine Act, the Commission's Procedural Rules, or the Administrative Procedure Act. 29 C.F.R. § 2700.1(b).

² Although the Commission Judges' decisions I cite herein are not binding precedent, *see* 29 C.F.R. § 2700.69(d), I find their reasoning persuasive.

Simplified Proceedings upon motion by any party explaining why the case is inappropriate for simplified treatment.³ 29 C.F.R. § 2700.104(a)–(b).

Here, Respondent sought to engage in discovery beyond the procedures permitted by Simplified Proceedings. Specifically, Respondent asserts that deposing MSHA’s inspector is essential to the presentation of its case. Preventing a party from gathering information needed to present an effective case would not serve the purposes of Simplified Proceedings and would run counter to the goal of streamlining the issues in this matter. Indeed, when one party objects and requires more discovery than allowed under Simplified Proceedings, “the likelihood of a speedy resolution of the case is diminished to the point where adherence to the rules becomes a hindrance rather than a benefit.” *Cactus Canyon*, 35 FMSHRC at 717. Furthermore, despite the Secretary’s arguments, even cases that meet most of the criteria found in Procedural Rule 101 may still be deemed inappropriate for Simplified Proceedings. *See, e.g., Grand Eagle Mining, Inc.*, 33 FMSHRC 2355, 2356 (Sept. 2011) (ALJ) (denying motion to designate case for Simplified Proceedings although most of the general criteria were met). I have determined that Respondent demonstrated a reasonable need for the discovery sought. Given that the Secretary has failed to establish that such discovery would cause undue delay, oppression, burden, or expense, I see no justification to limit the operator’s access to information and its right to due process. Therefore, I conclude that Simplified Proceedings are inappropriate for this case.

Based on the above, it is hereby **ORDERED** that the Secretary’s Motion for Reconsideration be **DENIED**. Furthermore, my Prehearing Order issued on November 14, 2017, shall control the prehearing procedures in this proceeding. Thus, the parties’ deadline for compliance with my Prehearing Order shall be **Tuesday, April 3, 2018**.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

³ A Judge may discontinue Simplified Proceedings *sua sponte*. 29 C.F.R. § 2700.104(a).

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November 27, 2017

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

Complainants

v.

PENNYRILE ENERGY, LLC,

Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. KENT 2018-0004-D
MSHA Case No. MADI-CD-2017-05

Mine: Riveredge Mine
Mine ID: 15-19424

**ORDER GRANTING JOINT MOTION FOR TEMPORARY ECONOMIC
REINSTATEMENT**

Before: Judge Andrews

On October 26, 2017, this Court issued a Decision and Order Reinstating Jonathan Holskey to his former position with Pennyrile Energy at the Riveredge Mine at his former rate of pay. Soon thereafter, the parties negotiated a Temporary Economic Reinstatement agreement in lieu of actual reinstatement, and have moved this Court to grant economic reinstatement.

Section 105(c) of the Mine Act, which protects miners in making health and safety complaints is central to the proper functioning of the law. Congress stated that “If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant 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 35-36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978). Section 105(c) was intended to ensure that miners’ rights to make complaints or refuse work were not chilled by any company action. Indeed, the Senate Committee stated that it “intends section 10[5](c) to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” *Id.* The intent of the legislation is best served by actual reinstatement at the mine of the miner.

Temporary Reinstatement of a miner who brings a nonfrivolous complaint of discrimination protects miners from losing their livelihoods while the merits of a case proceeds through the Commission. It also serves to show others in the mine that the miner who speaks up about health and safety matters is back at work, so they can be confident that the law will protect them if they ever feel the need to make a health or safety complaint.

It has become the norm that parties have routinely negotiated agreements for economic reinstatement in lieu of actual reinstatement, with the assumption that the two are equivalent. Commission ALJs (including the undersigned) have routinely granted requests for economic reinstatement in lieu of actual reinstatement. *See eg Sec'y o/b/o Mosby v. Mulzer Crushed Stone, Inc.*, 34 FMSHRC 391, 392 (2012) (ALJ). *Sec'y o/b/o Whiton v. Wharf Resources, (USA), Inc.*, 38 FMSHRC 124, 125-26 (2016)(ALJ); *Sec'y o/b/o York v. BR&D Enterprises*, 23 FMSHRC 697, 698 (2001) (ALJ); *Sec'y, on behalf of Phillips, v. A & Construction Co.*, 30 FMSHRC 1119, 1121 (2008) (ALJ); *Sec'y o/b/o Hines v. Martin Marietta Materials, Inc.*, 34 FMSHRC 1063, 1063 (2012) (ALJ); *Sec'y o/b/o Mitchell v. Vulcan Construction Materials, LP*, 34 FMSHRC 2985 (2012); *Sec'y o/b/o Williamson v. CAM Mining, LLC*, 31 FMSHRC 1418, 1418-19 (2009) (ALJ); *Sec'y o/b/o George v. Freeport-McMoran, Bagdad, Inc.* 33 FMSHRC 2488, 2488-89 (2011) (ALJ); *Sec'y o/b/o Jackson v. Lafarge North America, Inc.*,34 FMSHRC 2993, 2993-94 (2012)(ALJ); *Sec'y o/b/o Billings v. Proppant Specialists, LLC*,33 FMSHRC 2340, 2340 (2011) (ALJ); *Sec'y o/b/o Glosson v. Lopkey Quarriers, Inc.*, 38 FMSHRC 2356, 2356 (2016) (ALJ); *Sec'y o/b/o White v. GS Materials, Inc.*, 35 FMSHRC 506, 506-07 (2013) (ALJ). In many instances, parties submit the agreements without any facts or reasons supporting a temporary economic reinstatement in lieu of actual reinstatement. A temporary economic reinstatement is an agreement in the nature of a settlement and, as such, scrutiny should be applied to make sure that they serve the purposes of the Act.

This Court recognizes that there are certain instances where economic reinstatement may be preferable or necessary, such as when there is no work for the miner, where one or both parties are concerned about safety, or where it is impossible or impractical for the miner to return to the mine. However, the Act says nothing about Temporary Economic Reinstatement, and specifically authorized judges to reinstate miners. Economic reinstatement is not equivalent to actual reinstatement for the Complainant or for other miners, because even under the most favorable of agreements, the Complainant loses experience, the Complainant would not receive promotions that could only come from actual work in the mine, and if the Complainant seeks alternative work the future employer will take note of his absence from the mine. Furthermore, there are no assurances that other miners are made aware that the Complainant has prevailed in his Temporary Reinstatement proceeding, as they would if they saw him back at the mine. Such lack of information can chill the speech rights of the other miners.

In the instant case, the parties were instructed to submit a motion for economic reinstatement, wherein they provided legal and factual arguments supporting economic reinstatement. Accordingly, the Motion for Temporary Economic Reinstatement is **GRANTED** according to the terms of the agreement submitted by the parties. However, in recognition of the Complainant's right to physical temporary reinstatement, the Complainant may at any time move this Court to order physical (rather than economic) temporary reinstatement.

/s/ Kenneth Andrews
Kenneth R. Andrews
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 11, 2017

SECRETARY OF LABOR, MSHA on
behalf of **LOUIS SILVA, JR.**,
Complainant

v.

AGGREGATE INDUSTRIES WRC, INC.,
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEST 2017-0482-DM
RM-MD-17-05

Mine: Morrison Plant
Mine ID: 05-00864

ORDER DENYING RESPONDENT'S MOTION FOR SANCTIONS FOR SPOILIATION OF EVIDENCE

This matter is before me on a complaint of discrimination filed by the Secretary of Labor (“Secretary”) on behalf of Louis Silva, Jr. pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(2), against Aggregate Industries WRC, Inc. (“Aggregate Industries”). Respondent filed a Motion for Sanctions for Spoliation of Evidence. Complainant filed an Opposition to the motion.¹ For reasons that follow, I **DENY** Respondent’s motion.

Louis Silva, Jr., was terminated from his position as a Quality Control Technician at the Morrison Plant on or about January 19, 2017. On January 25, 2017, Silva, through separate counsel representing him in a workman’s compensation proceeding, returned his company-issued cell phone to Aggregate Industries. The cell phone contained no user data. The missing user data is the subject of Respondent’s motion and this order.

Respondent argues that Complainant should be sanctioned by the court because Silva intentionally destroyed potentially relevant evidence, thereby prejudicing Respondent. Specifically, Respondent argues that Silva, following his termination, intentionally deleted the contents of his company-issued cell phone before returning the phone to Aggregate Industries on January 25. Mot. 1-3. Respondent employed a forensic investigator who was able to determine that a “factory reset” of the phone, which deleted and made unrecoverable all user data, was performed on January 24. Mot. 3. Respondent argues that, based on deposition testimony, Silva’s phone may have contained information related to his allegations in this matter and the deletion of those contents prejudices Respondent “because it is unable to dispute any allegations that may or may not have been supported by the contents of the cell phone[.]” *Id.* at 1-2. Spoliation occurred because Silva had control over the company-issued cell phone, the contents of which are relevant to his claims and Aggregate Industries’ defenses in this case, and he intentionally destroyed the information on the phone despite having a reasonably foreseeable duty to preserve it, as evidenced by his hiring of an attorney as early as January 19. Mot. 2, 4-5.

¹ Louis Silva is also represented by separate counsel in this proceeding. Complainant’s opposition was filed jointly by counsel for the Secretary of Labor and counsel for Silva.

Respondent moves this court to utilize its broad discretion to impose sanctions against Silva for the spoliation. Mot. 6-11. It suggests four forms of sanction: (1) dismissal, (2) an adverse inference that the phone contained information unfavorable to Silva's case or did not contain information corroborating his alleged protected activity, (3) an order excluding testimony regarding the contents of the phone, and (4) an order granting fees and costs incurred by Respondent in bringing the subject motion. Mot. 2, 6-11.

Complainant, in opposition, argues that Respondent's motion should be denied for multiple reasons. First, Respondent did not confer with Complainant prior to the filing of its motion and, in doing so, failed to comply with Commission Procedural Rule 10(c). Opp. 2-3. Second, Respondent's allegations lack evidentiary support. Specifically, Complainant states that the "factory reset" was not a result of intentional conduct by Silva but, rather, was conducted without Silva's knowledge by his daughter while Silva was hospitalized. Opp. 3. Further, Respondent failed to show how the contents of Silva's phone are relevant to the case. Opp. 4. Furthermore, there is no evidence that Silva engaged in any conduct in bad faith or failed to preserve evidence where a duty was reasonably foreseeable. Opp. 4. Finally, Respondent has not shown that it was prejudiced and the relief sought is disproportionate to the facts and unsupported by law. Opp. 5.

I find that sanctions are inappropriate. I agree with Complainant that Respondent's allegations lack evidentiary support. Respondent blindly alleges that Silva intentionally destroyed relevant evidence on the phone. However, Complainant disputes this and instead, citing the Declaration of Silva, avers that it was not Silva who conducted the "factory reset," but rather his teenage daughter who did so while Silva was hospitalized.² Moreover, Complainant asserts that, while Silva did ask his daughter to remove his personal photos that were stored on the phone, the "factory reset" was conducted without his knowledge. Silva's declaration directly undercuts Respondent's argument regarding any intentional deletion of that information by Silva. *See Sec'y of Labor obo Jeffrey Pappas v. CalPortland Company, et al.*, 39 FMSHRC 808 (Mar. 2017) (ALJ) (Denying a motion for sanctions and noting that the party who failed to preserve certain materials lacked intent).

Respondent's argument that the destroyed information was relevant also lacks evidentiary support. I agree with Complainant that Respondent's assertions of relevance are based on speculation. Although the contents of the phone have been erased and it is impossible for the court to determine what was on the phone,³ Silva has declared that the "[a]ll of the safety complaints [he] made at the mine were made in person, and not through email or text messages. The same is true with respect to reporting [his] injuries to" Respondent. Opp. Ex. 1 ¶ 8. This testimony contradicts Respondent's statement that "Silva appears to allege that he made some safety complaints" using the phone." Mot. 5.

² The Secretary alleges that Respondent failed to confer prior to the filing of its motion. Had Respondent done so it may have learned of the Secretary's planned response, and the parties may have been able to resolve the issues on their own without the involvement of this court.

³ As noted by Complainant, however, Respondent may be able to obtain text messages and emails that were sent by Silva by examining the cell phones of other employees.

Finally, I agree with Complainant that Respondent “misses the mark on whether Mr. Silva had a duty to preserve evidence and whether such duty was reasonably foreseeable.” Opp. 4. Parties have a “duty to preserve evidence in [their] possession when [they] know[] that the evidence is potentially relevant to litigation before the evidence was destroyed.” *Pappas*, 39 FMSHRC at 810 (citing *Leon v. IDX Systems Corp.*, 464 F.3d 951, 959 (9th Cir. 2006)). At the time the phone was returned to Respondent, Silva had not filed a complaint of discrimination and had not retained counsel to represent him in anticipation of filing a complaint.⁴ Moreover, given the lack of evidentiary support regarding potential relevance of any information on the phone, I find that it is at best questionable whether there may have been some reasonable foreseeability of a duty to preserve anything on the phone.

While I do not resolve all disputes of fact in this order, the unsupported allegation of Respondent that Silva intentionally destroyed relevant information that he had a duty to preserve lacks evidentiary support and is contradicted by evidence presented by Complainant. I find that the requested sanctions are not warranted because Respondent’s allegation that there was information on the phone that was relevant to this case is speculative and there is no evidence that Silva intentionally deleted relevant data or instructed his daughter to do so. In addition, it is not at all clear that Silva had a duty to preserve data on the phone or whether such a duty was reasonably foreseeable at the time the data was deleted. Finally, Respondent failed to show that it was prejudiced by the deletion of the data. Assuming, for that sake of argument, that Silva did make safety complaints using the phone, such information would be on the phone of the management employee(s) to whom the complaints were made. Respondent’s motion is **DENIED**.

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

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RWM

⁴ Silva had retained counsel to represent him in a separate worker’s compensation proceeding, who was not the same private attorney representing him in the current proceeding.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

December 18, 2017

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

v.

MINGO LOGAN COAL, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2017-0370
A.C. No. 46-09029-435040

Mine: Mountaineer II

ORDER REJECTING SETTLEMENT MOTION AND NOTICE OF HEARING

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On November 8, 2017, the Secretary filed a motion pursuant to Section 110(k) of the Mine Act, 30 U.S.C. § 820(k), seeking approval of the proposed settlement (“Secretary’s motion”).¹ The Secretary’s motion proposes a reduction in penalty from \$20,280.00 to \$14,242.00. The Solicitor specifically requests a reduction in penalty for Citation No. 9068069 from \$12,075.00 to \$6,037.00. Citation No. 9068069 alleges the following:

The lifeline in the alternate escapeway is not located in such a manner for miners to use effectively to escape starting at the track switch for Cedar Grove Mains Section and extending for a distance of six crosscuts inby towards the #18 Head gate section. Directly under this lifeline [are] extraneous materials in the form of loose rock measuring from 2 inches up to 12 inches thick, and a track rail, and a wooden cable spoon.

Standard 75.380(d)(7)(iv)^[2] was cited 5 times in two years at [the subject] mine.

Citation No. 9068069. The violation was designated as a significant and substantial contribution to a mine safety hazard (“S&S”).

¹ Section 110(k) of the Mine Act states that: “No proposed penalty which has been contested before the Commission under Section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission.” 30 U.S.C. § 820(k).

² 75.380 (d)(7)(iv) requires that “[e]ach escapeway shall be . . . [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be . . . [l]ocated in such a manner for miners to use effectively to escape.” 30 C.F.R. § 75.380(d)(7)(iv).

The motion submitted by the Secretary provided the following information in support of the penalty reduction:

The Respondent has argued that the conditions cited in Citation Nos. 9068069 were not reasonably likely to result in an injury and therefore should not have been designated as S&S. The Secretary does not agree that such a showing is necessary for an S&S finding. However, as demonstrated in the recent Commission decision in *Consolidation Coal Company*, [39 FMSHRC 1737 (Sept. 2017)], the Secretary acknowledges the uncertainty of the outcome of that issue and has agreed to the reduced penalty amount in order to resolve this proceeding.

Secretary's Motion at 3.

On November 13, 2017, the solicitor was sent an email asking him to clarify the factual basis for the penalty reduction, which was entirely lacking from the original settlement motion, and to explain how the Commission's recent *Consolidation Coal* decision reflected uncertainty over the outcome of the S&S issue in this proceeding, given the Commission's well-settled case law that the existence of an emergency must be assumed when evaluating the reasonable likelihood of an injury resulting from a violation of an emergency standard.

The solicitor provided the following additional information in response:

The justification for the agreed-upon reduction is the uncertainty of the outcome of the gravity and S&S issues being challenged by the Respondent. In the *Consolidation Coal Company* decision, as well as in *Newtown Energy*, 38 FMSHRC 2033 ([Nov.] 2016), two of the current Commissioner's [sic] stated that the second element of the *Mathies* test requires a showing by the Secretary that the hazard contributed to was reasonably likely to occur. The Secretary does not agree with this reading of the *Mathies* test. Nevertheless, the Secretary recognizes that given the current split of opinion at the Commission, the outcome of this issue is uncertain. Even if an underlying emergency were assumed to have occurred, the Respondent argues that cited condition was not reasonably likely to result in fatal injuries to 20 miners as alleged in the citation. This was an alternate escapeway, miners would use the primary escapeway and the cited lifeline was in place and accessible. Should this matter go to hearing, the Secretary would argue that the gravity findings are supported. Nevertheless, the Secretary recognizes that the outcome of that issue is uncertain and the judge could rule in the Respondent's favor. The Secretary values a settlement where the citation is affirmed as issued. The Secretary has also considered that as part of the settlement, the Respondent has agreed to accept the other 6 citations in the docket as issued and as assessed.

Solicitor's November 13, 2017 email to the Court.

The solicitor was subsequently informed that this justification was insufficient and that the settlement could not be approved in its current form. The solicitor was also informed of the

following problems with the settlement motion that the parties could seek to avoid in an amended settlement motion.

Most significantly, even though the settlement does not delete the S&S designation, the substantial 50% penalty reduction proposed appears largely predicated on S&S arguments that are contrary to law. The Commission has repeatedly held, including after *Newtown*, that the existence of an emergency must be assumed when considering the reasonable likelihood of a hazard or injury for a violation of an emergency standard. *See ICG Illinois*, 38 FMSHRC 2473, 2476 (Oct. 2016). Additionally, the presence of a primary escapeway is immaterial to the analysis of whether a violation in the secondary escapeway was reasonably likely to lead to injury. In fact, the Commission and its ALJ's have previously rejected the exact same argument now offered by the parties in this matter for the exact same mandatory safety standard at issue here. *See Black Beauty Coal Co.*, 36 FMSHRC 1121, 1125 n.5 (May 2014) ("In challenging the S&S determination, Black Beauty raises the presence of other safety measures, such as a viable primary escapeway, . . . as mitigating the S&S determination. The Commission and courts have soundly rejected this line of argument.") *aff'g* 33 FMSHRC 1174, 1178-79 (May 2011) (ALJ) (rejecting this argument after finding that a primary escapeway "is equally vulnerable to the effects of a fire," which can "mak[e] it difficult, if not impossible, to see," and can cause "panic and disorientation" among even trained miners.) Neither *Newtown* nor the separate opinions in *Consolidation Coal* sought to overturn these holdings regarding the S&S analysis for escapeway or emergency standards. Therefore, the parties were informed that I could not accept such a substantial reduction in penalty based on arguments that run entirely counter to black letter law. Instead, the condition cited in and around the escapeway needed to be addressed standing on its own, and assuming an emergency event, in determining whether the operator's S&S arguments justified a reduction in penalty.

The solicitor was also asked to provide additional information clarifying the basis for the operator's argument that the cited lifeline was in fact accessible, since the citation seemed to suggest that the presence of extraneous material in the form of loose rock, a track rail, and a wooden cable spoon rendered the lifeline ineffective for use for a distance of six crosscuts. The solicitor was next informed that any arguments regarding fatal injuries to 20 miners, while not relevant to the S&S justification originally provided in the motion, may go to the gravity of the violation in an amended motion, but that I did not believe that this argument, alone, could justify a 50% penalty reduction. Finally, the parties were reminded of the information contained in the citation, noting that this was the fifth time in two years that the operator had been cited under this standard, and that this fact tended to argue against mitigation.

The parties were asked to promptly submit an amended settlement motion that addressed these issues, or else the matter would be set for hearing. No revision has been received.

Therefore, the Motion to Approve Settlement is **REJECTED** and the parties are **ORDERED** to appear for a hearing on the merits of the case.

NOTICE OF HEARING

In accordance with Section 105(d) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. §§ 801, et seq., **this case is set for hearing in South Charleston, West Virginia, on February 16, 2018, commencing at 8:30 AM.** A subsequent notice will identify the courthouse location.

The hearing will be conducted in accordance with the Mine Act and the Commission's Procedural Rules addressing the subject, as set forth at 29 C.F.R. Part 2700, Subpart G. The issues to be resolved are whether the Respondent violated the Mine Act and the cited regulatory standards, and if so, the level of gravity and degree of negligence of those violations which are proved, as well as the appropriate civil penalty to be imposed.

The parties are reminded to comply with the terms of any prehearing orders previously issued. It is further ordered that any party intending to offer exhibits at the hearing shall submit, twenty (20) days prior to the commencement of the hearing, a marked copy of all exhibits to the opposing party and the judge. The Secretary's exhibits shall be designated "S-#" and Respondent's exhibits shall be designated "R-#." Exhibits shall be clearly marked and numbered seriatim. If opposing counsel has an objection to the admission of any exhibit, he or she shall state the grounds for the objection in writing and submit it to the judge and opposing counsel at least five (5) days prior to the commencement of the hearing.

A list of witnesses (including experts) and a statement as to their expected testimony (and copy of any report prepared by an expert) shall also be exchanged by the parties with a copy submitted to the judge twenty (20) days prior to the commencement of the hearing.

Any stipulations agreed upon by the parties shall be submitted to the judge five (5) days prior to the commencement of the hearing.

Any person planning on attending the hearing who requires special accessibility features and/or any auxiliary aids (such as sign language interpreters) must request those sufficiently in advance of the hearing to allow accommodation, subject to the limitations set forth in 29 C.F.R. §2706.150(a) and § 2706.160(d).

If a settlement is reached after the date set forth on this Notice, the parties are directed to contact my law clerk, Roshan Dhillon, at 202-233-4010 or at rdhillon@fmshrc.gov immediately. Unless a written Order is issued upon my direction removing the matter from the docket, the parties are directed to appear at the time and place designated for hearing.

If you have any questions or concerns, please contact Mr. Dhillon.

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

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