SEPTEMBER 2012

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ADMINISTRATIVE LAW JUDGE ORDERS

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COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 12, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2011-163-M
v.	:	A.C. No. 33-00528-236600 X68
BEAVER EXCAVATING COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 31, 2012, the Commission received from Beaver Excavating Company ("Beaver") a motion seeking to reopen a settlement agreement and relieve it from the decision approving settlement entered against it.

On June 8, 2011, Chief Administrative Law Judge Lesnick issued a Decision Approving Settlement ("Decision") in response to the Conference and Litigation Representative's ("CLR") motion to approve the proposed settlement.

Beaver asserts that the Decision does not accurately represent the settlement upon which the parties had agreed. In particular, Beaver believes that the Secretary of Labor accepted Beaver's proposal to downgrade the level of the special assessment based on unwarrantable failure, but that the settlement order did not reflect this.

The Secretary does not oppose the request to reopen for the purpose of adjudicating the operator's claim, but notes that her non-opposition should not be construed as agreement with the operator's claim. The Secretary also notes that the Mine Safety and Health Administration ("MSHA") received payment for the amount Beaver was ordered to pay in the Decision, by check dated September 23, 2011.

Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its

issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the judge's order here has become a final decision of the Commission.

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

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

/s/ Mary Lu Jordan
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/s/Michael G. Young
Michael G. Young, Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 12, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2012-416
ADMINISTRATION (MSHA)	:	A.C. No. 46-08921-265006
	:	
v.	:	Docket No. WEVA 2012-417
	:	A.C. No. 46-08904-267757
AUSTIN POWDER COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 16, 2011, the Commission received from Austin Powder Company ("Austin") two motions seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2012-416 and WEVA 2012-417, both captioned *Austin Powder Company*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

The record indicates that in Docket No. WEVA 2012-416, proposed assessment No. 000265006 became a final order of the Commission on September 30, 2011, and a delinquency notice was mailed on November 15, 2011. Austin asserts that its safety specialist, who was responsible for forwarding proposed assessments to counsel to contest, was told by the safety director that he was awaiting input from the company president before making a final decision. The safety specialist noticed on October 27, 2011 that the proposed assessment was listed as delinquent on MSHA's website, but after speaking with the safety director, mistakenly understood that no additional action on her part was necessary. On November 17, 2011, the operator learned from counsel that MSHA's website accurately reflected the delinquency status of the assessment.

In Docket No. WEVA 2012-417, Austin asserts that its safety director informed its safety specialist that he had discussed these citations with counsel, which the safety specialist mistakenly understood to mean that the safety director had forwarded the proposed assessments to counsel for contest. Austin states that it only became aware of the delinquency on November 17, 2011, and promptly filed the motion to reopen.

The operator further states that in the future its safety specialist will forward to counsel all proposed penalty assessments which the safety director intends to contest. The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Austin's requests and the Secretary's responses, in the interests of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Patrick K. Nakamura
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September 12, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2010-275-M
v.	:	A.C. No. 06-00761-220793
H.I. STONE AND SON, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

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

On October 24, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Stone's failure to answer the Secretary of Labor's July 13, 2010 Petition for Assessment of Civil Penalty. The Commission did not receive Stone's answer within 30 days, so the default order became effective on November 24, 2011.

Stone acknowledges that it received the show cause order but states that it reached a settlement agreement with the Mine Safety and Health Administration ("MSHA") and paid the agreed upon amount. The Secretary does not oppose the request to reopen for the limited purpose of allowing the submission of the Motion to Approve Settlement, filed January 30, 2012. The Philadelphia Regional Attorney states that he was unaware of the Order to Show Cause and Order of Default.

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

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

Having reviewed Stone's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the default order for the limited purpose of permitting consideration of the settlement motion. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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September 14, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-66-M
v.	:	A.C. No. 41-00906-264970 M837
MMR CONSTRUCTORS, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 26, 2011, the Commission received from MMR Constructors, Inc. ("MMR") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on August 31, 2011, and became a final order of the Commission on September 30, 2011. MMR asserted that it was waiting on documentation from the project's site in order to fully investigate the matter and contest this citation. The Secretary opposed the request to reopen, stating that MMR's legal department chose not to contest the proposed assessment by the contest deadline, which constituted a wilful default.

On January 23, 2012, the Commission sent MMR a letter asking it to explain why it filed its motion to reopen more than 30 days after discovering that the penalty was not timely contested, what office procedures were implemented to prevent future defaults, and why it chose to wilfully default by not contesting timely. In response, MMR asserts that due to unusual circumstances, its safety director was away from the office during the month of September 2011. The safety director only forwarded the proposed assessment to MMR's legal department on October 3, 2011, upon his return to the office. MMR states that the safety director has never previously been away from his office for an extended period of time, and that once this isolated incident was identified new procedures were implemented to prevent such mistakes in the future. Moreover, MMR maintains that this citation was issued to the wrong company. The Secretary does not oppose the revised request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 14, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2011-686
v.	:	A.C. No. 15-18734-246313
POWELL MOUNTAIN ENERGY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 31, 2012, the Commission received from Powell Mountain Energy, LLC ("Powell") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On June 28, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Powell's failure to answer the Secretary's April 5, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Powell's answer within 30 days, so the default order became effective on July 29, 2011.

Powell asserts that it timely contested the proposed assessment, and never received the penalty petition. Powell's counsel states that he recently discovered this delinquency while reviewing the mine data retrieval system on MSHA's website. The Secretary does not oppose the request to reopen but notes that the penalty petition and Show Cause Order were mailed to the same address of record and were not returned undelivered. The record shows that the Show Cause Order was delivered on June 30, 2011. The Secretary states that the operator's address of record was changed on July 11, 2011, and MSHA mailed a delinquency notice to this new address of record on January 6, 2012. The Secretary maintains that it is the operator's responsibility to keep an accurate address of record, to have a forwarding address set up with the post office, and to forward documents that it receives to its legal counsel if necessary.

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

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

Having reviewed Powell's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Powell shall file an Answer to the Show Cause Order within 30 days of the date of this order.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Patrick K. Nakamura
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September 14, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2011-345-M
v.	:	A.C. No. 33-04592-243327
BROOKSIDE MATERIALS, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 23, 2012, the Commission received from Brookside Materials, LLC ("Brookside") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On June 21, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Brookside's failure to answer the Secretary's February 18, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Brookside's answer within 30 days, so the default order became effective on July 21, 2011.

Brookside asserts that it timely contested the proposed assessment, and did not receive anything since. Brookside encloses a copy of MSHA's delinquency notice, dated January 5, 2012. The Secretary does not oppose the request to reopen, and notes that the Conference Litigation Representative received Brookside's answer to the petition on March 23, 2011. However, there is no indication on the answer as to whether Brookside sent a copy to the Commission. The record shows that the Show Cause Order was delivered on June 24, 2011.

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Patrick K. Nakamura
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September 14, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2009-27-M
v.	:	A.C. No. 54-00050-163093
SAN LORENZO SAND AND GRAVEL CO.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 18, 2010, the Commission received from San Lorenzo Sand and Gravel Co. ("San Lorenzo") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On January 13, 2010, Chief Administrative Law Judge Lesnick issued an Order to Show Cause in response to San Lorenzo's failure to answer the Secretary's October 31, 2008 Petition for Assessment of Civil Penalty. On October 12, 2010, Chief Administrative Law Judge Lesnick issued an Order of Default.

San Lorenzo asserts that it timely answered the Show Cause Order and timely responded to the Default Order. San Lorenzo submits copies of certified mail receipts showing both answers were received by the Commission. The Secretary does not oppose the request to reopen.

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

/s/ Mary Lu Jordan
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/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

September 14, 2012

SECRETARY OF LABOR,	:	Docket No. VA 2010-305
MINE SAFETY AND HEALTH	:	A.C. No. 44-06499-214250
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2010-306
	:	A.C. No. 44-06718-214251
	:	
	:	Docket No. VA 2010-307
	:	A.C. No. 44-06748-214252
	:	
	:	Docket No. VA 2010-308
	:	A.C. No. 44-06759-214253
	:	
	:	Docket No. VA 2010-309
	:	A.C. No. 44-06839-214256
	:	
	:	Docket No. VA 2011-169
	:	A.C. No. 44-06499-241499
	:	
	:	Docket No. VA 2011-170
	:	A.C. No. 44-06718-241500
	:	
	:	Docket No. VA 2011-171
	:	A.C. No. 44-06748-241502
	:	
	:	Docket No. VA 2011-172
v.	:	A.C. No. 44-06759-241503
	:	
	:	Docket No. VA 2011-295
DOMINION COAL CORPORATION	:	A.C. No. 44-06759-246949

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On February 9, 2012, the Commission received from Dominion Coal Corporation ("Dominion") a motion seeking to reopen ten penalty assessment proceedings and relieve it from the default orders entered against it.[1]

On March 16, July 26, and July 29, 2011, Chief Administrative Law Judge Lesnick issued ten Orders to Show Cause which by their terms became Default Orders if the operator did not file an answer within 30 days. These Orders to Show Cause were issued in response to Dominion's failure to answer the Secretary's May 24, 2010, February 18, 2011, and April 25, 2011 Petitions for Assessment of Civil Penalty. The Commission did not receive Dominion's answers within 30 days, so the default orders became effective on April 18, August 26, and August 29, 2011, respectively.

Dominion asserts that it failed to file timely answers due to personnel changes and a shortage of personnel. Moreover, Dominion states that the Default Orders were not received by the correct person at the company. Dominion's compliance coordinator maintains that he made this issue his primary responsibility, trained employees regarding the importance of receiving and routing mail, and began working with a law firm to timely file future motions. The Secretary does not oppose the request to reopen for the limited purpose of allowing the submission of her Motions to Approve Settlement, filed in December, 2011.

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

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers VA 2010-305, VA 2010-306, VA 2010-307, VA 2010-308, VA 2010-309, VA 2011-169, VA 2011-170, VA 2011-171, VA 2011-172 and VA 2011-295, all captioned *Dominion Coal Corporation*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Dominion's requests and the Secretary's responses, in the interest of justice, we hereby reopen these proceedings and vacate the Default Orders. Accordingly, these cases are remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Dominion shall file Answers to the Show Cause Orders within 30 days of the date of this order.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 14, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2010-593
v.	:	A.C. No. 44-07082-230421-01
	:	
CONAWAY MINING COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 4, 2012, the Commission received from Conaway Mining Company, LLC ("Conaway") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On May 6, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Conaway's failure to answer the Secretary's November 9, 2010 Petition for Assessment of Civil Penalty. The Commission did not receive Conaway's answer within 30 days, so the default order became effective on June 6, 2011.

Conaway asserts that it timely answered the petition on December 3, 2010. Conaway further states that it did not know it was placed in default until after it agreed to a settlement in this case. The Secretary does not oppose the request to reopen, and notes that the Conference Litigation Representative ("CLR") received Conaway's answer to the petition on December 16, 2010. The CLR also notes that she filed a motion to approve settlement with the Commission on December 7, 2011. The record shows that the Show Cause Order was delivered on May 20, 2011.

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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September 14, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-283-M
v.	:	A.C. No. 26-02286-237706-02
BARRICK TURQUOISE RIDGE, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 9, 2011, the Commission received from Barrick Turquoise Ridge, Inc. ("Barrick") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On July 21, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Barrick's failure to answer the Secretary's February 22, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Barrick's answer within 30 days, so the default order became effective on August 22, 2011.

Barrick asserts that its counsel did not receive the assessment petition. Moreover, Barrick states that the Show Cause Order was mailed to its counsel's previous office address, which caused a delay in its receipt. Counsel for Barrick submits that he prepared an answer, but placed it in a file instead of mailing it. Counsel discovered this delinquency on or about September 29, 2011, and attempted to contact the operator for about two months, until late November, to confirm the operator desired to continue contest proceedings and file this motion to reopen.

The Secretary does not oppose the request to reopen but submits a certified mail receipt showing that the penalty petition was delivered to the operator on February 24, 2011. The Secretary bases her non-opposition solely on the confusion due to the counsel's office move and

change of address, and not on the failure of counsel's inadequate office procedures. The Secretary urges counsel to take all steps necessary to ensure future timely contests, and cautions that she may oppose future motions to reopen that are caused by this same failure in office procedures.

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

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

We note that Barrick and its counsel have a history of delinquencies based on miscommunication and leaving unfiled contests in file cabinets. *See Barrick Turquoise Ridge, Inc.*, 33 FMSHRC 2684, 2685 (Nov. 2011); 32 FMSHRC 853, 854 (Aug. 2010). The Commission has made it clear that where a failure results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008). Moreover, the record shows that copies of the Show Cause Order were delivered to the operator and its counsel on July 25, 2011 and July 28, 2011, respectively. Barrick's counsel filed a change of address notice with the Commission on August 3, 2011, after receiving the Show Cause Order. We urge Barrick and its counsel to take all steps necessary to ensure that responses to MSHA and the Commission are filed in a timely manner.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 14, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2009-1519
	:	A.C. No. 46-09065-184080-01
MOUNTAIN EDGE MINING, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On June 20, 2011, Mountain Edge Mining, Inc. ("Mountain Edge") filed with the Commission a petition for discretionary review of a decision issued in this proceeding by Administrative Law Judge William Moran. 33 FMSHRC 1272 (May 2011) (ALJ). On June 24, 2011, the Commission granted the petition.

Mountain Edge subsequently filed with the Commission a Joint Motion for Approval of Settlement. In the motion, Mountain Edge and the Secretary of Labor request that the Commission grant the motion and issue an order approving settlement and directing payment according to the parties' agreement.

Upon consideration of the motion, we hereby remand this matter to Judge Moran, who shall consider and dispose of the motion in accordance with Commission Procedural Rule 31, 29 C.F.R. § 2700.31.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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September 14, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2010-355-M
v.	:	A.C. No. 28-01034-230057 A0310
	:	
CUMBERLAND SAND AND GRAVEL, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On February 23, 2012, the Commission received from Cumberland Sand and Gravel, LLC ("Cumberland") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On May 10, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Cumberland's failure to answer the Secretary's October 22, 2010 Petition for Assessment of Civil Penalty.

Cumberland asserts that it filed a timely response to the Show Cause Order which included a typographical error in the case docket number. Cumberland submits copies of its communications with the Commission, as well as certified mail receipts. The Secretary does not oppose the request to reopen.

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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September 18, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-303
v.	:	A.C. No. 42-01566-267560
CANYON FUEL COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 15, 2011, the Commission received from Canyon Fuel Company, LLC ("Canyon") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment became a final order of the Commission on October 10, 2011. Canyon asserts that its safety manager asked an employee to pay the penalty and mail the contest form. The employee sent a check for the uncontested penalties, but did not mail the contest form. The Secretary does not oppose the request to reopen, and notes that MSHA received a payment for the uncontested penalties, by check dated September 27, 2011. The Secretary bases her non-opposition solely on the fact that this motion to reopen was filed shortly after receiving the delinquency notice, dated November 28, 2011. The Secretary notes that similar inadequate office procedures were evident in Canyon's previous motion to reopen, WEST 2011-1152, which was reopened on November 18, 2011.

The Commission has made it clear that where a failure results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008). We urge the operator to take all steps necessary to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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September 18, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2010-1284-M
v.	:	A.C. No. 46-08262-221287
JAUNT, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 9, 2011, the Commission received from Jaunt, Inc. ("Jaunt") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On March 18, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Jaunt's failure to answer the Secretary's July 23, 2010 Petition for Assessment of Civil Penalty. The Commission did not receive Jaunt's answer within 30 days, so the default order became effective on April 18, 2011.

Jaunt asserts that it was not aware it had to answer the penalty petition after it contested the proposed assessment. The Secretary does not oppose the request to reopen and notes that the operator is not listed on the show cause order distribution list.

Having reviewed Jaunt's request and the Secretary's response, in the interest of justice, we conclude that the Default Order has not become a final order of the Commission because the Order to Show Cause was never mailed to Jaunt. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Jaunt shall file an Answer to the Show Cause Order within 30 days of the date of this order.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

September 20, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of NORMAN DECK	:	
v.	:	Docket No. CENT 2012-689-DM
FTS INTERNATIONAL PROPPANTS, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2006) ("Mine Act").[1] On August 28, 2012,[2] the Commission received from FTS International Proppants, LLC ("FTS") a petition for review of Administrative Law Judge David Simonton's August 23, 2012 order temporarily

[1] 30 U.S.C. § 815(c)(2) provides in pertinent part:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as [s]he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

[2] On September 4, 2012, FTS filed a memorandum in support of its petition.

reinstating Norman Deck. On September 11, 2012, the Commission received the Secretary of Labor's opposition to the petition. For the reasons that follow, we grant review and affirm the Judge's order requiring the temporary reinstatement of Mr. Deck.

Mr. Deck worked as a load-out technician at FTS's Brewer Quarry Mine. 34 FMSHRC ___, slip op. at 2, No. CENT 2012-689-D (Aug. 23, 2012) (ALJ) ("slip op."). On April 30, 2012, Deck filed an anonymous complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that an accident at the mine had not been reported. *Id.* On May 14, 2012, FTS terminated Deck from his employment. *Id.* On the same day, Deck filed a complaint with MSHA alleging that his termination was related to his safety report.

MSHA Special Investigator Steve Medlin investigated Deck's discrimination complaint and concluded that it was not frivolously brought. *Id.* The Secretary filed an Application for Temporary Reinstatement, requesting an order requiring FTS to temporarily reinstate Deck to his former position. *Id.* at 1-2. The operator filed a request for hearing, and a hearing was held on August 16, 2012. *Id.* at 1.

On August 23, 2012, the Judge issued his decision, concluding that Deck's discrimination complaint was not frivolously brought and directing FTS to temporarily reinstate Deck to his former position or to a similar position at the same rate of pay and benefits and with the same or equivalent duties assigned. *Id.* at 5. The Judge concluded that it was undisputed that Deck engaged in protected activity by making a safety complaint to MSHA on April 30. *Id.* at 4. He further concluded that it was undisputed that Deck was terminated 14 days later. *Id.* The Judge noted that the evidence was disputed regarding whether Deck's April 30 complaint in some way motivated FTS to remove him from employment. *Id.* at 4. The Judge concluded, however, that there was sufficient evidence in the record to support the determination that the Secretary had established that Deck's discrimination complaint was non-frivolous. *Id.* at 4-5.

FTS filed a petition for review of the Judge's temporary reinstatement order pursuant to Commission Procedural Rule 45(f), 29 C.F.R. § 2700.45(f). It argues that the Secretary failed to meet her burden of proving that Deck had engaged in protected activity when he called MSHA on April 30. Supporting memo at 7-11. The operator asserts that the Judge erred in relying upon Investigator Medlin's testimony because it was inaccurate and unreliable, and that Deck's April 30 call to MSHA was not based on a reasonable and good faith belief that a violation had occurred. *Id.* In addition, FTS contends that the Secretary failed to prove that Deck's termination was motivated in part by his April 30 call to MSHA. *Id.* at 11-17. More specifically, the operator argues that the Judge erred in relying upon evidence that management officials told MSHA Investigator Medlin inconsistent reasons for Deck's termination because such evidence is disputed. *Id.* at 12-14. It further contends that the Judge erred in concluding that there was a coincidence in timing between Deck's April 30 complaint and May 14 termination because an intervening event had occurred (Deck's mistreatment of drivers on May 1) that was the real reason for Deck's termination. *Id.* at 14-16. Finally, FTS states that the Judge erred in relying upon Medlin's testimony that miners had informed him that a

management official had stated that Deck had been fired for calling MSHA. *Id.* at 16-17. It explains that Medlin's testimony lacked sufficient specificity, such as which miners made those statements. *Id.* at 16-17. The Secretary opposed the petition.

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). The Mine Act's legislative history defines the "not frivolously brought" standard as indicating that a miner's "complaint appears to have merit." S. Rep. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). The "not frivolously brought" standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990) ("*JWR*").

At a temporary reinstatement hearing, the Judge must determine "whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *JWR*, 920 F.2d 744. As the Commission has recognized, "[i]t [is] not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The Commission applies the substantial evidence standard in reviewing the Judge's determination.[3] *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co*., 22 FMSHRC 153, 157 (Feb. 2000).

We conclude that substantial evidence supports the Judge's determination that Deck's application for temporary reinstatement was not frivolously brought. We reject the operator's assertion that the Judge erred in concluding that Deck engaged in protected activity. As the Judge noted, evidence is undisputed that Deck filed a complaint with MSHA on April 30 when he anonymously notified MSHA that an accident had occurred at the mine and had not been

[3] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938)).

reported.[4] Slip op. at 4; Tr. 10, 73, 149-50. Section 105(c) of the Mine Act protects a miner who makes "a complaint under or relating to [the] Act." 30 U.S.C. § 815(c). Section 103(d) of the Mine Act, 30 U.S.C. § 813(d), and the implementing regulations in 30 C.F.R. Part 50, require an operator to keep records and report accidents that occur at a mine. In making the anonymous call to MSHA, Deck engaged in an activity protected by section 105(c). *See generally Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1364-65 & n.6 (Dec. 2000) (stating that complaints are protected as long as they reasonably relate to the safety and health of miners under the Act).

Moreover, as the Judge found, there are facts in the record which support the Secretary's theory of liability that Deck's termination was motivated in part by his April 30 call to MSHA. The Judge noted that "Deck was terminated by [FTS] a mere 14 days [after Deck's April 30 call to MSHA], thus meeting the circumstantial indicia of discriminatory intent based on the coincidence in time between the protected activity and the adverse action." Slip op. at 4. As to the dispute regarding whether Production Supervisor Brian Francis was aware that Deck had made the April 30 complaint prior to deciding to terminate the miner, the Judge primarily relied on the testimony of Deck "that Francis told him when he was removed, 'I guess you shouldn't have called MSHA now, should you?' Tr. 172." Slip op. at 5. The Judge cited the testimony of Medlin only to support the conclusion he reached based on the timing of the termination and Deck's testimony about what Francis had said. Furthermore, even though the operator disputes the evidence, Medlin testified that one management official informed him that FTS fired Deck for poor work performance, while another management official testified that Deck was fired for his mistreatment of drivers. Tr. 51-53, 126.

As to the operator's second argument, even if there were an intervening event that could have constituted a non-discriminatory reason for termination, the two-week period between Deck's complaint to MSHA and termination is sufficiently brief to support the finding that there was a coincidence in time between the protected activity and adverse action. *See, e.g., Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1090 (Oct. 2009). Finally, the investigator's testimony that miners informed him that a management official had stated that Deck had been fired for contacting MSHA is sufficiently specific for purposes of a temporary reinstatement proceeding without disclosing the identity of miners who made those statements. Tr. 126-27, 131-32, 134.

Requiring the Judge to resolve alleged inaccuracies and conflicts in testimony when the parties have not yet completed discovery would improperly transform the temporary reinstatement hearing into a hearing on the merits. *See Chicopee Coal*, 21 FMSHRC at 719; *CAM Mining*, 31 FMSHRC at 1088-89.

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[4] Given that this evidence is undisputed, whether Investigator Medlin's testimony was inaccurate as to specific details regarding the call is irrelevant to our consideration of whether Mr. Deck engaged in protected activity.

Accordingly, we affirm the Judge's August 23 decision temporarily reinstating Deck. We intimate no view as to the ultimate merits of this case.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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September 27, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. CENT 2012-137-RM
v.	:	CENT 2012-138-RM
PATTISON SAND COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These contest proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). Pattison Sand Company, LLC ("Pattison") operates a sandstone mine in Clayton County, Iowa. After a part of the roof fell in the 12 AR area of the mine, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Pattison Order No. 8659953, pursuant to section 103(k) of the Mine Act, 30 U.S.C. § 813(k).[1] The order prohibited activity in, and withdrew miners from, "all areas of the mine South of crosscut L that are not bolted and meshed." *Pattison Sand Co., LLC*, 33 FMSHRC 3096, 3097 (Dec. 2011) (ALJ).

Pattison challenged the order before the Commission on the basis that no "accident" had occurred and that the scope of the order was an abuse of discretion. *Id.* at 3123-32. The operator requested that, if the Commission declined to vacate the section 103(k) order in its entirety, the Commission should modify the scope of the order by limiting the withdrawal to the area affected by the roof fall. *Id.* at 3133. Pattison also filed an emergency motion to modify the order to permit its experts to access the mine to examine and evaluate conditions, install monitoring equipment, and conduct tests. *Id.* at 3133-36.

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[1] Section 103(k) of the Mine Act provides in pertinent part:

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

30 U.S.C. § 813(k).

The matter proceeded to an evidentiary hearing before Administrative Law Judge Thomas McCarthy. Judge McCarthy affirmed the section 103(k) order, concluding that the roof fall was an "accident" and that MSHA's issuance of the order did not constitute an abuse of discretion. *Id.* at 3139-47. The Judge held, however, that the Commission has no authority to modify the section 103(k) order. *Id.* at 3147. Additionally, the Judge reasoned that, if the modification request was alternatively viewed as a motion for temporary relief under section 105(b)(2) of the Mine Act, 30 U.S.C. § 815(b)(2), the request did not satisfy the prerequisites for temporary relief. *Id.* at 3148-49. The Commission thereafter denied a petition for discretionary review filed by Pattison.

Subsequently, Pattison filed a petition for review in the United States Court of Appeals for the Eighth Circuit. The Court granted in part and denied in part the petition for review. *Pattison Sand Company, LLC v. FMSHRC*, 688 F.3d 507, 509 (8th Cir. 2012).[2]

The Court affirmed the Judge's conclusion that the section 103(k) order was valid. *Id.* at 513. It determined that the Judge correctly reviewed the section 103(k) order under an arbitrary and capricious standard, and that substantial evidence supported the Judge's finding that the scope of the order was neither arbitrary nor capricious. *Id.* at 513, 514. The Court also held that the Judge correctly determined that the roof fall was an "accident" within the meaning of the Act and affirmed, as supported by substantial evidence, the Judge's determination that the instant roof fall qualified as an accident. *Id.* at 513-14.

The Court concluded, however, that, contrary to the Judge's rulings, the Commission has the power to modify section 103(k) orders. *Id*. at 516. The Court rejected the Secretary's contention that if the Court concluded that the Commission has authority to modify a section 103(k) order, remand would not be necessary because the Judge determined that the scope of the Secretary's original order was not arbitrary and capricious. *Id.* The Court reasoned that the Judge was proceeding under the assumption that he lacked authority to do anything but enforce the order as written or vacate it entirely. *Id.* The Court explained that it could not say that the Judge "would have reached the same conclusion had he recognized his authority to modify the order." *Id.* Accordingly, the Court remanded Pattison's requests for modification of the order to

[2] Pattison separately filed a complaint in federal district court against MSHA and the Commission alleging that MSHA's enforcement actions and the Commission's review procedures are contrary to the Act and the Fifth Amendment's due process clause. Pattison moved for a temporary restraining order and preliminary injunction preventing MSHA from enforcing parts of the section 103(k) order. The district court denied relief, and the Eighth Circuit affirmed the judgment of the district court. 688 F.3d at 509, 517.

the Commission for its consideration. *Id.* The Court noted that, upon remand, the Commission may decline to modify the order, but that it is for the Commission to make a decision in the first instance.[3] *Id.*

On September 21, 2012, the court issued its mandate in this matter, thereby returning the case to the Commission's jurisdiction. Accordingly, we remand this matter to the Judge for further consideration of the operator's requests for modification of the section 103(k) order consistent with the Court's decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

[3] Because the Court concluded that the Judge erred in determining that he lacked authority to modify the section 103(k) order, it did not address Pattison's arguments related to temporary relief. 688 F.3d at 516.

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ADMINISTRATIVE LAW JUDGE DECISIONS

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September 6, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 2008-1122 A.C. No. 15-19131-148988
v.	:	
MARSHALL MINING, INC., Respondent	:	Mine: 4A

DECISION

Appearances: Matt S. Shepherd, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, Lexington, Kentucky, on behalf of the Respondent.

Before: Judge Bulluck

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration ("MSHA"), against Marshall Mining, Inc. ("Marshall Mining"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act" or "Mine Act"), 30 U.S.C. § 815. The Secretary seeks civil penalties in the amount of $8,893.00 for one alleged violation of the Act and her mandatory safety standards.

A hearing was held in Ashland, Kentucky. The parties' Post-hearing Briefs are of record. For the reasons set forth below, I **AFFIRM** the citation and assess a penalty against Marshall Mining.

I. Stipulations

At the hearing, the parties stipulated as follows:

1. On January 30, 2008, Marshall Mining was the operator of the No. 4A Mine, Mine I.D. No. 15-19131.

2. The No. 4A Mine is a "mine" as that term is defined in section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

3. On January 30, 2008, products of the No. 4A Mine entered commerce or the operations or products thereof affected commerce within the meaning and scope of section 4 of the Mine Act, 30 U.S.C. § 803.

4. In 2008, the No. 4A Mine produced 169,502 tons of coal, and had 43,392 hours worked.

5. A copy of Citation No. 6649707 was served on Marshall Mining by an authorized representative of the Secretary.

6. Marshall Mining timely contested Citation No. 6649707.

7. Marshall Mining is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the presiding Administrative Law Judge has the authority to hear and issue a decision regarding this case.

8. The proposed penalty will not affect Marshall Mining's ability to continue in business.

II. Factual Background

Marshall Mining operates the 4A Mine, an underground coal mine, in Pike County, Kentucky. On January 30, 2008, Entry No. 1 of the 4A Mine was being advanced using continuous mining machines adjacent to and within 200 feet of an abandoned coal mine that was filled with water. Tr. 22, 26, 30, 87-88, 177; Ex. G-1. Under such conditions, the operator was required to drill boreholes in advance of mining.

Section 75.388 of the Secretary's regulations requires that when any working place approaches to within 200 feet of an adjacent mine in the same coalbed, and the adjacent mine has not been preshift examined, i.e., it is inactive, boreholes "shall be drilled." 30 C.F.R. § 75.388(a)(3).[1] The area where boreholes must be drilled is called the "drill zone." Tr. 8, 111-14. Boreholes are drilled with drill steel that comes in 10-foot sections, in advance of and perpendicular to the working face, as well as at perpendicular 20 degree angles from the ribs closest to the inactive mine workings. Ex. G-4; Tr. 149-51. The boreholes are designed to detect any potentially dangerous conditions that exist in an adjacent inactive mine, including water, which, if mined into, could inundate an active working place, and cause potentially lethal consequences. Tr. 126. In order to increase the probability of hitting water in adjacent inactive workings, boreholes are drilled close to the mine floor. Tr. 149-51.

[1] A borehole is a hole approximately 1.5 inches in diameter that is drilled in the face or ribs of a working place. Tr. 126.

Detailed requirements as to how boreholes must be drilled when a working place is within a drill zone are set forth in section 75.388. 30 C.F.R. § 75.388(b)-(c). An operator may also drill boreholes in alternative patterns under an MSHA approved plan that provides the same protection to miners as do the requirements of paragraphs (b) and (c) of section 75.388. 30 C.F.R. § 75.388(g). Before Citation No. 6649707 was issued, Marshall Mining had submitted two alternative borehole drilling plans to MSHA. The agency approved the first plan on November 9, 2007, and approved the second plan on December 13, 2007. Ex. G-4, G-5.

The November Plan required Marshall Mining to drill five 40-foot boreholes at the active face in advance of mining, three perpendicular to the face, and two into each rib at 20 degree angles. The Plan then limited the amount of coal the company could cut to 30 feet. This would leave a 10-foot buffer between the face and the maximum extent to which the boreholes were drilled. Ex. G-5. This would also ensure, at all times, a 10-foot buffer in advance of active mining.

The December Plan included two options. Under the first option, Plan A, 16-20 foot deep cuts made off the main entry called buttoffs would be made, and a 200 foot borehole would be drilled from the buttoff parallel to main entry. Tr. 37-42. Plan A was not included in the November Plan. Plan B of the December Plan was similar in most respects to the November Plan. It required that five boreholes be drilled in advance of mining from the face and ribs, with three of the boreholes drilled perpendicular to the face, and two other boreholes drilled into the ribs at 20 degree angles. Under Plan B, however, 30-foot boreholes would be drilled in advance of mining, and the company was limited to taking 20-foot cuts of coal. As in the November Plan, the December Plan required that the boreholes extend at least 10 feet beyond the face at all times, creating a 10-foot buffer in advance of active mining. Tr. 50-51; Ex. G-4. The parties agree that, on January 30, 2008, when Citation No. 6649707 was issued, Marshall Mining was advancing Entry No. 1 within a drill zone under Plan B of the alternative borehole pattern approved by MSHA on December 13, 2007. Tr. 32, 171-72, 176-77.

On January 30, 2008, MSHA Inspector Alan Howell was in the process of conducting a regular quarterly inspection of the 4A Mine. Tr. 21. Howell was accompanied by an MSHA trainee, Steven Caudill, and the 4A Mine superintendent, James Kilgore. Tr. 29. When Howell arrived at the working face of Entry No. 1, he and Caudill searched for boreholes in the face and found two. Tr. 51-52. Howell measured the depth of these holes to be approximately 3 feet deep. Tr. 63. Caudill corroborated Howell's testimony on this point, testifying that he was present when Howell measured the boreholes, and confirmed that both of the boreholes were two to three feet deep. Tr. 213-14. Using a fiberglass pry bar, Caudill also measured one of the two boreholes and found it to be "[t]wo and a half, maybe three feet" deep. Tr. 211-13.

III. Findings of Fact and Conclusions of Law

Based on the depth of the holes, Howell concluded that a cut of coal had been taken from Entry No. 1 in excess of the 30-foot requirement set forth in Plan B of the December Plan. As Howell testified, "[i]f they were using this plan [B], and they were taking 20 foot . . . cuts with

the [continuous] miner, there would be a 10 foot [bore]hole here at all times, a buffer . . . [i]n front of the mining." Tr. 50. In other words, if Marshall Mining had been following its alternative borehole drilling plan, it would have drilled 30-foot boreholes, then mined a 20-foot cut of coal, leaving a "buffer" of boreholes at least 10 feet deep. Before proceeding with another 20-foot cut, these 10-foot boreholes would have had to have been drilled again to a depth of at least 30 feet in advance of the working face. Tr. 50-51.

Although mine superintendent Kilgore testified that "sometimes holes are hard to find" (Tr. 151), he admitted on cross-examination that he had no personal knowledge as to whether the boreholes in Entry No. 1 were being kept 10 feet in advance of mining on the day that the citation was issued:

> Q: Do you have any independent knowledge, firsthand knowledge, of whether those boreholes were drilled, and if so how deep those boreholes were drilled in the No. 1 entry on January 30, 2008?
>
> * * *
>
> A: No, I can't say that I did.
>
> Q: You weren't there when they were drilling those boreholes, were you, Mr. Kilgore?
>
> A: Not that day, no, not at that time.

Tr. 178-79.

Howell issued Citation No. 6649707 to Marshall Mining for violating its alternative borehole drilling plan. The citation describes the "Condition or Practice" as follows:

> The operator has failed to comply with the alternative drill plans A and B approved by the District manager in that:
>
> 1 -- No butt offs are being cut so [as] to allow the 200 foot advanced drilling of bore holes as described in plan A of the Alternative Bore Hole Plan.
>
> 2 -- 30 foot cuts are being cut in the # 1 entry which violates Plan B of the Alternative Bore Hole Plan that requires no more than 20 foot cuts be taken.
>
> 3 -- The outside entry (number 1) is not being kept 60 [feet] in advance of other entries as required in Alternative Bore Hole

Plan B.

> 4 -- The operator has previously been [cited] for non-compliance of the approved bore hole plan on 1-9-2008 (citation #6649484).

Ex. G-2. Howell concluded that the violation was the result of Marshall Mining's high negligence, and was of a significant and substantial ("S&S") nature.

After issuing the citation, Howell required that the operator drill a 60-foot borehole towards the adjacent inactive workings. Tr. 86. As this borehole was being drilled, water began gushing out of it at a rate of five to eight gallons per minute. Tr. 87. Water continued pouring from the hole the following day. Tr. 90. This led Howell to issue imminent danger closure Order No. 6649710 on January 31, 2008, under section 107(a) of the Mine Act, 30 U.S.C. § 817(a). Tr. 88; Ex. G-11. Howell concluded that the maps Marshall Mining was using were inaccurate as to the location of the inactive workings adjacent to Entry No. 1. Tr. 90-91; Ex. G-11. Howell testified, "We knew that there was water coming out of the holes, and it was unknown where it was actually coming from." Tr. 90-91.

On February 4, 2008, Citation No. 6649707 was terminated. The notice of termination stated as follows:

> The operator has requested that the Alternate Drill Plans (A&B) approved December 13, 2007 be withdrawn. The request has been approved by the District Office. The Alternate Plan for drilling bore holes which was approved on November 9, 2007 is still in [effect] and does not require the conditions cited in the violation[,] therefore the citation is hereby terminated.

Ex. G-12.

Fact of Violation

The first allegation set forth in Citation No. 6649707, that Marshall Mining was not cutting any buttoffs according to Plan A of the December Plan, establishes that Plan A was not being followed by the company on January 30, 2008, and therefore, that Plan B was in effect. As I have previously noted, this point is not in dispute. At the hearing, the Secretary conceded that the third allegation set forth in the citation is not valid. Tr. 118-19. Respecting the fourth allegation, it is also undisputed, because it refers to a past violation, and does not, by itself, establish that Marshall Mining violated section 75.388(g) on January 30, 2008, as alleged.

The gravamen of the Secretary's case is thus the second allegation set forth in the citation, that Marshall Mining was taking 30-foot cuts in violation of Plan B, which required that no more than 20-foot cuts be taken. As to this allegation, I find no evidence in the record that

contradicts the testimony of Howell or Caudill as to the depth of the two boreholes that they were able to discover. I also find credible and convincing Howell's conclusion that the depth of the two boreholes indicated that Marshall Mining took an excessive cut of coal. The operator's cut of coal from Entry No. 1 effectively destroyed the 10-foot buffer that it was required to maintain in advance of mining, and reduced it to approximately 3 feet.

Marshall Mining argues that "[t]he citation at issue does not mention an alleged violation of the 10 foot buffer, which was required in the November Plan and the December Plan. . . . The citation was never modified to include an allegation that Marshall was not maintaining the 10 foot buffer." Resp. Br. at 10. This argument puts the cart before the horse. Marshall Mining's failure to maintain a 10-foot buffer is compelling evidence of its concomitant failure to limit itself to taking a 20-foot cut, which is the violation that the citation clearly alleges. Marshall Mining's attempt to find fault with the language of the citation is unavailing. Based on Howell's credible and well-corroborated testimony, I conclude that Marshall Mining was not following its December 2007 Plan.

Likewise, I find the rebuttal testimony of the operator's witness lacking in credibility. Mine superintendent Kilgore asserted that "we always drill that buffer zone" (Tr. 151), but he admitted on cross-examination that he had no first hand knowledge of borehole drilling operations on Entry No. 1 at the time of the citation. Tr. 178-79. The basis of his belief that a 10-foot borehole buffer was in place appears to have been past practice:

> Q: Okay. So your testimony that you always kept the buffer zone is based upon just something you always did, correct?
>
> A: Uh-huh, (affirmative).

Tr. 179.

Both Howell, for the Secretary, and Kilgore, for Marshall Mining, testified that, on January 30, 2008, Marshall Mining was operating in the Entry No. 1 of the 4A Mine under Plan B of the alternate borehole plan approved by MSHA on December 13, 2007. In its brief, however, Marshall Mining repudiates this point, stating that it "was in compliance with an approved and in effect plan, the *November plan*, on January 30, 2008." Resp. Br. at 10 (emphasis added). In support of this about-face, the company points to the notice terminating Citation No. 6649707, arguing that when Howell "became aware that the November plan was also in effect on January 30, 2008, he terminated the citation due to the fact that the November plan did not require items cited in the citation." Resp. Br. at 9. This position misconstrues both the plain meaning and effect of the termination notice.

The termination notice states that Marshall Mining requested that its December Plan be withdrawn, that MSHA approved this action, and that the November Plan "is still in [effect] and does not require the conditions cited in the violation." Ex. G-12. Marshall Mining would have

the terms of this termination apply retroactively to the conditions that existed on January 30, 2008, which the termination notice clearly does not do. To the contrary, the notice has obvious prospective effect; a reasonable reading of the notice of termination indicates that it reinstates the earlier, November Plan and nullifies the later, December Plan as of the date of the notice, February 4, 2008. *Id*.

The notice also states the obvious, that the 30-foot cut for which Marshall Mining was cited would have been allowed under the November Plan, although even under the November Plan, cuts had to be made so as to maintain a 10-foot buffer of boreholes in advance of mining. In fact, Marshall Mining's failure to maintain boreholes in advance of mining as a result of taking an unauthorized deep cut, as evidenced by the 3-foot boreholes Howell discovered, would also have violated the November Plan. Tr. 60, 63-64. Marshall Mining's argument is at odds with the termination notice, the testimony of its own witness, Kilgore, and the overwhelming weight of the evidence as to the conditions that existed in Entry No. 1 when the citation was issued. I find the company's position untenable and singularly unpersuasive. The evidence compels a finding that Marshall Mining was endangering it miners by taking cuts of coal that were too deep, regardless of which plan applied. I find, however, that consistent with the testimony of both Howell and Kilgore, Plan B of the December Plan was in effect in Entry No. 1 of the 4A Mine on January 30, 2008, and that Marshall Mining failed to comply with its requirements.

Accordingly, I find that Marshall Mining violated section 75.388(g), as alleged, by the Secretary.

Significant and Substantial

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

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

6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*,

52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The "discrete safety hazard" created by the operator in this case is obvious. As the Commission stated in *Kellys Creek Resources, Inc.*, the "legislative history [of 30 C.F.R. 75.388] is short, but telling: 'The necessity of maintaining drill holes in advance of the face in any working place approaching abandoned mine openings known or suspected to contain dangerous quantities of water or noxious or explosive gases *is obvious* and such holes are required by law in many coal-mining States.' S. Rep. No. 411, 91st Cong., 1st Sess. 84 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 210 (1975)." 19 FMSHRC 457, 461 (Mar. 1997) (emphasis added).

When Marshall Mining took too deep a cut in Entry No. 1 of the 4A Mine, and in so doing, failed to keep boreholes at least 10 feet in advance of mining, the company created conditions under which a major disaster may very well have occurred, given continued normal mining operations. Howell testified that failure to maintain an adequate buffer of boreholes created "a possibility of cutting into those old works and flooding the mine," which would very likely have resulted in fatalities. Tr. 60. This is especially true because the elevation of the working section in Entry No. 1 had dropped by approximately 12 feet just before the citation was issued, leaving the working section particularly vulnerable to an inundation from inactive workings at a higher elevation. Tr. 30. Moreover, after Howell issued the citation, he required that Marshall Mining drill a 60-foot borehole from which 5 to 8 gallons of water per minute gushed up to 2 to 3 feet into Entry No. 1. Tr. 86-88.

The events of July 2002 at the Quecreek No. 1 Mine in Somerset, Pennsylvania should have provided Marshall Mining ample warning of the potentially disastrous consequences of mining into inactive workings. Nine miners were trapped underground in the Quecreek Mine for approximately 76 hours after an adjacent inactive mine was cut into, which liberated a massive deluge of water that inundated the Quecreek Mine and trapped the miners. Tr. 60; *see Black Wolf Coal Co.*, 28 FMSHRC 699 (July 2006) (setting forth the facts of the Quecreek innundation). Marshall Mining was operating perilously close to conditions which, like those at Quecreek, had the potential of killing the miners working in its mine.

For purposes of determining whether Marshall Mining's violation was S&S, I find the Commission's decision in *Cumberland Coal Resources, LP*, particularly instructive. The *Cumberland* case involved a defective system of emergency lifelines in a mine's escapeways. 33 FMSHRC 2357, 2358-61 (Oct. 2011). In determining whether Cumberland's violation of the applicable standard was S&S, the Commission stated:

> Evacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs. When the citation for a violation of an evacuation standard is issued, presumably no emergency exists at

> that moment. While it is the hope and objective of all who work in mine safety that no emergency will ever occur in the future, if an emergency does occur, it is imperative that the requirements of the evacuation standard be met at that time.

Id. at 2367. The Commission concluded that, "with regard to evacuation standards, the applicable analysis under *Mathies* involves consideration of an emergency," and went on to find Cumberland's violation S&S. *Id*. at 2366.

Here, the situation is slightly different, in that the borehole requirements of section 75.388(g) are designed to *prevent* an emergency from occurring. However, consistent with *Cumberland*, I must consider the potentially catastrophic consequences that would occur in the 4A Mine if the protections against innundation afforded by boreholes were rendered ineffective by the operator's actions.

The operator argues that a safeguard it had in place, "a pump with a capacity of 200 to 300 gallons per minute," would have adequately addressed any innundation that might have occurred. Resp. Reply Br. at 5. The Commission rejected such a defense to an S&S finding in *Cumberland*, noting that one court had "rejected the operator's reliance on the additional safety measures as factors that would prevent an S&S finding." *Cumberland*, 33 FMSHRC at 2369 (citing *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995), and other cases with similar holdings). The Commission explained further that adopting Cumberland's argument that redundant, mandatory safety protections provide a defense to a finding of S&S would lead to the anomalous result that every protection would have to be nonfunctional before a S&S finding could be made. Such an approach directly contravenes the safety goals of the Act." 33 FMSHRC at 2369-70.

Accordingly, I find that Marshall Mining's violation of section 75.388(g) was S&S.

Gravity

In a 1996 *Consolidation Coal Company* decision, the Commission stated: "The gravity penalty criterion under section 110(i) of the Mine Act . . . is often viewed in terms of the seriousness of the violation. . . . The focus of the seriousness of the violation is . . . on *the effect of the hazard if it occurs*." 18 FMSHRC 1541, 1549-50 (Sept. 1996) (emphasis added) (affirming a judge's finding that a violation was "serious" based upon evidence of what *could have occurred* given the conditions present).

Respecting Citation No. 6649707, Howell concluded that Marshall Mining's violation of section 75.388(g) was reasonably expected to result in "lost workdays of restricted duty." I find, however, as set forth in my discussion of S&S above, that the more likely result of an accident occurring as a result of the operator's violation would have been fatal injuries to the nine miners working in Entry No. 1. See Tr. 60, 91-92.

Accordingly, I find that Marshall Mining's violation of section 75.388(g) was very serious.

Negligence

Marshall Mining knew that it was mining near inactive workings that were filled with water. Tr. 87-90, 164-65; Ex. G-1. The operator was well aware of the dangers associated with such conditions. As mine superintendent Kilgore testified, "I was actually scared of the place because, you know, the water." Tr. 160. Furthermore, Kilgore testified that he did not know whether the mine map was accurate. Tr. 167. In fact, he was aware that on January 17, 2008, approximately two weeks before the citation was issued, a borehole had been drilled into the adjacent inactive workings, which indicated that the mine map was inaccurate. Tr. 43, 78-80, 168. Indeed, Howell had cited the operator for violating its alternative borehole drill plan on two prior occasions, December 3, 2007, and January 9, 2008. Clearly, Marshall Mining was on notice that it needed to make more diligent efforts to protect the safety of its miners.

Accordingly, I find that Marshall Mining's violation of section 75.388(g) was the result of the operator's high negligence, as alleged by the Secretary.

IV. Penalty

Secretary's Penalty Proposal

While the Secretary has proposed a civil penalty of $8,893.00, she argues that, in light of having established the probability of multiple fatalities resulting from an innundation at the 4A Mine, the penalty assessed against Marshall Mining should be increased. Sec'y Br. at 14-16 (citing Tr. 91-92). The Secretary states that "[i]f the citation would have been marked fatal, the citation would have been assessed at $29,529 (131 points)." Sec'y Br. at 16.

Marshall Mining argues that "[t]he facts and testimony at trial certainly does [sic] not support an increase in the civil penalty as suggested by MSHA." Resp. Reply Br. at 5. The company points to the fact that it "had a pump with a capacity of 200 to 300 gallons per minute pumping water from the area in question. As a result of the pumping, there was less than one foot of water across the Number One entry." Resp. Reply Br. at 5 (citing Tr. 133-34). This argument ignores just how massive an innundation of water from abandoned workings can be, as occurred at Quecreek. The company also argues, without citing the record, that "[t]he mere fact that there may have been some confusion over the requirements of the November and December

drill plans clearly show[s] that Marshall [Mining's] action[s] were not egregious." Resp. Reply Br. at 5. To the contrary, I find the company's actions to have been highly negligent.

Section 110(i) Criteria

In assessing a penalty, I must independently determine the appropriate amount by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Marshall Mining is a medium-sized operator, with a history of prior violations that is not an aggravating factor in assessing an appropriate penalty. Stip. 4; Ex. G-13. As stipulated by the parties, the total proposed penalty will not affect Marshall Mining's ability to continue in business. Stip. 8. I also note that Marshall Mining raised no objection concerning its ability to pay, in light of the Secretary's request that a higher penalty be imposed. Marshall Mining demonstrated good faith in achieving rapid compliance with the standard after notice of the violation. The remaining criteria involve consideration of the gravity of the violation and Marshall Mining's negligence in committing it. These factors have been fully discussed above.

Assessment

The Secretary has established a very serious violation of 30 C.F.R. § 75.388(g) that was the result of the operator's high negligence. The Secretary petitioned the Commission to assess a penalty of $8,893.00 for this violation, which she amended in her Posthearing Brief to $29,529.00. Applying the civil penalty criteria, and in consideration of my findings that the violation was very serious and Marshall Mining was highly negligent, I find that a penalty of $15,000.00 is appropriate.

ORDER

ACCORDINGLY, it is **ORDERED** that Citation No. 6649707 is **AFFIRMED**, as issued, and that Marshall Mining, Incorporated, **PAY** a civil penalty of $15,000.00 within 30 days of this Decision.[2] **ACCORDINGLY**, this matter is **DISMISSED**.

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

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

Distribution: (Certified Mail)

Matt S. Shepherd, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Nashville, TN 37219-2456

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/tas

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 6, 2012

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDINGS:
Contestant,	:	
	:	Docket No. SE 2008-168-R
	:	Citation No. 7694210; 12/14/2007
v.	:	
	:	Docket No. SE 2008-174-R
SECRETARY OF LABOR,	:	Citation No. 7694206; 12/11/2007
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2008-175-R
Respondent.	:	Citation No. 7994207; 12/12/2007
	:	
	:	No. 4 Mine
	:	Mine ID 0101247
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2008-406
Petitioner,	:	A.C. No. 01-01247-138299-01
	:	
v.	:	No. 4 Mine
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent.	:	

DECISION

Appearances: Angela F. Donaldson, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, on behalf of the Petitioner;
Guy W. Hensley, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, on behalf of the Respondent.

Before: Judge Bulluck

These cases are before me on Notices of Contest and a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), on behalf of her Mine Safety and Health Administration ("MSHA"), against Jim Walter Resources, Incorporated, ("JWR"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act" or "Mine Act"), 30 U.S.C. § 815. The Secretary seeks civil penalties in the amount of $49,141.00 for fourteen alleged violations of the Secretary's Mandatory Safety Standards for Underground Coal Mines.

A hearing was held in Birmingham, Alabama. Prior to convening the hearing, the parties reached an agreement to settle twelve of the contested citations and, subsequently, filed a Joint Motion to Approve Settlement. The parties' Post-hearing Briefs are of record. For the reasons set forth below, I **AFFIRM** the two remaining citations, and assess penalties against Respondent.

I. Stipulations

The parties stipulated as follows:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide these proceedings.

2. JWR is a mine operator subject to the jurisdiction of MSHA.

3. JWR is the owner and operator of the No. 4 Mine located in Brookwood, Alabama.

4. Operations at the No. 4 Mine are subject to the jurisdiction of the Act.

5. All MSHA inspectors at issue were acting in their official capacities as authorized representatives of the Secretary.

6. The citations contained in this docket were served on JWR or its agent, as required by the Act.

7. The citations contained in this docket are authentic and may be admitted into evidence for the purpose of establishing issuance, not for the purpose of establishing the accuracy of any statements asserted therein.

8. JWR demonstrated good faith abatement.

9. The size of the mine and size of the controller are accurately reflected and accounted for in the Proposed Assessment of penalties for Citation Nos. 7692831 and 7692848.

10. The mine's history of violations for the two citations at issue is accurately reflected in the Secretary's exhibit P-3 for Citation No. 7692831, and P-4 for Citation No. 7692848.

11. The assessed penalties, if affirmed, will not impair JWR's ability to remain in business.

Sec'y Br. at 2-3; Tr. 9-11.

II. Factual Background

MSHA Inspector Timothy Foster, employed by MSHA since 2002, was a coal mine safety and health inspector during the time period relevant to the two citations at issue. Tr. 20. Foster worked in the coal mining industry since 1978 in a variety of capacities, including outby laborer, face equipment operator, certified mine examiner, certified electrician and foreman, and he has operated most types of equipment used at the face. Tr. 21-26. Foster also earned a college degree in mining maintenance, served as a union safety committeeman, and holds MSHA electrical, dust sampling and impoundment certifications. Tr. 25-26. At the time of the hearing, he was a roof control specialist assigned to MSHA's Homewood, Alabama office. Tr. 20, 28.

On July 31, 2007, Inspector Foster was conducting a regular, EO1 inspection of JWR's No. 4 Mine, accompanied by MSHA trainee Tom O'Donnell, JWR's representative Gary Toxey, and miners' representative Ricky Dunn. Tr. 28-30, 41. During the course of the inspection, Toxey was notified by Jim Brachner that a fire had occurred on a scoop battery on the Number 8 section. With his inspection team, Foster immediately traveled to the site to conduct an EO8 accident investigation. Tr. 29-31. It took 15 to 20 minutes to reach the scoop at the end of the track. Tr. 31. Foster observed that the battery lids had been raised, the battery was covered with expellent from the fire suppression system and fire extinguishers, leads on top of the battery had been cut, and several fire extinguishers had been strewn nearby. Tr. 31-32, 34; Ex. P-5. He examined the battery, and determined that the fire had been caused by an accumulation of coal and coal fines surrounding the receptacle, and loose butt connectors in the receptacle area. Tr. 37-39, 45, 59-60, 63. He took measurements of the accumulations, and interviewed several miners at the scene. Tr. 39, 41-44, 46-49; Ex. R-2, 9-16. When Toxey speculated that the material may not be combustible, Foster took a sample and submitted it for testing by MSHA. Tr. 65-67, 129. Notwithstanding Foster's decision to send the sample for testing of its combustibility content, pursuant to his investigation, he issued a citation to JWR for its failure to maintain the receptacle of the scoop battery free of combustible accumulations.

Subsequently, during the August 14, 2007 continuation of his inspection of the No. 4 mine, Foster, accompanied by O'Donnell, JWR's representative Chuck Gallaher, and miners' representative Ricky Dunn, inspected the East Belt Drive entry, including the transformer supplying electrical power to the belt drive motors. Tr. 138, 173. From his view through the window, Foster observed an accumulation of float coal dust on the internal energized electrical components. Tr. 140-42. Foster cited JWR for allowing float coal dust to accumulate inside the transformer.

As the inspection team left the area and came upon MSHA inspector John Church, an electrical specialist, who was traveling toward the East Belt Drive, Foster asked Church to check on the status of JWR's efforts to clean out the transformer. Tr. 152. When Church arrived at the transformer, a couple of miners had "blown out" the float coal dust with compressed air but, because the lids had been replaced and it was energized, he checked JWR's cleanup through the

window. Tr. 190-91, 205-06. Church observed that some float coal dust remained on the floor of the cabinet. Tr. 199-200, 204-05. Therefore, he did not terminate the citation. Tr. 191.

After Foster left the area, Toxey took a sample of the accumulation and sent it to JWR's lab for a "rock dust non-combustibility analysis." Tr. 303-04. Ultimately, Foster allowed additional time for JWR to charge a portable battery operated vacuum and remove the remaining material from the lower part of the cabinet. Tr. 153, 305; Ex. P-2.

III. Findings of Fact and Conclusions of Law

A. Citation No. 7692831

As a result of Inspector Foster's investigation of the scoop battery fire, and his opinion that it was caused by an accumulation of combustible material in the receptacle compartment of the battery, he issued section 104(a) Citation No. 7692831, alleging a significant and substantial violation of 30 C.F.R. § 75.400.[1] The citation further alleges that the condition was "reasonably likely" to cause an injury that could reasonably be expected to be "permanently disabling," and was the result of JWR's "moderate negligence." The "Condition or Practice" is described as follows:

> Combustible materials in the form of coal and coal fines were allowed to accumulate in and around the battery female receptacles of the DBT Model 188 Scoop, Company No. SP150 (s/n 488-1093). These accumulations measured 6 ½ inches wide x 5 ½ inches high x 12 inches in length and were in contact with the battery receptacles and battery terminal connections. The accumulations were found during a non-injury accident investigation of a fire that originated in the compartment housing the receptacles of the above listed scoop. Seven persons were in the immediate area fighting the fire and delayed access of the originating area due to I-beams being bolted across battery covers. Ventilation travels from this area inby to the working face. Persons are exposed to serious hazards from inhalation of toxic chemicals, smoke and dangers associated with fighting fires. The scoop was located on the No. 8 section (MMU 008-0) in spad No. 23454.

Ex. P-1.

[1] 30 C.F.R. § 75.400 requires that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

1. Testimony

a. Timothy Foster

Inspector Foster described his observations when he first arrived at the scoop:

> The scoop was sitting there and it had the battery lids open. Expellent was on the batteries from fire extinguishers, the automatic fire suppression system. The area was dark and charred. I seen [sic] cables that were on top of the scoop that had been cut and several fire extinguishers around the area.

Tr. 31. Additionally, using a diagram of a standard single lid scoop battery, Foster identified the charred underside of the lid and the charred cells, the open receptacle cover and area where coking of the coal had occurred, and the area behind the receptacle where he found loose cables.[2] Ex. P-5: A, B, C, D; Tr. 34-36. Foster testified that, using his tape, the accumulation measured 6 ½ inches wide, by 5 ½ inches high, by 12 inches long, and that he could see coal and coal fines in the material. Tr. 39, 41. He stated that, by touch, the accumulation was warm, and the smell of burning was obvious. Tr. 40-41, 44. According to Foster, based on the "matted together, charred, real black" condition of the coal and coal fines, it was also obvious that the accumulation had burned. Tr. 44-45, 77. As support for his opinion that a buildup of heat set the mixture of coal and coal fines on fire, he explained that JWR had sent out the battery to be rebuilt, and that the cable connections in the back of the receptacle had not been properly secured. Tr. 36-38. Foster emphasized that the heat generated by the unsecured cables, not allowed to dissipate and traveling to the combustible area, created all the elements of a fire triangle: oxygen, combustion source (coal and coal fines), and an ignition source (heat from improper installation of the cables). Tr. 59-64.

Foster testified that he interviewed all the miners who had knowledge of or who had been involved in putting out the fire. Tr. 43, 46. He questioned what they had seen, what they were doing when the fire occurred, what color it was if they saw it, how long it lasted, and what they used to extinguish it. Tr. 46. According to Foster, as is typical of investigations of ignitions, the accounts of the fire were inconsistent, in that it ranged from red to blue to orange to yellow, and lasted from 15 seconds to 10 to 15 minutes. Tr. 46-48. From his notes of investigation, taken contemporaneous with securing the site and conducting the interviews, Foster identified Frank Green, Randy Jones, Scott Box, Andrew Harris, Terry Tavel, and Gregory Davidson as the miners who had fought the fire. Tr. 48-49, 53, 99.

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[2] Unlike the single lid in the diagram, the battery at issue had dual lids that open out from the center and two receptacles. Tr. 32, 34, 211-14, 240-41, 262; see Ex. R-2 at 7 (Foster's diagram of the scoop battery in his Non-Fatal Accident Investigation Report. This distinction between the construction of the actual battery and the diagram is not material to the fact of violation). Tr. 70-71.

Foster testified that, "[b]ased on the observance of the combustible materials that were allowed to exist around the electrical area of the battery," he determined that a violation of section 75.400 existed. Tr. 52. He explained his reasoning for accessing JWR's negligence as moderate:

> I interviewed the scoop operator, and I asked him about how often they wash the batteries to alleviate a buildup of combustible materials, and he stated to me that he had just washed them, or they had been washed on the 30th, one day prior. The battery . . . lids were open . . . and most of the battery area didn't have all that much that would be attributed to the normal mining process; but the area inside the receptacle area, it had a lot of material in it. So I deemed that as a mitigating circumstance. They washed it. They may have opened them up and washed it a little, and thought that was good and left it.

Tr. 57. It was Foster's opinion, however, that, based on the amount of material that he observed, the battery's receptacle area had not been washed. Tr. 57.

Finally, as to his decision to send a sample of the accumulation for testing, Foster expressed his understanding that inspectors are not required to take samples for section 75.400 violations. Tr. 67. Indeed, there is no form for sampling under section 75.400; the form used by Foster is the Rock Dust Sample Submission Form pertaining to rock dust surveys in active areas of a mine under 30 C.F.R. § 75.403. Tr. 123-27, 131. He also asserted that the test results, indicating that the material was 66.9% compliant, did not alter his finding of a violation, because the material was not 100% incombustible. Tr. 67, 73-77, 130; Ex. R-1.

b. <u>Gregory Davidson</u>

JWR's witness, longwall helper Gregory Davidson, had been employed at the No. 4 mine for 5 years at the time of the hearing. Tr. 208. Davidson worked day shift in July 2007, had been a scoop operator for 1 ½ years, and was the operator of the scoop that caught fire at the end of the Number 8 section track on July 31. Tr. 208-09. He testified that, as part of routine maintenance on the scoop, he was required to wash the battery to remove any combustible material. Tr. 210. Davidson recalled that the scoop battery had had to be changed in the early morning of July 31, and in doing so, he had removed the I-beams, lifted the lids, washed away the coal dust, and checked the battery's air and water. Tr. 211, 214. In response to being asked whether the receptacle area had been washed, he responded that "[w]e never went in there. Never." Tr. 214; see 232-33. Davidson was unsure, but recalled that the scoop had been used to service an entry before it was moved to the end of the Number 8 track. Tr. 214-25. He testified that, as soon as they had exited the scoop, someone hollered "Fire," and he grabbed a fire extinguisher from a slow moving miner and helped put it out. Tr. 215-16. According to him, the fire "was along one of the cells where a wire had came (sic) off at, and that started the fire." Tr. 218-20; Ex. P-5. Davidson opined that the accumulation was mostly rock dust, which he described as grayish, wet on top, and hard. Tr. 221-23. He also stated that when Foster

identified the receptacle area as the source of the fire, the supervisor directed that, as part of routine scoop maintenance from then on, the electricians were to check battery receptacle compartments on a daily basis. Tr. 227-29.

c. Frank Green

Frank Green, JWR's supervisor coordinator on the evening shift, had worked at the No. 4 mine approximately 5 ½ years at the time of the hearing, and was a union electrician trainee in July 2007. On July 31, Green was working on the Number 8 section track entry assembling a new continuous miner with a representative of the equipment, DBT, some 40 to 60 feet away from the scoop. Tr. 236-37. Identifying himself as the first to see the fire, he testified that after hearing popping sounds, then seeing a flame emanating from under the battery covers, he hit the scoop's fire suppression system but, when it failed to put the fire out, other miners used fire extinguishers to put it out in about 10 minutes. Tr. 238-39, 252. He acknowledged that, because he had been engaged in hooking up the fire hose, he did not actually see the battery until after the fire had been extinguished. Tr. 239. He explained that the battery lids are plastic, and from his observation, they were only a little wrinkled, rather than melted. Tr. 240-41. Green identified the site of the fire as the cell area on top of the battery -- the same area that Davidson had identified on the diagram. Tr. 242; Ex. P-5. He explained that a lead running across that area had arced, and he "[didn't] know what it was arced on or how it shorted, but that's what caught on fire, was the actual wire lead." Tr.242. He described the accumulation as dark gray, hardened as a result of intermittent wetting and drying and, because it appeared to be a mixture of primarily rock dust with some coal dust, noncombustible. Tr. 244-46.

d. Gary Toxey

JWR's witness, safety supervisor Gary Toxey, had been working at the No. 4 mine for four years at the time of the hearing, and had 29 years of extensive experience in the underground coal mining industry, except, as he noted, in the electrical field. Tr. 253-254. His experience also includes mine rescue, and he is a certified first responder medic and Alabama state firefighter. Tr. 255-56. Toxey essentially gave the same account as Foster about the circumstances under which the inspection team was diverted to the scoop fire on the Number 8 section, and he estimated that it took about 30 minutes by rail to reach the location of the scoop at the end of the track. Tr. 258-59. Toxey described what he observed upon their arrival:

> When we arrived there at the scene of the accident, I observed the battery lids being raised, the crossbar had been unbolted, and the lids were open. At that time, that's when I realized that there had been an arc in between two cables. There were no flames and no smoke at the time of arrival. There were other personnel in the area. The scoop operator was standing close by, and his helper.

Tr. 259-60. On the diagram of the battery, he also identified the same area that Davidson had labeled as the location that the two cables had "arced together and stuck." Tr. 263; Ex. P-5. Toxey also stated that he observed "flash" and soot on the underside of the lids, and that the

insulation was burned off of the cables where they had arced and stuck together. Tr. 263-64. In his opinion, there had been an electrical fire due to arcing of the cables rather than a coal fire because, "a fire of that magnitude [would have] showed where it had burned all the paint off the lids. Not only that, it would have shown signs of burning and heating on the topside of the lids." Tr. 264; see 275-76, 280, 286, 288-89. However, Toxey did acknowledge that "[t]here was a lot of noncombustible material around the battery plug" and, therefore, substantiated the presence of the accumulation. Tr. 265. He opined that the material was grayish-white, pure rock dust, and he stated that there was no evidence of arcing or coking whatsoever in the receptacle housing. Tr. 272-74. Contrary to Davidson's actual testimony, Toxey testified that, after speaking with Davidson, he was under the impression that the arcing had lasted for one to three minutes. Tr. 274-75. According to Toxey, an arc leads to a flame path. Tr. 280. On cross-examination, however, he conceded that coal fines accumulated in the vicinity of a flame path could lead to a fire if an ignition source were present. Tr. 281- 82, 293.

2. Fact of Violation

In order to establish a violation of one of her mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.,* 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

The Commission, citing *Old Ben Coal Company,* 1 FMSHRC 1954, 1957, (Dec. 1979) ("Old Ben I"), stated that it had "previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to miners: 'Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. [Section 75.400] is one of those standards.'" *Black Diamond Coal Mining Co.,* 7 FMSHRC 1117, 1120 (Aug. 1985). In *Old Ben*, the Commission recognized that "[t]he language of the standard [75.400], its legislative history, and the general purposes of the Act all point to a holding that the standard is violated when an accumulation of combustible materials exists." 1 FMSHRC at 1956. In *Black Diamond*, the Commission also found that "[a] construction of the standard that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." 7 FMSHRC at 1121. The Commission has also rejected the rule that evidence of depth and extent is a necessary prerequisite to establishing a violation of section 75.400, holding that, subject to challenge before an administrative law judge, "an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present." *Old Ben Coal Co.,* 2 FMSHRC 2806, 2807-08 (Oct. 1980) ("*Old Ben II*"). Moreover, the Commission has long held that violations of section 75.400 are supportable by visual observation alone:

> [W]e have never held that violations of section 75.400 require a test to determine the particular combustible material present, and section 75.400 does not by its terms require testing. Our precedent indicates that violations of the accumulation standard have been established by inspector observations. (Citations omitted).

> Further, nothing advanced by Harlan here persuades us to take the extraordinary step of overruling our precedent by engrafting a testing requirement onto section 75.400.

Harlan Cumberland Coal Co., 20 FMSHRC 1275, 1290 (Dec. 1998). In pointing out the obviousness of the prohibition against permitting loose coal to accumulate, the Tenth Circuit has interpreted the mandate to require reasonably prompt clean up, "with all convenient speed." *Utah Power & Light Co. v. Sec'y of Labor*, 951 F.2d 292, 295 n 11 (10th Cir. 1991). The judgment of an MSHA inspector as to whether a violation existed is subject to review under "an objective test of whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light Co.,*12 FMSHRC 965, 968 (May 1990), *aff'd*, 951 F.2d 292 (10th Cir. 1991).

As might be expected, the Secretary maintains that "section 75.400 does not require a showing of the combustibility content of accumulated material in order to establish a violation of the standard. Sec'y Br. at 11. Indeed, as to the fact of violation, she frames the issue before me as "whether there is any effect of the presence of non-combustible materials near or mixed with the combustible materials that were, in fact, present." Tr. 14.

Arguing a contrary position, JWR maintains that this case is "unique," "special," "exceptional" because both citations involve material that was located in an enclosed area and, therefore, the "incombustible content of the cited material is knowable." JWR Br. at 4. While JWR acknowledges that "[t]here is no rule requiring laboratory sample results to substantiate a 75.400 citation," it contests the violations based upon the proposition that, "[f]or purposes of determining compliance with 75.400, laboratory sample results are the most accurate way to determine the incombustibility level of a cited accumulation of material. JWR Br. at 5; Tr. 79-80. Indeed, JWR's counsel clearly articulated the operator's position that sampling may be used in section 75.400 violations to rebut presumptions of combustibility:

> If the evidence in this case shows that the material was not combustible, then we are able to rebut an allegation that the material was combustible. There's nothing prohibiting an inspector from issuing a 75.400 based on a visual observation; but, if the evidence is that the material was not combustible and the inspector was incorrect, then by definition, under 75.400, you don't have an accumulation of combustible materials because the material is not combustible. It has to be proven, as a matter of fact, in this case.
>
> * * *
>
> Really, what you're looking at here is a reasonable miner test where, if two reasonable people observe a condition and disagree on the combustibility, then a sample can provide evidence that can help a fact-finder decide whether it was [a] combustible accumulation or not.

Tr. 82-85.

As the Secretary has pointed out, Inspector Foster fully explained the basis for concluding that what he observed was an accumulation of combustible material. Sec'y Reply Br. at 8. He testified that he found an accumulation in the receptacle compartment and that the combination of coal and coal fines embedded in the material was obvious. Tr. 39, 45. He measured the accumulation, and it was warm when he touched it. Tr. 39-40. He described the area around the plugs in the receptacle as "smutty" and "matted," and "real black" due to coking of the coal, and that the smell of burning was obvious. Tr. 44-45. Foster's notes of his investigation are consistent with his testimony. Ex. R-2 at 9-16.

Davidson described the material as grayish, mostly rock dust, wet on top and hard. Tr. 221-23. Green testified that the material was a hard, dark grayish mixture of rock dust and maybe coal dust. Tr. 244. Toxey's description, that the material was pure rock dust, stands by itself, uncorroborated by any other evidence. Tr. 272-73. Based on all the evidence, particularly, the testimony that the material ranged from gray, to dark gray, to black, I find that the accumulation contained coal and coal fines and, therefore, was combustible. Mindful of the Commission's rejection of excluding from the purview of the standard accumulations that are mixtures of combustible and noncombustible materials, I have considered the cases cited by Respondent, but find no authority, whatsoever, for requiring more of the inspector than his reasonable observation. Parenthetically, I note that the sample, although chemically altered as a result of burning and application of expellent, tested 33.1% combustible. Ex. R-1. The "reasonable miner" test advanced by JWR is simply not the objective test the Commission applies to the inspector's assessments. Finally, I find, based on Foster's measurements and the fact that pre-operational maintenance of the scoop had never included inspecting or cleaning the battery receptacle compartments, that the buildup of combustible material was extensive and not promptly removed, as envisioned by the standard. Accordingly, I conclude that the Secretary has proven, by a preponderance of the evidence, that combustible material was allowed to accumulate in the receptacle compartment of the scoop battery in violation of section 75.400.

3. Significant and Substantial

Inspector Foster determined that the violation was "significant and substantial" ("S&S"). The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine or safety hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a

measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The fact of violation has been established. The focus of the S&S analysis here is whether the violation was reasonably likely to result in an injury producing event. In *U.S. Steel Mining Company*, the Commission provided further guidance:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." (citation omitted). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial.

U.S. Steel Mining Co., Inc., 7 FMSHRC 1125, 1129 (Aug. 1985) (emphasis added).

When examining the likelihood of a fire, ignition, or explosion, the Commission examines whether a "confluence of factors" was present on the particular facts surrounding the violation, including the extent of the accumulations and the presence of possible ignition sources. *Amax Coal Co.,* 19 FMSHRC 846, 848 (May 1997) (quoting *Texasgulf, Inc.,* 10 FMSHRC at 500-01. The Commission also considers whether methane was present, and what type of equipment was in the area. *Enlow Fork Mining Co.,* 19 FMSHRC 5, 9 (Jan. 1997) (quoting *Utah Power & Light,* 12 FMSHRC at 970-71 (May 1990)); *Texasgulf,* 10 FMSHRC at 500-03).

Inspector Foster explained that all three elements of a fire triangle had been present. His conclusions, that the scoop battery caught on fire because of loose cable connections generating heat from the scoop's motion and igniting the coal, was not rebutted by JWR. Toxey, having no electrical training, was the only witness who opined that two cables had arced, and no fire had occurred. Indeed, the miners on the section described seeing and extinguishing a fire, and they also told Foster that the smoke had reached the face. The evidence proffered by JWR, that the top of the batteries burned at the cells, does establish that the fire originated in an area other than where the combustible accumulation was located, but only that the fire spread. Therefore, based on the unrebutted evidence of the loose cable connections and coking of the coal, I find that a fire occurred, and that it started in the receptacle compartment of the scoop battery.

Foster testified that he determined the violation to be reasonably likely to result in permanently disabling injuries because:

> In this case you've got combustion occurring in an area and the ventilation in this area travels inby to the face area where the miners are working, then they're exposed to the inhalation of toxic chemicals from combustion. They're also exposed to the dangers associated with putting the fire out. They can receive burns. They can receive chemical burns from the sulfuric acid that's inside the batteries. There's also a possibility of electrical shock hazards.

Tr. 58-59.

Considering that removal of the I-beams and opening the lids was required to access the fire, the scoop's fire suppression system was ineffective and use of fire extinguishers was necessary to put out the fire. Therefore, the miners were exposed to smoke, toxic fumes, and the actual flames. Applying the *Mathies* criteria, I find that the Secretary has met her burden of establishing the reasonable likelihood of the violation resulting in serious burn and inhalation injuries that would be permanently disabling to miners on the section, given continued mining operations. Accordingly, I find that the violation was S&S.

B. <u>Citation No. 7692848</u>

Based on his inspection of No. 4 mine's East Belt Drive, and his observation of float coal dust accumulations on the energized electrical components inside the transformer, Foster issued 104(a) Citation No. 7692848, alleging an S&S violation of 30 C.F.R. § 75.400, that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was the result of JWR's "moderate" negligence. The "Condition or Practice" is described as follows:

> Accumulations of combustible material in the form of float coal dust were allowed to exist in the 7200 KVA RAD Engineering (s/n 0699) transformer located in crosscut 3 of the East Belt Drive area. Float coal dust was visible on the electrically energized cables, switch gear and resistors through the windows [sic] at the high voltage end of the transformer. This area is located in the alternative escapeway, and ventilation travels inby to the working face where people work and travel. The failure to keep the transformer free of combustible material exposes miners to hazards of inhalation of toxic chemicals [and] also hazards associated with fighting fires.

Ex. P-2.

1. Testimony

a. Timothy Foster

Foster described the energized 7200 transformer, which provides electrical power to the belt drive motors, as approximately 10 to 12 feet in length, 5 feet wide, and 4 feet high; it has a visual disconnect window measuring 10 inches, by 10 to 12 inches, that provides a view of the internal electrical installations, and the internal cabinet is painted yellow. Tr. 140-41, 157. He testified that, through the window, he observed "very black" float coal dust heavily coating the energized "make and break" contactors, switch gears and resistors, such that the copper components could not be seen. Tr. 140-45, 157, 162, 164-65, 175. Foster explained that, because the transformer is located adjacent to the belt's dumping point, and coal dust is thrown up as a result of sweeping and travel, dust is "promulgated into the atmosphere," and the transformer's cooling fans draw it into the cabinet. Tr. 148, 163-65. He determined that, although JWR should have known the danger of permitting the accumulation to exist, there were mitigating circumstances that caused him to assess the operator's negligence as "moderate:"

> Mr. Gallaher said, you know, that they blow these things out on a regular basis. When I say 'blow out,' they take air. Normally, maybe on the weekends during fan checks and things like that, they know that they're going to get dust in these boxes. So they have a routine time that they do preventive maintenance, and things like that and, at that time, they can alleviate the area of combustible materials. This may have slipped through the cracks. It may not have gotten done.
>
> * * *
>
> I had checked some other ones [transformers], and they seemed to be okay. So this one may have just fell through the cracks.

Tr. 147-48. According to Foster, Gallaher made arrangement for an immediate clean up and, as the inspection team proceeded down the beltline, it encountered Inspector Church. Tr. 151-52, 176. Foster testified that he asked Church to check on the clean up of the transformer, since he was going in that direction. Tr. 152-53. Foster stated that, subsequently, he and Church traveled out of the mine together and that, as a result of Church's report that the float coal dust had been removed from the energized components, but that some remained on the cabinet floor, he, Foster, extended the abatement period to allow JWR to vacuum the float coal dust from the lower part of the cabinet. Tr. 152-53, 174-75; Ex. R-4 at 8, 9. Because the vacuum cleaner battery required charging, he testified, it was not until lunchtime two days later, August 16, that the material was removed from the cabinet floor. Tr. 154. Foster also stated that he did not see Toxey take a sample of the material from inside of the transformer. Tr. 157.

On cross-examination, while Foster acknowledged that "those areas are regularly swept to deal with the float coal dust," and that there are "sprays on the belt," he commented that he personally knows of situations where the abundance of float coal dust requires greater

measures. Tr. 166-68. He also stated that the belt entry is the alternative escapeway, that the air flows inby, and that the transformer, situated in a crosscut between the belt and track entry, was probably 30 feet from the belt. Tr. 170-71. According to him, JWR normally uses an air line, stationed in the belt drive area, to blow float coal dust out of the enclosure. Tr. 173. Finally, he acknowledged that Church had reported to him that the material on the cabinet floor "had become gray." Tr. 174-75.

b. <u>John Church</u>

John Church, an MSHA Conference and Litigation Representative, was an MSHA inspector and electrical specialist assigned to District 11 at the time of the August 14 inspection. Tr. 187-88. Church had been an MSHA employee for 19 years at the time of the hearing, and had 14 years experience in the mining industry prior to joining MSHA, including ownership of a mine and independent contract mining. Tr. 192. Church testified that as part of his regular inspection of the mine, he was checking on high voltage transformers parallel to the track, when Foster asked him to check on the clean up progress of the transformer he had cited and, if appropriate, terminate the citation. Tr. 188-89. He explained what action he took in response to Foster's request:

> I traveled over off the track entrance to a set of doors over where the power center was at. I looked at it. If my memory serves me, I think a couple of guys were there, and they had done some work. I looked inside of it, the best I could, to see what they had done. It looked like they may have used some compressed air to try to blow off the stuff inside out, but there was still some accumulations of float coal dust inside the enclosure.
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> * * *
>
> It was black in color, and the power center was parallel to the belt.

Tr. 189-90. Church described the transformer as an enclosure that, because it has lids, is not totally sealed and, therefore, "if there is an accumulation of float coal dust, it can be in the air and it can get inside the box; and that's generally where it comes from." Tr. 190-91. He stated that, when he inspected the power center, it was energized but the lids had been replaced. Tr. 191. He recalled that from his observation through the window, it was clear that more cleaning was needed, so he did not terminate the citation; rather, he suggested to the miners that they ask Foster for an extension of the abatement deadline. Tr. 191-92, 201.

On cross-examination, Church testified that he got to the transformer about 1 ½ to 2 hours after Foster had made the request, and through the window, it appeared to him that compressed air had been used successfully to clean the float coal dust from "the wires and cables and switch gear and stuff. That all looked to be pretty clean and clear. . . . What I observed was what I seen [sic] in the main bottom of the power center, on the floor of it." Tr. 194-95, 200. According to Church, although he had not witnessed any cleaning, the miners told him that they had cleaned inside the transformer. Tr. 199. Church also opined that, from his observation of the remaining material, JWR was in violation of section 75.400 and he, himself, would have cited the operator. Tr. 195, 203-04. In Church's experience, "rock dust,

coal dust, road dust and track dust will go - - will get inside the power centers; and they build up on the wires, and on the electrical connections on top of the transformers, and on top of the switch gear mechanisms. . . ." Tr. 196-98, 202-04.

c. Gary Toxey

Gary Toxey testified that he accompanied Foster during his inspection on August 14, although Foster testified to the contrary. Tr. 298. He described the location of the transformer in crosscut number 3, between the track and belt entries, as a "windy situation" that is constructed with a stopping that contains a man-door separating the greater air pressure in the track entry from the lesser air pressure in the belt entry. Tr. 300-302. According to Toxey, the air that travels across the crosscut carries rock dust, and that the material cited in the transformer was rock dust. Tr. 302-03. Toxey explained what action he took as a result of being cited by Foster:

> Once the power was disconnected from the switch gear, the lids were removed . . . and, at that time, I took out a dust sample bag that's used by MSHA. The area of the piece of equipment had been locked and tagged out. I brushed the resistors, the transformer, and the switch gear on the wall, and I recovered a sample. I labeled it as 3 East-A switch gear box. At that time, it was tied up, sealed, and after we . . . came back outside, it was given to my safety director, Jim Brackner. At that time, he sent it to our lab to have the rock dust noncombustibility analysis done.

Tr. 303-04. Toxey was of the opinion, based on his observation before the transformer was opened, that the material was noncombustible due to its grayish-white color. Tr. 304. He also testified that he took the sample prior to any cleaning, then the material was blown out, the lids were reinstalled, and the belt was restarted. Tr. 305. Toxey also testified that there was "very light film all over everything inside the switch gear," and that "the switch gears are cleaned as needed; on a weekly basis, they're checked under the permissibility checks." Tr. 306.

d. Jim Brackner

Jim Brackner had been JWR's safety director at the No. 4 mine for 4 ½ years at the time of the hearing, and he had held the position of supervisor for five years prior to that, UMWA committeeman for nine years, and fire boss pumper for 18 years. Tr. 311. Brackner testified that, because the East belt area is a "main line header and belt drive, normally, we have somebody there every shift," in order "to keep the area clean and rock dust it." Tr. 312. He testified about his involvement in the testing of the sample removed from the transformer:

> Basically, when this citation was issued, Mr. Toxey gathered a sample from inside the transformer and brought it out to me. I carried it to Jim Walter's lab. If I can remember, I gave it to Mr. Ashley Riley, and they sampled it up there, sampled both the contents, and then sent the results back to me.

Tr. 314. The sample results showed the material to be 87.90% noncombustible. Tr. 314; Ex. R-5. According to Brackner, the sample was gray, in his opinion a mixture of more rock dust than coal dust and, noncombustible. Tr. 315-16. When asked how the dust got inside the enclosure, Brackner speculated that it was carried by the cooling fans after it was stirred up by people working in the area, or when the walk-thru door in the number 3 crosscut was open. Tr. 316. He acknowledged that, despite JWR's dust suppression sprays, it is possible that coal dust could have been generated at the dumping point, some 500 feet away from the transformer. Tr. 317-18. When asked how often the transformers are blown out, Brackner responded that JWR's policy is to clean them on a weekly basis. Tr. 318, 319-20. He also testified that the electricians conduct monthly checks on the electrical components to ensure that the breakers and the ground faults are operating properly. Tr. 318-19. On cross-examination, however, Brackner was unable to pinpoint when the insides of the transformer in question had been cleaned prior to August 14. Tr. 319-20.

2. Fact of Violation

JWR has mounted no defense to the allegation that there was an accumulation inside the transformer, but bases its challenge on the material's combustibility content. Foster described that the electrical installations as coated with very black float coal dust. Toxey acknowledged that there was a very light film coating the electrical components, but that the material was grayish-white rock dust. Brackner testified that the material was a gray mixture of rock dust and coal dust. Church not only corroborated Foster's testimony that material had accumulated inside the transformer, but that it was black. JWR's own witnesses acknowledged that the material was, at least, gray. Mindful that Commission precedent has rejected an interpretation of the standard that permits accumulations of combustible and noncombustible mixtures, and has held that violations of section 75.400 simply occur when an accumulation of combustible materials exists, by Foster's reasonable observation, the Secretary has established the violation. Furthermore, as discussed in reference to the previous violation, sample testing is not required under section 75.400 and, unlike section 75.403, there is no noncombustibility compliance requirement. Accordingly, I find that JWR violated 30 C.F.R. § 75.400 when it permitted float coal dust to accumulate inside the transformer.

3. Significant and Substantial

Foster explained his S&S determination based on the seriousness of the violation:

> Well you've got combustible material on an energized area. If an accident were to occur, it's very reasonable to believe that it would be of a serious nature and people would receive serious injuries. You could have a fire here. The belt motors derive power from this area here. Inside this, you have . . . motor contacts. When those motor contacts open and close, then you have arcing occurring. If you've got arcing occurring, you have an ignition source. Now, if we add to that we've got float coal dust and oxygen, we've got all the elements of the fire triangle.

Tr. 148-49. Foster also testified that "a transformer could blow up as a result of this, people in the area would be subjected to the toxic chemicals that come off this, it's dangerous fighting fires, electrocution. The thing may not be deenergized." Tr. 150-51.

The fact of violation has been established. Foster gave detailed, credible testimony, unrebutted by JWR, that the elements of a fire triangle were created due to the float coal dust coating the energized electrical components operating inside the transformer. Applying the *Mathies* criteria, in the context of continued mining operations, I find that the Secretary has established the reasonable likelihood of the violation resulting in serious injuries to miners on the section from burns, explosion, and inhalation of toxic chemicals, and that these injuries would, at least, be reasonably expected to result in lost workdays or restricted duty. Accordingly, I find that the violation was S&S.

III. Penalty

A. Section 110(i) Criteria

While the Secretary has proposed a total civil penalty of $19,567.00 for the two violations under her civil penalty point system, 30 C.F.R. Part 100, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that JWR is a large operator, with a history of prior violations that is significant. Ex. P-3, P-4. As stipulated by the parties, the total proposed penalty will not affect JWR's ability to continue in business, and the company demonstrated good faith in achieving rapid compliance after notice of the violations. Stip. 8, 11. The remaining criteria involve consideration of the gravity of the violations and JWR's negligence in committing them. These factors have been discussed fully respecting each citation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

B. Assessment

1. Citation No. 7692831

The Secretary has established a serious violation of 30 C.F.R. § 75.400, that the violation was S&S, and caused by JWR's moderate negligence. The Secretary petitioned the Commission to assess a penalty of $15,571.00 for this violation. Applying the civil penalty criteria, I find that a penalty of $15,571.00, as proposed, is appropriate.

2. Citation No. 7692848

The Secretary has established a serious violation of 30 C.F.R. § 75.400, that the violation was S&S, and caused by JWR's moderate negligence. The Secretary petitioned the Commission to assess a penalty of $3,996.00 for this violation. Applying the civil penalty criteria, I find that a penalty of $3,996.00, as proposed, is appropriate.

IV. Approval of Settlement

The parties have filed a Joint Motion to Approve Partial Settlement of Docket SE 2008-406 and dismiss the case as to 12 of the 14 citations in the civil penalty docket. A reduction in penalty from $27,945.00 to $17,145.00 is proposed.[3] The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation Number	Initial Assessment	Proposed Settlement
7692833	$ 5,080.00	$ 2,282.00
7692836	$ 1,203.00	$ 1,203.00
7692844	$ 4,689.00	$ 2,514.00
7692845	$ 5,080.00	$ 3,143.00
7692849	$ 4,329.00	$ 3,463.00
7692851	$ 745.00	$ 317.00
7692889	$ 745.00	$ 344.00
7675031	$ 1,304.00	$ 263.00
7694206	$ 745.00	$ 297.00
7691156	$ 745.00	$ 596.00
7694207	$ 2,473.00	$ 1,978.00
7694210	$ 807.00	$ 745.00
	Total: $27,945.00	$17,145.00

I have considered the representations and documentation submitted by the parties, including modifications previously made to two citations, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

[3] The parties settlement agreement contains a $10.00 mathematical error. Because I deem the error *de minimis*, this Decision corrects the proposed settlement amount and, therefore, approves the corrected total amount of the civil penalty.

ORDER

WHEREFORE, it is **ORDERED** that Citation Nos. 7692831 and 7692848 are **AFFIRMED**, as issued; that the Secretary **MODIFY** Citation No. 7692844 to reduce the level of gravity to "permanently disabling," Citation No. 7692845 to "2 persons affected," Citation No. 7692851 to "6 persons affected," and Citation No. 7694210 to "1 person affected," and Citation Nos. 7692833, 7692889 and 7694206 to reduce the degree of negligence to "low;" and that Jim Walter Resources **PAY** a civil penalty of $36,712.00 within 30 days of this Decision. Accordingly, these cases are **DISMISSED**.

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

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September 7, 2012

SECRETARY OF LABOR, MSHA	:	TEMPORARY REINSTATEMENT
on behalf of ZACHARY TAYLOR,	:	PROCEEDING
Complainant,	:	
	:	Docket No. WEST 2012-1433-D
	:	DENV CD 2012-6
v.	:	
	:	
NEW ELK COAL COMPANY,	:	Mine: Elk Prep Plant
Respondent.	:	Mine ID: 05-04461

DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Appearances: Tim Williams, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for the Complainant;
Robin Repass, Jackson Kelly PLLC, Denver, Colorado, for the Respondent.

Before: Judge Miller

This case is before me on an application for temporary reinstatement filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against New Elk Coal Company, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (the "Act" or "Mine Act"). On August 23, 2012, pursuant to 29 C.F.R. § 2700.45(c), Respondent requested a hearing on the application. A hearing was held on August 30, 2012, in Denver, Colorado.

I. ANALYSIS AND FINDINGS

a. Background

New Elk Coal Company is an "operator" as defined in Section 3(d) of the Mine Act and the Respondent's operations affect interstate commerce. As such, Respondent is subject to the jurisdiction of the Mine Act, and the presiding Administrative Law Judge has the authority to hear and issue a decision regarding this case. Complainant, Zachary Taylor is a miner as defined by the Mine Act. Stip. 1-4.

Complainant, Zachary Taylor, was employed by New Elk Coal Company (hereinafter "New Elk"), at the Elk Prep Plant located near Weston, Colorado. Stip. 1,4. Taylor worked as a certified electrician in the maintenance department first in the prep plant and later underground.

Taylor was initially hired by a contractor, TK, but later, after TK lost its contract with New Elk, he was transferred to Strategic Staffing Solutions, Inc. The transfer did not affect his position or duties at the mine and at all times he was supervised by New Elk supervisors. It appears that New Elk uses a staffing company to hire and pay hourly workers, while New Elk hires and pays the salaried workers. Taylor was trained by the mine, and was subject to the policies and rules of the mine. He was terminated from his employment solely by supervisors of New Elk.

On June 29, 2012, Taylor filed a discrimination complaint against New Elk alleging that he was terminated from his employment in violation of section 105(c) of the Act. Taylor's complaint was investigated by the Secretary and the special investigator found that the mine discriminated against Taylor when his employment was terminated on May 12, 2012.

b. Findings of Fact

Taylor worked in the maintenance department of New Elk beginning in January of 2011. He worked first at the New Elk Prep Plant and then he was transferred to the underground portion of the mine at the Bates Portal mine on April 27, 2012. On April 15, 2010, Taylor called MSHA to report a number of safety hazards that he observed at the mine, near the belt line in a newly constructed area of the Prep Plant. Taylor reported that no pull cord had been installed for a section of the belt that had been added, that there was no lighting installed in a section of the tunnel, that the lighting in the escapeway was not working, and that live exposed wires were present in the tunnel. Taylor explained the safety issues he observed to his supervisor, and called MSHA in the presence of the supervisor. The day after Taylor made his complaint, MSHA conducted an inspection at the mine and issued a number of citations. Taylor believes, based upon his conversations with supervisors and his crew, that it was generally known that he called MSHA to make safety complaints. After Taylor completed his weekly rotation during the week he called MSHA, he returned home for his regular seven days offs. Just prior to returning to work, he was called and informed that he was being transferred to the day shift and to the underground portion of the mine. The call came too late for Taylor to reach the mine on the day of the change, since it was his expectation that he would be working the night shift, but he reported the following day. Taylor worked a schedule of twelve hour shifts, seven days on and seven days off.

Upon arriving at his new position underground, Taylor spoke with his new supervisor, Bill Massarotti. Massarotti told Taylor that maintenance does not call MSHA, that they resolve safety matters in-house, and that maintenance employees always follow the chain of command. The next day, MSHA conducted a second inspection, this time of the underground portion of the mine. Following the inspection, Taylor was told by his crew that everyone knew he had called MSHA and they asked him why he had done it. After that weekly rotation, Taylor returned home for a week, and received another call prior to his return to the mine, informing him that his shift had been changed again. Taylor again missed a day of work due to the change. He arrived on May 11, 2012, and told Lane Balzely, one of the supervisors, that he could not find his cap lamp. While Taylor went to find a new lamp, Balzely took the mantrip underground and subsequently wrote a reprimand to Taylor for missing the mantrip. Finally, on May 12, 2012, Taylor was

terminated from his employment at the mine when he was called into a meeting with New Elk supervisors, including Lane Balzely and Bill Massarotti. For the first time, at that meeting, Taylor learned that the mine believed he had made an incorrect splice in a cable and therefore he was being fired. Taylor testified that he did not make the incorrect splice as alleged, and was not told, or otherwise instructed, as to the kind of splice the mine expected.

New Elk asserts that Taylor was terminated for not correctly making a splice on the miner cable, thereby exposing miners to a shock hazard. It asserts that Taylor did not follow New Elk policy and training when making the splice. Taylor testified that he made the splice correctly and for purposes of this proceeding, I accept his representation that he did so.

c. Applicable Law

Section 105(c)(1) of the Mine Act provides that no person shall discharge or otherwise discriminate against a miner for exercising rights under the Act. It states in pertinent part:

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

30 U.S.C. § 815(c)(1)(Emphasis provided by the Commission in *Moses v. Whitley Development Corp.,* 4 FMSHRC 1475, 1478 (Aug. 1982)).

Pursuant to 105(c)(2), if the "Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has noted that the parameters of a temporary reinstatement hearing are narrow, being limited to a determination with respect to whether a miner's discrimination complaint has been frivolously brought. *See Sec'y of Labor o/b/o Price v. Jim Walter Res., Inc.,* 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd.,* 920 F. 2d 738 (11th Cir. 1990). Accordingly, it is only necessary to determine whether the Applicants' complaints *appear* to have merit. *See* S. Rep. No. 181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977,* 94th Cong., 2d Sess., at 624 (1978). In *Jim Walter Resources, Inc. v. FMSHRC*, the Eleventh Circuit found the "not frivolously brought" standard comparable to a "reasonable cause to believe" standard. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). The Eleventh Circuit concluded that the low burden imposed by the "not frivolously brought" standard reflects clear Congressional intent to make temporary reinstatement relatively easy to obtain. *Id.* at 748.

The Commission has consistently found that Congress intended section 105(c) to be broadly construed to afford maximum protection for miners exercising their rights under the Act. *See Sec'y of Labor o/b/o Charles H. Dixon et. al. v. Pontiki Coal Corp.,* 19 FMSHRC 1009,

1017 (June 1997) (*citing Swift v. Consolidation Coal Co.,* 16 FMSHRC 201, 212 (Feb. 1994) ("the anti-discrimination section should be construed 'expansively to assure that miners will not be inhibited *in any way* in exercising any rights afforded by the legislation.'")(quoting S. Rep. No. 181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977,* 94th Cong., 2d Sess., at 624 (1978) (emphasis added)).

Although the Secretary is not required to present a prima facie case in a temporary reinstatement proceeding the Commission has determined it useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. *Sec'y of Labor o/b/o Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085 (Oct. 2009). In order to establish a prima facie case under Section 105(c), a miner must show: (1) that he engaged in a protected activity; and (2) that his termination was motivated, at least in part, by the protected activity. *See Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980).

The Commission has held that evidence of motivation may be shown by circumstantial evidence. *See, e.g., Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), rev'd on other grounds sub nom., *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983) (holding that illegal motive may be established if the facts support a reasonable inference of discriminatory intent); *Schulte v. Lizza Industries, Inc.*, 6 FMSHRC 8 (Jan. 1984). Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include: (1) knowledge by the operator of the protected activity, (2) hostility toward the miner because of his protected activity, (3) coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complaining miner. *Jungers v. Borax*, 15 FMSHRC 300, 308 (Feb. 1993).

d. The Secretary Has Met Her Burden of Proof to Establish a Non-Frivolous Allegation

Taylor explained that he found safety hazards at the New Elk mine and that he brought them to the attention of his supervisor and called MSHA to report those hazards. The following day, an MSHA inspection was conducted that resulted in the issuance of a number of citations. I find, therefore, that Taylor has engaged in protected activity. Further, Taylor was the subject of an adverse action when he was terminated from his employment a few weeks after filing the complaint with MSHA.

It is undisputed that mine management, including Taylor's supervisor and the plant supervisor, were aware of Taylor's complaints about unsafe conditions and about the complaint he made with MSHA. Taylor further testified that the mine exhibited a hostile attitude toward him after the complaint was made and terminated his employment a few short weeks later. Given the timing of the termination, the knowledge of the supervisors at the mine, and the hostility toward Taylor, there is ample evidence to support that causal connection between the protected activity and the adverse action. Therefore, for purposes of this proceeding, the Secretary has demonstrated the elements of a prima facie case of discrimination and I find that the complaint was not frivolously brought.

The mine defends by asserting that Taylor was not employed by the mine, but instead was employed by Superior Staffing Solutions (SSS), Inc. However, there is evidence to demonstrate that SSS was merely an administrative tool for the mine. The miners were trained by New Elk, were subject solely to New Elk's supervision and the mine had the authority to hire and fire as it liked. I find the mine's argument that Taylor was not its employee is without merit.

The Secretary must demonstrate that the discrimination complaint made by Taylor "appears to have merit," i.e., that there is reasonable cause to believe that the miner was discriminated against *in part* due to protected activity in which he has engaged. *Sec'y of Labor v. Centralia Mining Co.,* 22 FMSHRC 153, 157 (Feb. 2000); *CAM Mining* at 1088. I find that Taylor made a safety complaint to MSHA in April, that the complaint was known to his supervisors and that there is adequate circumstantial evidence to connect Taylor's complaint to his termination. Therefore, the complaint filed by Taylor is not frivolous and Taylor must be reinstated.

e. Respondents' Economic Feasibility Argument

The Respondent argues that reinstatement of Taylor is barred because on July 11, 2012, New Elk laid off a large number of workers, including both hourly and salary employees. The mine work force was reduced from 337 employees to 35, four of which were electricians working in maintenance area. Massarotti explained that he made the decision regarding who to lay off and who to keep. He kept persons based on their experience and their skill. He indicated that he would not have chosen Taylor because the others had more experience and two of the three have mine foreman papers. Each can complete other tasks. Taylor was not at the mine during the layoff period and therefore he was not considered when the mine determined which electricians to keep and Massarotti agreed that he was not aware of Taylor's qualifications to remain employed.

> The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation or the time for which an operator is required to pay back pay to a discriminatee. *See Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 1638, 1639 (Sept. 1989) (holding that back pay is due to a discriminatee from the date of the unlawful discharge until the time of reinstatement or "the occurrence of an event tolling the reinstatement obligation"); *Wiggins v. E. Assoc. Coal Corp.*, 7 FMSHRC 1766, 1772-73 (Nov. 1985) (concluding that back pay award ended upon date of layoff). As a Commission Judge reasoned, "if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination." *Casebolt v. Falcon Coal Co., Inc.*, 6 FMSHRC 485, 499 (Feb.

> 1984) (ALJ) (citations omitted). Thus, Commission precedent recognizes that a change in circumstances may be relevant to tolling economic reinstatement in a temporary reinstatement proceeding. *See generally Sec'y of Labor on behalf of Shepherd v. Sovereign Mining Co.*, 15 FMSHRC 2450 (Dec. 1993).
>
> . . .
>
> The Commission has also recognized in remedial contexts that an operator has the burden employee or which would mitigate that liability.'" *See Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 770, 779 (May 1989) (citations omitted). The Commission has stated that, "[s]pecifically, the burden of showing that work was not available for a discriminatee, whether through layoff, business contractions, or similar conditions, lies with the employer as an affirmative defense to reinstatement and backpay." *Id.* In such circumstances, the operator must make such a showing by a preponderance of the evidence. *Id.*

KenAmerican Resources Inc., 31 FMSHRC 1050, 1054-1055 (Oct. 2009).

The issue of a layoff in this case presents a unique problem. Taylor was terminated prior to the layoff in July, 2012, and therefore was not considered in making the determination about who should remain employed. The decision, as to the electricians who remained, was made by Massarotti, the same supervisor who intimidated Taylor and who was involved in his termination. Massarotti testified that he chose three electricians based upon their experience and skill and he could not really compare Taylor's skill set to the skills of the others because he was not aware of Taylor's qualifications. While a large number of employees, both hourly and salary were laid off in July, there is not enough evidence to determine whether or not Taylor would have been one of those laid off. Therefore, the mine has not met its burden of proof on this issue, at this time.

The temporary reinstatement hearing is one of limited inquiry and, given the state of the case law on the issue of layoffs, as well as the limited evidence and discovery for a temporary reinstatement hearing, it is difficult to ascertain whether Taylor would have been laid off. In *KenAmerican Resources Inc.,* 31 FMSHRC 1050, 1054-1055 (Oct. 2009), the Commission determined that the judge should consider a layoff at the mine following a miner being returned to work under the provisions of temporary reinstatement. The Commission suggested that the parties engage in discovery and that they put on full and complete evidence as to the nature of the layoffs and whether the complainant would have been included.

Since the temporary reinstatement hearing is held prior to discovery or further development of the case, it is difficult for the mine to present the economic defense and it is difficult for the Secretary to rebut such a defense. Therefore, because I retain jurisdiction in this temporary reinstatement matter, I leave open the question of whether or not Taylor would have

been laid off, thereby limiting the term of his temporary reinstatement. New Elk may file a separate motion to re-consider the economic issue and the parties will be given time to engage in discovery and the development of the issues as to the layoff. While a full hearing on the matter may be suitable for the final discrimination matter, a follow-up hearing was sanctioned by the Commission in *Kenamerican* and, therefore, when the parties are adequately prepared, I will hold a hearing on the matter if so requested.

II. ORDER

For all of the reasons listed above, I find that the Secretary presented sufficient evidence at hearing to render the discrimination complaints non-frivolous. At hearing the parties agreed that any reinstatement would be economic reinstatement and Taylor would not return to the mine. Accordingly, **IT IS ORDERED** that Respondent immediately economically re-instate the Complainant, Zachary Taylor, **as of August 30, 2012,** at the same rate of pay and benefits that he was earning at the time of his termination. The parties may file a motion for reconsideration of the economic arguments related to the duration of the reinstatement order.

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

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September 21, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2011-1481-M
Petitioner,	:	A.C. No. 04-00743-263532 02
	:	
v.	:	
	:	
US BORAX, INC.,	:	
Respondent.	:	Mine: Boron Operations

DECISION

Appearances: Letha Miller, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner,
Dana Svendsen, Jackson Kelly PLLC, Denver, Colorado for the Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against US Borax, Inc. ("Borax"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The above captioned docket involves nine citations issued by MSHA under section 104(a) of the Mine Act at the Boron Operations (the "mine" or "Boron Operations") located in Boron, California. The parties presented testimony and documentary evidence at a hearing held on August 2, 2012, in Long Beach, California. At the hearing, the parties agreed that seven of the nine violations had been settled. Two citations are left for decision.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Boron Operations Mine is located in Boron, California and is owned and operated by US Borax, Inc., which is in turn owned by Rio Tinto Minerals. (Tr.19). US Borax extracts a boron material from a pit that is a mile deep and several miles long. (Tr. 19-20). The mine employs approximately 800 individuals and has a very large processing operation. (Tr. 96).

The parties agree that the mine is subject to the jurisdiction of the Mine Act, that the Respondent is an operator as defined by the Act and that the Administrative Law Judge has jurisdiction in this matter. Jt. Ex. 1.

Inspector Chad Hilde has been with MSHA since January, 2001. (Tr.16). Hilde received the requisite training at the mine academy and has also received training as an accident investigator. He had twenty years of mining experience prior to joining MSHA, primarily in sand and gravel operations. (Tr. 17). On April 4, 2011, Hilde was at the mine with a number of other inspectors and issued the two citations addressed below.

a. Citation No. 8560992

On April 4, 2011, Inspector Chad Hilde issued Citation No. 8560992 to Borax for a violation of Section 56.12032 of the Secretary's regulation. The cited standard requires that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." 30 C.F.R. § 56.12032. The citation alleges that "[t]he cover plate was missing over the 110 V, energized connection screws. The energized metal was approximately two inches below the timer clock face, exposing miners to electric shock or burn. he light timer for the acid pit was located in the plant 9 elevator hoist room." Hilde determined that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that one employee was affected, and that the negligence was high. A civil penalty in the amount of $18,271.00 has been proposed for this violation.

i. Brief Summary of Testimony

During the course of the April 4th inspection, Hilde traveled to the elevator hoist room in the 10-mol building at the mine.[1] Hilde was accompanied by Charles James, a safety and health advisor for the mine, and Ed Saxton, the supervisor of the area. (Tr.70). The elevator hoist room is reached by taking the freight elevator to the fourth floor of the building and then climbing a spiral staircase to the room above. (Tr.71,111). Little else is located on that particular floor of the building. (Tr.158). Hilde testified that, while traveling to the room, the group passed an electrician while going up the stairs, and learned from him that he had been in the room conducting electrical tests. (Tr. 29,70). Among other things, the hoist room contains two wall-mounted clock timers used to set the on and off operating times for discrete outside lights. (Tr. 23,118). While in the hoist room, Hilde opened one of the one clock timers and observed that the cover plate was missing over the energized connection screws on one of the light timers. (Tr. 22-24). The condition was immediately obvious.

Inspector Hilde took three photographs of the timer switch. Sec'y Ex. 3. Hilde testified that the photographs show the five screw lugs just below the yellow timer dial, four of which are energized with 120 volts, and the fifth of which serves as the ground wire. (Tr. 29). The energized components are directly below the clock face, approximately two inches away from the area where the timer is adjusted by hand. Sec'y Ex. 3; (Tr. 25, 27, 31). The timer was energized at the time of the citation. (Tr. 31). Hilde explained that the two hex bolts seen on the face of the timer are manually tightened or loosened to set the start and stop time. (Tr. 27). The time, however, is set by pulling out the yellow dial and turning it. (Tr. 31). The door to the clock

[1] While Hilde described the area as the #9 plant, the testimony established that it is known as the 10-mol building.

time box is not locked and, accordingly, is easily opened. (Tr. 27). Hilde testified that the switch used to turn off the clock is located just below the yellow dial, nearer to the energized parts. (Tr. 23, 31). There was no testing taking place when Hilde observed the violation.

Hilde explained that it was reasonably likely that someone would contact the energized part of the clock timer and suffer a shock or electrocution as a result. (Tr. 29-32). Each lug contained 120 volts and contact with one would result in anything from a minor shock to a fatality. (Tr. 29-30, 32, 38). At hearing, Hilde noted that, if the floor were wet after being cleaned or washed down, the shock would more readily travel through the body to the floor since the moisture would act as a conductor. (Tr. 30). Hilde testified to the many injuries in the mining industry due to contact with energized parts and the fact that these types of injuries occur not only to miners, but also to electricians. (Tr. 32-39).

Hilde testified that he was told by the operator that only electricians would access the box, which led him to understand that it was an electrician who left the cover plate off of the energized portion of the box. (Tr. 73). He explained that the condition was obvious once the box cover was open and an electrician should know that the insulated cover was missing. Further, the electricians should have conducted an area exam during the shift.

The witnesses for the mine agree that there was no cover over the energized area, and that anyone working inside the box would be exposed to 120 volts. James testified that, on the day of the inspection, the door to the hoist room at the top of the staircase was locked when the group arrived, so he asked Saxton to retrieve the key. (Tr. 159-160). Saxton, in turn, called the electrician assigned to the area and instructed him to bring the key. (Tr. 89). The same electrician returned with the key, after retrieving it from the operations manager below. (Tr. 70). Saxton testified that there was little in the room, and James described the room as dry, with some material on the floor, but no debris. (Tr. 160). James explained that, as one enters the room, the cited timer, along with a second timer, were to the left of the door, in the corner. (Tr. 160-161). James observed the missing cover as soon as the inspector opened the door of the timer. (Tr. 172-173). He testified that he immediately knew what the inspector was looking for and what the problem was. (Tr. 172-173).

Ribald, an electrical engineer in charge of all electricians at the mine, testified that he was aware that the insulated covers were missing on a number of the clock timers located around the mine. The electrical shop had been trying to identify and replace the missing covers on various timers. (Tr. 124, 162). Ribald explained that the covers supplied by the manufacturer became brittle after a time and were difficult to keep on the timer. (Tr. 123). For that reason, the mine had made its own covers, as well as ordered some replacement covers from the manufacturer, and was in the process of inspecting the timers and installing missing covers throughout the mine. (Tr. 125). According to Ribald, this particular hoist room must have been missed. (Tr.124). Witnesses for the mine agreed that the clock timers are not often accessed. (Tr. 120). Ribald testified that, because the timers were set at a standard time, he was not aware of the electricians having to make any adjustments to the timers for a number of years. (Tr. 120). Moreover, he doesn't recall that the subject timer had been adjusted recently, as all of the timers are low maintenance. (Tr. 120). Ribald agreed that the timers are turned off and on when the

lighting circuit requires repairs or troubleshooting. (Tr. 121). Notably, none of the mine's witnesses were able to establish how often repair or troubleshooting are required, but all witnesses agreed that it was infrequent.

Ribald, like Saxton and James who accompanied the inspector, had never been into the hoist room prior to the inspection conducted by Hilde. (Tr. 87, 157). They all agreed that the area was not accessed by working miners, but was the realm of electricians and Otis Elevator personnel. (Tr.87-88, 113). The mine's electricians inspected the fire extinguishers each month, did routine maintenance and testing, and cleaned or swept the room as needed. (Tr. 88, 157-158). Ribald explained that, as the overall supervisor, he believes the electricians at the mine are well trained and use personal protective equipment, including leather gloves, when carrying out electrical work on boxes such as the one that contained the clock timer. (Tr. 104-111).

ii. The Violation

The mine does not dispute that the violation occurred as alleged by Hilde. James explained that, although he not an electrician, he knew what Hilde would be looking for when he opened the box to look at the timer and he knew that there was a violation. Ribald and James agreed that the insulated cover for the energized portion of the clock timer was missing, and not anywhere to be found in the room. There was no evidence of testing or repairs being performed on the clock timer. Accordingly, I conclude that the operator violated the standard as alleged and that the Secretary has established the fact of violation.

iii. Significant and Substantial Violation

A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission set out a four-part test for analyzing the issue of significant and substantial. The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, i.e., a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a violation is S&S must be based on the particular facts surrounding the violation viewed in the context of continued mining operation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I have already concluded that a violation occurred. Moreover, there can be little doubt that by leaving the insulating cover off of the switches at the bottom of the timer, there was a measure of danger to safety, i.e., the possibility of electrocution. Nor can there be any question

that electrocution is an injury of a reasonably serious nature. However, as is frequently the case, the question of whether or not this citation is S&S turns on the third element of the *Mathies* test.

Hilde testified that, even though the door to the hoist room was locked, in his experience, miners access out of the way areas like this more than expected because these areas serve as a place to escape from the other activities at the mine and "hide out." (Tr. 61). He explained that the key is given to anyone who asks for it, including personnel who may be conducting maintenance, housekeeping, electrician, or contract work. (Tr.40). An electrician had just been in the room when Hilde arrived. (Tr.40). The room was regularly, albeit infrequently, accessed. Once the door to the timer is opened, the exposed energized parts are within inches of the areas that the electrician will touch. In Hilde's view, it is inevitable that someone will inadvertently contact the exposed lugs. Hilde explained that there have been many injuries in the mining industry that have involved touching exposed wires, including injuries to electricians. *See* Sec'y Exs. 7-23. Hilde didn't know how long the condition had existed, but there was substantial dust inside the box and on the energized lugs, which indicated to him that the conditions had existed for a "considerable amount of time."

The mine disputes the finding of S&S for a number of reasons. First, the room is locked with a padlock and the person, or persons, entering the room must retrieve the key from the operations supervisor. (Tr. 90, 111-112). Second, only electricians and elevator maintenance or repair persons would have reason to enter the room. (Tr. 87-88). Third, the room is only occasionally cleaned and accessed. The room contains equipment that requires maintenance as well as testing, including fire extinguishers that must be examined each month. (Tr. 131). Yet, according to the mine, all work is done infrequently and the clock timers are accessed even less frequently. Fourth, according to the mine's witnesses, the miners are well trained and use the required equipment at all times. (Tr. 117-118, 146). The mine argues that when the electrician is servicing or maintaining the clock timer, he uses gloves and, if he came in contact with the energized parts, he would not be injured. However, I note, just as Hilde did, as with any personal protective equipment, such as gloves, there is no guarantee they will be used during an adjustment of the small components on the timer. (Tr. 76-77).

While there is substantial evidence to show that persons enter the room and conduct certain activities in the room, there is little evidence that those persons access the clock timer. Instead, as Ribald explained, the timers are not changed routinely. Once the timers are set, there is no need to access them unless it is for troubleshooting. Therefore, while I find that the Secretary has established that work is done in the area on a regular basis, I cannot find that the box on the timer is opened *frequently* enough on a regular basis to justify the level of exposure necessary to sustain a S&S finding. Given the limited exposure, I find that the violation is not significant and substantial.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541,

1550 (Sept. 1996). At some point, someone will access the box and touch the timer or its parts without gloves, resulting in a serious injury. For that reason, I assess a higher penalty.

iv. Negligence

Hilde designated this violation as being the result of high negligence and testified that this operator has been cited for violations of this standard ten times in the past two years, two citations of which were issued the week prior to this citation, and eight citations of which were issued during the prior six inspections. (Tr. 42, 80). The mine asserts that only electricians open the door to the timer box. In Hilde's view, an electrician should replace the insulated cover if he removes it and would know if one were missing. (Tr. 41). Therefore, Hilde reasoned, the negligence was high. In addition, the sign on the door to the timer box reminds operators to replace the plastic cover before energizing the equipment. (Tr. 43). Further, the cover, which is included on the unit by the manufacturer, also instructs the user to "not remove the insulator." (Tr. 43-44). Finally, Hilde issued a second citation for a missing insulated cover on a clock timer during this same inspection.

Ribald explained that, six months prior to this issuance of this citation, the mine was aware that a number of timers were missing the insulated covers and had tried to identify those in order to repair them. The mine argues that it had been highly proactive in trying to identify and eliminate conditions similar to that which was cited and that the electricians were instructed to replace the insulated covers on the timers.

MSHA defines negligence as conduct that, either by commission or omission, falls below a standard of care established under the Mine Act to protect miners against the risks of care. Section 100.3(d) states that "[u]nder the Mine Act, an operator is held to a high standard of care. A miner operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3.(d). I find that the mine was certainly on notice of the need to make greater efforts to correct this type of violation. Still, this particular timer was not repaired and, based on the dust, had remained in the condition observed by Hilde for some period of time. Given that the mine was aware of the many missing insulated covers, yet failed to take action to correct the one at issue, I agree with the inspector that the negligence was high.

b. Citation No. 8560993

Also on April 4, 2011, Inspector Hilde issued Citation No. 8560993 to Borax for a violation of Section 56.14107(a) of the Secretary's regulations. The cited standard requires that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a). The citation alleges the following:

> There were two side opening fourteen inches in diameter exposing the moving brake drum. There was six inches of exposed,

> approximately four inch shaft and coupler at the brake drum. There was a thirty inch diameter opening exposing the hoist sheave. Moving machine parts present an entanglement hazard. The exposed moving parts were located at the plant 9 elevator hoist room at the top of the plant 9 screen house.

Hilde determined that a permanently disabling injury was reasonably likely to occur, that the violation was significant and substantial, that one employee was affected, and that the negligence was high. A civil penalty in the amount of $9,634.00 has been proposed for this violation.

i. Brief Summary of Testimony

At the same time and in the same hoist room discussed in the first citation, Hilde issued a second citation for failure to have guards in specific areas on the elevator hoist motor. (Tr. 47). The elevator hoist motor, shown in the photograph, Sec'y Ex. 29, is located on the floor in the hoist room. The motor stops and starts without warning when the elevator is called, and, according to Hilde, did so while Hilde was present. (Tr. 51-52, 55). The photograph clearly shows the three areas with exposed moving parts that Hilde cited, i.e., the hoist drum and the shaft. (Tr. 52-53). First, the hoist drum was not completely guarded on either side[2] and, in Hilde's view, created an entanglement hazard. The elevator ropes ride on the spoked portion as it turns at a moderate speed. (Tr. 55). Second, the entire shaft, seen in Sec'y Ex. 29 p. 2, moves at a faster speed as the elevator moves up and down. (Tr. 55). Hilde testified that, in each case, parts on the motor were not covered or protected, thereby creating an entanglement hazard. (Tr. 54, 56). According to Hilde, entanglement would lead to crushing injuries, amputation or broken bones. (Tr. 56). Hilde testified that the motor's moving parts were exposed and obvious as he entered the room. Hilde could not understand how this motor, sitting in the open with its moving parts plainly obvious, was missed and not guarded. (Tr. 66).

Hilde testified that the floor around the machine was covered in a fine powdery material that would be easy to slip on when dry, and even easier when wet. (Tr. 60). In addition, he observed conduit on the floor that created a tripping hazard. (Tr. 60). Hilde testified that the shut off switch was in the back of the room and would be difficult to access if one became entangled in the moving parts of the motor. (Tr. 61).

Hilde again explained, as mentioned above, that an electrician had been in the room doing a ground test just before Hilde arrived. (Tr. 57). According to Hilde, cleaning and inspections are regularly done in the room. While two miners are often in the room to clean or conduct maintenance, a sole miner may also work in the room. In addition, Otis Elevator employees access the room to conduct maintenance and repairs of the elevator system. (Tr. 62).

The witnesses for the mine testified, as described above, that the room was at the top of the building, that only electricians and the elevator maintenance company personnel had reason

[2] These openings were partially guarded by a guard installed by the manufacturer. (Tr. 75).

to enter the room, and that the room required a key to access and otherwise remained locked. (Tr. 93-94). The mine's witnesses explained that electricians are trained to look for guarding violations, as are all employees, but this guard did not show up on a work area inspection, so James was not aware of the hazards in the area. (Tr.165-166). James did not address why it was not inspected and noted. Ribald explained that generally an electrician, along with an apprentice, is present in the motor control center during the sweeping and cleaning of the area. (Tr. 113). James agreed that Otis Elevator personnel are on site once each month. Notably, none of the mine's witnesses, whose testimony consisted primarily of leading questions, explained how often persons accessed the room. As a result, I find Hilde's testimony regarding access to the room to be undisputed in many regards.

ii. The Violation

The mine does not dispute that the violation occurred as alleged by Hilde. The two witnesses who accompanied Hilde agreed that they observed the motor, unguarded, as soon as they entered the room. They had no explanation for why the motor was not guarded, and did not dispute that it was a hazard and a violation. The moving parts were obvious and easily accessed by anyone working in the room. Since the motor started without warning, a person working or cleaning near the motor would be taken by surprise and easily entangled in the motor. Therefore, I conclude that the operator violated the standard as alleged.

iii. Significant and Substantial Violation

The Commission has long held that a S&S designation must be based on the particular facts surrounding the violation, and viewed in the context of continued mining operation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). I have found that a violation exists and that the hazard associated with the violation is one of entanglement in moving machine parts. The entanglement will undoubtedly lead to a very serious injury, given the fact the shut off for the motor is not easily accessible to anyone caught in the moving part. Miners, and in particular electricians, are often in the room alone. The question of whether or not this citation is S&S turns on the third element of the *Mathies* test.

In discussing the injuries related to guarding in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission stated:

> We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981).

As discussed above, I find that there is ample access to this elevator hoist room. While the mine disputes that any work was being done in the room on the day of the inspection, the electrician was not called to testify. Instead, the other witnesses pointed out that electrical testing was being done on the lower levels of the building that day. There is no testimony to directly dispute Hilde's recollection that the electrician had just left the room after conducting electrical tests. Obviously work needs to be done in the room on a regular basis. Given that the motor is on the floor, that miners work around the motor, that there were tripping hazards, and considering the "vagaries of human conduct," I find that an injury is reasonably likely to occur as a direct result of this violation.

Hilde believes that, if left unabated, it is reasonably likely that a miner would come into contact with the moving parts and become entangled, which in turn would result in an injury that is permanently disabling. (Tr.57). Hilde has conducted accident investigations for MSHA and is aware of accidents that regularly occur in the industry that involve moving machine parts. (Tr.57). He has investigated amputations as a result of contact with unguarded parts. (Tr. 57). The fatalgrams offered into evidence, Sec'y Exs. 35 and 36, are examples of injuries that have occurred as a result of a miner becoming entangled in moving parts. (Tr. 58-59).

The Commission and courts have held that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harland Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999). Hilde is an experienced mine inspector, who testified with regard to each element of the Mathies formula for S&S. I credit his testimony, more so than the testimony of the mine's witnesses, as to the gravity of this violation. I have found that the cited standard was violated, that the absence of the guard presented a discrete safety hazard contributed to by the violation, that the hazard in fact would contribute to the resulting injury, and that the injury would be of a serious nature. Accordingly, I find that the violation is S&S.

iv. Negligence

Given the testimony outlined above, I find that the Respondent was aware of the hazard, understood that work was performed around the hoist motor, and knew that the motor was unguarded. *See Mainline Rock & Ballast*, 33 FMSHRC 307 (Jan. 2011) (ALJ). The witnesses for the operator agreed that the company trains all miners to look for guarding violations. Yet, even with the moving parts on the motor open and obvious to anyone who walks in the room, nothing was done to guard the motor. I am not persuaded by the mine's argument that the room is not often used and, therefore, the need for a guard went unnoticed. Given all of the circumstances, I find that the violation was the result of high negligence.

v. Settled Citations

The Respondent and the Secretary have agreed to the following settlement amounts and modifications for the remaining citations in this docket.

Citation/Order No.	Originally Proposed Penalty	Settlement Amount	Modifications
8607030	$7,578.00	$4,600.00	No Changes
8607031	$5,080.00	$3,800.00	Modified to Moderate Negligence.
8607032	$7,578.00	$5,500.00	Modified to Moderate Negligence
8560990	$5,961.00	$4,200.00	Modified to Moderate Negligence
8560991	$2,282.00	$1,700.00	Modified to Moderate Negligence
8607207	$2,678.00	$1,875.00	Modified to non-S&S and Unlikely.
8567737	$2,678.00	$0	Vacated.
TOTAL		$21,675.00	

I accept the representations and modifications set forth both at hearing, and in the Motion to Approve Settlement and Order Payment. I have considered the representations and documentation submitted. I find that the modifications are reasonable and conclude that that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The Motion to Approve Settlement is **GRANTED**.

II. PENALTY

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 Mine Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Mine Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

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

30 U.S.C. § 820(i).

I have found that the Secretary has established a violation as alleged in each of the citations herein. US Borax is a large operator. The mine terminated the violations in good faith, the penalties as proposed will not affect its ability to continue in business, and the history of assessed violations is a part of the record as Sec'y Ex. 34. I have discussed the gravity and negligence above for each citation. Based upon the record as a whole, and considering the six statutory criteria, I assess a penalty of $16,000.00 for Citation No.8560992 and $10,000.00 for Citation No. 8560993.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), I assess a total penalty of $26,000.00 for the two citations addressed in this decision. Consistent with my above findings regarding the settled citations and those citations that were contested at hearing, the S&S designation for Citation No. 8560992 is removed, the violation is deemed to be non-S&S, and U.S. Borax Inc. is hereby **ORDERED** to pay the Secretary of Labor the sum of $47,675.00 within 30 days of the date of this decision.

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

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September 21, 2012

MACH MINING, LLC,	:	CONTEST PROCEEDING
Contestant,	:	
	:	Docket No. LAKE 2009-716-R
v.	:	Order No. 8414529; 09/21/09
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine: Mach No. 1
Respondent.	:	Mine ID: 11-03141
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2010-190
Petitioner,	:	A.C. No. 11-03141-201809
	:	
v.	:	
	:	
MACH MINING, LLC,	:	
Respondent.	:	Mine: Mach No. 1

DECISION ON REMAND

Appearances: Edward Hartman, Office of the Solicitor, U.S. Dept. of Labor, Chicago, Illinois for the Petitioner.
Christopher Pence, Allen, Guthrie & Thomas, Charleston, West Virginia, for the Respondent.

Before: Judge Miller

This case is before me on a notice of contest and petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Mach Mining, LLC ("Mach" or "Respondent"), at its Mach No. 1 Mine (the "mine") near Johnston City, Illinois, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act:" or "Act"). The case includes one violation with an originally proposed penalty of $4,000.00. The parties presented testimony and documentary evidence at a hearing held in St. Louis, Missouri commencing on June 15, 2011. I issued a decision on July 27, 2011, in which I upheld Order No. 8414259, affirming a violation of 30 C.F.R. § 75.370(d) and the designation of the order as an unwarrantable failure. *Mach Mining LLC*, 33 FMSHRC 1674, 1681-82 (July 2011). I assessed a penalty of $5,000.00 for the violation. *Id*. at 1682. On

August 9, 2012, after a review of my decision, the Commission affirmed the violation and vacated and remanded the determination of unwarrantable failure. *Mach Mining LLC*, 34 FMSHRC __, slip op. at 7, 11 (Aug. 9, 2012).[1]

The Commission's decision requires additional findings as to the unwarrantable nature of the violation. Specifically, the Commission directed that I should consider and make findings regarding the extent of the violation, whether the violation posed a high degree of danger, whether the operator had been placed on notice that greater efforts at compliance were necessary, and address the evidence related to the operator's knowledge of the violation. *Id*. at 11. On remand, I discuss these factors and, again, find that Order No. 8414259 was properly designated as an unwarrantable failure.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

i. Background

Mach's No. 1 Mine, which began mining coal in 2005, is an underground coal mine near Johnston City, Illinois. Coal is mined using continuous miners that develop gate roads, and a longwall shearer to retreat-mine panels. The gate roads that contain the loader, power center, and other longwall infrastructure, are referred to as the "headgate entries," while the entries on the opposite side are referred to as the "tailgate entries." At the time the order in question was issued, Mach had completed mining longwall Panel No. 1, and was in the process of mining longwall Panel No. 2 and driving the headgate road for Panel No. 3. Mach had a base ventilation plan in place, as well as a site-specific plan for each of the panels being mined.

At hearing, the parties stipulated that Mach Mining is an operator of an underground coal mine, and that the mine is subject to the jurisdiction of the Act and the Commission. The parties further stipulated that Mach is a large operator and that the $4,000.00 penalty proposed by the Secretary will not hinder its ability to continue in business. (Tr. 8, 16). A history of assessed violations was admitted as Sec'y Ex.12. (Tr. 107).

The violation in this case is related to the ongoing negotiation of the ventilation plans for Panel Nos. 2 and 3, but is not a citation issued due to an impasse in plan negotiations. The subject order is also related to an order issued on March 13, 2009 by Inspector Bobby F. Jones, i.e., Order No. 8414238. Jones issued the 104(d)(1) order, after he discovered that Mach had mined past the projection point described in its ventilation plan. Mach, as part of its ventilation plan, had previously submitted a map showing three longwall panels, each of which were 18,000 feet in length. The ventilation plan, as submitted, was approved in March 2008. On March 13, 2009, Jones discovered that the Respondent, in violation of its approved ventilation plan, had

[1] The Commission also determined that failure to address the operator's efforts in abating the violation was harmless error. 34 FMSHRC __, slip op. at 10.

mined 1,000 feet beyond the proposed set up room in Headgate No. 3. By mining 1,000 feet past its projected point, Mach created a stair-step effect and, thus, changed the design of its ventilation plan. After the order was issued by Jones, Mach filed a notice of contest and, in April, 2009, after a submission of the issue on the record, ALJ Manning issued an order in which he determined that the mine violated its ventilation plan when it mined beyond the proposed area and created the stair-step system not listed in the plan.

Mach began working on an amended ventilation plan for Panel No. 3, and on September 3, 2009, after a number of meetings both in the district office and at the MSHA national office in Arlington, Mach submitted a revised plan, as well as information previously requested by MSHA. On September 9, 2009, Jones terminated Order No. 8414238 with a one sentence pronouncement, "MSHA hereby terminates this order." Shortly after the order was terminated, on September 20, 2009, Mach resumed mining in the Headgate No. 3 area, thereby resulting in Order No. 8414529, i.e., the order at issue in this case, which was issued on September 21, 2009 by Inspector Philip Long. The parties continued to discuss the provisions of both the base ventilation plan and the plan specific to Headgate No. 3. Eventually, the parties reached an impasse. As a result, MSHA issued two technical citations and letters of deficiency on September 29, 2009. The Respondent filed a notice of contest to the two citations and a hearing to resolve the plan dispute was held on November 3, 2009. Following the hearing, I issued a decision in which I determined that the District Manager did not abuse his discretion in requiring certain portions of the plan.

ii. Order. No. 8414529

The order that is the subject of this case was issued by Inspector Long after the parties began negotiations on the general ventilation plan and the plan specific to Headgate No.3, but before the parties reached an impasse. Specifically, the subject order relates to the events of September 20, 2009, when Mach resumed production in Headgate No. 3, asserting that the termination of Order No. 8414238 not only terminated the violation, but that it also approved Mach's new ventilation plan. Inspector Phillip Long issued the subject order on September 21, 2009, for a violation of 30 C.F.R. § 75.370(d). The citation alleges the following:

> The extraction of coal by the normal mining process had resumed on the No. 3 Headgate Unit, MMU 002, prior to the proposed ventilation plan being approved by the district manager. The mining process had started in No.3 Entry, inby the No.176 crosscut. Approximately 10' of advanced had been made on the curtain side of the entry. This order is issued upon the direction of district manager.

Inspector Long testified regarding the issuance of Order No. 8414529 and the reasons therefore. Long, who is now retired, was a MSHA Coal Mine Safety and Health Inspector for eleven years. Prior to becoming an inspector, Long worked in the coal industry for 28 years, primarily with

Old Ben Coal Company. He held various positions and worked many years in the safety department. (Tr. 17-21).

Long was assigned to follow Jones in the rotation to inspect the Mach No. 1 Mine beginning in July of 2009. Prior to conducting his first inspection at Mach, Long discussed the history of the mine with Jones, as well as the outstanding citations and orders. Jones explained that he had issued Order No. 8414238 for a ventilation violation in March, 2009, and that the order remained in effect. Long understood that no ventilation plan for Headgate No. 3 had been approved, and that mining was not occurring on that panel. He testified that he reviews the mine file each time he conducts an inspection. From the time he began inspecting the Mach No. 1 Mine, until the time he issued this order on September 21, 2009, Long did not see any approved ventilation plan in the mine file, nor was he notified that any ventilation plan had been approved. (Tr. 23-25). Long did not terminate the order issued by Jones, but was aware that Jones' supervisor, Rennie, instructed Jones to terminate the order in September. Long had no further information about the issuance or the termination of Jones' order, i.e., Order No. 8414238. (Tr. 25-26).

As Long began his inspection rotation at Mach, he had conversations about the ventilation plan with Anthony Webb, president of Mach, as well as with other managers at the mine. Long testified that, on several occasions, he discussed with Webb, Webb's concern with the ventilation plan, particularly after Jones had terminated Order No. 8414238 on September 9, 2009. Long made several notes about the conversations. His notes from September 16, 2009 demonstrate that Long spoke with Webb on that day and discussed that the mine was awaiting ventilation plan approval. Sec'y Ex. 9. Further, the notes reflect that Webb expressed his concern that it might take some time to win approval. (Tr. 26-27). Next, Long's notes from September 17, 2009, refer to a conversation with Webb while conducting an inspection on that date. Sec'y Ex. 10. Again, Long spoke with Webb and discussed the start up of the Headgate No. 3 unit. The two of them discussed the plan approval process and the fact that the mine continued to wait for MSHA approval. Additionally, on that date, Webb asked Long if "paper would be issued" if Mach started up without a plan. Long responded that it was "more than likely" that a violation would be issued. Long testified that he answered the inquiry based upon his understanding that no ventilation plan had yet been approved for the Headgate No. 3 area. If the plan had been approved, he would have told Webb to continue mining. (Tr. 30-33). I find Long to be a very credible and knowledgeable witness, who responded with thoughtful, candid, and detailed answers.

On September 21, 2009, Long again traveled to the mine to continue his inspection. Long's notes underscore that, on that day, he spoke with Chris England. Sec'y Ex. 7. England told Long that the mine was very close to starting up in Headgate No. 3 and asked if Long was going to issue an order if they started up. Long responded "yes," that he would issue an order if the plan had not been approved. (Tr. 34-36). Long then learned from Webb that the mine had in fact started production in Headgate No. 3. Long told the Respondent that he would travel to the area to confirm that mining was taking place, and, if he discovered that mining was occurring, he

would issue a 104(d)(2) order pursuant to 30 C.F.R. § 75. 370(d) for not having an approved ventilation plan in place. Long then traveled underground, observed mining in Headgate No. 3, and issued Order No. 8414529 to the mine for mining without an approved plan. Sec'y Ex. 6. Upon observing the mining in Headgate No. 3, Long telephoned the district office and spoke with the District Manager before he issued the violation as an unwarrantable failure to comply. Long agreed that he was instructed to issue the violation, but he also indicated that, while he was instructed to issue the order as "reckless disregard," he instead issued it as "high" negligence, which is what he believed it should have been. At no time did Long understand that Webb, or any other person at the mine, was operating under the assumption that the termination of the order previously issued by Jones was tantamount to an approval of the ventilation plan. (Tr. 36-41).

Anthony Webb testified on behalf of Mach. Webb testified that it was his belief that a ventilation plan was approved when Order No. 8414238 was terminated by Jones and, therefore, no violation exists, and Order No. 8414529 should not have been issued. (Tr. 89). Webb, the president of Mach mining, is responsible for all actions at the mine, both on the surface and underground. Part of his responsibility, both at the time of hearing and in 2009, includes the development of ventilation plans. (Tr. 66-67). Webb explained the sequence of events leading up to the citation issued by Long with little variance from the description provided by Long. He began with a meeting held on February of 2009. Webb asserted that Mach originally began negotiating the bleeder system of Panel No. 2 due to poor roof conditions and MSHA's concern about the airflow. Mach told MSHA of its intent to mine inby the Panel No. 2 bleeders in order to work around the bad roof it had encountered. (Tr. 70-72). Webb had several meetings with MSHA personnel and MSHA sought a map depicting the connection between Panel Nos. 2 and 3. On February 24, 2009, Mach representatives traveled to Arlington to meet at MSHA headquarters with a number of people, including the deputy administrator for coal. During that meeting, MSHA again asked for the map and Webb testified that he "forgot" to give District 8 the map. It was mailed the next day. Mach Ex. B; (Tr. 72). MSHA did not agree with the changes Mach sought to make and began further discussions about the ventilation of Panel No. 2. MSHA subsequently issued a "technical citation," Mach Ex. C, after the parties reached an impasse regarding the Headgate No. 2 area. Mach contested the citation and the case was assigned to ALJ Manning and set for hearing in April. (Tr. 75). Mach continued to work with MSHA and the parties resolved the matter prior to the hearing. Subsequently MSHA vacated the citation on April 15, 2009. The mine, with MSHA's acknowledgment, then reverted to the plan they had suggested. The mine did not receive a letter formally approving Panel No. 2, and no other actions were taken. (Tr. 76-78). It is important for purposes of the Mach defense to note that this citation was not terminated, and was, instead vacated, and the parties reverted back to an earlier plan.

Webb testified that, in the meantime, on March 13, 2009, Jones issued an order for an alleged ventilation violation at Headgate No. 3 for mining beyond the area depicted on the ventilation plan and creating, in effect, a stair-step ventilation system. This citation was not issued as a technical violation as a result of an impasse in the ventilation negotiation. Again,

Mach contested the order issued by Jones and, again, the case was assigned to ALJ Manning. Mach requested a second meeting in Arlington and met with MSHA on March 18, 2009 concerning the Panel No. 3 plan. District 8 ventilation plan specialists attended by telephone. District 8 was instructed to lay out for Mach what it expected to see at Panel No. 3 and, subsequently, Mach met again with the District 8 office. Mach then submitted "what they felt . . . [MSHA] had requested." (Tr. 79-80). In late May, while negotiations continued, Mach came up for a regular six month review of its base ventilation plan at the mine. The base plan was submitted to MSHA on June 4, 2009. In response to its submission, Mach learned of a new regulation requiring a justification for the use of belt air in the intake. The justification submitted by Mach was rejected and the parties held another meeting to discuss that issue. (Tr. 82). After meeting with the district office, Mach once again sought and was granted the opportunity to meet with the coal supervisors in Arlington on July 7. At that meeting, the parties discussed a number of issues, including the belt air. MSHA asked Mach about Headgate No. 3, and Mach acknowledged that the district office had requested further information, which had not initially been provided, about the ventilation for that area. (Tr. 82-83).

Webb explained that, in the meantime, ALJ Manning decided, through written submissions, that Mach had indeed violated the mandatory standard by mining the stair-step system in Headgate No. 3 without prior approval. However, ALJ Manning did not immediately rule on the negligence or penalty associated with the violation. During this time, while negotiations were ongoing, MSHA refused to terminate the citation issued on Panel No. 3. On August 6, Webb received a letter, Mach Ex. E, that set forth in writing the discussions already held with MSHA. According to Webb, the letter set forth a strategy for submission to be made by Mach to receive approval of a ventilation plan for Headgate No. 3. While Webb insists that the letter contained information about what Mach needed to do to "terminate the March 13th D order[,]" it really addresses requirements for a ventilation plan. Webb decided that he would ask ALJ Manning to decide if Mach had submitted an acceptable ventilation plan, which would then result in the order being terminated. On August 18, ALJ Manning agreed that he retained jurisdiction over the order assigned to him and set the matter for hearing in September. The issue was not heard by ALJ Manning because MSHA terminated the order prior to the hearing date. (Tr. 83-86).

Webb testified that, on September 3, 2009, he sent a letter to the District Manager for MSHA District 8 and included information previously requested by MSHA to support the ventilation plan being proposed by Mach for Headgate No. 3. Mach Ex. F. Webb asked that MSHA terminate the order issued by Jones in March, and provided information regarding the ventilation plan in Panel No. 3. (Tr. 86-87). Shortly thereafter, on September 9, 2009, and without any indication that the ventilation plan had been approved, Jones terminated the order. Webb opined that the termination of the order was the relief that Mach sought from ALJ Manning, and he believed the termination would allow them to continue mining in Headgate No. 3. At the time Jones issued the termination of the order, he advised Webb to speak with his supervisors in order to understand why it was terminated and what it would mean for the mine. Webb called Rennie, the supervisor of Jones, but Rennie could not provide an answer and

referred Webb to the District Manager. Webb chose not to contact the District Manager, and, instead, determined that the termination was tantamount to an approval of a ventilation plan. Webb next had a number of conversations, as detailed by Long and discussed above, wondering when the ventilation plan would be approved and asking Long if a citation would be issued if the mine continued mining activity in Headgate No. 3. In each instance, Long explained that a citation would issue if no plan were in place. (Tr. 88-89).

Webb testified that, on September 17, 2009, Mach's attorney wrote a letter to the Secretary explaining why he believed the plan had been approved and notifying MSHA that mining would commence in Headgate No. 3. Mach Ex. G. In the meantime, as Webb described, he believed that he had an approved plan, by virtue of the termination, commencing on September 9, 2009. He prepared to mine Headgate No. 3. (Tr. 89-90).

Webb explained that he attended nearly every meeting with MSHA, both locally and at the national office, and was familiar with all of the information relevant to the ventilation plan for Headgate No. 3. Webb believed that he had made every effort to communicate with MSHA and let them know of his plan. He testified that he was never told he could not resume mining, and he believed that the plan had been approved when the order was terminated. He based his belief on the fact that he had recently submitted the information sought by MSHA and because he sought termination of the order from ALJ Manning. (Tr. 92-34).

I do not find Webb to be a credible witness, and find that his testimony was an after-the-fact attempt to make excuses for his actions. Webb acknowledged that he spoke with Long a number of times and told him the mine was awaiting MSHA approval of the ventilation plan, even after Order No. 8414238 had been terminated by Jones. (Tr. 96). On September 16, Long spoke to both Webb and England, and one or both of the men told Long that the company was awaiting plan approval. Webb's testimony is contradictory in that he testified on the one hand that the plan was approved on September 9, 2009 with the termination of the order, and on the other hand that, when he spoke to Long on the 16th and the 17th, he told Long that Mach continued to wait for plan approval. Webb acknowledged that he did ask Long if a citation would be issued if he continued mining, but he was only seeking to gain information from Long about the district's position. Webb further agreed that Rennie instructed him to speak to the district office about the termination of the order issued by Jones, yet Webb chose not do so. (Tr. 99-100). Even though it was important to Mach to begin operations in the Headgate No. 3 area, Webb did not feel he could call the district and speak to the only person who could approve the plan to clarify if it had been approved. Webb had been involved in the plan negotiation and had spoken to the District Manager a number of times, as well as to supervisors in the Arlington headquarters. I find that Webb was aware that no ventilation plan had been approved. Webb did not receive any approval in writing, nor was he told by anyone at MSHA that he could continue to work in Headgate No. 3. To the contrary, he learned from Long that he could not begin mining the area, and did not follow up.

II. ISSUES ON REMAND

The Commission affirmed the determination that, "the termination of Order No. 8414238 did not amount to approval of Mach's ventilation plan…[,]" and accordingly affirmed Order No. 8414529. It stated, "any inconsistent enforcement actions by MSHA are relevant in considering Mach's degree of negligence[,]" and "'does not prevent MSHA from proceeding under an application of the standard that it concludes is correct.'" Mach, slip op. at 7. The Commission remanded the case for further discussion of the factors regarding the unwarrantable failure designation. As directed by the Commission, I address below, the extent of the violation, whether the violation posed a high degree of danger, whether the operator had been placed on notice that greater efforts at compliance were necessary, and evidence related to the operator's knowledge of the violation. *Id*. at 11.

Inspector Long determined that the operator's negligence was high and designated the order as an unwarrantable failure. The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id*. at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,193-94 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. In addition, because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998) (Commissioner Marks concurring in part and dissenting in part).

i. *Obviousness and Operator's Knowledge of the Existence of the Violation*

Long was directed by the District Manager to issue Order No. 8414529 with the suggestion that the negligence finding be marked as reckless disregard. However, because Long was not privilege to all of the meetings, conversations and negotiations between Mach and the district, he issued the order as he would at any other mine, as high negligence. One of the primary factors relied upon by Long in issuing the high negligence finding was the prior conversations he had with Mach's president and other supervisors. Long testified, convincingly, that he reminded the mine, any number of times, that there was no approved plan in place, and that as long as there was no plan, the mine could not begin mining in Panel No. 3.

Mach argues there was a good faith disagreement over the meaning of the termination of Order No. 8414238 and, therefore, the mine began mining and subsequently received the citation at issue on September 21, 2009 by Long. Webb, the President of Mach, testified that, upon Jones' termination of the Order on September 9, 2009, he immediately believed that the ventilation plan had been approved. This belief was based upon MSHA's August 6, 2009 letter to Webb listing specific plan items that needed to be addressed and approved for termination to occur, and to which Webb responded with the items on September 3, 2009. Mach Exs. E, F. Webb also attended several meetings with MSHA during which Headgate No. 3 and the ventilation plan were discussed. Additionally, the vacation of Citation No. 8414236 stated that approval for Headgate No. 3 was still required, whereas the termination for Order No. 8414238 did not contain similar language, but instead indicated only that MSHA terminated the order. Sec'y Ex. 5. Furthermore, Webb questioned not only Jones, but also Long's supervisor, Rennie, about the termination. Rennie was not able to answer Webb's questions about the termination letter and referred him to the person above him. Webb also contacted his counsel for an opinion and a letter was sent by counsel to MSHA on September 17, 2009, explaining Mach's interpretation that the ventilation plan had been approved and Mach would resume mining. Mach Ex. G. There is no record of a response from MSHA to this letter.

While Webb asserts that he had a good faith disagreement over the meaning of the termination of Order No. 8414238, there are many facts that do not square with that argument. First, Webb is well-educated, an engineer, and familiar with the plan approval process. Webb made no attempt to get a full answer as to the meaning of the order regarding the plan. Moreover, he was told on a number of occasions by inspector Long that he had no plan. Long suggested that Webb contact the district if he had further questions about the plan. Webb called Long's supervisor, but did not follow up with the district office and those involved in the plan approval process. Also, as Jones indicated in Order No. 8414238, Mach had been put on specific notice in several meetings that District Manager approval of the ventilation plan was required. Sec'y Ex 1. Additionally, Webb told Long numerous times that the mine continued to wait for plan approval after September 9, 2009, and Long advised Webb and England that he would more than likely issue paper if mining began without that plan. Sec'y Exs. 7, 9, 10. Still, mining moved forward, and Long testified that evidence that there had been mining in Headgate No. 3 was obvious. (Tr. 43). At no time during these events had approval of the ventilation plan been given in writing by the District Manager. Based upon the facts of this case, I find that any belief by Webb that the plan had been approved was not a good faith belief.

I note that my findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration, or lack thereof, and consistencies or inconsistencies in each witness's testimony and between the testimonies of witnesses. In evaluating the testimony of each witness, I have relied on his or her demeanor. As noted above, I find that Webb is not a credible witness. Instead, I find that Webb was intentionally looking for a way to get around the need for a plan and the time it was taking to get

a plan approved. His interest was in continuing mining activities and production. I give no weight to his assertions that he believed the plan was in place.

I am not persuaded by Webb's arguments and find them disingenuous given his background and his involvement in the plan approval process. In relation to the operator's knowledge, I find that the evidence that Webb acknowledged multiple times during the course of Long's inspections that the mine was awaiting approval for the ventilation plan, and asking if the mine would be issued "paper" for starting to mine again after the termination of the original order, drastically outweighs the possibility of confusion stemming from the inconsistent action taken with regard to Panel No. 2 and the termination letter itself. In my earlier decision I did not specifically say that Webb's actions were intentional, but that decision points in that direction, and I continue to believe that there was no genuine confusion about the meaning of the termination order upon which the mine relies. Instead, after seeking opinions from Long and others, Mach weighed the consequences and began mining. The violation was exceedingly obvious. The president and the supervisors knew that the mine should not start mining without a plan, yet it did so. Accordingly, I find the violation was obvious and known to mine management.

ii. *Operator Placed on Notice that Greater Efforts at Compliance were Necessary*

In its decision of this case on appeal, the Commission stated that repeated similar violations are relevant to the extent they put the operator on notice that greater efforts are needed for compliance with a particular standard. The Commission further stated that Citation No. 8414236 and Order No. 8414238 were specifically relevant to the operator's notice for Order No. 8414529.

Citation No. 8414236 was issued on March 11, 2009 and vacated on April 15, 2009 pursuant to Citation No. 8414236-06. In the section titled "Justification for Action", Mach was specifically notified under part "2" that it should not assume the ventilation plan provisions approved for Panel No. 1 or Panel No. 2 would be approved by MSHA for the purpose of mining Panel No. 3 and other future panels. Mach Ex. C.

Mach was issued Order No. 8414238 on March 13, 2009 for mining over 1000 feet inby the location of the proposed set-up rooms in Headgate No. 3. Under the condition or practice section, it was noted that an acknowledgement letter was sent on February 26, 2009 to Mach stating that approval by the District Manager was required and the mine operator had been put on notice in several meetings regarding that requirement. Sec'y Ex. 1. Even after these several notices, Mach was placed on notice yet again. Long made a record of a discussion he had with Webb on September 17, 2009, wherein Webb asked if "paper" would be issued if mining started, to which Long answered, "more than likely." Sec'y Ex.10. Long then proceeded to issue Order No. 8414529 on September 21, 2009 for mining in Headgate No. 3.

Mach was placed on notice more than 3 times over the course of February to September 2009 that approval of the ventilation plan was required to mine in Headgate No. 3. Nevertheless, the company refused to obey. While the mine argues that the message from the previous citations was not consistent, I am not persuaded by their argument that those previous citations and letters did anything other than put Mach on notice that it must have its plan approved in writing by the District Manager. I find that the operator, and specifically its management, had been placed on notice that greater efforts were necessary to comply, and I find this behavior to be aggravating conduct.

iii. *Extent of the Violation and Duration*

"The Commission has viewed the extent of a violative condition as an important element in the unwarrantable failure analysis." *IO Coal Co.*, 31 FMSHRC 1346, 1351-52 (Dec. 2009). Scope, magnitude, and abatement measures should be considered when performing the analysis to determine extensiveness. *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195-1196 (Oct. 2010). The scope of the violation included the entire mining area in Panel No. 3 and, had Long not issued his order, it is clear that the mining would have continued without the benefit of an approved ventilation plan. In addition, the magnitude of the violation includes the mining of approximately a 10'x10' area in Headgate No. 3, with the number of people being affected at 11, and the days of mining at an estimated 7-10 days according to Long. The area included an entire panel being mined by a regular mining crew. Undoubtedly, the violation was extensive. While the violative condition may not have existed for an extended period of time, I agree with the Secretary's argument that, for purpose of this unwarrantable failure analysis, "the violative act itself outweighs the short period of time between action and discovery." Sec'y Br. 12. Additionally, there is no indication that the mine would have stopped its mining without intervention from the MSHA inspector. The mine demonstrated that it was determined to continue mining without approval and, therefore, would have continued.

iv. *Degree of Danger*

In assessing the violation, Long determined that an injury or illness was unlikely because Mach was using the mining plan they had in place since the mine was started. There were no injuries associated with this violation and, as a result, Long determined that, if an injury or illness were to be sustained, it could reasonably be expected to result in no lost workdays. As such, the violation was determined to not be significant and substantial. This determination would generally weigh in favor of being a mitigating circumstance; however, there are additional considerations.

In the degree of danger analysis, a judge may consider whether there could be consequences of the violation that are dangerous. *Maple Creek Mining*, 27 FMSHRC 555, 565 (Aug. 2005). Ventilation plans are required to serve two main purposes: (1) keep coal dust down to avoid the serious implications associated with exposure to respirable dust and (2) to prevent the build-up of methane. The ventilation plan that Mach had in place was not designed for the

current mining contingencies and, therefore, it is difficult to know what vent controls must be in place to prevent exposure to respirable dust and to dilute and render harmless any methane. The additional drilling for Panel No. 3 caused a stair-step, making the ventilation plan in place inadequate. An inadequate ventilation plan can cause the build-up of methane and lead to life threatening situations, such as an explosion. Long marked the number of persons affected by the violation as 11, meaning that 11 miners' lives were at risk. Having the lives of 11 miners put at risk by a potential explosion as a result of methane build-up from an unapproved ventilation plan constitutes a high degree of danger.

v. *Operator's Efforts in Abating the Violation*

The Commission determined that failure to address the operator's effort in abating the violation was harmless error. 34 FMSHRC __, slip op. at 10. Even though additional discussion is not needed, it should be noted that there was no effort by Webb, or any other person at Mach, to abate mining in Headgate No. 3 without an approved ventilation plan. Mining was allowed to continue until Long was told about it on September 21, 2009, despite being put on notice several times before then, including at least one notice on September 17, 2009 by Long himself.

vi. *Mitigating Factors*

Mach asserts that, because MSHA vacated a citation, rather than terminating it, they had a good faith belief that the most recent plan submitted to MSHA had been approved. The mine, however, reverted to its old plan when it commenced mining activities. As discussed above, I do not find the argument to be persuasive, nor a good faith argument, and do not consider it to be a reliable mitigating factor. Instead, Webb asked and was told that he could not mine without a plan, and acknowledged that no plan was in place.

Given Webb's demeanor and the facts discussed herein, I find that Mach's conduct was intentional and unwarrantable. The aggravating factors discussed herein demonstrate that the violation had existed for some time and would continue to exist, that the violation included the entire working area and, therefore, was extensive; that the operator had been placed on notice that greater efforts were necessary for compliance; and that the operator made no effort to abate the violative condition in spite of the fact that the violation was obvious and posed a high degree of danger. Finally, I find that there is no question that the operator had direct knowledge of the existence of the violation. Inspector Long had discussions with Webb and England on September 16, 2009, in which one or both of them stated that they were waiting for approval of the ventilation plan by MSHA to begin mining in Headgate No. 3. Sec'y Ex. 9. On September 17, 2009, it was again mentioned that Mach was awaiting plan approval from MSHA and Webb asked if "paper" would be issued if Mach began mining Headgate No. 3, to which Long answered, "more than likely." Sec'y Ex. 10. On September 21, 2009, Webb presented a hypothetical about mining coal in Headgate No. 3 and then admitted to Long that coal had in-fact been mined; this was verified by Long. (Tr. 38-39). Webb and England both knew that they could not mine Headgate No. 3 without an approved ventilation plan and they knew they did not

have approval. In spite of such, they pushed forward with production. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure here is the determination of the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998) (Commissioner Marks concurring in part and dissenting in part).

After analyzing the factors set forth in *IO Coal* and *Consolidation Coal Co.*, I have concluded that the aggravating conduct by Mach significantly outweighs any mitigating circumstances. Accordingly, I find that the violation was a result of an unwarrantable failure to comply and, consequently, assess a penalty of $5,000.00 for the violation.

III. PENALTY

The principles governing the authority of Commission administrative law judge 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, the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. 2700.28. The Act requires that, in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

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

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

I accept the parties' stipulation that the penalty proposed is appropriate to this operator's size and will not affect its ability to continue in business. The mine is a large operator and has an unusually large number of ventilation plan violations given its short operating time. I agree with Long that Mach demonstrated high negligence, and I find that the mine demonstrated a serious lack of reasonable care and acted intentionally. Although the inspector designated the violation as non-S&S, I find that operating without an approved ventilation plan is a serious violation. I assess a penalty of $5,000.00 for Order No. 8414529.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the $5,000.00 penalty listed above for subject the order. Mach Mining, LLC is hereby **ORDERED** to pay the Secretary of Labor the sum of $5,000.00 within 30 days of the date of this decision. The Notice of Contest is **DISMISSED**.

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

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September 21, 2012

MACH MINING, LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. LAKE 2010-1-R
	:	Citation No. 6680550; 9/29/09
v.	:	
	:	Docket No. LAKE 2010-2-R
	:	Citation No. 6680551; 9/29/09
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mach #1 Mine
Respondent.	:	Mine ID 11-03141
	:	
SECRETARY OF LABOR,	:	CIVIL PENALY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2010-714
Petitioner,	:	A.C. No. 11-03141-201809
	:	
v.	:	
	:	
MACH MINING, LLC,	:	
Respondent.	:	Mach #1 Mine

DECISION ON REMAND

Appearances: Thomas Paige, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia and Peter Nessen, Office of the Solicitor, Chicago, Illinois, for Petitioner;
Daniel Wolff, Crowell & Moring, LLP, Washington, D.C., and David Hardy, Allen Guthrie & Thomas, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Miller

These cases were before me upon Contestant's request for an expedited hearing to challenge Citation Nos. 6680550 and 6680551 issued pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act" or "Mine Act"). The citations allege that Mach Mining was operating its #1 Mine with an unapproved ventilation plan (both a site specific and a base ventilation plan) in violation of 30 C.F.R § 75.370(d).

On June 4, 2009, Mach Mining ("Mach" or "Contestant") submitted a ventilation plan, which included a base plan and site specific plan, to the Mine Safety and Health Administration ("MSHA"). The parties entered into negotiations and discussed various plan provisions. In September, 2009, Mach communicated its intent to implement the unapproved plan in order to

bring these contests. By agreement between MSHA and the Contestant the mine began operation without an approved plan in place and, subsequently, on September 29, 2009, Mach was issued two citations by MSHA Inspector Keith Roberts.

The dispute in this case centered on whether Mach's proposed system of ventilating panel #3 was suitable, as well as whether the base, or general, plan was suitable to the conditions at the mine. The parties presented testimony and documentary evidence at a hearing held on November 3, 2009. On January 28, 2010, I issued a decision and determined that the termination of Order No. 8414238 did not amount to approval of Mach's ventilation plan and that the district manager did not abuse his discretion regarding plan provisions for the use of belt air, bleeder evaluation points, stoppings in the active tailgate entries, bleeder entry ventilation controls, ventilation of idle places and places where the roof bolter is operating, the plan requirement to specify means of compliance with 30 C.F.R. § 75.332, and inclusion of a depth-of-water action level. The operator appealed the decision, and on August 9, 2012, the Commission issued a decision affirming in part, and vacating and remanding in part. *Mach Mining LLC*, 34 FMSHRC __, slip op. at 25 (Aug. 9, 2012).

The Commission affirmed the decision related to the various portions of the proposed ventilation plan, except for the determination that the district manager did not abuse his discretion regarding ventilation controls in the bleeder entries. The Commission vacated and remanded this determination, and directed that further clarification be provided as to which ventilation controls MSHA required and whether the ventilation controls depicted in the stair-step were required to remain indefinitely. 34 FMSHRC __, slip op. at 15. In addition, the Commission directed that I further consider Mach's proposed site-specific plan for panel #3. *Id*. In conjunction with these issues, I must also take into consideration whether the issue on remand is moot as a result of a statement by Judge Manning in his decision in Mach Mining LLC on January 18, 2012 that "in 'March or April of 2012, MSHA approved the stair step design for the bleeders and Mach began mining Panel No. 3.'" *Id*. (quoting *Mach Mining LLC*, 34 FMSHRC 198, 205 (Jan. 2012).

On August 31, 2012, I requested submissions as to the issue of mootness from both parties. Both parties agreed that the issue of whether the district manager abused his discretion regarding ventilation controls in the bleeder entries is moot. The parties agreed that the Commission remanded the case for further fact-finding "on the issue of whether the district manager abused his discretion by requiring ventilation controls in the bleeders at Petitioner's mine, or to determine if the issue is now moot." Mach's Unopposed Mot. for Entry of Decision that Remanded Issue is Moot 1. Moreover, the parties agree that no further fact-finding is necessary and the remanded issue is moot. *Id*. Therefore, I find the issue is moot and no further action is required on remand. Accordingly, I reaffirm the findings in my original decision on the merits and **ORDER** payment as set forth in my original decision.

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

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September 27, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. KENT 2011-296 A.C. No. : 15-02709-237915-01
v.	:	
HIGHLAND MINING COMPANY LLC Respondent	: :	Mine Name: Highland # 9 Mine

DECISION

Appearances: Brian D. Mauk, Esq., Rachel E. Levinson, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner
Jeffrey K. Phillips, Esq., Steptoe & Johnson, Lexington, Kentucky for the Respondent

Before: Judge Moran

Four citations are at issue in this Docket. Three involve alleged violations of 30 C.F.R. § 75.202(a), which deals with protection from roof and rib falls, while the fourth alleges that 30 C.F.R. § 75.220(a)(1) was violated by the mine's failure to follow its roof control plan. For the reasons which follow, the Court upholds **Citation No. 8497732**, finds that it was significant & substantial and assesses a civil penalty of $3,700.00; upholds **Citation 8501027 and 8501032** and imposes civil penalties of $1,000.00 and $900.00, respectively; and for **Citation 8501040**, the Court upholds the violation, but reduces the penalty from the proposed amount to $250.00.[1] A hearing pertaining to this docket and several others was held in Evansville, Indiana during February 2012.

[1] Reference to a proposed penalty amount is simply a comparison point. All penalties were determined by consideration of the statutory penalty amounts.

FINDINGS OF FACT

Citation No. 8497732

This Citation, issued by MSHA Inspector Jeffrey Winders on June 14, 2010, cited 30 C.F.R. § 75.202(a). That section is entitled "Protection from falls of roof, face and ribs," and provides: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." The condition or practice identified by the Inspector relates: "The roof located at the 1st Main West Drive, crosscut # 13, where persons work or travel was not being supported or otherwise controlled to protect persons from hazards related to falls of the roof. Two roof bolts located over the belt have pulled through the bearing plates exposing unsupported roof which measured 11' by '. This standard was cited 66 times in two years at this mine."[2] To abate the condition, "[t]wo steel bars and jacks were installed in the affected area."

Highland concedes that the standard was violated but it challenges the designation that it was significant and substantial as well as the Inspector's characterization that the violation was of moderate negligence.[3]

Inspector Jeffrey Winders has been with MSHA for slightly more than five years and he has coal mine experience going back to 1976. He also has foreman papers. Shown Exhibits P 20 and P 21, Winders stated that he issued Citation # 8497732 on June 14, 2010. (Ex. 20). Exhibit P 21 reflects his notes associated with that citation. He arrived at the mine at the 2nd shift on June 13th at 11 p.m. and the inspection carried over until the 15th. Tr. 459. At that time, the Inspector was the checking fire suppression system, which is a water sprinkler system, installed on the belt drive. Tr. 460. During that inspection process the Inspector observed two roof bolts over the top of the drive arms that had pulled through their bearing plates. Tr. 464. The bearing plate is an 8 to 9 inch square piece of metal with a hole in its center. The plate slips over the roof

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[2] The Inspector agreed that the fact this standard was cited 66 times in two years at this mine does not mean that each of those dealt with the specific problem cited here. This is because the standard is broad, dealing with more roof support issues than the condition cited. Tr. 501.

[3] Highland also objects to the Agency's special assessment of the proposed penalty. Such an item of contention, that MSHA should not have specially assessed the violation, is not cognizable because, once a matter is challenged and before an administrative law judge, any penalty is determined only by consultation with the statutory penalty criteria. Part 100, special assessments and the like are not considered when a matter is before a judge. The Inspector advised that they were told that where a violation involved one of "the rules to live by," they were subject to a special assessment. Tr. 497. However, that is only a recommendation from the Inspector. Tr. 498. As stated, all of these issues are beside the point, because the Court determines the appropriate the penalty when matters proceed to hearing.

bolt and applies pressure to the roof. Tr. 464. Thus, the plate provides additional support for the roof. Tr. 464. There were adverse roof conditions in that area; rock was falling out around the roof bolts and the roof was uneven. The roof was about 10 feet high in the area cited. Tr. 465. The uneven roof signified to the Inspector that rock had fallen, and he stated that the roof was fractured in that area. Tr. 465. As noted, the area of unsupported roof measured 9 by 11 feet and the Court considers this to be an area of more than negligible size. Tr. 466. It was the Inspector's recollection that he had issued a citation for the same problem at the mine within the previous two months, a factor he considered in evaluating the negligence involved. Tr. 468.

During the course of the hearing, it was explained that this problem originated with the mine's purchase of bearing plates for the roof bolts which had holes that were too big. This allowed the bolts to pull through the plates. Tr. 470. The company informed the Inspector that they had purchased bearing plates with holes that were too large. Tr. 478. This information was known before the citation involved here was issued, as it was previously recognized along the "first north belt." Tr. 478. In the Court's view this awareness made the present violation more egregious, since the mine knew they had a problem. Nor, it is noted, upon the Inspector's issuance of the citation, did anyone from the mine contend that the bearing plates were fine or suggest that the roof was adequately supported. Tr. 479. The Inspector recommended that there be a special assessment and that occurred with the violation being so assessed at $3,700.00.

As the standard cited requires that the roof and rib shall be adequately supported in areas where persons regularly work or travel, per 75.202(a), the Inspector, noting the deficiencies he observed, considered the roof inadequately supported, and further, that it was an obvious condition. Tr. 471. For gravity, the Inspector characterized it as reasonably likely to result in an injury because of the extent of the unsupported area, 9 feet by 11 feet, along with the presence of adverse roof conditions in that area, with rock falling out around the roof bolts and fractures in the roof and with the area being regularly traveled. Tr. 471. The Inspector also noted rock dust in the bearing plates, a factor he used to assess how long the condition had existed. Tr. 472. As there was rock dust on the bolt itself where it was pulling through the plate, that meant the condition had existed for at least one shift. Thus, with the dust on it, that told him that the bolt had started to pull through the plate and then was dusted after that had occurred. Tr. 473. The Inspector also listed lost work days or restricted duty, as the type of injury to be expected, in that he believed that broken bones or contusions would result from being struck by a rock fall. One person was listed under the number affected, with that person being the belt man. Tr. 474. "Moderate" negligence was marked, because the condition was not reported or recognized and the Inspector was unable to find any mitigating circumstances present. Tr. 475. Although no withdrawal order was issued, this was because the area was flagged off, with red tape to alert miners of the hazard under the bolts. Tr. 476. In terms of exposure, the Inspector advised that the 3rd shift would do maintenance on that drive and the examiner would be in that area twice a day. Tr. 477.

As to the number of plates ordered which had holes that were too big, the Inspector could not state how many such plates had been ordered, but he offered that it was more than 25 or 30, after the problems were found along the first north. Tr. 484. The Inspector agreed that the bolt

and plate cited had been installed for years without any problem and that the bolt itself was still fully in the roof when he issued the citation. Tr. 485-486. Of course, the Inspector cited the bearing plate as the pertinent issue, not the bolt. The Inspector described "skin or surface issues" as issues or measures to control draw rock. Tr. 487. He defined draw rock as "Slate, 1 to 3 inches" and he therefore agreed that such draw rock is about 1 to 3 inches of the roof. Tr. 487. A plate, the Inspector also agreed, is used as assistance in control of draw rock as opposed to controlling the roof itself. Tr. 487. However, while Respondent's Counsel asserted that the plate is to help control the surface or the skin or the draw rock, and not the entirety of the roof, the Inspector did not unreservedly accommodate that claim. Instead, he asserted that the plate is also to keep the head of the roof bolt from being pulled into the roof itself. Tr. 488. Although the Inspector agreed that the bolts had not yet been pulled up into the roof, nor had the bolts gone through the plates entirely, that process had undeniably begun. Tr. 488.

The cited area was in a belt entry. Tr. 488. This area had a width of 19 to 20 feet and typically 4 to 5 bolts were used across, although in that particular area it was possible that more bolts were being used, because the belt drive was there and the roof had been cut out at that location. Often times there are more pins, i.e. roof bolts, in areas where the roof is higher. Tr. 489-490. Given that, the Inspector agreed that the spacing from bolt to bolt was more than adequate, as they were closer together than required by the roof control plan. Tr. 491. The bolts in issue were directly over the 1 west drive motors and above the sides of the belt line. Tr. 491. However, despite the observations about the number of roof bolts, the critical point is that there was a distance of 9 feet 11 inches to the next good permanent support. Tr. 492. Further, it was the Inspector's view that the bolts pulling somewhat through the plates would affect the integrity of all the bolts in the immediate roof. Tr. 492. His view was rational, being based in part on the manufacturer's requirement that both the bearing plate and roof bolt be intact. Tr. 492.
The Inspector agreed that at the time the citation was issued, the nut was still exposed outside the roof and that the bolt itself was not damaged. Tr. 493. However, it was also the Inspector's view was that the roof's integrity would be affected because, in its diminished state, it is no longer a solid beam. Tr. 493. Bearing plates, it must be remembered, *not just roof bolts*, are required under the roof control plan. Tr. 505.

The Inspector did know of Respondent's witness James Hackney, formerly with MSHA, whose last job with that Agency was as a roof control supervisor. Tr. 493. Further, he agreed that he would consult with Hackney on roof control issues, if he felt they were outside of his expertise. Tr. 494. In fact, he added that he had discussed *this issue, that is, generically, the matter of bolts pulling through plates,* with Mr. Hackney, as it pertained to the previous, similar, problem at this mine on the first north. Tr. 494. That discussion occurred when Mr. Hackney was still employed by MSHA. Tr. 495.

Reiterating earlier testimony, but this time on cross-examination, the Inspector repeated that the bolts were over the belt, in fact directly over the 1 west drive motors. Tr. 495. While

miners cannot be directly under those bolts, he noted that they can be "right at the edge of the belt line."[4] Tr. 495.

The Inspector agreed that the belt was not running at the time he issued the citation, nor did he require that the belt be shut down until the condition was abated. Tr. 502. The Inspector allowed 9 hours for the condition to be abated. Tr. 503. This meant that a pre-shift examiner would be in that area during the abatement period. Tr. 503. In a clarification, the Inspector stated that, while he believed that the roof bolts had been there for years, it was not his position that the condition cited had existed for such a period of time. Tr. 504. Instead, it was his view that the cited condition had existed for more than 1 shift. Tr. 504. Asked about whether a bearing plate is added simply to deal with draw rock, the Inspector advised that it is *not* limited to that function. Tr. 505. It should be pointed out that the Inspector believed that the plates he cited were *not* used exclusively for skin control but also to keep the bolts from pulling through. Tr. 506. Thus, as noted earlier in this decision, the plates' purpose was additionally to assist the roof bolt so that it would continue to do its job of keeping the roof from falling. Tr. 506. Without the plates, if the roof begins to take on weight, the glue could break around the bolt and cause the bolt to fail. Tr. 507. In fact, bearing plates are always used in roof control. Accordingly, *one does not see simply a roof bolt and no bearing plate*, as the two devices go hand in hand.

While, because of the belt structure which was present here, there would be less of a chance of roof falling on a miner, miners still could be exposed if working on the belt, such as by performing the task of changing a roller. Tr. 508. Additionally, the Inspector elaborated that his concern was not the area *directly* beneath the bolt; *rather it was the area from that bolt to the next permanently supported bolt*. It is that area that was considered to be unsupported. This is the area that the Inspector was concerned that it could fall away right up to the location of the next permanent support, i.e. to the next bolt with a good plate. Tr. 508. Thus, as noted, the distance referred to by the Inspector from the cited, defective bolt/plate, to the next good plate was 9 feet by 11 feet. Tr. 509. As the Inspector repeated, rock *was* falling out around the roof bolts and such rocks can fall at any time. Aggravating the situation, the roof was fractured and uneven around the cited area.

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[4] Inspector Winders was shown Ex P 22, Citation No. 8501027, wherein it was noted that Inspector Hargrove, who issued that citation, was addressing 3 roof bolts that were pulling through bearing plates but *that* the Inspector there *did not* list the condition as S&S. Tr. 499. The Court observed that each violation, even when addressing the same safety problem, is unique. If the Respondent's argument were accepted, it could be turned around and used as a basis to find that *all* such similar violations are S&S. Instead, the Commission has instructed that the S&S determination is to be based on the particular facts involved. Consistent with this observation, the Court interceded, ending that line of questioning, as it dealt with a different inspector, a different situation and a different inspector's judgment. As the Court then noted: "We have to focus on what this Inspector [ ] evaluated, the gravity to be for what he saw, not what [Inspector] Hargrove saw a month later in a different location." Tr. 500.

As part of its defense, Respondent called Blakely Menser. Tr. 518. Mr. Menser has long mining experience, including the last 4 years working as a belt foreman. Tr. 519. Part of his work includes belt installation. Shown Exhibit P 20, the citation in issue, Number 8497732, Menser agreed that he was issued that citation and that he was with Inspector Winders at that time when one of them noticed that 2 bolts were "broken loose." Showing that he had been well prepared for his testimony, he immediately added that "there was bolts all around the area of the intersection, and it was up over a belt line where people, . . . actually couldn't travel under it because . . . the drive motor [was there]." Tr. 521-522. He was then walked through the particulars, again stating that there were "bolts everywhere," in that area, and that he had never noticed the problem before. Tr. 522-523. Menser also marked on an exhibit, indicating with a red "X" where he had to stand in order to abate the citation. Mr. Menser maintained that the "little plates hold just a little bit of rock on the bottom. . . . the bolt is what's holding . . ." Tr. 524. The purpose of his drawing was to demonstrate that no one would be directly under the cited bolts. Tr. 525. Still, he acknowledged there is a walkway next to the cited area which is approximately five feet in width.[5] Tr. 536.

Menser did not agree that the violation was S&S, a view that was based upon his belief that miners would not be exposed to the condition. Tr. 528. However, on cross-examination, Menser admitted that, even where bolts are perfect, the roof can still fall. Tr. 537. He did acknowledge seeing where the bolts had pulled through but he did not recall seeing any uneven, bad roof in the cited area. Tr. 538. Importantly, in the Court's view, though Mr. Menser did not consider the condition to be "S&S," he conceded that the condition was "*probably a hazard, yeah. . . . it needs to be addressed*. . . " Tr. 537-538. (emphasis added).

The Court inquired too, asking if Menser's experience was primarily in belts. He affirmed that to be the case, and agreed that, for roof bolts, he was not an expert by any means. Tr. 539. When asked if plates don't protect simply against draw rock, but that they work with the roof bolt to protect the whole roof, Menser responded that "I'm sure they work together with the whole roof bolt." Tr. 540. When asked if there were a roof failure whether such a failure could be more extensive than the area right under the defective plate and that the roof *could come down* right up to the location of the next good plate, Menser stated that it *could happen* in some cases but that it could also not occur that way. Tr. 540.

Mr. James H. Hackney, whose name is referenced earlier in this decision, was called by Respondent's Counsel. Tr. 821. Mr. Hackney began working in the mines in 1969. His experience includes periods of work with MSHA and its predecessor agency, MESA. Tr. 822. He has also had significant experience working for mining companies. Shown Exhibit P 27, which reflects Hackney's name on that exhibit, it is a part of the mine's roof control plan, which was identified with regard to the citations in dispute in this proceeding. At the time of that plan, Hackney was MSHA's contact person regarding Highland's roof control plan. Tr. 825.

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[5] Shortly thereafter, Menser agreed that the walkway was closer to the belt than his not-to-scale drawing would suggest and he then amended his drawing to more accurately reflect its location. Tr. 532-533.

Hackney left MSHA in May of 2010. Tr. 852.

Mr. Hackney advised that bearing plates are an integral part of a *conventional* roof bolt. Tr. 826. However, in contrast, he maintained that for resin bolts, the plate is for surface control, that is, for the immediate strata only. Tr. 827. Further, Hackney stated that it was these resin bolts that were being used in the cited area. He maintained that plates used with resin bolts are not an integral part of the roof control process and instead they hold up only the immediate strata, that is, the immediate roof or, as it is also described, "draw rock." Tr.829. In fact, he maintained that 80% of the strength is the beam part of the resin bolt. Tr. 827. The Court then inquired how far that "immediate roof" goes up, asking if it was a foot or three feet, as examples to illustrate the point of the question. Hackney informed that the answer depended upon the particular strata, noting that it could be "several feet." Tr. 830. It is also noted that, accepting Mr. Hackney's opinion that the bolt provides 80% of the strength, this means that 20%, or 1/5th of that strength, does not come from the bolt.

Shown Exhibits P 20 and 21, Hackney at first opined that he did not consider that Citation Number 8497732 was S&S. The Court allowed that opinion to be made, but noted that Hackney admitted he was not there and therefore not in a position to offer an informed view. Tr. 831-832. In fact, Hackney then expressed that he did not have sufficient information to opine on the issue, thereby effectively retreating from his initial assertion. Tr. 832. Nor, he added, could he recall when he had been in that area in relation to the time that the citation was issued. Tr. 832. However, applying *his* understanding of S&S, he believed that the Inspector's notes did not support the conclusion that it was S&S. Tr. 833. He believed that the Inspector failed to identify the hazards, such as rock hanging or other hazards. The Court observed that, while Hackney may be a roof control expert, he is not an expert on the issue of whether a violation is or is not S&S. Tr. 835.

Respondent's Counsel then asked Hackney about the bearing plate issue at Highland. Hackney knew about the issue, explaining that when the roof bolts started taking weight, "the plate was coming sometimes through the head." Tr. 837. He maintained that Highland notified MSHA of this problem. Tr. 837. MSHA then came to the mine and "found out that the hole was larger than what should have been." Tr. 838. It was Hackney's position that Highland had taken care of this issue everywhere except where the belt line was, as they could not get a pinner in that area. Tr. 838. At that time, Hackney was MSHA's roof control supervisor for Highland's mine. Thus, he took the view that Highland had taken the initiative and had already tried to address the problem. Tr. 839. However, MSHA instructed that the mine had to start timbering the belt line and MSHA also added the Ker-Thob device as a requirement in their roof control plan. Tr. 839. That device allows the mine to screw the plate back up to the roof. Hackney added that the mine also installed jacks, that is, metal posts, to deal with this problem. Tr. 848.

The Court's view of all this is that while Highland has tried to diminish the seriousness of the plate issue, it seems that in fact the mine had to do a lot to deal with such an asserted "non-problem," and as such it tends to refute Highland's characterization. In fact, Mr. Hackney stated

that MSHA's expectation was that *every* location would be re-bolted *except* for the belt line, because of the difficulty in accessing it. Tr. 849.

In the course of its cross-examination, the Government aptly pointed out that Hackney's involvement with this issue was in 2007 or 2008, yet the citations here were issued in 2010. Tr. 852-853. Further, Mr. Hackney agreed that Inspector Hargrove's citation, per Exhibit P 22, was not in a belt entry. Tr. 853. Then shown Ex. P 24, also issued by Hargrove, Hackney agreed that too was not in a belt entry but rather was in the main north travelway. Tr. 854. Mr. Hackney was then directed to Ex P 21 at page 5, of Inspector Winders' notes, and he conceded having no basis to disagree with the Inspector's remark that the condition existed for over a shift. Hackney then offered that the mine would rock dust "[p]robably every 6, 7 days." Tr. 856. The Inspector's notes also refer to rock spalling out around the roof bolts and Hackney agreed that meant there was sloughing around the bolt, that is, there were indications of deterioration. Tr. 857. Although he considered that to be a hazard, he believed it would be only if one were standing directly beneath it. Tr. 857. The Court does not agree with Mr. Hackney's assessment, although it is noted that the Court expressly stated at the hearing that it viewed Mr. Hackney's testimony to have been made with integrity. However, that determination does not equate with adopting the witness' views. Instead, the Court decided to place more weight upon the opinion of Inspector Winders who, in contrast to Mr. Hackney, was present and observed the cited conditions first-hand.

When asked if rock falling out of one location increases the chance that nearby rock can fall out, Hackney could not answer that question with precision. Because of that response, the Court asked if the integrity of the roof is weakened if a portion of the roof falls out around a plate, and not just weakened at that location, but also nearby. Tr. 858. Hackney's response was if one is talking about the resin bolts, and sloughing around such a bolt, the beam is still there and that beam will hold the strata to prevent a roof fall. This would not be the case if only conventional bolts were being used. Tr. 858. Thus, he returned to his view of the superiority of resin bolts over conventional ones. However, Hackney agreed that the risk of a roof's integrity being impaired from rock sloughing off from around a plate will depend on the particular mine roof involved in a given situation. Tr. 859. This is a timely moment to remind the reader that Mr. Hackney never viewed the cited conditions. Hackney also conceded that he has written S&S violations based on conditions where he observed draw rock that had fallen out and for roof fractures too. Tr. 860. Mr. Hackney further conceded that there is no record that Highland had installed Ker-thobs, jacks, timbers or washers in the specific areas that were cited. Tr. 867-868

Highland's contention in its post-hearing brief that the violation was not S&S and that the negligence was less than moderate.

Although the Inspector identified the hazard as a miner being struck by a piece of roof, he admitted that the area had more than an appropriate number of roof bolts, as it had more bolts than were required. R's Br. at 3. As there was no problem with the roof bolts per se, but rather with the bearing plates pulling through those bolts, Respondent contends that such plates only work to assist with the control of the "surface or immediate roof, as opposed to support of the

entire roof strata." R's Br. at 3. Respondent contends that the Secretary did not meet her burden of proof as "no miner would be exposed [to the cited area] with any frequency" and because the roof bolt itself was still doing its job. R's Br. at 4. The Court does not agree. Exposure was demonstrated through the Inspector's testimony, which the Court credits and the fact that the entire roof strata may not fall does not show that the immediate rock would not present a reasonably serious injury. The Court may, and does, take note of the fact that roof falls are a major source of mine injuries.

Respondent also points to the testimony of its witness, Mr. Menser, that work or travel would not occur in the area of roof cited and it contends that Inspector Winders conceded that the area he cited was over a belt structure and not in a regularly traveled area.[6] R's Br. at 4. Although the Inspector named the belt man as the one person who could be affected by the hazard, he noted that person would not be in that area every day.[7] Thus, Respondent contends that Winders' explanation of the belt man's exposure was insufficient to support an S&S finding. Further, it asserts that Winders was not contemplating exposure of belt examiners when he issued the citation and that this was an afterthought. Respondent also relies upon the view of its witness, Mr. Hackney, for the position that the only hazard from this violation would be to those right underneath the bearing plates. Accordingly, Respondent contends that the Secretary did not meet its burden to show a miner would be in such area of danger.

Respondent urges that the Secretary did not show that "the condition, as cited, was reasonably likely to cause a roof fall and resultant injury." R's Br. at 6. Instead, the Respondent emphasizes that the bolts themselves were still working and that the bearing plates were doing their job "which was to keep the head of the roof bolt from being pulled into the roof." R's Br. at 6. As Respondent views it, the Inspector's sole justification regarding the condition being likely to contribute to a roof fall was that they "were *supposedly*[8] not being used in accordance with the manufacturer's recommendation." *Id.* at 6 (emphasis added).

The Respondent also asserts that the "moderate" negligence designation was uncalled for because there were "significant" mitigating circumstances. R's Br. at 7. In support of this, Highland contends that it did not know that the hole in the bearing plates was too large at the

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[6] As stated earlier, Inspector Winders agreed that, because of the belt structure, one cannot walk *directly* under the bolts he cited, but he added "[y]ou can be right at the *edge* of the belt line." R's Br. at 4, citing Tr. II at 405-406. (emphasis added).

[7] Respondent cites to another administrative law judge's decision to support its assertion that the present citation is not S&S. Beyond the distinct factual situations in that case from this one, decisions of fellow judges are of no precedential effect. Also, the S&S analysis is determined by the Commission's view of such a determination.

[8] The Court would remark that there is no "supposedly" here; the record establishes that these plates were not working as intended.

time the plates were ordered. It adds that these plates had been installed for more than three years, with no evidence of the problem found in the citation.

However, in the Court's view, as the bearing plates hole's size could not "grow" over time, it is dubious for the Respondent to claim that it did not know of the hole size issue from the start. A knowledgeable and thorough assessment would have disclosed the problem at the time of the bolts' original installation.

While the Respondent next notes that no one had, prior to the citation, identified them as a problem, rather than help the Respondent's contention, it underscores that they were negligent in not noting the issue prior to the Inspector observing the problem. Adding to the validity of this observation, the Respondent's next contention supports the Court's view, as Highland admits it became aware of the problem in other areas of its mine. Although it claims to have taken a "proactive[ ]" approach, this took the form of put[ting] *MSHA on notice* of the situation." R's Br. at 7. (emphasis added). It is the notice *to Highland*, not MSHA, that is the relevant issue in evaluating the Respondent's level of negligence. Last, Highland contends that MSHA did not "expect or require Highland to re-bolt the area where this citation was written." *Id.* at 7. It is on these bases that Highland contends its negligence should be deemed "low." *Id.*

The Secretary's Contentions

The Secretary first asserts that, per Citation No. 8497732, Highland violated 75.202(a), noting that both Menser and Hackney agreed that it was a violation. Regarding Inspector Winders marking the citation as reasonably likely to result in an injury, it points to three reasons supporting that conclusion: unsupported roof, adverse roof conditions in the area, (rock falling out around the bolts) and fractures present in roof area cited. Sec. Br. at 37. Referencing that the Respondent claims that the violation was not S&S because there was no exposure to the hazard, as the bolts were directly over the belt, it points out that Inspector Winders' notes indicate that his concern was not simply the area directly under the bolt. As he informed, that area, from that bolt to the next permanently supported bolt, is considered to be unsupported. If that bolt is damaged, roof could fall all the way to the next permanent support. Here, that distance, to the next permanent support, was not obstructed by the belt structure or the drive motor. Further, Mr. Menser also conceded that failure of the roof due to a defective plate can extend to the next good roof bolt. Sec. Br. at 38, citing Tr. 540-541. The Court agrees with and adopts this analysis.

The Secretary also speaks to the Respondent's other contentions, that the roof's integrity was still sound because it uses resin bolts and the bolts are used to form a "beam" where the coal has been removed and further that the bearing plate is only for surface control of the immediate strata. While the Secretary does not dispute that the bolt does the wealth of the work, the plates serve a role too, being used to hold up the immediate strata. Importantly, that immediate roof strata can extend out several feet. Even Mr. Menser agreed that the bearing plate works *with* the bolt. The plate, therefor, is not present for mine decor.

Other judges, the Secretary notes, have observed that a missing bearing plate lessens the effectiveness of the beam created by roof bolts. *See, Knox Creek Coal Corp*, 2010 WL 5619977 (Dec. 27, 2010) at *32, in which the S&S finding was sustained. Here, the Secretary argues the situation is analogous, as the bearing plate is an essential part of the roof control. It is decidedly not simply about the roof bolts. Sec. Br. at 39, citing *American Coal Co.*, 33 FMSHRC 2830, 2828 (Nov. 2011).[9] Together with the defective bearing plates, for which the Secretary notes that the Respondent makes no claim that they were not defective, the Inspector was concerned about the rock which had fallen out from around the bolts and Mr. Hackney agreed that, depending on the particular roof, rock spalling out from around a bolt could weaken the integrity of the roof. Sec. Br. at 39, citing Tr. at 858-860. Hackney also admitted he has written S&S citations where draw rock has fallen out or where roof fractures were present and that he considers both to be hazardous.

Further Discussion:

As noted often, including recently in the Commission's decision in *Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Black Beauty Coal Company,* 2012 WL 3255590 (August 2, 2012), "[t]he S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), [FN11] and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained: In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Id.* at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). *6 An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would

[9] The Court takes the same perspective as it did for the case cited by the Respondent. The findings here are made on the basis of the particular facts involved. This record supports the conclusion that bearing plates are an essential part of the bolt and plate arrangement. Beyond that observation, the Court based its findings on the particular facts at hand and not on determinations made in other cases about similar roof and plate problems addressed by other administrative law judges.

have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987).

Concluding Remarks for this Citation

Applying the *Mathies*' criteria, the violation was admitted and the hazard, that material could fall from the roof, was identified. Indeed, some rock had fallen from around the defective plates. The measure of danger to safety contributed to by the violation was diminishment of the roof's integrity. As noted, the plates are not the work of a decorator's touch. They are an essential part of the effective use of roof bolts. Thus, undeniably, the absence of an effective plate contributes to the cause and effect of the mine hazard. The reasonable likelihood that an injury will result was demonstrated. Nor does acceptance of the view that only the immediate strata is at risk of falling demonstrate that the hazard is minimal. The immediate strata, it was admitted, can be several feet in depth, which is hardly a slight matter. Further, the Court accepts the Inspector's testimony that is appropriate to consider the affected area to continue all the way to the next effective bolt. Exposure too, was established, not simply to refute the notion that one would need to be immediately under the bad plates, but also by the Inspector's testimony that belt examiners and maintenance workers would be within the zone of danger. Accordingly, there was a reasonable likelihood that one could be struck by falling strata and, if that occurred, such an injury would be of a reasonably serious nature. Accordingly, upon consideration of all the evidence, the Court finds that the violation was S&S and that, based upon its earlier comments, the Court also concludes that Highland's negligence was moderate. **Upon consideration of the statutory penalty criteria, the Court assesses a civil penalty for this violation, Citation Number 8497732, in the amount of $3,700.** [10]

[10] The other penalty factors, common to all of the violations addressed in this decision, are noted here. Highland does have a history of violations of section 75.202. In the two years previous to the citations addressed in this proceeding, it had over 60 such violations citing that standard. As with decision's earlier statement, it was acknowledged that while safety standard 75.202(a) had been cited at this mine many times, that did not mean that each of those involved bolts pulling through plates. Tr. 746. Although the standard pertains broadly to the support or control of roof, face and ribs, where miners work or travel, in order to protect them from falls of material, the particular source of a potential fall does not diminish the relevance of this general hazard, regardless of the particulars. The other penalty factors - good faith, the ability to continue in business, size of the business, along with negligence and gravity were all duly considered for each of the citations in issue.

Citation No. 8501027

MSHA Inspector Paul Hargrove[11] issued Citation Number 8501027 on July 12, 2010. In that citation he stated: "The roof at crosscut # 33 and crosscut # [61]on the 2nd Main West travel way, secondary escape way (sic), is not being supported or controlled to protect person (sic) from fall of roof or rock. At crosscut # 33 two roof bolts are pulling thru the roof bolt bearing plate. Also at crosscut # [31] one roof bolt is pulling thru the roof bolt bearing plate. This standard was cited 65 times in two years at a time." Ex. P 22 and 23, the latter reflecting the Inspector's notes for that Citation. Tr. 732. He marked the Citation as "non S&S." The citation was subsequently specially assessed at $1,000.00.

As with Inspector Winders'citation of the same problem, Inspector Hargrove cited 30 C.F.R. § 75.202(a). To abate the violation, Highland installed timbers at crosscut # 33 and at crosscut # 61 on the 2nd Main West travel way.

Before entering the mine on that day, Hargrove checked various mine record books. Upon entering, he was accompanied by Jim Gass, the section foreman, and Barney Alvey, the miners' representative. Tr. 734. At the location where he discovered the problem, Hargrove saw roof bolts that were not providing adequate roof support, in that the bolts were pulling through the bearing plates. Tr. 735. Such a condition, he informed, presents a hazard of a fall of roof or rock. The Inspector stated that the bearing plate puts compression on the beam and, without the plate, the beam will separate and start falling. A gap will develop as a consequence and this presents the hazard of a roof fall. Tr. 736. This condition was found on the Main West travelway, which is a secondary escapeway for the Number 3 and 5 units. Miners do travel in this area, as everyone on the Number 3 unit will be traveling there. Travel will be on mantrips and golf carts. Tr. 736. This condition was found between the 31 and 33 crosscuts. Tr. 737. Two plates were involved at crosscut 33. The distances for the two were approximately 8 feet by 9 feet. However, Hargrove marked the condition as non-S&S because the roof otherwise looked good to him; there was no loose rock or ribs at crosscut 33 and there were no cracks along the rib line or center of the entry. Tr. 739. Still, it was a violation of 75.202(a) and the requirement that the roof be supported or controlled to protect miners from falling roof or rock. Tr. 739.

Although the Inspector marked the Gravity section of the citation that an injury's occurrence was "unlikely," he was concerned that, eventually, if the condition were not corrected, the roof would deteriorate and become unsafe. He listed three miners as potentially affected, as that was the number in the area at the time of the citation's issuance. Tr. 739-740.

[11] Inspector Hargrove has mining experience dating back to 1975. It includes mine foreman papers in two states. He began with MSHA in February 2006 and he is an underground coal mine inspector. Tr. 731.

The Inspector listed the negligence as "moderate," since he noted that pie pans had been installed in the area. Thus, the mine knew the area had problems but they had missed those two roof bolts. Tr. 741. Because some effort had been made, he considered that a mitigating factor. Tr. 741. The condition was abated by installing timbers. This abatement method was permitted because one can install bolts, i.e. re-bolt, or one can employ standing timbers. Tr. 742. While he saw some mitigation and, as noted, marked it as "non-S&S," he still recommended that the violation be specially assessed because he has cited this problem numerous times at the mine. Tr. 743-744, 746. While Highland was making an effort to deal with the problem, it was Hargrove's view that they weren't making a good enough effort. Tr. 746. Hargrove considered the condition to be obvious and therefore not hard to detect. Tr. 748. While he couldn't state with certainty the length of time that the violative condition had existed, he did believe that it had been present for "quite some time." Tr. 749. Supporting that view, he did observe the presence of "a lot of rust on [the bolt and plates]," confirming that it had not recently become a problem. Tr. 749. Thus, he concluded that it could have existed for "weeks, months, a year maybe." Tr. 749.

Highland's contentions regarding Citation # 8501027[12]

Though issued by a different MSHA Inspector (Hargrove) and for different locations, both of these citations deal with the same type of problem found by Inspector Winders, namely, roof bolts pulling through bearing plates. As Inspector Hargrove did not mark the violations as S&S, Highland's objection is that they were considered to be of moderate negligence by the Inspector.[13] To support its view that the negligence was either none or low, Respondent relies upon the arguments it put forth for Inspector's Winders' citation. However, it also adds that Inspector Hargrove "acknowledged that Highland had taken corrective measures" by setting timbers in the area along with roof bolts and pie pans. R's Br. at 9. The same inspector also agreed that once Highland "determined that the holes in the bearing plates were

[12] Highland makes the same arguments for Citation 8501032.

[13] Highland also objected to MSHA's act of specially assessing these violations. As explained earlier, at the hearing stage, when a matter is before an administrative law judge, penalties are determined by consultation with the statutory penalty criteria. "Special Assessments" by the agency are no longer relevant. Therefore Respondent's arguments about this are not cognizable at this stage.

too large, it began addressing the problem, including placing additional plates."[14] *Id*. at 9, citing Tr. III at 837, 839.

The Court's conclusions regarding Citation # 8501027

Based upon Inspector Hargrove's testimony, as already described, the Court concludes that Highland's negligence was moderate. A civil penalty of $1,000.00 is assessed for this violation.

Citation # 8501032

Inspector Hargrove also issued Citation Number 8501032 on July 13, 2010. In that Citation, in which he again asserted a violation of 30 C.F.R. § 75.202(a), the Inspector stated that the "mine roof at crosscut # 27, crosscut # 28 and crosscut # 38 on the Main North travel way, secondary escape way, is not being supported or control (sic) to protect miners from fall of roof or rock. At crosscut # 27 two roof bolts are pulling thru the roof bolt bearing plate. One bolt has pulled thru the roof bolt bearing plate. At crosscut # 28 one roof bolt has pulled thru the roof bolt bearing plate and one is partially pulled thru the roof bolt bearing plate. Also at crosscut # 38 one roof bolt has pulled thru the roof bolt bearing plate. This standard was cited 66 times in two years at this mine." To abate the violation, "Six timbers, props, were installed at crosscut # 27, # 28, and crosscut # 38 on the Main North travel way." Gov. Ex. P 24.

Inspector Hargrove testified about Exhibit P 24, the citation he issued on July 13, 2010 and P 25, his associated notes. Tr. 752. At that time he was with Brad Carlisle from the mine's safety department and Charlie Hankins, the miners' representative. All Highland's miners travel through the cited areas. Tr. 754. Hargrove found that the mine roof at Crosscut Nos. 27, 28 and 38 on the main north travelway, secondary escapeway, was not being supported or controlled to protect miners from falling roof or rock. At crosscut 27, two roof bolts were pulling through the bearing plate and one bolt had pulled through the plate. At crosscut 28, one roof bolt had pulled through the plate and one had partially pulled through the roof bolt bearing plate. Further, at crosscut no. 38, one roof bolt had pulled through the roof bolt bearing plate. Tr. 755. The areas affected were 7' 4" by 8' 3", 12' by 7' 4" and 8' by 4' 6". Tr. 755. Hargrove considered these to

[14] Hargrove confirmed that a large number of miners pass through the cited area every day. As distinct from the similar citation discussed, he agreed that there was no belt structure under the area he cited. Tr. 766. The area he cited was, as noted, a secondary escapeway. People could walk directly under the cited area, yet Hargrove marked it as non-S&S. The aim of this cross-examination was an obvious attempt at a back door criticism of Inspector Winders' conclusion that the condition he observed was S&S. However, in the Court's view this is akin to criticizing a different umpire's strike call in a prior game, suggesting that the next umpire's call that a similar pitch was a ball should influence the prior game's call. The point is that all of these violations are judgment calls and the reasonableness of a given call is dependent upon the particular testimony related to a particular citation.

be a significant affected area. Tr. 755. The Court agrees. However, there were no adverse roof conditions noted in the mine's books. Tr. 755. These areas affected are to be on-shifted and pre-shifted and they are also traveled by essentially everyone at the mine. Tr. 756. As noted, Hargrove had checked the mine's books before entering the mine, but there was no record of the conditions he later found. Tr. 756. Hargrove believed that, had adequate exams been done, the conditions he found would have been noted in the mine's books *and he expressed that he also should have cited the mine for an inadequate exam*. Tr. 757.

In citing the mine for a violation of 75.202(a), he marked it as "unlikely" and this was because he saw no adverse roof conditions. Tr. 758. As with an earlier citation discussed by Hargrove, this issue had also been identified as a problem which needed corrections. While the mine had done some corrections, installing additional bolts and the like, they had not done a complete job and therefore their corrections had been inadequate. Tr. 758. Hargrove, comparing the two similar situations, described them as "[b]asically the same citation, different day." Tr. 760. Hargrove marked the injuries as lost work days or restricted duty. Tr. 761. Two people were the number affected. Tr. 762. Negligence was listed as moderate because some effort had been made but as noted, some areas had been missed. Tr. 762. The Inspector also noted that Charlie Hankins, a miners' representative, had worked at the mine for years and was a member of their safety committee. Tr. 763. Significantly, as noted, Hargrove believed that the condition had existed for "months, [and] possibly years." Tr. 764.

Hargrove informed that virtually all the miners, a number he estimated to be around 100, would pass the cited area. Tr. 767. Hargrove reiterated that four bolts were involved and that for two of them the bolt had pulled through the plate completely. Tr. 767. In fact, he found no plate at all for those two.[15] Nor was there any belt structure underneath any of the bolts. This meant that miners could walk directly under the four bolts. Tr. 768. Yet, he marked the violation as "non-S&S." Tr. 768. Although the Respondent suggested that the number of bolts that would need attention could be vast, suggesting at one point that there could be hundreds or thousands of bolts at the mine and that therefore it would be nearly an impossible task to find every bolt with a problem, the Court does not view that contention as aiding the Respondent but rather points to the need for more diligence. In any event, the Court believes that the analysis has to focus on the problem found by the Inspector here and that is the basis for the Court's views regarding negligence.

While Respondent also argued that it would make no sense for Highland to want to buy bearing plates that won't work, the Inspector countered that it made no sense for Highland to install them when they knew they were wrong in the first place. Tr. 770. In response to the idea that it was an innocent or unknowing mistake on Highland's part, the Inspector noted that the mine manager told him they had tried to solve the problem by adding washers. So, Highland did know about the problems. Tr. 771. Also, to the idea that this problem was at various locations throughout the mine, the Inspector took issue, stating that it was generally in the area where the

[15] This underscores the importance of dealing with this problem; eventually the plates will fall off and the bolt no longer then has its support partner.

north meets the west in the first part of the main west and therefore that it was really just one area. Tr. 772. The Inspector's larger point was that Highland knew it had this bearing plate problem. Tr. 773. Although the Inspector acknowledged that Highland had taken steps to address the roof bolt problem, by installing additional plates and bolts, they had not done so in the areas he cited. Tr. 777.

The Court's conclusions regarding Citation # 8501032

Crediting Inspector Hargrove's testimony on the issue of negligence, the Court finds that Highland was moderately negligent in this instance.[16] Thus, the Court agrees with the Secretary's contention that, while Highland made efforts at correcting the problem, it did not do an adequate job and therefore, given all the circumstances, it was moderately negligent. Sec. Br. at 42-43. An adequate preshift or onshift would have spotted these issues; Highland knew of the problem and that the area was bad, and that the agency had numerous meetings with Highland about this issue.

Although the Court easily could have imposed a penalty greater than the amount proposed, given the greater number of miners exposed, upon consideration of all the penalty factors, it imposes a civil penalty of $900.00.

Citation No. 8501040

This Citation was also issued by Inspector Hargrove. On July 19, 2010, Inspector Hargrove cited Highland for a violation of 30 C.F.R. § 75.220(a)(1). The condition or practice section of the Citation related that the "approved Roof Control Plan, dated Jan. 6, 2010, page # 3, entries width of 20 feet is not being followed on the # 2 unit, MMU-062-0 in the # 6 entry. The # 6 entry width is 21 feet 2 inches to 21 feet 4 inches for a distance of 6 feet. The standard was cited 44 times in two years at this mine." As with the other matters testified to, the fact that a particular standard was cited before does not mean that the same problems were present. This is because a broad standard, such as roof control, encompasses a number of problems that impact its control, not simply bolts with inadequate plates. Tr. 805. In fact, the Inspector could only recall two instances citing the roof control standard at this mine in which excessive widths were involved. Tr. 806. To abate the hazard, "Two eight foot bolts were installed in the wide area of the # 6 entry." Ex P 26 and P 28, the Inspector's notes related to that Citation, pages 1 through 10. Tr. 786.

For this matter too, Hargrove inspected various books before going underground and saw no notations of hazards identifying this problem listed among them. Tr. 787. He was performing

[16] As already noted, though both citations dealt with the same issue, bolts pulling through bearing plates, and though Inspector Hargrove did not list the violations as S&S, while Inspector Winders did, from the Court's perspective this simply demonstrates that each instance is fact specific and that the Agency did not "knee jerk" with the same reaction to each encounter of the defective plates by reflexively finding each instance to be S&S.

an E02 spot inspection which stems from the amount of methane the mine emits in a 24 hour period. Tr. 787. At that time he was on the Number 2 unit and MMU 062. Tr. 789. While Hargrove did not find any methane issues, as noted, he did find an entry with an excessive width in the Number 6 entry. Tr. 789. There, he found an entry at 21 feet 4 inches by 21 feet 2 inches for a distance of six feet. Tr. 790. Highland's roof control plan calls for a 20 foot width generally, except for the belt entry, where 21 feet is allowed. Tr. 790.

Inspector Hargrove identified P 27 and 27 A as Highland's roof control plan, effective January 6, 2010. The width limits are listed in that plan. Tr. 792. The Inspector stated he could tell when he arrived that the width was excessive. He was on foot and was walking across the faces. Hargrove could spot the problem because if a cut is done right it will have nice straight pillars, but, if not, it will be wide and then become narrow and the notch created by trying to correct the cut is the telltale sign. Tr. 794. The excessive cut was on one side. Tr. 811. Additional roof supports are required where the plan's maximum width is exceeded for more than five feet. Tr. 796. No additional supports had been installed in the area of the excessive width. Tr. 796. Hargrove expressed that the condition was obvious. The face boss, for example, is there for 8 to 10 hours a day and the area also would have been pre-shifted. Tr. 797. Accordingly, the Inspector believed that two examiners would have seen the problem and at least two members of mine management would also have seen it. Tr. 798. Based upon these observations and conclusions, he cited the mine for a violation of its roof control plan. Tr. 798. Nevertheless, Hargrove considered the problem as unlikely to result in an injury. Tr. 798. This view relied upon the presence of resin bolts, with 5 rows installed across the entry and he found that there were no cracks along the rib line nor in the center of the entry. Accordingly, despite the violation of the roof control plan, he concluded that there were no immediately hazardous conditions. Tr. 799. Thus the Inspector regarded it as more of a "technical" violation because he concluded that the roof looked good. Tr. 801. By contrast, had he seen cracks or cutters going down the rib line, or draw rock, or if the roof had been sloughing, he would have marked it as S&S. Tr. 801.

The Inspector observed that the mine could have taken steps to reduce the negligence, as by having installed an 8 foot mega-bolt. However, that would not eliminate the violation. It would only have reduced its negligence. Tr. 800. So too, despite marking the violation as "non-S&S," Hargrove noted that there is the risk that the roof can deteriorate and can do so in a short time, within a matter of one cut, or 20 minutes, or from one entry to the next. Tr. 802. In terms of persons affected, it could be anybody in the unit and he noted there's always foot traffic through that area. Tr. 802. The worry was that with a roof fall a severe, permanent, injury or death could result. Tr. 803. Abatement was accomplished through the installation of two 8 foot bolts being installed in the wide area of the Number 6 entry. Tr. 803. The Inspector did state that the mine, in allowing this condition to occur, was not following good mining practice. Tr. 805.

On cross-examination, Inspector Hargrove did not believe that the mine had attempted to address the situation by adding five bolts across the entry. Tr. 807. He did agree that the plan calls for 4 bolts across each entry but these were in the narrow part of the entry. Tr. 807. As he pointed out, the mine was cited for excessive width of entry, not for the number of bolts they had installed. Tr. 808. In fact, he stated the mine was simply using 5 bolts and that the roof control plan represents only the minimum requirements anyway. Tr. 808. As Hargrove noted, adding a 5th bolt or even a 6th doesn't change anything if one takes an extra notch out because that wouldn't move the bolt any closer and the entry would remain too wide.[17]

Highland's contention regarding Citation # 8501040

In terms of cognizable objections, Highland takes issue with the Inspector's marking this violation as a "lost workday or restricted duty" matter. In support, it notes that the Inspector stated he did not see any hazardous conditions nor did he observe any adverse conditions. In the "small area" he cited, there were five bolts across the entry and the plan only required four. Respondent maintains that had there only been four bolts present, MSHA would have allowed two additional bolts to be installed for an abatement and therefore, it contends, the same number of bolts would have been installed after the abatement, as existed at the time the violation was noted. It therefore contends that, if the same number of bolts could have been installed, had there been fewer present to begin with, this means that the existing number, present at the time of the citation, shows no lost workdays is the appropriate designation. As to the Respondent's claim that the violation was only of low negligence, it claims that "the width of the entry barely exceeded the permissible amount, the excessive width was of a short distance and more than the required number of bolts were already installed." R's Br. at 11. The Court rejects Highland's claims. In doing so, it points to and adopts Inspector Hargrove's testimony. Simply stated, the area was too wide and therefore non-compliant with its plan.

The Court's conclusions regarding Citation # 8501040

This violation, designated as non-S&S, was specially assessed at $450.00. Tr. 726. The Court agrees with Highland that, given the very short distance of the excessive width, the penalty should be reduced. Upon consideration of the facts and the penalty factors, the Court imposes a civil penalty of $250.00 for this violation.

[17] Respondent's Counsel went to some lengths to explore hypotheticals concerning whether a "snake" unit, for which an entry is permitted to be wider, at 21 feet, would have been a violation, had it been installed. The problem is this is not the situation the Inspector encountered. Tr. 815-816. Hargrove noted that there were no cuts or anything set up for a snake unit in the cited area. Tr. 817.

ORDER

The Court upholds **Citation No. 8497732**, finds that it was significant & substantial and assesses a civil penalty of $3,700.00; upholds **Citation 8501027 and 8501032** and imposes a civil penalties of $1,000.00 and $900.00, respectively; and for **Citation 8501040**, the Court upholds the violation, but reduces the penalty from the proposed amount to $250.00 . Respondent is **ORDERED** to pay a civil penalty in the amount of $5,850.00.

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

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September 27, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. VA 2010-310
Petitioner	:	A.C. No. 44-06045-212602
	:	
v.	:	Docket No. VA 2010-358
	:	A.C. No. 44-06045-215290
HUMPHREYS ENTERPRISES, INC.,	:	
Respondent	:	Mine: No. 5 Strip

DECISION

Appearances: Anh T. LyJordan, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Petitioner

William J. Sturgill, Esq., Norton, for the Respondent

Before: Judge Koutras

STATEMENT OF THE CASE

These civil penalty proceedings pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802, et seq. (2000), hereafter the "Mine Act", concern one Section 104(d)(1) significant and substantial (S & S) citation served on the respondent on January 28, 2010, and four Section 104(d)(1) S&S orders served on the respondent on January 28 and February 4, 2010, for alleged violations of mandatory safety standards 29 C.F.R. §§ 77.1004(b), 77.1002, and 77.1713(a).

A hearing was held in Abingdon, Virginia on December 6, 2011, and the parties appeared and participated fully therein. The parties filed post-hearing briefs and I have considered their arguments in the course of this decision.

Stipulations

The parties stipulated to the following:

1. During all times relevant, Respondent/Operator was the operator of the mine identified.

2. The mine is a "mine" as that term is identified in Section 802(h).

3. The products of the mine entered commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

4. The citation(s)/order(s) at issue in this matter were issued on the date stated therein and were issued by a duly authorized representative of the Department of Labor (MSHA).

The parties further stipulated to the authenticity of their respective documents submitted for the record; the large size of the respondent's mine operations; the proposed penalties were regularly assessed and will not adversely affect the respondent's ability to remain in business; and that the sequential issuance of the Section 104(d)(1) citation and Section 104(d)(2) order were procedurally correct as served on the respondent (Tr. 7-9).

The Alleged Violations

Docket No. VA 2010-310

Section 104(d)(1) S & S Citation No. 8158391, January 28, 2010,11:00 a.m., 30 C.F.R. § 77.1004(b) states as follows (Ex. G-2):

> The highwall above the Morris strip pit is in poor condition. Overhanging material exists at the pit entrance above the haulroad and pit edge. The overhanging material exists from 30' above the entrance up to 100' above the pit entrance. The overhanging areas protrude from the face of the highwall 2' to 4' and are 2' and 3' in length. Vertical fractures in the strata leave the highwall unstable. Overhanging areas exist above the active pit area. The overhanging areas protrude from the highwall face 2' to 4' and are 2' and 3' in length. Six miners in the strip pit are exposed to the hazard. The mine operator failed to take corrective measures to abate the condition or eliminate the miners' exposure. This is a repeat violation of the standard and the mine operator has demonstrated more than ordinary negligence and unwarrantable failure to comply with the standard.

The citation was modified the next day to add: "The mine operator engaged in aggravated conduct constituting more than ordinary negligence by ordering work to be performed below a dangerous highwall".

The citation was terminated at 2:30 p.m., on January 28, 2010, after the area was barricaded and posted or flagged.

Section 104(d)(1) S & S Order No. 8158392, January 28, 2010, 3:30 p.m., 30 C.F.R.§ 77.1002, states as follows (Ex. G-3):

> The mine operator has not taken the necessary precautions to minimize the possibility of spoil material rolling into the pit. For a distance of approximately 300' the spoil bank on the north side of the Morris strip pit is approximately 70' in height. A bench has been cut in the spoil approximately 20' below the top leaving spoil material 50' in height above the pit. The material is saturated and has not been sloped or compacted, Cracks in the bench run horizontal and parallel to the pit from settling of the materials. The spoil has sloughed off into the pit in some areas. Some material has been observed dribbling into the pit. Six miners are working in the pit at this time. No effort was made to slope the material or eliminate the hazard as the pit was developed. This is an unwarrantable failure to comply with a mandatory safety standard.

The order was modified the next day to add, "The mine operator engaged in aggravated conduct constituting more than ordinary negligence by ordering work to be performed underneath the dangerous spoil bank."

The order was terminated the next day after the area was barricaded to prevent anyone from working near the toe.

Section 104(d)(1) S & S Order No. 8158393, January 28, 2010, 4:00 p.m., 30 C.F.R. § 77.1713(a), states as follows (Ex. G-4):

> An adequate on-shift examination for hazardous conditions in the Morris strip pit has not been conducted or recorded. The daily on-shift inspection book does not reflect that the obvious hazards that have existed in the pit since development began, have been identified during on-shift examinations. It has been determined that it is highly likely a miner could be fatally injured by the hazards. This is an unwarrantable failure to comply with a mandatory safety standard.

The order was modified the next day to add: "The mine operator engaged in aggravated conduct constituting more than ordinary negligence by failure to record and take action on known hazards." The order was terminated at 5:45 p.m., the day it was issued, after "The hazards were identified and entered in the daily on-shift book."

Docket No. VA 2010-358

Section 104(d)(1) S & S Order No. 8158396, 4:45 p.m., February 4, 2010, 30 C.F.R. § 77.1004(b), states as follows (Ex. G-23):

> The highwall above the newly developed Morris Rider strip pit is in poor condition. The total height of the highwall is approximately 50'. A bench has been left approximately 20' above the coal. The mine operator has drilled and blasted too close to the highwall to leave an adequate safety bench. The strata in the existing 20' highwall above the strip pit is cracked from top to bottom throughout, over a distance of 138' from the pit entrance into the pit. Some of the cracks in the strata appear to be 4" to 6" wide. The highwall has not been scaled and overhanging material has been left on the highwall resulting in unconsolidated material 20' above the pit floor. The condition is obvious to the most casual observer. This is the 2nd violation of this standard during this inspection. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that six miners have been assigned to work in the strip pit and are exposed to the bad highwall which is an obvious violation.

The order was modified on February 8, 2010 to add: "This violation is an unwarrantable failure to comply with a mandatory standard."

The order was terminated at 8:00 p.m., on the day it was issued after compliance with Section 77.1004(b) was discussed with mine management and the area beneath the highwall was barricaded and posted.

Section 104(d)(1) S & S Order No. 8158398, 6:00 p.m., February 4, 2010, 30 C.F.R. § 77.1713(a), states as follows (Ex. G-24):

> An adequate on-shift examination for hazardous conditions in the newly developed Morris Rider strip pit has not been conducted or recorded. The daily on-shift inspection book does not reflect that the obvious hazard that has existed in the pit since development began has been recognized. This is the 2nd occurrence of a violation of this standard during this inspection. It has been determined that it is reasonably likely a miner could be fatally

> injured by the hazard. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that six miners have been assigned to work in the strip pit and are exposed to an obvious hazard.

The order was modified on February 8, 2010, to add: "This violation is an unwarrantable failure to comply with a mandatory standard."

The order was terminated the day it was issued at 8:15 p.m. after compliance with Section 77.1713(a) was discussed with mine management and the hazards were identified and entered in the daily on-shift book.

MSHA Inspector Herbert A. Skeens testified that he has been a surface mine inspector for 19 years, with prior mining experience. He confirmed his MSHA training and he has served as an accident investigator, served as a miner training instructor, and has received training related to ground control. Prior to his inspector's job, he was a mine equipment operator cleaning and developing highwalls (Tr. 17-22).

Mr. Skeens confirmed that he issued Citation No. 8158391 (Exhibit G-2), and identified his inspection notes (Exhibit G-5), (Tr. 24). He confirmed that he had a pre-inspection conference with day shift foreman Ricky Boggs, and he identified Exhibit G-7, as a photograph of the conditions he observed. He stated that photo labels 1-3, is an open area approximately 200 to 250 feet from the toe of the highwall where he met Mr. Boggs and conducted the conference (Tr. 25).

Mr. Skeens stated he viewed the highwall from 200 feet away and stated that it was "in poor condition, or felt it was." He then moved closer and identified photo areas 2 and 3 as "some pretty prominent overhanging conditions and loose material that got my attention." He confirmed that he identified these conditions in the body of the citation. He testified to certain distances and stated "it's not a detailed description, but its telling you that's where the hazards are" (Tr. 25-26).

Mr. Skeens stated that he based his conclusion that an injury would be reasonably likely to occur from the highwall condition because it is an active pit and a haulage truck shown in the photo is coming into the pit entrance and would be exposed. He also alluded to tracks that he "thinks," or "maybe I didn't," were 10 feet from the highwall toe. He also alluded to tracks "right up to the toe, or right against it, which indicates that equipment has been over there working" (Tr. 27). He further stated that in order to remove all of the material that created the highwall "you have to have equipment and people in there in close proximity to it to actually remove the material and develop or strip the pit" (Tr. 27).

Mr. Skeens identified photo Exhibit G-8, labels 1-4, (1) a huge overhanging rock (2) overhang, with cracks, loose material, and "not very solid"(3) tracks at the toe that indicated that "somebody's been there at some point in time for sure that would be exposed to these hazards above them." He confirmed labels 2 and 3 in Exhibit G-8 match up to labels 2 and 3 in Exhibit G-7, as well as Exhibit G-9 (Tr. 28).

Mr. Skeens identified photo label A as icicles due to freezing and thawing as moisture collects in January that will loosen ground materials causing it to dribble (Tr. 28-29). He identified label B as overhangs "protruding from the face past vertical with nothing supporting it," and it is "likely to fall" (Tr. 30). Label C is described as loose material that was not scaled down and is likely to fall. However, it was not overhanging (Tr. 31).

Mr. Skeens further describes photo Exhibits G-10 through G-12 as close-ups inter-related to the previously described conditions (Tr. 34-36). He described photo Exhibit G-14 as the back of the active pit with a road against the highwall going to the drill bench where the pit was being enlarged, and confirmed that it was a different area of the highwall than the previous photo exhibits. He described the conditions as vertical fractures, overhangs, loose material, and hazards that existed "from one end of pit to the other." He identified label A as "tracks on the pit floor." Photo Exhibit 15, with labels A thru C are loose cracks, fractures, and loose materials (Tr. 37-38).

Mr. Skeens explained the process for developing the pit and highwalls, including the blasting and removal of materials and scaling and addressing hazards (Tr. 39-42; Exhibits G-6 and G-7). He also explained what the respondent could have done to abate the highwall conditions that he observed, including scaling the wall, using an excavator with a bucket or bulldozer to scrape and remove loose materials (Tr. 42-43).

In response to the question of what the respondent could have done to abate the hazards that he described in the citation at that point in time, Mr. Skeens believed that after drilling and blasting, the loose materials should have been scaled and removed as drilling continued to the solid bench and coal. However, although he had no knowledge what the respondent had done at that time, he believed the highwall hazards should have been addressed from the beginning of the pit development (Tr. 45).

Mr. Skeens believed the cited highwall conditions existed for three weeks based on the size of the pit, the available equipment, and working two shifts a day to reach the available exposed coal at this time. He stated that the jeep parked in photo Exhibit G-7, is parked on coal at the bottom of the pit and it extends horizontally into the mountain and has not been loaded out (Tr. 46-48). He confirmed that the citations were terminated after the area was barricaded, and the coal that is exposed cannot be mined unless the respondent decides to go back and start developing it again (Tr. 49-51).

Referring to photo Exhibit G-7, Mr. Skeens stated label 2 and 3 depicts the pit from front to back at the beginning of the development as shown in photo Exhibits G-l through G-15, which

reflect the hazards that created and existed as the pit was being developed. He described the hazards as a fatality from materials falling from the highwall (Tr. 51-52).

Mr. Skeens stated that the pit foreman stated that work started in pit area on January 21, 2010, seven days prior to the issuance of the citation. He explained that the area has been mined over a period of five years, and then abandoned and re-mined, and that it was possible that the pit conditions could have existed for five years. He confirmed that hazards will appear as the pit is developed (Tr. 53-54).

Referring to photo Exhibit G-10, Mr. Skeens stated that there was no way that it was feasible to scale that overhang down, and could have barricaded it to eliminate the hazard, or leaving a safety catch bench (Tr. 58-59). He confirmed that on the day of his inspection, he found one partial semblance of a safety bench and no barricades (Tr. 60).

Mr. Skeens stated that he had many conversations with day and night shift foremen and superintendents regarding his concerns about the highwall development practices and ground control plan during his mine visits. He confirmed that he based his high negligence and unwarrantable failure determinations on his belief that the cited condition was obvious to him as he drove on the property, and the respondent's history of the same violations and practices "that goes back. I can't give you the exact times, but right around ten years" (Tr. 65- 66).

Inspector Skeens confirmed that he issued Citation No. 8158392, and he identified a copy of his notes (Exhibits G-3, G-5). He stated that he concentrated on the spoil side of the pit and that it was obvious that nothing was being done to minimize the possibility of spoil materials rolling into the pit and that "stuff was actually dribbling off the face of the slope and it was not sloped" (Tr. 70).

Referring to photo Exhibit G-15, related to his order, he stated that label 4 depicts hazards that could roll into the pit and possibly injure someone. He pointed out a bulldozer that was constructing a berm barricade to abate the violation and to keep people away from the toe of the pile while loading and trucking material out of the pit. He confirmed that he observed this work when he issued the violation (Tr. 71-72).

Mr. Skeens identified photo Exhibit G-l 7-3, as void where material fell in the pit. He confirmed that the berm was constructed after the citation was issued, and he pointed out a front end loader and dozer on the coal and confirmed that the material at the toe had previously sloughed off and was not falling while he observed the work (Tr. 73-76). He stated that the material is loose and not compacted and sloped, but as mining progressed, the spoil pile toe was being removed and "it's gonna fall" (Tr. 76).

Mr. Skeens identified photo Exhibit G-l8 through G-22, as materials, cracks that represent separating fissures that he believed would slough off into the pit where he earlier observed miners working (Tr. 77-78). He believed the proper method to insure against the spoil

bank from dribbling was to safely slope the pile with a dozer or elevator. He did not observe any part of the pit being adequately sloped to prevent a hazard (Tr. 81).

Mr. Skeens confirmed that he previously discussed the ground control plan with "probably, Eddie, the safety director," or "somebody when we were talking about what needed to be done with the spoil bank," but "not to the extent about highwall development" (Tr. 81). He confirmed that he observed nothing on the day he issued the order, including looking at the photographs, indicating that the operator was trying to address or abate any spoil hazards, prior to his issuance of the order, and he could not recall that the operator informed him of their efforts in this regard (Tr. 82).

Mr. Skeens stated that he cited Section 77.1002, for the operator's failure to use effective measures to minimize the possibility of spoil rolling into the pit, rather than a violation of the ground control plan. He confirmed that the safety standard refers to box cuts, and he explained the process of developing box cuts while driving into the shot material (Tr. 82-86).

Mr. Skeens stated that he based his high negligence and unwarrantable failure determinations on "how obvious it is, by no efforts being taken to minimize the possibility of this spoil rolling into the pit." He also considered that material had already rolled into the pit "to some extent," and concluded that the foreman must have known about the conditions (Tr. 87).

Referring to the photo of the haul truck, Mr. Skeens stated that people were on the ground there "because we know they were over there when they were drilling or blasting, etcetera," and that the highwall drill was not equipped with falling object protection (Tr. 88).

Mr. Skeens confirmed that he issued Section 104(d)(1) Order No. 8158393, January 28, 2010, because the hazardous conditions were not recorded on the on-shift examination records (Exhibit G-4). He conceded that while he did not include or identify any hazards in his citation, his notes state that obvious hazardous conditions have been cited in the pit (Tr. 89).

Mr. Skeens stated "I probably wasn't specific enough in what those conditions exactly were." He explained that he was referencing his previous citation and order when he noted that those cited conditions were not identified, recognized or recorded in the mine book. He stated that he reviewed the on-shift examination book after issuing the initial citation and order, and examined it more closely to determine whether the foreman or mine management knew the violation existed, because the foreman had to conduct the examination and insure that hazardous conditions are recorded (Tr. 90).

Referring to his notes, Mr. Skeens read his notation "The violation existed since 1/21/10, when the pit was developed, "and he stated that he looked at the book" at least that far back, "but could not prove that any prior work was performed" (Tr. 91). He believed the foreman either was "very negligent "in conducting an examination and didn't see obvious hazards, or he recognized the hazards and blatantly was not going to record them, which was more than ordinary negligence (Tr. 92).

On cross-examination, Mr. Skeens confirmed that some of his photographs are close-ups of the same areas, and he confirmed that photo Exhibit G-7, labeled 2 and 3, are the same area as photo G-10, and he identified and clarified all of the photographs that may or may not refer to the same pit areas or conditions (Tr. 98-103).

With regard to photo Exhibit G-7, related to his citation, Mr. Skeens did not recall how many prior visits he may have made to that area. When asked of any prior visits regardless of whether it was an active or inactive area, he replied, "I don't know" (Tr. 103). He further explained that "it not being active, my focus was somewhere else. It's a possibility. But I don't recall going through that area" (Tr. 103).

Mr. Skeens confirmed that at the conclusion of his inspections he conducts an exit conference with management discussing any problems and issues. He confirmed that as a matter of procedure he makes an entry in his notes verifying the conference. A conference would relate to spoil pile and highwall safety and in at least 95 percent of his completed inspections, he would note that he held an exit conference (Tr. 103-107).

Referencing photo Exhibits G-9 and G-7, depicting loose materials, Mr. Skeens was asked whether the loose materials laying at the toe of the highwall, as shown in G-9, were there at all times other than what is shown in G-7. He replied "No", and confirmed that he found no more than is shown in G-7.

When asked if a highwall that had existed for two or more years would result in more loose dribbling materials, other than shown in G-7, he replied "in my opinion, they came through here with this equipment and removed any material that may have fell" (Tr. 107). He further explained that, "what's laying there probably fell off that wall," and confirmed that he had no knowledge as to whether other material may have fallen off the highwall because he was not there (Tr. 108).

Mr. Skeens reiterated that he based his high negligence finding on his belief that the conditions "were obvious and extensive hazards from one end of the highwall to the other end and from one end of the pit to the other, from the entrance all the way to the back end of it as shown in the photographs" (Tr. 110).

Mr. Skeens stated that he observed six people working the pit at the time he issued the citations and orders, and that they would be in a bulldozer, a hauler, and a front-end loader at the pit spoil pile and highwall areas, as shown in photo Exhibit G-16, and that all six would be exposed at some point in time if the wall would collapse. He agreed that whether or not all six would be exposed as a group at one time would depend on where they were located in the pit, and they are not all in the pit at one time. He confirmed that the number of people exposed to a fatality during a shift could be more or less (Tr. 111-114).

Mr. Skeens stated that he based his unwarrantable failure and highly likely findings (Order No. 8158392) on his observations and the photographs that he took. He stated that saturated materials had sloughed off the spoil pile into the pit and it is unstable and not sloped. He believed it was highly likely that the materials would injure someone and the cracks show that the material had moved and was still moving as he took the pictures (Tr. 115-116).

Mr. Skeens states the materials could have been pushed into the old pit from a previous cut or pushed over from the upper benches. He did not know how long the area had been mined and re-mined and stated that "it could have been there for a long time" but was not sure how long it's been there (Tr. 117). Mr. Skeens stated that photo Exhibit G-16 shows cracks at the top of the pile and in the roadway and shows that "something has been up there at some time" and that he, and possibly the foreman or safety director, were there while he was taking pictures. He confirmed that he was careful not to go into the hazardous area (Tr. 117-118).

Mr. Skeens stated that he based his high negligence and aggravated conduct of the foreman finding on the extent and obvious hazards on the spoil and his observations of material dribbling off the face of the pile but did not go close enough to the bottom of the toe "hunting for small things" (Tr. 120). He also considered that nothing was done to reduce the slope or stabilize the spoil bank, but conceded he did not cite the slope of the spoil (Tr. 121).

Mr. Skeens stated that the crack shown in photo Exhibit 19 was the result of shifting material when mining was done at the toe and material was taken out when a box cut was made (Tr. 123). He confirmed that he based his "highly likely" determination on the steepness, saturation, and movement of the spoil (Tr. 126).

On redirect examination, Mr. Skeens confirmed that he took a picture of the highwall (Exhibit G-7), and later circled the areas that he identified as hazardous, but did not take pictures of every hazard (Tr. 132). He also confirmed that his exit conferences consisted of conversations with different mine foremen on different shifts and not necessarily after a citation is issued (Tr. 133).

In response to bench questions, Mr. Skeens agreed that notes should be made to document that he discussed and put management on notice about the violations. He confirmed that his notes (Exhibit G-5 at 4) reflect that the foreman knew that the condition existed and that heavy equipment tried to take it down but could not bring it down. He agreed the foreman made an effort to address the hazard and conceded that he did not note any instances of any prior conversations he had with mine personnel. He stated that the citation itself documented the hazard and agreed that this did not document the fact that he discussed it (Tr. 133-137).

Eddie Clapp, respondent's safety director identified Exhibits R-l through R-10, as photographs of the highwall and spoil pile he took from January through March 2010. R-l and R-2 are photos of the highwall taken on January 28, R-3 through R-5 are photos of the highwall

taken on February 3, 2010, and photos R-7 through R-10 are photos of the highwall taken on March 2, 2010. Photo R-6 is the spoil pile opposite the highwall taken on February 3, 2010.

Mr. Clapp stated that he took the photographs in sequence to show that there was no movement from one date to the next of the spoil bank and highwall. He stated that the highwall area in photo R-l is the same wall shown in the petitioner's Exhibit G-7, and that the area has been moved on and off for the past several years, and that the upper part of the wall has existed for two years and was being removed at that time, and that they looked the same as they were when the citations were issued in January, 2010 (Tr. 139-150).

Mr. Clapp confirmed that he was familiar with the highwall area and that when the citations were issued the area was barricaded off at the center part of the pit and the coal was removed and no mining has taken place in that area since that time and the area has been completely filled in (Tr. 143-144).

Mr. Clapp agreed that mining, blasting, and abandonment of the mined out area would affect the stability of the highwall and spoil pile (Tr. 145). He confirmed that he observed the highwall for months after it was barricaded and observed no major rock falls or sloughing off the highwall or spoil pile other than dribbling the size of dirt, gravel, or small rocks, but nothing that would be catastrophic (Tr. 147).

In response to bench questions, Mr. Clapp confirmed that he has discussed the highwalls with Inspector Skeens "once or twice", and has informed him that attempts are made to scale the highwalls as they come down. He explained that areas that are "pitting out", as shown on the photographs are not necessarily hazards and on many occasions they are solidly in place and would not move when attempts were made to take them down by dozers and other equipment (Tr. 147-148).

Mr. Clapp stated that the standard Section 77.1004(b) refers to "overhanging highwalls", and not "overhangs" which he believes are a distinct difference. He stated that the highwall in issue is sloped back at least ten degrees and is laid back even more than a typical highwall of five degrees, and that "the farther up you get, the farther back the highwall is away from the pit area" (Tr. 148).

Mr. Clapp stated that the question of overhanging highwalls is a legitimate matter of opinion, and that he strongly disagrees with the inspector's belief that "a rock jutting out" is an overhanging highwall (Tr. 150). Mr. Clapp stated that the respondent has been in business since 1971 and has never had a major highwall or spoil pile failure or collapse that would cover up equipment. He has confidence in his mine foreman that safety is the ultimate goal and there has never been a fatality at the mine (Tr. 149).

Mr. Clapp stated that there are highwall areas "where we have taken and shown teeth mark on rocks where we've tried to pry them loose" and that it made no difference and the inspector still considered it an overhanging highwall (Tr. 150). Mr. Clapp guessed that prior to

January 10, 2010, the respondent may have been issued one or two citations for the standard cited in this case in other areas, and that the area cited in this case was a relatively new job with a new foreman (Tr. 151).

Richard A. Boggs testified that he has 36 years of strip mining experience and has worked for the respondent for 23 years and was the job foreman when the citations were issued on January 28, 2010. He confirmed that he was assigned to that particular job a month earlier in December after the prior foreman retired (Tr. 153).

Mr. Boggs stated that he discussed the citation with Inspector Skeens at the bottom of the wall shown in photo Exhibit G-7, after he took his pictures. He stated that attempts were made to remove materials at the location show by #2 on the photo, and Exhibit R-l. He stated that the wall was an existing wall that was there two years before he started excavating the material, and that attempts to take it down with a loader and dozer could not take it down because it was solid (Tr. 155).

Mr. Boggs further explained that the area in question was higher than the existing bench level shown in the photos and that material had to be pulled down in order to reach the rock but it would not budge, as shown by the marks on the rocks. With respect to the #2 and #3 areas on Exhibit G-7, he confirmed that nothing was done to remove the pre-existing stumps (Tr. 157).

Mr. Boggs stated that he regularly inspected the areas periodically five or six times daily during his shift and never observed any material fall while he was working there and never observed any movement of the wall, including six months after the citation was issued when he passed the wall on a daily basis. He confirmed that the area has been backfilled (Tr. 158).

Mr. Boggs confirmed that he had a conversation with the inspector about the spoil pile, and that he told him that the pile was not sufficient and too high to be working on it. Mr. Boggs stated he observed nothing out of the ordinary, no failure of rock, and that the pile was sloped and not vertical, and there was some rock formation under it to hold it (Tr. 159).

Mr. Boggs stated that he and the inspector walked on the top of the pile and that he observed some cracks pointed out to him by the inspector. Mr. Boggs did not believe that posed a hazard and he pointed out tractor tracks that may have been on a road during a prior cut that had been made and before the recent cut was taken and before the coal was mined (Tr. 160-161).

On cross-examination and referring to photo Exhibit G-16, Mr. Boggs explained the process of drilling and taking the cuts shown, and he identified label 4 where the last cut was taken moving from the front to the back from where the photo was taken. He described the surface work area to be solid ground where the drill had operated to reach the coal. After the material was blasted, it was moved out of the pit. He agreed that the process loosens any spoil materials and that the equipment used would be a dozer, and two front-end loaders and two trucks (Tr. 162-167).

Referring to photo Exhibit G-13, Mr. Boggs confirmed that it was part of the high wall that he and the inspector discussed. Petitioner's counsel pointed out that the inspector testified that photo label B was an overhang, that C was loose and unconsolidated material, and that D were vertical cracks, all of which he concluded were hazardous conditions and that the wall was not in a safe condition. Mr. Boggs agreed that the photo was of the wall that he and the inspector were looking at, but he did not agree that the conditions identified by the inspector were hazards that affected the stability of the highwall (Tr. 169-170).

Mr. Boggs explained that he considered highwall hazards to be obvious conditions such as moving materials or large cracks and overhangs that are cracked from behind, loose materials or trees above the wall, that are obvious to anyone looking at the wall. He did not believe that the sandstone rock formation in issue that had existed for a minimum of two years without falling, and six months later when he checked it daily, to be an obvious problem, and if it was, he would have bermed it off (Tr. 170-172).

Mr. Boggs stated that he would have recorded an obvious overhanging large rock 6 to 8 feet over a pit area in his on-shift book, and that he currently noted an area that was noted but could not be taken down by a loader or dozer, or blasted out, and he bermed it off and stayed away from the area (Tr. 172).

Mr. Boggs confirmed that he did not berm off the large rock noted by the inspector in Exhibit G-7-2, even though it could not be taken down, because he did not believe it was a hazard and the bench below would provide protection from anything falling from above. He also confirmed that all highwall hazards are scaled or pulled down when they present a problem (Tr. 173-175).

Mr. Boggs could not recall any conversations with the inspector related to continued unsafe highwall practices. He explained that he was a night shift foreman for eleven years and worked on reclamation construction for three to four years. He previously met the inspector, but was never previously issued any citations from him, and never spoke to him prior to the citation he issued in this case about any need to do a better job with highwalls or spoil piles (Tr. 176-178).

On re-direct examination, Mr. Boggs identified the series of benches that are created as materials are being scaled down and they serve to prevent scaled materials from falling below and the materials in the bench are left in place if they cannot be reached and scaled down (Tr. 185-186).

Gary Ring, mine second shift superintendent and night shift coordinator, has served in those positions for seven years, and has been employed by the respondent for twenty-three years. He is a licensed foreman since 1976, and has served as mine foreman since 1999. He recalled when the citation was issued in the wintertime when it was "wet and nasty." He recalled that a portion of the highwall in question had existed for one to two years prior to the issuance of the

citation and before the respondent started removing coal and that the lower portion was created within weeks. He identified the lower portion as the Humphreys 2 strip mine (Tr. 189-193).

Mr. Ring stated that in his opinion as an experienced supervising foreman, he did not believe the job foreman was negligent at all for leaving the cited area the way it was when the inspector found it because the area that he cited was barricaded and before it was barricaded it was obvious to him (Ring) that there were no hazards (Tr. 194).

In response to bench questions and after reviewing photo Exhibits G-7 through G-9, with the numbered labels which the inspector labeled as hazardous conditions, Mr. Ring stated it was the same cited highwall which is no longer in existence and he stated that "I can see nothing there that would have fallen or created a problem." He stated that he saw no loose materials or overhangs in the photos and that the wall consists of a rock structure with different rock formations (Tr. 195-196).

James R. Jones, testified that he is a professional engineer registered in Virginia, Kentucky, and West Virginia, and has been practicing for 40 years. He is employed by the Red River Coal Company, owned by the respondent, and is a graduate of Virginia Tech University.

Mr. Jones identified Exhibits R-l 1 through R-13 as drawings prepared by his staff under his supervision. The drawings represent the overall pit locations on the respondent's surface mines, as surveyed by a two-man survey crew and the highwall and spoil sections that are at issue in this case. He explained the different computations and locations, including the elevations and slopes for the areas surveyed. He explained that the highwall section included bench cuts and depending on the angles of measurements, the highwall was sloped at 72 to 75 degrees, and that it was "definitely sloped with a bench between the two walls" (Tr. 201-203; Exhibit R-12). He further confirmed that the spoil pile was also sloped and depending on the line of sight, it was sloped from 51 to almost 40 degrees (Tr. 203-204; Exhibit R-13).

On cross-examination, Mr. Jones stated that the pit surveys are dated about the dates the orders were issued and the last survey date is shown as 2-11-10, and the survey crew was instructed to find a safe place to look at the wall that would be representative (Tr. 204-205).

Inspector Skeens confirmed that he issued 104(d)(1) Order No. 8158396 on February 4, 2010, at the Morris Rider Strip pit, after observing a highwall in "extremely poor condition" (Tr. 212; Exhibit G-23). He described the general conditions of the highwall he noted on the face of his order and described a bench that was left approximately 20 feet above the coal seam. He commented that anybody could plainly see that the highwall was in terrible condition (Tr. 212-214).

Mr. Skeens confirmed his inspection notes and identified photographs that he took when he issued the order (Exhibits G-25 and G-26 through G-31). He described the areas labeled 1 and 2 on Exhibit G-25 as overhangs, and No. 3 as loose materials that had been blasted and left.

Exhibit G-27-2, is the same location as G-26-2, and G-28, is the same wall from a different angle (Tr. 215-217).

Mr. Skeens stated that the loose material shown in Exhibit G-29-A, "probably came off the highwall and you can see tracks from rubber-tired equipment that's been working in that area" when the overburden was removed and hauled out during the development of the highwall. He stated that work would have been performed at that toe of the wall. He believed the highwall itself was the hazard and the exposure was the fact that work had to be performed there (Tr. 218-219).

Mr. Skeens explained that work would have been performed at the top of the wall loading materials with a loader bucket and loading it on a haul truck. All of the materials were part of the overburden that covered the coal that had to be removed to expose and mine the coal, and the exposure would be miners removing the overburden, rather than scaling the wall (Tr. 221-223).

Mr. Skeens stated that photo exhibit G-30, was taken to show that the material "is shot to pieces and there's not much there that could be called a solid highwall". He believed "the whole thing's a hazard in its entirety" and that it was not scaled and simply left. He confirmed that the material fell out of the top of the wall to the bottom as the overburden was being removed. He explained that all of the material would have to be removed to reach the coal and he pointed out the front-end loader in the picture whose tires "are probably running on the coal" and the operator was advancing further around the corner to clean up the materials (Tr. 225).

When asked if the loader operator would be at the bottom of the wall given the conditions shown in the photograph, he stated that "at some point in time a loader or a machine that somebody has come through there and removed that material, and they were exposed to those hazards when they did (Tr. 225-226).

Mr. Skeens speculated that it was "a good possibility" that all of the accumulated material shown in the photograph was the result of the highwall collapsing, and it was also "possible they just didn't clean it up as they went like they should have" (Tr. 226). He confirmed that in the absence of any hazard, or work taking place, the material could be left in place, but the common practice is to remove it all when it's close to the coal (Tr. 227).

Mr. Skeens stated that photo Exhibit G-30, is from a point looking into the pit close to the entrance and that in order to access the work area people would have to pass the highwall, as the loader did when material was removed. Referring to photo Exhibit R-31, he stated that the truck shown was at the approximate entrance of the pit and would be traveling past the highwall on its way into the pit, and it would be exposed to the vertical strata fractures. He confirmed that he did not speak to any truck driver or loader operator while he was at the pit (Tr. 228-229).

Mr. Skeens confirmed that he observed trucks passing in and out of the pit and that the highwall conditions he observed extended for a distance of 138 feet from the pit entrance into the pit. He did not determine the distance between the tracks and the highwall conditions, but the

loader would have been under the highwall (Tr. 230-232). He stated that trucks passing in and out of the pit area would be within 15 to 20 feet of the highwall and that the tracks shown on Exhibit G-29 are probably 15 feet from the highwall (Tr. 236-237).

Mr. Skeens explained that the vehicle tracks reflect that someone had been working in the area at some time immediately under the highwall removing the overburden, but that no one was there at the time he took his pictures. He believed it was highly likely that the conditions he found would result in injury to miners. He estimated that it takes "at least a couple of shifts, to move that amount of material, and it could have been longer" (Tr. 239-240).

Mr. Skeens stated that after issuing the order he reviewed the mine on-shift examination book and found no recording of any hazards, and that the Order No. 8158398 that he issued reflects that an adequate examination was not made (Tr. 241; Exhibit G-24). He conceded that the order does not identify the hazards that prompted him to issue the order. He further explained that he included the photos with his notes when he turned them in to his supervisor, but did not give them to the respondent. He further confirmed that he did not identify any hazard details in his notes other than his comment that the highwall "is in an obviously poor condition" (Tr. 243).

Mr. Skeens confirmed that his notation "the foreman had every reason to know a violation exists, especially after being cited on January 28, 2010," related to a different highwall location that he cited. He confirmed that both violations involved the same day and night foreman and he considered this when he made his high negligence determination. He further stated that he saw no indication that anything had been done "to make that what would be considered a good highwall" and saw no evidence of any attempts to scale the highwall (Tr. 243-247).

On cross examination, Mr. Skeens agreed that all of the highwall materials he observed was the result of blasting that had occurred, and confirmed that it initially came to his attention when he observed it from a distance of 200 feet at a location where he was checking a haulage truck. He explained that he had observed the truck and signaled the driver to come to him at a location away from the highwall, and he did not notice any problem at that time. The truck was in the pit and not at the base of the highwall (Tr. 248-251).

Mr. Skeens confirmed that both of the orders were evaluated as "probably likely" and not "highly likely" as he previously testified (Tr. 253). He could not recall reviewing four photo exhibits submitted by the respondent to MSHA's counsel that depict a wider travelway area than those shown in his photographs because he was concentrating on the conditions of the highwall (Tr. 254).

Mr. Skeens stated that the front-end loader had to be at the toe of the highwall to remove the material. However, he conceded that in the area of photo Exhibit G-29, the material is loose on the ground with no loader there and that the actual work taking place when he was there had moved beyond that point. He believed that in the normal course of mining a loader would return to the area to clean the material and haul out the coal and if he did not issue the citation that

would have happened. He could not recall anyone telling him that they would come back from the other side of the highwall (Tr. 256-257).

Referring to photo Exhibit G-30, Mr. Skeens confirmed that the loader that appears to be up against the loose material is actually around the corner and on the other side of the material. With regard to the haulage truck which appears to be close to the highwall in photo Exhibit G-31, he estimated that it was actually 15 to 20 feet from the toe or base of the highwall. He could not recall returning to the area after he issued the citation (Tr. 258).

Referring to Exhibit G-30, Mr. Skeens stated that he did not know whether the loose rock materials on the ground were blasted out, rather then sloughing off, and it appears "that they've been coming down through there and they've actually left it laying there". He concluded that work was definitely performed at the toe when the overburden was removed (Tr. 262)
.

Eddie Clapp, respondent's safety director, identified photo Exhibits R-l through R-4 as pictures he took the morning after the citations of February 4 were issued. The photos show the roadway used by the haulage trucks. The width of the travel way is three hauler-widths wide. A hauler is 30 feet wide and the roadway is approximately 100 feet wide. He confirmed he was not present when the inspector was there (Tr. 274-275).

On cross-examination, Mr. Clapp confirmed that the area shown in photo R-l was barricaded off the same evening the order was issued. He did not know whether the material shown was blasted off or sloughed off the highwall (Tr. 276).

In response to a bench question, he stated that the haulage truck shown in photo Exhibit R-3 is 50 feet from the wall and that the barricade was 30 feet from the wall. He confirmed that the barricade is constructed with berm material (Tr. 276).

David Mead, respondent's retired foreman, testified he was the evening shift foreman when the citations of February 4, 2010, were issued and that Ricky Boggs was the day shift foreman. He stated that the material shown in photo Exhibit G-29 came off of the highwall after it was blasted when the area was being widened out for more work space (Tr. 277-278).

Mr. Mead identified photographic Exhibits R-l through R-4 as the area where he would have been working after it had been barricaded off and after the area was stripped. He confirmed that work was taking place around the area. Referring to photo Exhibit G-29, he stated that rubber-tired equipment could not run over the loose material because it would damage the tires and he could not see a tire mark in the photograph (Tr. 279-281).

On cross-examination Mr. Mead confirmed that his night shift was working in the area to clean up and remove the material to establish a wider place to work. He stated that the area behind the barricade was shut at a later time and the coal was taken out and he returned shortly after that time (Tr. 282-284).

Garry Ring, second shift superintendent and night shift coordinator, testified that the loose materials shown in photo Exhibit G-29, is material that was left after the coal area was cleaned and the area was being widened and would have been shot in the future and there was no reason to take the materials out. The material was the result of blasting and after the material is "trucked out" it was picked up to make room to work. He explained that the area was drilled, blasted, and cleaned up at a later time (Tr. 286).

Mr. Ring stated that the material was blasted from the top at some point in time after the citation was issued and it was in the plan all along in order to make room to work. The area was never intended to be left as a highwall because it was at a smaller scale of a large mountain that needed to be taken out piece-by-piece in order to establish a working place to blast and bring in equipment to work (Tr. 287).

He confirmed that Exhibit G-29 depicts the remnants of a blasted area and it is material that has been shot and there was no point in trying to clean it up because coal was going to be loaded in the area. The wall was never scaled because the area was part of a drill bench and it is a face of a drill bench and "not really a highwall" (Tr. 289).

Mr. Ring confirmed that haul trucks were traveling the roadway shown in Exhibit R-l and everyone was staying away from the materials before the inspector barricaded the area. He confirmed that no hauling was taking place in the area shown in Exhibit G-29, because there was

no point in cleaning it up until it was ready to be blasted and there was no reason for anyone to travel that area when the roadway shown in Exhibit R-l was available (Tr. 290).

On cross-examination, Mr. Ring explained the process for drilling, blasting, and cleaning out the material as the drill benches are established. He explained that the blasted materials will "kick out" 40 or 50 feet and it appeared from Exhibit G-29, that a loader came in and picked up some of the material and did not try to get under the wall and just stayed away from it (Tr. 291-292). He stated that the material shown in Exhibit R-l was barricaded or bermed off after the order was issued. He identified the right side of the drill bench where the bulldozer in the photograph as shown is more than 40 or 50 feet beyond the highwall (Tr. 294). He identified the material below the bulldozer as blasted material and stated that the wall behind the dozer where it was working is not shown in the photo and is not the wall shown in the photo (Tr. 296-297).

Discussion and Findings and Conclusions

Docket No. VA 2010-310

Section 104(d)(1) S & S Citation No. 8158391

The respondent is charged with a failure to take down an allegedly unsafe highwall. The alleged conditions cited in the order may be summed up as follows:

> The cited highwall is in "poor condition".
>
> The presence of overhanging materials in areas from 30 feet, and up to 100 feet, above the pit entrance and haulroad protruding from the highwall face two feet to four feet, and two feet to three feet in length. Vertical fractures in the strata leave the highwall unstable.
>
> Overhanging areas exist above the active pit area, and protrude from the highwall face two to four feet, and are two to three feet in length.

The inspector confirmed that he had not previously inspected the area shown in Exhibit G-7, and with the exception of the general location he described, the citation does not specifically describe the alleged hazardous areas affected or the nature of the hazardous materials. The inspector's notes reflect what is reflected in the citation (Exhibit G-5 at 3-4).

In support of the alleged violation, the Secretary introduced nine (9) photographs taken by the inspector on the day he issued the citation (Exhibits G-7 to G-15). The inspector enhanced the photographs by marking them with a total of seventy-three (73) circled alphabetical and numerical "indicators" that he marked after he took the photographs to support his opinions that they constituted hazardous materials. None of the photographs were provided to the respondent when the citation was issued, nor were they incorporated by reference as part of the citation. The respondent introduced photograph Exhibits R-l through R-10 in support of its defense of the violations at issue in these proceedings. Exhibits R-l 1 and R-l2 are engineering pit specifications.

I find that the failure to clearly describe with particularity the nature of the alleged unsafe conditions as part of the citation presents difficult credibility and surprise issues, as well as a prejudicial lack of basic reasonable notice, particularly in this case when the citation was issued approximately two years before the hearing.

The explanatory testimony of the inspector with respect to the photographs reflects they are interchangeable and duplicate close-ups taken from different angles (Tr. 24-38). The inspector confirmed that photograph exhibits G-12 is a different area to the right of the area described in his

citation (Tr. 32-33), and that Exhibit G-14 depicts a different section of the highwall at the back of the pit area (Tr. 36-37).

The inspector confirmed that photograph Exhibit G-7, marked with locations #2 and #3, identify the conditions he cited in support of the citation (Tr. 25-26; 44). Accordingly, I find that the focus of his concerns were limited to that area. I note that the vehicle parked at the base of the highwall below those areas was identified as the inspector's vehicle (Tr. 137-138)

Photographic Exhibit G-7, #2, depicts the large rock, shown in the enlargement close-up Exhibit G-10. The inspector testified that on the day he took the photographs, there was no feasible way to scale or bring the rock down (Tr. 58-59). The inspector's notes reflect that Foreman Boggs informed him that "heavy equipment pried on the material but was unable to bring it down" (Exhibit G-5 at 4).

Foreman Boggs, the job foreman at the time the citation was issued, with 36 years of strip mining experience, testified credibly that the wall shown in Exhibit G-7, and Exhibit R-2, was an existing wall that was there two years before excavation work started and that attempts to take the rock down with a dozer and loader would not pull the rock down because "it wouldn't budge. I mean, it was solid" (Tr. 155-156).

Safety Director Clapp confirmed that the wall shown in respondent's Exhibit R-l, and Exhibit G-2, existed for two years prior to the development of the pit (Tr. 143). He confirmed that after the citation was issued and the area was barricaded, he observed the highwall for months, and saw no major rock falls off the highwall, and basically it stayed intact until it was backfilled (Tr. 146).

Mr. Clapp stated that Section 77.1004(b) refers to "overhanging highwalls" and not "overhangs". He was of the opinion that there is a distinct difference in the two terms, and that the cited highwall was sloped back about 10 degrees and laid back even more (Tr. 148). I take

note of the fact that *Dictionary of Mining Mineral, and Related Terms*, 781 (U.S. Dept. of the Interior, 1968) , defines "overhang" as "Projecting *parts* of "a face or bank" (emphasis added).

With regard to the loose rock shown at location #3, Exhibit G-7, it would appear that the material is intact and in repose in an area that may not be within the reach of any heavy duty scaling equipment. In this regard, the inspector agreed that in the event an area cannot be reached for scaling, a safety catch bench would provide protection.

The inspector testified that the area marked #2, Exhibit G-7, "looks like a semblance of a safety bench" and that there is "a small area that you can technically say is a bench". However, he believed it was "not enough of an area to protect against a potential fall from the #3 area above" (Tr. 60). Although he expressed this concern, I find it significant that he did not cite the respondent for a violation of Section 77.1003, regarding the width and height of benches.

Foreman Boggs testified credibly that he examined the area in question five or six times a day while he was working there (Tr. 157). He confirmed the area was backfilled, and that for a six month period after the violation was issued, he observed the area daily and observed no evidence of any movement (Tr. 159).

Mr. Boggs further testified that while attempts were made to pull down the materials at location #2, Exhibit G-7, and respondent's Exhibit R-2, in an effort to take down any problem materials at that location, there was a bench at that location approximately 10 to 12 feet wide above that location. (The bench area is clearly shown in respondent's photographic Exhibits R-l and R-2, and R-7.)

I find no credible evidence that the inspector observed any work taking place that would have exposed anyone to any hazardous conditions. Further, he conceded that he could not prove that any work was performed there prior to the issuance of the citation (Tr. 91). Although he observed "a bulldozer and front-end" loader constructing a berm barricade, that work was being performed to abate the citation after he verbally informed the foreman that he would issue it (Tr. 71-73).

I credit the testimony of Foreman Boggs that the cited loose rock conditions, and in particular the large rock that could not be taken down were not hazardous. I further credit his testimony that the existence of the bench that he described provided adequate protection to prevent falling materials from above. I conclude and find that the Secretary has not established by a preponderance of any credible evidence that the cited condition constituted unsafe ground conditions that required it to be corrected or posted. Accordingly, Citation No. 8158391 IS VACATED.

Section 104(d)(1) S & S Order No. 8158392

The respondent is charged with an alleged violation of 30 C.F.R. § 77.1002, for allegedly failing to take necessary precautions to minimize the possibility of spoil material rolling into the pit. The cited standard requires such precautions when box cuts are made.

The order states that the pit spoil bank was approximately 70 feet in height for a distance of approximately 500 feet, and that a bench was cut in the spoil approximately 20 feet below the top, leaving spoil material 50 feet in height above the pit. The spoil conditions are described as follows:

> The material is saturated and has not been sloped or compacted. Cracks in the bench run horizontal and parallel to the pit from settling of the materials.

> The spoil has sloughed off into the pit in *some areas. Some material* has been observed dribbling into the pit (emphasis added).

I take note of the fact that the cited standard Section 77.1002 only requires "necessary precautions" to "minimize" spoil spillage into the pit. The use of the word "minimize" infers that while spoil spillage will occur during the mining process, it should be controlled as necessary. The question of what may be reasonably "necessary" to comply with the standard is a matter of an opinion or judgment call that must be considered and decided after weighing and balancing the testimony of the inspector and the pit foreman.

In support of the alleged violation, the Secretary introduced seven (7) photographs taken by the inspector when he issued the citation (Exhibits G-16 through G-22). Although the Secretary's index of hearing exhibits reflects that photograph Exhibits G-14 and G-15 are associated with Citation No. 8158391, counsel confirmed that they also relate to the cited spoil pile, Citation No. 8158392 (Tr. 102). The inspector enhanced the photographs after they were taken by marking them with twenty three (23) alphabetical and numerical "indicators" to support his opinions that they were hazardous materials. The photographs were not provided to the respondent when the order was issued, nor were they incorporated by reference.

Referring to photograph Exhibit G-16, a view from the top of the spoil pile to the toe while he was at the top with his rule, the inspector confirmed that he was concerned about the edge of the spoil bank that had fallen to the bottom (Tr. 118). However, he did not photograph or go to that area to examine the materials on the ground "hunting small things" (Tr. 119-121).

With respect to his photograph references, the inspector stated photographic Exhibit G-17, "A" - "3", shows where "some sloughage" had occurred and was "at rest at the angle of repose" (Tr. 76). Exhibit G-18, #2, reflects where the material "had sloughed off and failed to some degree" (Tr. 77). Exhibit G-19, reflects some cracks he observed when he walked across the top of the pile that had separated and the ground had settled (Tr. 77). He was unsure whether photograph Exhibits 19 and 20, were at different locations and could not confirm the location, other "than it's up on top of the spoil bank, and were "representative examples" of separating fissures" (Tr. 78). He further stated that Exhibits G-21 and G-22 were at different locations, and he basically used a rule "to kind of put it at scale, how much the ground had moved" (Tr. 78). The "rule" shown in the photographs show separations of 4 to 5 inches.

The inspector believed that in order to insure the spoil bank did not spill into the pit, it would have been possible to slope the pile with a dozer or excavator (Tr. 79 - 80). He stated that when he issued the order he observed nothing that the respondent had done to address the spoil bank hazard, and that when he reviewed his photograph, he observed no positive spoil bank safety, and confirmed that he did not cite a violation of the ground control plan (Tr. 82).

Although the inspector observed ongoing work while he observed the spoil pile, he confirmed that it was being done to construct a protective berm in order to abate his previously

issued violation (Tr. 71). Further, although he believed that nothing had been done to reduce or stabilize the spoil pile, and did measure or cite the slope angle, he nonetheless stated that "it plays a hand", and "if its sloped the way it should be, the stuff wouldn't be rolling in the pit" (Tr. 121). He also believed that if the slope angle was 45 degrees or less, the likelihood of materials rolling into the pit would be "pretty slim", but a "round enough rock could roll" (Tr. 122).

The inspector stated that the spoil bank was created when the materials from the existing highwall were pushed into an old abandoned pit that had piled up and created the spoil bank (Tr. 79). He could not recall being told about what was done to address that situation (Tr. 82). He did not know how long the pile had existed (Tr. 117).

Foreman Boggs, who was in the cited area before and after the work was completed, testified credibly that when he was called to the pit area to speak with the inspector about the problem, the inspector informed him "the overhangs and stuff wasn't to his standards and he didn't like the looks of them" (Tr. 154 - 155). Mr. Boggs further testified credibly that when he spoke to the inspector about the spoil pile, the inspector informed him that "he looked at it and said it was too high for us to be working under it" (Tr. 159). Mr. Boggs stated that he observed nothing out of the ordinary, no failure of rock, and there was a rock formation underneath to hold it.

Foreman Boggs further stated that he and the inspector walked to the top of the pile, and although the inspector pointed out some cracks, Mr. Boggs did not believe they would result in anything falling and that the tracks shown in Exhibit G-16, were from a travel road that had been used prior to the cut that was made to access the coal, and that he had previously been in that area (Tr. 160). He believed the "greyish area" shown to the left of the photograph was at a prior cut area and it was on a solid rock formation (Tr. 164).

Foreman Boggs explained the process taking place when box cuts are made in order to remove the spoil above the working area shown in photograph Exhibit G-16, #4, that is the location of the spoil pile at the base of the wall where the cut was started, including drilling, blasting, and scaling. He conceded that while spoil materials laying on top of rock would be somewhat affected and loosened, during his shift examinations he looks for any cracks or falling materials on the spoil side of the wall (Tr. 169).

The respondent's ground control plan provides for a ground slope of 45 to 60 degrees, a maximum height of 250 feet for deposited spoil, and a maximum 50 degree angle of deposited spoil when box cuts are made (Exhibit G-6). The order states that the spoil bank was 70 feet high, leaving a bench 20 feet below, with spoil material 50 feet above the pit. That pile was well below the 250 foot maximum allowable height.

The respondent's registered engineer James Jones identified and explained the highwall and spoil pile survey drawings made under his supervision the day after the order was issued (Exhibits R-l 1 - R-13); (Tr. 198 - 205). He testified credibly that the highwall "was definitely

sloped, and there was a bench between the two walls. Slope and then a slope." (Tr. 203). He confirmed that the spoil pile was also sloped, and that depending on the viewing angle, the slope angle "would be 51 degrees, or about 39 degrees, or almost 40 degrees" (Tr. 204). I conclude and find that the spoil pile complied with the relevant ground control plan.

The inspector's arrival at the pit spoil pile area on the day he issued the order was his first visit to that area. He testified he formed an opinion that nothing was done to address the alleged spoil hazardous condition when he first observed it from the pit ground level. He further stated that he confirmed that opinion after taking and reviewing his photograph that showed "no spoil bank safety" (Tr. 82). There is no evidence that he measured the angle of the spoil pile.

When asked what would be necessary to achieve spoil compliance, the inspector believed it was possible to slope the pile with a dozer or excavator (Tr. 80), and that the spoil should have been sloped "the way it should be" to prevent materials rolling into the pit (Tr. 121). He further believed that with a slope angle of 40 degrees or less, the likelihood of spoil rolling into the pit would be "pretty slim" (Tr. 122).

The credible testimony of Engineer Jones reflects that the spoil angle could be at an angle of 30 to 40 degrees depending on the direction from where it is observed, placing it at a slope angle below the 45 degree angle the inspector believed would present a slim likelihood of spoil materials rolling into the pit.

I find that Foreman Boggs, with 36 years of strip mining experience, his familiarity with the highwall and spoil areas in question during his inspections of the areas on a daily basis, and his explanations of the box cut process that included drilling, blasting, scaling, and the removal of spoil materials, to be more credible than the inspector who I find was not as familiar with the area as the foreman, and had no first hand knowledge concerning the work that may have been done, or the ground conditions that may have existed at that time.

I further credit the foreman's testimony that his shift examinations included looking for cracks or falling materials that would present a hazard problem (Tr. 169), and that when he and the inspector were at the top of the pile, he observed the relatively small cracks and they were on a solid rock formation.

Based on all of the foregoing circumstances and findings and conclusions, I find that the foreman had no perceptible reason for addressing the spoil pile or believing that any corrective action was necessary. Accordingly, I conclude and find that a violation of Section 77.1002, has not been established by a preponderance of any credible evidence and the Order IS VACATED.

Section 104(d)(1) S & S Order No. 8158393

The respondent is charged with an alleged violation of 30 C.F.R. § 77.1713(a), for an alleged failure to conduct an adequate on-shift examination for hazardous conditions and recording those conditions in the daily on-shift mine inspection book.

The inspector's order does not specify or describe the alleged hazardous conditions that he believed should have been discovered and recorded in the mine books. The order simply refers to "obvious hazards". The inspector conceded he did not identify the "obvious hazards" (Tr. 67). When asked to explain the hazards, he responded, "The obvious hazards, part of them, are just what we've discussed" (Tr. 68). The inspector made reference to his notes (Exhibit G-5 at 10), where he states "obvious hazardous conditions have been cited in the pit". He explained that the previous two issues cited in his citation and order in these proceedings are what he had in mind as the conditions that were not identified, recognized, or recorded in the mine book. He conceded "I probably wasn't specific enough in what those conditions were" (Tr. 89).

In its post-hearing brief, the respondent argues that the order issued by the inspector did not identify the alleged hazardous conditions or their locations except to state "in the pit". The respondent further states that the inspector relied upon his field notes to provide this information and that the notes were not served on the respondent (Resp. Br. at 14). The Secretary's brief does not address this issue.

I take Judicial Notice of MSHA's Handbook Series, Number PHO 8-1-1, March, 2008, at 2, concerning accuracy in writing citations and orders, and in particular the use of "assumptions or suppositions not based on evidence of facts", and "failure to specifically describe the area of danger or area affected", with the following admonition:

> The description of a violation must be written in such a manner that all parties know the true nature of the situation. The descriptive narrative must include information that clearly establishes a violation and describes with particularity the nature of the violation. The proposed civil penalty prepared by the Office of Assessments is determined, in part, by information contained in the citation or order.

On the facts of this, I conclude and find that the order issued by the inspector was not in compliance with MSHA policy. I further conclude and find that the Order was a "stand alone" order that unfairly fails to describe or otherwise specify the nature of the alleged hazardous conditions that formed the basis for the order, to the prejudice of the respondent. Accordingly, the Order IS VACATED.

Docket No. VA 2010-358 (Tr. 210-301)

Section 104(d)(1) S & S Order No. 8158396

The respondent is not charged with a violation of its ground plan filed pursuant to Section 77.1000(a). The inspector issued the violation pursuant to Section 77.1004(b) that requires taking down of *overhanging highwalls and banks, and the prompt correction of other unsafe ground conditions* (emphasis added). The standard provides a compliance exception if the area is posted.

The alleged conditions described on the face of the order may be summed up as follows:

> The *bench* area beneath the 50 foot highwall "is in poor condition" in that a *bench* was left approximately 20 feet above the coal, in that drilling and blasting has taken place too close to the highwall to leave an "adequate safety bench" (emphasis added).
>
> The strata in the existing 20' highwall above the strip pit is cracked from top to bottom throughout over a distance of 138 feet from the pit entrance into the pit. Some of the cracks appear to be 4" to 6" wide.
>
> The highwall has not been scaled and overhanging material has been left on the highwall resulting in unconsolidated material 20 feet above the pit floor.

The inspector modified the order four days later on February 8, 2010, by adding a sentence stating "This violation is an unwarrantable failure to comply with a mandatory standard". He did not modify his "reasonably likely" gravity or "high" negligence findings noted in his initial order.

I take note of the fact that while Section 77.1004(b) does not specifically include a bench as an area that requires complete removal, it may be considered as an "other unsafe ground condition" that requires correction. Further, although the order describes the highwall height at 50 feet, it states that the existing 20 foot highwall was cracked from top to bottom for a distance of 138 feet from the pit entrance into the pit, with no further explanations. Considering these alleged hazardous conditions, I find it significant that the inspector determined the gravity level as "reasonably likely", rather than "highly likely" (Tr. 253).

I find no evidence to support any reasonable conclusion that the highwall was overhanging in violation of the first requirement in Section 77.1004(b) that requires correction by taking such a highwall completely down. The order states that the highwall was "in poor

condition", and the inspector determined the gravity level as "reasonably likely" rather than "highly likely" (Tr. 253). Although the inspector noted several locations in the general pit area where he observed overhanging "areas" and "materials", he failed to describe with any particularity any of the alleged hazardous materials, except for a reference to a strata crack 4 to 6 inches wide.

The second requirement found in Section 77.1004(b) in issue in this case is whether the highwall materials photographed by the parties were in fact unsafe ground conditions that were not promptly corrected and placing working miners at risk.

With respect to any likely hazardous materials exposure affecting miners, the Secretary relied on the photographs taken by the inspector and his supporting testimony (Exhibits G-26 to G-31). In this regard, the inspector confirmed that he observed no one working immediately under the highwall when he arrived at the scene on the day he issued the order and that this was his first visit to that area (Tr. 238-239). He also confirmed that he first observed the entire highwall area from a distance of 200 feet and that it immediately caught his attention (Tr. 248).

The inspector believed that work had taken place at the toe of the highwall prior to the day of his arrival, and that it was "probably closer" to the highwall at that time, and miners were "probably" exposed to hazards at that time (Tr. 237-239). However, he conceded that the work that was taking place that he observed when he arrived was beyond the area where the past work had taken place (Tr. 255).

The inspector testified that the enlarged photograph exhibits, G-26 through G-29, are of the same area and that labels #1 through #3 depict overhanging and loose materials that were blasted and not cleaned up. He identified the arrow label "A" in photo G-29, as material that probably came off the highwall with tracks from rubber tired equipment that had been working in that area to remove and load out the materials that had been blasted (Tr. 214 -219).

The inspector stated that based on the materials shown in photo exhibit G-30, "it was a good possibility" that it was the result of a highwall collapse or "that they just didn't clean it up as they went like they should have". However, he confirmed that once the material accumulates, in the absence of any work taking place or any hazard exposure, the materials could be left in place (Tr. 226).

With regard to photo exhibit G-32, labeled A through E, the inspector stated it shows several prominent vertical rock strata fractures, and that any trucks that may be passing by while going to the working area could be exposed to that condition. He confirmed that he did not speak to the truck driver shown at the left corner of the photo and did not speak to the loader operator shown in photo exhibit G-30 (Tr. 229). He conceded that while it appears that the loader is up against the material, it is actually around the corner on the other side of the material (Tr. 258). The inspector stated that the trucks he observed were just passing in and out of the pit (Tr. 230). He did not document the distance between the truck and the highwall but estimated it was 15 to

20 feet (Tr. 236, 258). He confirmed that the truck was working in the pit, but he did not observe it at the base of the highwall (Tr. 251).

The respondent presented four photographs (Exhibits R-l through R-4) which portray a panoramic view of the highwall area in issue (Exhibit G-29), and provide a better perspective of the relationship of the highwall, the blasted materials, and the working equipment parameters. Respondent further offered the testimony of Safety Director Eddie Clapp, shift foreman David Mead, and shift superintendent Gary Ring, each with 25 years of mining experience.

Safety director Clapp testified that he took the photographs the morning immediately after the order was issued in order to show the height of the highwall in reference to the height of the loaders and hauler trucks, and the haulage road running by the highwall, and he confirmed that he did see the inspector's photographs. He estimated the width of the haulage road shown in the photographs as "three hauler-widths or 100 feet", the hauler in exhibit R-3 is approximately 50 feet from the highwall, and the materials at the bottom is a barricade (Tr. 275-276).

Foreman Mead testified that the materials shown in the Secretary's exhibit G-29 is material that was blasted off the wall and left in place to be cleaned up. Work was taking place to widen the area shown in the photograph in order to establish "a good place to work in there, getting cleaned up" (Tr. 278). He confirmed that he later returned to the area to resume stripping and come in "from the back up" the highwall (Tr. 279).

Mr. Mead further explained that the materials in question would not have been cleaned up on his night shift because it was a recent shot. However, work was taking place to enlarge the area and the day shift would have cleaned it up. The area behind the barricade was shot at a later time and the coal was stripped (Tr. 281-283). Mr. Mead stated that no work was taking place under the highwall areas shown in Exhibit G-29, and that no rubber-tired equipment would have been traveling over the sharp rock materials shown at the base of the highwall because it would result in tire damage (Tr. 280-281). He confirmed that photographic exhibits R-l through R-4, depicts areas where he would have been working after it was barricaded off (Tr. 278).

Shift superintendent Gary Ring testified that the blasted materials that appear in Exhibit G-29, were left in place because it would be a "future shot area", and there was no point in cleaning it up because room was being made in the adjacent area where some of the material was being cleaned up in order to bring in machinery. The area was blasted from the top of the pile as planned at a later date and it was never intended to be scaled or left as a highwall. He explained that a highwall needs to be taken down a piece at a time to make room to continue on with the planned coal extraction (Tr. 286-288).

Mr. Ring testified that no truck hauling was taking place in the Exhibit G-29 area and there was no point in cleaning up the materials until it was ready to be blasted. Further, there was no reason for any haul trucks to be in that area because a tire could be cut and "you would be in a bad situation if you was over there under it" Tr. 290).

Mr. Ring further explained the drilling, blasting, and clean up cycle, and that depending on the type of equipment, it would probably be 40 to 50 feet from the highwall while removing the material. He confirmed that photographic exhibit R-l shows the area that was barricaded after the order was issued and the barricade material was probably blasted material that was moved to construct the barricade (Tr. 291-293). With respect to the loader shown at the top of a pile of material in Exhibit R-l, Mr. Ring stated it was "on the backside . . . way beyond the highwall" approximately 40 to 50 feet away from the safe wall in that area (Tr. 294-298).

After careful consideration of all of the testimony in this case, I conclude and find that the respondent's witnesses, each of whom had 25 year of surface mining experience with first hand knowledge of the conditions of the highwall in the normal course of their daily duties during the pit operations, had a more credible familiarity with the highwall conditions than the inspector, particularly since the alleged hazardous ground conditions were practically all the result of blasting rather than loose materials that had fallen off the highwall. Further, having observed the demeanor and candor of the respondent's witnesses, they did not impress me as individuals who would place themselves and fellow miners at risk by ignoring the cited safety standards and allowing any work to be done that would expose them to any unsafe ground conditions.

I conclude and find that the explanatory testimony of the respondent's witnesses, with respect to the spoil materials and condition of the highwall work area shown in the photographs, is more credible than that of the inspector and credibly rebuts the inspector's explanations regarding the photographs that depicted vehicle tracks at the toe of the highwall, the proximity of the haulage trucks to the highwall as they traveled in and out of the pit, the width of the haulage road, and the proximity of the loader in a location beyond the work location in question.

I conclude and find that the inspector issued the order based in part on his speculative belief that work had taken place under hazardous highwall conditions, prior to his arrival on the day he issued the order (Tr. 239). I find no evidence establishing when the work was performed, the absence of testimony from anyone as to the work that may have been done, or any credible evidence concerning any prevailing unsafe conditions.

The inspector further speculated that the work crew would return to that location to complete the clean up of materials and that they would be working under the toe of the highwall and exposed to the same hazardous conditions. He denied that he was ever told that any work that was left to complete in that area would be accessed from the back side of the highwall (Tr. 256-257). He candidly admitted again that he speculated what would have occurred had he not intervened and issued the order (Tr. 265).

With regard to the inspector's concern that in the absence of any barricade the blasted materials that were not cleaned up would expose miners continuing the work to a hazard, the fact is that he did not issue a violation for a failure to barricade (Tr. 270-271). Further, after the order was terminated the same evening it was issued, the inspector never returned to the area and there

is no evidence that he observed any further work that may have been done at that location under any loose highwall materials.

I find no evidence that any of the miners that the inspector observed working on the day he issued the order were actually working under any unsafe conditions, and he conceded that they were not directly under the highwall exposed to any unsafe conditions. Further, no evidence was forthcoming with respect to the six miners referred to in the order, or whether or not they were the ones the inspector observed. In this regard, I note that the order states that "six miners have been assigned to work in the strip pit and are exposed to an obvious hazard". Absent any credible evidence to the contrary, I reject any credible inference that the assignment of miners to work in the pit automatically places them at risk.

Based on the foregoing findings and conclusions, I find that the Secretary has failed to prove by a preponderance of any credible evidence that the highwall bank conditions cited by the inspector were unsafe and a violation of Section 77.1004(b). Accordingly, the alleged violation and the order ARE VACATED.

Section 104(d)(1) S & S Order No. 8158398

The inspector issued the order for an alleged violation of 30 C.F.R. § 77.1713(a) that requires on-shift examinations of each active working area and active surface installation by a certified person for hazardous conditions. Any noted hazardous conditions are required to be reported to, and corrected by the operator.

The inspector's description of the conditions that prompted him to issue the order do not include any description or identification of any specific hazardous conditions other than the failure to conduct or record an adequate on-shift examination for hazardous conditions, and the fact that the examination book did not reflect that the "obvious hazard, that has existed in the pit since development began, has been recognized", and a "determination that is reasonably likely a miner could be fatally injured by the hazard".

This order was also modified by the inspector four days later to add an identical sentence that the violation was an unwarrantable failure to comply with the cited standard. The order was modified a second time on February 9, 2010, to allege that "Six miners have been required to work in the strip pit causing them to be exposed to a dangerous highwall."

The inspector conceded that he did not describe, or otherwise identify, the alleged hazardous conditions that he believed should have been noted and recorded as part of his order. He confirmed that his photographs, with a photo-mounting worksheet, and his notes were turned in with the violation when he turned it in to his supervisor. He stated the photographs were not provided to the respondent when the order was issued because it was his job to interpret them (Tr. 241-242).

I take note of the fact that the inspector's notes do not include any notations describing the alleged hazardous conditions other than brief comments that the operator failed to recognize and record "obvious hazards", and that the "Strip pit is in obviously poor condition" (Ex. G-25 at 8). The inspector acknowledged that although he did not identify the alleged hazardous conditions, his notes state "the highwall is in an obviously poor condition", but conceded "I didn't go into details as far as what those conditions were" (Tr. 243).

1 conclude and find that a condition precedent for establishing a violation of Section 77.1713(a) is proof by a preponderance of any credible evidence that the cited conditions are in fact unsafe and exposed miners to risk. In this case, although the order not only fails to describe with any particularity the alleged hazardous conditions, a defect that I find would in and of itself support a vacation of the order, I find no credible evidence to support any reasonable conclusion that the conditions were in fact hazardous.

I have concluded that there is no credible evidence to support the inspector's belief that the conditions cited in his order constituted unsafe ground conditions in violation of Section 77.1004(b). Accordingly, in the absence of any unsafe ground conditions, I conclude and find that no reporting was required. Accordingly, the alleged violation and the order ARE VACATED.

ORDER

Based on the foregoing findings and conclusions, **IT IS ORDERED AS FOLLOWS**:

Docket No. VA 2010-310

Section 104(d)(1) S & S Citation No. 8158391, January 28, 2010, 30 C.F.R. § 77.1004 (b) **IS VACATED**.

Section 104(d)(1) S & S Order No. 8158392, January 28, 2010, 30 C.F.R. § 77.1002, **IS VACATED**.

Section 104(d)(1) S & S Order No. 8158393, January 28, 2010, 30 C.F.R. § 77.1713(a), **IS VACATED**.

Docket No. VA 2010-358

F.R. § 1004(b), **IS VACATED**.
Section 104(d)(1) Order No. 8158398, February 4, 2010, 30 C.F.R. § 77.l73(a), **IS VACATED**.

The Secretary's petitions for assessment of civil penalties in these matters **ARE DISMISSED** .

/s/ George A. Koutras
George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 28, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. SE 2010-1012-M A.C. No. 08-000078-224490
v.	:	Mine: Alico Road Quarry
CEMEX CONSTRUCTION MATERIALS OF FLORIDA, LLC, Respondent	: : :	

DECISION AND ORDER

Appearances: Robert Hendrix, Conference and Litigation Representative, Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama for Petitioner

Amy Walker, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia for Petitioner

Fernando Chavez, *pro se,* Cemex Construction Materials of Florida, LLC, Miami, Florida for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration (MSHA), against Cemex Construction Materials of Florida, LLC (Respondent), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the Mine Act). Five section 104(a) citations remain at issue.[1]

[1] At the hearing, the parties made a joint motion on the record to settle the other three citations at issue in Docket No. SE 2010-1012-M, i.e., Citation Nos. 6514121, 6514122, and 6598830. Tr. 11-13; *see also* Jt. Ex. 1. The parties proposed that Citation No. 6514121 be modified to reduce the level of negligence from "high" to "moderate" and to reduce the proposed penalty from $687.00 to $207.00; that Citation No. 6514122 be modified to reduce the likelihood (continued...)

An evidentiary hearing was held in Miami, Florida. The parties introduced testimony and documentary evidence,[2] and witnesses were sequestered. While Respondent did not submit post-hearing brief, the Secretary filed a post-hearing submission, which stated that the attached Commission decision in *Buffalo Crushed Stone, Inc*., 19 FMSHRC 231 (1997) supported her position on the emergency stop device standard in 30 C.F.R. § 56.14109a at issue in Citation Nos. 6598656 and 6598658. *See* Tr. 351. On the entire record, including my observation of the demeanor of the witnesses,[3] I make the following:

II. Findings of Fact and Conclusions of Law Regarding Unsettled Citations

A. Stipulated Facts

The parties stipulated to the following facts.

1. Cemex Construction Materials of Florida, LLC, Alico Quarry Mine, ID number 080078, is subject to the jurisdiction of the Federal Mine Safety Act and Health Act of 1977 (the Mine Act), 30 U.S.C. §§ 801 through 965.

2. Respondent is an operator as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d).

3. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Mine Act.

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[1](...continued)
of injury or illness from "reasonably likely" to "unlikely," to delete the significant and substantial designation, and to reduce the proposed penalty from $687.00 to $139.00; and that Citation No. 6598830 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," to reduce the injury or illness that could reasonably be expected to occur from "fatal" to "permanently disabling," and to reduce the proposed penalty from $540.00 to $100.00. I have considered the representations presented and conclude that the proposed settlements are appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, those settlement agreements are approved.

[2] In this decision, "Tr." refers to the hearing transcript; "J. Ex. #" refers to the parties' joint exhibits; "P. Ex. #" refers to the Secretary's exhibits; "R. Ex. #" refers to the Respondent's exhibits. The Docket No. on the transcript prepared by the court reporter has been corrected. P. Exs. 1-26 and R. Exs. 5-21 were received into evidence. Tr. 26-28, 339-340.

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

4. The citations at issue were properly served by an authorized representative of the United States Secretary of Labor upon an agent of Cemex on the date and places stated therein, and may be admitted into evidence for the purpose of establishing the issuance of the citations, but not for truthfulness or relevancy of any statements asserted therein.

5. The exhibits are authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

6. The proposed penalties will not affect Respondent's ability to continue in business.

8. Respondent demonstrated good faith in abating the violations at issue.

9. Respondent operated the mine for 27,846 hours in 2009, during which one S&S and 10 non-S&S citations were issued, and Respondent operated the mine for 27,317 hours in 2010, during which no citations/orders were issued.

Tr. 15-16. Although the parties did not stipulate that Respondent's mining operations affect interstate commerce, I take administrative notice of the fact that the Commission has previously asserted jurisdiction over Respondent, and Respondent has not specifically raised an interstate commerce challenge to jurisdiction over the Alico Quarry Mine.

B. Additional Findings of Fact and Legal Analysis Regarding Unsettled Citations

1. Citation 6514123

a. Factual Background

Citation 6514123 alleges that Respondent violated 30 C.F.R. § 56.12032. The cited standard provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." The citation alleges the following condition or practice:

> At the electrical switch station below the scale house, the dead front panel cover was not in place on the 480 volt 3 phase circuit breaker for the feeder circuit for the 120/240 volt transformer for this area. Bare energized terminals were present at the top of the circuit breaker. The outer cover to the box was in place and locked however access to the breaker by an electrician would expose the employee to a shock or electrocution hazard to trip or reset the breaker. The panel cover was lying nearby. An electrician locked the outer lid until the box could be de-energized and the panel cover reinstalled.

P. Ex. 1.

The violation is alleged to be significant and substantial (S&S),[4] with gravity alleged to be reasonably likely to result in a fatal injury, and one person affected. Negligence is alleged to be moderate. The Secretary proposes a penalty of $687.00.

On July 29 and 30, 2009, MSHA inspector John D. Reed[5] inspected Respondent's Alico Quarry Mine, an aggregate-producing operation in Fort Myers, Florida. Tr. 37-38. He was accompanied by Respondent's supervisor Danny Anez. Tr. 40. At the electrical switch area in the bottom of the operating scale house, a dead front panel cover was lying on a transformer box adjacent to a locked electrical box containing the circuit breaker. Tr. 42-43, 241-42, 244; *see also* R. Exs. 4-5.[6]

When Reed asked Anez to open the locked box, Anez informed him that the electricians were the only employees who had a key. Tr. 43, 245.[7] Anez then summoned electrical support supervisor Larry O'Brien, who has been with Respondent for 20 years and has worked at the Alico Quarry Mine for three days a week during the past four years. Tr. 44, 235-36. O'Brien opened the locked electrical box pursuant to Reed's directive. Tr. 44, 241, 244.

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[4] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 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." 30 U.S.C. § 814(d)(1).

[5] John Reed has been an MSHA inspector, specializing in electrical issues, since 1989. Before that, Reed was employed with the West Virginia Department of Mines as an underground electrical inspector for about seven years. Prior to that, Reed worked as an electrician and miner for several major corporations in West Virginia. Inspector Reed has a bachelor's degree from the West Virginia Institute of Technology, and two associate degrees from the same school, one in electrical engineering and technology and another in mechanical engineering technology. Moreover, Reed has taught electrical training courses for private industry and MSHA. Tr. 32-36. I note that credible testimony from an experienced MSHA inspector, such as Reed, is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (1998); *Buck Creek Coal, Inc*., 52 F.3d 133, 135-36 (7th Cir. 1999).

[6] Reed testified that ". . . the reason its called a dead front panel is to keep you from getting dead. I mean it eliminates any exposure to any live things, thus everything's dead when you open that box. It also has a protective rating against any kind of an arc that would occur when you put the breaker in. . . . It wouldn't stop an arc blast, but it would slow it down . . . . It would help to quench it 'cause it's metal and it's grounded." Tr. 59.

[7] Respondent employed two electricians at that time, Larry O'Brien and Rob Brignoni. Tr. 238. O'Brien testified that Brignoni was the last electrician to perform work in and lock up the box. Tr. 238, 250-51. Brignoni was no longer employed by Respondent at the time of the hearing. Brignoni did not testify. Tr. 238.

The opened box had no dead front panel cover,[8] the breaker was "on," and there were bare, energized terminals on the top and bottom of the circuit breaker. Tr. 44, 252; *see also* R. Ex. 3. The bare terminals were on the back side of the circuit breakers, so that one would have to reach in behind the box when performing work to be exposed to the 480 voltage circuit breaker feeder. Tr. 44, 52, 255.[9] Indeed, Reed's notes state, "Lid was lying nearby. Box was locked by electrician, had the key. Exposure to bare energized parts contained." Tr. 52; P. Ex. 5.

Nevertheless, Reed determined that the hazard resulted from moderate negligence[10] and was reasonably likely to result in the electrocution of one of Respondent's trained electricians. Tr. 52-53. Reed testified:

> The exposure to the miner, electrician, would have occurred during continued mining operations this condition would not go abated. When you put that breaker in, there's a bare energized terminal. Even if breaker tripped, if we assumed the bottom wasn't hot, which would be no reason to go in there to reset the breaker, the - - when you put the breaker in, your hand would be within inches of the bare, energized parts.
>
> In addition to that, when breakers trip, it's not always the case that they go back in and reset and everything's okay. They trip for a reason and sometimes that reason has not been cleared. So one of the functions of the dead front panel is to help reduce arc blast also. These breakers can blow up . . . .
>
> The contact underneath the scale house . . . it's a damp area and an area of high humidity. And when workers work, they're usually sweaty when they get called to perform functions, would probably result in electrocution of the employee.

Tr. 54-55.

On cross examination, Reed testified that before performing work in the box, a trained electrician like himself would de-energize and lockout, and wear low or medium voltage gloves. Tr. 93-94. Indeed, O'Brien testified that if Reed had not told him to open the box, he would have turned off the breaker prior to commencing work inside the box. Tr. 246-48. O'Brien further testified that he wears 1000-volt rubber gloves with "leather over" protection when

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[8] O'Brien did not know how long the dead front cover plate had been missing. Tr. 249.

[9] Reed testified that the 480-volt system was a grounded system with 270 volt potential between any phase and ground, which is enough voltage to electrocute most people, since "[i]t won't let go." Tr. 55.

[10] In this regard, Reed testified that the locked electrical box limited exposure to the electricians. Tr. 56-57.

performing work inside the box. O'Brien further testified that he has never experienced a shock when wearing such gloves. Tr. 246, 255-56.

Respondent also has a zero tolerance logout/tagout policy. Violators are terminated. Tr. 243-44. The alleged violation was terminated when O'Brien took the cover plate lying on top of the transformer and put it back in place in the electrical box. Tr. 249-250.

b. Legal Analysis

i. Violation

Section 56.12032 unambiguously requires that cover plates on electrical junction boxes be kept in place at all times, except during testing or repairs. After the locked electrical box was opened, the cover plate was missing. No testing or repairs were in progress. Accordingly, I find a violation of the standard.

ii. S&S Analysis

The Mine Act defines an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the *Mathies* test: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An evaluation of the reasonable likelihood of injury is made assuming continued normal mining operations. *U.S. Steel Mining Co.* (*U.S. Steel III*), 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.* (*U.S. Steel I*), 6 FMSHRC 1573, 1574 (July 1984)).

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

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

The Commission recently reiterated these principles in *Cumberland Coal Resources, LP*, 2011 WL 5517385 (Oct. 5, 2011),[11] and *Musser Engineering, Inc*., 32 FMSHRC 1257 (Oct. 2010). The Commission emphasized that the test under the third prong of *Mathies* is whether the hazard fostered by the violation is reasonably likely to cause injury, not whether the violation itself is reasonably likely to cause injury. *Cumberland Coal Res*., 2011 WL 5517385, at *5; *Musser*, 32 FMSHRC at 1280–81, citing *Elk Run Coal* and *Blue Bayou Sand & Gravel*, *supra*.

Applying these principles, I find that the violation was not S&S. I have found the underlying violation of a mandatory safety standard. I also find that the missing dead front cover panel, which protects persons from electrical shock and arc blast, created a discrete electrical hazard or measure of danger to safety. I find, however, that the Secretary failed to establish the third *Mathies* element, i.e., that the hazard contributed to was reasonably likely to cause injury.

In this regard, the only persons exposed to the hazard were Respondent's two trained electricians. Tr 105-06. They were trained in logout/tagout procedures, for which Respondent tolerates no violation. Tr. 243. Inspector Reed conceded that before performing work in the locked electrical box, a trained electrician like himself would de-energize and lockout, and would wear low or medium voltage gloves. Tr. 93-94. Indeed, seasoned electrician O'Brien credibly testified that if Reed had not directed him to open the box, he would have turned off the breaker prior to commencing work inside the box. Tr. 246-48. O'Brien further credibly testified that he wears 1000-volt rubber gloves with "leather over" protection when performing work inside the box, and he has never experienced a shock when wearing such gloves. Tr. 246, 255-56. Finally, I note that the Secretary, through the testimony of inspector Reed, failed to establish

[11] The Commission in *Cumberland Coal Resources* remanded to the judge for a reassessment of civil penalties, as it vacated the Judge's conclusions on the issue of S&S. 2011 WL 5517385, at *11. *Cumberland Coal Resources* appealed the judge's Decision on Remand to the Commission, which denied its Petition for Discretionary Appeal. *Cumberland Coal Res., LP*, Docket No. PENN 2008-189 (FMSHRC) (Nov. 14, 2011). The judge's final decision on remand decision is currently on appeal before the United States Court of Appeals for the D.C. Circuit. *Cumberland Coal Res., LP*, Docket No. PENN 2008-189 (FMSHRC) (Oct. 25, 2011) (ALJ), *appeal docketed*, No. 11-1464 (D.C. Cir. Nov. 29, 2011).

what arc blast is or how the violation contributed to an arc blast hazard.[12] In these circumstances, I decline to speculate and conclude that the Secretary has failed to establish by a preponderance of the record evidence that the hazard fostered by the violation was reasonably likely to cause serious injury.[13] Accordingly, I find the violation non-S&S. *See e.g., Essroc Cement Corp*., 33 FMSHRC 459, 467-68 (Feb. 2011) (ALJ).

iii. Negligence Analysis

Under the Mine Act, an operator is held to a high standard of care, and the failure to exercise this high standard of care constitutes negligence. 30 C.F.R. § 100.3(d). A mine operator must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. *Id*. The Mine Act's regulations define four different negligence levels: 1) reckless disregard occurs when the operator displays conduct which exhibits the absence of the slightest degree of care; 2) high negligence occurs when an operator knew or should have known of a Mine Act violation, and there are no mitigating circumstances; 3) moderate negligence occurs when an operator knew or should have known of a violation, but there are mitigating circumstances; and 4) low negligence occurs when an operator knew or should have known of a violation, but there are considerable mitigating circumstances. 30 C.F.R. § 100.3(d), Table X.

Applying these principles, I find that the failure to replace the missing dead front cover panel was the result of Respondent's moderate negligence. The Respondent knew or should have known of the violation, since the cover plate was in plain view on the transformer adjacent to the electrical box, but the locked box limited the exposure of the bare, energized terminals to trained electricians, who would have to reach behind the breaker without sufficient glove protection to suffer injury. Tr. 56-57. The Secretary failed to prove how long the cover plate was missing. In these circumstances, I find mitigating circumstances and affirm inspector Reed's designation of negligence as moderate.

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[12] I take judicial notice of the fact that arc blast is a dangerous condition associated with the explosive release of energy caused by an electrical arc due to either a phase to ground or phase to phase fault. Arc blast can result from many factors, including dropped tools, accidental contact with electrical systems, build up of conductive dust, corrosion, and improper work procedures.

[13] Given this finding, I need not address the fourth *Mathies* element. Were I to reach this element, I would find that the fourth *Mathies* element was satisfied. That is, although injury was unlikely, any such injury would be of a reasonably serious nature, and likely fatal. In this regard, I give substantial weight to Reed's testimony that the 480-volt system was a grounded system with 270 volt potential between any phase and ground, which is enough voltage to electrocute most people. Tr. 55.

iv. Penalty Criteria

I next address the appropriate penalty. A mine operator is subject to a civil penalty for any violation occurring at its mine. 30 U.S.C. § 820. Such penalties provide a "strong incentive for compliance with the mandatory health and safety standards." *Nat'l Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 401 (1976). In enacting the Mine Act, Congress aimed to set sufficiently high penalties to effect deterrence. "To be successful in the objective of including [sic] effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance." S. Rep. No. 95-181 at 90 (1977).

The Court has broad discretion to assess penalties *de novo*. *See, e.g.*, *Spartan Mining Co.*, 2008 WL 4287784 at *22 (2008) (affirming ALJ's 800 percent increase of proposed penalty based upon gravity and negligence factors); *Mountain Edge Mining, Inc*., Docket No. WEVA 2009-1617 (ALJ, May 19, 2011) (imposing a penalty amount eight times that originally assessed by MSHA). In assessing penalties, the Commission and its judges must "consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i).

I have considered the stipulated history of violations set forth above. Respondent is a small mine operator. The violations herein were abated in good faith. The parties also stipulated that the penalties proposed will not have an adverse effect on Respondent's ability to remain in business. Further, two of the proposed penalties adjudicated herein have been slightly reduced and all three settled citations resulted in reduced penalties. My gravity and negligence findings for each violation are discussed herein. Accordingly, applying the penalty criteria set forth in section 110(i), I assess a penalty of $139.00 for the violation set forth in Citation 6514123.

In sum, Citation 6514123 is modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," to delete the significant and substantial designation. The proposed penalty is reduced from $687.00 to $139.00.

2. Citation 6514130

Citation 6514130 alleges that Respondent violated 30 C.F.R. § 56.20003(b). The cited standard provides, in pertinent part: "(b) the floor of every workplace shall be maintained in a clean and, so far as possible, dry condition. Where wet processes are used, drainage shall be maintained . . . . " The citation alleges the following condition or practice:

> At the wet process primary plant, drainage was not being maintained for the ground floor areas of the plant. Made drainage ditches were not functional due to lack of maintenance and unnecessary areas of water and mud were present in some of the primary travel areas of the plant. Unnecessary accumulations of mud and water were creating a slip/fall hazard that would likely worsen during continued mining operations. Persons work in this area each day during both production weeks and maintenance weeks. Maintenance work on the drainage ditches in this area was immediately beg[u]n by the operator. Improvements in the drainage in this area were immediately noted.

P. Ex. 6.

The violation is alleged to be S&S, with gravity alleged to be reasonably likely to result in an injury or illness that could reasonably be expected to result in lost workdays or restricted duty, with one person affected. Negligence is alleged to be high. The Secretary proposes a penalty of $687.00.

a. Factual Background

The record establishes that Inspector Reed returned to the wet primary plant on June 30, 2009 about 4:25 a.m. to find the ground floor flooded. Tr. 63, 65.[14] "There was a lot of standing water in a lot of areas, water was not going anywhere." Tr. 63. Reed took several photographs (P. Exs. 9-14) and talked to supervisor Anez about drainage. Anez told Reed that the drainage canal (ditch) was stopped up and that is why Respondent could not get rid of the water. Tr. 65.[15]

About mid-morning, superintendent Gary Parker joined the inspection party as they walked to the drainage canal. Tr. 65-66. The inspection party was exposed to wet and muddy

[14] Mid-June through mid-September is the rainy season in southern Florida, and it rained heavily the night before, although Reed did not recall rain during his inspection. Tr. 66, 71, 114, 116-17.

[15] Anez did not testify in rebuttal.

conditions as they traversed the ground level. Tr. 113, 127. In fact, P. Ex. 13 shows Parker walking through a wet, muddy area toward the Porta-John. *See also* Tr. 112-13, 123. Reed's testimony and photographs further establish that there was some employee exposure to these extensive, obvious, wet, and muddy conditions, as employees accessed the control tower and conveyor belt system from their vehicles parked nearby. Tr. 71-72,74-76.

Reed credibly testified that the drainage canal had not been cleaned out for quite some time as he observed a lot of silt and foot-high vegetation, such as saw grass, growing in it. Tr. 67-69, 125. Reed told Respondent's representatives that he was going to write a citation for failure to maintain drainage. Respondent immediately began working with a backhoe to clean out the drainage canal in an attempt to restore drainage. Tr. 67. Neither Anez nor Parker testified for Respondent.

Reed further testified that he designated the violation as S&S because the failure to maintain drainage for the ground floor area created an unnecessary buildup of mud and water that made it reasonably likely that employees traversing the area would slip and fall and suffer serious injury such a broken bones, sprains, or strains resulting in lost work days or restricted duty. Tr. 78, 81-82. Reed testified that typically these miners work with tools and equipment, such as shovels and water hoses, in their hand, which would make it more likely that they could not break their fall and would suffer injury when they fell. Tr. 81-82. Reed determined that negligence was high because the drainage problem was obvious and extensive, could easily be resolved with proper use of equipment had Respondent wanted to do so, and no mitigating circumstances were proffered other than, "it rained last night." *See* Tr. 78-81.

Respondent's witness, 20-year plant operator, Roy Swoverland, testified about drainage abatement efforts after the citation was written. Tr. 278-279. Although Swoverland testified that employees do not "really" travel on foot through the cited area (Tr. 282-286), I reject such testimony because Parker was photographed walking through the area (P. Ex. 13), and P. Ex. 14 shows a loader in the area that employees walk to for access. Tr. 300. Furthermore, although Swoverland testified that a track hoe would clean the drainage ditches out and drainage would be maintained on a regular basis (Tr. 291, 295), Swoverland conceded that Respondent kept no records with regard to maintenance of the drainage system and Respondent proffered none. Tr. 291-92. Moreover, maintenance manager Ramos was not sure who maintains the drainage. Tr. 314.

b. Legal Analysis

Given Respondent's failure to provide probative evidence regarding drainage maintenance, I give substantial weight to inspector Reed's eyewitness testimony that on July 30, 2009, the drainage canal had not been maintained for quite some time. Accordingly, I find a violation of Section 56.20003b because the drainage was not maintained.

I find, however, that the violation was not S&S. The failure to maintain drainage created extensive, wet, and muddy conditions on the ground level of the processing plant, thereby

creating a discrete slip/fall hazard or measure of danger to safety. With respect to the third and fourth *Mathies* elements, the Secretary has not provided sufficient evidence to show that the wet and muddy conditions would be reasonably likely to result in a fall in which a miner would be injured and that any resulting injury would be of a serious nature. Although the puddles of water were extensive, the wed and muddy areas generally appear to be shallow, free of equipment, machinery, tools, or sizable terrain irregularities (e.g., loose aggregate, rutting, potholes, oruneven ground, etc.) that might cause a miner to stumble or fall. *See* P. Ex. 9-11; R. Ex. 8-10. It is also unclear how often miners would walk through the cited areas where there is substantial water on the ground. Swoverland testified that the plant does not run after heavy rainstorms because it is difficult for heavy haulage trucks to operate on the unpaved roads. Tr. 294. The Secretary did not adequately explain why miners would need to access the wet and muddy areas during normal mining operations if the plant was closed.

Even assuming that the failure to maintain the drainage contributed to a slip and fall hazard that was reasonably likely to occur, the record does not support a finding that a reasonably serious injury would result from such a fall. Inspector Reed testified that a miner slipping in the puddles would likely incur serious injuries, including broken bones and muscle strains and sprains. Tr. 78, 81-82. In assessing the seriousness of the injuries, Reed took into account his assumption that miners would typically be carrying tools or equipment in their hands, which would prevent them from using their hands to regain balance or would further contribute to the miner's injury. Tr. 81, 82. Beyond Reed's speculation that a miner would typically carry a shovel or water hose into the cited areas, however, there is no evidence in the record about the the types of tools, if any, that would be carried into the wet and muddy areas at issue.

Without evidence of other aggravating factors, a slip and fall on open ground in mud does not normally cause serious injuries. *Ormet Primary Aluminum Corp.*, 23 FMSHRC 1330, 1337 (Dec. 2001) (ALJ Zielinski) (finding that a violation of 30 C.F.R . § 56.20003(b) was not S&S when miners were at risk of slipping in mildly caustic mud on a concrete deck). I find it significant that the wet and muddy areas at issue were devoid of large aggregate or machinery that might cause serious injury if a miner fell in one of the areas. *See S & S Dredging*, 33 FMSHRC 1324, 1326 (May 2011) (ALJ Weisberger) (finding that a fall of one to three feet was not S&S due in part to the "absence of evidence of . . . objects [on the ground] that would cause head injuries, neurological injuries or any injuries that would have some lasting impact or would have a high likelihood of a long period of recuperation"). In the circumstances of this case, I find the violation to be non-S&S.

I further find that the failure to maintain the drainage was the result of Respondent's high negligence. Based on the photographs in evidence and Reed's first-hand observation, I have found that the drainage problem was obvious and extensive. The abatement efforts corroborate Reed's testimony that the failure to maintain drainage could easily have been rectified with proper use of equipment had Respondent wanted to engage in such efforts.

In addition, Reed credibly testified that no mitigating circumstances were proffered by Respondent other than, "it rained last night." *See* Tr. 78-81. As Reed explained, ". . . [t]here had been rain the night before, no question about that, but there's rain in Florida in the summertime almost every day. At some point in time, it rains almost every day if we're in a normal weather pattern, so rain's not usual. Rain such has to be dealt with." Tr. 66. The record establishes that the rain and water overflow from the wet process plant was not being dealt with adequately or in a timely fashion. The wet and muddy conditions were extensive and obvious, the ground floor was flooded, and the drainage canal had not been cleaned out for quite some time. In fact, Reed observed a lot of silt and foot-high vegetation, such as saw grass, growing in the drainage canal. Tr. 67-69, 125. In these circumstances, I affirm Reed's designation of negligence as high.

In sum, Citation 6514130 is modified from "reasonably likely" to "unlikely" and the S&S designation is deleted. Negligence is affirmed as high. Applying the penalty criteria set forth in section 110(i) and outlined above, I assess a penalty of $139.00 for the violation in Citation 6514130.

3. Citation 6598656

Citation 6598656 alleges that Respondent violated 30 C.F.R. § 56.14109(a). The cited standard provides that "Unguarded conveyors next to travelways shall be equipped with (a) Emergency stop devices so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor; or (b) Railings . . . .

The citation alleges the following condition or practice:

> An approximately 1/4 inch diameter cable used as an emergency stop cord located next to the walkway adjacent to the No. 2 conveyor could not readily deactivate the drive motor if an individual was to fall on or against the conveyor belt due to the amount of slack in the cable. The slack extended from the emergency stop device to the top of the conveyor which is approximately 50-60 feet. The operator stated that the cord was stretched after being used. An employee sits and works on the conveyor. In the event of an emergency, employees attempting to engage the emergency stop cord when falling onto the belt would not be able to deactivate the drive motor and could suffer broken bones and/or lacerations.

P. Ex. 16.

The violation is alleged to be significant and substantial (S&S), with gravity alleged to be reasonably likely to result in a lost work days or restricted duty, with one person affected. Negligence was designated as moderate. The Secretary proposes a penalty of $207.00.

a. Factual Background

On November 23, 2009, MSHA inspector Donnie Lewis[16] inspected Respondent's Alico Quarry Mine. He was accompanied by Respondent's supervisor Anez and assistant supervisor Hummer Ramos. Tr. 130.[17] When inspecting the number 2 conveyor, Lewis observed that the emergency stop cord had "too much slack in it, that if someone was to fall against the conveyor they could not deactivate it." Tr. 132. The area was accessed at least once weekly. Tr. 136. Lewis testified that the purpose of the cord was to deactivate the drive motor and stop the belt from moving if anyone fell on or against the belt. Tr. 138. P. Ex. 17 is a photograph of the condition observed as documented by Lewis' notes (P. Ex. 18), which indicate, inter alia, "e-stop cord was loose, could not trip when fell into." *See also* Tr. 134-35. Lewis testified that the cord ran between eye bolts near the frame of the conveyor without tension or tautness. Tr. 161. Anez explained to Lewis that the slack could be because the emergency cord had been used often and stretched. Tr. 132-33. Lewis also testified that Anez told him that "an employee will sit and work on the conveyor once a week." Tr. 168. When asked whether Anez was speaking about the picker station as pictured in R. Ex. 10, from which an employee sits on the side of the belt and picks off tree roots, Lewis acknowledged that he could have misinterpreted Anez's remark. Tr. 168-171. "I don't think I would interpret it that way, but I guess it could have been. I don't think I would have took it that way." Tr. 171. Lewis did not ask Anez what his comment meant. Tr. 172.

Initially, Lewis testified that the cord was not positioned where it could be deactivated, but acknowledged twice on questioning from the undersigned that he did not test the emergency stop cord. Tr. 137, 141. He also conceded that "at the bottom of the conveyor the slack was tight enough . . .[but] the top of the belt had a significant amount of slack in it." Tr. 141. On further questioning from the undersigned as to how he knew that the E-stop cord would not trip if he did not test it, Lewis testified that he was not aware of what the Court was talking about, "pulling the test or falling." Tr. 143. Inspector Lewis then explained, "I stood by the belt and laid my body onto the conveyor and showed him that it would not trip." Tr. 144. On later cross-examination, Lewis further explained that he did try to trip the E-cord stop by throwing his body on the conveyor, but not by reaching out to grab it with his hand, which is what he thought the Court meant by asking whether he tested the E-stop cord. Tr. 184.

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[16] At the time of the hearing, Lewis has been an inspector since January 4, 2009 and had conducted about 150 inspections. Prior to joining MSHA, he had twelve and one-half years of experience working as either an electrician, blaster, welder, machine operator, or supervisor. Tr. 129.

[17] Ramos had 21 years of experience with Respondent during which he worked as master equipment operator, master equipment operator leadman, and maintenance manager. Tr. 302-03.

Lewis testified that "you would really have to fall onto the conveyor [face] neck first, with your hands at your knees to be able to trip it. No one falls like that. They fall with their hands in front of them. And if your body was to touch it with the metal slack, it couldn't trip it." Tr. 159. Lewis acknowledged, however, that the E-cords were designed to trip if one puts some kind of pressure against it, whether pushing against it or pulling against it. Tr. 160.

On cross-examination, Lewis reiterated, "I stood up and leaned over onto the belt." Tr. 172. He explained, "I turned and faced the conveyor. . . I showed him [Anez] with my body by leaning from my waist up over the belt and my legs onto the conveyor and said, look, if I fall on the conveyor, it's not going to move the E-stop cord." Tr. 173.[18] Lewis testified that he was actually leaning over the rollers, with his body at more of an angle at the bottom, in a purported attempt to demonstrate how most people fall, while trying deliberately to hit the E-stop cord. Tr. 174-75. Lewis further testified that if one side of one's body fell onto the conveyor one would have to reach across with the opposite hand to try to activate the E-stop cord, which was positioned poorly between the eye bolts, especially if one was caught in any type of clamp or drum. Tr. 177.

Lewis testified on cross that he showed Anez a few different ways that someone could fall onto the conveyor and deactivate the drive motor. Tr. 178. Lewis testified that the slack was so close to the frame that there was no tension (tautness) to deactivate the drive motor on the conveyor. Tr. 178. "It was an extreme amount of slack for any stop cord." Tr. 179. Given the amount of slack, Lewis opined that a miner falling on or against the conveyor could not readily deactivate the conveyor drive motor. Tr. 222.

Lewis never pulled on the E-stop cord to determine if it would deactivate the drive motor. 197, 225. On re-cross, Lewis testified that "[w]hen I threw my body on it, it didn't *really* deactivate it." Tr. 226.

During his demonstration, Lewis was challenged by Ramos, who informed Lewis that the E-stop cord had been tripped. Lewis testified that the E-stop cord never moved, so he asked Ramos to show him how the E-stop box or flag was tripped. Ramos then took Lewis to the top of the conveyor where the E-stop box was located and Ramos told Lewis that it had been tripped. Lewis said, "it's set." Ramos allegedly responded, "I set it back." Lewis testified that he dismissed Ramos's challenge as irrelevant because the cord never moved. Tr. 180-82. Lewis thinks the issue arose again during the closeout conference, but does not remember being challenged by anyone else. Tr. 180-81.

When asked on cross whether he attempted to trip the E-stop cord again after the challenge from Ramos, Lewis testified that he tried again in the presence of Ramos and Anez and the cord did not trip. Tr. 182. When asked by the undersigned whether that second attempt

[18] Lewis did not explain how his legs could have been on the conveyor.

was in his notes anywhere, Lewis indicated that it was not. When asked why not, Lewis initially answered, "I wish I knew, " (Tr. 182), and subsequently explained that he thought the challenge was irrelevant and argumentative. Tr. 183. Lewis could not recall exactly when Mr. Luis DelaRosa, Respondent's eastern regional safety coordinator, arrived on the scene, although Lewis acknowledged that DelaRosa did show up. Tr. 183.

Ramos testified that Mr. DelaRosa showed up at the inspection "early morning around midday," and was present with Ramos when Citation 6598656 was issued. Tr. 303. I note that Citation 6598656 was issued at 1:35 p.m. *See* P. Ex. 16, box 2. Ramos was with inspector Lewis in front of the tripping mechanism of the E-stop cord. Tr. 338. Ramos testified that Lewis tripped the E-stop cord once, and DelaRosa tripped it once by bumping it with his hip. Tr. 319, 333. Ramos testified that Lewis tested the trip cord on conveyor 2 and it worked, "it stopped and I had to go reset it." Tr. 308-09. Ramos testified that Lewis "faced the conveyor and he leaned forward and once he touched the cord it tripped, so I had to go reset it." Tr. 309, 330. Ramos reiterated that he saw Lewis trip the cord. That is, Lewis stood facing the conveyor and leaned forward towards it, while stating that when you fall onto a conveyor, you fall like this. Tr. 329-30. Ramos testified that as soon as Lewis' body touched the pull cord, Ramos had to reset it. Tr. 330.

When asked if he informed inspector Lewis that the cord had been tripped, Ramos testified that Lewis "saw me walk down and reset it." Tr. 309. When asked whether the E-stop cord was tested again, Ramos testified that "Mr. DelaRosa tested it once. It tripped again and I had to go back down and reset it." Tr. 309. Ramos testified further testified as follows: "After I reset the conveyor, Mr. DelaRosa said, you see it works. He went down to reset it. And then Mr. DelaRosa went sideways, touched the trip cord, and as I was walking back up, I had to turn back around and go reset it again." Tr. 310. On further questioning from the Court, Ramos explained that DelaRosa bumped the cord with his hip. Tr. 333. Ramos testified that Lewis knew that the cord was tripped by DelaRosa because "I told him, hold on a second. I gotta walk down and reset it." Tr. 309. Ramos walked down the conveyor about 20-25 feet to reset the trip cord while DelaRosa stayed with inspector Lewis. Tr. 310.

When asked by the undersigned whether Lewis mentioned any slack in the emergency cord, Ramos testified, "He mentioned it had a little bit of slack in it, but from what I can see, the slack didn't look bad and every time he touched I, it went off. It did its purpose of what it's there for, to stop the conveyor." Tr. 311.

Safety coordinator DelaRosa testified that he was present at the time the citation issued and inspector Lewis stated that he thought there was too much slack on the E-stop cord to trip it. DelaRosa testified that he demonstrated that the cord would trip, and the conveyor stopped when DelaRosa leaned against it and pushed it with his hip. Tr. 344. According to DelaRosa, Lewis said, "that wasn't the correct way to do it," and Lewis proceeded to demonstrate that people fall forward onto the conveyor belt. DelaRosa told Lewis that he disagreed because the catwalk and conveyor ran parallel, so if one was walking down the catwalk and lost balance, one would fall sideways onto the conveyor, and not fall facing it. Tr. 345. DelaRosa testified that he triggered

the E-stop cord at the same location that inspector Lewis did, although DelaRosa believes that he and not Lewis triggered the cord first. Tr. 346. The Secretary did not cross examine DelaRosa.

b. Legal Analysis

i. Commission Precedent in *Buffalo Crushed Stone*

The Commission has only addressed the mandatory safety stop cord standard in 30 C.F.R. § 56.14109a on one prior occasion. *See Buffalo Crushed Stone, Inc*., 19 FMSHRC 231 (1997) (Commissioner Riley dissenting). In that case, an emergency stop cord strung alongside a conveyor was displaced for a length of approximately 20 feet due to a bent eye bolt through which the cord ran. At the center of the 20-foot section, a 2- to 5-foot length of the stop cord dropped 2 inches below conveyor belt. The inspector testified that a person falling on or against the conveyor from the adjacent walkway at this location would not be able to readily deactivate the conveyor drive motor by *pulling* the stop cord and injury could result. A citation was issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging an S&S violation of section 56.14109(a). 19 FMSHRC at 232.

Following an evidentiary hearing, the judge concluded that Buffalo had not violated section 56.14109(a) regarding the emergency stop cord and dismissed the citation. The judge noted that the standard does not require the stop cord to be located at a specific height and that there was no evidence that a falling person could not readily deactivate the conveyor at the cited location by pulling the stop cord. *Id*. at 233.

On appeal to the Commission, the Secretary argued that the judge ignored testimony that at the cited location the stop cord was not readily accessible to a person who slipped or fell onto the belt and erred when concluding that no violation of section 56.14109(a) occurred. By contrast, respondent argued that the judge correctly found that no evidence was presented showing the conveyor could not be readily deactivated. Respondent further argued that the standard does not specify the height of the cord relative to the conveyor and that the inspector's determination of violation was based solely on his interpretation of the law. *Id*. at 234.

Chairman Jordan and Commissioner Marks reversed the judge's determination that there was no violation of section 56.14109(a) and remanded for a determination of whether the violation was S&S and the assessment of a civil penalty. Commissioner Riley dissented and would have affirmed the judge's determination that there was no violation. *Id.* at n. 7.

The Commission majority acknowledged that section 56.14109(a) does not specify a particular placement for the stop cord, but requires that it be located so "a person falling on or against the conveyor can readily deactivate the conveyor drive motor." Accordingly, they framed the core interpretive issue as the meaning of the term "readily deactivate." The majority then examined the inspector's testimony, which explained that a stop cord is in its "correct location" when it is "stretched tightly" and is "above the belt" because "in slipping and falling . . . you want your elbow or arm to hit the stop cord before you hit the belt."

The majority further cited inspector testimony that a miner should not have to "consciously think to grab the cord and pull it to deactivate it." Rather, according to the inspector's training, the stop cord should be "nice and tight" and located from "somewhere near the side edge of the belt to as much as four inches above the side edge of the belt." The majority noted that the inspector issued the subject citation because one of the upright steel standards which held the cord in place was bent and had caused a portion of the stop cord to become slack and fall 2 inches below the conveyor belt.

The Commission majority then concluded that because the Secretary's interpretation of the stop cord standard was consistent with its language and not unreasonable, deference to that interpretation was appropriate. 19 FMSHRC at 234-35, citing *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted); *see also Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 462 (D.C. Cir. 1994). Specifically, the Commission majority stated:

> Section 56.14109(a) requires the emergency stop device to be "located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor." The Secretary has interpreted this standard to require stop cords to be taut and located above the conveyor belt so that a falling person's arm or body can hit the stop cord "on the way down during the fall." The Secretary's interpretation is consistent with the language of section 56.14109(a). The standard is directed at protecting someone who is "falling on or against the conveyor" and requires that such person be able to "readily deactivate the conveyor drive motor." 30 C.F.R. § 56.14109(a) (emphasis added). It is not limited to protecting persons who have already fallen onto the conveyor belt. Moreover, according to the record, conveyor belts are generally "anywhere from knee high to above waist high." The Secretary asserts that someone who is "falling" toward a moving belt of this height would find it virtually impossible to locate a stop cord that is hanging even slightly below the conveyor and, therefore, would not be able to "readily" deactivate the conveyor before landing on it. In our view, the Secretary reasonably concludes that a person in the process of falling will only be able to "readily deactivate" the conveyor if he does not have to consciously look for the stop cord. By requiring the stop cord to be located where it is likely a person's arm or body will automatically deenergize the conveyor belt, the Secretary seeks to reduce the chance that a miner will fall onto that belt while it is still moving, or that a miner will suffer injury by getting an arm caught as he tries to catch himself.
>
> We note further that, by interpreting section 56.14109(a) in a manner that reduces the likelihood of a miner who falls coming into contact with a moving belt, the Secretary has taken an approach that is also consistent with the alternative means of compliance provided by 30 C.F.R. § 56.14109(b). Under that section, in lieu of a stop cord, an operator can provide protection from unguarded conveyors by installing railings "which are positioned to prevent persons from falling on or

> against the conveyor." *Id.* Railings are not directed at miners who have already fallen onto the belt; they afford protection by preventing persons from coming into contact with the moving conveyor. Likewise, by requiring stop cords to be located so they will deenergize the belt "on the way down during the fall," the Secretary seeks to prevent miners from coming into contact with the moving conveyor, rather than simply providing miners with a means of deactivating the belt once they have landed on it.

19 FMSHRC at 235 (transcript cites omitted).

The Commission majority rejected the dissent's contention that the interpretation of the stop cord standard was the solitary idea of a rogue inspector, noting that the Secretary, on brief, urged the Commission to affirm the citation on the very basis articulated by the inspector. *Id*. at 235-36. The majority found the Secretary's stop cord interpretation identical to that advanced in *Asarco, Inc*., 14 FMSHRC 829, 831-32 (May 1992) (ALJ), a case which the Commission did not review,[19] and noted that the operator made no claim that it was unaware of MSHA's interpretation or was subjected to inconsistent application of MSHA's stop cord requirement. 19 FMSHRC at 235-36.

The *Buffalo Crushed Stone* majority also rejected the dissent's contention that the Secretary's interpretation constituted an amendment of the standard, which may only be enforced after formal rulemaking, since the Secretary's interpretation did not conflict with an existing legislative rule, which would require formal rule making under *American Mining Congress v. MSHA*, 995 F.2d 1106, 1113 (D.C. Cir. 1993). Rather, it merely sought to explain the term "readily deactivate," and thus clarify or explain existing law, an action exempt from rule making. *See Drummond Co.*, 14 FMSHRC 661, 684-85 (May 1992). In sum, the Commission majority concluded that the Secretary's interpretation of section 56.1409(a) was reasonable and entitled to deference because it was consistent with the language of the standard, it furthers the safety aims, and it is in harmony with the alternative requirement pertaining to unguarded conveyors. 19 FMSHRC at 236-37.

Applying the Secretary's interpretation to the facts in *Buffalo Crushed Stone*, the Commission majority found that substantial evidence did not support the judge's determination that respondent did not violate section 56.14109(a). There was no dispute that a portion of the stop cord was slack and had fallen below the conveyor belt. As such, it was not a stop device which could "readily deactivate" the conveyor drive motor. Accordingly, the majority reversed

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[19] In *Asarco*, the judge found the Secretary's interpretation of 30 C.F. R. § 56.14109(a) to be inconsistent with the plain meaning of the standard and unworthy of deference. 14 FMSHRC at 834-35. In that case, the respondent provided expert opinion testimony based on ergonomic studies and simulation of falls, that the stop cords at issue were ideally located and fully complied with the requirements of the standard. Commissioner Riley's dissent in *Buffalo Crushed Stone* essentially adopted the judge's analysis in *Asarco*. *See* 19 FMSHRC at 243-44.

the judge's determination that respondent did not violate section 56.14109(a) and remanded for a determination of whether the violation was S&S and for assessment of a civil penalty. 19 FMSHRC at 236.

Commissioner Riley's dissent faulted the majority for imagining specificity where the regulation was silent and demanded flexibility. 19 FMSHRC at 242. He also faulted the Secretary for failing to promulgate a more specific regulation consistent with the inspector's detailed testimony that the cord must be situated so as to automatically de-energize the conveyor if a miner fell against the belt. In his view, the majority made up for the Secretary's oversight by retroactively promulgating a specific regulation, which short-circuited the legal prerequisites of formal rule making. *Id*. at 243-44.

The dissent could find no definition of the word "readily" that was synonymous with "automatically." Nor could it find any language to support the majority's adoption of the inspector's "not . . .consciously think" standard as the most reasonable interpretation of where and how to position a stop device. Furthermore, the dissent found no support for the majority position in *Asarco*, where the judge's unreviewed decision soundly rejected the Secretary's interpretation that the cord had to be placed where it is likely that a person's arm or body will automatically de-energize the conveyor belt. The *Asarco* judge reasoned as follows:

> This standard does not require that an operator locate its stop cords so that it guarantees that a person who falls on or against a conveyor will first fall on or through that stop cord. . . .
>
> . . . The standard does not define, mandate nor restrict the "location" of the stop cord, other than to state that it must be "readily" accessible to the person who is falling. It does not prohibit stop cords below, at, or above any particular component of a conveyor. With respect to a belt conveyor, the standard does not dictate placement vis-a-vis the floor, the upper or lower belts, the upper or lower idlers, the pulleys, or the drive motor. . . .
>
> If the Secretary truly desires to direct the specific location of stop cords and further wishes to require that a person falling on or against a conveyor first fall "through" the stop cord, then the Secretary must pursue this goal through notice-and-comment rulemaking. The Secretary should promulgate a standard to clearly and directly address not only the perceived hazard but also clearly inform the mine operator what he must do for compliance. In short, the Secretary's interpretation (1) contradicts the "plain meaning" of this performance standard; and (2) violates the rulemaking requirements of the Mine Act.

14 FMSHRC at 834, 836. The dissent concluded that the majority decision arbitrarily affirms a capricious standard, which finds no foundation in the language or history of the regulation. "If a conveyor belt that a person can 'readily deactivate' actually means a belt that 'automatically

deenergizes' whenever a person approaches, the regulation should be revised by the Secretary through formal rulemaking." 19 FMSHRC at 244.

On remand from the Commission majority, the judge found that the violative condition - a portion of the slack cord that had fallen two inches below the conveyor belt - contributed to the hazard of a miner, who falls, coming in contact with a moving conveyor belt. 19 FMSHRC 620, 622 (Mar. 1997)(ALJ). The judge then analyzed whether the third element of the *Mathies* test had ben satisfied, i.e., the likelihood of an injury producing event - - a miner falling in the area where the cord was slack. *Id.* The judge found that the inspector's testimony on this issue constituted opinion as to "what could occur should a miner fall, and not be able to grab the stop cord," but no evidence was adduced regarding the likelihood of a miner falling in the area of the cord that was cited. Finding "no evidence in the record of the conditions in the area which would have made a fall reasonable likely to have occurred," the judge concluded that the Secretary failed to establish that the violation was S&S. *Id*. at 623.

ii. Application of *Buffalo Crushed Stone*

I am constrained to follow the Commission majority's opinion in *Buffalo Crushed Stone*. The Commission's decision in *Buffalo Crushed Stone* deferred to the Secretary's interpretation of the term "readily deactivate" as used in section 56.14109(a).[20] As in *Ascaro* and *Buffalo*

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[20] As noted, that standard provides that unguarded conveyors next to travel ways shall be equipped with (a) emergency stop devices so that a person falling on *or* against the conveyor can readily deactivate the conveyor drive motor, or (b) railings. I further note that MSHA's Program Policy Manual provides the following guidance on this standard.

. . . .

> Under Sections 56/57.14109(a), emergency stop devices must be located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor. MSHA expects that a miner would be able to readily reach the emergency stop device to activate it and that the device would be located along the portion of the unguarded conveyor that is adjacent to a travelway.
>
> . . . .

See MSHA Program Policy Manual, Vol. IV, Metal and Non-metal Mines, Subpart M, Machinery and Equipment, 56/57.14109, Unguarded Conveyors With Adjacent Travelways (underscore added). Moreover, R. Ex. 11, which Respondent represented was MSHA guidance from its website on unguarded conveyors next to travel ways, provides as follows:

> The emergency stop cord must be sufficiently tight to assure the conveyor drive motor will be deactivated when the cord is pulled. There is no specific location

(continued...)

Crushed Stone, *supra*, the Secretary proffers the same legal interpretation here, i.e., that the standard requires that the stop cord be automatically triggered by someone who is falling on or against the conveyor.

In *Buffalo Crushed Stone*, there was no dispute that the stop cord was so slack that it had fallen under the conveyor belt and would not automatically trigger unless a miner consciously reached for the cord and pulled it. *Buffalo Crushed Stone*, 19 FMSHRC at 236. In the current case, although Respondent does not contest the Secretary's regulatory interpretation, Respondent challenges the inspector's factual determinations. There is conflicting testimony regarding whether the stop cord was sufficiently taut in Citation 6598656, or too low in Citation 6598658 below, to readily deactivate the respective drive motors if one fell on or against the conveyors. Tr. 200. Accordingly, I analyze and weigh the probative record evidence and make factual and credibility findings regarding the conflict in testimony. *See Sunny Ridge Mining Co., Inc*., 19 FMSHRC 254, 257 (Feb. 1997).

With regard to Citation 6598656, I find that the Secretary failed to establish by a preponderance of the evidence that Respondent violated 30 C.F.R. § 56.14109(a). I find more reliable and probable and credit the testimony of DelaRosa over that of inspector Lewis that a person walking down the catwalk would fall sideways onto conveyor no. 2, and not fall facing it. Tr. 345.[21] There were no tripping hazards on the walkway. The conveyor belt ran parallel to the walkway and appears to be about waist or chest high. P. Ex. 17. In fact, Lewis testified that when he leaned over the conveyor, he was waist up over the belt with his legs on the conveyor. I find that this was not possible. *See* P. Ex. 17.

Even assuming that Lewis meant that he leaned with his waist over the belt, and his legs remained on the travelway, I discredit his testimony that the stop cord was not tripped when he leaned against it. I find Lewis' explanation that he did not understand the Court's question as to whether he tested the stop cord to be contrived and unreliable, and rebutted by the testimony of Respondent's witnesses, especially Ramos. Ramos testified that Lewis tripped the stop cord once, and DelaRosa tripped it once by bumping it with his hip. Tr. 319, 333. Ramos testified that Lewis "faced the conveyor and he leaned forward and once he touched the cord it tripped, so

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[20](...continued)
required for the stop cord, however it should be located so that a person falling on or against the conveyor can activate the stop cord.

See R. Ex. 11, showing a miner pulling on an emergency stop cord along a conveyor belt with a walkway.

[21] The Secretary provided no evidence about the location of the stop cord in relation to the picker station, or what Anez meant when he told Lewis that an employee sits and works on the conveyor, as set forth in Citation 6598656. In fact, Lewis acknowledged that he did not ask Anez for clarification. Tr. 172.

I had to go reset it." Tr. 309, 330. Ramos clearly reiterated that he saw Lewis trip the cord as he stood facing the conveyor and leaned forward towards it, while demonstrating how one would fall. Tr. 329-30. Ramos testified that as soon as Lewis' body touched the pull cord, Ramos had to reset it. Tr. 330.

In addition, I note that Lewis essentially conceded on cross that he showed Anez a few different ways that someone could fall onto the conveyor and deactivate the drive motor. Tr. 178. Such concession is consistent with Ramos' testimony that Ramos had to keep resetting the cord after it was tripped. In addition, Lewis' testimony on re-cross, "[w]hen I threw my body on it, it didn't *really* deactivate it (Tr. 226), was equivocal. By contrast, I find that the testimony of Ramos and DelRosa -- that notwithstanding any slack in the cord, both Lewis and DelaRosa tripped the E-stop mechanism -- was generally consistent and rendered with certitude. Moreover, the photograph in P. Ex. 17 shows a cord that appears sufficiently taut. In these circumstances, I credit the testimony of Ramos and DelaRosa over the testimony of inspector Lewis, and I find that a person falling on or against conveyor no. 2 could readily deactivate the conveyor drive motor. Accordingly, I find that the Secretary failed to establish a violation of the standard and I vacate Citation 6598656.

4. Citation 6598658

Citation 6598658 also alleges that Respondent violated 30 C.F.R. § 56.14109(a). The citation alleges the following condition or practice:

> An approximately 1/4 inch diameter cable used as an emergency stop cord located next to the walkway adjacent to the conveyor C8 on the Scalping Tower's first floor was placed 29 inches from the walkway floor. The emergency stop cord could not readily deactivate the drive motor if an individual was to fall on or against the conveyor belt due to the location of the emergency stop cord being approximately 18 inches below the conveyor belt. Employees access this area weekly for maintenance. Employees are exposed to a hazard of not being able to deactivate the drive motor in the event of an emergency from falling on or against the conveyor and could suffer broken bones and/or lacerations.

P. Ex. 19.

The violation is alleged to be significant and substantial (S&S), with gravity alleged to be reasonably likely to result in lost work days or restricted duty, with one person affected. Inspector Lewis testified that the area was not restricted from access. Accordingly, the citation, which was originally written as unlikely to result in an injury and non-S&S, was modified to reasonably likely to result in lost work days or restricted duty and S&S,[22] because an employee was likely to suffer broken bones if caught in the belt and unable to activate the E-stop cord. Tr.

[22] This modification occurred after Lewis discussed the citation with his supervisor.

149-150, 152; Tr. P. Ex. 19-21 Negligence was modified from moderate to low based on Respondent's knowledge of the alleged violation and Anez's remark that the condition had existed that way for years. P. Ex. 21; Tr. 152. The Secretary proposed a penalty of $100.00.

a. Factual Background

After inspecting conveyor no. 2 above, Lewis inspected conveyor no. 8 and observed that "the emergency stop cord was located way below the actual conveyor itself, almost riding onto the frame of the conveyor, and in my judgment I just didn't see how somebody could fall onto that conveyor and can really deactivate it." Tr. 144-45. On questioning from the Court, Lewis testified that he leaned over onto the belt (laid his body over it) and the E-stop cord did not trip. Tr. 145. 146 When asked, how the cord would be tripped, Lewis replied, "by pulling on the cord," but acknowledged that he did not pull on the cord. Tr. 145-46. When asked whether someone who fell on the conveyor could reach down and activate the emergency stop cord, Lewis testified that *he did not think so* based on his estimate that the belt would be moving about 300 feet per minute, and any such reach from the conveyor to the cord 18 inches below (i.e., less than an arm's length) would be obstructed by eye bolts and the frame as the belt moved forward. Tr. 146-47, 159, 190. The alleged violation is depicted in P. Ex. 22 (top photograph where the cord passes next to or under a small electrical box) and the termination of the violation is depicted in P. Ex. 22 (bottom photograph). Tr. 191.

Inspector Lewis determined that the violation was S&S because it met the four *Mathies* criteria. Tr. 150. When asked by the undersigned to explain how the alleged violation met each of the four *Mathies* criteria, Lewis restated the language of the standard to describe the alleged violation, determined that there was a discrete safety hazard because "employees were exposed to an unguarded area," determined that the hazard (described by Lewis as unrestricted exposure to the unguarded area), if left unabated, was reasonably likely to result in an injury, and determined that such injury was likely to result in broken bones or [strained] joints, which were serious. Tr. 151.

Lewis testified that an employee would be exposed to the hazard on the walkway. "If he trips and hits the conveyor, it's going to throw him in an involuntary motion into a position whereas he will not be able to readily deactivate it with his hands or anything, and he's going to fall and break an arm or break a leg. If he was positioned to a point whereas he fell onto it with his body and deactivated it, he wouldn't have that problem. He would stop immediately." Tr. 153.

When asked by the undersigned how one would trip from the walkway and hit the conveyor, Lewis testified that the conveyor is really close to the walkway. Tr. 153-54; Cf. P. 22. Indeed, there was a water hose that presented a tripping hazard on the walkway adjacent to conveyor no. 8. Tr. 189; P. Ex. 22 (bottom picture). On cross, Lewis testified that one could trip onto the conveyor or onto the walkway "[d]epending on how your arms flew out." Tr. 190.

Lewis also testified that it was possible to get entangled between the belt and the roller, which could result in lacerations or broken appendages, and if clothing got caught in the belt, it would drag one along and one would not break free without the E-stop cord being triggered. Tr. 154-55. Lewis explained that it would be difficult to grab the E-stop cord while the belt was moving because of devices along the side of the conveyor, such as rollers and a small electrical box, as pictured in P. Ex. 22. Tr. 156. Lewis testified that he would have to reach down below his knees to grab the cord, although he conceded that the cord was designed to be triggered by contact with any part of the body. Tr. 185, 190. Lewis opined that at the point where the E-stop cord runs next to or underneath the electrical box (at best a few inches), one's body would not come in contact with the cord. Tr. 191; P. Ex. 22. Lewis distinctly recalled that he took the photograph to show the hindrance of the sole electrical box. Tr. 191, 224.

On redirect, Lewis testified that the location of the pull cord under the junction box would hinder proper operation of the pull cord, which was not within easy reach. Tr. 223. On re-cross, Lewis acknowledged that a pull cord that could be reached at 18 inches away was readily available if one was trying to reach for the cord. Tr. 226.

R. Exs. 19-21 are photographs taken by Ramos during the inspection. They represent true and accurate representations of the conditions along certain sections of conveyor no. 8 on November 23, 2009. Tr. 313-17. Inspector Lewis and maintenance man "Piojo" are pictured in R. Ex. 19. Ramos did not remember if Mr. DelaRosa was present that day. Tr. 317-18. DelaRosa did not testify about conveyor no. 8.

Ramos testified that Lewis issued Citation 6598658 because the pull cord was too low. Tr. 320. When shown R. Ex. 20, Ramos opined that if Piojo fell on conveyor No. 8 the pull cord would trip because Piojo did so. "He leaned up against the conveyor and it tripped." Tr. 318. Conveyor no. 8, pictured in R. Ex. 20, is about chest high on Piojo, and the pull cord is about waist high, although the record does not reflect Piojo's height. Tr. 320. When asked again whether Piojo would be able to trip the cord if he fell on the conveyor belt, Ramos again testified affirmatively. Tr. 320-21. The Court asked, "Did he that day?" Ramos replied, "Yes." When asked by the Court how [Piojo] fell against the belt, Ramos replied, "I don't remember exactly how he pushed against it. I think he just leaned up against the conveyor and tripped it." Ramos then testified that while the belt was running, Piojo "leaned up against the pull cord and it tripped it." Tr. 318. Ramos testified that he pull cord was at least eight inches away from the frame. Tr. 321.

Ramos refused to acknowledge, however, that in the top picture of P. Ex. 22, the pull cord was running along the frame by the junction box. Tr. 322; *see* P. Ex. 22, top picture. Ramos testified that the pull cord did not sit along the bottom of the frame, because it was installed in eye bolts on top of the junction box. Tr. 322-23. Ramos could not remember whether the bottom picture in P. Ex. 22 (abatement) was taken before or after the citation was written. Tr. 324. Although Ramos testified that the E-stop cord was installed in eye bolts along

the length of the conveyor as pictured in R. Ex. 20, that picture shows the cord dropping below the frame behind Piojo. Tr. 325.

When asked how he accounted for the top picture in P. Ex. 22, Ramos explained that although the pull cord is not in the eye bolt, it is above the frame. Tr. 325. The photo appears to show otherwise, and Ramos acknowledged on redirect that the photograph was an accurate representation of where the pull cord was in reference to the frame. Tr. 328. Moreover, when pressed on questioning from the undersigned, Ramos could not recall whether the cord was in the eye bolts for the full length of conveyor no. 8, although he then testified that the cord was positioned the same way in each location there was an eye bolt. Tr. 327-28.

On redirect, however, Ramos testified that the pull cord, depicted in the top picture of P. Ex. 22, had sufficient tension and would be triggered if someone leaned against it. Tr. 335. In addition, Ramos testified that he would be able to reach the pull cord from the conveyor, which was only 18 inches away. He also testified that if he was standing on the catwalk, he could bump the pull cord with his body. Tr. 336-37.

b. Legal Analysis

Unlike the foregoing citation, where I credited the testimony of Ramos and DelaRosa over the testimony of inspector Lewis concerning the slack in conveyor no. 2, I find that Lewis credibly testified that he leaned over onto the belt on conveyor no. 8 and the E-stop cord did not trip, as it was too low. Tr. 145, 146. Unlike the foregoing citation, Ramos, Respondent's sole witness concerning this citation, specifically failed to rebut this testimony from Lewis, which essentially established that if one fell on or against the belt, the cord would not trip. Rather, Ramos testified that Pioja fell against the conveyor cord and it tripped. Tr. 320-21. I note that when asked by the Court how [Piojo] fell against the belt, Ramos could not remember exactly how Piojo "pushed against it. I think he just leaned up against the conveyor and tripped it." Tr. 321. Ramos then testified that while the belt was running, Piojo leaned up against the *pull cord* (not the conveyor) and tripped it. Tr. 321.

I find that Ramos testimony concerning this citation was equivocal, unreliable, and contrary to the photographic evidence. As noted, Ramos refused to acknowledge that in the top picture of P. Ex. 22, the pull cord was running along the frame by the junction box. Tr. 322; *see* P. Ex. 22, top picture. Ramos could not remember whether the bottom picture in P. Ex. 22 (abatement) was taken before or after the citation was written. Tr. 324. Moreover, although Ramos testified that the E-stop cord was installed in eye bolts along the length of the conveyor as pictured in R. Ex. 20, even that picture showed the cord dropping below the frame behind Piojo. Tr. 325. Although Ramos testified that he would be able to reach the pull cord from the conveyor, which was only 18 inches away, I am persuaded by Lewis' testimony that when someone fell on the conveyor, which was moving about 300 feet per minute, one's reach for the cord would be obstructed by eye bolts and the frame as the belt moved forward. Tr. 146-47, 159, 190. In these circumstances, I find that the Secretary establish by a preponderance of the

evidence that a person falling on or against conveyor no. 8 could not readily deactivate the drive motor. Accordingly, I find that Respondent violated 30 C.F.R. § 56.14109a with respect to conveyor no. 8.

I further find that the violation was S&S under the four *Mathies* criteria. Tr. 150. I have found the violation above. That is, the record establishes that a person falling on or against the unguarded conveyor adjacent to the nearby travelway could not readily deactivate the emergency stop device (cord) because it was located too low below the conveyor belt. This violation contributed to a discrete safety hazard that a miner would become entangled in the conveyor belt if he fell on or against it because the belt could not be stopped by the fall. Further, I find that there was a reasonable likelihood that the hazard contributed to by the violation will result in an injury because the debris (*see, e.g.*, R. Ex. 19 and 21), blue tarp material (*see* R. Ex. 20), and water hose (*see* P. Ex. 22, bottom picture) on the adjacent travelway presented a tripping hazard that made a fall reasonably likely to occur during continuous mining operations. Finally, the Secretary established a reasonable likelihood that the injury in question would be of a reasonably serious nature based on Lewis testimony that entanglement between the belt and the roller would result in lacerations or broken appendages. Tr. 154-55; *see also* P. Ex. 19.

I further find that the violation was properly designated as the result of Respondent's low negligence, particularly because the stop cord had been in its present location for many years. P. Ex. 21; Tr. 152.

In sum, Citation 6598658 is affirmed, as modified in P. Ex. 21. Applying the penalty criteria set forth in section 110(i) and outlined above, I find that the proposed penalty of $100.00 is appropriate.

5. Citation 6598828

Citation 6598828 alleges that Respondent violated 30 C.F.R. § 56.14107a. The cited standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive head, tail, and takeup pulleys, flywheels, coupling, shafts, fan blades, and similar moving parts that can cause injury."

The citation alleges the following condition or practice:

> The tail pulley located on the Rice Rock conveyor was not guarded to prevent employees from contacting moving machine parts. A gap of approximately sixteen inches in width by sixteen inches in height was located between the existing guard and tail pulley. A grease fitting was located approximately twenty two inches from the gap. The area is accessed approximately twice a month for maintenance and was last accessed approximately two weeks ago to grease the tail pulley. Employees accessing this area are exposed to an entanglement hazard form coming in contact with moving machine parts.

P. Ex. 24.

The violation is alleged to be non-S&S, with gravity alleged to be unlikely to result in a permanently disabling injury, and one person affected. Negligence is designated as moderate. The Secretary proposes a penalty of $100.00.

a. Factual Background

Inspector Lewis testified that he issued the citation (P. Ex. 24) on May 26, 2010 to supervisor Anez because he observed an unguarded gap that he measured" to be 16" by 16" near the tail pulley, which allowed exposure to the tail pulley. Tr. 163-64. The gap in guarding was about above four and one-half feet above ground level. Tr. 218. The area was accessed at the end of the work day and the tail pulley was greased about once every two weeks. No foot traffic was observed in the area. P. Ex. 26.

Lewis determined that exposure was unlikely because the grease footing used for the pulley was not in the exposed area and employees had no reason to be around the exposed area. Tr. 165. Nevertheless, he determined that if one got caught in the tail pulley, one would likely lose appendages. Tr. 166. Lewis designated negligence as moderate because Respondent's representative (either Anez or safety manager Fernando Chavez) admitted that the condition was extant for two weeks. Tr. 167, 202; P. Ex. 26.

On cross examination, Respondent repeatedly queried Lewis concerning the accuracy of his measurements of the unguarded gap, as described in the citation. Initially, Lewis could not recall how he took the measurements of the gap in guarding. Tr. 209. Then Lewis explained how he came up with the measurements. Tr. 212, 215. Thereafter, Lewis again could not recall his measurement methodology. Tr. 218. Moreover, Lewis testified inconsistently about the distance from the gap to the grease fitting. Tr. 216, 224. Lewis' recollection of events was unimpressive.

b. Legal Analysis

Despite Lewis' inconsistencies about measurements and distances, which basically amount to "much ado about nothing," I find the violation. The tail pulley was a moving machine part that was only partially guarded. If a miner reached through the unguarded gap to pull material out or access a nearby grease fitting, the miner could be entangled, pulled into the tail pulley, and lose an arm, hand, or finger. The failure to guard the pulley contributed to an entanglement hazard that was unlikely to result in a permanently disabling injury, however, because exposure to the hazard was infrequent and limited. Negligence was at least moderate as the unguarded condition existed for two weeks. Considerable mitigating circumstances were not proffered. Accordingly, I affirm the citation, as written.

In sum, Citation 6598828 is affirmed, as written. Applying the penalty criteria set forth in section 110(i) and outlined above, I find that the proposed penalty of $100.00 is appropriate.

III. ORDER

Citation No. 6514123 is **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation. The proposed penalty is reduced from $687.00 to $139.00. Citation No. 6514130 is **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation. The proposed penalty is reduced from $687.00 to $139.00. Citation No. 6598828 is **AFFIRMED, AS WRITTEN**, with an assessed penalty of $100.00. Citation No. 6598656 is **VACATED**. Citation No. 6598658 is **AFFIRMED, AS MODIFIED in P. Ex. 21**, with an assessed penalty of $100.

The proposed settlement agreement is **APPROVED** for Citation Nos. 6514121, 6514122, and 6598830.

Within thirty days of the date of this decision, Respondent Cemex Construction Materials of Florida, LLC is **ORDERED** to pay a total civil penalty of $924.00 for violations adjudicated or settled herein.

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

Distribution: (E-Mail and Certified Mail)

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710

September 12, 2012

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA)	:	
on behalf of REUBEN SHEMWELL,	:	Docket No. KENT 2012-655-D
Complainant	:	MADI CD 2012-08
	:	
v.	:	
	:	
ARMSTRONG COAL COMPANY, INC.,	:	Parkway Mine Surface Facilities
	:	Mine ID: 15-19356
and	:	
	:	
ARMSTRONG FABRICATORS, INC.,	:	
Respondents	:	

ORDER DISSOLVING ORDER OF TEMPORARY REINSTATEMENT

Appearances: Matt S. Shepherd, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor;
Tony Oppegard, Esq., Lexington, Kentucky, for Reuben Shemwell;
Adam K. Spease, Esq., Miller Wells, PLLC, Louisville, Kentucky, for Armstrong Coal Company, Inc., and Armstrong Fabricators, Inc.;
Daniel Z. Zaluski, Esq., Madisonville, Kentucky, for Armstrong Coal Company, Inc.

Before: Judge Feldman

This temporary reinstatement action, filed by the Secretary on March 9, 2012, on behalf of Reuben Shemwell, arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("Act" or "Mine Act"). Under section 105(c)(2), ". . . if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). Although the Secretary has

brought this temporary reinstatement matter, Tony Oppegard has also filed an appearance in this proceeding as Shemwell's private counsel.[1]

I. The Issue Presented

The question presented in this proceeding is whether a temporary reinstatement order should remain in effect after the Secretary has concluded the facts surrounding Shemwell's September 14, 2011, discharge do not constitute a violation of the anti-discrimination provisions of section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1). As discussed below, the recent decision in *North Fork Coal Corporation v. FMSHRC*, __ F.3d __, 2012 WL 3289806 (6th Cir. 2012), determined that temporary reinstatement terminates after the Secretary, upon investigation, concludes that a violation of the anti-discrimination provisions of section 105(c) has not occurred.

II. Background

The Secretary's application for temporary reinstatement was granted following an evidentiary hearing conducted on May 23, 2012. 34 FMSHRC __, slip op. (Jun. 2012) (ALJ). The order required Armstrong Coal Company, Inc., and/or Armstrong Fabricators, Inc., (collectively referred to as "Armstrong"), to immediately reinstate Shemwell to the welder position he held immediately prior to his September 14, 2011, termination, or to a similar position as a laborer at the same rate of pay and benefits, and with the same or equivalent duties assigned to him. Slip op. at 12. Back pay was awarded to Shemwell effective April 25, 2012. *Id.* at 13. The June 21, 2012, decision temporarily reinstating Shemwell was affirmed by the Commission. 34 FMSHRC __ (July 2012).

As an alternative to temporarily reinstating Shemwell, Armstrong filed a joint motion to approve its agreement with the Secretary to economically reinstate Shemwell. The parties' agreement was approved on August 1, 2012. 34 FMSHRC __, slip op. (Aug. 2012) (ALJ). The order granting temporary reinstatement provided, pursuant to the agreement, that:

> Shemwell shall receive back pay as of April 25, 2012, until the Order of Reinstatement issued on June 21, 2012, is dissolved, or is otherwise no longer in effect. The terms of the agreement include the Respondents' assurance that Shemwell will receive all benefits

[1] Commission Rule 4(a) provides that a complainant on whose behalf the Secretary has brought an action under section 105(c)(2) is a party who may present additional evidence. 29 C.F.R. § 2700.4(a). The Commission has approved the appearance of an attorney representing the miner a section 105(c)(2) proceeding. Mountain Top Trucking Co., 18 FMSHRC 487, 488 (Apr. 1996).

> he would have received if he were physically working at the mine, including, but not limited to, health insurance, contributions to a § 401k plan, and all relevant bonuses given to Armstrong's welders during the temporary reinstatement period.

Slip op. at 2.

On July 27, 2012, the Mine Safety and Health Administration (MSHA) advised that it had declined to bring a discrimination action on Shemwell's behalf because its investigation revealed that a violation of section 105(c)(1) had not occurred. Letter from Carolyn T. James, Assistant Director, Technical Compliance and Investigation Office, to Reuben Shemwell (July 27, 2012). Shortly thereafter, on August 14, 2012, the United States Court of Appeals for the Sixth Circuit held, contrary to a prior Commission decision, that an order of temporary reinstatement dissolves when the Secretary determines that a violation of section 105(c)(1) has not occurred. *North Fork*, *supra*, *rev'g Sec'y of Labor o/b/o Mark Gray v. North Fork Coal Corp.*, 33 FMSHRC 27 (Jan. 2011)**.**

In view of *North Fork*, on August 15, 2012, Armstrong filed a motion seeking dissolution of the order of temporary reinstatement, and Shemwell's reimbursement of wages and benefits received from July 27, 2012, the date the Secretary declined to file a discrimination complaint.[2] Armstrong's motion is predicated on the Court's holding that "the order of temporary reinstatement dissolves when the Secretary determines that no violation has occurred." *Armstrong's August 15, 2012, Mot.* at 2-4, citing *North Fork*, 2012 WL 3289806 at 6.

The Secretary's response to Armstrong's August 15, 2012, motion was filed on August 20, 2012. The Secretary does not oppose the prospective termination of Shemwell's temporary reinstatement. However, the Secretary asserts that dissolution of Shemwell's temporary reinstatement should not be retroactively applied. *Sec'y Resp. to Armstrong's August 15, 2012, Mot.* at 3.

On August 27, 2012, Oppegard filed, on Shemwell's behalf, a response to Armstrong's motion opposing both the prospective and retroactive dissolution of temporary reinstatement. Oppegard's opposition is based on the terms of the parties' economic reinstatement agreement. *Oppegard's Resp. to Armstrong's August 15, 2012, Mot.* at 1-2. Oppegard contends that the terms and effect of the parties' agreement cannot be overridden by the "6th Circuit's decision in *North Fork." Id.* at 3. Oppegard relies on the terms of the parties' agreement that provide:

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[2] Shemwell's complaint was filed with MSHA on January 23, 2012. The Secretary advised Shemwell of the results of her investigation on July 27, 2012. Armstrong filed a previous motion to dissolve on August 2, 2012, based on the Secretary's failure to adhere to the 90 day timetable for completion of her investigation of Shemwell's complaint specified in section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3). Armstrong's August 2, 2012, motion is deemed moot in view of the Court's August 14, 2012, *North Fork* decision.

> This Agreement shall remain in effect until a final order of the Federal Mine Safety & Health Review Commission is entered regarding Shemwell's underlying discrimination complaint (MSHA Case No. MADI-CD-2012-08) - whether that case is brought by the Secretary of Labor under § 105(c)(2) of the Mine Act or by Shemwell under § 105(c)(3) of the Mine Act, *or until such time as the Order of Temporary Reinstatement dated June 21, 2012 is dissolved or otherwise no longer in effect.*

Parties' July 17, 2012, Economic Reinstatement Agreement at 2 (emphasis added).

III. Disposition

North Fork, the controlling law in this instance, holds that "upon the Secretary's determination that discrimination in violation of the Mine Act has not occurred, a miner is no longer entitled to temporary reinstatement." *North Fork*, 2012 WL 3289806 at 8. *North Fork* did not directly address whether the temporary reinstatement should be dissolved prospectively or retroactively. However, the Court did acknowledge the history of the Commission's treatment of temporary reinstatement prior to the Commission's decision in *North Fork Coal Corp.,* 33 FMSHRC 27 (Jan. 2011). In this regard, the Court noted "the Commission's [prior] 27 year accepted practice of dissolving temporary reinstatement following the Secretary's determination of no Mine Act violation." *North Fork*, 2012 WL 3289806 at 7. During these twenty-seven years, the Commission dissolved temporary reinstatement prospectively by a timely order[3] issued following notification by the Secretary. Consistent with the Court's acknowledgment of the procedural history, the Secretary does not oppose the prospective dissolution of Shemwell's temporary reinstatement.

As previously noted, Oppegard opposes both the prospective and retroactive dissolution of Shemwell's reinstatement. With respect to Oppegard's opposition to prospective dissolution, Oppegard's reliance on the terms of the temporary reinstatement agreement is misplaced for several reasons. As a threshold matter, the terms of the agreement recognize that Shemwell's reinstatement shall remain in effect "until such time as the Order of Temporary Reinstatement dated June 21, 2012 is dissolved." *Parties' Agreement* at 2. As a consequence of this decision, the temporary reinstatement order *shall be dissolved*.

Even if the terms of the temporary reinstatement agreement were inconsistent with the Court's decision in *North Fork*, a contract cannot extend a statutory right that the court has determined no longer exists. Here, the 6th Circuit has determined that a miner's entitlement to temporary reinstatement under section 105(c)(2) ceases after the Secretary's decision not to bring

[3] The dissolution of Shemwell's temporary reinstatement has been briefly delayed by relocation of the Commission's headquarters to 1331 Pennsylvania Avenue, NW, Suite 520N, Washington, DC 20004-1710.

a discrimination complaint on the miner's behalf. Thus, in this instance, there is no longer a justification for the Commission's continued approval of the parties' temporary reinstatement agreement.

With respect to the remaining issue of retroactivity, Armstrong's request for retroactive dissolution and reimbursement by Shemwell essentially is an equitable argument that lacks merit. The Court addressed Armstrong's concern in *Jim Walter Res. v. FMSHRC*, 920 F.3d 738 (11th Cir. 1990). The Court stated:

> ... Congress, in enacting the "not frivolously brought" standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits.

Id. at 748, n.11.

It is significant that Armstrong chose to economically, rather than actually, reinstate Shemwell. Thus, Armstrong agreed to payment of Shemwell's wages while foregoing the benefit of his services as a welder. Consequently, any loss incurred by Armstrong during the relevant retroactive period is a result of Armstrong's decision to economically reinstate Shemwell.[4]

ORDER

In view of the above, **IT IS ORDERED** that the Motion to Dissolve and for Reimbursement filed jointly by Armstrong Coal Company, Inc., and Armstrong Fabricators, Inc., **IS GRANTED, IN PART**, with respect to the prospective dissolution of Shemwell's temporary reinstatement. Consequently, **IT IS FURTHER ORDERED** that the June 21, 2012, order granting the temporary reinstatement of Shemwell as of April 25, 2012, **IS DISSOLVED** effective as of the date of this Order.[5]

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[4] A Commission judge has previously noted that any loss by a mine operator incurred as a result of a delay in dissolving a miner's economic reinstatement was not recoverable in that it was the result of the operator's "decision to forego performance of work by [the] Complainant." *Sec'y o/b/o Dewayne York v. PR&D Enterprises, Inc.,* 23 FMSHRC 113, 114 (Jan. 2001) (ALJ Zielinski).

[5] This Order dissolving Shemwell's temporary reinstatement has been served on the parties by electronic and certified mail.

IT IS FURTHER ORDERED that the joint motion filed by Armstrong Coal Company, Inc., and Armstrong Fabricators, Inc., seeking the retroactive dissolution of the June 21, 2012, Order of Temporary Reinstatement **IS DENIED.** Consequently, Shemwell is not required to return any wages and the value of any benefits previously received under the terms of the parties' economic temporary reinstatement agreement.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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/tmw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 18, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2011-612-M A.C. No. 10-02190-244171
v.	:	
TIMBER SAVERS, INC. Respondent	:	Mine: Rock Solid Mine

ORDERS ON MOTION TO AMEND PETITION FOR CIVIL PENALTY AND MOTION FOR PARTIAL SUMMARY JUDGMENT

In this Civil Penalty Proceeding involving a single citation, with a proposed penalty of $100.00, issued to the Respondent, Timber Savers, Inc., the Secretary seeks to amend its Petition to list the Respondent's name as either Timber Savers, Inc. and/or the Solid Rock Gravel Company. The Secretary also seeks Partial Summary Judgment on the issue of jurisdiction, finding, whichever name(s) appropriately and most accurately describe the Respondent's operations, that it is a mine within the meaning of the Mine Act and subject to the jurisdiction of the Mine Safety and Health Administration. Upon review of the Motions and the Responses thereto, the Court finds that the amendment modifying the named Respondent is appropriate and warranted under the circumstances and is therefore **GRANTED** and further that, as this case is nothing more than a garden variety, and meritless, objection to MSHA's jurisdiction, the Secretary's motion for summary judgment is also **GRANTED**.

Protracted discussion of these matters is not warranted and will not be made. Regarding the correct name of the operation cited, suffice it to say that MSHA, relying upon quarterly production reports submitted by Timber Savers, believed that to be the correct name for the Respondent's crushing aggregate site. In an attempt to ferret out the correct name for the operation cited, the Petitioner, upon deposing Phillip Berreth, the sole owner/shareholder for Timber Savers, learned that the cited mining operation was changed to "The Solid Rock Gravel Company." Mr. Berreth testified that Timber Savers ceased operations in 2004, selling its assets to the Solid Rock Gravel Company. Mr. Berreth, again through his deposition, stated that he bought Timber Savers from his father and, when that operation ceased, its assets were sold to the Solid Rock Gravel Company. Mr. Berreth, as the sole owner of Timber Savers, then became the sole owner of the Solid Rock Gravel Company. The latter, "new" operation of Mr. Berreth operates year round, selling crushed gravel to purchasers for their various needs. Critically, Mr.

Berreth admitted in his deposition that the site which was inspected by MSHA *is the same site* where the Solid Rock Gravel Company performs its gravel crushing operation.

Jurisdiction is not defeated merely because MSHA, in good faith, incorrectly named the entity where the crushing activities were ongoing. All parties understood the location of the operation cited and something as superficial as listing its formal name does not impair the effectiveness of the civil penalty proceeding filing. It would, for example, be sufficient if MSHA, unable to accurately determine the correct mine name, had to list the operation's location simply by its geographic coordinates alone. Here, the heart of the Respondent's objection emanates not from an incorrect listing of the mine operation, but rather from its view that its activity does not constitute interstate activity. That issue, raised in the Secretary's other motion, will be next addressed. Accordingly, the motion to amend the petition is **GRANTED**.

The Secretary's second motion is a motion for partial summary judgment. In that motion the Secretary seeks a ruling that the Respondent, Timber Savers, Inc., and/or its alternative identifying name, the Solid Rock Gravel Company, is a mine subject to the jurisdiction of the Mine Act. For the reasons that follow, the Court, having considered the motion and the Respondent's responses thereto, finds that the Respondent's operation is indeed and without any doubt subject to the Mine Act. Accordingly, the Secretary's Motion for Partial Summary Judgment is also **GRANTED.**

The Court notes that the motion is supported by the deposition of Phillip Berreth who, by his own deposition, acknowledges that he is the sole stockholder of Timber Savers, a company that he purchased from his father in 1995 and that he is also the sole owner of the Solid Rock Gravel Company. The latter company is open year round, has equipment associated with mining activities, such as front end loaders and a crusher and sells gravel to customers who need that product. Mr. Berreth, again from his own words under oath during his deposition, admitted that he has never filed a legal identity report for the Solid Rock Company, though he admits that the Company crushes aggregate on the site where MSHA issued the citations in this docket.

As the Secretary notes in the Summary to her Motion: "There is no doubt that the Respondent's rock crushing operation is a mine subject to the jurisdiction of the Mine Act. Mr. Berreth, the sole shareholder/owner testified that the operation, which he reports should be called The Solid Rock Gravel Company (although he files quarterly reports with MSHA suggesting that the production is really that of Timber Savers, Inc.) is a facility for the extraction, crushing, screening and sale of rock/aggregate. The product, according to Mr. Berreth, is sold to anyone who wants it and is used for road building. In producing this aggregate, Mr. Berreth utilizes the telephone for taking customer orders, dump trucks manufactured outside the state of Idaho for transporting the aggregate to the customers, front end loaders manufactured outside the state of Idaho for loading the aggregate onto the dump trucks, and office equipment, including computers as well as the use of credit cards. Mr. Berreth testified that the annual dollar volume of business of this company is a quarter of a million dollars." Motion at 11.

There is no genuine dispute of a material fact in this case and therefore summary judgment is appropriate. Clearly, this operation is a mine within the meaning of Section 3(h) of the Mine Act and its activity, all of which has been acknowledged by its owner, affects commerce within the meaning of Section 4 of the Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 801 et seq. The Court has reviewed Mr. Berreth's responses to both motions and finds them to be without any merit. In issuing this ruling, the Court takes note of and incorporates by reference portions of the Secretary's Motion. The Court also takes notice of the very relevant and on point decision of fellow Administrative Law Judge Zane Gill's decision in *Sec. v. Fittstone, Inc.*, 33 FMSHRC 2933 (Nov. 2011). That decision appears in the Appendix to this decision.

Accordingly, the Court finds that the Respondent's facility, located at Weippe, Idaho and known as both Timber Savers, Inc. and the Solid Rock Gravel Company, is a mine within the meaning of the Mine Act and is subject to the jurisdiction of the Mine Safety and Health Administration.

The parties are **DIRECTED** by these ORDERS to consult with one another to determine if the civil penalty issues can be settled and to then email the Court within two (2) weeks of the date of this Order to advise about the status of the matter. The communication to the Court is to be sent to: wmoran@fmshrc.gov .

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

Distribution:

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APPENDIX

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER v. FITTSTONE, INC., RESPONDENT 33 FMSHRC 2933, 2011 WL 6148975 (Nov. 30 2011) Judge L. Zane Gill.

ORDER GRANTING THE SECRETARY'S PARTIAL SUMMARY JUDGMENT MOTION

This case is before the court on a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (the "Act"). The parties filed cross-motions for summary judgment. The underlying controversy involves citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") under Section 104(a). The issue the parties argued in their cross-motions is whether MSHA has jurisdiction to inspect the Respondent's limestone gravel operation. A telephone hearing on this issue was conducted on September 28, 2011.

The Respondent argues that its limestone gravel facility is not subject to MSHA's jurisdiction because it does not "substantially" affect interstate commerce. This position is based on the Respondent's interpretation of the Supreme Court's decision in United States v. Lopez, 514 U.S. 549 (1995). Respondent argues that after Lopez, a mine must satisfy a "substantial qualifier" test before MSHA can exert its inspection jurisdiction. This interpretation is plausible because in Lopez the Supreme Court stated that "the proper test requires an analysis of whether the regulated activity substantially affects interstate commerce." Id., 559 (emphases added) The Supreme Court also said that "where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." Id. (emphases added)

However, by placing so much weight on the word "substantial," the Respondent misinterprets Lopez. The Lopez decision resolves the issue of whether a federal law banning possession of a firearm on public school property, 18 U.S.C. § 922(q)(1)(A), the Gun-Free School Zones Act of 1990, could be applied under a Commerce Clause argument when there was no discernable nexus between a student's possession of a firearm and any commercial or economic activity.

*2934 While it is true that in order for an activity to come under the Commerce Clause, there must be a showing that the activity "substantially affects" interstate commerce, i.e., the activity must first be shown to be commercial in nature. Lopez determined that possession of a firearm was not commercial or economic in nature, therefore there was no need to move to the secondary issue of whether the commercial activity had a substantial impact on interstate commerce.

In short, the Lopez decision did not elevate the "substantial qualifier" test to primary importance as the Respondent argues, but affirmed that laws and/or regulations promulgated via the Commerce Clause need to have some basis in commerce. By validating Wickard v. Filburn 317 U.S. 111 (1942) in its Lopez decision, the Supreme Court made it clear that if an economic

activity is involved, the level of activity needed to justify extension of Commerce Clause authority is indeed quite minimal. The Supreme Court cited Wickard as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." Id., at 560 Accordingly, Wickard is still good precedent, and we are bound by it in this matter.

**2 Comparing the facts in Wickard with the facts in this case, there is no question that the Fittstone facility affects commerce and is under the Mine Act's jurisdiction. In Wickard, a law was established to limit wheat production based on acreage owned by a farmer in order to drive up wheat prices during the Great Depression. A farmer grew more than the limits permitted and was ordered to destroy his crops and pay a fine, even though he was producing the excess wheat for his own use and had no intention of selling it. The Supreme Court found that "[e]ven activity that is purely intrastate in character may be regulated by Congress, where that activity, combined with like conduct by others similarly situated, affects commerce among the States […]." Fry v. United States, 421 U.S. 542, 547 (1975) citing Wickard, at 127-128

Here, the Respondent's total facility sales were $358,901.00 for the time period February 23, 2010, to August 24, 2010. [FN1] In addition, the Research and Innovative Technology *2935 Administration ("RITA") survey [fn2] CITED BY THE respondent in support of its position, confirms that there is only a small amount of gravel and stone included in the total freight transported in the United States. This demonstrates that even a relatively small amount of gravel production can have a disproportionate effect on interstate commerce for purposes of jurisdictional analysis, and it bolsters the Secretary's argument.

In addition to Wickard and Fry, there are numerous decisions that support the argument that MSHA has jurisdiction over the Respondent's Fittstone facility. For instance, in Jerry Ike Harless Towing, Inc. and Harless Inc. v. Sec'y of Labor, the Commission stated that the "Commerce Clause of the Constitution has been broadly construed [… and that] Commercial activity that is purely intrastate in character may be regulated by Congress under the Commerce Clause, where the activity, combined with like conduct by others similarly situated, affects commerce among the states."Jerry Ike Harless Towing, Inc. and Harless Inc. v. Sec'y of Labor, 16 FMSHRC 683, 686 (April 1994), citing Fry v. United States, 421 U.S. 542, 547 (1975); Wickard, at 111. The Commission continued by saying that "Congress intended to exercise its authority to regulate interstate commerce to the 'maximum extent feasible' when it enacted section 4 of the Mine Act." Id., citing Marshall v. Kraynak, 604 F.2d 231, 232 (3d Cir. 1979), cert. denied 444 U.S. 1014 (1980) Though Harless Towing was published a year prior to Lopez, the Commission has not changed its stance on the matter.

In a Second Circuit decision issued in 2004, the court affirmed Wickard and Fry v. United States when it found that a gravel mine that did business only in New York was under the Mine Act's jurisdiction. D.A.S. & Gravel v. Sec'y of labor, 386 F. 3d 460, 463 (2nd Cir. 2004). The court stated that "the Commerce Clause does not preclude Congress from regulating the activities of an economic actor whose products do not themselves enter interstate commerce, where the activities of such local actors taken together have the potential to affect an interstate market the regulation of which is within Congress' power." Id.

**3 In United States v. Lake, 985 F.2d 265, 267-69 (6th Cir. 1993), which the Commission cited in Harless Towing above, a mine operator sold all its coal locally and purchased mining supplies from a local dealer. Id., at 269. The court found that the operator was engaged in interstate commerce because "such small scale efforts, when combined with others, could influence interstate coal pricing and demand."

The Secretary has also argued and provided evidence that the Respondent's use of machinery and equipment bought from out-of-state manufactures affects interstate commerce, also bringing respondent under MSHA's jurisdiction. Though there is abundant precedent *2936 supporting the Secretary's assertion on this point, [FN3] it only serves to bolster my decision. I conclude, therefore, that the Respondent's gravel operation affects interstate commerce and comes under MSHA's inspection authority.

Accordingly, the Secretary's Motion for Partial Summary Judgment is GRANTED and the Respondent's summary judgment motion is DENIED.