

September 2015

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Secretary of Labor v. Big Laurel Mining Corporation, Docket No. VA 2012-56, et al (Judge Paez, September 1, 2015)

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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 1, 2015

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

v.

BEVERLY MATERIALS, LLC

Docket No. LAKE 2011-957-M

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). The citation at issue alleges that Beverly Materials, LLC, (“Beverly”) violated 30 C.F.R. § 56.14132(a)¹ by failing to maintain a manually-operated horn on a scraper in functional condition. At issue is whether the Administrative Law Judge erred by finding that the horn’s intermittent functioning satisfied section 56.14132(a). For the reasons that follow, we hold that the operator violated the standard, and that the Judge should not have vacated the citation. Accordingly, we reverse the Judge’s decision and remand the case for assessment of a penalty.

I.

Factual and Procedural Background

Beverly Materials operates the Beverly Materials West Pit, a surface sand and gravel operation in Illinois. In 2011, an inspector from the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation No. 6555598 to Beverly. The citation alleged that the horn on the scraper did not function when tested. After the initial test, the inspector heard the horn function when the scraper operator subsequently drove it around the pit. The horn again failed to function, however, when re-tested. The inspector concluded that the horn functioned only intermittently and, as a result, issued the citation. The inspector determined that the negligence level was moderate, and MSHA proposed a penalty of \$100.

¹ Section 56.14132(a) states that “[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.”

The factual dispute between the parties centered on whether the scraper's horn functioned when tested by the inspector. Beverly argued that the horn worked when it was tested during a pre-operation examination and that it worked while the scraper was operating. The inspector acknowledged that he heard the horn work while the scraper was operating, but testified that it never worked during his testing. Tr. 229. Beverly's production superintendent testified that the horn worked intermittently during the inspector's testing, and conceded that at times it did not work. Tr. 239. Ultimately, the horn was replaced because it was found to be unreliable.

The Judge vacated the citation. According to the Judge, "the horn was working when the shift began and only later started acting up, working intermittently thereafter." 35 FMSHRC 88, 98 (Jan. 2013) (ALJ). The Judge found that the horn's intermittent functioning satisfied section 56.14132(a)'s requirement that horns on mobile equipment "be maintained in functional condition." As a result, he vacated the citation. *Id.*

The Secretary of Labor filed a petition for discretionary review, which we granted.

II.

Disposition

We conclude that the Judge erred in vacating the citation. The language of section 56.14132(a) is clear and imposes a continuing responsibility on operators to ensure that horns function at all times. Our cases have uniformly applied the plain language of such standards. In *Wake Stone Corp.*, 36 FMSHRC 825, 827 (Apr. 2014), the Commission held that the plain language of section 56.14132(a) requires that horns or other audible warning devices must function at all times unless the equipment has been taken out of service for repair. The Commission further held that the term "'maintain' [means] that warning devices shall be capable of performing on an uninterrupted basis." *Id.* (citations omitted). Thus, the standard "imposes a continuing responsibility on operators to ensure that safety alarms do not fall into a state of disrepair." *Id.* (citations omitted). *See also Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1762-63 (Aug. 2011) (finding that the words "maintain" and "functional" in 30 C.F.R. §77.410(c) plainly require that warning devices be capable of uninterrupted performance at all times).

Nally & Hamilton is closely analogous to the present matter. The mine operator in that case argued that it had not violated the standard, because the back-up alarm on a piece of equipment worked during the operator's pre-operation examination even though it did not work when tested by an MSHA inspector. *Id.* at 1761-64. As in *Nally & Hamilton*, we reject the operator's argument here, as it would likewise create an exception to the express requirements of the standard and contravene the strict liability principles and safety objectives of the Act. *See also Lopke Quarries, Inc.*, 23 FMSHRC 705, 708 (July 2001) ("The inclusion of the word 'maintain' in the standard . . . incorporates an ongoing responsibility on the part of the operator").

Because the manually operated horn in the present case worked only intermittently (Tr. 232, 239), we hold that Beverly violated the standard and that the Judge erred in vacating the citation.

III.

Conclusion

For the reasons stated above, we reverse the Judge's decision and rule that section 56.14132(a) was violated. We remand the case to the Judge to assess a civil penalty.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 9, 2015

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

v.

BIG RIDGE, INC.

Docket Nos. LAKE 2011-699-R
LAKE 2011-700-R
LAKE 2012-475

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

DECISION

BY THE COMMISSION:

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), present issues involving the Secretary of Labor’s authority to issue orders under Mine Act sections 103(j) and 103(k), 30 U.S.C. § 813(j) and (k), commonly referred to as “control orders.”¹ In particular, the case raises the following issues: (1) whether the Secretary’s authority to issue an order pursuant to section 103(j) is dependent upon an accident necessitating “rescue and recovery work,” (2) what definition of “accident” should apply to sections 103(j) and (k), and (3) whether an order under section 103(k) may only be issued when an authorized representative of the Secretary is “present” at the time of the accident.

An Administrative Law Judge upheld the use of section 103(j) and (k) orders to preserve evidence after an accident and affirmed a citation alleging that Big Ridge, Inc. violated the terms of the orders. 34 FMSHRC 845 (Apr. 2012) (ALJ).

For the reasons that follow, we hold that the plain meaning of section 103(j) precludes the Secretary from issuing a section 103(j) control order unless “rescue and recovery work is necessary” and that the Judge did not find, nor does the record substantiate, that rescue and recovery work occurred. We further hold that the definition of “accident” at section 3(k) of the Mine Act (30 U.S.C. § 802(k)) applies to sections 103(j) and (k). Finally, we affirm the Judge’s finding of a violation and uphold the citation in this case because we determine that the subsequent section 103(k) order was validly issued and that Big Ridge violated its terms.

¹ The Commission in *UMWA v. Greenwich Collieries*, 8 FMSHRC 1302, 1303 n.2 (Sept. 1986), described section 103(j) and (k) orders as “control orders” since they are the means by which the Secretary may “assume initial control of a mine in the event of an accident.”

I.

Factual and Procedural Background

Big Ridge operates the Willow Lake Portal Mine, an underground coal mine. On May 16, 2011, a continuous miner became stuck at 2:45 a.m. on the third shift. Although the tail of the continuous miner was located underneath supported roof, the body of the continuous miner was beyond the last row of bolts under unsupported roof. In order to extricate the continuous miner, a number of miners were tossing “crib-ties”² towards the continuous miner’s left side cat track.

At approximately 3:15 a.m., a slab of rock approximately 7 feet long and 2 feet wide and 1 to 8 inches thick fell from the unsupported roof. The rock struck the continuous miner’s tail causing it to break apart. A portion of the broken rock struck the unit mechanic, Tom Borders, who was kneeling at the right side of the end of the continuous miner’s tail. Two miners removed the rock from Borders and helped him to his feet. His left arm was bleeding, and pressure was applied. He was driven out of the mine by the mine manager, who stopped to retrieve additional bandages to treat Borders’ arm. Borders never lost consciousness and was able to converse normally. Borders was taken by ambulance to the Harrisburg Medical Center, where he was treated for the following injuries: a broken left wrist; a laceration to his upper left arm that required 25 stitches; and multiple abrasions to his body, including his head. Borders was never admitted to the hospital.

At 5:10 a.m., an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a verbal section 103(j) order over the telephone to Big Ridge that prohibited all activity in the area where the accident occurred, until MSHA determined that it was safe to resume normal operations. Upon the arrival of MSHA inspectors at the mine, the section 103(j) order was modified to a section 103(k) order at 6:28 a.m. Section 103(k) Order No. 8424291-01 provided that:

The initial order is hereby modified to reflect that MSHA is now proceeding under the authority of Section 103(k) of the Federal Mine Safety and Health Act of 1977. This section 103(k) order is intended to protect the safety of all persons on-site, including those involved in rescue and recovery operations or investigation of the accident. The operator shall obtain prior approval from an Authorized Representative of the Secretary for all actions to recover and/or restore operations in the affected area. Additionally, the operator is reminded of its existing obligations to prevent the destruction of evidence that would aid in investigating the cause or causes of the accident.

² American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 131, 573 (2d ed. 1997) (“*DMMRT*”) defines “crib” in relevant part as a “construction of timbering made by piling logs or beams horizontally one above another . . . each layer being at right angles to those above and below it,” and “tie” as “a beam, post, rod, or angle to hold two pieces together”

On May 19, 2011, MSHA issued Citation No. 8428712, which alleged that Big Ridge had violated Order No. 842491-01 by continuing to mine in the area of the roof fall, without the approval of MSHA, and had destroyed any additional evidence in the accident investigation.

Big Ridge contested both the citation and order and moved to dismiss the citation on the ground that the section 103(j) order and its subsequent modification to a section 103(k) order were invalid. The Judge denied its motion and found Order No. 8424291 to be valid. Since the denial was not appealable as a final decision, Big Ridge preserved its argument for appeal, and the parties stipulated that a violation of Order No. 8424291-01 occurred as set forth in Citation No. 8428712, and that the proper negligence designation was “high.” The parties waived a hearing, and the Judge’s decision was based upon the record, including the pleadings, stipulations of fact, and briefs.

The Judge determined that the Secretary had authority to issue section 103(j) and 103(k) orders in incidents where rescue and recovery work was not necessary. 34 FMSHRC at 851-52. Concluding that the “triggering event for the issuance of a 103(j) order is the occurrence of an ‘accident’ as that term is defined in Section 3(k) of the Mine Act,” 30 U.S.C. § 803(k), the Judge determined that the roof fall and associated miner’s injury constituted an accident that authorized the Secretary to issue a section 103(j) order. *Id.* He rejected Big Ridge’s contention that rescue and recovery work must be necessary before a section 103(j) order is issued. Instead, the Judge reasoned that the language of section 103(j) grants MSHA “broad authority . . . to impose whatever reasonable measures it deems to be appropriate and necessary.” *Id.* at 854. The Judge also observed that, although not necessary to the decision, the stipulated facts arguably fell within the definition of “rescue” in section 103(j). *Id.* at 852.

The Judge further found that the Secretary reasonably exercised his authority in issuing the section 103(k) order. *Id.* at 855. He concluded that the section 103(k) order was properly issued when the inspector arrived at the mine to insure the safety of the miners until an investigation of the causes of the roof fall could be completed. *Id.* Given that Big Ridge stipulated that it violated the terms of the section 103(j) and 103(k) orders as set forth in Citation No. 8248712, the Judge upheld the citation. *Id.* at 856.

II.

Disposition

A. Whether the Mine Act Authorizes the Secretary to Issue a Section 103(j) Order in the Event of an Accident Where Rescue and Recovery Work Is Not Necessary³

The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to

³ On this same date, we issue our decision in *Jim Walter Resources, Inc.*, Nos. SE 2011-477-R, et al., which also involves this question.

an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted).

In ascertaining the plain meaning of the statute, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," to determine whether Congress had an intention on the specific question at issue. *Id.*; *Local Union 1261, UMWA*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "Chevron I" analysis. See *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).⁴

Section 103(j) of the Mine Act states as follows:

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. For purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death had occurred. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate, to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

30 U.S.C. § 813(j).

The initial step under a *Chevron I* analysis is to decide whether Congress directly addressed the question of whether and when the Secretary may issue a section 103(j) control order. The Secretary contends that Congress was silent, in the first sentence of section 103(j), on the issue of what measures are appropriate to preserve evidence and who makes the determination. Thus, the Secretary argues that section 103(j) is ambiguous. Oral Arg. Tr. 41-44. However, we conclude that Congress did directly speak to that issue.

⁴ If the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "Chevron II" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. See *Chevron*, 467 U.S. at 843-44; *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin Coal Co.*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13.

The first sentence of section 103(j) states that in the event of an accident, “the operator shall notify the Secretary . . . and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof.” We discern no ambiguity in this sentence. The sentence applies to operators and does not include a grant of authority to the Secretary. Accordingly, we conclude from the plain statutory language that the first sentence of section 103(j) applies only to the obligations of operators, not to the authority of the Secretary. *See Performance Coal v. FMSHRC*, 642 F.3d 234, 238 (D.C. Cir. 2011) (when statutory language is clear, a party must show that “Congress did not mean what it . . . said . . . or . . . surely could not have meant it.”); *see also Thunder Basin Coal Co.*, 18 FMSHRC at 586-87 (rejecting Secretary’s argument that Mine Act section 109 implicitly included Commission orders in the posting requirements, reasoning that “Congress [clearly] did not intend such result . . . and the statute must be construed to effectuate that intent.”).

The third sentence of section 103(j)⁵ provides the Secretary authority to take “whatever action he deems appropriate, to protect the life of any person” but that authority arises upon the occurrence of “any accident . . . where rescue and recovery work is necessary.” Thus, the Secretary’s authority to issue any section 103(j) control order stems solely from the third sentence of section 103(j) and occurs in the event of an accident where there is “rescue and recovery work.”

Based on the foregoing, we reject the Secretary’s argument that the issuance of a section 103(j) order is authorized in the absence of rescue and recovery work. In fact, the statutory language unambiguously points to the contrary – that the Secretary’s authority is contingent upon an accident involving rescue and recovery work. Accordingly, we vacate the Judge’s decision that in the event of an accident alone, the Secretary may issue a control order under section 103(j).⁶

⁵ This had originally been the second sentence of the section until the Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, § 5, 120 Stat. 493 (“MINER Act”) added the present second sentence. Thus, until 2006, section 103(j) contained two sentences, the first sentence beginning, “In the event of any accident occurring in a coal or other mine,” and the second sentence beginning, “In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary”

⁶ Commissioner Cohen joins the majority in this decision with some reluctance. Big Ridge, through its actions and arguments, has identified a divide between the Mine Act’s goals and its limitations. We accept Big Ridge’s argument that the first sentence in section 103(j) plainly obligates an operator to prevent the destruction of evidence. However, it is apparent that Big Ridge did not take the obligation very seriously. For instance, the Judge concluded that “Respondent not only failed to preserve evidence at the accident site, it continued to mine in the exact area of the roof fall for [] an additional two feet in entry number 10 and removed approximately five feet of the number 10 entry for a distance of approximately eighteen feet squaring the face.” 34 FMSHRC at 854-55.

(continued...)

We note that the Judge stated in dicta that the stipulated facts “arguably fall within the definition of ‘rescue.’”⁷ *Id.* at 852. However, this case was decided on the basis of stipulations, and the parties did not argue the rescue and recovery issue before the Judge. The parties focused their arguments on the first sentence of section 103(j), not on the third. Accordingly, we conclude that the record is not sufficiently complete to determine whether rescue and recovery work took place. Given the lack of substantial evidence on this point, together with the foregoing discussion of the limitation of control orders under section 103(j) to “rescue and recovery work,” we decline to uphold the section 103(j) order.⁸

B. Definition of “Accident”

Big Ridge contends that the Judge erred in applying the definition of “accident” in section 3(k) of the Mine Act in finding that an accident had occurred authorizing issuance of 103(k) Order No. 8424291-01.⁹ It contends the Judge should have applied the more limited

⁶ (...continued)

Commissioner Cohen further notes that Big Ridge’s disregard for the importance of accident investigations demonstrates precisely why the Secretary requires enhanced authority to preserve accident scenes, regardless of whether rescue and recovery work is necessary. In the absence of Congressional action, the Secretary currently lacks the tools necessary to immediately order the preservation of evidence at all accident scenes and to ensure that the root causes of those accidents will be identified in furtherance of the general protective purposes of the Mine Act. 30 U.S.C. § 801. Instead, until an authorized representative arrives at the mine, the Secretary must rely on an operator to fulfill its obligation to preserve evidence, well aware that it may have disincentives to do so. This policy problem requires a legislative solution.

⁷ The Judge relied on the definition of “rescue” in the 1968 edition of the *DMMRT* at 913, that defines “rescue” as “to move men or dead bodies from a mine after a mine disaster. Sometimes called recover.” (The 1997 *DMMRT* at 454 inserts the word “live” before “men.”). He explained that “arguably” a rescue occurred because after the roof collapse, fallen rock had to be moved from Borders by two other miners. The mine manager moved the miner by driving him to the surface, and he was again moved by ambulance to the Harrisburg Medical Center for further treatment. 34 FMSHRC at 852.

⁸ When reviewing an Administrative Law Judge’s factual determinations, the Commission is bound by terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support the [Judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁹ Section 3(k) provides that “‘accident’ includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person.” 30 U.S.C. § 802(k).

definition of accident found at 30 C.F.R. § 50.2(h).¹⁰ The use of the definition of accident found at 30 C.F.R. § 50.2(h) rather than the definition in section 3(k) of the Mine Act would mean that MSHA could issue a control order under section 103(j) or 103(k) for injury to a miner only if the injury was fatal or had “a reasonable potential to cause death.”

The Commission has determined that the definition of “accident” in section 3(k) of the Mine Act applies throughout the Mine Act. *Revelation Energy, LLC*, 35 FMSHRC 3333, 3337 (Nov. 2013) (“section 3(k) . . . sets forth definitions ‘[f]or the purpose of this chapter.’”). *See also Aluminum Co. of Am.*, 15 FMSHRC 1821, 1825-27 (Sept. 1993) (applying the section 3(k) definition of “accident” when evaluating a section 103(k) order). The Commission in *Revelation* rejected the operator’s argument, like Big Ridge’s argument in the instant case, that the Secretary should be limited by the definition of “accident” set forth in the regulations at 30 C.F.R. § 50.2(h). 35 FMSHRC at 3338-39. In *Revelation*, the Commission concluded that a blast that caused the launch of a two-ton rock causing no injuries constituted an accident under section 3(k) for purposes of a section 103(k) order. *Id.* at 3339.

Likewise, we reject Big Ridge’s argument that the Secretary’s authority is limited by the second sentence in section 103(j). The second sentence refers specifically to the preceding sentence and requires that the operator’s notification obligation must be fulfilled within 15 minutes of the death of an individual or an injury or entrapment that has a reasonable potential to cause death. As noted above, it was added by the MINER Act, whose legislative history clarified that the 15-minute notification time was introduced for certain types of accidents involving “death” or the “reasonable potential to cause death.”¹¹ The second sentence of section 103(j) does not in any way modify what constitutes an accident under the Act.

Accordingly, the definition of “accident” in section 3(k) of the Mine Act applies to sections 103(j) and (k). The event injuring miner Borders was an “accident” within the meaning of sections 103(j) and (k).¹²

¹⁰ In relevant part, 30 C.F.R. § 50.2(h) includes within the definition of accident, “(1) A death of an individual at a mine; (2) An injury to an individual at a mine which has a reasonable potential to cause death”

¹¹ The Senate Report stated that the “committee intends the 15 minute requirement to apply only to accidents . . . that involve an injury or entrapment of an individual at the mine which has a reasonable potential to cause death.” S. Rep. No. 109-365, at 9 (2006). The 15-minute notification did not change the definition of accident, but set forth a class of accidents that required “MSHA notification within 15 minutes.”

¹² Big Ridge also argues that section 103(k) requires that an inspector be physically present at the mine when the accident occurs in order to issue a section 103(k) order. We summarily reject that contention: It is plainly refuted by the wording and purpose of section 103(k).

We affirm the Judge's determination that the section 103(k) order was validly issued and that Big Ridge violated its terms, as set forth in Citation No. 8428712. Accordingly, we affirm that citation.¹³

III.

Conclusion

For the reasons set forth above, we affirm the Judge's decision in result.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

¹³ We note that the parties have agreed to a \$3,224 penalty for Citation No. 8428712 as set forth in an Amended Decision Approving Settlement dated October 1, 2013, in Docket No. LAKE 2012-475, which has been consolidated with this appeal.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 9, 2015

JIM WALTER RESOURCES, INC.

v.

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

Docket Nos. SE 2011-477-R
SE 2011-478-R

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

DECISION

BY THE COMMISSION:

These contest proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), involve the Secretary of Labor’s authority to issue orders under Mine Act sections 103(j) and 103(k), 30 U.S.C. § 813(j) and (k), commonly referred to as “control orders.”¹ In particular, the case raises the following issues: (1) whether the Secretary’s authority to issue an order pursuant to section 103(j) is dependent upon an accident necessitating “rescue and recovery work,” and (2) whether an order under section 103(k) and its subsequent modification were validly issued after an ignition occurred at the mine.

An Administrative Law Judge upheld the Secretary’s use of section 103(j) and (k) orders to withdraw miners and preserve evidence after an accident and dismissed the contests of those orders filed by Jim Walter Resources, Inc. (“JWR”). 34 FMSHRC 31 (Jan. 2012) (ALJ).

For the reasons that follow, we hold that the plain meaning of section 103(j) precludes the Secretary from issuing a section 103(j) control order unless “rescue and recovery work is necessary.” We affirm the Judge in result because we determine that the section 103(k) order and its modification were validly issued.

¹ The Commission in *UMWA v. Greenwich Collieries*, 8 FMSHRC 1302, 1303 n.2 (Sept. 1986), described section 103(j) and (k) orders as “control orders” since they are the means by which the Secretary may “assume initial control of a mine in the event of an accident.”

I.

Factual and Procedural Background

On March 25, 2011, at approximately 6:00 a.m., Keith Pylar, Safety Supervisor at the Jim Walter Resources No. 7 Mine, called MSHA Field Office Supervisor Jacky Shubert, to report an ignition on the No. 4 section where JWR was “doing some burning and welding.” Shubert orally issued a section 103(j) order, which prohibited JWR from working in the area of the welding ignition.

Shubert then immediately contacted MSHA Inspector Joe Turner at his home and directed him to investigate the incident. When Inspector Turner arrived at the mine, there were no ambulances, rescue vehicles, or fire trucks present. At that point, approximately two hours after the issuance of the (j) order, he modified the (j) order to a section 103(k) order. The (k) order shut down activity in by the feeder on the Number 4 section, the loading point where the coal travels before it hits the conveyor belt. Turner went underground, interviewed miners, and investigated the ignition.

The (k) order was modified at 3:00 p.m., between shifts, so that all miners were required to take an hour-long training course on ignition safety and prevention before they could enter the mine. This training requirement stemmed in part from the mine’s history of approximately 22 or 23 ignitions in the past 14 or 15 months. The No. 7 Mine is the gassiest mine in MSHA District 11, liberating 20 million cubic feet of methane every 24 hours, and is subject to five-day spot inspections.² The training was staggered so that all miners received the training before going underground, and production was not entirely halted.

JWR contested both the (j) and (k) orders, and a hearing was held before an Administrative Law Judge. The Judge affirmed the orders and dismissed JWR’s contest. 34 FMSHRC at 31. The Judge agreed with the Secretary’s interpretation that section 103(j) gives the Secretary the authority to issue orders to preserve evidence because that provision requires an operator to take appropriate measures to prevent the destruction of evidence, including withdrawal of miners from the affected area. *Id.* at 53-54. The Judge rejected JWR’s argument that, under section 103(j), the Secretary possesses the authority to preserve the accident scene only where rescue and recovery work is necessary. *Id.* at 60-61. Instead, he reasoned that the plain meaning of section 103(j) did not resolve the question of the Secretary’s authority and therefore “deference should be afforded to the Secretary’s reasonable interpretation of the provision at issue.” *Id.* at 50. The Judge concluded that “[g]iven that the Congress’ stated intention under the Mine Act was to protect miners’ safety and health, and given the central role that ignitions have played in most mine disasters, it would seem odd that Congress would provide for (j) orders only when that goal effectively has been defeated when the need for rescue and recovery has arisen.” *Id.* at 61.

Likewise, the Judge found that MSHA had the authority to impose whatever reasonable measures it deems to be appropriate and necessary in the event of an accident under section

² Section 103(i) requires the Secretary to provide one spot inspection every five days for mines that liberate “excessive quantities” of methane, which is more than one million cubic feet of methane during a 24-hour period. 30 U.S.C. § 813(i).

103(k) once the inspector arrived at the mine. *Id.* at 54. Additionally, the Judge determined that MSHA’s decision to modify the section 103(k) order so as to require a mine-wide ignition training course was a “reasonable decision . . . in view of the high number of ignitions during the past 15 months” at the No. 7 mine. *Id.* at 55-56, 60.

II.

Disposition

A. Whether the Mine Act Authorizes the Secretary to Issue a Section 103(j) Order in the Event of an Accident Where Rescue and Recovery Work Is Not Necessary

The issue of whether the Mine Act authorizes the Secretary to issue a section 103(j) order in the event of an accident where rescue and recovery work is not necessary is fully addressed in our decision in *Big Ridge, Inc.*, Nos. LAKE 2011-699-R, et al., which we also issue this date. As we have concluded in *Big Ridge*, the Commission holds that the Secretary has statutory authorization to issue a control order under section 103(j) only in situations where rescue and recovery work is necessary. Because rescue and recovery work was not necessary in this case, the 103(j) order is vacated.³

B. Whether the Section 103(k) Order Was Validly Issued

Section 103(k) of the Mine Act states in relevant 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, and the operator of such mine shall obtain the approval of such representative . . . , when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

JWR argues that the section 103(k) order was erroneously issued prior to the Secretary’s investigation of the facts relating to the accident. However, the terms of section 103(k) do not limit the Secretary in this fashion. Section 103(k) grants the Secretary the authority to issue orders the Secretary deems appropriate to ensure the safety of any person in the mine in the event

³ JWR petitioned to overturn the Judge’s credibility determination with respect to MSHA Supervisor Shubert’s testimony in support of issuance of the 103(j) order. In light of the ruling set forth above, that issue is now moot. JWR’s further argument that issuance of the 103(j) order deprived it of an opportunity to challenge a modification of an existing 103(k) order is also moot. Regarding the 103(k) order, if an operator believes a newly issued 103(k) order is a modification of an existing 103(k) order, it may seek temporary relief, but it must demonstrate that the challenged order is a modification of an existing order. Here, the 103(k) order was based on separate events and is neither duplicative nor a modification of the existing 103(k) order.

of any accident. Under the plain language of section 103(k), an order under this section may be issued when the Secretary's representative is present at the mine and an accident has occurred.

A natural reading of section 103(k) supports the Secretary's view that the inspector must be at the mine site to issue the section 103(k) order, not that the Secretary must be aware of exactly what the accident entailed let alone have completed an investigation into the accident before issuing a section 103(k) order. In *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 488-491 (9th Cir. 1983), the Ninth Circuit upheld a section 103(k) withdrawal order that was issued by a mine inspector at the mine site after the accident (a fire) occurred. The Court stated that "[s]ection 103(k) gives MSHA plenary power to make *post-accident* orders for the protection and safety of all persons." *Id.* at 490 (emphasis in original). We conclude based on the plain language of section 103(k) that the Secretary was authorized under section 103(k) to issue the withdrawal order to insure the safety of miners until the investigation was completed and MSHA had determined that it was safe to return in by the feeder.

JWR further challenges the section 103(k) order on the basis that the Mine Act does not permit the Secretary to convert a section 103(j) order to a section 103(k) order. The Mine Act permits an inspector present at the mine to issue a 103(k) order to protect persons in the mine. We will not exalt form over substance by finding a 103(k) order invalid because it was issued as a conversion of a 103(j) order. Thus, although we determine that the section 103(j) order is invalid, the (k) order meets all the requirements of the Mine Act and is an independently valid order.

C. Modification of the Section 103(k) Order to Require Mine-Wide Training

JWR also asserts that the inspector committed an abuse of discretion by modifying the (k) order to require training of all miners on ignition issues. We agree with the Judge's holding that the one-hour training requirement was "prudent under the circumstances" of the ignition history and the gassy conditions of the mine. 34 FMSHRC at 45, 49, 55-56 & n. 34. In *Miller Mining*, 713 F.2d 489-90, the court determined that modifications to a (k) order requiring training and other conditions before miners could re-enter, were "reasonably tailored to the situation." Likewise, in this case, Order No. 8519555-02 requiring the training was reasonably tailored to the circumstances given the extensive ignition history at the mine. Thus, we conclude that the modification to the (k) order was not an abuse of discretion.

D. Evidentiary Issues

JWR appeals a number of the Judge's evidentiary rulings and his credibility determinations. Both of these types of determinations are reviewed under an abuse of discretion standard. *Shamokin Filler Co.*, 34 FMSHRC 1897, 1907 (Aug. 2012), *aff'd*, *Shamokin Filler Co. v. FMSHRC*, 772 F.3d 330 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 1549 (2015) (mem.); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010). Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Pero v. Cyprus Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000) (citations omitted). Thus, JWR asks the Commission to take the extraordinary step of overturning evidentiary rulings and credibility determinations that reside in the unique province of the fact-finder.

JWR argues that the Judge made a number of evidentiary errors that prejudiced it with respect to the section 103(k) order's training requirement. However, this, too, is a matter especially entrusted to the Commission's Judges. The Commission's Procedural Rules grant a Judge the power to "[r]ule on offers of proof and receive relevant evidence," "[r]egulate the course of the hearing" and "[d]ispose of procedural requests or similar matters." 29 C.F.R. § 2700.55.

We are unpersuaded by JWR's argument that the Judge erroneously discounted the circumstances of the prior ignitions when evaluating the training requirement. JWR asserts that the evidence revealed that the prior ignitions did not result in any injuries and that the ignitions were significantly different; therefore, it was allegedly an abuse of discretion to order mine-wide training. The Judge allowed JWR's summary of the ignition events to be admitted and acknowledged that there were "no injuries, entrapments, property damage, ongoing emergencies, or conditions requiring rescue and recovery work," and no violations were found. 34 FMSHRC at 60. However, the Judge ruled that the particular facts involving each ignition were not relevant to the issuing of the order. *Id.* at 46.

Given that it is the province of the Judge to efficiently run the hearing, and that he did accept JWR's summary of the prior ignitions, it was not an abuse of discretion to exclude additional evidence of the prior ignitions, which was of limited probative value and may have unduly delayed the hearing. *See Shamokin Filler Co.*, 34 FMSHRC at 1906-08 (upholding Judge's exclusion of evidence that was of "limited probative value" and would have "consum[ed] an inordinate amount of time.").

We also decline to overturn the Judge's evidentiary rulings with respect to the exclusion of evidence offered by JWR in connection with the training requirement in the section 103(k) order. JWR takes issue with the Judge's exclusion of methane readings from two spotters at the time of the ignition to rebut the Secretary's methane evidence. Inspector Turner noted that he recorded one reading at 4.8 percent. Tr. 230-31; 34 FMSHRC at 44 n.23. Even assuming the readings showed low methane levels at the specific time of the ignition, the training requirement arose from uncontroverted evidence that the mine is extremely gassy and has an extensive history of ignitions. Thus, low methane readings at a particular moment do not offset the continuing dangers of working in a methane-rich mine – dangers that support the training element of the 103(k) order.

Similarly, the Judge did not abuse his discretion by excluding training rosters indicating how many miners took the training nor a JWR plan for ignition prevention. The Judge determined that the material was irrelevant to the reasonableness of the Secretary's decision to order mine-wide training. *Id.* at 49. Although JWR asserts that the training significantly delayed production, the Judge found the hour-long training minimally burdensome and prudent under the circumstances. *Id.* at 60, 61 n.45 (the Judge finds that there was a "rational connection" between the facts and the Secretary's choices.)

III.

Conclusion

Based on the foregoing, we vacate the section 103(j) order and uphold the section 103(k) order and its modification. We affirm the Judge's dismissal of the contest proceedings.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 16, 2015

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

v.

WADE SAND & GRAVEL COMPANY

Docket No. SE 2013-120-M

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

DECISION

BY: Young, Cohen, and Althen, Commissioners

In this proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), the Administrative Law Judge denied the motion for summary decision of Wade Sand & Gravel Company (“Wade”) and granted the Secretary of Labor’s cross-motion. 35 FMSHRC 817, 818 (Apr. 2013) (ALJ). At issue both before the Judge and on appeal is the appropriate penalty assessment for a single guarding violation. The issue presented by Wade is whether its history of violations was appropriately calculated by the Secretary in preparing a civil penalty. However, as described below, we need not reach that issue because we conclude that the Administrative Law Judge made an independent determination of the penalty which is supported by substantial evidence and was within her discretion.

For the reasons that follow, we affirm the Judge’s decision.

I.

Facts and Proceedings Below

A. Factual Background

On September 24, 2012, Inspector Charles Gortney of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation No. 8549940 to Wade for failure to guard moving machine parts on a welding machine in violation of 30 C.F.R. § 56.14107(a). On November 8, 2012, MSHA sent Wade a notice of a proposed penalty of \$1,026.

MSHA’s penalty proposal was made pursuant to its regular penalty assessment formula found in 30 C.F.R. Part 100. With respect to the “history of violations” criterion, MSHA

calculated points using the charts contained in section 100.3(c) of his regulations.¹ It determined that Wade's history of violations per inspection day warranted 25 out of 25 possible points and that its history of repeat violations per inspection day warranted 17 out of 20 possible points. 30 C.F.R. § 100.3(c) (Tables VI and VIII). According to MSHA's Mine Data Retrieval System, Wade's history of violations included 67 prior violations over 23 inspection days for a total of 2.91 violations per inspection day and 9 violations of the same standard for a total of 0.39 repeat violations per inspection day. Accordingly, MSHA assigned Wade a total of 42 penalty points for this criterion and proposed a penalty of \$1,026.

Having contested MSHA's penalty proposal, Wade moved for summary decision, contending that MSHA's application of section 100.3(c) pertaining to its history of violations was inappropriately applied and contravenes the regulation's plain language. According to Wade, 62 of the 67 violations and 8 of the 9 repeat violations should not have been included in its history because these violations occurred prior to the 15-month period identified in section 100.3(c). The Secretary responded by filing his cross-motion for summary decision.

Both before the Judge and currently on appeal, Wade does not contest the underlying violation, and the parties agree that there are no material facts in dispute as to the other penalty criteria or the evidence related to the history of violations criterion. The only issue raised by Wade is whether MSHA complied with section 100.3(c) of its penalty regulations in considering Wade's history and assigning points under his regulations for this criterion.

Wade argues that the plain language of the Secretary's regulation mandates consideration of only those previous violations that were both cited and became final within 15 months of the date of the violation at issue. The Secretary argues that since the effective date of the 2007 rule, MSHA has used the final order date to calculate an operator's history of violations, regardless of when the violations were cited.

¹ Section 100.3(c) provides:

History of previous violations. An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history. The repeat aspect of the history criterion in paragraph (c)(2) of this section applies only after an operator has received 10 violations or an independent contractor operator has received 6 violations.

30 C.F.R. § 100.3(c).

B. The Judge's Decision

At the outset of her decision, the Judge concluded that the Secretary's regulation was ambiguous and deferred to his interpretation, concluding that his consideration of the violations that had become final in the 15-month period prior to the violation at issue in this case was proper. The Judge noted that the language of section 100.3(c) could be subject to either party's interpretation, but held that the Secretary's interpretation was reasonable. 35 FMSHRC at 821-22.

Ultimately, however, the Judge stated that the Commission possessed the final authority to assess penalties. Exercising that authority, she considered the evidence pertaining to the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i),² and independently assessed the same penalty amount as was proposed by MSHA—\$1,026—for the violation in this case. 35 FMSHRC at 822-24.

II.

Disposition

Whether the Judge's independent assessment of the civil penalty in this case was supported by substantial evidence.

Although Wade challenges the Secretary's proposed penalty assessment in this case, it is the Commission's final penalty assessment that ultimately governs this matter. The Commission possesses independent authority to assess penalties *de novo* pursuant to section 110(i) of the Mine Act. 30 U.S.C. § 820(i) ("The Commission shall have authority to assess all civil penalties provided in this Act."). The Commission is bound neither by the Secretary's proposed assessment nor by his Part 100 regulations governing his penalty proposal process.³ *E.g.*, *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("neither the ALJ nor

² Section 110(i) provides in pertinent part:

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

30 U.S.C. § 820(i).

³ The Mine Act states that "[i]n proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors." 30 U.S.C. § 820(i).

the Commission is bound by the Secretary's proposed penalties;" also, "neither the Act nor the Commission's regulations require the Commission to apply the formula for determining penalty proposals that is set forth in section 100.3"); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1980 (Aug. 2014). Here, the Judge exercised independent judgment and authority in assessing the final penalty amount.

The Judge considered the record evidence on each of the six penalty criteria and independently determined that a penalty of \$1,026 was appropriate under the circumstances. Specifically, the Judge noted that the parties represented that there were no material facts in dispute, Wade stipulated to the appropriateness of the penalty to the size of the business, the level of gravity and moderate negligence determined by the inspector, and that the penalty will not affect its ability to continue in business. The parties agreed that Wade demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. The only issue in dispute was the evidence as to Wade's history of violations and the extent to which it should be considered when assessing the penalty. 35 FMSHRC at 823. In her decision, the Judge independently considered the evidence as to Wade's history, stating:

In my review of the history, which has included an evaluation of the materials before me, as well as information regarding this mine available on MSHA's Mine Data Retrieval website, it is clear that this operator has reduced its number of violations over the past few years. However, I note that the "history of previous violations" is one of only six factors that must be considered. Moreover, *any apportionment of points in the Secretary's system to one factor over another is not binding, nor is it part of my analysis in this matter.*

Id. (emphasis added). Thus, the Judge acknowledged the evidence that Wade had improved its history and gave little weight to the Secretary's point allocation to this criterion. For this reason, we find that the Judge considered the record evidence on each of the six penalty criteria and independently determined that a penalty of \$1,026 was appropriate under the circumstances.⁴

Substantial evidence supports the Judge's findings on each of the penalty criteria, and her final assessment of a penalty was within her discretion as a Commission Judge. Based on the Commission's independent authority to assess penalties, we affirm the Judge's penalty assessment in this case.

Given our conclusion that the Judge determined the penalty pursuant to section 110(i) of the Mine Act independently of the Secretary's Part 100 regulations, we have no need to consider the validity of the Secretary's interpretation of the word "violations" in 30 C.F.R. § 100.3(c). Indeed, to do so would constitute an advisory opinion, a type of decision that the Commission, like

⁴ The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act. *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)).

the federal courts, does not issue. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969); *Oak Grove Res.*, 36 FMSHRC 2411 (Sept. 2014). We recognize that operators such as Wade may be dissatisfied with the calculation of the points attributable to the history of violations reflected in the Secretary's proposed assessment of penalty. If so, they may contest the proposed penalty and be afforded an independent assessment by a Commission Administrative Law Judge based on section 110(i) of the Mine Act.⁵

⁵ Because we find the Judge conducted an appropriate and independent penalty analysis pursuant to section 110(i), we do not find it necessary to construe the Secretary's regulations in this case. Our concurring colleagues, however, would do so. They suggest that the Commission should defer to the Secretary's reasonable interpretation of his Part 100 regulations. In light of our colleagues' suggestion of deference to the Secretary's interpretation of *his* regulations, it is most important to state here, as we have in past cases, that Commission Judges need not defer to any element of the Part 100 regulations, including definition of terms. We must not compromise, through notions of deference or otherwise, our Congressional mandate to assess civil penalties independently after making findings of fact.

Therefore, for example, when Commission Judges consider "whether the operator was negligent" in assessing a civil penalty in accordance with section 110(i), they need not defer to the definitions of "negligence" established by the Secretary in his Part 100 regulations. *See Brody Mining, LLC*, 37 FMSHRC ___, slip op. at 15-17, No. WEVA 2009-1000 (Aug. 25, 2015); *see also Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998); *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3105-09 (Dec. 2014) (Comm. Cohen concurring). While Commission Judges may certainly review MSHA assessed violation history reports to get a sense of an operator's violation history, as suggested by our colleagues, slip op. 7 n.1, our Judges are free to assess penalties without resort to the Secretary's penalty proposal regulations.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision assessing a penalty of \$1,026.

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

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

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

Chairman Jordan and Commissioner Nakamura, concurring:

We agree with the majority that the Judge's assessment of the penalty is supported by substantial evidence and did not constitute an abuse of discretion. We write separately, however, because we also conclude that the Judge was correct in finding that the language of section 100.3(c) (setting forth the manner in which an operator's history of violations is computed) is ambiguous, and that it is appropriate to defer to the Secretary's reasonable interpretation of this regulation.

Our colleagues in the majority counsel against reaching this question, suggesting instead that operators who are not satisfied with the points attributed to their history of violations may simply contest the penalty assessment and have a judge assess the final penalty. Slip op. at 5. This is not a particularly practical approach. Instead of requiring each operator who believes the Secretary's interpretation of his penalty regulations is unreasonable to contest and litigate the penalty, we believe it preferable to provide the requested guidance now.

Rather than eschew this issue, which was briefed by the parties and fully analyzed and decided by the judge, we prefer to follow the example of the Commission in deciding *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 673 (Apr. 1987). In that case, the Commission addressed the operator's argument that the Secretary failed to comply with Part 100 of his regulations by utilizing the special assessment formula instead of the regular or single assessment formulas under his then-existing penalty regulations. *Id.* at 678. The Commission emphasized that it had consistently rejected assertions that it was bound by the Secretary's penalty regulations, and acknowledged the Commission's independent penalty assessment authority under the Mine Act. *Id.* at 678-79. Nonetheless, it went on to issue a ruling that the Secretary, in proposing the special assessment under the penalty regulations, did not act arbitrarily. *Id.* at 680.¹

¹ We of course agree with our colleagues' statement that our judges must independently assess penalties. Slip op. at 5, n.5. However, it is true nevertheless that, although our judges independently assess a penalty *de novo*, many of them find MSHA's penalty regulations (and the manner in which the Secretary applies them in proposing a penalty) useful guidance. *See, e.g., Orica Nelson Quarry Serv.*, 35 FMSHRC 3004, 3014 (Sept. 2013) (ALJ); *Ligget Mining, LLC*, 33 FMSHRC 1702, 1717 (July 2011) (ALJ). It is also our understanding that often, in assessing a penalty, some judges will review an "assessed violation history report" produced by MSHA and made part of the case record. *See, e.g., Taft Production Co.*, 36 FMSHRC 522, 537-38 (Feb. 2014) (ALJ) (relying on a report from MSHA's database to determine operator's violation history); *TRC Mining Corp.*, 35 FMSHRC 590, 613 (Mar. 2013) (ALJ) (same).

When judges do turn to the Secretary's penalty regulations for guidance, they need to have a correct understanding of what they mean, and how to accurately interpret them. In providing such an interpretation (as the parties have requested us to do in this case), we apply traditional tools of regulatory interpretation, including principles of deference. This in no way subverts the longstanding principle that our judges must independently assess penalties pursuant to section 110(i) of the Mine Act.

Section 100.3(c) provides in relevant part:

History of previous violations. An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history.

30 C.F.R. § 100.3(c).

The Secretary interprets section 100.3(c)'s phrase "violations . . . in a preceding 15-month period" to include all violations that became final orders of the Commission within the preceding 15 months, *regardless of when the violation was initially cited*. Wade contends that the regulation permits MSHA to count only those violations that were both cited and became final orders of the Commission within the preceding 15 months.

Wade argues that the language of section 100.3(c) is plain and that "violations" refers to the event or occurrence giving rise to the violative condition, and not the citation or order issued by MSHA as a result of the violative conduct. Wade further maintains that if the Secretary had meant to include assessments that became final during the relevant time frame irrespective of when such violations occurred, he could have and should have drafted the regulation to explicitly indicate that.

As the Judge noted, and the Secretary concedes, Wade's interpretation is a permissible reading of the provision at issue. However, the Secretary's interpretation is likewise an acceptable one. Because the regulation is subject to competing interpretations, it is ambiguous, and deference must be accorded to the Secretary's reasonable interpretation. We believe that the Secretary's interpretation is reasonable, especially in light of the regulatory history, legislative intent, and the overall deterrent purpose of the Mine Act's penalty procedures.

The Commission has held that "the Secretary's interpretation of a regulation is reasonable where it is 'logically consistent with the language of the regulation and . . . serves a permissible regulatory function.'" *Alcoa Alumina & Chemicals*, 23 FMSHRC 911, 913-914 (Sep. 2001) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted)); *Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted))).

The Secretary amended his penalty regulations in 2007. The 2007 rule added the following pertinent language to the second sentence of section 100.3(c): "or have become final orders of the Commission,"² and changed the time period under consideration from 24 months to

² This additional language added "final orders" to the two categories that had previously

15 months. 72 Fed. Reg. 13,592, 13,604 (Mar. 22, 2007). While MSHA narrowed the relevant time period to more accurately reflect the most recent history of the operator, it made clear that it would consider all violations that became final orders during that shorter time frame. As the preamble explained:

MSHA included the insertion of the phrase “final orders of the Commission” to clarify the Agency’s practice, in existence since 1982, to use only violations that have become final orders of the Commission in determining an operator’s history of violations. This practice will continue to provide a measure of fairness by not including in an operator’s history those violations that are in the adjudicatory process which may ultimately be dismissed or vacated. *As each penalty contest becomes final, however, the violation will be included in an operator’s history as of the date it becomes final.*

Id. (emphasis added).

As the Judge noted, the preamble clearly expresses MSHA’s intent to use the date on which a contested penalty “becomes final” when determining an operator’s history of previous violations. The Judge explained:

To find otherwise and accept Wade’s interpretation of Section 100.3(c) would lead to an absurd result which would encourage mine operators to contest all citations and draw out the litigation in the hope that no final order of the Commission would be issued before the passage of 15 months. If such were allowed to occur the operator would be able to avoid all accountability for any history of violations it has developed. Certainly that cannot be the intention of either the Mine Act or the Secretary’s regulations.

35 FMSHRC at 822.

We agree with the Judge’s analysis. Exclusion of a large number of violations due to a long adjudicatory pendency period would not present an accurate and complete picture of an operator’s history and thus would diminish the effect and purpose of this criterion. *See* S. Br. at 17 (stating that in 2009, 89 percent of contested citations would never have been counted in the operator’s history of violations because they took more than 15 months to be resolved and become final Commission orders). In addition, an operator would also receive the benefit of the exclusion

² (...continued)

been used to determine an operator’s history of violations (“assessed violations that have been paid or finally adjudicated”). 72 Fed. Reg. 13,603.

of these pending, non-final violations for purposes of calculating proposed penalty assessments on subsequently issued violations, thus resulting in lower proposed penalties in the future.³

The policy reasons in support of the Secretary's interpretation are further underscored by the deterrent purpose behind the Mine Act's penalty procedures. The D.C. Circuit's discussion of the legislative history behind this criterion in *Coal Employment Project v. Dole*, 889 F.2d 1127 (D.C. Cir. 1989), highlights this point. In that case, the court rejected a provision of the Secretary's penalty regulations excluding single penalty assessments from an operator's history of violations. *Id.* at 1136-39. The court stated that Congress "was intent on assuring that the civil penalties provide an effective deterrent against offenders with records of past violations" and concluded that the Mine Act and legislative history required MSHA to consider all violations under the history of violations criterion. *Id.* at 1133, 1138.

Accordingly, we agree with the Judge's conclusion that the Secretary's interpretation of his history of violations penalty regulation is reasonable. For the foregoing reasons, we would affirm the Judge's decision assessing a penalty of \$1,026.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

³ Wade contends that the Secretary's consideration of violations that occurred nearly three years prior to the penalty assessment at issue in this case is inconsistent with his stated explanation for shortening the time period for consideration of an operator's history from 24 to 15 months: focusing on the most recent history of the operator. It suggests that including in an operator's history only violations that were cited within the 15 month period helps MSHA to better assess whether the current behavior of operators is compliant with safety standards, pointing out that its own safety record had improved. However, as noted above, this method would remove many violations from consideration, because some citations issued within the 15 months would not yet be paid or otherwise become final. Also, although the history of violations regulation may not benefit an operator who demonstrates recent improvements in safety, at the same time it does not penalize an operator whose safety record has recently become worse (because some recent citations may not yet be final). Furthermore, even if MSHA's system does not take recent improvements into account, a judge may note an operator's recent reduction in violations. In fact, that is precisely what occurred in this case. 35 FMSHRC at 823.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 18, 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

WEST ALABAMA SAND & GRAVEL,
INC.

Docket No. SE 2009-870-M

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

DECISION

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. (2012) (“Mine Act”), and involves a single citation issued to West Alabama Sand and Gravel, Inc., (“West Alabama”) by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). The citation alleges that a truck driver climbed on top of his truck without fall protection on West Alabama’s mine property. The Administrative Law Judge affirmed the violation and its S&S designation, but ruled that it did not result from an unwarrantable failure to comply with the standard in question.¹ The Judge also reduced the penalty from the proposed assessment of \$15,971 to \$760. 34 FMSHRC 1651 (July 2012) (ALJ).

The Secretary of Labor filed a petition for discretionary review (“PDR”), which we granted. The Secretary asserts, *inter alia*, that the Judge abused his discretion by converting the operator’s opposition to the Secretary’s motion for summary decision into a cross-motion for summary decision, in deleting the unwarrantable failure designation and reducing the negligence level from “high” to “moderate” on the basis of summary decision, and in reducing the penalty by over 95%.

For the reasons set forth below, we vacate the Judge’s decision that the violation was not an unwarrantable failure, and his negligence findings, and remand this matter for further proceedings consistent with this decision.

¹ The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.” The operator did not contest the Judge’s finding of a significant and substantial violation. Therefore, that finding is not before us in this case.

I.

Factual and Procedural Background

This case involves a citation issued to West Alabama at its mine facility in Fayette, Alabama, pursuant to section 104(d)(1) of the Mine Act. 30 U.S.C. § 814(d)(1). On July 1, 2009, an MSHA inspector issued Citation No. 6511548, alleging a violation of 30 C.F.R. § 56.15005.² The citation alleges that a driver climbed atop his vehicle without employing fall protection. Sec’y Pet. for Assessment of Civil Penalty. The citation was designated as significant and substantial (“S&S”)³ and attributed to West Alabama’s high negligence and unwarrantable failure to comply with the standard. The Secretary proposed that a penalty of \$15,971 be assessed.

Following discovery, the Secretary filed a motion for summary decision. In his motion, the Secretary stated there were no material facts in dispute and that the Secretary was entitled to judgment on the entire case, including the fact of the violation, the S&S and unwarrantable designations, and the penalty. West Alabama opposed the motion, arguing that material issues of fact existed both as to its negligence and whether it was given adequate notice that it could be held liable for the conduct of independent contractors. Although West Alabama acknowledged that a truck driver had violated the safety standard while on mine property, it argued that it should not held be liable for the truck driver’s violative conduct because it could not control or direct the driver. West Alabama further maintained that the proposed penalty was excessive when compared to similar citations and that its history of compliance and lack of actual knowledge mitigated its negligence.

In response, the Secretary filed a memorandum of points and authorities rebutting West Alabama’s contention that genuine issues of material fact remained in dispute and providing legal arguments in support of the Secretary’s position. The Secretary further argued that he did not agree with West Alabama’s assertion that it had a “good safety history” and provided the Judge with a list of all citations issued to the operator while the mine was in operation.

² Section 56.15005 states that “[s]afety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.”

³ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

On February 28, 2011, the Judge held an off-the-record conference call with the parties to discuss the Secretary's motion for summary decision.⁴ Because the call was not recorded, the Commission does not have the benefit of a transcript. It appears undisputed, however, that the Judge attempted to obtain a settlement. Failing that effort, he apparently suggested/stated the manner in which he would resolve the case if the operator filed some sort of stipulation with him.

On March 12, 2012, West Alabama filed stipulations, wherein it again admitted that a driver had been on mine property and had climbed onto his truck without a safety belt or harness. The Secretary filed a response to West Alabama's stipulations in which he argued that his motion for summary decision should be granted because West Alabama had admitted the violation and had failed to provide any facts that disputed the Secretary's S&S and unwarrantable failure designations.

On July 17, 2012, the Judge issued an order granting summary decision, in part, to the Secretary on the validity of the citation and the S&S designation. 34 FMSHRC at 1657. However, the Judge construed West Alabama's opposition as a cross-motion for summary decision on the unwarrantable failure issue, and granted summary decision to the operator. The Judge reasoned that the lack of a history of similar violations and West Alabama's asserted "reasonable and apparent good faith belief" that it was not responsible for a contractor's violative conduct "reduce[d] the degree of negligence under the threshold required for an unwarrantable failure." *Id.* at 1655. In addition, the Judge found that the reduction in the level of negligence and the small size of West Alabama's operations justified a reduction in penalty to \$760, rather than the proposed amount of \$15,971. *Id.* at 1656.

II.

Disposition

Summary decisions are governed by Commission Procedural Rule 67, which provides that:

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

⁴ Since November 2010, the Commission's teleconferencing service has offered Judges the option of recording and then ordering written transcripts of telephone conferences. Commission Judges should make use of the transcript capacity in any situation where the contents of a telephone conference with the parties may become the subject of review in a subsequent appeal. This includes telephone conferences where summary decision is discussed, and also matters such as discovery disputes. However, this does not include telephone conferences where the subject matter remains limited to settlement discussions.

29 C.F.R. § 2700.67(b). The Commission “has long recognized that [] ‘[s]ummary decision is an extraordinary procedure,’” and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which “the Supreme Court has indicated that summary judgment is authorized only ‘upon proper showings of the lack of a genuine, triable issue of material fact.’” *Energy W. Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

Appellate review of summary judgment decisions issued pursuant to Federal Rule 56 is *de novo*, in that the reviewing court applies the same Rule 56(c) standard as the trial court. 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2716, at 273-74 (3d ed. 1998). When the Commission reviews a summary decision and determines that the record before the Judge contained disputed material facts, the proper course is to vacate the grant of summary decision and remand the matter for an evidentiary hearing. *See Energy W. Mining Co.*, 17 FMSHRC 1313, 1316-19 (Aug. 1995); *Missouri Gravel*, 3 FMSHRC at 2473.

In considering a motion for summary decision, a Judge’s role is limited to a determination of whether a case can be decided without the need to resolve any factual disputes. *See* 11 James Wm. Moore et al., *Moore’s Federal Practice* § 56.24 (3d ed. 2015). A Judge may not weigh the evidence nor shall he or she engage in fact-finding beyond the facts established by the record. *See, e.g., Hasan v. Foley & Lardner LLP*, 552 F.3d 520, 527 (7th Cir. 2008).

Upon review of the record, we conclude that genuine issues of material fact preclude a granting of summary judgment on the issues of unwarrantable failure and negligence.

A. The Unwarrantable Failure and Negligence Findings

The Judge deleted the unwarrantable failure designation for the violation and reduced the negligence level to moderate, implicitly discerning from West Alabama’s opposition to the Secretary’s Motion for Summary Decision a motion for summary decision in favor of the operator on the unwarrantable failure question. 34 FMSHRC at 1653, 1655.

The Judge did not commit legal error in considering West Alabama’s opposition as a motion for summary decision. Although we find no explicit authority to convert a response into a cross-motion for summary decision, as a general matter a Judge may grant summary decision *sua sponte* or in favor of a non-moving party pursuant to the Federal Rules of Civil Procedure and achieve the same effect. *See* Fed. R. Civ. P. 56(f) (amended in 2010 to explicitly allow for the consideration of summary decision on the motion of a Judge in accordance with long standing practice).

However, we have urged caution in considering such a drastic procedure as it can easily lead to arbitrary and erroneous decisions. *Missouri Gravel*, 3 FMSHRC at 2471 n.2. In the rare circumstances where it is appropriate to entertain summary judgment *sua sponte* or in favor of a non-moving party, such discretion must invariably be tempered by the need to ensure that (1) discovery is sufficiently advanced so that parties have had a reasonable opportunity to ascertain the material facts, and that (2) the parties are given adequate notice to bring forward their evidence. *See Celotex*, 477 U.S. at 326.

The record here is not sufficient to support summary judgment on the issues of unwarrantable failure or negligence. In particular, the facts stipulated to or shown by competent record evidence do not conclusively establish the reasonableness of the operator's alleged good faith belief. A party's conclusory statement that it acted in good faith cannot be treated as a binding determination of material fact. As the Secretary correctly notes, the Judge's disposition of this question, at this stage, precluded the Secretary from having "an opportunity to challenge the sincerity of Junkin's asserted belief or any evidence in support of it."⁵ PDR at 20. We also agree with the Secretary that there is no competent record evidence that would support the existence of the belief. *Id.*

In vacating the unwarrantable failure finding, the Judge viewed as dispositive West Alabama's asserted lack of awareness that it was responsible for the behavior of contract employees. He found that view to be a reasonable, good faith belief on the part of the operator. The Judge pointed to the absence of relevant previous citations as providing a "reasonable basis" for the operator's belief. 34 FMSHRC at 1655. However, the absence from the record of MSHA citations for an obviously dangerous practice does not mean that an operator could reasonably believe that permitting such practices to occur on its property is not dangerous. It is too late in the day for any owner/operator to assert that it is unaware of its responsibility for contractors' violations.⁶

Section 110(a)(1) of the Mine Act states that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary" 30 U.S.C. § 820(a)(1). This statutory provision has been interpreted definitively as imposing responsibility on an owner/operator for a contractor's violations since 1977. *See, e.g., Bituminous Coal Operators' Ass'n v. Sec'y of Interior*, 547 F.2d 240 (4th Cir. 1977).

Moreover, as a result of the summary disposition, the Secretary was not afforded the opportunity to present evidence to show that there were genuine issues of material fact as to the operator's alleged good faith belief or other issues related to unwarrantable failure.

Additionally, it appears from the Judge's decision that he did not consider all the factors that bear upon an alleged unwarrantable failure. The Commission has emphasized that all relevant facts and circumstances of each case must be examined to determine if an actor's

⁵ Clay Junkin, West Alabama's Vice President, was present at the mine at the time that the truck driver was observed by the MSHA inspector. 34 FMSHRC at 1652.

⁶ In footnote 1 of his decision, the Judge stated, "[w]hether Denbar Trucking [the employer of the driver who climbed on top of his truck without fall protection] was an independent contractor, or a customer of West Alabama, is not material to the disposition of this matter. For the purposes of this decision, Denbar will be considered an independent contractor." 34 FMSHRC at 1651-52 n.1. We follow the Judge in not distinguishing the status of the truck driver, and, like the Judge, refer to him as a "contract employee." *Id.* at 1655.

conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). While a Judge may determine, in his or her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). Rather than a complete analysis of all relevant factors, and indicating how his consideration of those factors informed his decision, the Judge rested his conclusion on the single factor of the operator's awareness that greater efforts are necessary for compliance. After citing this factor – alone – as one the Commission has found “significant,” the Judge reasoned that “*the dispositive issue* is whether Junkin's asserted lack of awareness that West Alabama was responsible for contract employees should be viewed as a mitigating circumstance with respect to the alleged unwarrantable failure.” 34 FMSHRC at 1654-55 (emphasis added).

While mitigation that reduces an operator's negligence below the threshold of a “serious lack of reasonable care” may be enough to support a Judge's conclusion that the violation did not result from unwarrantable failure, the Judge here did not adequately support this conclusion or fully consider the other factors, several of which would seem relevant and perhaps aggravating or adverse to the operator's defense. The operator, in its responses to the Secretary's First Request for Admissions, admitted to knowledge that such violative behavior had occurred in the past, with West Alabama's knowledge. Admission Nos. 13, 20. This is relevant to the factors of duration and knowledge. The Secretary at least disputed the operator's general safety record, which might have relevance on the degree of care it applied to its duties under the Act and mandatory standards, generally. Finally, and most importantly, the Judge correctly held that it would be reasonably likely that allowing miners to work “on an uneven surface elevated ten feet above the ground will result in an accident involving a fall that is reasonably likely to result in serious injury.” 34 FMSHRC at 1654. This at least raises the question of an obvious violation of a mandatory standard in a way that could seriously injure a miner. The Judge considered none of this in weighing the supposedly objective, good faith belief that an operator might permit such a practice at its mine.

As a result of the aforementioned, the Judge's negligence findings and his decision to delete the Secretary's unwarrantable failure designation are vacated. This proceeding is remanded so that the Judge may conduct a hearing. Our review of the record and the parties' filings indicate that because facts remain in dispute, a hearing is necessary on these issues.

B. Penalty

We also note that the Judge may have improperly determined what he believed to be an appropriate penalty in this case and worked back from that conclusion to reach a result supporting it. Noting the operator's citation to other ALJ decisions for violations of the same standard, the Judge cited the specific penalty amounts in his decision. 34 FMSHRC at 1653-54. Although the Judge does correctly state the law governing penalty determinations, *id.* at 1656, the reduction in the penalty by more than 95% resulted in an assessment that is close to the assessments issued by other Judges in other cases.

Further, it appears from a pleading by the operator that it believed that during the February conference call, it received an assurance from the Judge that if it filed certain stipulations, the Judge would reduce the proposed penalty by approximately 98%.⁷ The operator's pleading supports the inference that the Judge had reached a conclusion on the penalty before performing the analysis. Commission Judges must be very careful to avoid circumstances in which a party could reasonably believe that it had reached a unilateral agreement on the disposition of a case with the Judge without the consent or participation of the other party.

⁷ Prior to the Judge's issuance of the summary decision, the operator filed a responsive pleading asserting that, "[a]t the time West Alabama agreed to enter the Stipulation of Facts, it was West Alabama's understanding [that] the fine in this case was to be reduced to \$350.00." West Alabama's Reply to Pet'r's Resp. to Resp't's Stip. of Facts (July 12, 2012). Although it appears the Judge did not receive this pleading prior to issuing his summary decision, as set forth above, the pleading does essentially state that the operator believed a quid pro quo arrangement with the Judge had been reached.

III.

Conclusion

Based upon the foregoing discussion, we vacate the Judge's order granting summary decision in favor of West Alabama on the issue of an unwarrantable failure as well as the Judge's findings regarding negligence, and remand this case for further proceedings consistent with this decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 29, 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

SMALL MINE DEVELOPMENT

Docket Nos. WEST 2011-1351-M
WEST 2011-1153-RM

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

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). At issue is a single citation issued to Small Mine Development (“SMD”) for its failure to install a refuge chamber while engaged in the initial development and exploration of an ore body. On December 11, 2012, the Judge affirmed the citation and the significant and substantial (“S&S”)¹ designation. 34 FMSHRC 3193 (Dec. 2012) (ALJ).

SMD filed a petition for discretionary review in which it asserts that the Secretary’s interpretation of 30 C.F.R. § 57.11050(a)², requiring a refuge chamber when there is only one functioning escapeway, is contrary to the standard’s plain meaning and not entitled to deference. In addition, SMD argues that the citation was not properly designated as S&S. For the reasons that follow, we affirm the Judge’s decision.

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

² Section 57.11050(a) requires that:

Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

I.

Factual and Procedural Background

SMD was contracted to drive the initial exploratory drift at Newmont Gold's Vista Mine in Nevada in order to determine the feasibility of mining a gold ore deposit. The exploratory drift was designed to be 16 feet wide, 16 feet high, and 1,371 feet in length with a decline from the portal of 9.5%. The drift was also designed to have four crosscuts, which were intended to eventually accommodate storage, drilling stations, and a refuge chamber.

On June 7, 2011, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted a spot inspection of the Vista Mine after hearing that the mine had not yet installed a refuge chamber. When the inspector arrived at the mine site, he observed a refuge chamber, forklift, loader, and various trucks near the portal. Although the inspector did not enter the mine, he was able to determine from a mine map that SMD had advanced the drift approximately 1000 feet and was nearing completion of the fourth crosscut, but had yet to install an emergency refuge. Tr. 21-28.

Based on these observations, the inspector issued Citation No. 8605242, alleging a violation of section 57.11050(b)³ for SMD's failure to deploy a refuge chamber while the mine had only one escapeway. The inspector believed that if the conditions continued unabated, it was reasonably likely that the lack of a refuge would lead to a fatal injury were there to be a roof fall or equipment fire that prevented miners from getting out through the mine's sole escapeway. Tr. 32-34.

The Judge concluded that because both parties had put forth reasonable interpretations regarding the obligation to provide a refuge chamber in light of the conditions existing at the time of the inspection, the standard was ambiguous. The Judge found further that deference to the Secretary's interpretation was warranted because it was reasonable, and consistent with the language and safety-promoting purposes of the standard and the Mine Act. *Id.* at 3203, 3205-06.

In addition, the Judge affirmed the Secretary's negligence and gravity findings. On the S&S issue, the Judge found that in the event of a ground fall or equipment fire, the lack of a refuge was reasonably likely to result in serious injuries. *Id.* at 3208. The Judge rejected SMD's arguments that additional safety measures provided by the operator would reduce the likelihood of injury and affirmed the Secretary's S&S designation. *Id.* at 3207-08.

The Commission granted SMD's petition for discretionary review.

³ Prior to the hearing, the Judge granted the Secretary's motion to plead a violation of 30 C.F.R. § 57.11050(a) in the alternative. On appeal, the parties do not rely on the applicability of subsection (b). As a result, we need not address the applicability of subsection (b) in this decision.

II.

Disposition

A. Regulatory Interpretation

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a “regulation is silent or ambiguous with respect to the specific point at issue, we must defer to the agency’s interpretation as long as it is reasonable.” *Tenet HealthSystems Healthcorp. v. Thompson*, 254 F.3d 238, 248 (D.C. Cir. 2001). *See generally, Auer v. Robins*, 519 U.S. 452 (1997).

The parties disagree as to section 57.11050(a)’s meaning. SMD argues that a literal reading of the standard would require a refuge chamber only “while a second opening to the surface is being developed.” According to the operator, therefore, if no second opening is developed, no refuge chamber is required. Because the standard only recommends, but does not require, a second escapeway during exploration or development of an ore body, SMD contends that an operator who chooses not to provide that second escapeway, cannot be required to install a refuge chamber.

The Secretary argues that taken together, the first two sentences of the standard clearly require that mines have two escapeways, and that if a mine does not have a second escapeway, it must have a method of refuge and one escapeway. The Secretary contends that the third sentence (“a second escapeway is recommended, but not required, during the exploration or development of an ore body”) dispenses with the two-escapeway requirement for mines in exploration and development, but remains silent about a refuge requirement, creating an ambiguity. Oral Arg. at 60-61. In light of this ambiguity, the Secretary argues that the standard must be read as a whole and that doing so reveals its general aim to provide miners with two means of survival during an emergency. Therefore, a refuge chamber must be provided whenever there is only one functional escapeway.

We conclude that the standard is ambiguous. It does not directly state whether mines are required to have a refuge chamber during the exploration or development of an ore body when only one escapeway will be developed. It is unclear the extent to which each sentence should be read in conjunction with one another or how the general requirements of the first two sentences are impacted by the third sentence. While not explicitly stating that a refuge chamber is required in all situations where a mine has only one escapeway, the standard, by virtue of its silence, leaves open the question of whether the refuge requirement applies in such circumstances. *See Takacs v. Hahn Auto. Corp.*, 246 F.3d 776, 782 (6th Cir. 2001) (citing *Whetsel v. Network Prop. Servs., LLC*, 246 F.3d 897 (7th Cir. 2001)).⁴

⁴ We reject the dissent’s argument that the *Takacs* and *Whetsel* cases do not include the concept that a regulation’s ambiguity may be shown by its silence as to a particular set of factual (continued...)

The standard states that a refuge chamber is required when a second escapeway is being developed, but it is ambiguous because it is silent as to whether a refuge chamber is mandated when only one escapeway is anticipated during exploration or development. *See Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 10-11 (D.C. Cir. 2003) (finding regulatory language ambiguous in part because the wording clearly mandated how respirable dust must be measured under some circumstances, but was silent as to how it should be measured under others); *E. Associated Coal Corp.*, 27 FMSHRC 238, 242 (Mar. 2005) (finding training regulation ambiguous because it did not explicitly address the disputed issue of whether hazard training must include provisions of a mine’s roof control plan). Thus, “[n]eedless to say, the language of this section does not unambiguously resolve this dispute.” *Excel Mining*, 334 F.3d at 8.

We analyze the text of the standard construing all parts together, interpreting the meaning not from certain words in a single sentence but from the standard as a whole, and viewing it in light of its general purpose. 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.5 (7th ed. 2014); *Advanta USA, Inc. v. Chao*, 350 F.3d 726, 728-29 (8th Cir. 2003) (applying rules of statutory construction with equal force to discern an issue of regulatory construction). We agree

⁴ (...continued)

circumstances. Slip Op. at 13. Both cases involved claims for overtime compensation under the Fair Labor Standards Act (“FLSA”). In both cases, the respective employer-defendants had made deductions from employees’ pay which were inconsistent with the contention that the employees were “exempt employees” under FLSA, but had changed that policy and restored the deductions. The employers thus contended that they had not lost the ability to characterize the employees as exempt under FLSA on the basis of the “window of correction” principle contained in 29 C.F.R. § 541.118(a)(6). The Secretary of Labor filed amicus briefs in both cases, arguing that the “window of correction” regulation was ambiguous, and seeking deference for his interpretation that the employers’ actions were not covered by the “window of correction” principle. Agreeing with the Secretary, the 7th Circuit in *Whetsel* found the regulation to be ambiguous, stating: “We rely on the fact that the regulation *does not explicitly state* that it is available to correct a policy or pattern of deductions, *thus leaving open the question of whether it applies to those circumstances.*” 246 F. 3d at 901 (emphasis added). The 6th Circuit in *Takacs* explicitly relied on this statement by the *Whetsel* court. 246 F. 3d at 782. Similarly, we find that 30 C.F.R. § 11050(a) is silent, and thus ambiguous, as to the issue of whether refuge chambers are required in exploration or development mines with only one escapeway.

with the Secretary that the third sentence does not expressly rescind the refuge requirement contained in the first two sentences. *See* Comm'n Oral Argument Tr. 34.⁵ Thus, our dissenting

⁵ The Secretary's view that the first two sentences should be read together, with the third sentence only "taking back" the two-escapeway requirement during exploration and development but not "taking back" the refuge requirement, is supported by the regulatory history. An earlier version of the first sentence, which was identical in all pertinent respects to the first sentence of the current standard, was proposed on June 24, 1970 to replace the then-existing standard. The proposed standard read:

Every mine shall have two separate properly maintained escapeways to the surface which are so positioned that damage to one shall not lessen the effectiveness of the other.

Health and Safety Standards for Metal and Nonmetallic Underground Mines, 35 Fed. Reg. 10,305, 10,307 (proposed June 24, 1970) (to be codified at 30 C.F.R. pt. 57). By its terms this proposal provided that miners always have two ways of escape.

On December 17, 1971 the Secretary revised the proposed standard by adding a sentence which was identical to the second sentence in the current standard. The revised proposal read:

Every mine shall have two separate properly maintained escapeways to the surface which are so positioned that damage to one shall not lessen the effectiveness of the other. A method of refuge shall be provided while a second opening to the surface is being developed.

Health and Safety Standards for Metal and Nonmetallic Underground Mines, 36 Fed. Reg. 24,044, 24,045 (proposed Dec. 17, 1971) (to be codified at 30 C.F.R. pt. 57).

Thus, when the second sentence was originally drafted, the proposal retained the requirement that all mines have two escapeways. The second sentence required that a refuge be provided in the one instance where it was contemplated that only one escapeway would exist in the mine, i.e., while the second escapeway was being developed. This regulatory history supports the Secretary's argument that the first two sentences taken together mandate that miners always have two ways to safety.

It was not until nearly six years later that the third sentence was added to what became the final rule:

A second escapeway is recommended, but not required, during the exploration or development of an ore body.

New and Revised Health and Safety Standards for Metal and Nonmetal Mines, 42 Fed. Reg. 57,038, 57,043 (Oct. 31, 1977) (to be codified at 30 C.F.R. pts. 55-57).

(continued...)

colleagues, in stating that the third sentence addresses one-escapeway mines, slip op. at 12, are only half right — the sentence addresses one-escapeway mines, but only as to the escapeway requirement, not the refuge requirement.⁶

The dissent’s assertion that the standard unequivocally provides only one instance where a refuge is required, slip op. at 15, is inconsistent with its critique of us for “miss[ing] or ignor[ing] the structure of section 57.11050 . . . [which] contains two subsections [including] [s]ubsection (b) [which] deals with placement of refuges in two-escapeway mines.” Slip op. at 12. Section 57.11050(b) does indeed create a requirement for a method of refuge “for every employee who cannot reach the surface from his working place through at least two separate escapeways within a time limit of one hour when using the normal exit method.” Thus, there are *two* circumstances where a refuge chamber is required in an underground metal or non-metal mine. The second circumstance occurs even though a mine has two separate escapeways. The fact that section 57.11050(b) requires a refuge chamber when a miner has to travel a long distance to the surface even though two separate escapeways exist — in effect, a third method of safety — supports the Secretary’s contention that the first two sentences of section 57.11050(a) taken together mandate that miners always have at least two ways to safety.

Moreover, under the literal approach adopted by the dissent, the careful operator who acts on the recommendation in the third sentence and plans to construct a second escapeway during

⁵ (...continued)

This sentence provides for an exception to the two-escapeway requirement during exploration or development work. With respect to miner safety it creates the same circumstance contemplated in sentence two, i.e., the existence of only one escapeway in the mine. As the Secretary correctly notes, despite creating the same circumstance, sentence three is silent as to whether a refuge is required.

⁶ The dissent points to our recent decision in *Big Ridge, Inc.*, 37 FMSHRC ___, Nos. LAKE 2011-699-R et al. (Sept. 9, 2015), as a model for determining whether regulatory language is ambiguous. *Big Ridge* involved the interpretation of section 103(j) of the Mine Act, 30 U.S.C. § 813(j), which sets forth the responsibilities of an operator and the Secretary after a mine accident. In that case, we held that section 103(j) of the Mine Act was clear and unambiguous because Congress had directly spoken to the issue at hand.

Section 103(j) explicitly sets forth separate obligations for the operator and authorization for the Secretary in two distinct scenarios: in the event of an accident (where an operator must notify the Secretary and take measures to prevent the destruction of relevant evidence) and in the event of an accident in which rescue and recovery work is necessary (where the Secretary is authorized to issue a 103(j) control order when he deems it appropriate, to protect individuals and supervise and direct rescue and recovery activities). We thus relied on the plain language of the statute to reject the Secretary’s contention that he was authorized to issue a 103(j) control order in the absence of rescue and recovery work. *Big Ridge, Inc.*, 37 FMSHRC at ___, slip op. at 5. However, such clarity is not found in section 57.11050(a), where the obligations of the operator during exploration and development are muddled because of the question of how the regulation’s third sentence modifies the obligations imposed by the first and second sentences.

exploration and development would have to provide a refuge while there was just one escapeway, while the less prudent operator who has no plans to construct a second escapeway would have no requirement to provide a refuge. This leads to an absurd result that we cannot sanction, providing an additional reason why we reject the asserted “plain language” approach to interpreting the standard. *See Cent. Sand & Gravel Co.*, 23 FMSHRC 250, 254 (Mar. 2001); *Rock of Ages Corp.*, 20 FMSHRC 106, 122 (Feb. 1998); *R.G. Johnson Co., Inc. v. Apfel*, 172 F.3d 890 (D.C. Cir. 1999) (rejecting the district court’s literal reading of a statute because the interpretation would frustrate the clear intent of Congress).

As the D.C. Circuit noted in upholding the Secretary’s interpretation of a preshift examination standard, “[t]he standard of review that governs interpretive dueling before this court compels us to defer to the Secretary of Labor’s interpretation of her own regulations unless it is plainly erroneous or inconsistent with the regulations.” *Sec’y of Labor v. Spartan Mining Co.*, 415 F.3d 82, 83 (D.C. Cir. 2005). The Secretary’s interpretation of a regulation is reasonable where it is “logically consistent with the language of the regulation and . . . serves a permissible regulatory function.” *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). In interpreting the meaning of regulatory language, the Commission avoids focusing on an isolated phrase at the expense of the overall intent of the regulators and the safety objectives that the regulation is attempting to achieve. *See Morton Int’l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996) (citations omitted) (“[R]egulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions.”); *Dolese Bros. Co.*, 16 FMSHRC 689, 693 (Apr. 1994) (“A safety standard ‘must be interpreted so as to harmonize with and further . . . the objectives of’ the Mine Act.”) (quoting *Emery Mining Co. v. Sec’y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)).

Upon examination of the standard as a whole, it is reasonable to conclude that the drafters intended for miners to have more than one method of survival in case of an emergency. Section 57.11050(a) provides that mines in production shall have at least two functional escapeways at all times. In circumstances where a miner does not have ready access to more than one means of escape, an operator must provide a refuge chamber. Choosing to avail itself of the option to operate with only one escapeway during exploration or development, as the standard permits, should not thereby permit the operator to also deprive miners of the alternate means of survival provided by a refuge chamber.

Given the importance the standard places upon providing duplicative means of survival in an emergency, it makes sense that the same protections be extended to miners who are engaged in exploration or development work, which carries with it many of the same dangers as production mining. SMD’s interpretation, however, would frustrate the purpose of the standard and deprive those miners of an alternate means of safety were the sole escapeway to become impassable. In addition, SMD’s interpretation would produce the anomalous result whereby operators who follow the Secretary’s recommendation to install a second escapeway would have to provide a refuge chamber during construction of that escapeway, while operators who ignored the recommendation would be allowed to proceed with only one escapeway and no refuge chamber.

The operator argues that the Secretary's interpretation is not reasonable because it departs from agency precedent and was instituted without the benefit of notice-and-comment rulemaking.⁷ According to SMD, prior to 2006 the Secretary followed an unwritten policy of not requiring a refuge during exploration or development. The Judge, however, found that the Secretary never held a prior interpretation of the standard and there is not enough evidence in the record for us to disturb that finding. 34 FMSHRC at 3204.⁸

Even assuming, *arguendo*, such prior approach did exist, the Secretary's current interpretation would still warrant controlling deference. An agency's change in interpretation of a regulation does not require notice-and-comment rulemaking under the APA. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206-07 (2015). SMD cannot reasonably claim to be unfairly surprised by the policy change. *Cf. Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (deference is not appropriate when a change in agency interpretation creates an unfair surprise). SMD was first put on notice of the Secretary's interpretation in 2006 when it received a citation alleging a violation of section 57.11050(a). *See* Gov't Ex. 9. Although the 2006 citation was ultimately vacated by the Secretary, MSHA also published program information bulletins ("PIBs") in 2007 and 2009 clearly setting forth the Secretary's current interpretation. *See* Program Information Bulletin, No. P07-04, at 1-2 (Feb. 28, 2007) (Gov't Ex. 6); Program Information Bulletin, No. P09-09, at 1-2 (Jun. 4, 2009) (Gov't Ex. 7). Based upon this history, the Secretary's interpretation clearly represents a long standing, considered exercise of the Secretary's policy making authority. *See Auer v. Robbins*, 519 U.S. 452, 462 (1997) (deference to an agency interpretation of an ambiguous regulation is warranted when it "reflect[s] the agency's fair and considered judgement on the matter in question").

Accordingly, the Secretary's interpretation deserves controlling deference.

B. S&S

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies 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

⁷ The Administrative Procedure Act ("APA") does not require notice-and-comment rulemaking when an agency issues interpretive rules intended to advise the public of the agency's construction of the rules which it administers. *See, e.g., Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). *See also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206-07 (2015) (finding that notice-and-comment rulemaking is not required even when an agency changes its interpretation of one of the regulations it enforces).

⁸ We note that in the incident described *infra*, footnote 9, MSHA required refuge chambers to be used in a mine being developed, which had only one escapeway, in 1978, after the present language of the regulation had become effective.

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

SMD argues that the Secretary failed to proffer sufficient evidence showing that the lack of a refuge chamber would be reasonably likely to result in an injury. SMD reasons that because there was no evidence of ground problems or equipment malfunction, the inspector’s conclusion was purely speculative. Moreover, SMD asserts that extra safety measures such as fire suppression systems, shotcrete, and emergency air and water tubing further decrease the possibility of serious injury in case of an emergency.

In terms of the *Mathies* test, the Judge, after finding a violation of section 57.11050(a), concluded that “there can be little doubt that the failure to provide a method of refuge created a discrete safety hazard, that of miners having no alternative means of survival in the event of an emergency that blocks the single escapeway.” 34 FMSHRC at 3206. The Judge then determined that the Secretary had established a reasonable likelihood that the hazard contributed to will result in a serious injury, based on the history of numerous diesel equipment fires and ground failures at mines in the area. *Id.* at 3206-08.

Because this case involves a violation of an emergency evacuation standard, our application of the *Mathies* test is controlled by *Cumberland Coal Res., LP*, 33 FMSHRC 2357 (Oct. 2011), *aff’d*, *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013). In *Cumberland*, the Commission held that “[t]he hazard contributed to by defectively placed lifelines necessarily involved consideration of an emergency situation.” 33 FMSHRC at 2364. This is because “[e]vacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs.” *Id.* at 2367.

When applying the *Mathies* analysis with respect to violations citing deficiencies with evacuation and shelter of miners in an emergency, we consider the S&S nature of those violations within the context of an emergency. *Cumberland*, 717 F.3d at 1027-28 (providing that “assuming the existence of an emergency” when evaluating the S&S nature of emergency safety measures is consistent with *Mathies*). The D.C. Circuit made clear that the likelihood of an emergency actually occurring is irrelevant to the *Mathies* inquiry, which focuses on the nature of the violation itself. *Id.* at 1027 (citing *Sec’y of Labor v. FMSHRC*, 111 F.3d 913, 917 (D.C. Cir. 1997)). *Cf. Spartan Mining Co.*, 35 FMSHRC 3505, 3509 (Dec. 2013) (Secretary need not prove the likelihood of an emergency when evaluating whether escapeway violations were S&S).

In the context of a roof fall or equipment fire that impedes passage through the mine's sole escapeway, the lack of a refuge chamber clearly contributes to the hazards posed by miners not having a safe location to await rescue. Without the fresh air and water supply and protection from fire and hazardous gases that a refuge chamber provides, there is a reasonable likelihood that miners would suffer serious, potentially fatal injuries before they can be rescued.⁹ Although other safety measures such as fire suppression systems and emergency air and water tubing may also help prevent injury in an emergency, the Commission and courts have soundly rejected the argument that additional safety measures should preclude a finding of S&S. *Cumberland*, 33 FMSHRC at 2369 (citing *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995)).

Accordingly, the Judge's application of the *Mathies* test to conclude that the refuge violation was S&S is fully supported by the record.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's finding of a violation and the S&S determination.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

⁹ MSHA has documented an incident where, in an underground zinc mine, a diesel-powered front end loader caught fire, blocking a 15-degree incline to the mine portal. The mine was under development and had only one escapeway. Twenty-nine trapped miners retreated to rescue chambers, where they waited more than five hours until a rescue team reached them and brought them out safely. MSHA, *Mine Safety and Health Magazine*, April-May 1978, page 19.

Commissioners Young and Althen, dissenting:

This case rests upon interpretation of the three brief and easily understood sentences that comprise 30 C.F.R. § 57.11050(a). The majority attempts, with lawyerly aplomb but no success, to rationalize the meaning of the sentences by ignoring or mischaracterizing the plain language of the section. The majority also erroneously affirms a meritless S&S determination made by an inexperienced inspector who did not even enter the mine. We respectfully dissent.

I.

Discussion

A. The Plain Meaning Rule

This case turns upon interpretation of section 57.11050(a). The section consists of three sentences:

Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

In *Christensen v. Harris*, 529 U.S. 576, 588 (2000), the Supreme Court reinforced the primary rule of regulatory construction — the plain meaning of a statute or regulation governs. The Court made it clear that neither an agency nor a subsidiary tribunal may substitute its ad hoc judgment for the words of a regulation, stating:

But *Auer* deference is warranted only when the language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous—it is plainly permissive. To defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. Because the regulation is not ambiguous on the issue of compelled compensatory time, *Auer* deference is unwarranted.

Id.

Obviously, the plain language rule applies with full force and effect to the Commission’s interpretations of the Mine Act, regardless of the interpretation urged upon it by the Secretary. See *Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d 297, 312 (7th Cir. 2012) (“Because we have determined that the plain meaning of § 815(c) requires that we reverse the Commission, we do not need to reach the question of the proper deference owed to the Secretary’s interpretation of the statute.”); *Performance Coal Co. v. FMSHRC*, 642 F.3d 234, 238 (D.C. Cir. 2011)

("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there") (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). The same holds true with respect to the regulations implementing the Mine Act. See *Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (Jan. 1998) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987)); *Morton Int'l, Inc.*, 18 FMSHRC 533, 538–39 (Apr. 1996) (stating that if violation of regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what agency intended but did not adequately express) (quoting *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982) (quoting *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976))).

B. Section 57.11050(a) does not require refuge chambers in one-escapeway exploration projects.

Section 57.11050(a) follows classic rules of legal draftsmanship. The first sentence creates a general rule. The following two sentences establish distinct and disconnected exceptions to that general rule, based on a mine's status. Nothing in the language or structure of the section or, for that matter, in the history of the section's promulgation and enforcement, indicates any interrelationship between the separate exceptions that follow the expression of the general rule.

The first sentence of section 57.11050(a) creates an obligation for underground mines to have two escapeways: "Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others." 30 C.F.R. § 57.11050(a). Obviously, this sentence does not consider, let alone require, refuge chambers in any mine. The following two sentences create separate exceptions to the two-escapeway obligation. Only the second sentence requires refuge chambers.

The second sentence creates a narrow, time-limited exception to the two-escapeway requirement — namely that "[a] method of refuge shall be provided while a second opening to the surface is being developed." 30 C.F.R. § 57.11050(a). Recognizing that there cannot be two escapeways from the very opening of a mine, the second sentence exempts operators from the requirement for a second escapeway while the second escapeway is constructed. It conditions that exception on the provision of a refuge chamber during the period of construction. This exception is limited to the period necessary for construction of the second escapeway. The sentence addresses one, and only one, circumstance — the construction of a second escapeway.

The third sentence creates a complete exception from the requirement for two escapeways, but is limited to a narrow class of small and evanescent mines: "A second escapeway is recommended, but not required, during the exploration or development of an ore body." 30 C.F.R. § 57.11050(a). In creating this exception, MSHA did not mention, let alone establish, a requirement to use a refuge chamber in exploration mines.

The majority misses or ignores the structure of section 57.11050. The section is entitled "Escapeways and refuges." It contains two subsections. Subsection (a), which is at issue here, deals with escapeways. Placement of refuge chambers is not the subject matter of subsection (a).

Subsection (b) deals with placement of refuges in two-escapeway mines. The second sentence of subsection (a) requires a refuge chamber as the “second” means of protection while the second escapeway is constructed in mines required to have two escapeways.

The incongruity of asserting that the second sentence of section 57.11050(a) requires a refuge in a permissible one-escapeway exploration project is obvious upon the briefest reflection. The third sentence plainly states that only one escapeway is required in an exploration mine. The second sentence requires the provision of a refuge chamber “while a second opening to the surface is being developed.” 30 C.F.R. § 57.11050(a). It distorts all meaning, and defies commonsense, to read the second sentence to require a refuge chamber where a second escapeway is neither required nor under construction.

Reading the second sentence to mandate a refuge chamber in an exploration mine would mean the sentence requires a refuge chamber if one set of circumstances exists (ongoing construction of a second escapeway) and also requires a refuge chamber if that same set of circumstances does not exist (no ongoing construction of a second escapeway in an exploration mine). Thus, the majority expands a brief, clear, and narrow exception by permitting the Secretary to add a wholly new requirement. In effect, it amends the second sentence to read, “A method of refuge shall be provided while a second opening to the surface is being developed *and also shall be provided in an exploration mine with one escapeway.*”

Moreover, the exception in the second sentence is limited by the time necessary to construct a second escapeway. Such time limitation would be irrelevant to a one-escapeway exploration project where no second escapeway is being or will be constructed unless the exploration mine moves to production. At that point, the refuge chamber and second escapeway would be mandatory.

The majority fails to attempt to reconcile its expansion of the second sentence with the words of the regulation. The majority’s rationale is a stand of twigs too weak to survive the gentlest breeze: an argument that the regulation is “silent” and, therefore, amenable to the majority’s policy preference and two subsidiary arguments — resort to regulatory history that actually works directly against them and a policy argument based only upon their personal wishes as to what the section should provide.

With nothing in the language of the section or regulatory history upon which to rely, the majority cites *Takacs v. Hahn Automotive Corp.*, 246 F.3d 776, 782 (6th Cir. 2001), which in turn cites *Whetsel v. Network Property Services, LLC*, 246 F.3d 897 (7th Cir. 2001), for the proposition that section 57.11050 is “silent” with respect to one-escapeway exploration mines, and, therefore, ambiguous.

Neither *Takacs* nor *Whetsel* rests upon “silence.” In *Takacs* and *Whetsel*, the issue was whether certain deductions from the plaintiffs’ pay caused the employees not to be exempt employees for overtime purposes under the FLSA and relevant Department of Labor regulations. The case concerned the “window of correction” test to determine whether the “salary basis” requirement of regulations promulgated under the Fair Labor Standards Act (“FLSA”) properly applied to certain specific employees. They involved the issue of whether those courts should

defer to the Secretary's interpretation of the regulation. In *Whetsel*, the employer cited provisions of the regulation that it asserted implied the correctness of its position under the principle of *expressio unius est exclusio alterius*. The court found the principle to have "reduced force" in the context of interpreting regulations. 246 F.3d at 902. It was in rejecting use of the provisions cited by the plaintiff to imply the interpretation asserted by the plaintiff that the court noted the failure of the regulation to accept "explicitly" the plaintiff's interpretation. *Id.* at 901. The cases do not involve "silence" but rather the court's unwillingness to imply a proffered interpretation from other provisions of the regulation under the circumstances of the cases.

The United States Court of Appeals for the D.C. Circuit has reversed the Commission for hearing "sounds in the silence" despite plain statutory language. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 158 (D.C. Cir. 2006). In this case, there is no "silence" — no need for any implication. The regulation explains clearly and unequivocally when a refuge is required. The regulation simply does not speak the words the majority wishes to hear. Ironically, the majority's hearing impairment occurs just a month after the entire Commission correctly applied the plain meaning rule to reject a similar "silence" argument by the Secretary. *Big Ridge Inc.*, 37 FMSHRC ___, Nos. LAKE 2011-699-R, et al. (Sept. 9, 2015).¹ Notably, *Big Ridge* involved a section of the Mine Act, the language of which is not subject to clarification by the Secretary. Here, we consider a regulation that the Secretary could have modified through rulemaking if he decided to change the obligations imposed upon operators.²

In fact, by asserting that the second sentence of section 57.11050(a) is "silent" with respect to refuge chambers in one-escapeway exploration mines, the majority effectively concedes that the second sentence simply does not address one-escapeway mines. However, instead of concluding that because the next sentence addresses one-escapeway mines, such silence intentionally omitted one-escapeway mines from the ambit of the refuge chamber requirement, the majority acquiesces to the Secretary's mission of amending the regulation through litigation before the Commission.

The only argument by the majority even possibly drawn from the words of the section is the claim that the third sentence does not "expressly rescind" a refuge requirement they contend is "contained in the first two sentences." Slip op. at 4. The irresolvable problem for that statement is that the first "two" sentences of the section do not create a requirement for a refuge chamber. Only the second sentence creates an obligation for a refuge chamber, and the requirement could not be clearer. A refuge chamber is required "while a second opening to the surface is being developed." 30 C.F.R. § 57.11050(a). As is obvious to all but the majority, neither the first nor

¹ In *Big Ridge*, the Commission rejected an argument by the Secretary that the first sentence of section 103(j) of the Mine Act is silent on the right of the Secretary to issue orders for the preservation of evidence and thus ambiguous. The Commission correctly applied the plain language of the section. 37 FMSHRC at ___, slip op. at 5.

² Program Information Bulletin No. P07-04, at 1-2 (Feb. 28, 2007) (Gov't Ex. 6); Program Information Bulletin No. P09-09, at 1-2 (Jun. 4, 2009) (Gov't Ex. 7) are classic examples of an attempt to make a de facto change of the substance of the rule without rulemaking.

the second sentence creates a requirement for a refuge chamber in a one-escapeway mine. Simply put, there is no requirement for a refuge chamber in a one-escapeway mine to “rescind.”³

The “silence” argument by the majority essentially is a contention that refuge chambers are required for one-escapeway mines because the third sentence that expressly permits one-escapeway exploration and development mines does not expressly state that refuges are not required. To the majority, the regulation’s plain requirement for a refuge chamber in one circumstance — “when a second escapeway is being developed” — means that the separate third sentence requires refuge chambers unless such sentence expressly provides that the duty is not required. Slip op. at 4-6. Under this contorted logic, the third sentence that says nothing at all about refuge chambers actually means a refuge chamber is required unless the regulation had gone on to say, “by the way, a refuge chamber is not required.” The majority assiduously ignores, indeed flees from, acknowledging that the regulation plainly and unequivocally provides one specific circumstance when a refuge chamber is required. Again, that requirement is “while opening to the surface is being developed.” 30 C.F.R. § 57.11050(a). Because the language of the section is plain, we need not deal with the majority’s subsidiary arguments. The plain language governs. However, as seen below, the majority’s subsidiary arguments serve only to strengthen the clear intent of the plain language.

The majority cites to regulatory history. Slip op. at 5 n.5. The regulatory history that exists, however, actually supports the plain language of the regulation demolishing the majority’s reconstruction of the section based upon a “silence” theory.

The majority observes that, as proposed in 1971, the section required two escapeways in all mines except while a second escapeway was being constructed. They then assert the requirement for a refuge chamber for two-escapeway mines in 1971 must apply to one-escapeway mines permitted by the final regulations adopted six years later. In fact, promulgation of the exception in the final regulation to allow exploration and development mines to have only one escapeway is directly contrary to the majority’s theory.

The promulgated regulation changed the proposed requirement that all mines have two escapeways in order to allow one-escapeway mines in exploration and development mines. When the agency made that change, it certainly was aware of the brief, clear requirement of the immediately preceding sentence providing for a refuge chamber while the operator constructs the second escapeway in a two-escapeway mine. Yet, the drafters omitted any requirement for a refuge chamber in the newly created category of one-escapeway mines. Certainly, if the agency desired to require a refuge in one-escapeway mines, it would have included such a requirement in adding the right for there to be one escapeway in exploration mines. Thus, the addition of an exception from the two-escapeway requirement without requiring a refuge chamber works

³ The majority seems to fault us for the Secretary’s drafting, stating that in failing to read into the standard language what the Secretary didn’t include, we “are only half right – the sentence addresses one-escapeway mines, but only as to the escapeway requirement, not the refuge requirement.” This is circular. Without the assumption of a “refuge requirement” by the majority, there is none.

against the argument that a requirement that applies only to two-escapeway mines was intended to extend to the new class of one-escapeway mines.

Finally, rather than making any additional legal argument, the majority turns to an unsupported hypothetical. For its hypothetical, the majority creates an operator that constructs a second escapeway from the very outset of a short-lived exploration mine. They call it the “careful” operator. Creation of this hypothetical “careful” operator allows the majority to dispense with any analysis of the clear language of the regulation without any record support. They then assert that the regulation would be unfair to their careful operator that is doing more than the clear application of the law, as written, would require. Thus, they characterize as an “absurd” result the typical and regular operation of the law through which operators that comply with the regulation’s explicit terms are not punished regardless of whether other purely hypothetical operators do more than the law requires. In fact, of course, the majority seeks to punish the law-abiding operator for failing to act in accordance with their policy desires.

Apart from the logical fallacy inherent in its argument that where one does more than required, all must do more than required, the majority, consciously or not, chooses to view exploration mining as a “one size fits all” enterprise in which an operator of an exploration mine must immediately insert a refuge chamber at the mouth of the mine even though the entire mine will be short-lived and may not extend more than a few hundred feet with a total travel time of a few minutes.⁴ In the real world, of course, exploration mines are not one size fits all. An exploration mine may be undertaken to confirm the likelihood of economically viable deposits or they may be prospecting ventures aimed at less likely targets for production mining. Exploration mines may prove or disprove the economic viability of opening a production mine at very different points in the exploration process. As exploration mining proceeds, points will arise at which the exploration is negative or positive for production mining.⁵

Given that MSHA defines exploration mining as narrowly as possible,⁶ the absence of any bright-line test, and the short-term nature of any exploration, the exploration operator must

⁴ The majority seems not to understand that mineral exploration and development depends, *inter alia*, upon geologic, technical, environmental, and economic considerations. A plethora of variables enters into the undertaking of mineral exploration.

⁵ We further note that making the “careful” operator the new legal benchmark would perversely discourage more careful practices, which would only be seen by operators as a toehold for more onerous regulation as requirements are ratcheted up. As they say, no good deed goes unpunished.

⁶ MSHA’s Program Policy Manual states:

In this connection, “exploration or development of an ore body” should be used in its narrowest sense, i.e., while an ore body is being initially *developed*, or *development or exploration work is being conducted as an extension of a currently producing mine*.

(continued...)

be alert to whether the exploration mine will lead to production. With the commencement of production, the operator must begin to establish a second escapeway and insert a refuge chamber. However, the section clearly does not require a refuge chamber unless and until the operator elects to commence production, which triggers the requirement to begin construction of a second escapeway. It is those two requirements — commencing construction of a second escapeway and insertion of a refuge chamber — that go together by virtue of the first and second sentences.⁷

We may gain insight into the regulatory decision not to require refuge chambers in exploration mines that are evanescent by their very nature by examining other regulations. For example, the exploration mine in this case was nearly completed. Tr. 126-27. At this point of completion, the face was approximately 1,000 feet from the outside environment (Tr. 85), the entry was 16 feet by 16 feet (Tr. 122), and it was a 5 to 10 minute walk from the face to the outside world (Tr. 135). In turn, subsection (b) of section 57.11050 requires that, if miners cannot reach the surface from their workplace through the two required escapeways within one hour, refuge chambers must be within 30 minutes (not 10 minutes) from the miners' workplace.⁸ 30 C.F.R. § 57.11050(a). Similarly, section 75.1506(c)(1), requiring refuge chambers in underground coal mines (often with significant seam height and terrain impediments), provides in part that refuge chambers must be within 1,000 feet of the nearest working face. 30 C.F.R. § 75.1506(c)(1). Therefore, those sections permit placement of refuge chambers further by time and/or distance from the face than the time or distance necessary to exit this exploration mine.

⁶ (...continued)

IV MSHA, U.S. Dept. of Labor, *Program Policy Manual*, 57.11050 (2003) (emphasis added).

⁷ We note that, although there is scant regulatory history, the history of the period demonstrates a likely scenario for the exception to allow one-escapeway exploration mines — a desire to encourage mineral exploration and development within the United States. We need cite no authority for the common knowledge that in the early 1970s there was a worldwide copper shortage causing many homebuilders to switch from copper wiring to aluminum — a change that would be reflected in house fires in only a few years. More importantly and just as well known, in May 1973, oil-exporting nations embargoed oil shipments. The impact upon the United States was immediate and dramatic. Prices for petroleum-based products — an almost unlimited array of products from gasoline to paint to all plastic products — skyrocketed. These developments naturally created a demand for domestic American production of raw materials. In this context, encouragement of exploration mining is entirely understandable.

⁸ In attempting to deal with section 57.11050(b), the majority does not address the point of our reference to this subsection. The point, of course, is that, in drafting the final regulation in 1978, the drafters decided 30 minutes provided an adequately close refuge. Thus, the regulation permits refuge chambers to be 30 minutes from the workplace in production mines while in this, and other short-lived exploration mines, the outdoor environment (10 minutes away) is closer than required for refuges in mines that require the presence of two escapeways.

Thus, the majority would find that this section requires more of short-lived, minimally-staffed exploration mines than are required of large underground production mines.⁹

In this decision, the majority abdicates the Commission's responsibility to apply the regulations as written. Through such action, the critical right of the public to notice of and opportunity to comment upon the requirements of binding rules backed by punitive sanctions suffers irreparable harm. A society of fair and transparent rulemaking is grievously injured if courts, commissions, or agencies may change rules simply by declaring a rule "silent" simply because it does not comport to the desired policy outcome, and, therefore, is amenable to whatever interpretation the enforcement or adjudicatory authority wishes to impose by fiat.¹⁰

In sum, the majority's arguments display an outcome-driven determination rather than dispassionate regulatory analysis. *See* slip op. at 4-6.¹¹ For our part, we are left, first and last, in the place where all regulatory analysis must begin — the plain language of the regulation.

⁹ Moreover, under section 57.11050(a), there would be no requirement in the regulation for the position of the placement of refuges in one-escapeway mines. Any placement would be less than 30 minutes from the face. Therefore, despite the inspector's protestation, placement of a refuge just within the outside opening would comply with section 57.11050(a) and (b). In fact, there would be a host of unanswered questions. When would the refuge chamber be required in a one-escapeway exploration mine? When the entry was 100 feet and less than a minute to the outside? When the entry was 500 feet and 2.5 to 5 minutes from the outside? Finally, recognizing the vital importance of the exploration and development of metal and nonmetal resources, the promulgating Secretary may have decided not to require refuges in exploration mines that are transitory and rapidly either abandoned or converted to production mines, at which point the first two sentences of the section would then apply.

¹⁰ Rulemaking serves the critical interests of transparency and public participation in the creation of binding obligations. MSHA has long had an opportunity to propose requiring installation of refuge chambers in exploration mines by amendment of the regulation rather than taking the path of attempting to force refuge chambers upon one-escapeway mines through an untenable, invented interpretation. MSHA's failure to take such action notwithstanding the clarity of section 57.11050(a) is another factor in rejecting the Secretary's tortured interpretation of the regulation. *See Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 711 (8th Cir. 2013) ("MSHA has not changed the regulation even when it had the opportunity to do so.").

¹¹ While the majority claims that MSHA "has documented" a situation where miners in a development mine with a single escapeway were able to use a refuge chamber, slip op. at 10 n.9, this supposed historical reference is legally irrelevant. The "documentation" is included in a news item in a publication that MSHA did not even rely on in these proceedings. It is not part of the administrative record before us and we therefore may not consider it. *See* 30 U.S.C. § 823(d)(2)(C). Furthermore, the news item, even if accurate, indicates that 29 miners were underground at the mine. This is radically different from the circumstances before us. The news item does not state whether MSHA required the chamber due to the extensive nature of the development or whether the operator voluntarily installed it. Of course, even were there some regulatory history consonant with the majority's desire to impose a refuge chamber requirement

(continued...)

C. The Secretary's position is not entitled to deference.

If deference were a consideration in this case, the Judge and the majority err in failing to follow fundamental precepts of administrative law and regulatory interpretation in obeisance to “deference.” For example, in *Moore v. Hannon Food Service, Inc.*, 317 F.3d 489 (5th Cir. 2003), the Fifth Circuit demonstrates that the Seventh Circuit in *Whetsel, supra*, improperly failed to focus upon the plain language of the regulation as the starting point for its “ambiguity” analysis. Instead, the *Whetsel* court started with the agency’s interpretation and then applied it to the regulation. As the Fifth Circuit states, this mode of interpretation puts the cart before the horse:

Under *Christensen*, this approach is backwards. The presence or lack of ambiguity in a regulation should be determined without reference to proposed interpretations; otherwise, a regulation will be considered “ambiguous” merely because its authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope.

317 F.3d at 497.

Even if we were to find the regulation to be ambiguous, the Commission must determine whether the Secretary has exercised his fair and considered judgment on the issue. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012). The Secretary’s interpretation is impermissible under this standard.

The Secretary’s interpretation would fail because it cannot stand as the considered position of the agency. We do not blindly defer to agency decisions simply because they are agency decisions, and where the Secretary has not exercised his fair and considered judgment, his interpretation does not deserve controlling deference. *Id. See also Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584, 588 (D.C. Cir. 1997) (stating that an agency cannot “promulgate mush” and then ask for deference to clarify regulations), *abrogated on other grounds, Perez v. Mortgage Bankers Ass’n*, 575 U.S. ___, 135 S. Ct. 1199, 1207 (2015).¹²

¹¹ (...continued)

on one-escapeway exploration mines, it could not overcome the plain language of the section. A regulation cannot be construed to mean what an agency intended but did not express. *Performance Coal*, 642 F.3d at 238.

¹² In *Perez v. Mortgage Bankers Association*, the Supreme Court reversed the requirement, articulated in *Paralyzed Veterans*, that interpretive rules that substantively alter a regulation’s prior, definitive meaning must proceed through notice-and-comment rulemaking. The Supreme Court’s unanimous judgment disapproved of the D.C. Circuit’s decision as inconsistent with the Court’s “straightforward reading of the APA.” 135 S. Ct. at 1207. However, nothing in the Court’s opinion undercuts the D.C. Circuit’s disapproval of untrammelled deference. Indeed, Justice Scalia and Justice Thomas expressly questioned the application of *Auer* deference and its underpinnings in *Seminole Rock. Id.* at 1211-13 (Scalia, J., (continued...))

At the time this standard was promulgated, the considered view of the agency did not deem necessary a requirement for either two escapeways or an escapeway and a refuge at all times in an exploration mine, even though that could have been easily expressed. Unwinding that policy choice should require an equally thoughtful and deliberative process. Evidence of such care is entirely absent from the administrative record.¹³

The factual context of this case also highlights the formless nature of the supposed “rule” and the near-total absence of the analytical underpinnings required to support the asserted exercise of the agency’s reasoned and considered judgment. Only by allowing a further over-reach by the agency do we learn when the “duty” to provide a shelter arises, i.e. at or before the second crosscut is made. Accepting the “rule” as such requires us to permit the agency to impose *another* specific regulatory requirement setting a limit at the second crosscut without the benefit of rulemaking. We should not be party to this abrogation of the administrative process.

D. The S&S designation is unsupported by substantial evidence.

We also dissent from the majority’s holding that the violation in this case was S&S. There is no evidentiary or legal basis for holding that the absence of a refuge chamber at this stage of the mine’s development was of such a nature that it made it reasonably likely to result in an event causing death or serious bodily injury. If anything, a careful analysis of the S&S issue only underscores the unreasonableness of the Secretary’s construction of the standard to find a violation here.

Cumberland did clarify that standards designed to protect miners in the event of an emergency must consider such emergency as part of the operative context for the law. *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2364-65 (Oct. 2011), *aff’d*, 717 F.3d 1020 (D.C. Cir. 2013). Following *Cumberland* we applied a full *Mathies* analysis in a case, even though the parties stipulated that an emergency requiring the use of escapeways would be reasonably likely to result in serious injuries. *Spartan Mining Co.*, 35 FMSHRC 3505, 3507, 3509 (Dec. 2013) (citing *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984)). Here, the inspector and, consequently, the Judge merely assumed that the absence of a refuge chamber was reasonably likely to result in a reasonably serious injury. The Judge failed to apply the *Mathies* test to the facts of this case.

¹² (...continued) concurring); *Id.* at 1213-25 (Thomas, J., concurring). Justice Alito suggested he would consider these views in a more appropriate context, where concerns about “the aggrandizement of the power of administrative agencies” enabled by *Seminole Rock* and its progeny “may be explored through full briefing and argument.” *Id.* at 1210-11 (Alito, J., concurring in part). Thus, a significant plurality on the Court is open to questioning *Auer* due to overreaching typified by the Secretary in this case.

¹³ The majority and the Judge below seem untroubled by practical aspects of mining, especially in an exploration context. We should draw a reasonable inference that the Secretary determined at the time the rule was drafted that the advice of its advisory committee was helpful on this question and that the Secretary accordingly determined that the recommended exception was consistent with the statute.

The circumstances in this case cannot support an S&S finding under a principled application of the *Mathies* test. First, the inspector had no underground mining experience prior to becoming an inspector. Tr. 42. Second, he made no underground examinations at the mine prior to issuing the citation. Tr. 27, 50. In fact, he had never been to the mine before. Tr. 43. The inspector also testified that he did not take the mine's ventilation into account in writing an S&S violation. Tr. 55.¹⁴

The Commission has held that an S&S determination may not be based on purely speculative conjecture about a potential injury that "could" occur. *Texasgulf, Inc.*, 10 FMSHRC 498, 500-01 (Apr. 1988). Despite this well-settled law, the majority approves the S&S conclusions reached by a relatively inexperienced inspector regarding a mine he had never visited before and circumstances in an underground environment he had not seen, concerning possible hazards he had not considered.

The evidence is thus insubstantial and vanishingly weak in its purported support of the conclusion reached. While the Secretary posits that the violation is S&S because a refuge chamber would not have been available in the event of an emergency, the Secretary can point to no clear regulatory standard for determining *when* and *where* the refuge would be required in the mine. Nor does the majority articulate a particular point at which the refuge would have been necessary and practical in this mine. It is obvious that the obligation is neither feasible nor useful when the earth is first disturbed and not apparent at all at what point the operator's duty would arise under the majority's view. At what point, by time or distance, would the refuge chamber be required — 100 feet or 1 minute, 300 feet or 3 minutes, 600 feet or 6 minutes, etc.?

Thus, the Secretary's position is facially arbitrary and unreasonable. It is not grounded on any facts particular to this mine or even those applicable generally to mines during their early development. Indeed, in this very case, it has been suggested that the operator would not have been in violation had it stated that it intended to install the refuge chamber at some point in the near future during the development process. Surely, the Secretary would not suggest that actions in compliance with the law and regulations nonetheless contribute significantly and substantially to the cause and effect of a hazard likely to cause death or serious injury to miners. *See Mathies* at 3; *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 827 (Apr. 1981) ("[A] violation 'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety and health").

¹⁴ The Judge generally precluded cross-examination about the specific conditions the inspector may have considered in determining that the violation was S&S. Tr. 52-55. However, the Secretary bears the burden of proof on this issue, and it is conclusively established that the inspector did not observe any conditions underground at a mine he had never visited before determining that this violation was S&S.

II.

Conclusion

Perhaps it is inevitable that federal agencies imbued with the hubris of executive authority will seek to impose regulatory obligations without following the dictates of law. However, the only function of an adjudicatory body is to enforce compliance with the law. Here, the Commission affirms a result-driven policy decision thereby permitting MSHA to create a new regulation without rulemaking. Neither MSHA nor the Commission will afford affected persons and members of the public a chance to comment on this fundamental change. We respectfully dissent.

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 29, 2015

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

v.

BRODY MINING, LLC

Docket Nos. WEVA 2014-82-R, et al.¹

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

DECISION

BY: Young, Cohen, and Nakamura, Commissioners

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), are before the Commission a second time on interlocutory review. In this case of first impression, a Commission Administrative Law Judge dismissed a “pattern of violations” (“POV”) notice issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Brody Mining, LLC pursuant to section 104(e)

¹ The other relevant docket numbers involved in this proceeding are listed in Appendix A, attached to this decision.

of the Mine Act,² 36 FMSHRC 2941 (Nov. 2014) (ALJ), and we granted review of the Secretary of Labor's petition. At issue is whether the Judge had jurisdiction to review the validity of the POV notice and, if so, whether the Judge erred in dismissing the notice. For the reasons discussed more fully below, we conclude that the Judge had jurisdiction to review the POV notice. However, we further conclude that under the circumstances of this case he erred in

² Section 104(e) of the Mine Act, 30 U.S.C. § 814(e), provides:

(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

invalidating the POV notice. Accordingly, we vacate the Judge's invalidation of the POV notice and remand for further proceedings.

I.

Procedural Background

Section 104(e) of the Mine Act sets forth provisions regarding the issuance and termination of a POV notice. Section 104(e)(1) provides that if an operator has a pattern of violations of mandatory health or safety standards which are of such nature as could significantly and substantially contribute to the cause and effect of health or safety hazards, it shall be given written notice that such a pattern exists. 30 U.S.C. § 814(e)(1). If, within 90 days following issuance of the POV notice, an inspector cites the operator for a significant and substantial ("S&S") violation,³ then MSHA shall issue a withdrawal order under section 104(e) of the Act. *Id.* The operator will thereafter be subject to additional withdrawal orders for each new S&S violation subsequently discovered until a complete inspection of the mine has revealed no further S&S violations. 30 U.S.C. §§ 814(e)(2), (3).

MSHA has published regulations at 30 C.F.R. Part 104 to implement section 104(e) of the Mine Act. The regulations, which were first published in 1990, initially included provisions which identified information that MSHA used to determine mines with a "potential" pattern of violations ("PPOV") and provided that only citations and orders that had become final orders were used to identify a mine with a PPOV. 30 C.F.R. § 104.3 (1991). When notified of a PPOV, an operator had an opportunity to engage in certain remedial measures. 30 C.F.R. § 104.4(a) (1991). The rule set forth procedures for the issuance of a POV notice if the MSHA District Manager continued to believe that a pattern of violations existed at the mine. 30 C.F.R. § 104.4(b) (1991). Under these regulations, MSHA never successfully used its pattern of violations authority against a mine operator.⁴

Part 104 was most recently revised in January 2013, and the revised rules became effective on March 25, 2013. 78 Fed. Reg. 5056, 5056-74 (Jan. 23, 2013). The revised POV regulations implemented two major changes from the 1990 rule: (1) the elimination of the PPOV notice and review process; and (2) the elimination of the requirement that MSHA could consider only final orders in its POV review. *Id.* at 5056. In relevant part, the POV regulations list eight factors that MSHA considers in making its POV determination, and provide that MSHA will post specific pattern criteria on its website. 30 C.F.R. §§ 104.2(a), (b).

³ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

⁴ *See*, U.S. Dep't of Labor, Office of Inspector General audit report, "In 32 Years MSHA Has Never Successfully Exercised its Pattern of Violations Authority," Rep. No. 05-10-005-06-001 at 14 (Sept. 29, 2010), referenced in the preamble of the 2013 POV rule, 78 Fed. Reg. 5056, 5058 (Jan. 23, 2013).

These proceedings involve a POV notice and subsequent withdrawal orders issued to Brody pursuant to section 104(e) of the Mine Act and the revised POV regulations. In our first interlocutory review, as described below, we upheld the facial validity of the revised rules. In this, our second interlocutory review, we review the application of the rules to the subject proceedings.

A. First interlocutory review

On October 24, 2013, MSHA issued a POV notice to Brody for conditions at its No. 1 Mine. The notice lists 54 citations and orders issued between October 9, 2012 and October 8, 2013, in groups regarding conditions and or practices that contribute to: (1) ventilation and/or methane hazards; (2) emergency preparedness and escapeway hazards; (3) roof and rib hazards; and (4) inadequate examinations. The notice further states that, “[t]hese groups of violations, taken alone or together, constitute a pattern of violations” Notice No. 7219154.

Brody filed a contest with the Commission, challenging the issuance of the notice. Chief Administrative Law Judge Robert Lesnick dismissed the contest on the basis that no provision of the Mine Act or the Commission’s procedural rules authorized him to adjudicate the notice in the absence of a withdrawal order predicated on the notice. 36 FMSHRC 284, 287 (Jan. 2014) (ALJ). Brody did not seek review of the Judge’s dismissal of the contest.

After issuance of the POV notice, Brody received several section 104(e) withdrawal orders. Brody filed contests of the withdrawal orders and an application seeking temporary relief from the POV notice and withdrawal orders. The application for temporary relief was denied, and Brody did not seek review of that decision. 36 FMSHRC 2027, 2033 (Aug. 2014).

In the contest proceedings on the orders,⁵ the parties filed cross-motions for summary decision regarding the validity of the revised POV regulations. Among other issues, the parties disputed whether MSHA properly eliminated the 1990 PPOV notice and review process and the requirement that MSHA could only consider final orders in its POV review process.

By order dated January 30, 2014, the Chief Judge affirmed the facial validity of the revised POV regulations. 36 FMSHRC at 298-316. The Judge certified his order for interlocutory review, which we granted.

While the facial validity of the rule was pending before us on interlocutory review, prehearing proceedings continued at the trial level.⁶ The Chief Judge reassigned the case to

⁵ Contest proceedings arise under 30 U.S.C. § 815(d), as implemented by 29 C.F.R. Part 2700 Subpart B, and involve the contest of a citation or order before MSHA has proposed a civil penalty for the violation described in the citation or order.

⁶ Commission Procedural Rule 76(a)(2) provides in part, “[i]nterlocutory review by the Commission shall not operate to suspend the hearing unless otherwise ordered by the Commission.” 29 C.F.R. § 2700.76(a)(2).

Administrative Law Judge William Moran for hearings on the citations and orders underlying the POV notice. On August 4, 2014, Judge Moran issued notices scheduling the hearings for the weeks of September 23, September 29, and October 7, 2014. The captions of the hearing notices identified the docket numbers of the civil penalty proceedings⁷ associated with the citations and orders listed in the POV notice but did not list the docket numbers of the contests of the section 104(e) orders.

On August 28, 2014, we issued our decision on the first interlocutory appeal. 36 FMSHRC at 2027 (“*Brody I*”). We concluded that the revised POV regulations are facially valid and consistent with the requirements of procedural due process, that MSHA’s screening criteria available on MSHA’s website (*see* 30 C.F.R. § 104.2(b)) were not required to be the subject of notice-and-comment rulemaking, and that the rule was not applied in an impermissibly retroactive manner to Brody. *Id.* at 2054. Accordingly, we affirmed the Judge’s interlocutory order and remanded for further proceedings. *Id.* Brody has filed a petition challenging the Commission’s decision in the U.S. Court of Appeals for the D.C. Circuit.⁸

B. Second interlocutory review

Prior to the first hearing date before Judge Moran, the parties filed several pretrial motions, including Brody’s Motion in Limine Concerning Definition of a Pattern, in which the operator sought to compel the Secretary to define “pattern of violations” and to explain how the alleged S&S violations constitute a pattern of violations. During a conference call on September 19, 2014, the Judge granted Brody’s motion and ordered the Secretary to provide a clearer definition of the term and to set forth with specificity what constitutes a POV with respect to the citations and orders involved in the case. Conf. Call Tr. (9-19-14) at 9-11; *see also* Tr. (9-23-14) at 14.

During the three-week hearing period in September and October 2014, the Judge conducted a hearing on 28 of the citations and orders listed in the POV notice.⁹ At the beginning of the hearing, prior to taking evidence, the Judge dismissed the POV charge. Tr. (9-23-14) at 68-69; Tr. (9-24-14) at 439-40. Subsequently, the Judge issued an order, dated November 3, 2014, stating that he had dismissed the POV notice at the beginning of the hearing because the Secretary had failed to adequately set forth the basis for his POV charge and had denied Brody procedural due process. 36 FMSHRC at 2952-53. The Judge also set forth his findings with respect to the violations and S&S designations alleged in the citations and orders, and assessed

⁷ Civil penalty proceedings arise under 30 U.S.C. § 815(a), as implemented by 29 C.F.R. Part 2700 Subpart C, and involve the contest of a civil penalty that MSHA has proposed for a violation described in a citation or order.

⁸ The case is pending as No. 14-1171.

⁹ Prior to hearing, the 54 citations were reduced to 52 because the Secretary vacated two citations listed in the POV notice. 36 FMSHRC at 3033 (stips. 8, 9). The Secretary further agreed to delete the S&S designations with respect to 12 citations, and Brody agreed to accept the allegations of violation and S&S designations with respect to 12 citations. *Id.* at 2960-61.

civil penalties. *Id.* at 2960-3031. He held that 17 citations and orders were S&S, while 11 were not. *Id.*

The parties filed several post-hearing pleadings, including the Secretary's motion requesting that the Judge certify his November 3 order for interlocutory review. In the motion, the Secretary argued in part that the Judge's dismissal order presented the controlling questions of whether the Judge had jurisdiction to adjudicate the validity of the POV notice, and whether the Secretary's definition of "pattern of violations" satisfies section 104(e)(4) of the Mine Act and due process requirements. The Secretary further asserted that immediate review would materially advance resolution of these proceedings.

On December 30, 2014, the Judge issued an order which, in relevant part, granted the Secretary's motion for certification. 36 FMSHRC 3355, 3363-64 (Dec. 2014) (ALJ). The Judge also stated that, as a result of his dismissal of the POV notice, all section 104(e) orders issued to Brody were automatically converted to section 104(a) citations. *Id.* at 3364 n.5.

In January 2015, we issued an order granting interlocutory review of the Judge's November 3 order "with regard to whether the Judge had jurisdiction to adjudicate the validity of the POV notice issued by the Secretary to Brody on October 24, 2013, and if so, whether the Judge erred in dismissing the Secretary's POV notice." Unpublished Order at 1 (Jan. 8, 2015). We granted leave to the United Mine Workers of America to file an amicus curiae brief supporting the Secretary's position, and heard oral argument.

II.

Disposition

A. Jurisdiction

The Secretary makes two main arguments in support of his position that the Judge lacked jurisdiction to adjudicate the validity of the POV notice. First, he contends that the Judge's hearing notices did not include the dockets of the contests of the section 104(e) withdrawal orders, and that the Judge may not adjudicate the validity of the notice in the absence of a contest of a section 104(e) withdrawal order. Second, the Secretary asserts that the contested withdrawal orders are before the D.C. Circuit on interlocutory appeal, and the Court has exclusive jurisdiction over the contests under section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1).¹⁰

¹⁰ 30 U.S.C. § 816(a)(1) provides in relevant part:

Any person adversely affected or aggrieved by an order of the Commission issued under this Act may obtain a review of such order in any United States court of appeals Upon such filing, the court shall have exclusive jurisdiction of the proceeding and of the questions determined therein, and shall have the power to make and enter . . . a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission

As to the Secretary's first argument, the Secretary is correct in asserting that if the contests of the section 104(e) withdrawal orders were not before the Judge, the Judge lacked jurisdiction to consider the validity of the POV notice issued to Brody. Under the law of the case doctrine, a decision made at one stage of litigation and not challenged on appeal continues to govern the proceedings. *Manalapan Mining Co.*, 36 FMSHRC 849, 852 (Apr. 2014). In his January 30, 2014 order, the Chief Judge dismissed Brody's contest of the POV notice on the basis that no provision of the Mine Act or the Commission's procedural rules authorized him to adjudicate a notice in the absence of a contest of a withdrawal order based upon the notice. 36 FMSHRC at 287. Because Brody did not seek review of the Judge's dismissal of the contest, the Judge's ruling is the law of the case in this proceeding. 36 FMSHRC at 2033. Thus, in this proceeding, the validity of the POV notice may only be considered as part of the adjudication of a contest of withdrawal orders predicated on the notice.¹¹

As mentioned above, the Judge's hearing notices did not include the docket numbers of the contest proceedings of the section 104(e) withdrawal orders that were predicated on the POV notice. Rather, the Judge included the docket numbers of the civil penalty proceedings associated with the citations and orders listed on the POV notice. The Judge, however, included the docket numbers of the contests of the withdrawal orders in his November 3, 2014 order disposing of the matters at issue during the hearing.

We conclude that, although the Judge did not include the docket numbers of the contests of section 104(e) withdrawal orders in the notices of hearing, those contests were before him at the time of the hearing. In his January order, the Chief Judge consolidated all contests of the section 104(e) orders predicated on the POV notice.¹² 36 FMSHRC at 293. When the Chief Judge reassigned the case to Judge Moran, he included all of the pending contest proceedings (the original 28 contests that were captioned in the Chief Judge's January 2014 order plus 48 additional contests). Thus, all of the pending contests of the section 104(e) orders were assigned to Judge Moran, including the 28 contests that later became part of an interlocutory appeal to the D.C. Circuit.

While the docket numbers of the section 104(e) contests were not included on Judge Moran's notices of hearing, the parties and Judge clearly understood that those contests were at issue during the hearing. Indeed, some of them are listed on the Secretary's Prehearing Statement. In addition, counsel for the Secretary and the operator made statements during the hearing indicating their understanding that the contests were at issue during the hearing. Tr. (9-23-14) at 35, 65-67. On the first day of the hearing, the Judge read the docket numbers at issue in the hearing and specifically included the docket numbers of contests of section 104(e) orders predicated on the POV notice. Tr. (9-23-14) at 4; *see also* (Tr. 9-23-14) at 69; Tr. (9-29-14) at

¹¹ The issue of whether the Commission is authorized to directly review a POV notice is before the Commission in *Pocahontas Coal Co.*, Docket No. WEVA 2014-202-R.

¹² A Commission Judge may at any time, upon his or her own motion, order the consolidation of proceedings assigned to the Judge and involving similar issues. 29 C.F.R. § 2700.12.

825. The Secretary's counsel did not object, or indicate any surprise, about the inclusion of the docket numbers of contests of section 104(e) orders. The parties were not prejudiced by the Judge's failure to include the docket numbers of the withdrawal order contests in the hearing notices.¹³ Thus, the Judge's omission of the docket numbers of the contests of the withdrawal orders in the hearing notices amounts to harmless error and does not deprive the Judge of jurisdiction over the contests.

We further hold that the Judge was not deprived of jurisdiction over the POV notice because the contested withdrawal orders are before the D.C. Circuit on interlocutory appeal. Following our remand in *Brody I*, the 28 contest dockets that were the subject of our decision were simultaneously pending before Judge Moran and the D.C. Circuit.

Section 106(a) of the Mine Act provides that if a party appeals a Commission decision to a court of appeals, the court "shall have exclusive jurisdiction of the proceeding and of the questions determined therein." 30 U.S.C. § 816(a). Appellate review of Commission action is restricted to final Commission orders. *See Meredith v. FMSHRC*, 177 F.3d 1042, 1047-48 (D.C. Cir. 1999) ("[W]e do not discern any exception to the principle of finality within the Mine Act's judicial review provisions."). Because *Brody I* remanded the contests to the Judge "for further proceedings" (36 FMSHRC at 2054), our decision was not a final Commission order. *Meredith*, 177 F.3d at 1047 ("[T]he Commission's order . . . remanding the matter to the ALJ for further record development clearly falls outside the heartland of final action.").

The collateral order doctrine provides a court of appeals with a basis for jurisdiction to hear appeals from a limited category of decisions that are not final. *Id.* at 1048. Under that doctrine, "even though a disposition does not end the litigation, it qualifies for immediate review if it: (i) conclusively determines a disputed question; (ii) resolves an important issue completely separate from the merits of the action; and (iii) is effectively unreviewable on appeal from a final judgment."¹⁴ *Id.* (citations omitted). All three prongs must be satisfied in order for review to be granted. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). If the Court determines that it has jurisdiction over the contest proceedings under this doctrine, such jurisdiction would necessarily involve a question determined to be completely separate from the merits of the proceedings, essentially by operation of an exception to section 106(a). *See, e.g., Vulcan Constr. Materials, LP v. FMSHRC*, 700 F.3d 297, 300 (7th Cir. 2012).

Thus, the exercise of the Court's jurisdiction would not deprive the Judge of jurisdiction to consider the merits of the contest proceedings. Accordingly, we conclude that the Judge had

¹³ We do not consider it significant that the Judge did not refer to the disposition of the section 104(e) contests in his November 3 order. The Judge clarified in his December 30 order that the effect of his determination that the POV notice was invalid was to modify the section 104(e) orders to section 104(a) citations. 36 FMSHRC at 3364 n.5.

¹⁴ The D.C. Circuit has requested that the Secretary and Brody brief whether the Commission's order is final and appealable. Unpublished Order, No. 14-1711 (D.C. Cir. Jan. 13, 2015).

jurisdiction to consider the validity of the POV notice because the contests of the withdrawal orders predicated on the POV notice were properly before him.

B. The Judge's Dismissal of the POV Notice

The Judge noted that Brody filed before him a motion in limine seeking to compel the Secretary to identify: “(1) what constituted a pattern of violations; (2) what number of S&S designations Brody had to prevail upon to defeat the pattern of violations designation; and (3) how the grouping of citations in the pattern notice constituted a pattern of violations.” 36 FMSHRC at 2952. The Judge “agreed that each of these were reasonable and necessary inquiries, essential for a Respondent to be able to defend against the [POV] charge,” and dismissed the POV notice at the beginning of the hearing based on his determination that the Secretary had failed to set forth the basis for his POV charge. *Id.* at 2952-53.

We address the Judge's determinations with respect to each of the three elements that he concluded were essential for Brody's defense against the POV charge. We begin by addressing whether the Secretary failed to adequately identify what constitutes a “pattern of violations.”

In enacting section 104(e), Congress explicitly recognized that the provision was necessary to “provide an effective enforcement tool to protect miners when the operator demonstrates [its] disregard for the health and safety of miners through an established pattern of violations.” S. Rep. No. 95-181, at 32 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* (“*Legis. Hist.*”), at 620 (1978). Congress stated that it viewed the pattern notice “as indicating to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem, one which permits continued violations of safety and health standards.” S. Rep. No. 95-181 at 33, *Legis. Hist.* at 621. It observed that the existence of a pattern “should signal to both the operator and the Secretary that there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient.” *Id.* Congress explained that while it “considers that a pattern is more than an isolated violation, pattern does not necessarily mean a prescribed number of violations of predetermined standards nor does it presuppose any element of intent or state of mind of the operator.” *Id.*

On review and before the Judge, the Secretary construes “pattern” to mean “[a] mode of behavior or series of acts that are recognizably consistent,” and submits that as few as two violations may constitute a pattern. Sec'y Br. at 10, *citing Pattern*, Black's Law Dictionary (9th ed. 2009); Sec'y Post-Hr'g Br. at 9. The Secretary further states that “a POV exists if the S&S violations are ‘ordered’ or ‘arranged’ in such a way that reflects an ‘external organizing principle’ – the principle that the operator has a tendency to commit [] S&S violations.”¹⁵ Sec'y

¹⁵ The Secretary's identification of an “external organizing principle” is not very helpful. In defining the external organizing principle as a “tendency to commit S&S violations,” the Secretary essentially is referring to the pattern rather than identifying what it is a pattern of. Thus, with regard to the “external organizing principle,” the Secretary's definition is circular. As noted below and consistent with the legislative history and regulations discussed herein, the
(continued...)

Br. at 10; Sec’y Post-Hr’g Br. at 9. The Secretary emphasizes that a “mode of behavior or series of acts” is “rendered ‘ordered’ or ‘arranged’ based on their relationship to each other or some external principle, rather than a mere numerical calculation.” Sec’y Br. at 10-11; *see also* Sec’y Post-Hr’g Br. at 9.¹⁶

The POV rule itself provides additional guidance regarding the interpretation of “pattern of violations.” It states that it implements section 104(e) of the Act “by addressing mines with an inspection history of recurrent S&S violations of mandatory safety or health standards that *demonstrate a mine operator’s disregard for the health and safety of miners.*” 30 C.F.R. § 104.1 (emphasis added). The stated purpose of the procedures set forth in the POV regulations “is the restoration of effective safe and healthful conditions at such mines.” *Id.* The POV regulations also set forth eight criteria that MSHA reviews to identify mines with a POV in section 104.2:

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

30 C.F.R. § 104.2(a).¹⁷

¹⁵ (...continued)
actual “external organizing principle” is whether the operator has demonstrated a disregard for the health and safety of miners.

¹⁶ The Secretary has invited the Commission to determine which factors are relevant to determining the existence of a pattern of violations. Sec’y Post-Hr’g Br. at 12; Sec’y Br. 13-14.

¹⁷ We note that with respect to section 104.2(a)(7), regarding “[o]ther information that demonstrates a serious safety or health management problem at the mine,” the Secretary stated in the preamble to the regulations that:

[T]his other information may include, but is not limited to, the following:

- Evidence of the mine operator’s lack of good faith in correcting the problem that results in repeated S&S violations;

(continued...)

We can discern in the Secretary’s definition of “pattern,” together with the Secretary’s implementing regulations, a definition of “pattern of violations” that is consistent with the purpose of section 104(e), as evident in the legislative history. Accordingly, we hold that a “pattern of violations” under section 104(e) is established by an inspection history of recurrent S&S violations of a nature and relationship to each other such that the violations demonstrate a mine operator’s disregard for the health or safety of miners. No particular number of S&S violations is required in order to constitute a pattern of violations, and a finding of a pattern of violations does not presuppose any element of intent or state of mind of the operator.¹⁸ The eight criteria listed in section 104.2(a) are relevant to the determination of whether a pattern of violations exists.¹⁹ As specific to this case, the POV notice issued to Brody lists four patterns,

¹⁷ (...continued)

- Repeated S&S violations of a particular standard or standards related to the same hazard;
- Knowing and willful S&S violations;
- Citations and orders issued in conjunction with an accident, including orders under sections 103(j) and (k) of the Mine Act; and
- S&S violations of health and safety standards that contribute to the cause of accidents and injuries.

78 Fed. Reg. 5056, 5062 (Jan. 23, 2013).

¹⁸ Nor is it necessary, as the Judge suggested (Tr. (9-23-14) at 60; Tr. (9-25-14) at 649-50; 36 FMSHRC at 2953), for the Secretary to demonstrate that the existing enforcement scheme is unable to address the history of recurrent violations.

¹⁹ In a particular case, there may be “other information that demonstrates a serious safety or health management problem” 30 C.F.R. § 104.2(a)(7). In this case, the Secretary suggested, before the Judge and on review, that the Commission consider such factors as:

1. The nature and seriousness of the hazards presented;
2. The timing of the violations;
3. The location of the violations in the mine;
4. Any trends with regards to injuries and/or accidents;
5. Whether management personnel were involved;
6. The standards violated;
7. The conduct of the operator in responding to the related violations and whether the operator exhibited any heightened awareness of possible consequences; and
8. Any other factor that is revealed by the evidence to establish a ‘mode of behavior or series of acts that are recognizably consistent.’

Sec’y Br. at 13; Sec’y Post Hr’g Br. at 12-13; Tr. (9-23-14) at 48-49. At oral argument before us, the Secretary’s counsel provided a fuller explanation of these factors. With respect to the third factor above, counsel stated that if violations “keep happening in the same location, that would be a factor strengthening a pattern allegation.” Oral Arg. Tr. at 33. The sixth factor above refers
(continued...)

identifying the specific standard or hazard that was implicated by those patterns. Sec’y Br. at 16; Oral Arg. Tr. at 10; Sec’y Post-Hr’g Br. at 10, 15; Conf. Call Tr. (7-22-14) at 9.

Regarding the second part of the motion in limine, the Judge accepted Brody’s argument that it was “essential” that Brody know the number of S&S designations that it had to prevail upon in order to defeat the pattern of violations designation.²⁰ 36 FMSHRC at 2952; *see also* Conf. Call Tr. (7-22-14) at 7-8; Tr. (9-23-14) at 13, 15-16. The Secretary contends that no particular number of violations is necessary to establish a POV. Sec’y Br. at 10. The Secretary’s contention is supported by legislative history, in which Congress explained that while it “considers that a pattern is more than an isolated violation, pattern does not necessarily mean a prescribed number of violations.” S. Rep. No. 95-181 at 33, *Legis. Hist.* at 621. Accordingly, because no particular number of S&S violations is required in order to constitute a POV, we conclude that the Judge erred in his determination that Brody would need to know what number of S&S designations it had to prevail upon in order to defeat the pattern charges.

We next address the Judge’s determination that the Secretary failed to adequately identify how the grouping of the citations and orders in the POV notice issued to Brody constituted a pattern of violations. We recognize that in this case of first impression, the appropriate

¹⁹ (...continued)

to the standards encompassed by MSHA’s Rules to Live By initiative, whereas the first factor relates to standards other than those encompassed by the Rules to Live By. *Id.* at 34. With respect to the seventh factor, the “consequences” referred to are those that relate to the safety and health of miners. *Id.* at 34-35. Depending upon the facts of a case, we agree that these may be helpful interpretative tools. The Judge may also consider other evidence that tends to show or refute a pattern arising from the relationship between violations and other circumstances, such as a change in safety or senior management personnel, or notice of a general problem communicated to mine management and the response by the mine.

²⁰ Our dissenting colleague disagrees that the Judge accepted Brody’s argument that it was “essential” that Brody know the number of S&S designations that it had to prevail upon in order to defeat the POV designation. Our colleague relies in part upon a statement that the Judge made on the first morning of the hearing that he was not “looking for numbers.” Slip op. at 27-29. As Brody has acknowledged, however, Brody repeatedly sought “information as to what number of S&S citations it needed to defeat to have the POV notice vacated,” from the first hearing on temporary relief to the hearing before Judge Moran. *See, e.g.*, B. Br. at 2, 4, 18. In his November 3 decision, the Judge stated that he had “agreed” that Brody’s inquiry regarding the number of S&S designations was a “reasonable and necessary inquir[y], *essential* for a Respondent to be able to defend against the [POV] charge.” 36 FMSHRC at 2952 (emphasis added). We view this statement by the Judge in his written decision as adequate to support our conclusion that the Judge’s invalidation of the POV notice rested in part on his conclusion that Brody would need to know what number of S&S designations it would have to prevail upon in order to defeat the pattern charges. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1483 (Aug. 1982) (citing *Capitol Aggregates, Inc.*, 2 FMSHRC 1040, 1041 (May 1980)) (holding that a bench decision may be subject to later revision by a Judge and that it is not considered a final decision until it is written).

procedural path is far from clear. While we commend the Judge on his expeditious and decisive handling of this case, we nonetheless conclude that it was premature to dismiss the POV notice at the beginning of the hearing, prior to taking evidence.

Preliminarily, we briefly describe our due process holding in *Brody I* in order to clarify the scope of our consideration in the subject appeal.

In the first interlocutory appeal before us, Brody argued that the POV rule denied it due process because the rule permitted interruptions in its mining operations caused by the issuance of section 104(e) withdrawal orders without a prior hearing. 36 FMSHRC at 2041. We applied the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to consider whether due process was denied by the POV rule's elimination of the provision that MSHA could consider only final orders in its POV review and its elimination of the PPOV review process.²¹ 36 FMSHRC at 2042-47. We concluded that an operator may have a "post-deprivation" hearing on a POV notice after it has been issued a section 104(e) withdrawal order, after it has been deprived of its property interest of uninterrupted mining, and still be afforded adequate due process under the regulations. *Id.* at 2044. In reaching this conclusion, we relied upon various protections afforded operators.²² We also noted that the unwarrantable failure provisions of section 104(d), like the POV provisions of section 104(e), do not contain any provisions for a hearing or other due process protection prior to the withdrawal of miners. *Id.*

At issue in the instant litigation are the contests of section 104(e) orders and the validity of the POV notice upon which they are predicated. The Commission's formal adjudicatory procedures set forth in 29 C.F.R. Part 2700 apply to these proceedings, including the opportunity for a full due process hearing as required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (2011) ("APA"). *See* 75 Fed Reg. 81459, 81460 (Dec. 28, 2010) (noting that hearings provided under the Commission's procedural rules, including those designated for simplified proceedings, are "full due process hearings").

²¹ The three-part test set forth in *Mathews v. Eldridge* balances the operator's interest in avoiding a loss against the interests which the government seeks to advance through summary proceedings. 4 Jacob A. Stein et al., *Administrative Law* § 32.02[1], at 32-54, 32-55 (2015). If the "private interest outweighs the government's interest, greater procedural due process rights will be afforded to the affected party." *Id.* at 32-55, 32-60, 32-61. The test requires "a weighing of the interests of the affected [operator], the risk of erroneous decision-making based on the procedures used, and the government's interest in efficient resolution of the issues." *Id.* at 32-54.

²² The Commission noted the following pre-deprivation protections: MSHA's monthly monitoring tool; a process allowing operators to present information to support mitigating circumstances to the District Manager; a procedure permitting a corrective action program at any time; an opportunity to discuss citations with inspectors during a close-out conference; and an expedited procedure for contesting S&S citations. 36 FMSHRC at 2044-46. The Commission also relied upon the following post-deprivation procedures: an operator may seek temporary relief from a section 104(e) withdrawal order; and operators may seek expedited proceedings on contests of section 104(e) orders. *Id.* at 2046-47.

Section 105(d) of the Mine Act requires that in adjudicating contests of orders issued under section 104 of the Mine Act, the Commission shall comply with the notice requirements set forth in section 554 of the APA. It provides:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance . . . of an order issued under section 104 . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order

30 U.S.C. § 815(d). The APA “codifies fairness guarantees for the administrative process.” *Dep’t of Educ. of State of Cal. v. Bennett*, 864 F.2d 655, 659 (9th Cir. 1988); *accord SunBridge Care and Rehab. for Pembroke v. Leavitt*, 340 Fed.Appx. 929, 935 (4th Cir. 2009) (“The APA ‘requires procedural fairness in the administrative process.’”) (citations omitted). Thus, we apply principles developed under the APA in considering whether the Secretary failed to adequately state how a pattern of violations exists with respect to the citations and orders listed in the POV notice.

Section 554(b)(3) of the APA requires that parties “shall be timely informed of . . . the matters of law and fact asserted.” 5 U.S.C. § 554(b)(3).²³ Under this standard, courts have held that as “long as a party to an administrative proceeding is reasonably apprised of the issues in controversy, and is not misled, the notice is sufficient.” *St. Anthony Hosp. v. U.S. Dep’t of Health & Human Servs.*, 309 F.3d 680, 708 (10th Cir. 2002) (citations omitted); *SunBridge*, 340 Fed.Appx. at 936. “To establish a due process violation, an individual must show he or she has sustained prejudice as a result of the allegedly insufficient notice.” 309 F.3d at 680 (citations omitted); *Long v. Bd. of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1158 (10th Cir. 1997). Prejudice may be demonstrated by a showing that a party would have litigated the matter differently if adequate notice had been received. *See* 117 F.3d at 1158; *Rapp v. U.S. Dep’t of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, 1520 (10th Cir. 1995); *Citizens Bank of Marshfield, MO v. FDIC*, 751 F.2d 209, 213-14 (8th Cir. 1984); *see also Cumberland Coal Res., LP*, 32 FMSHRC 442, 449 (May 2010).

²³ 5 U.S.C. § 554(b) provides:

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

- (1) the time, place, and nature of the hearing;
- (2) the legal authority and jurisdiction under which the hearing is to be held; and
- (3) the matters of fact and law asserted. . . .

Here, the Judge invalidated the POV notice at the beginning of the hearing prior to the taking of evidence²⁴ based on his conclusion that the Secretary had failed to describe how the citations and orders listed in the notice constituted one or more patterns of violations. Tr. (9-23-14) at 68-69; Tr. (9-24-14) at 439-40. The Judge perceived that the Secretary had refused to describe how the citations and orders listed on the notice constituted patterns until after such time that the Judge had made his S&S determinations. Tr. (9-23-14) at 12; *see also* 36 FMSHRC at 2953 n.5 (citing Tr. (9-24-14) at 439-42); *Id.* at 2949-50 (noting that the Secretary's refusal to identify the basis for the pattern claim until after the Judge made his S&S determinations was antithetical to procedural due process).²⁵

We agree with the Judge that the Secretary is ordinarily required to disclose his theory of how the groupings in a POV notice constitute one or more patterns of violations prior to a hearing on the pattern. In *Brody I*, we accepted the Secretary's interpretation of the term "violations" in the phrase "pattern of violations" to include nonfinal orders that have not been the subject of Commission review. 34 FMSHRC at 2036-38. The Secretary relied upon nonfinal orders to describe the patterns set forth in the POV notice issued to Brody. Before the Commission, the Secretary requested that the proceedings be bifurcated so as not to disclose his theory of how the individual S&S violations comprised a pattern until after the Judge ruled on which citations were S&S. Conf. Call Tr. (9-19-14) at 2-3; Tr. (9-23-14) at 12. As an exercise of his discretion, the Judge properly rejected this request. 36 FMSHRC at 2950, 2959. Given the Judge's ruling rejecting bifurcation, Brody was entitled to the Secretary's theory of how the groupings amounted to patterns prior to the hearing on the pattern so as to be able to defend against the pattern charges.

In future cases,²⁶ we anticipate that in proving a POV, the Secretary may call one or more witnesses, such as inspectors or District Managers, who will testify about how the S&S violations constitute a POV. The identity of such witnesses will be disclosed prior to hearing by virtue of a Judge's prehearing order. The operator may become familiar with the Secretary's

²⁴ The Judge clarified during the hearing that he had dismissed the POV notice at the beginning of the hearing, although he would issue the order setting forth his ruling after the hearing. Tr. (9-24-14) at 439-40; *see also* Tr. (9-23-14) at 34-35, 68.

²⁵ Indeed, in the introduction to his order, the Judge said, "Like the unfair card game, the Secretary advised that he would be announcing the 'rules,' not simply after the hearings were concluded, but that he would also wait until after the Court made its determinations as to which of the litigated citations and orders were found to have the significant and substantial findings associated with them." 36 FMSHRC at 2950. As described below, however, the Secretary's counsel had modified his position and had agreed to address how the S&S violations link up and establish a pattern at the conclusion of evidence on each group of S&S violations. Tr. (9-23-14) at 49.

²⁶ We note that parties may file motions to sever non-pattern related citations from dockets involved in contests of section 104(e) orders. *See* 36 FMSHRC at 2960 n.9.

theory of the pattern by discovery, including contention interrogatories²⁷ and/or depositions of the Secretary's POV witness. However, evidence should not be developed, nor should discovery be permitted, regarding MSHA's prosecutorial discretion in issuing a POV notice.

Nonetheless, we conclude that the Judge used an overly harsh remedy in invalidating the POV notice before it was sufficiently clear that such a remedy was warranted. Contrary to the Judge's perception that the Secretary was maintaining the position that he would not address the pattern charges until after the Judge made his S&S determinations, it appears that the parties had indicated at the beginning of the hearing prior to the taking of evidence that they would address the alleged patterns during closing arguments at the conclusion of evidence relating to the citations and orders included in each pattern, and in post-hearing briefs. Tr. (9-23-14) at 49, 71-72. In fact, the Secretary's counsel attempted to describe in his opening statement regarding a grouping listed in the notice – "emergency preparedness and escapeway hazards" – how the alleged S&S violations formed a pattern.²⁸ Notice No. 7219154. The Secretary's counsel stated:

[Y]ou'll be hearing this week the first group of violations, the escapeway, emergency preparedness violation[s]. These violations are all similar in nature. Several of them cite the same standard. Several of them cite very similar conditions. They all relate to the same hazard; that hazard being, in the event of a mine emergency, miners being able to evacuate the mine quickly or to access lifesaving equipment, such as SCSRs or refuge alternatives.

These violations were all issued within a confined period of time. We started in September of 2012 and went through up until when the POV notice was issued in October of 2013. And we believe that those are the types of factors that, as I discussed earlier, support a finding that these violations – that there's a pattern here. They were told by the violations themselves, "You're not maintaining your lifelines; you're not maintaining your directional indicators; you're not maintaining access to lifesaving equipment." And they were cited over and over and over again.

And you'll hear from Inspector Hatfield that he had a meeting with mine management in July of 2013, gave them a copy of the Cumberland Mining decision, told them, talked to them about what S&S meant and how that applied to escapeway and

²⁷ We note that Brody, for instance, could have filed contention interrogatories requesting the basis for the Secretary's contention that the groupings on the POV notice constituted patterns. *See* 29 C.F.R. § 2700.58; *see also* Fed. R. Civ. P. 33(a)(2) ("An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact . . .").

²⁸ We further note that during the course of the hearing and during closing argument, the Secretary's counsel attempted to make arguments relating the citations to patterns. Tr. (9-24-14) at 372; Tr. (9-25-14) at 814-15; *see* 36 FMSHRC at 2958.

emergency-type violations and that you have to view those conditions in the context of an emergency. And yet there were more violations after that.²⁹

We believe that the totality of the evidence, your Honor, will show that there was a consistent mode of behavior with respect to these types of violations and that that history shows a pattern of violations.

Tr. (9-23-14) at 52-53.³⁰ The Judge, however, effectively foreclosed such argument based on his dismissal of the POV notice at the beginning of the hearing. Tr. (9-24-14) at 438-40; Tr. (9-25-14) at 691-92, 814-15. Furthermore, based on the Judge's ruling, Brody did not defend against the patterns.³¹ Tr. (9-24-14) at 438-39; Tr. (9-25-14) at 814-15.

In light of the foregoing, we conclude that the Judge dismissed the POV notice before Brody had demonstrated that it had sustained prejudice as a result of the Secretary's failure to describe how the citations and orders listed in the POV notice amounted to patterns. *See Long*, 117 F.3d at 1158 ("To establish a due process violation, an individual must show he or she has sustained prejudice as a result of the allegedly insufficient notice.") (citations omitted). Instead, the Judge should have permitted the Secretary to submit evidence regarding the citations and orders, including any evidence relevant to the patterns, and allowed Brody to rebut the evidence and to argue post-hearing that it had been prejudiced by the Secretary's alleged failure to identify the basis for the pattern charges. It is possible that the opportunity to rebut such evidence and make such argument would have been sufficient for Brody to defend against the POV charges. However, if Brody was prejudiced by the Secretary's pre-hearing failure to provide a sufficiently clear articulation of how the citations and orders listed on the notice constituted patterns, Brody would have the record necessary to specifically demonstrate how it would have litigated its

²⁹ We disagree with our dissenting colleague that an inspector can "offer no meaningful testimony regarding the basis for MSHA's POV determination." Slip op. at 34 n.9. For example, an inspector who witnesses safety practices at a mine over a period of time and who may have communicated concerns about those practices to mine management and seen the response by the mine, can certainly provide meaningful testimony.

³⁰ Our dissenting colleague states that the Secretary "toss[ed] out a few potential 'factors' on the opening day of the hearing" without correlating them to the POV allegations against Brody. Slip op. at 36. We disagree. The opening statement quoted above clearly reflects application of the factors to the specific POV charges.

³¹ Brody attempted to elicit testimony that it considered relevant to the pattern charges but the Judge stated, "Do you want to open the door to the subject of what constitutes a pattern when the government has essentially said, well, we'll let you know about that after the judge has decided what violations are S&S?" Tr. (9-24-14) at 437-38. As noted, the Judge was incorrect that the Secretary would not state the basis for the pattern charges until after the Judge made his S&S determinations. This had been the Secretary's position previously, but it had changed as of the Secretary's opening statement.

defense differently. Because the POV notice was invalidated prior to the taking of evidence, we lack the record necessary to review whether Brody had been prejudiced by the Secretary's failure to disclose his POV theory prior to hearing and, if not, whether one or more patterns had been proven. *See generally Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992) (noting the importance of the development of necessary factual findings at the trial level to the Commission's review function). Hence, we conclude that the Judge erred in dismissing the POV notice at the beginning of the hearing.

Accordingly, because the Judge erred in finding it necessary for the Secretary to respond to Brody's inquiry regarding the number of S&S designations it had to prevail upon in order to defend against the POV charge, and in dismissing the POV notice at the beginning of the hearing, we vacate the Judge's invalidation of the POV notice and remand for further proceedings.³²

On remand, the Judge shall apply the definition of "pattern of violations" set forth above in determining whether the Secretary has proven one or more patterns of violations with respect to the 29 citations and orders³³ affirmed as S&S.³⁴ In so doing, the Judge shall permit the parties to brief the application of the definition of POV to the 29 violations found to be S&S, and such other matters as he may consider appropriate. After such briefing, if any, the Judge shall consider any request by Brody to reopen and further develop the record in order to defend against the

³² Our dissenting colleague states that affirmance of the dismissal would go much further toward assuring the Secretary's good-faith compliance with our future roadmap. Slip op. at 36. However, our decision to vacate rests on an essential balancing of the private interests at stake against the paramount public interest in miner safety, in considering a statutory sanction that has not been effectively employed in nearly four decades. *See Long Branch Energy*, 34 FMSHRC 1984, 1996 (Aug. 2012) (recognizing that the public interest in miner safety must be balanced against private interests). We recognize that the Mine Act is built around Congress's fundamental declaration that "the first priority and concern of all in the . . . mining industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. § 801(a). It is worth noting that Brody had received 253 S&S citations during the POV screening period. 36 FMSHRC at 2060.

³³ The 29 citations and orders include the 17 affirmed as S&S by the Judge and the 12 citations for which Brody agreed to accept the S&S designations.

³⁴ We reject the Secretary's suggestion that appeals from the Judge's S&S determinations should be handled in the instant proceeding. Such review exceeds the scope of our order granting interlocutory review. *See* 29 C.F.R. § 2700.76(d); *Asarco, Inc.*, 14 FMSHRC 1323, 1326-27 (Aug. 1992). Moreover, the Secretary's position would mean that once the Secretary issued a POV notice, the mine would be subject to section 104(e) withdrawal orders not only during the litigation of the underlying S&S citations and orders, but also during appeals of Judges' S&S determinations to the Commission. Due process does not permit such a delay in the resolution of the validity of the POV notice.

POV allegations. Any such further development of the record by Brody shall be subject to evidentiary rebuttal by the Secretary.³⁵

III.

Conclusion

For the reasons discussed above, we vacate the Judge's invalidation of the POV notice and remand for further proceedings consistent with this decision.³⁶

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

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

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

³⁵ While a second evidentiary hearing as described above may be appropriate in the unusual posture of this case, which involves multiple interlocutory appeals including an appeal to the D.C. Circuit, we emphasize the need for expedition in other POV cases in the future.

³⁶ The Secretary filed with the Commission a motion to stay the effect of the Judge's November 3, 2014 order, so that MSHA may continue issuing section 104(e) withdrawal orders to Brody. The effect of our decision is to permit MSHA to resume issuing section 104(e) orders to Brody, effective upon the issuance of this decision. Furthermore, any withdrawal orders issued to Brody which had been converted to section 104(a) citations by virtue of the Judge's invalidation of the POV notice are hereby converted back to orders issued under section 104(e) of the Act. Hence, we hereby deny the Secretary's motion to stay as moot. *See Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1001 (May 2012).

Chairman Jordan, concurring:

Although I agree with the majority that the decision of the judge below should be vacated and remanded, I reach that conclusion by way of a different analysis and therefore write separately.¹ As discussed below, I find that the information provided to Brody before the hearing about MSHA's pattern of violations notice afforded the operator sufficient due process.

My colleagues in the majority conclude the judge erred in dismissing the Secretary's pattern of violations (POV) notice in this case. However, they "agree with the Judge that the Secretary is ordinarily required to disclose his theory of how the groupings on a POV notice constitute one or more patterns of violations prior to a hearing on the pattern." Slip op. at 16. Without explaining whether the Secretary's failure to provide such a theory would amount to a violation of due process, as Brody and my dissenting colleague maintain, the implication of their opinion is that disclosure of the Secretary's theory will be required in future cases and is best accomplished by following the majority's suggested framework for litigating a POV case:

In future cases we anticipate that in proving a POV, the Secretary may call one or more witnesses, such as inspectors or District Managers, who will testify about how the S&S violations constitute a POV. The identity of such witnesses will be disclosed prior to hearing by virtue of a Judge's prehearing order. The operator may become familiar with the Secretary's theory of the pattern by discovery, including contention interrogatories and/or depositions of the Secretary's POV witness. However, evidence should not be developed, nor should discovery be permitted, regarding MSHA's prosecutorial discretion in issuing a POV notice.

Slip op. at 16 (footnotes omitted).

On the other hand, my dissenting colleague would affirm the judge because in his view "[t]he Secretary's failure to provide an ascertainable basis for the POV determination, standing alone, demonstrates a denial of due process warranting dismissal of the POV determination." Slip op. at 33.

Turning to the majority opinion, although the procedure outlined therein might be one that parties choose to adopt, I do not consider it to be a necessary prerequisite to the Secretary's prosecution of a POV charge. This is because the POV notice issued to Brody "reasonably apprised [it] of the issues in controversy" so as to provide the notice required under the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (2011). *St. Anthony Hosp. v. U.S. Dep't of Health & Human Servs.*, 309 F.3d 680, 708 (10th Cir. 2002) (citation omitted). Brody's contention, accepted by the judge and the dissent, that it was deprived of due process because it

¹ I agree, however, with the analysis of the majority supporting its ruling that the Commission has jurisdiction to decide this case.

did not know why the underlying citations referenced in the notice constituted a pattern of violations is, in my view, without merit.

Due process is a flexible concept, the test being “one of fairness under the circumstances of each case whether the employer knew what conduct was in issue and had a fair opportunity to present his defense.” *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981), *abrogated on other grounds*, *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990).

As the majority correctly states, under the APA we must discern whether Brody was “timely informed of . . . the matters of law and fact asserted.” Slip op. at 15, citing 5 U.S.C. § 554(b)(3). The majority also notes that federal appellate courts have held that “[a]s long as a party to an administrative proceeding is reasonably apprised of the issues in controversy, and is not misled, the notice is sufficient.” Slip op. at 15, *citing St. Anthony Hosp.*, 309 F.3d at 708.

Here, Brody was informed of the specific conduct upon which the Secretary would rely to support his allegation that Brody had engaged in a pattern of violations. The POV notice referenced 54 citations or withdrawal orders previously issued to Brody. Each of those enforcement actions had alleged a violation of a particular mandatory safety standard and described the conduct that prompted its issuance. Moreover, each citation or order contained the allegation that the violation was deemed “significant and substantial.” The POV notice organized these citations and orders into the following four groups:

- 18 citations and orders involving ventilation and/or methane hazards
- 20 citations and orders involving emergency preparedness and escapeway hazards
- 9 citations and orders involving roof and rib hazards and
- 7 citations involving inadequate examinations.

The POV notice alleged that these four groups of violations, either alone or together, established a pattern of violations. *See Brody Mining, LLC*, 36 FMSHRC 2027, 2032 (Aug. 2014) (“*Brody P*”).²

Brody contends it needed more information in order to prepare its defense to the pattern charge. However in promulgating the POV regulation, the Secretary provided guidance about the kind of behavior that would prompt an allegation of “pattern of violations.” *See Harmon Mining Co. v. Layne*, No. 97–1385, 1998 WL 610651 (4th Cir. Aug. 27, 1998) (holding that the regulation at issue provided the operator adequate notice of the applicable standard used to rebut a claim of disability in a black lung case). The regulation explained that it implemented section 104(e) of the Mine Act (the pattern of violations provision) “by addressing mines with an inspection history of recurrent S&S violations of mandatory safety or health standards that

² As the majority correctly points out, only 28 citations were litigated at the hearing. Prior to that, the Secretary vacated two citations listed in the POV notice, and agreed to delete the S&S designations with respect to 12 citations. Brody agreed to accept the allegations of violation and S&S designations with respect to 12 other citations. Slip op. at 5, n.9.

demonstrate a mine operator's disregard for the health and safety of miners." 30 C.F.R. § 104.1.³ Besides the underlying citations and the description of the kind of conduct the pattern regulation was designed to address, the regulation and its accompanying preamble also set forth several factors that the Secretary indicated he might consider in deciding whether to issue a POV.⁴ Thus, after the receipt of the POV notice, Brody knew that the Secretary would rely on the conduct described in the underlying citations (at least those that were upheld as S&S violations), and would apply any relevant criteria listed in the POV regulation and preamble, in urging the Judge

³ My colleagues have adopted a definition of "pattern of violations," derived from the language of the Secretary's POV regulation, a definition with which I agree. Slip op. at 11 (majority opinion), slip op. at 37 (dissenting opinion).

⁴ The POV regulations set forth eight criteria that MSHA reviews to identify mines with a POV:

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

30 C.F.R. § 104.2(a).

Regarding the above reference to "[o]ther information that demonstrates a serious safety or health management problem at the mine," the preamble to the POV regulation explained that it may include, but is not limited to, the following:

- Evidence of the mine operator's lack of good faith in correcting the problem that results in repeated S&S violations;
- Repeated S&S violations of a particular standard or standards related to the same hazard;
- Knowing and willful S&S violations;
- Citations and orders issued in conjunction with an accident, including orders under sections 103(j) and (k) of the Mine Act; and
- S&S violations of health and safety standards that contribute to the cause of accidents and injuries.

78 Fed. Reg. 5056, 5062 (Jan. 23, 2013).

to conclude that the operator had exhibited a disregard for the safety and health of miners to such an extent that the enforcement tool of a POV notice was warranted.⁵

Admittedly, Brody did not know exactly how the Secretary would make that argument. However the discovery process, as well as the use of prehearing orders, is available to help in that regard. This is different than holding that due process requires that an operator be provided with the Secretary's "theory" prior to the hearing, which seems akin to a requirement that the Secretary provide the operator with his closing argument or post-hearing brief, prior to the start of the trial.

The information provided to Brody was sufficient to afford it due process. Moreover it is consistent with the type of notice provided to operators when other kinds of enforcement actions are taken. For example, an operator can be subjected to a withdrawal order or citation that contains the Secretary's determination that the underlying condition is "significant and substantial" or resulted from an "unwarrantable failure" to comply.⁶ In such cases, the operator has been provided with a citation or withdrawal order describing the condition or behavior that prompted the enforcement action. The Commission has never concluded that due process required the Secretary to provide his underlying theory as to why the violations merited these determinations before the operator could mount a defense. In the case of citations describing conditions deemed S&S or unwarrantable, an operator would be considered adequately informed, for due process purposes, even if the citation did not spell out why the Secretary decided to attach those designations to the conditions described therein.

Undoubtedly caselaw concerning what constitutes a pattern of violations will develop over the coming years, just as the law regarding the enforcement actions referred to above has been clarified. This does not mean, however, that because Brody's challenge to its POV notice occurred before Commission jurisprudence in this area had been refined that due process was not provided.

Our precedent regarding unwarrantable failure provides an analogous example. In *Emery Mining Corporation*, 9 FMSHRC 1997 (Dec. 1987), the Commission announced for the first

⁵ My dissenting colleague points out that due to the heavily regulated nature of mining, operators of underground coal mines receive numerous S&S citations every year, and that therefore every operator experiences a "recurrence" of S&S violations." Slip op. at 37. It is worth bearing in mind, however, that 99 percent of mines are not even considered for a POV notice because they do not meet the pattern screening criteria. *Brody I*, 36 FMSHRC at 2049, n.19. Brody's receipt of 253 S&S citations during the POV screening period helped make it a potential candidate for a POV notice. *Id.* at 2060 (Althen, dissenting).

⁶ Certain violations can be deemed to be "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" or caused by the "unwarrantable failure" of the operator to comply with the mandatory health and safety standard. 30 U.S.C. § 814(d)(1). The Secretary's decision to attach these designations can result in the immediate issuance of a withdrawal order or, like the pattern notice, lead to withdrawal orders upon the detection of future violations.

time that unwarrantable failure meant “aggravated conduct constituting more than ordinary negligence.” The parties had litigated the case without the benefit of this definition, and on appeal the Commission, after stating this ruling, went on to determine whether the specific violation was unwarrantable. In subsequent rulings, the Commission identified factors that could be considered to help determine if such aggravated conduct occurred. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

Brody’s due process claim also fails because an integral part of a due process claim based on a lack of sufficient notice is a party’s showing that it was prejudiced:

“To establish a due process violation, an individual must show he or she has sustained prejudice as a result of the allegedly insufficient notice.” . . . *Long v. Bd. of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1158 (10th Cir. 1997). Prejudice may be demonstrated by a showing that a party would have litigated the matter differently if adequate notice had been received. *See* 117 F.3d at 1158; *Rapp v. U.S. Dep’t of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, 1520 (10th Cir. 1995); *Citizens Bank of Marshfield, MO v. FDIC*, 751 F.2d 209, 213-14 (8th Cir. 1984); *see also Cumberland Coal Res., LP*, 32 FMSHRC 442, 449 (May 2010).

Slip op. at 15.

Clearly the burden was on Brody to show that it had been prejudiced. Brody failed to meet this burden. Nowhere in its briefs to the Commission did it explain how it would have litigated the case differently if a more elaborate or detailed theory regarding the pattern had been presented by the Secretary in the POV.⁷

⁷ At oral argument before the Commission, Counsel for Brody was asked “how specifically was the operator prejudiced by these proceedings What would you have done that you weren’t able to do as a result?” Oral Arg. Tr. at 59. Counsel responded that he would have asked “why you think, for example, this particular group’s citations forms a pattern based on any of the 13 criteria?” (referring, presumably to the criteria in the Secretary’s POV regulations and the preamble to the regulations). In my view, this fairly obvious question could have been posed at the hearing before the Judge based solely on the information available to Brody at the beginning of the proceedings.

The operator has offered nothing more to demonstrate that it suffered prejudice. It failed to show in any meaningful way what it would have done differently at the hearing – in terms of evidence, witnesses, lines of inquiry, etc. – had it been provided the additional information about the alleged patterns it claims it required. Consequently, its due process claim cannot survive. For the reasons discussed above, I join my colleagues in the majority in vacating the Judge’s decision invalidating the POV notice and remanding for further procedures.⁸

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

⁸ I agree with my colleagues in the majority that the effect of the Commission’s decision is to permit MSHA to resume issuing section 104(e) withdrawal orders to Brody, and that therefore the Secretary’s motion to stay should be denied as moot.

Commissioner Althen, concurring in part and dissenting in part:

I concur with the Commission majority regarding the jurisdictional issues raised by the Secretary. Regarding the reversal of the Judge's dismissal of the Secretary's pattern of violations determination, I respectfully dissent. I agree with the excellent opinion of the Administrative Law Judge. I write only to explain my disagreement with the majority's decision and to comment briefly upon the framework outlined by the majority for adjudication of future pattern of violation cases.

I.

DISCUSSION

A. The Majority's Decision

The majority reverses the Judge on two grounds. First, it asserts that the Judge required the Secretary to identify a specific number of S&S violations necessary for a pattern of violations, thereby committing reversible error. Second, it holds that the Judge erred by dismissing the case at the beginning of the hearing.

The first is a makeweight to justify reversal. The second is inexplicable. The majority's instruction for the handling of future pattern of violation ("POV") cases demonstrates that it agrees that the Secretary failed to provide due process rights. However, the majority finds dismissal "too harsh" a remedy. Thus, the majority treats the Secretary as a schoolchild failing to complete his homework rather than a cabinet officer failing to accord the operator due process protections in seeking the most severe sanction available under section 104 of the Mine Act.

1. The Judge did not require the Secretary to identify a specific number of proven violations necessary to sustain the POV notice.

The majority asserts that the Judge required the Secretary to specify how many S&S designations he had to prevail upon in order for Brody to defend against the POV. The Judge did no such thing. The Judge did not issue a written order. However, the nature of his oral order is clear. He directed the Secretary to provide an explanation of the theory by which the 54 alleged violations set forth in the POV notice constituted a pattern of violations.

At an early stage of the proceeding, the Judge asked Secretary's counsel for an explanation of why the alleged violations constituted a pattern,

Okay. Let me ask this and I think I know the answer but I want to hear. Is there any document that's been filed by the Secretary that has clearly identified at this point in time, basis for the charge if there's a pattern involving Brody. Or is it sort of still, a haze. Kind of, you know, something that's sort of like London fog where there's an assertion made that there's a pattern but the Secretary

hasn't yet clearly identified the basis of that claim. Is that what – is that the way things are?

Conf. Call Tr. (7-22-14) at 9. In reply, the Secretary's counsel referred only to the POV notice.

In a later prehearing conference, the Judge clearly articulated that he wanted the Secretary to identify the basis for asserting that the alleged violations constituted a POV. In part, the Judge stated:

Now, let's get to the last outstanding motion which is Brody's motion that the Secretary should define a pattern. . . . I agree with Brody on this. It is my position that the Secretary should announce at the outset its theory as to how these violations either in total or independently as the four group

. . . Here's my thinking on this. I think as a fundamental matter of fairness, Brody is entitled to know this.

Conf. Call Tr. (9-19-14) at 9. At the outset of the hearing, the Judge recapitulated his order:

So I did grant the – Brody's motion to compel the Secretary to – this is not an exact quote, but it doesn't distort it – to define what constitutes a pattern of violation in these particular cases and to set forth with specificity what the Secretary believes constitutes a pattern of violation with respect to the 52 citations or orders involved here.

Tr. (9-23-14) at 14.

Earlier, when the parties said they were attempting to settle some of the alleged violations, the Judge responded:

Yes, I'm glad to hear that some of these are being worked out. I guess whatever number are determined to be S&S, the larger issue is, "What is the definition of a pattern and do these constitute that?" That's what we want to keep our eye on ultimately and that's all you care about ultimately, one of the major things you care about ultimately.

Conf. Call Tr. (9-19-14) at 14.

Finally, on the opening day of the hearing, the Judge could not have been more explicit. He expressly said he was not looking for numbers: "We're not looking for numbers here. I'm not looking for numbers. I'm looking for something a little more sophisticated than that." Tr. (9-23-14) at 52.

In none of these statements does the Judge state or imply that the Secretary had a duty to provide a specific number of violations necessary to prevail. In fact, as set forth immediately above, he expressly disclaimed such a desire. Indeed, the Judge and the parties were well aware of the Secretary's position that there are not a specific number of S&S violations necessary or sufficient to constitute a Pattern of Violations. The Secretary articulated this position in briefing the first Brody POV case before the Commission. Sec'y Resp. Br. at 32, *Brody Mining, LLC*, 36 FMSHRC 2027 (Aug. 2014) (Docket Nos. WEVA 2014-82-R, et al.). Accordingly, there could have been no doubt in either party's mind that the Judge's order was not focused on a particular number of violations but rather on a basic description of why the Secretary contended the alleged violations identified in the POV notice constituted a pattern of violations.¹

Notwithstanding these orders issued before the hearing, including the express disclaimer of a need for numbers, the majority plucks one word – “essential” – from the Judge's lengthy dismissal order after the hearing to conjure a reason for reversal.² Of course, in reality, the reason for dismissal was the failure of the Secretary to provide any explanation of why the alleged violations identified in the POV notice constituted a pattern of violations.

Just as in his prehearing orders, the Judge's written dismissal order repeatedly restates that his order was for an explanation of why the alleged violations constituted a pattern of violations. Two examples of this basis suffice:

An agency provides adequate notice in such a situation when, whether “by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would

¹ The Secretary asserts and the Commission agrees that MSHA need not prove any specific number of violations to demonstrate a pattern of violations. Conversely, no specific number of S&S violations, standing alone, establishes POV status. In every case, the Judge must apply the pattern criteria to determine whether the Secretary has demonstrated that recurrent S&S violations, by their nature and relationship with one another, prove the operator is one of “those few operators who have demonstrated a repeated disregard for the health and safety of miners and the health and safety standards issued under the Mine Act.” 78 Fed. Reg. 5056, 5058 (Jan. 23, 2013).

² The majority also references two transcript cites: Conf. Call Tr. (7-22-14) at 7-8 and Tr. (9-23-14) at 13, 15-16. Slip op. at 12-13. Neither is relevant. In the first, the Judge inquired how many of the alleged violations the Secretary would need to prove. His orders, however, do not reflect any such inquiry. In the other cited pages, the Judge notes that in an earlier POV case the Secretary did identify a specific number but had stepped back from that position in this case. That was simply a factual statement. Indeed, the passage shows that the Judge and Brody understood that the Secretary's position that no specific number of violations was needed to demonstrate a pattern of violations. On these pages, as elsewhere, the Judge simply emphasized the need for the Secretary to explain how the alleged violations identified in the POV notice constituted a pattern of violations. He said, “[a]nd so with that being alleged, the Secretary must not only define a ‘pattern’ but also how the cited violations constitute a pattern.” Tr. (9-23-14) at 16.

be able to identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform.” *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

36 FMSHRC at 2957 (footnote omitted). Earlier the Judge stated “[t]hus, the Court expressed that, on procedural due process grounds, it was an obligation on the Secretary’s part to identify, in advance of the hearing, the road map explaining the basis for his claim that the mine has shown a pattern of violations.” *Id.* at 2953.

Indeed, in the very paragraph from which the majority seizes one word, the Judge reiterates that he “directed that, prehearing, the Secretary was to set forth the basis for its contention that those violations created a pattern of violations.” *Id.* at 2952. The Judge then notes the due process issue arose from a Motion in Limine by Brody asserting the need to have several identified types of information. In the following sentence, the Judge characterized Brody’s request as reasonable and refers to the previously identified grouping of inquiries as “essential.”

The majority focuses upon the one word “essential” in the post-trial written order in which the Judge referred to a group of varying inquiries as the support for finding that the Judge had required the Secretary to identify a specific number of violations. As we have seen, however, throughout the prehearing process and in his post-hearing decision, the Judge grounded dismissal in the generalized failure of the Secretary to provide any basis for his contention that the allegations in the POV notice set forth a suitable basis for his POV determination. I cannot join in a reversal founded upon a gross and obvious mischaracterization of the Judge’s order.³

Two points remain. First, even under the majority’s selection of one word upon which to hang reversal, the majority does not claim that the Judge based the dismissal solely upon a failure to provide a specific number of necessary. They cannot deny that the Judge ordered an explanation of the basis for finding a pattern of violations and the Secretary failed to obey that order. Indeed, the majority expressly recognizes this in its finding that “[h]ere, the Judge invalidated the POV notice . . . based on his conclusion that the Secretary had failed to describe how the citations and orders listed in the notice constituted one or more patterns of violations.” Slip op. at 15. Given the indisputable failure of the Secretary to provide any prehearing explanation of the basis of the POV determination, an erroneous demand for a precise number would be harmless error when compared to the Secretary’s failure to provide *any* of the necessary information covered by the Judge’s order. That leads to a final point.

At the Commission meeting on this case, Commissioners spoke of a need to advise the Secretary of the requirements for presentation of a POV case. In turn, as part of its roadmap,⁴ the

³ The majority concede that the Judge expressly said he not looking for numbers – a point that directly undercuts their position. Slip op. at 12 n.20. Their further comment in that footnote explains that they vacate the Judge’s decision not based upon the Judge’s findings, but instead based upon the majority’s claim that Brody wanted a specific number. Thus, the majority admits to basing their decision upon the unfulfilled desires of the respondent.

⁴ The Judge asked the Secretary for a roadmap of the basis for the POV determination.

majority requires the Secretary, in future cases, to provide exactly the kind of information required by the Judge in this case. The majority writes “[w]e agree with the Judge that the Secretary is ordinarily required to disclose his theory of how the groupings in a POV notice constitute one or more patterns of violations prior to a hearing on the pattern.”⁵ Slip op. at 16. Thus, the majority reverses the Judge for applying a standard with which they agree and which they themselves now impose upon the Secretary.

I would advance the process for the fair adjudication of POV cases by requiring the Secretary to comply with the requirements of the Constitution from the earliest cases forward. There is no learning curve or hall pass for due process violations by federal agencies.

2. Dismissal was not premature.

The majority’s second reason for reversal is that the Judge erred by dismissing the case at the beginning of the hearing – that such action was “too harsh.” Two propositions underlie the majority’s belief that dismissal was premature. These are (1) Brody did not show prejudice from not receiving fair notice of the basis of the POV determination; and (2) on the opening day of the hearing, the Secretary allegedly changed his position and stated he would explain the basis of his determination as the trial proceeded.

The majority asserts that the Judge dismissed the proceeding without a showing of prejudice. This position reflects a fundamental misunderstanding of the Judge’s decision and of the application of the pattern criteria to a POV determination.⁶

⁵ Use of the term “ordinarily” by the majority is somewhat mysterious. They do not elaborate upon the kind of case that would be sufficiently “extraordinary” to obviate the due process requirement for fair notice. In any event, they do not find this case to be extraordinary.

⁶ The majority cites cases under the notice requirement of section 554(b)(3) of the Administrative Procedure Act. Slip op. at 15. The cited cases involve issues of whether the claimant could fairly understand the issues ruled upon by the Administrative Law Judge based upon the notice it received. That issue is subtly but substantially different from the duty to provide the basis of the claim with sufficiently ascertainable certainty to permit a fair trial in the first place. Tribunals set aside claims failing the requirement for fair notice. *Dep’t of Educ. of State of Cal. v. Bennett*, 864 F.2d 655, 659 (9th Cir. 1988) (“For notice to have been adequate in this case, then, California must have been afforded ample opportunity to understand that reallocations among local educational agencies outside of the Tydings period could be the determinative issue. . . . The Secretary’s final decision thus ranged beyond the issues defined in the notice of hearing. The final decision is therefore void . . .”). As the United States Court of Appeals for the Second Circuit has explained, “the time for giving notice of the matters of fact and law asserted is prior to the hearing, not in what the Board calls ‘General Counsel’s post-complaint theory of the case’ unveiled in a post-hearing brief.” *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 861 (2d Cir. 1966).

Citing *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995), the Judge based dismissal on the undebatable proposition that the government must provide “fair notice” of the basis of its claim with “ascertainable certainty” in the imposition of a civil or criminal sanctions. See *Loma Linda Univ. Med. Ctr. v. Sebelius*, 408 Fed. Appx. 383 (D.C. Cir. 2010), *aff’g* 684 F. Supp. 42 (D.D.C. 2010); *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Gates & Fox Co. v. OSHA*, 790 F.2d 154 (D.C. Cir. 1986); *Stansberry v. Holmes*, 613 F.2d 1285, 1289 (5th Cir. 1980); *Dravo Corp. v. OSHA*, 613 F.2d 1227, 1232 (3d Cir. 1980) (citing *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649-50 (5th Cir. 1976)).

As the United States Court of Appeals for the Fourth Circuit stated in *U.S. v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997), “because civil penalties are ‘quasi-criminal’ in nature, parties subject to such administrative sanctions are entitled to ‘clear notice.’” See also *Diamond Roofing*, 528 F.2d at 649 (“Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires . . .”).

Moreover, in his dismissal order, the Judge made a specific and well-founded finding of prejudice,

By [MSHA] not setting forth the basis for its claim of a pattern of violations, Brody was put at a great disadvantage to defend itself from that charge. Not being forearmed with the knowledge of the theory of the Secretary’s pattern of violations, facing the unknown as it were, Brody could not know how to defend itself. It could not, for example, anticipate nor ask questions during the hearing if it has not been informed of the basis for the alleged pattern. In fact, under the Secretary’s approach, Brody would not know of the grounds for the pattern charge until *after* the Court made its findings as to which of the citations/orders were affirmed and among those, which were significant and substantial.

36 FMSHRC at 2958-59 (emphasis in original). The Secretary’s failure to provide an ascertainable basis for the POV determination, standing alone, demonstrates a denial of due process warranting dismissal of the POV determination. Were it necessary, however, even a cursory examination of the record demonstrates the substantial prejudice.

When the Judge said “good morning” on the first day of the hearing, Brody knew that the Secretary originally had based the POV determination on 54 alleged S&S violations that, by then, had been reduced to 40 in number.⁷ Brody also knew the substantive pattern criteria for

⁷ By then the Secretary had vacated two of S&S citations entirely and had modified 12 others to drop their S&S designations. On the opening day of the hearing, therefore, the POV claim rested upon 40 alleged S&S violations. Brody conceded 12 of the violations, leaving 28 for trial. After trial, the Judge sustained 17 of the alleged S&S violations. Therefore, after trial, the Judge sustained 29 S&S violations out of the original 54 allegations – 54%.

POV determinations promulgated by MSHA after formal rulemaking.⁸ Due to the Secretary's noncompliance with the Judge's order, Brody did not know why MSHA claimed 12 conceded and 28 contested S&S citations constituted a pattern of violations.⁹

Of course, Brody could apply the pattern criteria to the 40 alleged violations, and the pattern criteria do serve as a form of notice of alleged conduct constituting a pattern of violations. Of those 40 alleged S&S violations: none alleged a failure to abate; five alleged unwarrantable failures; none alleged an imminent danger violation; none alleged a training violation; none alleged a violation related to an accident, injury, or illness records; four alleged high negligence, thirty-five alleged moderate (ordinary) negligence, and one alleged low negligence.

⁸ The criteria, set forth in 30 C.F.R. § 104.2(a), are:

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

In the preamble to the final rule, MSHA stated that the catchall provision of "other information" includes evidence of the mine operator's lack of good faith in correcting the problem that results in repeated S&S violations; repeated S&S violations of a particular standard or standards related to the same hazard; knowing and willful S&S violations; citations and orders issued in conjunction with an accident, including orders under sections 103(j) and (k) of the Mine Act; and S&S violations of health and safety standards that contribute to the cause of accidents and injuries. 78 Fed. Reg. at 5062.

⁹ Of course, Brody had information about each of the 40 alleged S&S violations, but information about a particular citation does not inform the operator of any relationship connection warranting a POV determination. Further, inspectors obviously do not make the POV determination. Therefore, they could offer no meaningful testimony regarding the basis for MSHA's POV determination. Each inspector can testify about the citations he/she wrote but, unless the inspector was involved in making the POV determination, the inspector cannot explain the theory of how the groupings on a POV notice constitute one or more patterns of violations – information the majority recognize as essential to the Secretary's case. Slip op. at 16.

From the yearlong monitoring process, therefore, out of 40 alleged S&S violations, at least insofar as the formally promulgated pattern criteria were involved, the Secretary's case depended upon alleged unwarrantable failures to comply with several different safety standards and the criterion of "information that demonstrates a serious safety or health management problem" from 30 C.F.R. §104.2(a)(7). Presumably, the Secretary knew why MSHA found the 40 S&S citations demonstrated a serious safety or health management problem warranting POV status. If the Secretary could not explain the relationship among the alleged violations that led to that determination until after a hearing, how did MSHA make the determination in the first place? Yet, the Secretary refused to provide such information to the respondent.

Under these circumstances, as the Judge below correctly stated in vivid terms, the need for an advance explanation of the basis of the basis for finding "management disregard" is obvious. The prejudice in facing a hearing without such explanation is palpable.

To borrow the imagery of the Judge, the Secretary refused to explain why he asserted he had a winning hand based upon the 54 S&S violation cards he himself had deliberately selected and dealt, but instead wanted to see which cards remained after the hearing thereby allowing a post hoc rationalization for his initial determination. Further, in this case, that rationalization occurs against an ambiguous standard of a "safety and health management problem" and without any advance explanation of how or why the alleged violations demonstrated a safety and health management problem. In the absence of any explanation of the relationship basis allegedly supporting the POV notice, it is clear that the respondent could not be prepared to submit evidence to rebut an unknown prosecution theory.¹⁰

The majority sets out a unique standard for dismissal of an insufficient claim – a party must show prejudice from not knowing vital information that it cannot know because the government withholds the information. Further, based upon the duty of the Secretary in future cases to disclose his theory of how the groupings on a POV notice constitute one or more patterns of violations prior to a hearing on the pattern, future respondents will be entitled to receive such information. In light of the obvious prejudice of not knowing the basis of the claim of POV status, the majority decision demands future respondents have the very information it denies Brody. The roadmap for future cases is appropriate. The majority does not explain why Brody was not similarly entitled to such information.

Separately, the majority credits the Secretary's offer on the first day of the hearing of additional factors that it asserts could play into the finding of a pattern of violations. Of course, a listing of a few random factors the Secretary might seek to apply in any pattern of violation case minimally expressed in the opening statement at hearing was not responsive to the Judge's order.

¹⁰ The dilemma facing the Secretary arises from the decision to base POV determinations on unproven allegations. A respondent facing a decision based on relationships among and between unproven allegations is most certainly prejudiced if the charging party can wait to explain the basis of the charge until after a hearing. Such a process allows the Secretary to refuse to explain the basis of the decision until after he arrives at the place where he could have begun – a set of proven violations.

It does not explain the theory of liability in the particular case. Further, a partial list of potential factors does not apprise a party of the relationship factors regarding the specifically alleged violations that must underlie a finding that a specific respondent was a pattern violator. That is what the Judge rightly ordered. As the Judge sagely observed, “I’m looking for the [link], the underlying intellectual theory that groups these together and then equates to a pattern.” Tr. (9-23-14) at 52.¹¹

Tossing out a few potential “factors” on the opening day of the hearing without correlation to the allegations against Brody clearly did not cure the prejudice of the Secretary’s refusal to obey the Judge’s pre-hearing order. The Secretary had not identified any of these factors before the opening day despite two years of rulemaking, and having issued the POV determination nearly a year before the start of the hearing and the Judge’s pre-trial order. That offer was far too little and far too late to satisfy the Judge’s order or the Secretary’s due process obligation.¹²

¹¹ The Secretary derived the few factors expressed on the opening day from Commission unwarrantable failure cases: “the extent of the condition, the length of time that it existed, whether the violation was obvious, whether it posed -- it posed a significant hazard, the operator’s knowledge.” Tr. (9-23-14) at 47. This list, even if offered in the weeks before the hearing, provided little or no meat to the skeletal charges against Brody. In his post-hearing brief, the Secretary offered a more comprehensive list consisting of the nature and seriousness of the hazards; timing of the violations; location of the violations in the mine; any trends regarding injuries and/or accidents; whether management personnel were involved; the standards violated; the conduct of the operator in responding to the related violation and whether the operator exhibited any heightened awareness of the possible consequences; and the ever present catchall of any other factor that is revealed that would be evidence to establish a “mode of behavior or series of acts that are recognizably consistent.” Sec’y Post-Hr’g Br. at 12-13. As of the opening day of the hearing, the Secretary had not expressed these factors and, more importantly, had not alerted Brody in any respect how relationships among the alleged violations could sustain MSHA’s POV determination.

¹² The majority quotes in full a scant four-paragraph (267 words) statement by the Secretary’s counsel on the opening day of the hearing to argue that some disclosure, however late-blooming, was made or attempted to be made to Brody. Slip op. at 17-18. Not only does the majority fail to deal with the fact that this was the “opening day of the hearing” thereby hardly affording time for preparation but also, and far more importantly, the Secretary’s statement provided virtually no information related to the pattern criteria. The Secretary did not claim, let alone, specify that any of the alleged violations were orders for failure to abate, unwarrantable failure orders, imminent danger orders, failure to train orders, etc. Indeed, from the face of the text, it appears they all fell into the “other” category of the pattern criteria. Even then, the only “factors” from the list suggested by the majority are terse statements that the groupings were for violations of the same standard or related to the similar hazards, occurred within a 13 month period (hardly the definition of a short period of time), and there was allegedly one conversation with one unidentified member of “mine management.”

The Commission should sustain the dismissal of the POV notice. The Judge did not demand a detailed advance description of all the evidence or even all the arguments the Secretary planned to make. He demanded an explanation of the theory underlying the claim that the specifically identified alleged S&S violations constituted a pattern of violations. Affirmance of the dismissal would go much further to assuring the Secretary's good-faith compliance with the majority's future roadmap than inventing excuses for the Secretary's failure to provide basic due process.¹³

B. Future POV Litigation

The majority opinion provides two directions for future POV cases. First, it holds that a pattern of violations "is established by an inspection history of recurrent S&S violations of a nature and relationship to each other such that the violations demonstrate a mine operator's disregard for the health or safety of miners." Slip op. at 11. Second, recognizing the requirements of due process, at least for future cases, the majority announces that the Secretary "is ordinarily required to disclose his theory of how the groupings on a POV notice constitute one or more patterns of violations prior to a hearing on the pattern." *Id.* at 16. Both the definition and the imposition of minimal requirements of due process are welcome. I offer a few additional comments regarding the elements identified by the majority.

The majority states that disregard of health and safety does not imply intent or state of mind. I agree. Congress has found that the first priority of everyone involved in mining must be the health and safety of miners. Therefore, when an operator is, or should be, aware of the recurrence of violations of mandatory safety standards that significantly and substantially threaten the health or safety of miners, it must take steps to prevent such recurrences. Applying that obligation in the context of POV determinations, however, requires an understanding of the reality of S&S citations in the mining industries.

In order to protect the health and safety of miners, MSHA, in accordance with the Congressional directive, heavily regulates and vigorously inspects mines. Mining involves continual movement of miners, machines, and strata in difficult and ever-changing environments. As a result, given the pervasive regulation of mining and the frequency of inspections, MSHA annually issues numerous citations many of which are designated S&S. For example, according

¹³ The majority criticizes the view that the Commission would advance fair and efficient enforcement of section 104(e) by requiring adherence to the Constitution in this early POV proceeding. Slip op. at 19 n.32. Their stated basis is that the unquestionable purpose of the Mine Act to preserve miner safety outweighs the constitutional rights of the respondent. They take their argument a revealing step too far, however, by expressly basing their equation upon the failure of the Secretary to enforce section 104(e) effectively for forty years. To the majority, therefore, a weighty factor in their balancing has nothing to do with this case but rather is dependent on the past failures of the Secretary. By the date this decision issues, Brody will have been operating for more than nine months without the POV sanction. If Brody has failed the specific pattern criteria, the Secretary obviously may make another POV determination regarding Brody.

to data on the MSHA's website, during the five years between 2010 and 2014, MSHA issued approximately 395,000 citations to coal operators, and approximately 29 percent, or approximately 115,000, were marked significant and substantial. *Mine Safety and Health at a Glance*, MSHA, <http://www.msha.gov/MSHAINFO/FactSheets/MSHAFCT10.asp> (last visited Sept. 25, 2015).

Effectively, therefore, dependent upon the size of the operation, operators of underground coal mines annually receive numerous S&S citations. Thus, every operator experiences a "recurrence" of S&S violations, and every S&S violation manifests some failure to meet a mandatory safety standard. However, MSHA has emphasized that the pattern of violations regulation aims at operators who have demonstrated a repeated disregard for the health and safety of miners and the health and safety standards.¹⁴

It is in this context of numerous S&S violations but a regulation aimed at operators that disregard safety that we must focus upon the four key elements of a pattern of violations: recurrent S&S violations of a nature and relationship that show a pattern of disregard of health and safety. At the outset, MSHA must prove a series of recurrent S&S violations. Then, based upon the evidence presented by the parties, the Judge must evaluate the nature and relationship of the S&S violations. This evaluation must lead to a reasoned conclusion of whether the Secretary has demonstrated the recurrent S&S violations prove the operator disregards safety.

Understanding the centrality of the four elements, the question becomes how, when virtually all underground coal operators annually receive numerous S&S citations, the Commission should determine when the recurrence of S&S violations by a specific operator

¹⁴ This is a repeated theme of the POV regulation:

The final rule allows MSHA to focus on the most troubling mines that disregard safety and health conditions and will not affect the vast majority of mines, which operate substantially in compliance with the Mine Act.

....

... the majority of mine operators are conscientious about providing a safe and healthful work environment for their miners. The POV regulation is not directed at these mine operators. ...

....

With respect to compliance performance, MSHA's experience reveals that the vast majority of mines operate substantially in compliance with the Mine Act.

78 Fed. Reg. at 5058, 5070.

demonstrates the particular set of violations are sufficient to place that operator in the category of disregarding safety.

The starting point is application of the substantive regulatory criteria promulgated by MSHA at 30 C.F.R. § 104.2 (a). The regulatory criteria result from notice-and-comment rulemaking and are particularly suited for the POV task because they identify types of S&S violations that tend to demonstrate disregard for safety. The substantive pattern criteria form the conceptual platform for a POV determination.¹⁵

Most of the substantive pattern criteria involve violations that by their nature tend to show disregard of safety – failures to abate cited violations, unwarrantable failures (aggravated conduct beyond ordinary negligence), withdrawal orders for insufficient training, and orders issued in conjunction with an accident.¹⁶ An operator that recurrently fails to abate violations, does not sufficiently train miners, or engages repetitively in unwarrantable failures of a standard tends to demonstrate a disregard of safety. Indeed, the Secretary’s notion of an “external organizing principle” is useful in this regard, provided it means that the operator “organizes” its operations in a manner that permits repeated S&S violations that are serious and grave and demonstrate that the operator is failing to make sufficient efforts to meet the requirements of a compliant mining operation.

¹⁵ 30 C.F.R. § 104.1 provides,

This part establishes the criteria and procedures for determining whether a mine operator has established a pattern of significant and substantial (S&S) violations at a mine. It implements section 104(e) of the Federal Mine Safety and Health Act of 1977 (Mine Act) by addressing mines with an inspection history of recurrent S&S violations of mandatory safety or health standards that demonstrate a mine operator’s disregard for the health and safety of miners.

Thus, the criteria deal specifically with the issue of the types of recurrent violations that show a disregard for health and safety. The criteria are set out in their entirety in note 8 above. Slip op. at 33 (dissent).

¹⁶ The Secretary established the use of specific pattern criteria at 30 C.F.R. § 104.2(b), but has announced that the specific criteria are only a statement of policy, and has published the criteria only on its website. The Judge below and I agree “with the Secretary’s position that the screening criteria are not relevant to the hearing on the subsequent withdrawal orders issued under section 104(e) or on the notice of pattern of violations issued to Brody Mining on October 24, 2014.” Conf. Call Tr. (9-19-14) at 8. Therefore, alleged violations considered in the specific pattern criteria that are not alleged to support the POV notice play no role in a Judge’s determination whether an operator satisfies the substantive criteria formally established at 30 C.F.R. § 104.2(a).

While starting with the substantive pattern criteria that by their nature tend to show a disregard of safety, the inquiry does not necessarily end there. Although most of the pattern criteria set forth violations that by their nature tend to demonstrate a disregard of safety, the pattern criteria include “[o]ther information that demonstrates a serious safety or health management problem at the mine such as accident, injury, and illness records.” 30 C.F.R. § 104.2(a)(7).¹⁷ Therefore, MSHA may seek to build a POV case based upon S&S violations of specific mandatory safety standards that occur during the mining process – that is, S&S violations other than those expressly identified in the criteria that provided the evidence proves the requisite disregard of safety. Use of such violations leads to, and demonstrates the need for, the third critical element of analysis – to show a “relationship” among the S&S violations demonstrating disregard of safety.

For the Secretary to prevail in prosecuting a POV notice, he must prove a sufficient relationship among the violations to warrant a finding of a disregard of safety. The relationship element is integral and essential to proof of a “pattern.”¹⁸ The requirement for demonstration of a relationship applies to all POV cases including those involving violations expressly identified in the pattern criteria. Thus, the totality of conduct by the operator in light of the nature of proven S&S violations and the relationships among them must determine the outcome of the case.

Obviously, relationship issues involve a fact-intensive analysis of a wide array of factors. An exhaustive list is not possible. At footnote 19, the majority identifies “other information” listed by the Secretary and notes examples of additional evidence that also may be useful such as a change in safety or senior management personnel – a list to which I would add the degree of negligence for proven S&S violations. The key, of course, is not a precise or specific list of factors. It is whether there is a discernable and identifiable relationship among the proven S&S violations. The Secretary and operator both may introduce evidence relevant to the proving or disputing the nature of and relationship among proven S&S violations bearing upon the final, dispositive issue – disregard of health and safety.

¹⁷ Use of the term “information” is inappropriate. The proper terminology is “S&S violations” that show a health and safety management problem. On the other hand, use of the term “management problem” has some advantages – namely, it avoids terminology that might seem to imply a requirement of particular state of mind.

¹⁸ Cases under the Racketeer Influenced and Corrupt Organizations (“RICO”) Act illustrate the elements of a “relationship” among acts alleged to constitute a “pattern.” See *Sedima v. Imrex Co.*, 473 U.S. 479 (1985); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989).³⁷ In *H.J. Inc.*, the Supreme Court characterized “relationship” as including acts that “are interrelated by distinguishing characteristics and are not isolated events.” *H.J. Inc.*, 492 U.S. at 230. Although a pattern of S&S violations is different from a pattern of RICO violations, this model does serve to convey the notion of interrelationship that must exist. These cases also identified “continuity” as an element of a pattern. The need for this element seems to be implicit in the factors identified for evaluation of the regulatory pattern criteria and in the Secretary’s use of discrete one-year periods of evaluation.

Ultimately then, the outcome determinative question is whether the preponderance of the evidence proves a disregard of safety through commission of S&S violations showing disregard of safety. The Judge may find some factors more or less relevant or important in each particular case. In the end, the Judge must undertake a reasoned consideration of proven S&S violations, the criteria set forth in 30 C.F.R. § 104.2(a), and the relationship between and among the proven S&S violations.

Finally, with respect to due process rights, given that the relationship among S&S violations is an outcome determinative element of a pattern of violations charge, the Secretary must provide in advance a sufficient theory of such relationships to allow the operator to prepare to meet the case with rebuttal evidence. Further, although a respondent may not invade the deliberative or other privileges, it is entitled to know the basis for the POV determination – a basis that presumably inspectors issuing individual citations cannot provide. In short, as the majority said, the Secretary must “disclose his theory of how the groupings on a POV notice constitute one or more patterns of violations prior to a hearing on the pattern.” Slip op. at 16. Discovery material, including depositions of relevant individuals, disclosing the factual basis for the allegation that the S&S violations identified in the POV notice constitute a pattern of violations must be available. In short, permissible discovery must be sufficient to permit a fair hearing on the Secretary’s theory of why the recurrent S&S violations by their nature and relationship establish the respondent disregarding miners’ health and/or safety.

II.

CONCLUSION

The Commission has jurisdiction over this proceeding. Further, the majority properly has identified a workable definition of pattern of violations and properly required implementation of at least minimal due process elements for POV determinations. My disagreement is only with the majority’s forgiveness of the deprivation of due process in the present proceeding. For that reason, I respectfully dissent.

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

APPENDIX A

WEVA 2014-83-R
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710

September 30, 2015

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

v.

JIM WALTER RESOURCES, INC.

Docket No. SE 2011-407-R

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

DECISION

BY: Young, Nakamura, and Althen, Commissioners:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). At issue is an imminent danger order issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) pursuant to section 107(a) of the Mine Act, 30 U.S.C. § 817(a),¹ to Jim Walter Resources, Inc. (“JWR”) at its No. 7 Mine, an underground coal mine in Alabama. The order alleges elevated levels of methane at 5.6 percent in a roof cavity within the mine.

On December 22, 2011, the Administrative Law Judge issued a decision in this case affirming the section 107(a) withdrawal order. 33 FMSHRC 3211 (Dec. 2011) (ALJ). The operator filed a petition for discretionary review of the Judge’s decision, which the Commission granted. For the reasons that follow, we affirm the Judge’s decision.²

¹ Section 107(a) provides in relevant part that if an MSHA inspector “finds that an imminent danger exists, [the inspector] shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from” the relevant area until the danger no longer exists. 30 U.S.C. § 817(a).

² On this same date, the Commission is issuing a separate decision in a case involving very similar issues. *Jim Walter Res. Inc.*, Docket No. SE 2012-681-R.

I.

Factual and Procedural Background

A. Factual Background

On February 14, 2011, MSHA Inspector Lee Getter was conducting a five-day spot inspection³ of the No. 8 Section of JWR's No. 7 Mine, due to the fact that the mine was liberating over one million cubic feet of methane in a 24-hour period. Tr. 34. During the inspection, Getter observed a continuous miner operator, a helper, an electrician, two roof bolters, two shuttle car operators, and a supervisor working in the No. 8 Section. Tr. 50. The continuous miner was located at the face of the No. 2 entry, and the roof bolter was located in the last open crosscut between the No. 2 and 3 entries. Tr. 50. Getter also observed another inspector taking dust samples in the section. Tr. 49. Counting the other inspector and her traveling party, Getter testified that there may have been 10 to 12 people in the section at the time of his inspection. Tr. 50.

During the inspection, Getter noticed a roof cavity that was located at the intersection between the No. 2 and 3 entries, about 40 feet back from the face. Tr. 51-52. The cavity was about 5½ feet deep, and contained a smaller, upper cavity that was approximately 1½ feet deep, which left four feet in the larger, main cavity. Tr. 98-99.

Upon discovering the cavity, Getter instructed the continuous miner operator to raise a methane detector into the cavity. About halfway into the first, larger cavity, the methane reading shot up to 4.6 percent. The miner operator quickly pulled the probe back in order to avoid the possibility of burning out the detector in the face of quickly rising gas levels. The miner operator then attempted another methane reading. Tr. 57-58. The second time, the detector was pushed to the edge of the smaller, upper cavity, and the reading showed 5.6 percent methane. Tr. 58. Getter testified that, during this time, one of the roof bolters was about to pin a loose rib that was located nearby the pocket of methane, which would have produced sparks. Tr. 63, 163.

Upon discovering the methane, Getter issued a section 107(a) imminent danger withdrawal order, directing the operator to cease mining operations in the area. The order alleged that the operator had "allowed methane levels to reach 5.6%" in the roof cavity. Gov't Ex. 1, at 1.

JWR subsequently contested the imminent danger order. On December 22, 2011, the Judge affirmed the order.

³ Under section 103(i) of the Mine Act, any mine that liberates more than "a million cubic feet of methane . . . during a 24-hour period" is required to have an MSHA inspector inspect the mine "every five working days at irregular intervals." 30 U.S.C. § 813(i). The No. 7 Mine liberates more than one million cubic feet of methane in a 24-hour period and therefore is subject to a spot inspection every five days. Tr. 34.

B. The Judge's Decision

1. Whether the Inspector Abused His Discretion in Issuing the Imminent Danger Order

The Judge held that Inspector Getter did not abuse his discretion by finding an imminent danger at the roof cavity. She concluded that Getter reasonably believed that an ignition of the methane in the cavity was likely to occur. She credited Getter's testimony that a methane concentration of over 5 percent is in the explosive range,⁴ and that with such a high level of methane, everything becomes a possible ignition source, including the slightest friction and even clothing static. 33 FMSHRC at 3217.

The Judge also found that various ignition sources existed in the area. *Id.* at 3213, 3217; Tr. 64. Specifically, the Judge credited Getter's testimony that a continuous miner was prepared to begin cutting coal nearby the roof cavity, which would have produced sparks igniting the methane. She also credited Getter's testimony that a roof bolter was energized and moving through the area to begin roof bolting a loose rib, which would have produced sparks nearby the roof cavity. 33 FMSHRC at 3213, 3217; Tr. 62-63. She emphasized that the last open crosscut is the "busiest area," with many miners traveling through the area, and that the area contained a significant amount of energized equipment and cables. 33 FMSHRC at 3214, 3218. Finally, the Judge noted that a roof fall, which created the cavity, had occurred within the previous few days, and that roof falls can also constitute ignition sources. Accordingly, the Judge credited Getter's description of the scene as "volatile" and sensitive — "a ticking time bomb." 33 FMSHRC at 3214, 3218, Tr. 64.

The Judge further found that the mine's ventilation system was reasonably likely to push the methane downward toward the mining machines and cables. She emphasized that the air in the cavity "was not being adequately diluted, as evidenced by the high levels of methane that remained" in the cavity. *Id.* at 3218. She found that, under normal mining operations, the methane would have migrated to other areas, pushed along by air that would not adequately dilute the mixture. *Id.* Based on these reasons, the Judge found that Getter reasonably believed that an ignition of methane was likely to occur, and that he did not abuse his discretion in issuing the section 107(a) withdrawal order. *Id.* at 3220.

2. Whether the Imminent Danger Order was Duplicative

The Judge also rejected the operator's argument that the section 107(a) order was duplicative. The operator claimed that the order was unnecessary because JWR had already

⁴ The explosive range of methane is between 5 and 15 percent. *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1135 n.13 (May 2014); *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). While methane may ignite at 1 percent, things change dramatically when the reading is over 5 percent. There is no longer simply a danger of ignition. Rather, there is the potential to ignite an explosive mixture of methane and other gases.

issued its own withdrawal order under 30 C.F.R. § 75.323(b)(2)⁵ so that no mining activities would have been taking place by the time Getter issued the imminent danger order. The Judge, however, found that there was no indication that JWR was in the process of removing power or miners from the area when Getter discovered the excessive quantities of methane. Specifically, the equipment in the section was energized, and the miners were preparing to produce coal by the time Getter had arrived. 33 FMSHRC at 3219; Tr. 163 (“[b]y the time we got ready to start running, Lee came up . . .”).

The Judge further concluded that, as a matter of law, section 75.323(b)(2) and section 107(a) “impose separate and distinct [legal] duties” on an operator. 33 FMSHRC at 3219. Accordingly, she held that the imminent danger order was not duplicative.

3. Whether Various Pieces of Evidence were Admissible

The Judge made several evidentiary rulings that were adverse to the operator. Specifically, the operator had objected to reports of prior methane ignitions at the mine, as well as a bottle sample test result showing methane at 9.11 percent, which was observed by the inspector after he issued the section 107(a) withdrawal order. Over renewed objections, the Judge admitted both pieces of evidence. Tr. at 19, 40, 68-69; Sec’y Ex. 3, 5, 6. The Judge reasoned that Getter was well aware of the prior ignitions at the time that he issued the section 107(a) order (Tr. 35) and that those ignitions were facts known to him that supported his imminent danger finding. The Judge further reasoned that the 9.11 percent methane reading was relevant because it independently confirmed Getter’s testimony about the methane level in the roof cavity exceeding 5 percent. 33 FMSHRC at 3213.

⁵ Section 75.323(b)(2) provides that “[w]hen 1.5 percent or more methane is present in a working place or an intake air course, including an air course in which a belt conveyor is located, or in an area where mechanized mining equipment is being installed or removed — [e]veryone except those persons referred to in § 104(c) of the Act shall be withdrawn from the affected area[,] and[,] [e]xcept for intrinsically safe AMS [Atmospheric Monitoring Systems], electrically powered equipment in the affected area shall be disconnected at the power source.” 30 C.F.R. § 75.323(b)(2).

II.

Disposition

A. The Judge Properly Concluded that the Inspector Did Not Abuse His Discretion in Issuing the Imminent Danger Order.⁶

Section 107(a) of the Act provides in relevant part that if an MSHA inspector “finds that an imminent danger exists, [the inspector] shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from” the relevant area until the danger no longer exists. Section 3(j) defines an “imminent danger” as a condition “which could reasonably be expected to cause death or serious physical harm before such condition or practice *can be abated.*” 30 U.S.C. § 802(j) (emphasis added).⁷

An inspector’s issuance of a section 107(a) imminent danger order is reviewed under an “abuse of discretion” standard. *Island Creek Coal Co.*, 15 FMSHRC 339, 345-47 (Mar. 1993); *Utah Power & Light Co.*, 13 FMSHRC 1617, 1627 (Oct. 1991). A section 107(a) order will be upheld if the Secretary proves by a preponderance of the evidence that the inspector reasonably concluded, based on information known or reasonably available to the inspector, that an imminent danger existed. *Island Creek*, 15 FMSHRC at 346-47.

Here, we conclude that substantial evidence supports the Judge’s finding that the inspector reasonably concluded that the methane in the roof cavity was reasonably expected to cause death or serious physical harm before it could be abated.⁸

⁶ Commissioners Althen and Young note for the record their disagreement with the concurring opinion of the Chairman and Commissioner Cohen for the reasons set forth in their dissenting opinion in *Jim Walter Res. Inc.*, 37 FMSHRC ___, slip op. at 1-6, No. SE 2012-681-R, issued on the same day as this decision.

⁷ The parties offer two different interpretations of what constitutes an “imminent danger.” The Secretary claims that he need not prove that death or serious injury is reasonably expected to occur within a “short period of time,” and that the Commission caselaw setting forth this requirement conflicts with the statutory definition of “imminent danger” in section 3(j). The operator, by contrast, argues that the requirement of a “short period of time” is correct and that an actual, ready ignition source is required to sustain an imminent danger order in the context of methane accumulations. We need not reach this issue in this case, however, because the result will be the same under either interpretation.

⁸ When reviewing a 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 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that

(continued...)

First, Inspector Getter knew that the roof bolting process would have created sparks that were reasonably likely to come into contact with the methane in the nearby roof cavity, had the operator pinned the loose rib. James Woods, the section coordinator, testified that the roof bolting process would have occurred 25 feet away from the roof cavity. Tr. 190. Although 25 feet is not directly next to the cavity, it is close enough that sparks could reach the roof cavity and come into contact with the methane. Getter also testified that the roof bolting process tends to “sling” sparks. Tr. 63. Specifically, according to Getter, during the pinning process “you’ve got metal cutting rock . . . which creates heat, which creates sparks.” Getter added that “when they insert a pin into the roof, you’ve [also] got metal to metal from the roof bolt and actually what’s called the Decatur plate on the roof bolt that once spun up against tends to *sling* sparks also and create heat.” *Id.* (emphasis added). Getter noted that “[t]here have been cases where ignitions have occurred from the actual holes where they’re inserting roof bolts.” *Id.* As a result, the argument that the distance between the pinning process and the methane was great enough to prevent an ignition is unpersuasive.⁹

Second, the fact that the continuous miner had many moving parts that could produce sparks and cause ignitions was information reasonably available to Getter. On direct examination, Getter testified about numerous prior ignitions that had occurred at the mine. He stated that “the commonality for all of the [prior] ignitions was the continuous mining machine cutting into the hard rock bottom.” Tr. 45; Gov’t Ex. 5-E. Although the continuous miner was located 40 feet in by the methane pocket (Tr. 114), the miner could have travelled closer to the roof cavity, producing sparks from the roof antenna that could ignite the methane.¹⁰ Furthermore, any methane ignitions at the continuous miner could have been propagated by the methane in the roof cavity. Tr. 114.

⁸ (...continued)

“fairly detracts” from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

⁹ We find unpersuasive the operator’s argument that the methane monitor on the roof bolter would have mitigated the threat of any explosion by detecting the methane in the roof cavity and shutting down the roof bolter. The roof bolter only extended up to the roof line, which was 7 to 7½ feet high. The methane, by contrast, existed *above* the roof line, within the cavity. Tr. 83-85. Thus, the methane monitor on the roof bolter would have failed to extend high enough into the roof cavity to detect the methane. Furthermore, the roof bolter would have been 25 feet away from the methane. In any event, the Commission has declined to give probative value to mine operators’ reliance on redundant safety measures. *Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995); *Amax Coal*, 18 FMSHRC 1355, 1359 n.8 (Aug. 1996).

¹⁰ On direct examination, Woods testified that the side of the continuous miner had an antenna welded onto it in order to gauge the height of the entry and ensure that the roof would be no lower than 84 inches. Tr. 163-64. He also admitted on cross-examination that the antenna would often scrape the roof and could possibly cause sparks. Tr. 190-92.

Third, we conclude that Getter's knowledge of the prior methane ignitions at the mine constitutes an independent reasonable basis for his issuance of the section 107(a) order. Tr. 75-76, 176. Getter testified that he had been aware of "quite a few" of the prior ignitions at the mine through "[d]iscussions in the office," and that the mine had actually experienced an ignition on a different section the same day that Getter did his inspection at the mine for the instant case. Tr. 34-35.

Fourth, the existence of the prior roof fall is information that was reasonably available to Getter and relevant to his imminent danger finding. Woods admitted on cross-examination that the prior roof fall creating the cavity occurred *two days* before Getter issued the imminent danger order. Furthermore, Woods conceded that such roof falls constitute ignition sources that can interact with methane in the area. Tr. 176. As a result, Getter had a reasonable basis for issuing the section 107(a) order. Accordingly, we find that the Judge's decision was based on substantial evidence.¹¹

B. The Imminent Danger Order Was Not Duplicative of the Operator's Withdrawal Order Under Section 75.323(b)(2).

We reject JWR's claim that the section 107(a) order was duplicative and unreasonable. The operator claims that the section 107(a) order was unnecessary because the operator's withdrawal order under section 75.323(b)(2) was already in effect, so that mining activities would have ceased by the time Getter issued the order. This claim, however, is controverted by the fact that the operator had no plans to delay coal production until *after* Getter discovered the excessive quantities of methane. Tr. 163, 227-28. This necessitated issuance of the order.¹²

Furthermore, even if JWR could prove that it had been planning to halt coal production before the inspector discovered the methane, the caselaw governing allegedly duplicative enforcement actions does not support it. The issue is whether multiple standards "impose

¹¹ By contrast, we conclude that substantial evidence does not support the Judge's finding that Getter reasonably concluded that the methane would have migrated to other areas of the mine towards the cable and equipment. 33 FMSHRC at 3218. According to Getter, the airflow was ventilating the roof cavity in an upwards direction. Tr. 69-70, 87. Although this upwards ventilation was improved upon abatement by repositioning a blower curtain, Getter testified that "methane is lighter than air" and "rises to the top." Tr. 87. Therefore, we conclude that substantial evidence does not support the Judge's finding that the airflow would have pushed the methane downwards before it could be abated. Regardless, however, this constitutes harmless error because substantial evidence still exists to support the Judge's decision, as shown *supra*.

¹² It would be odd and contrary to the Act's enforcement scheme if operators could issue a withdrawal order under section 75.323(b)(2) upon learning of a dangerous condition from an MSHA inspector, in order to avoid the consequences of a section 107(a) order. "The strict liability nature of the Act does not allow for this sort of gamesmanship." *Wake Stone Corp.*, 36 FMSHRC 825, 829 (Apr. 2014) (refusing to allow operator to insist on a pre-operational examination upon learning of an impending MSHA inspection, in order to avoid liability for failing to maintain service horn in working condition).

separate and distinct duties” on an operator. *Spartan Mining Co.*, 30 FMSHRC 699, 716 (Aug. 2008); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-04 (June 1997). In a situation analogous to that in this case, the Commission explained that, unlike section 107(a), the mandatory withdrawal standard in question, 30 C.F.R. § 75.309(b), was “directed to the operator rather than the Secretary.” *Wyoming Fuel Co.*, 13 FMSHRC 1210, 1215 (Aug. 1991). Section 75.309(b) is similar to section 75.323(b)(2) in that they both require operators to shut down power and withdraw miners from dangerous areas of a mine. In the same way, section 107(a) and the mandatory standard in this case “impose separate and distinct duties” between the Secretary and the operator. Accordingly, we conclude that the section 107(a) order is not duplicative.

C. The Judge Acted Within Her Discretion In Making Evidentiary Rulings that Were Adverse to the Operator.

We reject JWR’s claims of evidentiary and procedural error. First, we conclude that the Judge properly admitted the reports of the prior methane ignitions at the mine (Gov’t Exs. 5A-5M) because Getter was well aware of the prior ignitions at the time that he issued the section 107(a) order (Tr. 35) and those ignitions were thus “facts known to him” that supported his imminent danger finding. We further find that the operator cannot plausibly claim that the Secretary’s late disclosure of the reports shortly before the trial denied the operator a fair hearing, because the operator makes no argument as to how it was legally prejudiced by the late disclosure.

Second, we conclude that the Judge properly admitted the bottle sample testing result showing 9.11 percent methane because it independently corroborates Getter’s testimony. Getter testified at the hearing that when testing the methane in the roof cavity, he had observed an increased reading and he believed that the methane may have actually been at a greater level due to the height of the cavity. Tr. 58, 68.

Third, we find that the Judge did not err by declining to draw the credibility determination that the operator sought on cross-examination regarding the issue of how high up in the roof cavity the methane existed. On cross-examination, the operator attempted to use the inspector’s notes to impeach his testimony on this issue, and to show that the methane was located not in the main part of the cavity, but in the upper cavity only. Although the Judge admitted the notes into the record, she stated that she “[didn’t] hear . . . any inconsistent statement” on this issue and that she would allow the notes in “[f]or what they’re worth.” Tr. 127-28. The Commission has recognized that a judge’s credibility determinations are entitled to great weight and may not be overturned lightly. *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1196–97 n.8 (Oct. 2010); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010).

Finally, we reject JWR’s argument that the Judge improperly treated Getter as an expert witness. The full sentence in the Judge’s decision that prompts the operator’s claim of error reads that “[Getter] is a ventilation expert, and is aware that methane above 5 percent is volatile and explosive.” 33 FMSHRC at 3217. The fact that methane above 5 percent is explosive is common knowledge in the mining industry and has been previously noted by the Commission. *Texasgulf*, 10 FMSHRC at 501. Commonly known information in the mining industry is a far cry from the

“scientific, technical, or other specialized knowledge” that requires qualification as an expert under the Federal Rules of Evidence. *See* Fed. R. Evid. 701, 702. As a result, we conclude that the Judge did not treat Getter as an expert witness.

III.

Conclusion

For the reasons stated above, we affirm the Judge’s finding of an imminent danger.

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

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

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

Chairman Jordan and Commissioner Cohen, concurring:

We agree with the majority that there is substantial evidence to support the Judge's conclusion that the inspector reasonably concluded that the accumulation of methane in the roof cavity was reasonably expected to cause serious physical harm before it could be abated, and that there were multiple proximate potential ignition sources. However, we believe that it is not necessary to reach that issue.

Rather, we conclude that the detection of an explosive concentration of methane, by a mine inspector, in active workings within an underground coal mine (i.e., an area where miners work or travel pursuant to 30 C.F.R. § 75.2), justifies the issuance of an imminent danger order requiring the immediate withdrawal of miners, without the need to determine the presence of a ready ignition source. We explain the bases of that conclusion in our separate opinion issued as part of the Commission's concurrently issued decision concerning a separate incident of an explosive accumulation of methane at Jim Walter Resources' No. 7 mine. *See Jim Walter Res. 37 FMSHRC __*, No. SE 2012-681-R.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 2015

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

v.

JIM WALTER RESOURCES, INC.

Docket No. SE 2012-681-R

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY: Nakamura, Commissioner:¹

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). At issue is an imminent danger order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 107(a) of the Mine Act, 30 U.S.C. § 817(a),² to Jim Walter Resources, Inc., ("JWR") at its No. 7 Mine, an underground coal mine in Alabama. The order alleges elevated levels of methane in excess of five percent in a roof cavity within the mine.

On January 23, 2014, the Administrative Law Judge issued a decision in this case affirming the section 107(a) withdrawal order. 36 FMSHRC 235 (Jan. 2014) (ALJ). The operator filed a petition for discretionary review of the Judge's decision, which the Commission granted. For the reasons stated below, I affirm the Judge's decision.³

¹ Commissioner Nakamura affirms the Judge's decision on the basis that it is supported by substantial evidence. Chairman Jordan and Commissioner Cohen in a separate opinion affirm the Judge's decision because they agree with the opinion of Commissioner Nakamura that substantial evidence supports the decision of the Judge upholding the imminent danger order, and on the basis that five percent methane in active workings constitutes an imminent danger. Commissioner Young and Commissioner Althen dissent, as they would reverse the Judge's holding on the basis that it is not supported by substantial evidence and because they disagree with the approach articulated by Chairman Jordan and Commissioner Cohen.

² Section 107(a) provides in relevant part that if an MSHA inspector "finds that an imminent danger exists, [the inspector] shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from" the relevant area until the danger no longer exists. 30 U.S.C. § 817(a).

³ On this same date, the Commission is issuing a separate decision in a case involving a very similar issue. *Jim Walter Res. Inc.*, Docket No. SE 2011-407-R.

I.

Factual and Procedural Background

A. Factual Background

On August 13, 2012, MSHA Inspector Larry McDonald was conducting a quarterly inspection of the No. 8 section of JWR's No. 7 mine. McDonald observed eight miners in the area, although he was not certain where each miner was located. Those miners included JWR safety supervisor John Connellan and United Mine Workers of America ("UMWA") miners' representative Steve Pendley, who both accompanied McDonald on the inspection. The closest miners not part of the inspection party included Eric Church, an hourly UMWA miner, and the section foreman James Woods.

As McDonald walked towards the face of the mine, he turned left onto the No. 2 entry, and his methane detector began to fluctuate. As McDonald walked through the No. 2 entry, he turned right into a long crosscut, which was located between the No. 2 and 3 entries. Once in the long crosscut, he observed a line curtain hung up, which was intended to ventilate the methane in the area. When McDonald reached the right corner of the curtain to make a reading, he observed a cavity in the roof of the long crosscut.

McDonald testified that while taking a series of dust surveys, he observed a Lo Trac machine⁴ moving in the area. Tr. 92-95. After taking the dust surveys, McDonald turned off the No. 3 entry into a long crosscut heading toward the No. 2 entry. As he came through a man door into the crosscut, he observed a change in his methane detector, with an increase of .4 percent. McDonald went to a line curtain that was hung in the long crosscut to make another methane reading. He turned around and saw a high cavity in the roof. Tr. 95-96. McDonald subsequently stepped up on a pallet of blocks and raised his detector into the cavity. The reading exceeded five percent. Tr. 97. The cavity measured approximately five feet wide by seven feet in length by two feet in depth. Tr. 112-13. McDonald was not certain as to how close to the long crosscut the remaining miners in the vicinity were. Tr. 182.

McDonald corroborated his methane reading of over five percent by having Pendley and Connellan use their methane detectors to take readings in the cavity, which showed the same result of over five percent methane. Tr. 97. McDonald then issued a section 107(a) imminent danger withdrawal order, directing the operator to cease mining operations in the area. The order alleged that "[m]ethane was allowed to accumulate in a high cavity on #8 section (MMU-008) in

⁴ A Lo Trac machine is a non-permissible piece of mobile equipment that hauls and delivers various supplies to and from the long crosscut. When a piece of equipment is "non-permissible," it lacks the protective safeguards to prevent dangerous electrical currents or sparks from being produced. All face equipment must be maintained in permissible condition. 30 C.F.R. § 75.503. "Permissible" means "all electrically operated equipment taken into or used in by the last open crosscut of an entry . . . designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and . . . to prevent, to the greatest extent possible, other accidents in the use of such equipment." 30 C.F.R. § 75.2.

between the #2 intake entry and the #3 intake belt entry, which is the long crosscut." JWR Ex. C1.

JWR subsequently contested the imminent danger order. On January 23, 2014, the Judge affirmed the order.

B. The Judge's Decision

The Judge held that McDonald did not abuse his discretion by finding an imminent danger at the roof cavity. He concluded that McDonald reasonably believed that an ignition of the methane in the cavity was likely to occur. Specifically, the Judge credited McDonald's testimony that the Lo Trac was reasonably likely to enter the long crosscut, arc and spark, and ignite the methane in the roof cavity. 31 FMSHRC at 242-44.

The Judge credited McDonald's testimony that he had observed the Lo Trac travel in the long crosscut before he issued the imminent danger order, and that this constituted a reasonable basis for issuing the order. The Judge also found that, even if McDonald were mistaken about the Lo Trac entering the long crosscut, it was reasonable to conclude that the Lo Trac was reasonably likely to enter the long crosscut in the foreseeable future. This finding was based on the Lo Trac's exposed components, its lack of explosive proof enclosures, its proximity to the long crosscut, and its mobility. *Id.* at 242.

In finding that the Lo Trac was an ignition source, the Judge rejected the operator's argument that it was unlikely that the Lo Trac would spark at exactly the right angle to ignite the methane. *Id.* at 243-44. The Judge stated that the issue was whether the inspector reasonably believed that the Lo Trac was likely to enter the crosscut and spark, igniting the methane. The Judge emphasized that the long crosscut was the source of some activity that day, and that there were materials stored in the crosscut. *Id.* Citing *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991), for the proposition that the Secretary does not have to establish the "percentage of probability that an accident will happen," the Judge found that it was not "improbable" that the Lo Trac would ignite the methane. 36 FMSHRC at 242-43.

The Judge also rejected JWR's argument that it was improbable that the Lo Trac would ignite the methane because the Lo Trac had been "tagged out" for repair. Noting that the operator, and not MSHA, had "tagged out" the Lo Trac for a minor issue, the Judge found that nothing prevented the Lo Trac from being used by mine personnel for its intended purpose. Based on these reasons, the Judge found that McDonald reasonably believed that an ignition of methane was likely to occur, and that he did not abuse his discretion in issuing the section 107(a) withdrawal order. *Id.* at 243.

II.

Disposition

A. The Judge Properly Concluded that the Inspector Did Not Abuse His Discretion in Issuing the Imminent Danger Order.

Section 107(a) of the Act provides in relevant part that if an MSHA inspector "finds that an imminent danger exists, [the inspector] shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from" the relevant area until the danger no longer exists. 30 U.S.C. § 817(a). Section 3(j) defines an "imminent danger" as a condition "which could reasonably be expected to cause death or serious physical harm before such condition or practice *can be abated*." 30 U.S.C. § 802(j) (emphasis added).⁵

An inspector's issuance of a section 107(a) imminent danger order is reviewed under an "abuse of discretion" standard. *Island Creek Coal Co.*, 15 FMSHRC 339, 345-47 (Mar. 1993) (citations omitted); *Utah Power & Light Co.*, 13 FMSHRC at 1622-23 (Oct. 1991). A section 107(a) order will be upheld if the Secretary proves by a preponderance of the evidence that the inspector reasonably concluded, based on information known or reasonably available to the inspector, that an imminent danger existed. *Island Creek*, 15 FMSHRC at 346-47 (citations omitted).

Here, substantial evidence supports the Judge's finding that the inspector reasonably concluded that the methane in the roof cavity was reasonably expected to cause death or serious physical harm before it could be abated.⁶ Inspector McDonald based his imminent danger determination on two factors: (1) he relied on the fact that the Lo Trac is a non-permissible piece of equipment that could arc or spark; and (2) he knew that the Lo Trac is a mobile piece of

⁵ The parties offer two different interpretations of what constitutes an "imminent danger." The Secretary claims that he need not prove that death or serious injury is reasonably expected to occur within a "short period of time," and that the Commission caselaw setting forth this requirement conflicts with the statutory definition of "imminent danger" in section 3(j). The operator, by contrast, argues that the requirement of a "short period of time" is correct and that an actual, ready ignition source is required to sustain an imminent danger order in the context of methane accumulations. I need not reach this issue in this case, however, because the result will be the same under either interpretation.

⁶ When reviewing a 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 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

equipment that commonly delivered materials and supplies to and from the long crosscut.⁷ Furthermore, the fact that the area surrounding the long crosscut was the source of some activity was information reasonably available to McDonald. Thus, McDonald was justified, based on information known or reasonably available to him, in concluding that the Lo Trac was reasonably likely to ignite the methane in the roof cavity before the methane could be abated.⁸

It was reasonable for McDonald to surmise that the Lo Trac could wind up in a position where it could ignite the methane in the roof cavity. McDonald knew that Lo Tracs do not have explosive-proof enclosures. Tr. 88-89, 209-10. Rather, Lo Tracs contain electrical connections that are open, exposed alternators, and frictional brakes that can cause sparks. Tr. 209-210. McDonald also knew that the Lo Trac is a mobile piece of equipment. Moreover, Connellan testified that the Lo Trac is typically used to take supplies to the long crosscut. Tr. 315. Thus, the record establishes that the Lo Trac was certainly capable of traversing the long crosscut, and passing beneath the roof cavity containing methane in an explosive range.

⁷ McDonald testified that he observed roof bolts, a pallet of blocks, cans of motor gear and hydraulic oil, bags of rock dust, fire extinguishers, timbers and other miscellaneous supplies stored in the crosscut. Tr. 115.

⁸ The Judge's factual finding that the Lo Trac was tagged out is non-dispositive because the Judge found that the Lo Trac was tagged out by the operator, and not by MSHA. 36 FMSHRC at 243; Tr. 265. The record shows that the operator tagged out the Lo Trac in order to fix a minor oil leak "that would occur down the road." Tr. 265, 311. Nothing in the record indicates that the operator would have been prevented from putting the Lo Trac back into use for its intended purpose during the time that the methane pocket existed.

There is also substantial evidence in the record that the area surrounding the long crosscut was the source of some activity, and that materials were stored in the crosscut. Tr. 315, 317-20. Therefore, it was reasonable for McDonald to assume that the Lo Trac could enter the crosscut to retrieve or move such materials in the foreseeable future. Accordingly, I conclude that substantial evidence supports the Judge's conclusion that McDonald did not abuse his discretion in finding the existence of an imminent danger.⁹

III.

Conclusion

For the reasons stated above, I affirm the Judge's finding of an imminent danger.

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

⁹ Citing to the fact that subsequent to the issuance of the order the excessive methane was abated within 20 minutes by extending an existing line curtain 25 feet to the area of the cavity, the dissent argues that it was not reasonable for the inspector to expect an ignition before the condition was abated. I disagree. A determination of whether an inspector reasonably concluded that an imminent danger existed is based upon a review of the information known or reasonably available to the inspector at the time of issuance of the order. *Island Creek*, 15 FMSHRC at 348. Here, the inspector testified that when he inserted his gas detector to within 14 inches of the top of the cavity it registered "over range," so that while he knew that the methane level exceeded five percent, the level could be significantly higher by some unknown quantity deeper in the cavity. Tr. 97, 104-05. Given the state of his knowledge, the inspector did not abuse his discretion in issuing the order based on his conclusion that an ignition was reasonably likely to occur before the explosive concentration of methane could necessarily be abated.

Chairman Jordan and Commissioner Cohen, concurring:

We agree with the opinion of Commissioner Nakamura that there is substantial evidence to support the Judge's conclusion that the MSHA inspector was justified in issuing an imminent danger order because of the potential of the Lo Trac machine to ignite the methane in the roof. However, we believe that it is not necessary to reach that issue. Rather, we conclude that the detection of an explosive concentration of methane, by a mine inspector, in an area of an underground coal mine in which miners work or travel, justifies the issuance of an imminent danger order requiring the immediate withdrawal of miners, without the need to determine the presence of a ready ignition source.

Factual Background

On August 13, 2012, MSHA Inspector Larry McDonald conducted a quarterly inspection of the No. 8 section of JWR's No. 7 mine. Inspector McDonald was accompanied by JWR safety supervisor John Connellan and the miners' representative Steve Pendley. As he proceeded towards the face of the mine, McDonald turned into the No. 2 entry, whereby he noticed his methane detector began to fluctuate. Continuing through the entry, the inspector turned into a long crosscut located between the No. 2 and 3 entries. As he came through a man door into the crosscut, he observed that his methane detector indicated an increase of 0.4 percent. McDonald went to a line curtain that was hanging in the long crosscut to make another methane reading. When the Inspector reached the right corner of the curtain, he observed a cavity in the roof of the long crosscut. He raised his detector into the cavity in order to obtain a methane reading. The reading exceeded five percent. Tr. 97. McDonald corroborated his methane reading by asking Pendley and Connellan to take readings in the cavity using their detectors. Both detectors indicated the presence of methane in levels greater than five percent. Methane in the 5-15% range is explosive.

McDonald issued an imminent danger withdrawal order under section 107(a) of the Mine Act, directing the operator to cease mining operations in the area. 30 U.S.C. § 817(a). The order alleged that "[m]ethane was allowed to accumulate in a high cavity on #8 section (MMU-008) between the #2 intake entry and the #3 intake belt entry, which is the long crosscut." Sec'y. Ex. 9.¹

Analysis

It is well-established that an inspector's issuance of a section 107(a) order will be upheld if the Secretary proves by a preponderance of the evidence that the inspector reasonably concluded, based on the evidence reasonably available to him, that an imminent danger existed. *Island Creek Coal Co.*, 15 FMSHRC 339, 346-47 (Mar. 1993) (citations omitted). Traditionally,

¹ Although he could not recall their precise location, the Inspector testified to the presence of eight additional miners in the area, in addition to the individuals accompanying him. Tr. 182-3. Moreover, earlier in his inspection, while taking a series of dust surveys, McDonald observed a Lo Trac machine. Tr. 92-3. The Lo Trac is a non-permissible piece of mobile equipment, which means it does not have an explosion-proof enclosure. Tr. 88-89, 116.

in cases where an inspector issues an imminent danger order as a result of a methane accumulation, the Commission has required the Secretary to demonstrate the presence of an ignition source that might be reasonably expected to cause an explosion. See *Island Creek*, 15 FMSHRC at 346-48. However, as we explain below, those cases have not confronted the issue presented here, in which an explosive concentration of methane is detected in active workings of a mine.² We conclude that if an inspector encounters an explosive level of methane (i.e., five percent or greater) in active workings of an underground mine, he or she is justified in issuing a section 107(a) order without further determining the existence of an ignition source.

Section 3(j) of the Mine Act defines an “imminent danger” as a “condition or practice . . . which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.” 30 U.S.C. § 802(j). We conclude that once an accumulation of methane in active workings reaches the explosive range, it becomes imminently dangerous.

The drafters of the 1969 Coal Act referred to the accumulation of methane gas in explosive amounts as “[t]he most hazardous condition that can exist in a coal mine and lead to disaster-type accidents . . .” H.R. Rep. No. 91-563, at 21 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Pub. Welfare, 94th Cong., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1051 (1975).³ “Explosive mixtures are formed when methane concentrations in the mine atmosphere range from 5 to 15 percent. The energy required for ignition is minute.” S. Rep. No. 91-411, at 25 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Pub. Welfare, 94th Cong., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 151 (1975). In enacting the Coal Act, Congress recognized that numerous potential ignition sources are “always present” in a coal mine “even under the best mining conditions.” H.R. Rep. No. 91-563 at 21.

In light of this legislative history, we conclude that an explosive accumulation of methane “could reasonably be expected to cause death or serious physical harm” at *any* moment in time, including the time before the condition can be abated. 30 U.S.C. § 802(j). Hence, permitting an inspector to issue a section 107(a) order upon the finding of explosive methane in active workings, without finding a specific ignition source, is consistent with the statutory language.

The history of coal mining in the United States is replete with examples of the tragic consequences associated with methane.

For example, in 1940, 257 coal miners died in four separate methane gas explosions. This provided the impetus needed to enact Federal legislation which had been pending for several years. In 1941, Congress quickly passed the Coal Mine Health and Safety Act. In December, 1951, 119 coal miners died in another explosion

² The Secretary’s regulation at 30 C.F.R. § 75.2 defines “active workings” as “[a]ny place in a coal mine where miners are normally required to work or travel.”

³ The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), was the predecessor to the 1977 Mine Act.

of naturally occurring methane gas in a coal mine in West Frankfort, Ill. The following year Congress amended and strengthened the 1941 act. Again, in November of 1968 still another methane gas explosion in a coal mine in Farmington, W. Va., killed 78 men. Within a year, Congress passed the new Federal Coal Mine Health and Safety Act of 1969.

H. R. Rep. No. 95-312, at 4 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res. 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 360 (1978). Even in recent years, we have witnessed horrific methane explosions which have taken the lives of 13 miners at JWR's No. 5 Mine in 2001, *Jim Walter Res., Inc.*, 28 FMSHRC 579 (Aug. 2006); 12 miners at the Sago Mine, S. Rep. No. 109-365 at 2 (2006) (legislative history of the Mine Improvement and New Emergency Response Act of 2006, P.L. 109-236); and 29 miners at the Upper Big Branch Mine, *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3090, 3091 (Dec. 2014), *appeal docketed*, No. 15-1008 (D.C. Cir. Jan. 15, 2015).

Congressional concern regarding the danger associated with methane is further evidenced by the mandatory tests for methane that must be conducted at specified locations and intervals, and the immediate withdrawal of miners required when such examinations reveal the presence of methane in amounts much lower than the explosive level detected in the present case. To illustrate, section 303(h)(1) of the Act requires tests for methane "at the start of each shift . . . at each working place." 30 U.S.C. § 863 (h)(1). Testing is also required at each working place every 20 minutes during the shift. *Id.* The Act further provides, in section 303(h)(2), that "if at any time the air at any working place, when tested . . . contains 1.5 volume per centum or more of methane, all persons [except those needed to abate the condition] shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane." 30 U.S.C. § 863 (h)(2). Testing is also required under section 303(i)(1). These tests must occur at four hour intervals at a "split of air returning from any working section." 30 U.S.C. § 863(i)(1). If it contains 1.5 volume per centum or more of methane, miners must be withdrawn. 30 U.S.C. § 863 (i)(2).⁴

⁴ Sections 303(h) and 303(i)(1) and (2) state:

(h)(1) At the start of each shift, tests for methane shall be made at each working place immediately before electrically operated equipment is energized. Such tests shall be made by qualified persons. If 1.0 volume per centum or more of methane is detected, electrical equipment shall not be energized, taken into, or operated in, such working place until the air therein contains less than 1.0 volume per centum of methane. Examinations for methane shall be made during the operation of such equipment at intervals of not more than twenty minutes during each shift, unless more frequent examinations are required by an authorized representative

(continued...)

That Congress identified areas in which regular methane testing be done, and specified conditions under which withdrawal of miners must occur, could lead one to conclude that the immediate withdrawal of miners is justified only if accumulations of methane are detected in certain amounts in those specific areas, to wit: the working place or a split of air returning from a working section. Since the methane accumulation at issue here was not detected in either of those areas, the argument could be made that the Secretary needs to demonstrate more than the

⁴ (...continued)

of the Secretary. In conducting such tests, such person shall use means approved by the Secretary for detecting methane.

(2) If at any time the air at any working place, when tested at a point not less than twelve inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off, no other work shall be permitted in such place, and due precautions shall be carried out under the direction of the operator or his agent so as not to endanger other areas of the mine. If at any time such air contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104(d) of this Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane.

(i)(1) If, when tested, a split of air returning from any working section contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in the mine so that such returning air shall contain less than 1.0 volume per centum of methane. Tests under this paragraph and paragraph (2) of this subsection shall be made at four-hour intervals during each shift by a qualified person designated by the operator of the mine. In making such tests, such person shall use means approved by the Secretary for detecting methane.

(2) If, when tested, a split of air returning from any working section contains 1.5 volume per centum or more of methane, all persons, except those persons referred to in section 104(d) of this Act, shall be withdrawn from the area of the mine endangered thereby to a safe area and all electric power shall be cut off from the endangered area of the mine, until the air in such split shall contain less than 1.0 volume per centum of methane.

30 U.S.C. § 863(h)(1)(i)(2).

presence of methane to justify the imminent danger order; that he needs evidence of an available ignition source. We do not believe such an argument would be well founded.

Congress specified how methane testing should be carried out at working places and at splits of air returning from working sections, and required that operators must withdraw miners if the methane concentration in those areas was 1.5% or more. This should not lead to the conclusion that a methane accumulation in other active workings would not require the same precautionary measure, i.e., the immediate withdrawal of miners, when the amount of methane detected has reached the explosive level of 5% -- more than three times the methane level required for withdrawal in sections 303(h) and (i)(1)-(2).

The testing required under section 303(h) at the start of the shift occurs at "each working place." This is defined at 30 CFR § 75.2 as: "[t]he area of a coal mine in by the last open crosscut." It is logical that Congress would focus on this area because of its proximity to where the mining process is actually occurring. Methane is released during the extraction of coal and the working place is an area where equipment may be in operation which could pose an ignition source. Hence, this testing is required before any equipment is energized. Similarly, testing at a split of air returning from any working section, as required by section 303(i), is done because the detection of a certain level of methane at that location "indicates that considerably larger amounts of methane may be accumulating in the air at places in the mine through which the current of air in such split has passed." S. Rep. No. 91-411 at 59, reprinted in Legis. Hist. 1969 Act at 185.

It is notable that withdrawal of miners is required when the air measured at these areas contains 1.5 volume per centum or more of methane. Although that methane level is below the level required for an explosion, Congress recognized that "[o]nce it reaches 1.5% it can accumulate rapidly. Thus, action must be taken promptly before it reaches 1.5 percent and men must be withdrawn when it reaches 1.5 percent." *Id.* (discussing statutory language that became section 303(h) of the Act). Although the area where the methane was detected in this case was not in a location that fit within the definition of "working place," the amount of methane detected was already in the explosive range. Given that fact, we believe it was eminently reasonable for the inspector to require the immediate withdrawal of miners, without continuing to investigate to determine the existence of potential ignition sources.

We note also that, although the miners are withdrawn from a working place when methane levels reach 1.5%, the power to electric face equipment must be cut off when methane is at one percent. One could posit, therefore, that the statute requires the withdrawal of miners from a working place at a significantly lower methane level than the explosive amount present here, and such withdrawal would be required even though potential ignition sources, in the form of equipment, might have already been required to be de-energized at the lower level of methane.

That a dangerous level of methane in a location within the active workings of the mine could justify the withdrawal of miners is further supported by requirements contained in section 303(t) of the Act. Under that provision, when any mine fan stops, miners must be withdrawn

from the working sections and power in the mine is cut off.⁵ Power can be restored and work resumed if ventilation is restored within a reasonable period but only after “the working places *and other active workings* where methane is likely to accumulate are reexamined by a certified person to determine if methane in amounts of 1.0 volume per centum or more exists therein.” 30 U.S.C. § 863(t) (emphasis added). If a methane level of less than 1.0% in active workings is a prerequisite for resuming work after a disruption in ventilation due to a fan stoppage, we conclude that it is reasonable to consider the detection of methane in the explosive range of 5% or more at a location in active workings an adequate basis for requiring the withdrawal of miners from the affected area.

Furthermore, the action required under the imminent danger order in question was no different from the withdrawal mandate the operator would have had to obey under 30 C.F.R. § 75.323 when methane reaches a level of 1.5% or more.⁶ Section 75.323 applies not only to “working places” but also to “intake air courses.” 30 C.F.R. § 75.323(b)(2). The operator’s

⁵ Section 303(t) provides:

Each operator shall adopt a plan within sixty days after the operative date of this title which shall provide that when any mine fan stops, immediate action shall be taken by the operator or his agent (1) to withdraw all persons from the working sections, (2) to cut off the power in the mine in a timely manner, (3) to provide for restoration of power and resumption of work if ventilation is restored within a reasonable period as set forth in the plan after the working places and other active workings where methane is likely to accumulate are reexamined by a certified person to determine if methane in amounts of 1.0 volume per centum or more exists therein, and (4) to provide for withdrawal of all persons from the mine if ventilation cannot be restored within such reasonable time. The plan and revisions thereof approved by the Secretary shall be set out in printed form and a copy shall be furnished to the Secretary or his authorized representative.

30 U.S.C. § 863(t).

⁶ 30 C.F.R. § 75.323(b)(2) provides in relevant part:

(2) When 1.5 percent or more methane is present in a working place or an intake air course, including an air course in which a belt conveyor is located, or in an area where mechanized mining equipment is being installed or removed—

(i) Everyone except those persons referred to in §104(c) of the Act shall be withdrawn from the affected area; and

(continued...)

counsel admitted during oral argument that the area in question was on intake air. Oral Arg. Tr. 31-32. Therefore, it would have been required to comply with the protocol mandated by section 75.323. Given the danger of methane that exists in intake air courses,⁷ it is appropriate to withdraw miners from such areas when they contain more than three times the quantities of methane than are required under section 75.323 (as was the case here). In sum, declaring the inspector's decision to withdraw the miners pursuant to the imminent danger order an abuse of discretion, as JWR urges, is particularly inappropriate here, when this is the very action JWR would have been required to implement under the mandatory standard at section 75.323.

The standard we propose does not conflict with Commission precedent. In *Island Creek*, the Commission affirmed a finding that MSHA inspectors had abused their discretion in issuing imminent danger orders upon determining that there were explosive accumulations of methane located in the gob, without also determining that there were ready ignition sources present. 15 FMSHRC at 346-47. It was significant to the Commission, however, that the inspectors had not observed explosive levels of methane in active workings of the mine. *Id.* at 347. Thus, in affirming the Judge, the Commission declined to mandate that whenever an inspector identifies explosive accumulations of methane in a mine he must also identify a potential ignition source before issuing an imminent danger order pursuant to section 107(a). Rather, the Commission explicitly stated: "We need not and do not reach the issue of whether, in another case, the Secretary may support an imminent danger order by showing that an explosive accumulation of methane is present without proving a specific ignition source." *Id.* at 348.

In *Cumberland Coal Res.*, 28 FMSHRC 545, 558 (Aug. 2006), the Commission vacated a Judge's affirmance of an imminent danger order. The Commission concluded that a MSHA directive to the inspector to issue an imminent danger order if methane measures above 4.5% at a measuring point location alone left no discretion for the inspector to make an independent judgement. *Id.* at 555-58. Critically, the measuring point locations in question were in the gob, and not active workings of the mine. *Id.* 549-50. Moreover, the Commission made clear that its conclusion was "based on the unique circumstances of this case." *Id.* at 558.

In *Wyoming Fuel Co.*, 13 FMSHRC 1210 (Aug. 1991), a MSHA inspector issued an imminent danger order after detecting methane in excess of 1.5% in a return airway entry. The Commission concluded that substantial evidence supported the Judge's finding that no imminent danger existed. *Id.* at 1213. Significantly however, the Commission stated that "[t]he record clearly demonstrates that at the time the section 107(a) order was issued, the concentration of methane had not reached an explosive level, [and] mining activity had been suspended." *Id.*

⁶ (...continued)

(ii) Except for intrinsically safe AMS, electrically powered equipment in the affected area shall be disconnected at the power source.

⁷ See Safety Standards for Underground Coal Mine Ventilation, 61 FR 9764-01, 9778 (Mar. 11, 1996) (amending 30 C.F.R. § 75.323) ("the presence of methane in . . . [a working place, an intake air course, or an area where mechanized mining equipment is being installed or removed] . . . can pose a significant risk to miners and therefore their withdrawal from the affected area is essential to their safety").

For all the aforementioned reasons, we would hold that because the inspector credibly testified in this proceeding that he measured methane levels above five percent in a place where miners are normally required to work or travel, his belief that there was an imminent danger was reasonable and the 107(a) order was not an abuse of discretion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

Commissioners Young and Althen, dissenting:

The evidence demonstrates that an inspector detected an explosive level of methane in a small roof cavity in an inactive crosscut where neither miners nor equipment were present and in which the means for rapid abatement was both obvious to, and known by, the inspector. No ignition source was in the crosscut. Given the obvious and nearby means for rapid abatement and the absence of any ignition source, not only was there clearly time to consider whether there was a reasonable expectation of injury before abatement could be completed but also such abatement clearly was available. Nonetheless, the majority upholds the instantaneous issuance of an imminent danger order. We respectfully dissent.

A. Imminent Danger

Inspectors must have considerable discretion in determining whether an imminent danger exists. *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2164 (Nov. 1989). This right applies with special force in the context of the buildup of an explosive level of methane.

At the same time, the Commission must give effect to all the words of the statute so that “no part will be inoperative or superfluous, void or insignificant.” *In re Surface Mine Regulation Litigation*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) quoting 2A Norman J. Singer, *Sutherland Statutory Construction* § 46:06 (4th ed. 1973). See also *Commercial Union Ins. Co. v. United States*, 999 F.2d 581, 587 (D.C. Cir. 1993); *American Fed’n of Gov’t Emp. v. Fed. Labor Relations Auth.*, 834 F.2d 174, 177 (D.C. Cir. 1987). In reviewing imminent danger orders, therefore, the Commission must apply all the words of the definition of an imminent danger.

The Mine Act sets forth a clear statutory definition of an imminent danger. An imminent danger is “the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.” 30 U.S.C. § 802(j). Therefore, substantial evidence must support each element of an imminent danger: (1) a condition or practice in a mine (2) which could reasonably be expected to cause (3) death or serious physical harm (4) before such condition or practice can be abated.

In *Island Creek Coal Company*, 15 FMSHRC 339 (Mar. 1993), the Commission focused upon the statutory requirement that the reasonable expectation of death or serious injury must be “before such condition or practice can be abated.” Finding the inspector was required to make a reasonable investigation, the Commission vacated the imminent danger order stating:

The Commission has held that, in imminent danger cases, the judge must determine “whether a preponderance of the evidence showed that the conditions or practices, as observed by the inspectors, could reasonably be expected to cause death or serious physical harm, before the conditions or practices could be eliminated.” . . . We explained that, in making such a determination, a judge “should make factual findings as to **whether the inspector made a reasonable investigation of the facts, under the circumstances**, and whether the facts known

to him, or reasonably available to him, supported issuance of the imminent danger order.”

Id. at 346, citing *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1291 (Aug. 1992) (emphasis added).

The Commission has very recently confirmed *Island Creek's* holding that a Judge need not accept an inspector's subjective perception that an imminent danger existed. Instead, “[t]he Commission has explained that a Judge is not required to accept an inspector's subjective perception that an imminent danger existed but, rather, **must evaluate whether it was objectively reasonable for the inspector to conclude that an imminent danger existed.**” *Mill Branch Coal Corp.*, 37 FMSHRC ___, slip op. at 7, No. VA 2012-435-R et. al. (July 23, 2015), citing *Island Creek*, 15 FMSHRC at 346 (emphasis added). Therefore, looking at the objective facts, we review the Judge's determination of whether the inspector abused his discretion under a substantial evidence standard. See *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1555 (June 2014).

In *Cumberland Coal Resources, LP*, 28 FMSHRC 545 (Aug. 2006), the Commission unanimously vacated an Administrative Law Judge's affirmance of two imminent danger orders issued upon an inspector's detection on separate days of rapid buildups of methane in crosscuts to the levels of 4.8% and 5%, respectively. In reversing the Judge, the Commission found that the inspector failed to conduct the “requisite reasonable investigation of the facts in exercising his discretion.” *Id.* at 556. The Commission further noted that the inspector did not know whether there was any buildup of methane in the area of the face. Affirmance of an imminent danger order, therefore, requires evidence demonstrating the inspector based the order upon a reasonable investigation supporting a conclusion of a reasonable expectation of death or serious injuries before abatement of the hazard. The Commission's decision was not based upon the location of the measuring points, but instead upon the inspector's abuse of discretion in failing to make any reasonable investigation or determination of imminent danger. *Id.* at 556. The holding in *Cumberland* should be outcome determinative in this case.

In *Utah Power & Light Company*, 13 FMSHRC 1617, 1622 (Oct. 1991), the Commission observed that, if any hazard that has the potential to cause a serious injury is an imminent danger, the distinction between an imminent danger and a significant and substantial violation is lost. The outcome determinative difference is that, for an imminent danger, the expectation must be for a serious injury or death “before the condition or practice can be abated.” We should continue to abide by Commission precedent that gives meaning and substance to this definition of an imminent danger.

Obviously, the extent of the “investigation” necessarily depends upon the circumstances. If the danger is obvious and extreme, such as an explosive level of methane in a working face area with working miners present, the investigation and hence, the decision may be virtually instantaneous.¹ However, a more considered approach is available when no activity is occurring, no miner or equipment is in the area, and there is an obvious means of abatement at hand.

¹ For this reason, we have joined our colleagues in unanimously finding an imminent danger in *Jim Walter Res.*, No. SE 2011-407-R (being issued concurrently with this decision).

Most recently, the United States Court of Appeals for the District of Columbia Circuit reinforced the nature, and limits, of imminent danger orders in contrast to other remedies available to inspectors,

Most obviously, section 103(k) safety orders allow inspectors to impose whatever restrictions or requirements they judge appropriate to deal with the accident in question, while section 107(a) withdrawal orders simply close the mine. In short, section 107(a) is an emergency blunderbuss, unsubtle and extreme, for circumstances in which getting miners out and away is the only appropriate response. Section 103(k), which the inspectors used here, is a subtler instrument that can be tailored to any situation.

American Coal Co. v. FMSHRC, 796 F.3d 18 (D.C. Cir. 2015).

We agree with the Court's characterization of imminent danger orders as an “extreme” measure taken when exigencies warrant. Chairman Jordan and Commissioner Cohen assert, without any supporting reference, that an explosive level of methane can be expected to cause serious injury “at any moment in time.” Slip op. at 2. The Mine Safety and Health Administration (“MSHA”), the agency entrusted by Congress with the right and duty to establish safe mining rules and policies has not made such a finding. The Secretary has not argued for, or pursued through rulemaking, an approach that would require inspectors to issue imminent danger orders under the circumstances described by Chairman Jordan and Commissioner Cohen.² Inspectors have a duty to exercise discretion in determining whether there is a reasonable expectation of death or serious injury “before the condition can be abated.” Apparently, our colleagues would continue to allow inspectors to exercise discretion but would make the discretionary decision to issue an imminent danger order in the described circumstances unreviewable by the Commission. Such an abdication of responsibility would not be consistent with the Mine Act, the obligations of the Commission, or the rights of operators for review.³

² Nobody – least of all us – questions the danger posed by methane in underground mines, or that such danger was among the Act’s animating purposes. But methane and imminent dangers are both specifically addressed in the original Act, which further imposes on the Secretary a duty to promulgate improved standards by rule to protect miners. The Secretary has not done so by declaring explosive methane in active workings to be a *per se* imminent danger in the absence of an ignition source despite Commission decisions.

³ Chairman Jordan and Commissioner Cohen write at length in support of a proposition with which everyone involved in mining agrees – methane is very dangerous. Their support for their imminent danger approach to this case, however, comes down to a one sentence assertion that methane may explode “at any time” – an assertion for which they cite no support and in which they do not consider the need for an ignition source. They also state that their approach – an approach that would automatically “justify” – that is, require Commission approval, of any imminent danger order issued by an inspector for explosive methane in active workings despite the factual circumstances and without substantive review would not conflict with Commission precedent. While they have limited the application of this new suggestion of a Commission rule

(continued...)

B. The evidence does not demonstrate a reasonable expectation of death or serious injury before abatement.

As the inspector entered an inactive crosscut, he observed a curtain the purpose of which he knew was to “ventilate and remove methane gas.” Tr. 101. No miners were present in the crosscut, and there was no equipment in the crosscut. Obviously, therefore, no work was being performed. After traveling just approximately 25 feet further into the crosscut, he noticed a cavity in the roof. Tr. 100. The cavity was approximately 7’(l) x 5’(w) x 2’(h). Tr. 104.

Standing on a pallet, the inspector put his methane monitor into the cavity. As he lifted it toward the high point, the reading was over 5% methane. Tr. 97. He immediately issued the imminent danger order. To abate the violation, miners simply advanced the curtain already known by the inspector to be ventilating the crosscut by about 20 feet. As the mine inspector should have expected, advancement of the curtain and the consequent immediate dilution of the methane was easily and quickly accomplished – that is, the entire process took less than twenty minutes in total and dissipation of the methane took no more than 15 seconds after the curtain was advanced. Tr. 206-07. Indeed, the inspector actually delayed abatement somewhat by not permitting movement of the curtain until power was cut and miners were removed from areas substantially inby the cavity. Tr. 113-14.

The inspector testified about the presence of four specific pieces of equipment as possible ignition sources.¹⁰⁴ 36 FMSHRC 235, 241 (Jan. 2014) (ALJ) (citing Tr. 113-14, 117). Three of the suggested sources were inby the cavity, located in intake air, and remote from the crosscut and cavity. The Judge convincingly rejected them as possible ignition sources.

As the fourth possible source, the inspector suggested an out of service Lo Trac parked outside the crosscut at a distance of at least 200 feet from the cavity in the crosscut. The Judge found that the inspector believed he had seen it there. However, the Judge then found that mine witnesses had refuted the inspector’s testimony that he had seen the Lo Trac in the crosscut

³ (...continued)

to active workings, as a practical matter there was no greater danger of a methane explosion in this case than there was in the *Island Creek* and *Cumberland Coal Resources* cases. *See supra*. The danger of an explosion could not arise “at any time” here, because there was no likelihood of an ignition of explosive methane without a plausible ignition source. Further, the Commission has long held that an inspector must make a reasonable investigation of the facts before issuing an imminent danger order – a principle we recently re-affirmed in *Cumberland Coal*, 28 FMSHRC at 556-58. Their suggestion of automatic deference to the discretionary decision of an inspector would obliterate that requirement and is thus in direct conflict with an established line of our precedent. And finally, *Island Creek* specifically focused on the unavailability of an ignition source, not merely the fact that the methane was located in the gob. *See* 15 FMSHRC at 347-48 (noting Secretary’s acknowledgment that methane accumulation in the gob did not create an imminent danger in the absence of an ignition source).

⁴ The inspector did not suggest any general mine hazard, such as the flaking of a piece of roof, as a possible ignition source.

earlier in the day. Accordingly, there was no objective evidence that the Lo Trac had been in the crosscut. 36 FMSHRC at 242.⁵ It was undisputed that at the time the inspector issued the imminent danger order the Lo Trac was out of service, was not in the crosscut, and was at least 200 feet from the cavity. Nonetheless, the Judge accepted that the Lo Trac constituted a possible source for ignition of the methane in the cavity before abatement.

In sum, the situation encountered by the inspector was a small roof cavity in a vacant crosscut without the presence of miners and with an obvious resource for quick and easy abatement. Not only was no work underway but also no equipment, working or otherwise, was in the crosscut. The methane was in a roof cavity well above the mine floor and the evidence showed no hazard from possible flow of methane from the cavity. *Id.* at 242; Tr. 400. The obvious step to abate the condition was to direct air into the cavity by advancing a nearby already hanging brattice cloth 25 feet.

Based upon the record, therefore, it cannot be disputed that, for the Lo Trac to have ignited the methane in the cavity before completion of the rapid abatement, it would have to: (1) have been put back in service; (2) traveled into the crosscut where it would have been forbidden to travel by virtue of 30 C.F.R. § 75.323(b) requiring all persons other than those performing abatement to have been withdrawn until completion of abatement;¹⁶ (3) traveled approximately 200 feet up the crosscut; (4) gone through the area where the curtain was being moved 25 feet to eliminate the presence of methane; (5) traveled directly underneath the cavity; (6) sparked at the precise moment of being under the cavity; and (7) the spark traveled several feet upward into the cavity. All of this would have to occur before dilution of the buildup by extending the curtain 25 feet – a quickly and easily completed process. The likelihood of the occurrence of all these events is not reasonably expectable; indeed, it is wholly improbable.

⁵ As noted above, the Commission does not review an imminent danger order based upon the inspector's subjective belief but rather the objective facts that actually existed. *Mill Branch*, 37 FMSHRC ___, slip op. at 7, VA 2012-435-R et. al. (July 23, 2015) citing *Island Creek*, 15 FMSHRC at 346.

⁶ The concurrence notes the hazards of methane in intake air courses and the requirement that the operator withdraw miners pursuant to 30 C.F.R. § 75.323(b). Slip op. at 7 and n.7. They do not note, however, that the operator was practically in compliance with the requirements of this subsection, nearly from the moment that the problem was discovered. There was no electronically-powered equipment in the area where the methane was discovered. Changes to the ventilation system were undertaken immediately upon discovery of the methane. While there were two other miners in the general vicinity of the long crosscut, nobody was present in the immediate area of the cavity where the methane was confined except those persons working to solve the problem, including the inspector. Nor does the record establish that the mine was in production or that any other work was being performed. While the concentration in this case was greater than the one percent level triggering section 75.323(b), the conditions and circumstances show that even without the ordered withdrawal, the operator was nearly in what the regulations have deemed an appropriate safety posture pending the reduction in methane to a level below one percent – which, again, was nearly instantaneous. Those conditions must be taken into account, were known or should have been known to the inspector, and refute the assertion that a methane explosion could have occurred “at any time” before it could be abated.

Because reasoned discourse cannot give rise to a “reasonable expectation” of the sequential occurrence of all these events before dilution of the methane, it is unsurprising that the Secretary did not present any evidence of an expectation that the Lo Trac would be placed in service before the methane in the cavity could be diluted, or that it had been sparking at any point before it was taken out of service. The underlying conditions of this specific methane buildup did not necessitate a snap decision to issue an imminent danger order when the crosscut was vacant and an obvious means for rapid abatement was at hand. In this inactive crosscut, the inspector had sufficient time to recognize that there was not a reasonable basis to expect an ignition before the rapid movement of the brattice forward.

As described above, there was not a reasonable basis to expect the Lo Trac could pass underneath the cavity and spark upwards prior to abatement. Thus, the problem with the granting of unreviewable discretion suggested by our colleagues Chairman Jordan and Commissioner Cohen is that it reads the word “imminent” out of the statute. We have noted repeatedly that an imminent danger is one that could arise “at any time.” *See, e.g., Utah Power & Light Co.*, 13 FMSHRC at 1622; *Connolly Pacific*, 36 FMSHRC at 1555. However, absent an ignition source nearby, the hazard could not have arisen at any time. The only source relied upon by the judge was too far away and was not actively engaged in mining activities. There was no imminent danger, as defined by the statute and decades of Commission case law.

In closing, we emphasize that an explosive level of methane in a mine is a highly dangerous circumstance. Inspectors must react quickly to such a circumstance. However, the need for a quick reaction does not justify instantaneous over-reaction. Quick reaction does not always mean instantaneous reaction. The Commission must enforce all the words of the Mine Act. Commission precedent correctly establishes that an investigation reasonable to the circumstances must precede issuance of an imminent danger order and that a condition which may be abated before a reasonable expectation of the occurrence of death or serious injury may arise is not an imminent danger. Here, the facts establish that there was not a reasonable basis for expecting an ignition before dilution of the methane. Therefore, under these specific circumstances there was not an imminent danger.

We dissent.

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 10, 2015

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

v.

EMERALD COAL RESOURCES, LP

Docket No. PENN 2014-174
A.C. No. 36-05466-337811

BEFORE: Nakamura; Cohen and Althen, Commissioners¹

ORDER

BY: Nakamura and Althen, Commissioners:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On March 12, 2014, the Commission received from Emerald Coal Resources, LP (“Emerald”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

¹ Chairman Mary Lu Jordan and Commissioner Michael G. Young assumed office after this case had been considered by the other Commissioners. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Chairman Jordan and Commissioner Young have elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on December 10, 2013, and became a final order of the Commission on January 9, 2014. Emerald asserts that it failed to timely contest the proposed assessment because its safety director was on leave from his duties from October 18, 2013 to February 17, 2014 to address a serious medical issue. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

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

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

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

Commissioner Cohen, dissenting:

I dissent from my colleagues' decision because I conclude that Emerald Coal Resources has not demonstrated good cause to reopen the subject civil penalty proceeding.

On December 10, 2013, the Proposed Assessment form at issue was delivered to Emerald Mine. At this time, the mine's safety director was on an extended medical leave.² Emerald did not file a timely contest to the proposed assessment.

On February 24, 2014, after the safety director had returned to work, the mine received a letter from MSHA stating that Emerald was delinquent in the payment of penalties associated with the subject assessment. Thereafter, the safety director contacted counsel, who filed the motion to reopen on March 12, 2014. The operator submits that its failure to timely contest the form, during the time when its safety director was on leave, is the result of inadvertence or mistake within the meaning of Rule 60(b) of the Federal Rules of Civil Procedure.

The operator's contention that its failure to timely file the form was the result of some form of excusable neglect is not substantiated. The prolonged absence of a safety director at a large coal mine is not, in and of itself, good cause to permit the reopening of a civil penalty proceeding. *See* Ex. A.³ Presumably, during the safety director's lengthy absence from work Emerald made arrangements for his duties and responsibilities to be handled by someone else.

The operator's motion provides no details regarding how the safety director's responsibilities were handled in his absence, and, in particular, does not describe if the mine had established any procedures for contesting MSHA's proposed civil penalties or citations in his absence. Furthermore, the motion does not provide relevant information regarding who at the mine received the proposed assessment on December 10 and what was done with it. Therefore, it is not possible to determine whether this failure to timely file was the result of excusable neglect on the part of an otherwise diligent operator, or whether it was symptomatic of a general indifference to MSHA deadlines during the relevant four month period.

A mine of Emerald's size surely must have had a safety department that continued to operate in the four-month absence of its director, yet the motion contains no affidavit from anyone other than the absent safety director, certifying that he was indeed

² The safety director was on medical leave from October 18, 2013 to February 17, 2014.

³ The Proposed Assessment for the citations at issue represents that Emerald Mine received the maximum number of "mine points" and "controller points" when MSHA's assessment office considered the "size of the operator" pursuant to the Secretary's Part 100 penalty regulations. *See* 30 C.F.R. § 100.3.

absent. While his medical condition is deserving of sympathy, it does not relieve Emerald of its responsibility to comply with MSHA procedures.

For the aforementioned reasons, I conclude that Emerald has not established good cause for its failure to timely file, and, therefore, I do not vote to grant reopening of the civil penalty proceeding. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).⁴

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

⁴ As points of contrast, compare the Commission's holdings in *Tata Chemicals Partners*, 37 FMSHRC 523 (Mar. 2014) and *Tata Chemicals Partners*, 37 FMSHRC 525 (Mar. 2014). In these proceedings, the Commission concluded that an operator demonstrated good cause to reopen proposed assessments which were delivered to a mine, and not timely contested during a period when the party normally responsible for MSHA filings was on medical leave. The motions to reopen were accompanied by an affidavit from an employee, newly tasked with the responsibilities, which explained in some detail why he inadvertently failed to properly contest the proposed assessments.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710

September 10, 2015

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

v.

HARRY CROOKER & SONS,
INC.

Docket No. YORK 2014-81
A.C. No. 17-00576-326378

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On February 11, 2014, the Commission received from Harry Crooker and Sons, Inc. (“Harry Crooker”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered at some point between July 9, 2013 and July 16, 2013.¹ As a result, the proposed assessment became a final order of the Commission at some point between August 8, 2013 and August 15, 2013. Crooker asserts that it had sent a timely contest to the proposed assessment to MSHA on July 16, 2013. The Secretary states that it does not have any record of receiving the contest form, but does not oppose reopening the penalty assessment. Crooker does not offer any proof of delivery via certified mail. The Secretary urges the operator to take all steps necessary to ensure that future penalty assessments are contested in a timely manner.

¹ Neither party offers any information regarding the date that MSHA delivered the proposed assessment to Harry Crooker. The record does show, however, that MSHA issued its remittance coupon to Harry Crooker on July 9, 2013. Furthermore, the operator asserts that it mailed in the contest form on July 16, 2013, and offers a copy of the contest form with the signature of the safety director and the aforementioned date. Thus, we can reasonably infer that the proposed assessment was delivered to the operator at some point from July 9, 2013 to July 16, 2013.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
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September 15, 2015

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

v.

BIG LAUREL MINING CORPORATION

Docket Nos. VA 2012-56
VA 2012-337

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

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 1, 2015, a Commission Administrative Law Judge issued a decision, disposing of issues and assessing civil penalties in the sum of \$252,304 relating to citations and orders issued to Big Laurel Mining Corporation by an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”). 37 FMSHRC ___, slip op. at 36, Nos. VA 2012-337, et al. (Sept. 1, 2015) (ALJ).

On September 9, counsel for Big Laurel filed a Notice of Suggestion of Pendency of Bankruptcy and Automatic Stay of Proceedings. In the notice, counsel states that on August 3, 2015, Alpha Natural Resources, Inc. and certain of its direct and indirect subsidiaries filed Chapter 11 petitions in the United States Bankruptcy Court for the Eastern District of Virginia. Counsel further states in part that, in accordance with the automatic stay imposed by 11 U.S.C. § 362(a), no party may commence or prosecute any cause of action outside of the Bankruptcy Court either against Big Laurel or its successor, Mill Branch Coal Corporation, without first obtaining an order lifting the stay from the Bankruptcy Court. In addition, Counsel states that actions taken in violation of the automatic stay, and judgments entered or enforced against the debtors, including Big Laurel or Mill Branch, while the stay is in effect, are void.

Section 362(a) of the Bankruptcy Code provides that the filing of a Chapter 11 bankruptcy petition operates as an automatic stay of the continuation of administrative proceedings against the bankruptcy petitioner. 11 U.S.C. § 362. However, section 362(b)(4) exempts from the automatic stay provisions the continuation of a proceeding by a “governmental

unit” to enforce the governmental unit’s police or regulatory power.¹ As the Commission has previously recognized, the Secretary of Labor, the Department of Labor, and MSHA are all “governmental units” within the meaning of the Bankruptcy Code.² *Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1530 (Aug. 1990) (“*JWR*”).

The present case was brought by the United States, through the Secretary, to effectuate and enforce mandatory safety standards that implement the Mine Act. Thus, it is the kind of regulatory action covered by the police or regulatory power exception to the automatic stay. *See Hidden Splendor Res., Inc.*, 35 FMSHRC 1548, 1549-50 (June 2013); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (Feb. 1995); *JWR*, 12 FMSHRC at 1530.

¹ Section 362(b)(4) provides in part:

(b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay—

(4) under paragraph (1) . . . of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit’s . . . police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit’s . . . police or regulatory power.

11 U.S.C. § 362(b)(4).

² 11 U.S.C. § 101(27) defines “governmental unit” as the “United States; . . . department, agency, or instrumentality of the United States.”

We construe Big Laurel's notice as a petition for discretionary review and motion to stay. We hereby deny the petition because it fails to set forth grounds for review as required by the Mine Act and the Commission's procedural rules. *See* 30 U.S.C. § 823(d)(2)(A); 29 C.F.R. § 2700.70. In accordance with those provisions, Big Laurel must file any amended petition for discretionary review by October 1, 2015.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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September 1, 2015

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

v.

BIG LAUREL MINING CORPORATION,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. VA 2012-56
A.C. No. 44-07087-269672

Docket No. VA 2012-337
A.C. No. 44-07087-283547

Mine: Mine No. 2

DECISION

Appearances: Matthew R. Epstein, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;

Max L. Corley III, Esq., Dinsmore & Shohl, LLP, Charleston, West Virginia, for Respondent.

Before: Judge Paez

This case is before me upon petitions for the assessment of a civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). In dispute are three section 104(a) citations, one section 104(d)(1) citation, and three section 104(d)(1) orders issued by the Mine Safety and Health Administration (“MSHA”) to Big Laurel Mining Corporation (“Big Laurel” or “Respondent”) as the owner and operator of Mine No. 2 in Wise, Virginia. To prevail, the Secretary must prove any cited violation “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

The parties stipulated to the following:

1. Respondent was an “operator” as defined in [section] 3(d) of the [Mine] Act, 30 U.S.C. § 802(d), at [Mine No. 2,] the [m]ine at which the [citations and orders] in this matter [were] issued.

2. The operations of Respondent at [Mine No. 2] are subject to the jurisdiction of the [Mine] Act.
3. [This] proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and its assigned Administrative Law Judges, pursuant to [s]ections 105 and 113 of the [Mine] Act.
4. The citation[s] and orders in this matter were properly issued and served by a duly authorized agent of the Secretary of Labor upon a representative of Respondent at the date, time and place stated therein as required by the [Mine] Act.
5. The citation[s] and order[s] at issue in this matter are true and authentic copies of those that were issued and served on the mine operator.
6. The proposed penalty for the subject order will not affect the mine operator's ability to remain in business.
7. The mine operator abated the alleged cited conditions in good faith.

(Joint Ex. 1.)¹

I. STATEMENT OF THE CASE

These cases involve seven alleged violations related to roof failures in Mine No. 2 in August 2011, and Big Laurel's reactive strategy to address those and numerous other roof failures in the previous eight months of the year. Together, the seven alleged violations in two dockets carry a combined proposed penalty assessment of \$305,800.00.

Docket No. VA 2012-56 involves two alleged violations at Mine No. 2. The first, Citation No. 8178521, charges Big Laurel with a violation of 30 C.F.R. § 75.223(a)(1).² The second, Citation No. 8191715, charges Big Laurel with a violation of 30 C.F.R. § 75.380(d)(1).³ The Secretary proposes a penalty of \$6,996.00 for Citation No. 8178521 and \$1,304.00 for Citation No. 8191715.

¹ In this decision, the hearing transcript, the Secretary's exhibits, Big Laurel's exhibits, and the parties' joint exhibits are abbreviated as "Tr.," "Ex. GX-#," "Ex. R-#," and "Joint Ex. #," respectively. I note that Exs. R-1 through R-7, R-14, R-18, and R-19 are duplicative of the Secretary's exhibits.

² Section 75.223(a) provides, in relevant part: "Revisions of the roof control plan shall be proposed by the operator—(1) When conditions indicate that the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts[.]" 30 C.F.R. § 75.223(a).

³ Section 75.380(d) provides, in relevant part: "Each escapeway shall be—(1) Maintained in a safe condition to always assure passage of anyone, including disabled persons[.]" 30 C.F.R. § 75.380(d).

Docket No. VA 2012-337 involves five alleged violations. Citation Nos. 8178516 and 8178522, and Order No. 8178524 charge Big Laurel with violations of 30 C.F.R. § 75.202(a).⁴ Order Nos. 8178523 and 8178525 charge Respondent with violations of 30 C.F.R. § 75.364(b)(1) and (b)(2),⁵ respectively. The Secretary proposes a penalty of \$52,500.00 each for Citation No. 8178516, Order No. 8178523, and Order No. 8178525, and a penalty of \$70,000.00 each for Citation No. 8178522 and Order No. 8178524.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket Nos. VA 2012-56 and VA 2012-337 to me, and I held a hearing in Abingdon, Virginia. The Secretary presented testimony from MSHA inspectors Christopher Cain and Michael Hughes. Big Laurel presented testimony from airway examiner Jesse Ring, mine general manager John Richardson, mine superintendent Steven Moore, and former Virginia state mine inspector Jerry Scott. The parties each filed post-hearing briefs and reply briefs.

II. ISSUES

For Citation No. 8178516, the Secretary asserts that Respondent failed to fulfill the duty imposed by 30 C.F.R. § 75.202(a) by allowing an uncontrolled roof fall to occur in 1 North Mains, exposing miners to the hazards of a roof fall. (Sec’y Br. at 26–30.) For Citation No. 8178521, the Secretary asserts that Big Laurel did not fulfill its duty under 30 C.F.R. § 75.223(a)(1) by failing to revise its roof control plan for areas already mined despite repeated roof falls in those areas. (Sec’y Br. at 57–59.) For Citation No. 8178522 and Order No. 8178524, the Secretary asserts that Big Laurel failed to fulfill its duty under 30 C.F.R. § 75.202(a) by failing to address deteriorating roof conditions across the intake and return entries in 4 Northeast Mains. (Sec’y Br. at 30–33, 51.) For Order Nos. 8178523 and 8178525, the Secretary asserts that Respondent failed to fulfill its duty imposed by 30 C.F.R. § 75.364(b)(1) and 75.364(b)(2), respectively, by failing to identify extensive hazardous conditions during the mine examiner’s weekly examination of the intake and return airways in 4 Northeast Mains. (Sec’y Br. at 44–46, 54–55.) Finally, for Citation No. 8191715, the Secretary asserts that Respondent failed to fulfill

⁴ Section 75.202(a) 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.” 30 C.F.R. § 75.202(a).

⁵ Section 75.364(b) was amended in 2012. *See* 77 Fed. Reg. 20,700, 20,705 (Apr. 6, 2012). At the time of the violations in August 2011, section 75.364(b) provided, in relevant part, as follows:

Hazardous conditions. At least every 7 days, an examination for hazardous conditions shall be made by a certified person designated by the operator at the following locations:

- (1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.
- (2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled.

30 C.F.R. § 75.364(b) (2011).

its duty under 30 C.F.R. § 75.380(d)(1) by allowing a large volume of water to accumulate in the primary escapeway in 4 Northeast Mains. (Sec’y Br. at 60–62.)

In response, Big Laurel asserts that it did not commit any of the alleged violations. (Resp’t Br. at 20–23, 36–39, 43–46, 65–67, 70.) In the alternative, Respondent challenges the Secretary’s gravity and negligence determinations for each alleged violation, specifically the significant and substantial (“S&S”)⁶ designations, as well as the unwarrantable failure⁷ determinations for Citation No. 8178522 and Order Nos. 8178524, 8178523 and 8178525. (Resp’t Br. at 23–28, 38–40, 47–61, 67–69, 72–73.)

Accordingly, the following issues are before me: (1) whether the Secretary has carried his burden of proof that Respondent violated the Secretary’s mandatory health or safety standards; (2) whether the record supports the Secretary’s assertions regarding the gravity of the alleged violations, including the S&S designations; (3) whether the record supports the Secretary’s assertions regarding Big Laurel’s negligence in committing the alleged violations, including the unwarrantable failure determinations; and (4) whether the Secretary’s proposed penalties are appropriate.

For the reasons that follow:

1. Citation No. 8178516 is **AFFIRMED** as written;
2. Citation No. 8178521 is **AFFIRMED** as S&S, and **MODIFIED** to change the likelihood to “reasonably likely” and to reduce the level of negligence from “high” to “moderate;”
3. Citation No. 8191715 is **AFFIRMED** as written;
4. Citation No. 8178522 is **AFFIRMED** as S&S and an unwarrantable failure, and **MODIFIED** to change the likelihood to “reasonably likely;”
5. Order No. 8178524 is **AFFIRMED** as S&S and an unwarrantable failure, and **MODIFIED** to change the likelihood to “reasonably likely;”
6. Order No. 8178523 is **AFFIRMED** as S&S and an unwarrantable failure, and **MODIFIED** to change the likelihood to “reasonably likely;”

⁶ The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes in gravity violations that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

⁷ The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. 814(d)(1), which establishes more severe sanctions for any violation that is caused by the “unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

7. Order No. 8178525 is **AFFIRMED** as S&S and an unwarrantable failure, and **MODIFIED** to change the likelihood to “reasonably likely.”

III. FINDINGS OF FACT

Big Laurel’s Mine No. 2 was a room-and-pillar coal mine located in Wise County, Virginia.⁸ (Ex. R–10 at 1.) Big Laurel developed the mine by cutting a series of entries and perpendicular crosscuts that together form a grid if viewed from above. (Ex. R–25; Ex. GX–14.) Between these entries and crosscuts, Big Laurel left large pillars of coal in place for support while miners delved deeper into the coal seam. (Tr. 95:8–16.) To develop the mine, Big Laurel excavated long sections named Mains that provided both access for miners and fresh air to the active production sections. (See Ex. GX–1.) The mine then created a number of rooms branching off from these Mains. (See Ex. R–25.) For each room, Big Laurel first advanced into the room, developing the grid of entries and crosscuts, and then retreat-mined, removing the remaining pillars of coal and allowing the mine roof to collapse behind the miners. (See *id.*) In 2011, Big Laurel was actively mining rooms off of the 4 Northeast Mains section of Mine No. 2. (Tr. 168:16–22.) In August 2011, Big Laurel had already retreat-mined the 1 Right, 2 Right, and 3 Right panels off of 4 Northeast Mains, and was retreat-mining the final 4 Right panel. (Tr. 511:3–513:1; Ex. R–25.)

In the sections that had not been retreat-mined, the thick coal pillars left in place supported most of the weight of the mountain. (Tr. 95:8–16.) To keep the mine roof from collapsing in the excavated entries and crosscuts, Big Laurel installed lines of roof bolts. (*Id.*) Each line of installed roof bolts created a beam across the entry or crosscut that replaced the support lost by removing the coal. (Tr. 27:4–10, 31:16–23.) These beams of roof bolts were the mine’s primary roof support. (Tr. 31:16–23.) The mine also installed cable bolts and longer roof bolts as secondary support that extended deeper into the mine roof. (Tr. 33:1–15, 21–24.) Where these first lines of defense against gravity were insufficient, Big Laurel installed standing support in the form of timbers, cribs, metal jacks, and beams. (Tr. 35:18–36:12, 475:4–16.)

A. Factors that Can Worsen a Mine Roof

Over time, gravity exerts pressure on a mine, deteriorating its roof and causing a number of potentially hazardous conditions. (Tr. 34:6–11.) Indicators of deteriorating conditions in the roof and mine ribs include draw rock, cutters, bending or curling of roof bolt plates, loose or broken roof bolts, and cracks in the roof. (Tr. 35:9–16, 36:24–37:2, 37:8–18.) A cutter is a serious condition that occurs when the roof begins to separate from the pillar wall, or rib. (Tr. 27:10–14, 36:24–37:2.) Draw rock is a more common occurrence of loose rock that may fall if not pulled down. (Tr. 37:8–18, 138:7–13, 298:2–9.) Draw rock can range in size from a few inches deep and long to as much as six feet long. (Tr. 364:24–365:4.) Draw rock falls from the immediate roof, which extends as high as the roof bolts. (*Id.*) In contrast, a roof fall occurs when the rock separates from above the primary support’s anchorage point. (Tr. 365:7–10.) Draw rock,

⁸ Mill Branch Coal Corporation became the operator of the mine in 2013 and renamed the mine North Fork #6. (Tr. 298:10–22; Ex. R–10 at 1.) Revelation Energy, LLC, became the operator in 2015 and renamed the mine D-6 North Fork. See Mine Safety & Health Admin., *Mine Data Retrieval System*, <http://www.msha.gov/drs/drshome.htm> (last visited Aug. 31, 2015).

cutters, and roof bolts showing signs of bearing excessive weight do not necessarily suggest that a roof fall is imminent, but they can indicate a heightened risk of a fall. (Tr. 34:8–15, 101:17–22.)

The quality of the mine roof can vary based on a number of factors, including the composition of the roof, the presence of small seams of coal or water in the roof, the depth of the mine, and whether coal seams above and below the mine have been excavated.

Sandstone forms a strong roof, as it is a hard material that provides solid anchor points for roof bolts and does not easily crack and fall. (Tr. 40:2–9.) Conversely, laminate shale forms a particularly weak roof, as it consists of thin layers of shale rock that can more easily crack and separate. (Tr. 27:14–28:5.)

Veins of coal known as coal rider seams can also weaken the mine roof. (Tr. 37:19–38:6.) Because coal is a naturally weak and porous substance, a coal rider seam can undermine the roof's stability. (Tr. 37:24–38:6.) The location of the coal rider seam in the strata above the mined coal may vary across the mine. (Tr. 152:8–18.) Indeed, the coal rider seam may disappear altogether in some sections. (Tr. 152:8–14.) Because coal is softer and darker in color than shale or sandstone, a mine's roof bolters should notice when they drill through a coal rider seam. (Tr. 150:13–25, 151:8–12.) Coal rider seams can also be identified in the core hole samples taken by geologists and engineers during planning of the mine. (Tr. 151:13–152:7, 571:17–19.) A roof fall that contains a significant amount of black coal also may indicate the presence of a coal rider seam. (Tr. 153:1–4.)

The presence of water may further deteriorate a mine roof. (Tr. 58:23–25, 456:17–457:10, 463:6–13.) Water can erode parts of the roof, weakening it. (Tr. 58:23–25, 94:1–9.) Because coal is porous, coal rider seams can act like a sponge and hold water in the mine roof. (Tr. 38:3–6.) Moisture can also create draw rock, as rock may loosen while drying out. (Tr. 463:6–13.)

Overmining and undermining can also adversely affect roof conditions in a mine. (Tr. 564:1–3.) Overmining occurs when another coal seam above the mine is excavated and can change the way pressure from the overburden dissipates down through the mountain. (Tr. 50:21–51:18.) To minimize the impact of overmining, mines attempt to line up the location of their entries, crosscuts, and coal pillars, a process called “stacking the blocks.” (Tr. 51:8–14.) Aligning the coal pillars with those above and below allows the pressure from the overburden above the mines to go straight down through the blocks. (Tr. 51:1–18.) Conversely, improperly aligning the blocks can direct pressure onto the roof above excavated entries and passageways, accelerating the development of problems in the mine roof. (Tr. 53:8–16, 354:21–355:13.)

The depth of an underground coal mine also affects the mine's roof conditions. Shallow depths can exacerbate existing problems. (Tr. 111:17–21.) The amount of ground, or cover, over a mine varies with the topography of the surface, such as a mountain. (Tr. 111:23–112:9.) Where a mountain drops steeply into a valley or gulch, the mine's cover can vary sharply from one entry to the next. (Tr. 111:23–112:5.) This variance in cover can result in horizontally shifting pressures within the mine, particularly in mines that are shallow. (Tr. 110:25–111:16.)

B. Negative Factors Present in Big Laurel's Mine No. 2

Big Laurel's Mine No. 2 suffered from a number of these adverse roof conditions. Most of the mine's 4 Northeast Mains and 4 West Mains sections lacked a strong sandstone roof and had only a weaker laminate shale roof. (Tr. 58:8–12; Ex. GX–15.) In addition, a coal rider seam was present in much of the same area. (Tr. 38:7–12; Ex. GX–16.) Mine No. 2 was naturally wet, particularly in summer months, when fans pumped hot, humid air into the mine where it condensed on the cooler roof, ribs, and floor. (Tr. 139:2–10.) Further complicating matters, the Yellow Rose mine was engaged in overmining by mining a coal seam located 40 to 60 feet above Big Laurel's Mine No. 2. (Tr. 50:9–15, 52:2–11.) The Yellow Rose mine failed to stack the blocks with Mine No. 2. (Tr. 53:4–16; Ex. GX–17.) Finally, Mine No. 2 was a shallow mine, with cover of only around 350 feet near the 4 Northeast Mains section. (Tr. 603:14–20.) The 4 Northeast Mains area was located directly underneath a steep mountain valley. (Tr. 701:4–11; Ex. GX–14.) Taken together, a band of several inherently adverse roof conditions covered a significant area of the mine, including the active area in 4 Northeast Mains and part of the neighboring section, 4 West Mains.

C. Protective Measures Required in Mine No. 2

To ensure that underground coal mines are installing sufficient roof support, MSHA requires that each mine submit and follow an approved roof control plan. (Tr. 143:23–144:4, 145:11–19;) *see generally* 30 C.F.R. §§ 75.220–75.223 (discussing roof control plans). Roof control plans generally set maximum widths for entries and crosscuts, and minimum levels of roof support in each cut. (Tr. 32:12–23.) Mines are allowed to exceed the minimum support requirements by installing additional roof bolts or longer roof bolts. (Tr. 144:2–10.) Indeed, roof control plans generally contain clauses requiring an operator to install additional support when necessary to address adverse roof conditions. (Tr. 149:2–6, 16–20.) MSHA reviews the roof control plan during every quarterly inspection of the mine and every six months as part of a separate roof control review by MSHA specialists. (Tr. 135:14–19.) Where roof conditions deteriorate or a roof control plan has proven insufficient to support the mine roof, MSHA may require the operator to alter its roof control plan to better support the roof. (Tr. 148:10–22.) Such changes usually focus on the active mining section, not older sections that have already been mined. (Tr. 148:10–15, 503:10–12.)

Big Laurel's roof control plan required the mine to install rows of five fully grouted, five-foot-long roof bolts, as well as a cable bolt or superbolt in the entries. (Tr. 144:14–21; Ex. GX–18.) Big Laurel consistently exceeded its roof control plan by installing an additional bolt in each row. (Tr. 330:18–331:6, 465:21–466:8, 635:7–10.) The extra roof bolt provided additional support for the roof and helped shield Big Laurel from potential roof control violations if the ribs were to slough off, expanding the width of a passageway. (Tr. 330:18–331:6.) MSHA roof control specialist Scott Beverly reviewed the mine's roof control plan on August 16, 2011. (Tr. 189:24–190:20; Ex. GX–22; Exs. R–11, R–16.) Beverly and his superiors signed off on the roof control plan as adequate on August 28, 2011. (Tr. 190:11–20.) Prior to Beverly's semi-annual plan review, MSHA inspector Michael Hughes reviewed the roof control plan in June 2011 as part of his normal quarterly inspection of the mine. (Tr. 269:22–270:4; Ex R–11.)

Coal mines are required to conduct regular examinations to identify potentially hazardous roof conditions, including a weekly examination of the mine's intake and return airways. (Tr. 314:16–24, 490:7–19.) The airway examiner's duty is to ensure that potential roof and rib hazards in the intake and return airways are addressed before the conditions can block the airways or miners' travelways. (Tr. 314:16–24.) In 2011, MSHA required mines to report any unplanned rock falls on travelways and lifelines or that impede the airways. 30 C.F.R. § 50.10 (2011); (Tr. 65:4–17; 586:15–588:16; *see also* Ex. R–13 (MSHA's new policy on reportable roof falls)).

D. Big Laurel's History of Roof Falls

Despite consistently exceeding the mine's roof control plan by using extra roof bolts, Big Laurel experienced a number of unplanned roof falls at Mine No. 2 in 2011. (Tr. 199:8–16; Ex. R–9.) Mine No. 2 reported six roof falls to MSHA in the first seven months of the year. (Tr. 199:8–16.) The first roof fall in 2011 took place on January 19 in 4 Northeast Mains, approximately 1,000 feet from the active mining section. (Tr. 160:6–22; Ex. R–9 at 1; Ex. R–24.) This fall affected the No. 3 entry in 4 Northeast Mains, forcing the mine to move its alternate escapeway from the No. 3 entry to the No. 2 entry. (Tr. 86:8–18; Ex. R–25.) Then on February 8, a fall occurred in the return airway entry on 4 West Mains, an access panel directly adjacent to 4 Northeast Mains. (Tr. 165:17–19; Ex. R–9 at 2; Ex. R–24.) The fall on February 8 happened approximately 2,000 feet from the January 19 fall in 4 Northeast Mains, or approximately 3,000 feet from the active mining face. (Ex. R–9 at 2.) The 4 West Mains fall was followed one week later on February 15 by a fall in 1 North Mains. (Tr. 167:14–18; Ex. R–9 at 3.) 1 North Mains is an older section of the mine located approximately 11,000 feet from the active mining section in 4 Northeast Mains. (Tr. 168:23–25; Ex. R–24; Ex. R–9 at 3.) Following the February 15 fall, MSHA warned Big Laurel to adjust its roof control plan.

MSHA roof control specialist Chris Cain conducted the required six-month review of the mine's roof control plan on February 28, 2011. (Ex. R–11.) Cain found the plan insufficient due to the three roof falls since the start of the year. (*Id.*) On March 6, before Big Laurel could submit an updated roof control plan, the roof collapsed in the 3 Right panel off 4 Northeast Mains, disrupting the active mining section. (Tr. 171:21–172:19; Ex. R–9 at 4.) Following this fall, MSHA required Big Laurel to use longer and stronger bolts; however, the changes only affected the active mining section. (Tr. 174:13–175:12, 498:21–499:2.) This fall was located approximately 1,000 feet from the first fall on January 19. (Ex. R–25; Ex. R–9 at 4.)

The roof falls continued through spring and summer. On April 15, the roof collapsed again in the intake entry of the 3 Right panel of 4 Northeast Mains, approximately 600 feet from the working mine face. (Tr. 177:25–178:4; Ex. R–9 at 5.) Then on July 5, the roof collapsed in 4 West Mains, the access area abutting 4 Northeast Mains. (Tr. 177:25–178:4; Ex. R–9 at 6.) The July 5 fall occurred some 3,000 feet from the working face, but only about five crosscuts away from the previous fall in 4 West Mains on February 16. (Ex. R–9 at 6, Ex. R–24.)

Altogether, Big Laurel reported six roof falls to MSHA in January to July 2011, including three roof falls in the 4 Northeast Mains section, two in the adjacent 4 West Mains section, and one roof fall in the 1 North Mains area. (Exs. GX–21, R–22.) The mine also received 39

violations for section 75.202(a) regarding roof control in the two years prior to August 2011. (Tr. 204:8–11; Ex. R–10; *see also* Ex. GX–19 (copies of Virginia citations issued at Mine No. 2).) In August 2009, a miner died from a roof fall at Big Laurel’s Mine No. 2. (Tr. 61:19–20.)

IV. PRINCIPLES OF LAW

A. Significant and Substantial (S&S)

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

In providing guidance for the application of the *Mathies* test, the Commission has observed that “the reference to ‘hazard’ in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e. that the violation present a *measure of danger*.” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission also has indicated that “[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742–43 & n.13 (Aug. 2012). The Commission further has found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010) (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

B. Unwarrantable Failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (1987). It is characterized by “indifference,” a “serious lack of reasonable care,” “reckless disregard,” or “intentional misconduct.” *Id.* at 2003–04; *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test). Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. *See IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009). The Commission has identified several such factors, including: the length of time a violation has existed, the extent of the violative condition,

whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See id.* These factors are viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All relevant facts and circumstances of each case must be examined to determine whether an actor's conduct is aggravated or if mitigating circumstances exist. *Id.*

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. The August 22 Roof Fall in 1 North Mains — Citation No. 8178516

On August 22, 2011, a roof fall broke the miner tracking system in the 1 North Mains section of Mine No. 2. (Tr. 495:5–10.) The collapsed roof also fell on the lifeline, blocking the mine's primary escapeway. (Tr. 24:20–25:10.) Big Laurel called MSHA to ask whether they needed to report the fall. (Tr. 61:24–62:2.) MSHA confirmed that the roof fall was reportable, issued a withdrawal order pulling miners from the active mining section, and assigned roof specialist Christopher Cain to investigate the incident. (Tr. 24:20–25:10, 62:3–14.) Cain, who joined MSHA in October 2006 after eight years in the mining industry, had worked for the roof control team nearly a year in total by August 2011. (Tr. 28:22–29:15, 131:8–17, 132:1–7.) Cain was familiar with the history of roof falls at Mine No. 2, as he investigated several falls earlier in 2011, including the March 6 fall that led Big Laurel to adjust its roof control plan. (Tr. 171:23–172:1.)

At the mine, Cain met with Alpha Resources' assistant mine manager, John Richardson, who was acting for mine superintendent Steven Moore on August 22. (Tr. 378:4–25.) After reviewing the mine's examination reports, Cain, Richardson and mine foreman Tony Dean traveled underground to investigate the roof fall in 1 North Mains. (Tr. 62:20–63:8, 379:1–8.) There, Cain found miners already setting timbers in Entry No. 6 to reinforce the roof support and block off the approaches to the fall. (Tr. 63:5–16.) The fallen material was seven or eight feet high, nearly reaching the mine roof. (Tr. 181:18–25.) Cain believed he saw roofbolt plates around the fall curling at the edges and otherwise showing signs of bearing excessive weight. (Tr. 63:11–16.) Cain examined the adjacent intake entry, Entry No. 5, and found what he believed were similar signs of deterioration in the roof, including roofbolts bearing excessive weight. (Tr. 63:17–21.) Cain found significant amounts of moisture in both entries. (Tr. 64:1–4.)

Based upon his observations, Inspector Cain issued Citation No. 8178516, alleging a violation of 30 C.F.R. § 75.202(a):

A roof fall has occurred in the Primary Escapeway at S.S. 2778 along the No. 1 North Mains. Upon investigation, it was found that the immediate roof was deteriorated and weakened by moisture. Also roof bolt plates inby and outby the fall area showed signs of weight. When examined, test holes at S.S. 2768 and 2783 (both in the primary escapeway) indicated moisture in the mine roof. The hazard exists of

a miner traveling through the affected area and being contacted by falling roof material and receiving serious or fatal injuries. Miners work and travel through the affected area on a regular basis.

This mine has experienced a total of eight unintentional roof falls, six of these occurring in the past year. Also the operator has been cited 39 times in the past two years for failure to comply with 30 C.F.R. Part 75.202(a). The operator is hereby being put on notice to comply with 30 C.F.R. part 75.202(a) in all areas where miners work and travel. Failure to do so may result in an increase in negligence when cited.

Standard 75.202(a) was cited 38 times in two years at mine 4407087 (38 to operator, 0 to a contractor).

(Ex. GX-2 at 1-2.) Cain asserted that the violation affected one person and that a fatal injury was reasonably likely. (*Id.*) Cain designated the violation as S&S and characterized Big Laurel's negligence as "moderate." (*Id.*)

Mine superintendent Steven Moore subsequently examined the roof fall later on August 22. (Tr. 483:14-22.)

1. The Parties' Contentions and Principles of Law

The Secretary asserts that Big Laurel failed to fulfill the duty imposed by 30 C.F.R. § 75.202(a) when an uncontrolled roof fall occurred in Entry No. 6 of 1 North Mains on August 22. (Sec'y Br. at 26-28.) The Secretary also claims the mine failed to sufficiently support the roof in surrounding areas, including adjacent Entry No. 5, where miners were working. (*Id.* at 27-28.) The Secretary asserts that the insufficiently supported roof was reasonably likely to fall on a miner, and that any such incident could reasonably be expected to be fatal, making the violation S&S. (*Id.* at 28-29.) The Secretary further asserts that Respondent displayed moderate negligence by allowing dangerous roof conditions to go undiscovered and unaddressed for a significant amount of time. (*Id.* at 30.)

In response, Big Laurel claims the Secretary has not demonstrated that Big Laurel failed to support or otherwise control the mine roof in 1 North Mains. (Resp't Br. at 20.) Big Laurel asserts that the roof fall on its own is insufficient evidence to find a violation of 30 C.F.R. § 75.202(a). (*Id.* at 20-21.) Respondent argues no indications of deterioration of the roof existed prior to its collapse. (Resp't Reply at 2-3.) Respondent further claims that the alleged violation was not S&S because it did not contribute to a hazard, and that the mine was not negligent because it was in compliance with its roof control plan. (*Id.* at 23-28.)

Section 75.202(a) requires that operators support or otherwise control the roof of a mine to protect persons from hazards related to roof falls. 30 C.F.R. § 75.202(a). Accordingly, the Secretary must show (1) that the roof or ribs were not supported to protect persons from hazards related to roof falls and (2) the insufficiently supported roof or ribs were located in an area where

persons work or travel. See *Jim Walter Res., Inc.*, 37 FMSHRC 493, 495 (Mar. 2015). Because section 75.202(a) is worded broadly, the Commission has held that “the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard.” *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998) (citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987)). The Commission has further held that “a fatality resulting from a fall of roof material where persons work or travel unquestionably demonstrates a violation of section 75.202(a).” *Jim Walter Res.*, 37 FMSHRC at 496. Regarding the second element, the Commission has found that a single trip through an area of the mine is sufficient to constitute work or travel through the area. *Faith Coal Co.*, 19 FMSHRC 1357, 1359 (Aug. 1997).

2. Further Findings of Fact

Big Laurel’s mine examiner, Jesse Ring, testified that he found no indications the mine roof was weakening when he last examined the primary escapeway on August 17, five days prior to the fall. (Tr. 322:24–323:8, 328:3–16, 329:6–24.) Similarly, assistant mine manager John Richardson asserted there was no evidence after the August 22 fall of deteriorating roof conditions outside of the No. 6 entry, where the fall occurred. (Tr. 381:21–382:13.) Accordingly, Big Laurel asserts that there were no signs suggesting the need for additional roof support. (Resp’t Br. at 20–22.)

In contrast, Inspector Cain testified that he found roof bolts showing signs of bearing excessive weight in Entry No. 5, to which the lifeline was being rerouted. (Tr. 63:17–21.) Cain also claimed to find signs of further deterioration of the roof where miners were working to install supplemental roof support and isolate the roof fall.⁹ (Tr. 66:14–67:8.) Moreover, Cain testified that the conditions he found would not have developed suddenly, and similar conditions would have been present in Entry No. 6 prior to the fall. (Tr. 69:23–70:10.)

The roof fall in Entry No. 6 of 1 North Mains was large, covering an area some 25 feet long and 25 feet wide with rubble up to eight feet deep. (Tr. 68:16–19.) This roof fall was not the mere dislodging of a small amount of draw rock, but a failure of the beam in the roof that keeps the mountain off miners. Although I recognize that isolated occurrences of draw rock can appear without warning (Tr. 138:7–23, 268:1–9), a collapse of this magnitude indicates the mine roof

⁹ Respondent contends that Cain’s testimony is inconsistent with his actions during the roof fall investigation, as the inspector did not issue an imminent danger withdrawal order under section 107(a) of the Mine Act, 30 U.S.C. § 817(a), to the miners installing supplemental roof support. (Resp’t Reply at 3.) Respondent’s argument misconstrues the law. The Mine Act defines an “imminent danger” as a condition “which could reasonably be expected to cause death or serious physical harm *before such condition or practice can be abated.*” 30 U.S.C. § 802(j) (emphasis added). Violative conditions certainly may exist but not cross this heightened threshold of imminence. See *Connoly-Pacific Co.*, 36 FMSHRC 1549, 1555 (June 2014); *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 183 (Feb. 1991) (“the conditions created by [a S&S] violation need not necessarily be so impending as to constitute an imminent danger”).

showed prior signs of deterioration.¹⁰ See *Jim Walter Res.*, 37 FMSHRC at 496 (declining to adopt a *per se* rule that all roof falls are violations of the standard, but finding that a fatal fall of an eight-foot slab of rock unquestionably demonstrates a violation of section 75.202(a)). Given such a large collapse, I infer that there was a broader weakening of the mine roof, consistent with Cain's testimony that the roof showed signs of deterioration in neighboring entries and crosscuts. Finally, Cain's allegations are supported by the deposition testimony of mine superintendent Scott Moore, who examined the affected area several hours after Cain's investigation. Moore stated that he found a number of roof bolt plates taking excessive weight one crosscut away from the fall in Entry No. 6. (Tr. 592:1-5.) Moreover, Moore said these plates were not localized to a single line of roof bolts, but were scattered throughout the area. (Tr. 592:18-593:17.) I find Moore's deposition statements, read into the record at hearing, to be credible and supportive of Cain's testimony.¹¹

Based on the evidence before me, I find that the roof in 1 North Mains showed signs of deterioration in Entry No. 6 and adjacent Entry No. 5 near the roof fall. I further find that similar signs of the mine roof's pending collapse existed prior to the fall on August 22.

3. Analysis and Conclusions of Law

a. Violation – Citation No. 8178516

The mine roof in 1 North Mains showed signs of deterioration both in surrounding crosscuts and entries and at the site of the roof fall prior to its collapse. I determine that a reasonably prudent miner seeing such signs of an impending collapse would take additional steps

¹⁰ Big Laurel asserts that Virginia mine inspector Scott's notes suggest the roof was sufficiently supported because Scott did not issue a citation for the roof fall. (Resp't Br. at 22.) However, Scott did not arrive until two days after MSHA had already investigated the roof fall, and Scott's notes offer little pertinent information. (Ex. R-20.)

¹¹ Superintendent Moore's testimony at hearing deviated dramatically from that in his deposition. Moore's answers on cross-examination regarding the August 22 fall were at best unclear and potentially obfuscatory. (See Tr. 591:5-593:18.) In other instances, Moore contradicted his own previous testimony. (*Compare* Tr. 511:5-513:1 (Moore contending he told workers on the active section to be more vigilant after the August 22 citation), *with* Tr. 506:6-507:13 (Moore claiming he did not understand that Cain's notice from August 22 extended to the active section).) Moore similarly contradicted testimony from Big Laurel's other witnesses (See Tr. 368:10-18), as well as consistent statements from inspectors Cain and Hughes. (See Tr. 522:3-13, 529:9-22, 539:17-21, 593:18-594:13, 26:2-17, 82:6-15, 251:19-252:6, 543:15-544:14, 723:14-724:8; Ex. R-8 at 5; Ex. GX-12 at 11; Ex. GX-9.) These problems give me significant concerns about the accuracy of Moore's testimony. Accordingly, I do not give weight to any of Moore's testimony insofar as it contradicts the testimony of other witnesses. I do, however, give weight to Moore's contradictory deposition statements because the statements were against Moore and Big Laurel's interests. See *generally* Fed. R. Evid. 804(b)(3)(A) (creating exception to hearsay rules for statements against own interests).

to support or control the roof to protect persons from the hazards of a roof fall. The Secretary has therefore satisfied the first element of a violation.¹²

Big Laurel does not dispute the Secretary's contention that Entry No. 6 of 1 North Mains was an area in which persons worked and traveled. Miners examined the entry once per week and occasionally performed maintenance. (Tr. 67:1-8, 315:3-6, 316:15-24.) The entry was also used as a travelway to bring supplies in and out of the mine. (Tr. 69:11-17.) Accordingly, I determine that Entry No. 6 of 1 North Mains was an area worked and traveled for the purposes of section 75.202(a). *See Faith Coal*, 19 FMSHRC at 1359. Given the evidence before me, I conclude that Big Laurel violated 30 C.F.R. § 75.202(a).

b. Gravity and S&S Determination

Big Laurel's violation of section 75.202(a) establishes the first element of the *Mathies* test for a S&S violation. The second element of the *Mathies* test asks whether the violation contributed to a discrete safety hazard. Here, Cain credibly testified that the mine's failure to support its roof exposed miners to falling roof material.¹³ (Tr. 63:22-64:7, 67:21-24.) I credit Cain's testimony and determine the Secretary has satisfied the second *Mathies* element.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. Because miners regularly traveled the aircourse and primary escapeway in 1 North Mains, the Secretary claims a roof fall could reasonably be expected to result in an injury. (Sec'y Br. at 29.) As I have already noted, miners used the entry as a travelway and escapeway through 1 North Mains, and examiners checked the area weekly. (Tr. 67:1-8, 315:3-6, 316:15-24.) Miners also were preparing to reroute the affected lifeline through Entry No. 5, where the roof also showed signs of deterioration. (Tr. 63:9-21.) Big Laurel has not presented evidence to counter the Secretary's assertions regarding

¹² Big Laurel contends that it could not have violated the standard because it exceeded its roof control plan throughout the mine, including where the roof fall occurred in 1 North Mains. (Resp't Br. at 22-23.) However, the Commission has consistently held that a violation of the mine's roof control plan is not necessary to show a violation of section 75.202(a).

¹³ Respondent contends that the roof fall did not contribute to any discrete safety hazard, as required in the *Mathies* test. (Resp't Br. at 24.) Respondent asserts that the fall of the roof was limited to one intersection and would not expand further, and thus posed no ongoing threat to miners. (*Id.*) Respondent therefore argues that the roof fall was in fact the cure for an insufficiently supported roof, not the hazard to be feared. Accepting this tortured logic would effectively protect the most serious violations of section 75.202—those in which the mine has actually suffered a roof collapse—from sanction under the Mine Act. To the contrary, MSHA and the Commission have repeatedly recognized that roof falls rank among the most serious dangers in the mining industry. *See Consolidation Coal Co.*, 6 FMSHRC 34, 37-38 (Jan. 1984); *see also Safety Standards for Roof, Fall and Rib Support*, 53 Fed. Reg. 2354 (Jan. 27, 1988) (recognizing dangers of roof falls).

likelihood.¹⁴ Finally, Cain credibly testified that roof falls generally tend to be fatal for miners caught in the collapse. (Tr. 67:9–13.) Given this evidence, I determine that a roof fall was reasonably likely to occur and cause a serious injury, satisfying the third and fourth *Mathies* elements. Accordingly, Citation No. 8178516 was appropriately designated as S&S.

c. Negligence

Big Laurel also challenges the Secretary’s determination that the violative conditions were a result of the operator’s moderate negligence. (Resp’t Br. at 25–28.) Respondent emphasizes that Jesse Ring, a mine examiner with extensive experience, traveled the area five days prior and found no roof deterioration; thus, the mine had no warning of an impending fall. (*Id.* at 26–27.) Big Laurel also stresses that it exceeded its roof control plan throughout the mine. (*Id.* at 27.) The Secretary does not challenge Big Laurel’s contention that Ring conducted his exam. The Secretary instead argues that the operator should have identified the developing problems prior to the fall, as the conditions would take more than a short amount of time to develop. (Sec’y Br. at 30.)

I credit Cain’s testimony that the deteriorating roof conditions did not develop suddenly, and determine that Big Laurel should have known about the poor roof prior to August 22. In addition, the high number of reported roof falls since the start of the year, including one in the 1 North Mains section, put Big Laurel on notice that it needed to be more vigilant in checking for deteriorating roof conditions. Nevertheless, the Secretary has not produced substantial evidence suggesting how long the poor roof conditions lasted and were visible to miners traveling through the area. In addition, the inspector’s failure to cite Respondent for an inadequate examination suggests that the conditions could have been overlooked in an examination five days prior to the fall. Thus, the Secretary’s evidence shows that Big Laurel failed to identify relatively recent conditions that were not immediately obvious to an examiner. Accordingly, I conclude that Respondent’s negligence was moderate for Citation No. 8178516. *Cf.* 30 C.F.R. § 100.3(d) at Table X (suggesting “moderate negligence” where the “operator knew or should have known of the violative condition or practice, but there are mitigating circumstances”).

B. The August 31 Roof Fall and Investigation — Citation Nos. 8178521, 8191715, & 8178522 and Order Nos. 8178524, 8178523, & 8178525

Nine days later, on August 31, mine examiner Jesse Ring and Virginia state mine examiner Jerry Scott were conducting the weekly examination of the mine’s airways when they came across an unplanned roof fall in the No. 6 entry of 4 Northeast Mains. (Tr. 336:7–337:2.)

¹⁴ Respondent emphasizes that the *Mathies* test asks what is reasonably likely to occur, and not merely what “could” or “might” occur. (Resp’t Br. at 25.) Although Big Laurel points to *Tilden Mining Co.*, 24 FMSHRC 53 (Jan. 2002) (ALJ), for support, Respondent does not explain how that non-binding ALJ decision supports Big Laurel’s position. Instead, Respondent echoes its prior contention that no hazard existed and thus no injury would be reasonably likely to result. (Resp’t Br. at 25.) It is unclear how the cited case supports Respondent’s position, as *Tilden* does not address the *Mathies* test for S&S violations, but rather whether the Secretary proved the fact of a violation. *See Tilden*, 24 FMSHRC at 67. Moreover, decisions from Administrative Law Judges are not binding precedent. 29 C.F.R. § 2700.69(d).

Despite Superintendent Moore's protests to the contrary, State Inspector Scott felt the roof fall needed to be reported to MSHA. (Tr. 517:17–518:8.) Accordingly, Big Laurel reported the fall, and MSHA again assigned Inspector Cain to investigate. (Tr. 74:10–18.)

At the mine, Cain met with Superintendent Moore and MSHA Inspector Michael Hughes, who was already at the mine for the regular quarterly inspection. (Tr. 282:15–25.) After reviewing the weekly examination records, Cain asked Moore how Big Laurel planned to address the continuing roof falls. (Tr. 75:17–24.) Moore responded that the mine planned to continue to isolate the roof falls and install supplemental support when roof falls are encountered. (Tr. 75:24–76:6.)

Following Moore's response, Inspector Cain issued Citation No. 8178521, alleging a violation of 30 C.F.R. § 75.223(a)(1):

The operator of this mine did not propose a revision to the approved Roof Control Plan when conditions indicate that the plan is not suitable for controlling the roof, face, or ribs. This mine has had 7 roof falls in a one year period. Two of these roof falls in the last 10 days. The falls are not isolated to an exact area of the mine and have occurred in areas where miners work and travel on a regular basis. The hazard exists that if the roof falls are allowed to continue that a fatality will occur. This is the second issuance of this violation as a result of the mine's roof fall history in the past 7 months and the operator is being put on notice that failure to be proactive in the controlling of roof, face, and ribs at this mine may increase the negligence of any future citations under 30 C.F.R. Part 75 Subpart C ([sections] 75.200 thru 75.223 including all subparts).

(Ex. GX–8 at 1.) Cain asserted that the violation affected two people and that fatal injuries were highly likely. (*Id.*) Cain designated the violation as S&S and classified the operator's negligence as "moderate." (*Id.*)

Cain, Hughes, and Moore then traveled underground to investigate the fall. (Tr. 83:24–84:6.) Near the fall, the parties traveled through a large pool of water located in the primary escapeway, Entry No. 5. (Tr. 252:23–253:10.) The water stretched a length of two crosscuts. (Ex. GX–11 at 1.) Hughes did not see any water pumps set to address the accumulation. (Tr. 304:21–305:8.)

Based on his observations, Inspector Hughes issued Citation No. 8191715 to Big Laurel, alleging a violation of 30 C.F.R. § 75.380(d)(1):

The primary escapeway is not being maintained in a safe condition to always assure passage of anyone including disabled persons. When checked, the escapeway, starting at S.S. 3345 up to S.S. 3357 (2 breaks) contains water rib to rib and measures up to 8 [inches] deep.

The water is [murky] and not clear. The hazard exists that a miner may fall over unknown debris in the water and become injured. Miners travel this entry on a regular basis.

(Ex. GX-11 at 1.) Hughes asserted that the violation affected one person and that a permanently disabling injury was reasonably likely. (*Id.*) Hughes designated the violation as a S&S and assessed Big Laurel's negligence as "moderate." (*Id.*)

In Entry No. 6, the parties found the fall covering an area 25 feet long by 25 feet wide with as much as nine feet of rubble, reaching to the mine roof. (Ex. R-9 at 8.) Cain noticed a substantial amount of coal in the rock that had fallen out of the roof. (*Id.*) While investigating the new fall, Cain discovered an older fall also in Entry No. 6 just two crosscuts away. (Tr. 88:1-7.) Big Laurel had already isolated the older fall, installed timbers to stop its spread, and fully rock-dusted the area. (Tr. 99:22-100:2.) Although Entry No. 6 had been the mine's primary escapeway, Big Laurel never reported the older fall to MSHA, and mine workers and officials could not say with any specificity when the fall occurred. (Tr. 88:8-23, 356:24-358:20.) Big Laurel shifted the primary escapeway to Entry No. 5 around the time of the old fall. (Tr. 583:2-20.)

Cain examined the broader area around the two falls in Entry No. 6. The party traveled parts of entries No. 5 and 6, the intake air entries, and Entry No. 7, the return entry that was separated by stoppings from the other entries. (Tr. 84:7-13, 109:11-20.) In the entries, Cain examined several test holes and used a fiberoptic boroscope to better view the roof conditions. (Tr. 92:3-13.) Cain believed he saw a coal rider seam in the test holes he examined. (Tr. 92:8-13.) Cain also believed he saw a number of cutters and roof bolts bearing weight in all three entries. (Tr. 109:21-110:5.)

Based on his observations, Cain issued Citation No. 8178522, alleging a violation of 30 C.F.R. § 75.202(a):

The primary escapeway for the 001 MMU along the 4 Northeast Mains from S.S. 3051 inby to S.S. [3560] was not being supported or otherwise controlled to protect persons from hazards related to falling roof material. The area was supported with 5[-foot-long] fully grouted bolts and a combination of 8[-foot-long] super bolts and 12[-foot-long] cable bolts. This combination of roof support has been indicated to have failed due to numerous roof falls along the 4 Northeast Mains and other areas of the mine. The adjacent #6 entry has had two roof falls in an area outby the 3 Right panel. The only additional support found along the escapeway were 7 jacks and 2 posts (all located in the same intersection). When test holes were scoped the same conditions of gray laminate shale with coal streaks and a coal rider seam averaging 1 to 2 feet thick are present. Water is also present in the mine roof and was also found in the other roof falls. Cutters can be seen down the left ribline for most of the affected area and also along the right ribline [in] some areas. Draw [r]ock is present along the

primary escapeway. A mine map presented outside by the superintendent indicates that active mine above the 4 Northeast Mains did not stack their blocks with the blocks that were already mined in the 4 Northeast Mains. This condition can worsen roof and rib conditions in this mine. This mine has had seven roof falls in a one year period and two in the last 10 days. The hazard exists of a miner or miners traveling down the primary escapeway and being fatally injured due to falling roof material. This entry is traveled by miners on a regular basis.

This violation is an unwarrantable failure to comply with a mandatory standard. The mine operator and agents of the operator engaged in aggravated conduct constituting [] more than ordinary negligence in that:

1. An examination by an agent of the operator is conducted weekly through the area.
2. The condition is obvious with cutters going down the ribs, roof bolt plates showing signs of taking weight, and draw rock present in the entry.
3. Reasonable efforts were not made by the mine operator to correct or increase the roof support in the area. The mine has had to change the approved roof control plan due to roof falls occurring where the same combination of 5[-foot-long] fully grouted bolts with a combination of 12[-foot-long] cable bolts and 8[-foot-long] super bolts failed on the [No.] 3 Right Panel inby the affected area. (The plan changes were to install a combination of 6[-foot-long] fully grouted bolts and 16[-foot-long] cable bolts.) No additional support was found or installed in this area to protect miners and additional roof falls occurred in areas mined where the old plan was in effect and the old roof support was used.
4. This mine was put on notice to comply with 75.202(a) on 08/22/2011 due [to] the number of roof falls occurring where miners work and travel. Standard 75.202(a) was cited 29 times in two years at mine 4407087 (29 to the operator, 0 to a contractor).

(Ex. GX-4 at 1-3.) Cain asserted that the violation affected two people and that fatal injuries were highly likely. (*Id.* at 1.) Cain characterized Big Laurel's negligence as "high" and designated the violation as S&S and as the result of the operator's unwarrantable failure to comply with a mandatory health or safety standard. (*Id.*)

Inspector Cain then issued Order No. 8178524, alleging a violation of 30 C.F.R. § 75.202(a). The order alleged insufficient support in "[t]he right return bleeder for [No.] 1 Right, [No.] 2 Right, and [No.] 3 Right panels along the [No.] 4 Northeast Mains from S.S. 3052 to S.S. 3381." (Ex. GX-6 at 1-2.) Other than the location, the text of the order mirrored the text of Citation No. 8178522. (*Id.* at 1-3.) Cain similarly asserted that the violation affected two people and that fatal injuries were highly likely. (*Id.* at 1.) Cain also characterized Big Laurel's

negligence as “high” and designated the violation as S&S and as the result of the operator’s unwarrantable failure. (*Id.*)

Because Big Laurel’s Jesse Ring had completed an examination of the area earlier the same day, Cain also issued Order No. 8178523, alleging a violation of 30 C.F.R. § 75.364(b)(1):

The weekly examinations being conducted along the [i]ntake air course and primary escapeway along the [No.] 4 Northeast Mains are being conducted inadequately by the examiner. The records for the last month do not indicate the hazards found in the form of loose ribs, draw rock, and cutters present in the mine roof. No hazards were recorded for the [i]ntake listed in the Weekly Examination Book for examinations conducted in the month of August. The hazard exists of a miner being seriously or fatally injured due to one or numerous hazardous conditions being allowed to exist with no corrective action to protect miners from them. Miners work and travel through the area on a regular basis. This mine has a history of roof falls occurring in the [No.] 4 Northeast Mains and other areas where the examiner travels.

This violation is an unwarrantable failure to comply with a mandatory standard. The mine operator and agents of the operator engaged in aggravated conduct constituting [] more than ordinary negligence in that:

1. The examiner conducting the weekly exam of the intake air course is an agent of the operator.
2. The weekly examination record book is being certified by both the examiner and superintendent that a complete and accurate examination of the intake air course is being conducted.
3. The hazardous conditions present were obvious and extensive with only [an] isolated area with any type of corrective action (the installation of 7 jacks and 2 posts) being completed.
4. The mine has a history of roof falls and the hazards present indicate that a roof fall in the area can likely occur.
5. The hazards have existed for a period of at least two weeks or more.

(Ex. GX–5 at 1–2.) Cain again asserted that the violation affected two people and that fatal injuries were highly likely. (*Id.* at 1.) Cain similarly characterized Big Laurel’s negligence as “high,” and designated the violation as S&S and as the result of the operator’s unwarrantable failure. (*Id.*)

Cain also issued Order No. 8178525, alleging a violation of 30 C.F.R. § 75.364(b)(2) because “[t]he weekly examinations being conducted along the [r]ight [r]eturn air course for the 1 Right, 2 Right, and 3 Right panels along the 4 Northeast Mains are being conducted inadequately by the examiner.” (Ex. GX–7 at 1–2.) Other than the location, the text of Order No. 8178525 mirrors that of Order No. 8178523. (*Id.*) Cain asserted the violation affected two people

and that fatal injuries were highly likely. (*Id.*) He characterized Big Laurel’s negligence as “high,” and marked the violation as S&S and an unwarrantable failure. (*Id.* at 1.)

Big Laurel withdrew its miners from the active mining section as a result of these orders and shifted some mining equipment to another part of the mine. (Tr. 549:16–21.) The mine installed substantial supplemental roof support through the No. 5 and No. 7 entries to abate the alleged violations. (Tr. 121:9–19, 122:24–123:4, 124:3–9.) Cain eventually terminated the orders on September 12, 2011, approximately two weeks after the roof fall. (Tr. 125:2–8; Ex. GX–10.) Big Laurel also conducted a further geological survey of this area of the mine based on existing core hole data to better map the location of the coal rider seam. (Tr. 240:20–241:4; *see* Ex. GX–16.) Big Laurel never resumed mining from 4 Northeast Mains, but instead permanently closed and sealed the section in late 2011. (Tr. 550:5–9.)

1. Citation No. 8178521: Failure to Propose Changes to the Roof Plan

For Citation No. 8178521, the Secretary asserts that Respondent violated 30 C.F.R. § 75.223(a)(1) when it failed to revise the mine’s roof control plan for areas already mined despite repeated roof falls in those areas. (Sec’y Br. at 57–59.) The Secretary further claims the violation contributed to potential roof falls, and thus was S&S. (*Id.* at 59–60.) Finally, the Secretary argues that Big Laurel was highly negligent in failing to amend its roof control plans. (*Id.* at 60.) Respondent asserts that it did not violate section 75.223(a)(1), as the mine’s roof control plan already included provisions calling for additional support where necessary, and MSHA had repeatedly found the plan sufficient. (Resp’t Br. at 36–38.) Respondent also asserts that the alleged violation did not contribute to any hazard and that the mine was not negligent because the roof control plan had passed muster with MSHA. (*Id.* at 38–40.)

a. Violation

Section 75.223(a)(1) requires operators to propose revisions to a mine’s roof control plan when conditions in the mine indicate that the old plan is no longer suitable to control the roof, face, ribs, or coal or rock bursts. 30 C.F.R. § 75.223(a). When MSHA adopted this standard, the agency noted that “any condition which indicates the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts requires that the plan be revised.” 53 Fed. Reg. 2354, 2372 (Jan. 27, 1988). In interpreting and applying broadly worded standards, “the appropriate test is . . . whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). To prove a violation of section 75.223(a)(1), the Secretary therefore must show (1) the existence of adverse roof conditions at the mine, (2) that a reasonably prudent miner would have recognized the existing roof control plan was insufficient to address those negative conditions, and (3) the mine did not amend the roof control plan.

The parties do not dispute the existence of adverse roof conditions in parts of Mine No. 2. Although much of the mine had a strong sandstone roof, the 4 Northeast Mains and 4 West Mains sections had only a laminate shale roof that contained a coal rider seam and a source of water. (Tr. 58:8–12; Ex. GX–15, Ex. GX–16.) Mining had occurred both above and below Mine

No. 2, and the Yellow Rose mine above it had failed to properly stack the blocks in 4 Northeast Mains and 4 West Mains. (Ex. GX-14.) These adverse conditions are important factors in the mine's ability to control its roof and ribs. (Tr. 353:10-355:7, 390:1-17.) Accordingly, I determine that adverse conditions affecting the mine roof existed in 4 Northeast Mains and 4 West Mains, satisfying the first element of a violation.

Similarly, Respondent does not contend that it proposed modifications to the roof control plan to address adverse conditions away from the active mining section. Although Big Laurel adjusted its roof control plan at MSHA's direction in March, those changes only affected newly mined areas. (Tr. 498:7-499:2.) The Secretary therefore has demonstrated the third element of a violation of section 75.223(a)(1).

The only element at issue is the second: whether a reasonably prudent miner would have recognized the mine's existing roof control plan was insufficient to address the adverse conditions encountered in the mine. The Secretary asserts that the number of roof falls and the deteriorating conditions discovered in 4 Northeast Mains on August 31 demonstrated the obvious inadequacy of the roof control plan. (Sec'y Br. at 58.) The Secretary suggests that Big Laurel's installation of extensive supplemental roof support in Entry Nos. 2, 3 and 4 of 4 Northeast Mains prove the operator was aware of the dangers the adverse roof conditions posed. (*Id.* at 58-59.)

In contrast, Big Laurel claims it did not violate 30 C.F.R. § 75.223(a)(1) for two reasons. First, it asserts that the roof control plan was sufficient to address any deteriorating roof conditions in previously mined sections because the plan already contained provisions requiring the operator to install additional support wherever needed. (Resp't Br. at 37-38.) Contrary to the Secretary's assertion, Respondent contends that its installation of supplemental roof support through much of 4 Northeast Mains demonstrates the adequacy of the plan. (*Id.*) Second, Respondent asserts that it could not have known it needed to amend its roof control plan because plan revisions for previously mined areas are rare. (*Id.* at 37.) For support, Big Laurel points to MSHA's approval of the roof control plan just days ahead of the August 31 roof fall in 4 Northeast Mains. (*Id.* at 38.)

Mine No. 2 reported eight roof falls in the first eight months of 2011 and had at least one more significant roof fall that Big Laurel neglected to report. (*See* Ex. R-9 at 1-8.) Only one fall occurred at the active mining face; the remainder occurred in previously mined areas. (*Id.*) Seven of those nine falls were located in 4 Northeast Mains or the adjacent 4 West Mains, the sections affected by the band of inherently adverse roof conditions, including a poor laminate shale roof, a coal rider seam, overmining with unstacked blocks, and low cover with a steep ascent.¹⁵ (*See* Ex. GX-16.) All seven of those falls occurred within approximately 2,000 feet of the first fall in 4 Northeast Mains in January 2011. (*See id.*) These falls occurred despite Big Laurel's stated policy of going beyond the minimum required by the mine's roof control plan. Twice Big Laurel received explicit warnings from MSHA that its existing roof control measures were insufficient, first in a negative six-month review of the mine's roof control plan in February, and then in a

¹⁵ At hearing, Big Laurel's witnesses asserted that the number of falls was within reason for a mine the size of Mine No. 2. (Tr. 388:8-15.) This assertion amounts to a false equivalence that ignores the clustering of roof falls in an area that suffered from adverse conditions not prevalent throughout most of the mine.

citation for failing to propose changes to its plan. Even after these notices, Big Laurel only adopted changes affecting newly mined areas. Such changes bought Big Laurel a few months' respite from MSHA's scrutiny, but they did nothing to enhance miners' safety while working or traveling in previously mined areas, where the falls continued. Big Laurel's efforts to address the mine's deteriorating roof around 4 Northeast Mains and 4 West mains proved insufficient fall after fall, on January 19, February 8, March 6, April 15, July 5, and August 31. Only the fall on March 6 occurred on the working section.

The Mine Act imposes an affirmative duty on mine operators to protect the health and safety of miners. 30 U.S.C. § 801(e). Throughout 2011, Big Laurel failed to proactively adopt measures that would ensure its workers were protected from serious, deteriorating roof conditions in previously excavated areas. Where Big Laurel did install significant secondary support, it did so only in response to a roof fall, and then only in the entries critical to the continued production of coal, such as the section's belt entry and primary travelway.

Given the evidence before me, I determine that a reasonably prudent miner familiar with the protective purposes of the standard would have recognized that Big Laurel's existing roof control policies were insufficient to address the adverse roof conditions affecting the mine in 4 West Mains and 4 Northeast Mains. Big Laurel's repeated failure to prevent roof falls demonstrates that the existing clause allowing Respondent to install additional support as needed was insufficient. Revisions to the roof control plan for areas away from the face may be rare, but the repeated falls, coupled with MSHA's prior warnings, gave Big Laurel ample notice that its roof control plan was insufficient for certain areas of the mine. At the very least, prudence demanded that Big Laurel reexamine its core hole samples to identify the conditions behind the repeated roof failures in 4 Northeast Mains and 4 West Mains, and then increase its examinations of those areas to identify potentially hazardous conditions before they become deadly. Big Laurel made no such efforts until forced to adopt these measures to terminate the violation. (Ex. R-6 at 2.) The Secretary has thus proven the second element of a violation of section 75.223(a)(1).

The Secretary having shown all three elements of a violation of section 75.223(a)(1), I thus conclude that Respondent violated 30 C.F.R. § 75.223(a)(1).

b. Gravity and S&S

Big Laurel's violation of section 75.223(a)(1) establishes the first element of the *Mathies* test for a S&S violation. For the second element, the Secretary alleges that the obsolete roof control plan exposed miners to the hazard of roof falls.¹⁶ (Sec'y Br. at 59-60.) Mine No. 2 suffered on average one reported fall per month in 2011, including two in the last 10 days of August. Better, more frequent examinations would have discovered signs of deterioration and allowed the mine to supplement failing roof support or cordon off hazardous areas prior to the roof's collapse. Accordingly, I determine that Big Laurel's failure to amend its roof control plan

¹⁶ Big Laurel again asserts that its roof control sufficiently covered already-mined areas, and thus logically could not contribute to a hazard. (Resp't Br. at 38-39.) However, I already have found that the mine's existing roof control plan as applied was insufficient to address the set of inherently adverse roof conditions found in 4 Northeast Mains.

contributed to the exposure of miners to the hazards of a roof fall, satisfying the second *Mathies* element.

For the third *Mathies* element, the Secretary claims that the extent of the deteriorating roof conditions, the number of falls already experienced in 4 Northeast Mains, and the high level of danger posed by a roof fall made the hazard highly likely to result in an injury. (Sec’y Br. at 59.) Because the adverse roof conditions extended across the active mining area in 4 Northeast Mains, the likelihood of an injury was greater here than in 1 North Mains. Nevertheless, a designation of “highly likely” carries an air of imminence. *See Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 859 (June 1996) (considering an inspector’s change from “reasonably likely” to “highly likely” in accord with the inspector’s imminent danger order). Inspectors Cain and Hughes agreed that the conditions found in 4 Northeast Mains did not suggest another roof fall to be imminent. (Tr. 217:10–23, 226:13–227:2, 289:21–24.) The most traveled entries of 4 Northeast Mains had already been buttressed with cribs, timbers, high jacks, and beams. (Tr. 474:19–475:22.) Accordingly, I determine that the Secretary has not proven that an injury was highly likely to result; rather, the injury was reasonably likely. *See* discussion, *supra*, Part V.A.3.b.

As already explained, the injury from a roof fall could reasonably be expected to be fatal. *See* discussion, *supra*, Part V.A.3.b. Thus, the Secretary has met his burden of proving that the hazard of a roof fall was reasonably likely to cause injuries reasonably serious in nature, satisfying *Mathies*’ third and fourth elements. I therefore conclude that this violation was appropriately designated as S&S.

c. Negligence

The Secretary contends that Respondent was highly negligent in failing to amend its roof control plan, as the mine had abundant notice that its efforts were no longer sufficient to control the deteriorating mine roof. (Sec’y Br. at 60.) In its defense, Big Laurel points to MSHA’s recent review and approval of the plan as mitigating factors. (Resp’t Br. at 39–40.)

I share the Secretary’s concern that Big Laurel made little, if any, effort to understand and address the numerous roof falls in Mine No. 2, particularly in the 4 Northeast Mains and 4 West Mains areas. That said, I am also troubled by MSHA’s apparent lack of care. MSHA approved Big Laurel’s revisions in March, despite offering no better controls to previously mined areas. The agency then compounded its poor oversight by approving the mine’s existing plan in the August six-month review. These are significant oversights that improperly suggested the mine’s current roof control program was sufficient, despite numerous signs to the contrary. Although the Mine Act makes clear that Big Laurel is primarily responsible for ensuring the safety of its mine, MSHA’s actions partially mitigate the company’s negligence.¹⁷ *See* 30 U.S.C. § 801(e).

¹⁷ Big Laurel asserts that its history of installing additional support also mitigates any alleged negligence. (Resp’t Br. at 39.) As Inspector Cain noted at hearing, however, when a mine exceeds the minimum supports outlined in its roof control plan and the support still proves insufficient, the baseline shifts upward to at least the level of additional support being used.

(continued...)

Given these factors, I determine that Big Laurel was moderately negligent in failing to update its roof control plan. *Cf.* 30 C.F.R. § 100.3(d) at Table X (suggesting “moderate negligence” where some mitigating circumstances are present).

2. Citation No. 8178522 and Order No. 8178524: Conditions in 4 Northeast Mains

For Citation No. 8178522 and Order No. 8178524, the Secretary alleges that Respondent violated section 75.202(a) by allowing extensive dangerous roof conditions to develop unchecked in Entry No. 5, the intake entry and primary escapeway, and Entry No. 7, the return entry, of 4 Northeast Mains. (Sec’y Br. at 30–33, 51.) The Secretary asserts that the conditions constituted S&S violations, and that the dangerous nature of the conditions, the length of time they existed, and their obvious nature constitute aggravating circumstances amounting to an unwarrantable failure to comply with mandatory health or safety standards. (*Id.* at 33–44, 52.) Respondent contends the mine roof was sufficiently maintained and did not show deterioration or hazardous conditions in either entry. (Resp’t Br. at 43–46.) Big Laurel alternatively argues the conditions posed no hazard and the operator was not negligent. (*Id.* at 46–61.)

a. Further Findings of Fact

Respondent first asserts that the weight of testimony at hearing shows the entries had neither extensive cutters, nor numerous roof bolt plates taking weight, nor other adverse roof conditions. (Resp’t Br. at 45–46.) Respondent asserts that Inspector Cain’s findings lack all credibility. (*Id.* at 45.) In support, Respondent points to the testimony of Superintendent Steve Moore, Examiner Jesse Ring, State Inspector Jerry Scott, and MSHA’s Michael Hughes. (*Id.*)

Inspector Cain stated that the left-most entries of 4 Northeast Mains suffered deterioration early in 2011. As the mine settled, pressure shifted from Entry Nos. 1, 2, 3, and 4 to the right side of the section to affect Entry Nos. 5, 6, and 7. (Tr. 111:1–16.) This horizontal shift created sporadic cutters along the left-hand side of the entries and caused draw rock to form throughout the entries. (Tr. 28:9–15.) Cain’s contemporaneous notes, while not identifying the specific location of the hazards discovered, corroborate his testimony. (*See* Ex. GX–9.)

Again, a major roof fall such as the one that occurred in Entry No. 6 of 4 Northeast Mains indicates a broader weakening of the mine roof in the area. *See* discussion, *supra*, Part V.A.2. Moreover, this was the second such roof fall in the entry, the other taking place just two crosscuts away. (Tr. 88:2–13; Ex. GX–9 at 3.) This older fall and other signs of a deteriorating roof led Big Laurel to shift its primary escapeway to Entry No. 5 earlier in 2011. (Tr. 653:1–11.) In addition, nearby entries had also shown signs of deterioration. A fall in Entry No. 3 and broader deterioration prompted Big Laurel to install cribs, timbers, and beams throughout Entry

¹⁷ (...continued)

(Tr. 185:19–25.) In addition, Big Laurel’s installation of cribs and timbers throughout the main travelway and belt entries of 4 Northeast Mains did not result from the company’s proactive efforts to prevent roof problems. Rather, it was in reaction to a roof fall and other signs of deterioration. Big Laurel’s decision to adopt extra measures to protect active coal production areas does not permit the company to neglect to adopt similar protective measures elsewhere.

Nos. 2, 3, and 4. On the other side of the section, Big Laurel suffered two roof falls while mining the Right panels on the other side of Entry No. 7. Finally, the entire 4 Northeast Mains was covered by a band of inherently adverse roof conditions that could seriously, adversely affect the stability of a mine roof. (*See* Ex. GX-14; Ex. GX-15; Ex. GX-16.) This undisputed evidence supports Cain's testimony.

Big Laurel's efforts to address the violations further lend support to the allegations. Big Laurel spent nearly two weeks installing extensive supplemental support throughout Entry Nos. 5 and 7 to abate the conditions. Superintendent Moore contended that the mine installed this extensive support merely to ensure Cain would be satisfied. Cain, however, only ordered the mine to address violations in the No. 5 and 7 entries; MSHA did not direct the method of abatement. (Tr. 118:18-25.)

Big Laurel urges that I disregard this evidence and focus instead on the testimony from Moore, Hughes, Scott, and Ring. (Resp't Br. at 45.) First, Moore testified that the cited roof conditions were not present. (Tr. 528:10-16, 529:2-8.) As I noted above, however, Moore's testimony regarding the August 22 roof fall was fraught with inconsistencies. *See* discussion, *supra*, Part V.A.2. Given the considerable discrepancies in Moore's testimony, I afford it very little weight.

Inspector Hughes stated that he also found roof control violations during the investigation, but did not write up the conditions because they were incorporated by Cain's broader citation and order. (Tr. 252:15-22.) Although Hughes was not certain the conditions Cain identified were cutters, Hughes deferred to Cain's assessment. (Tr. 288:2-11, 294:20-295:1.) Moreover, Hughes admitted that he lacked the specialized training in roof control that Cain received.¹⁸ (Tr. 246:19-247:5.)

State Mine Inspector Scott testified that he did not find obvious cutters in Entry No. 5 on August 31 or during a return visit to 4 Northeast Mains in November 2011, after Big Laurel installed supplemental support. (Tr. 664:11-665:8, 669:13-670:13; Ex. R-21.) However, Scott did find extensive amounts of draw rock in the entry for nearly the entire length of 4 Northeast Mains. (Tr. 664:1-20.) Scott issued his own citation directing Big Laurel to clean the entry of excessive draw rock. (Tr. 664:17-20; Ex. R-23 at 34-36.) Scott was a seasoned inspector with nearly 38 years in underground mines, including 26 years with Virginia's Department of Mines, Minerals, and Energy. (Tr. 622:14-18, 625:5-15.) However, Scott's training and experience did not include the kind of intensive roof control training that Cain received to become a roof specialist.

Like Scott, Mine Examiner Jesse Ring asserted that he did not find any hazards related to the roof or ribs in the No. 5 or No. 7 entries. (Tr. 347:7-24.) Ring further stated that he checked test holes near the fall and did not find any cracks or other problems in the holes. (Tr. 339:9-12.)

¹⁸ Big Laurel points to Hughes's prior inspection notes to argue that the roof conditions cited by Cain did not exist. (Resp't Br. at 44, 46; Resp't Reply at 12.) However, I do not credit them, as Hughes admittedly lacked Cain's expertise and his inspection notes lacked specificity in relation to those areas cited by Cain. (Ex. R-15; Tr. 277:17-280:16; *see also* Ex. R-17 (notes of MSHA Inspector Larry Stanley from April 2011).)

He also did not find any roof bolt plates showing signs of taking excess weight from the nearby fall. (Tr. 339:13–19.) Ring did not record any information regarding the roof fall or the examination of neighboring entries in his notes.

Given the undisputed evidence before me, and recognizing the extensive training that MSHA specialists receive, I credit Cain’s testimony over that of Ring and Scott. Accordingly, I find that cutters, draw rock, and other indicators of a deteriorating roof existed throughout the intake and return entries in 4 Northeast Mains. Nevertheless, I recognize that Scott, Ring, and Hughes did not easily identify the cutters Cain discovered along the left ribs of Entry Nos. 5 and 7. I credit this testimony and find that some of the cited conditions were not obvious without close inspection. Based on the testimony of Cain, Hughes, and Scott, however, I find that the extensive accumulations of draw rock in the entries were obvious.

b. Violation

To demonstrate a violation of section 75.202(a), the Secretary must show (1) that the roof or ribs were not supported to protect persons from hazards related to roof falls and (2) the insufficiently supported roof or rib were located in an area where persons work or travel. I have already found that cutters and extensive amounts of draw rock were present in Entry Nos. 5 and 7, and it is uncontroverted that miners worked and traveled in the entries at least once a week. The only question before me, therefore, is whether a reasonably prudent miner would have recognized that the entries required additional support.

Signs of a poor roof existed throughout Entry Nos. 5 and 7. Although some of the signs were not obvious, the extensive draw rock was obvious to any miner of reasonable prudence. More importantly, the mine had a number of roof falls—at least eight in the eight months prior to August 31—and information showing numerous adverse roof conditions across 4 Northeast Mains. These falls would have prompted a reasonably prudent miner to explore the adverse conditions affecting the roof. Miners aware that an area contains a coal rider seam and suffers from improperly stacked blocks would be extra cautious in checking for signs of a deteriorating roof. (Tr. 355:8–13, 390:7–17.) Therefore, I determine that a reasonably prudent miner, prompted by regular roof falls and spurred by an explicit warning from MSHA, would have recognized that Entry Nos. 5 and 7 required additional support.

Given these considerations, I conclude that in Citation No. 8178522 and Order No. 8178524 the Secretary has satisfied the elements of a violation of section 75.202(a) for both Entry No. 5 and Entry No. 7 of 4 Northeast Mains. Big Laurel did not sufficiently support or control its roof in these entries to protect persons from the hazard posed by roof falls.

c. Gravity & S&S

Respondent violated section 75.202(a), satisfying the first part of the *Mathies* test. As explained earlier, an insufficiently supported roof exposes miners to hazards related to roof falls such as falling rock, satisfying the second prong of *Mathies*. See discussion, *supra*, Part V.A.3.b. A roof fall in a primary escapeway, travelway, intake airway, or return airway, reasonably could be expected to cause serious or fatal injuries, thus satisfying the third and fourth elements of the

Mathies test. See discussion, *supra*, Part V.B.1.b. As explained previously, the hazard was not highly likely to cause an injury because the cited entries were lightly traveled and a new fall was not likely in the immediate future. See *id.* I therefore conclude that the Secretary has demonstrated that Citation No. 8178522 and Order No. 8178524 were S&S, but reasonably likely rather than highly likely.

d. Negligence and Unwarrantable Failure

The Secretary designated both of these violations as unwarrantable failures and characterized Big Laurel's negligence in each case as high. In particular, the Secretary emphasizes that Big Laurel had notice the mine needed to better control its roof yet did nothing to improve its compliance in an area known to suffer from adverse conditions. (Sec'y Br. at 35–44.)

Looking to the factors for determining aggravated conduct, three of the seven factors favor the Secretary's unwarrantable failure allegation.¹⁹ First, the violative conditions were extensive. Cutters and excessive draw rock covered the length of Entry Nos. 5 and 7, approximately 2,000 feet. The cited conditions took Big Laurel nearly two weeks to fully address. See *Manalapan Mining Corp.*, 35 FMSHRC 289, 295 (Feb. 2013) (considering the time to abate violative conditions when assessing the extent of a violation). Second, the extent of the conditions suggests that they existed for a significant amount of time before they were addressed. As Inspector Cain credibly testified, such expansive conditions could not develop in a matter of hours, but over a long period of time. (Tr. 99:7–25.) Moreover, the mine first noticed deteriorating roof conditions on the right side of the section in Entry No. 6 *several months* prior to the August 31 investigation. (Tr. 579:1–581:3.) Third, given the extent of the violation and the threat posed by roof falls, the conditions posed a high degree of danger to miners.

In its defense, Respondent contends that it did not have notice that greater efforts at compliance with section 75.202(a) were necessary. (Resp't Br. at 52–56.) Big Laurel asserts that Cain's explicit notice was insufficiently precise to put the mine on notice for conditions in 4 Northeast Mains. (*Id.* at 54–56.) Respondent further insists it was not on notice from prior citations, as the operator had steadily reduced its violations of section 75.202(a). (*Id.*) Respondent's first argument misrepresents the nature of MSHA's notice. In putting Big Laurel on notice on August 22, Cain did not direct Big Laurel to install additional support throughout the mine, but to be more vigilant in finding deteriorating roof conditions so the conditions could be addressed or otherwise controlled to protect miners. At the very least, this requires informing the mine examiners to be more thorough during examinations. See *IO Coal*, 31 FMSHRC at 1354 (emphasizing that mine management had a duty to raise safety awareness of potential hazards on all mine sections, not merely those close to prior cited hazards). Big Laurel did not take even this modest step. Second, Big Laurel's improving citation history belies the large number of falls Mine No. 2 suffered in 2011. The eight prior falls in the first eight months of the year and the adverse roof conditions placed Big Laurel on notice that it needed to be more

¹⁹ Respondent challenges the extent, duration, and danger of the violation on the grounds that the violative conditions did not exist. I have already made findings to the contrary.

assiduous in supporting the roof of 4 Northeast Mains. This notice simply reinforced Cain's directive that the mine would be subject to heightened penalties for future failure to comply.²⁰

Next, Big Laurel argues that it neither knew nor should have known of the violative conditions. (Resp't Br. at 56–58.) Respondent emphasizes that the roof fall in Entry No. 6 took place between the weekly examinations by Examiner Ring. (*Id.* at 56.) Whether Big Laurel should have discovered the fall in Entry No. 6 earlier is tangential to the issue at hand. Cain cited Big Laurel not for the fall but for extensive deterioration of the roof in adjacent entries. Those conditions developed over a long period of time, giving the mine ample opportunity to find and address the problems. Given Big Laurel's heightened notice, the operator should have known of the broader problems in 4 Northeast Mains.²¹

Big Laurel also asserts that it made reasonable efforts to protect miners from roof falls. (Resp't Br. at 59–61.) Although Big Laurel exceeded the minimum requirements of its roof control plan, those minimums are not relevant where adverse roof conditions requiring additional support are present. Indeed, I have already found that the mine's roof control plan was inadequate. Big Laurel failed to sufficiently protect its miners from hazardous conditions it knew about. Although the mine rerouted its lifeline away from Entry No. 6 in 4 Northeast Mains, the operator did not close off access points to the entry as close as two crosscuts from the older fall. Big Laurel's examination books also could not warn miners of the dangers of Entry No. 6 because the mine kept no record of when hazardous conditions first appeared in the entry.²² In reality, Big Laurel made no notable effort to address the deteriorating mine roof in Entry Nos. 5, 6, and 7.

Of the seven factors in the unwarrantable failure analysis, only the obviousness of the violation does not weigh sharply against Respondent. Even though the extensive draw rock in the area was obvious, some of the violations were not as obvious as Cain asserted. *See* discussion,

²⁰ Superintendent Moore's reaction to the discovery of another roof fall further suggests Big Laurel understood it was subject to heightened sanctions. Rather than immediately calling in the discovered fall to MSHA, Moore attempted to dissuade Inspector Scott from reporting the collapse. (Tr. 612:8–13.) Such a reaction suggests that Big Laurel's management was far more concerned with the pecuniary impact of calling in the fall than the serious risk it posed to miners.

²¹ Respondent also insists that it had no knowledge of the "specific existence of a coal rider seam" in 4 Northeast Mains, and thus should not have known that the bad roof conditions existed. (Resp't Br. at 57.) Assistant Mine Manager Richardson, however, admitted knowing of the coal rider seam, and examiner Jesse Ring had seen the coal rider seam depicted on a map. (Tr. 389:6–17, 351:21–352:4.) Furthermore, Big Laurel's engineers held proof of the coal rider seam in core samples, with which the company was able to produce a general map of the seam. MSHA may not previously have demanded the core hole data from Big Laurel, but MSHA's failure does not excuse Big Laurel's own willful ignorance. The Mine Act places primary responsibility for protecting miners' safety upon the mine operator. 30 U.S.C. § 801(e).

²² Pointing to Moore's testimony, Respondent asserts it warned miners and enlisted the help of engineers. I do not find Moore's testimony credible. *See* discussion, *supra*, Part V.A.2.

supra, Part V.B.2.a. Accordingly, this factor does not weigh either for or against a determination that Big Laurel’s conduct constituted more than ordinary negligence.

Big Laurel had numerous signs that the mine roof was no longer stable in 4 Northeast Mains. Despite these signs, Big Laurel’s management did not seek help from mine engineers to better understand the cause of the mine’s repeated roof falls. (Tr. 387:16–388:21, 504:15–22.) Indeed, Assistant Mine Manager Richardson could not even recall whether the mine had a history of roof falls prior to August 2011, despite seven falls occurring in as many months. (Tr. 388:16–389:5.) Moreover, Richardson admitted that the mine did not heed MSHA’s explicit warning to do more to address roof falls because Big Laurel felt its existing efforts were sufficient. (Tr. 386:20–387:15.) Big Laurel’s management knew of the coal rider seam and the overmining problems at Mine No. 2, but did not believe the conditions merited any additional attention. (Tr. 389:6–21.) Undaunted by eight roof falls in as many months, Big Laurel pushed coal production without any attempt to understand the reasons for the falls. Unfazed by a direct warning from MSHA, Big Laurel pushed coal production without even notifying its safety examiners of the need for greater vigilance. Unconcerned about the potential for another fatal roof collapse, Big Laurel addressed the serious safety concerns only insofar as they threatened the mine’s haulage and belt entries, and thus the company’s bottom line. More than simply ignoring the signs of danger, Big Laurel made some attempt to prevent MSHA from learning about two serious roof falls within the mine. In disregarding these signs, Big Laurel placed production ahead of worker safety. This is precisely the type of aggravated conduct the unwarrantable failure provisions of the Mine Act are designed to deter.

Based on the evidence before me, I find that for Citation No. 8178522 and Order No. 8178524 Big Laurel’s conduct in violating section 75.202(a) in Entry No. 5 and Entry No. 7 amounted to an unwarrantable failure to comply with a mandatory health or safety standard. For the same reasons, I also determine that Big Laurel was highly negligent in failing to address the deteriorating roof conditions throughout the No. 5 and No. 7 entries. *Cf.* 30 C.F.R. § 100.3(d) at Table X (suggesting “high negligence” where the “operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances”).

3. Orders Nos. 8178523 and 8178525: Insufficient Examinations

For Order Nos. 8178523 and 8178525, the Secretary asserts that Respondent did not satisfy its duty under 30 C.F.R. § 75.364(b)(1) and 75.364(b)(2), respectively, by failing to identify the hazardous roof conditions during the mine examiner’s weekly examination of the intake and return airways of 4 Northeast Mains. (Sec’y Br. at 44–46, 54–55.) As with the underlying roof control violations, the Secretary claims these violations were S&S and that Big Laurel’s conduct constituted high negligence and an unwarrantable failure. (*Id.* at 46–50, 55–56.) Respondent asserts that it did not violate sections 75.364(b)(1) or 75.364(b)(2) because its examiner conducted a sufficient examination of the entries. (Resp’t Br. at 65–67.)

a. Violation

To show a violation of sections 75.364(b)(1) and 75.364(b)(2), the Secretary must demonstrate that either no examination for hazards took place, or that the examination took place

but the examiner failed to identify hazards. Here, the Secretary alleges that Ring's examination on August 31 was insufficient because he failed to notice hazardous roof conditions throughout Entry Nos. 5 and 7.

I have found that Respondent violated section 75.202(a) by failing to support extensive deteriorating roof conditions in Entry No. 5 and Entry No. 7. Although Examiner Ring stated he actively pulled draw rock during his examinations, his contemporaneous notes fail to identify any hazards. (Ex. GX-13.) Ring performed an examination of the intake and return entries of 4 Northeast Mains just hours prior to Cain's investigation, yet Ring again did not identify any safety hazard in the examination. (*Id.*) Ring's sparse note-taking was not isolated to August 31, as the mine examiner's notes do not identify with specificity any roof hazards going back to the start of July 2011. (*Id.*) Notably, Ring never noted either the prior roof fall in Entry No. 6 or the other hazardous conditions that Big Laurel says required the lifeline to be moved to Entry No. 5. (Ex. GX-13; Tr. 356:24-358:22, 361:5-362:8.) Given this evidence, I determine for Orders Nos. 8178523 and 8178525 that Ring conducted an insufficient examination of the return and intake airways on August 31, 2011, in violation of sections 75.364(b)(1) and 75.364(b)(2), respectively.

b. Gravity and S&S

Applying the *Mathies* test, Big Laurel's violation satisfies the first element. The Commission has recognized that examinations are "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). The purpose of weekly examinations such as those required under section 75.364(b) is "to discover and correct conditions posing a hazard to miners" in areas not normally examined during regular preshift and onshift examinations. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 693 (July 2002) (considering predecessor provision of section 75.360(b) in the Federal Coal Mine Health and Safety Act of 1969) (citations omitted). Ring's failure to identify the deteriorating roof allowed poor roof conditions to persist and left miners with access to the dangerous areas. Thus, Ring's insufficient examination contributed to the hazard of a roof fall, satisfying the second element of the *Mathies* test. As explained above, the roof fall was reasonably likely, but not highly likely, to contribute to an injury, and that injury reasonably could be expected to be serious or fatal. *See* discussion, *supra*, Part V.B.1.b. Accordingly, the Secretary has satisfied the third and fourth elements of *Mathies*. Based on the evidence before me, I therefore conclude that for Order Nos. 8178523 and 8178525 Respondent's violations of section 75.364(b)(1) and section 75.364(b)(2) were S&S, and reasonably likely.

c. Negligence and Unwarrantable Failure

The Secretary again asserts that Respondent's conduct amounted to high negligence and an unwarrantable failure. (Sec'y Br. at 48, 56.) Respondent avers that it was not negligent because Examiner Ring discovered the roof fall on August 31 and thoroughly examined the surrounding area. (Resp't Br. at 67-69.)

In analyzing an inadequate examination for an unwarrantable failure determination, many of the aggravating factors overlap with those of the underlying violation. *See Consolidation Coal Co.*, 23 FMSHRC 588, 597-98 (June 2001) (remanding for consideration of the extent, duration,

and obviousness of the underlying violative coal accumulations when assessing unwarrantable failure of an inadequate preshift examination). However, the Commission has focused on how long the operator's examination had been inadequate and whether the operator was on notice that it needed to improve its safety checks. *See Va. Slate Co.*, 23 FMSHRC 482, 492 (May 2001) (vacating an ALJ's decision of no unwarrantable failure for violating preshift requirements).

The duration of the inadequate examination significantly overlaps with the duration of the underlying violations. As Cain explained, the signs of a deteriorating roof developed over a period of weeks or months. (Tr. 99:7–25.) Nevertheless, Ring's examination notes for months contained scant details. (Ex. GX–13.) Ring never identified the location of any roof hazards, despite several serious roof falls during the period. Accordingly, the duration of the violation was substantial.

In addition, Big Laurel was on notice that its examinations were insufficient. Cain warned the operator on August 22 that it needed to improve its efforts at supporting or controlling the roof. Inherent in that demand is notice that the operator must improve its examinations to find potential hazards so they can be addressed more quickly. Big Laurel itself knew of its inadequacy, noting that examinations needed to improve. (*See Ex. GX–27.*) Despite acknowledging the need for improved inspections, Big Laurel's management never informed Ring that his work needed to improve. The company therefore made no efforts to address its insufficient examinations despite having explicit notice of its shortcomings.

The other factors for determining whether Big Laurel's behavior constituted aggravated conduct mirror those for the underlying violations. As discussed above, the undiscovered violative conditions were extensive and the danger posed by the unnoticed conditions high.

Finally, the underlying violations were not entirely obvious. Accordingly, this factor does not weigh in favor of either side.

Given these considerations, I determine that for Orders Nos. 8178523 and 8178525 Big Laurel's violations of sections 75.364(b)(1) and 75.364(b)(2) were unwarrantable failures to comply with mandatory health or safety regulations. For the same reasons, and those explained above, I also conclude that for both violations Big Laurel was highly negligent in allowing the insufficient examinations to continue unchecked for months.

4. Citation No. 8191715: The Blocked Escapeway

Section 75.380 requires that underground coal mine operators maintain a primary escapeway in a safe condition to assure passage of anyone, including injured miners. 30 C.F.R. § 75.380(d)(1); *see Maple Creek Mining, Inc.*, 27 FMSHRC 555, 556–57 (Aug. 2005). Operators must keep escapeways clear for miners to quickly exit the mine in the event of an emergency. *Mach Mining, LLC*, 35 FMSHRC 2937, 2942–43 (Sep. 2013) (citing *Am. Coal Co.*, 29 FMSHRC 941, 948, 953–54 (Dec. 2007)). Furthermore, the Commission has held that the test with respect to the use of an escape route “is not whether miners have been safely traversing the route under normal conditions, but rather the effect of the condition of the route on miners’

ability to expeditiously escape a dangerous underground environment in an emergency.” *Am. Coal Co.*, 29 FMSHRC at 950 (citations omitted).

The Secretary alleges that Respondent violated section 75.380(d)(1) when it allowed a large volume of water to accumulate in the primary escapeway in 4 Northeast Mains. (Sec’y Br. at 61–62.) The Secretary further contends that the violation was S&S because the pool of water obscured debris that reasonably could cause miners traveling the escapeway on foot to trip and fall. (*Id.* at 62–63.) MSHA initially evaluated Respondent’s negligence in this case as moderate, but the Secretary argues in his brief that I should raise the level of negligence based on the evidence adduced at hearing. (*Id.* at 63.) In contrast, Respondent claims the escapeway was maintained in a safe condition, and thus there was no violation of the regulation. (Resp’t Br. at 70–71.) In the alternative, Big Laurel argues the violation was neither S&S nor the result of the operator’s negligence. (*Id.*)

a. Further Findings of Fact

Big Laurel contends that the Secretary has not met his burden of proof of showing a violation. (Resp’t Br. at 70–71.) Respondent relies on the testimony of Examiner Jesse Ring and State Inspector Jerry Scott, who traveled the affected area approximately six hours before Hughes. (*Id.* at 70.) Although Ring and Scott found water in Entry No. 5, it was less extensive than Inspector Hughes noted. (Tr. 349:1–21, 694:21–695:5.) Neither Ring nor Scott felt the water accumulation at that time made the escapeway dangerous to travel. (Tr. 339:20–24, 694:5–14.)

Although Ring and Scott suggest the water accumulation was smaller prior to Inspector Hughes’ arrival, they do not refute the Secretary’s evidence in support of the citation. Scott explicitly suggested that the water could have continued to accumulate in the primary escapeway after his inspection. (Tr. 693:10–15.) Hughes similarly believed the water may have accumulated in the escapeway as a result of the recent roof fall in Entry No. 6. (Tr. 255:23–256:3.) Although Big Laurel had water pumps in 4 Northeast Mains to remove water, the pumps were not addressing the cited accumulation. (Tr. 350:4–6, 304:21–305:8, 559:4–9.)

Given the evidence before me, I conclude that the water continued to accumulate in the primary escapeway after Ring and Scott left the area. By the time Hughes arrived in the area, the water spanned the entire width of Entry No. 5 for a distance of two crosscuts and in depths of up to eight inches.

b. Violation

I have determined that the water accumulation obstructed the entire escapeway for a length of two crosscuts. Therefore, the existence of a violation hinges on the question of whether the water made traveling the route dangerous for miners attempting to escape an accident in the mine. Here, the water was eight inches deep and overlaid a mine floor that was covered in draw rock. (Tr. 693:16–21.) This amount of water could hide problems on the mine floor, causing miners to trip and fall and slowing their escape from a mine disaster. (Tr. 253:5–16.) Although the inspectors were able to safely travel through the water in vehicles (Tr. 558:21–559:3), they

were neither on foot nor escaping from a dangerous incident elsewhere in the mine. During an emergency evacuation, miners would likely need to move quickly through the area to seek safe passage away from danger. *Maple Creek*, 27 FMSHRC at 560 (citing 61 Fed. Reg. 9764, 9810 (Mar. 11, 1996)).

Given the evidence before me, I conclude that such a long stretch of water eight inches deep, combined with questionable conditions on the mine floor, would significantly slow miners escaping from a danger at the face of the mine, particularly miners carrying an injured colleague. Accordingly, the Secretary has satisfied the second element of a violation of section 75.380(d)(1), and thus shown that Big Laurel violated 30 C.F.R. § 75.380(d)(1) in Citation No. 8191715.

c. Gravity and S&S

Big Laurel's violation of the standard establishes the first *Mathies* prong. For the second element, I credit Hughes' testimony that the water created a trip-and-fall hazard that would slow miners' escape in an emergency.²³ (Tr. 253:11–19.) Consequently, I determine that the Secretary has satisfied his burden of proof on the second element of the *Mathies* test.

With regard to the third and fourth elements of the *Mathies* test, The Secretary contends that, given emergency conditions, the bad conditions of the escapeway would be reasonably likely to cause reasonably serious injuries. (Sec'y Br. at 62.) I have credited Hughes' testimony that, given a hurried escape from a mine accident, panicked miners would be reasonably likely to trip and fall while traversing the watery escapeway with hidden hazards. (Tr. 254:1–4.) Hughes explained that trip-and-fall accidents could result in broken bones and twisted limbs. (Tr. 253:23–254:10.) The Commission has consistently recognized that such injuries are of a sufficiently serious nature to support a S&S designation. *See, e.g., S & S Dredging Co.*, 35 FMSHRC 1979, 1981 (July 2013) (overturning a Judge's ruling that muscle strains were insufficient to underpin a S&S designation). Based on this testimony, I determine that the Secretary has shown that, in an emergency situation, the accumulated water would be reasonably likely to cause a reasonably serious injury, thus satisfying the third and fourth prongs of the *Mathies* test. Based on the evidence before me, I conclude that Citation No. 8191715 is S&S.

d. Negligence

The Secretary next asserts that the water accumulation was the result of Big Laurel's high negligence. (Sec'y Br. at 63.) The Secretary argues that Inspector Hughes was incorrect in initially assessing the violation as being the result of moderate negligence because the mine knew of the accumulation and did nothing to remedy the condition. (*Id.*) Respondent contends it was not negligent in allowing the water to accumulate, as the mine had pumps in the area to remove the water. (Resp't Br. at 72–73.)

²³ Big Laurel emphasizes that the inspectors traveled the escapeway without incident during their investigation. (Resp't Br. at 71) Respondent again fails to address the conditions likely present in an emergency.

The water largely accumulated in the hours between the discovery of the fall and the arrival of Inspectors Hughes and Cain. *See* discussion *supra*, Part V.B.4.a. The accumulation was smaller when Ring and Scott examined the area, so the mine could not appreciate the extent of the problem. In addition, Big Laurel kept pumps in the area to address similar water accumulations. (Tr. 304:21–305:2.) Although the pumps were not in use upon Hughes’ arrival, the mine was prepared to address the conditions.

I determine that these factors mitigate Big Laurel’s negligence. Accordingly, I conclude that Hughes’ initial assessment of moderate negligence for Citation No. 8191715 is appropriate.

VI. PENALTY

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator’s history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator’s business; (3) the operator’s negligence; (4) the penalty’s effect on the operator’s ability to continue in business; (5) the violation’s gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). The parties have stipulated that the fines will not affect the operator’s ability to remain in business, and the operator abated the conditions in good faith. (Joint Ex. 1.) I further note that Big Laurel was a relatively large mine. (Tr. 631:7–11.) The Secretary proposed a combined penalty of \$305,800.00 for all seven violations.

A. Citation No. 8178516, August 22, 2011

I have determined that Big Laurel violated section 75.202(a), and that the violation was S&S and the result of the operator’s moderate negligence.

The Secretary has proposed a specially assessed penalty of \$52,500.00 for Citation No. 8178516, asserting that this substantial penalty is necessary to deter the operator from committing future violations of this standard. (Sec’y Br. at 63–67.) At hearing, Cain testified that he suggested the enhanced penalties because of the mine’s lack of effort to prevent future falls. (Tr. 103:20–104:12, 107:21–108:6.) Inspector Hughes, however, expressed uncertainty about the need for such an enhanced penalty. (Tr. 294:7–296:21.) In the two years prior to the violation, the mine received 38 violations under section 75.202(a). (Ex. GX–26.) I recognize that section 75.202(a) is a widely cited standard. (Ex. R–12.) The August 22 roof fall was the latest in a line of serious roof falls, however, not minor violations of the standard. (*See* Ex. GX–27; Ex. GX–28.) Nevertheless, this fall in 1 North Mains was nearly two miles away from all but one of the prior falls in Mine No. 2 and did not evidence the same adverse roof conditions found in 4 Northeast Mains. Furthermore, Inspector Cain warned Big Laurel with Citation No. 8178516 of substantially enhanced penalties for any *subsequent* violations of section 75.202(a). Given these factors and the mitigating evidence that supported a finding of moderate negligence, the Secretary’s proposed penalty is not appropriate. Considering all of the facts and circumstances of this matter, I assess a penalty of \$25,000.00 for this citation.

B. Citation No. 8178521, August 31, 2011

The Secretary has proposed a penalty of \$6,996.00 for Citation No. 8178521. I have determined that Big Laurel violated section 75.223(a)(1) and that the violation was S&S and the result of Respondent's moderate negligence. Big Laurel received one prior citation for violating 75.223(a)(1) in the two years prior to August 31, 2011. (Joint Ex. 1.) I reduced the likelihood determination from "highly likely" to "reasonably likely" and the negligence finding from "high" to "moderate." Given the serious risk posed by roof falls, however, these changes do not justify a significant reduction in the penalty. Considering all of the facts and circumstances involved in this matter, including the parties' admissions regarding the six civil penalty criteria, I determine a penalty of \$6,000.00 is appropriate for this violation.

C. Citation No. 8178522 and Order No. 8178524, August 31, 2011

The Secretary has proposed a penalty of \$70,000.00 each for Citation No. 8178522 and Order No. 8178524. In each instance, I have upheld the violation and found it to be S&S and the result of Respondent's unwarrantable failure to comply with section 75.202(a), but reduced the likelihood from "highly likely" to "reasonably likely." In the two years prior to the violation, the mine received 39 violations under section 75.202(a). (Ex. GX-26.) Big Laurel's conduct was unjustified. Nevertheless, given the reduced likelihood and the substantiated questions regarding the obviousness of the cited conditions, I assess a penalty of \$63,000.00 for each violation.

D. Order Nos. 8178523 and 8178525, August 31, 2011

The Secretary has proposed a penalty of \$52,500.00 each for Order No. 8178523 and Order No. 8178525. In each instance, I have upheld the violation and found it to be S&S and the result of the Respondent's unwarrantable failure to comply with section 75.364(b)(1) and section 75.364(b)(2), respectively, but reduced the likelihood to "reasonably likely." I note that Big Laurel had no previous violations of 30 C.F.R. § 75.364(b)(1) in the two years prior to this inspection, and two prior violations of 30 C.F.R. § 75.364(b)(2). Because I have reduced the likelihood and found the conditions to be marginally less obvious than the Secretary asserted, I assess a penalty of \$47,000.00 for each violation.

E. Citation No. 8191715, August 31, 2011

The Secretary has proposed a penalty of \$1,304.00 for Citation No. 8191715. Turning to the six statutory penalty criteria, I have found that Big Laurel violated section 75.380(d)(1), and that the violation was S&S and the result of Big Laurel's moderate negligence. Big Laurel's violation history reveals it received one citation for violating section 75.380(d)(1) in the two years prior to the citation in question. Considering these factors, as well as the mine's large size, ability to pay the penalty, and its good faith in abating the conditions, I determine the Secretary's proposed penalty of \$1,304.00 is appropriate.

VII. ORDER

In light of the foregoing, it is hereby **ORDERED** that:

Citation No. 8178516 is **AFFIRMED** as written;

Citation No. 8178521 is **AFFIRMED** as S&S, but **MODIFIED** to change the likelihood determination to “reasonably likely” and reduce the level of negligence from “high” to “moderate;”

Citation No. 8178522 is **AFFIRMED** as S&S and an unwarrantable failure, but **MODIFIED** to change the likelihood determination to “reasonably likely”;

Order No. 8178524 is **AFFIRMED** as S&S and an unwarrantable failure, but **MODIFIED** to change the likelihood determination to “reasonably likely”;

Order No. 8178523 is **AFFIRMED** as S&S and an unwarrantable failure, but **MODIFIED** to change the likelihood determination to “reasonably likely”;

Order No. 8178525 is **AFFIRMED** as S&S and an unwarrantable failure, but **MODIFIED** to change the likelihood determination to “reasonably likely”;

Citation No. 8191715 is **AFFIRMED** as written.

WHEREFORE, Big Laurel Mining Corporation is **ORDERED** to pay a penalty of \$252,304.00 within 40 days of this Decision.²⁴

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

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/lct

²⁴ Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office,
P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 2, 2015

MATTHEW A. VARADY,
Complainant,

v.

VERIS GOLD USA, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-307-DM
WE-MD 14-03

Mine: Jerritt Canyon Mill
Mine ID: 26-01621

DECISION AND ORDER

Appearances: Matthew A. Varady, *pro se*, Elko, Nevada, for Complainant

David M. Stanton, Esq., Goicoechea, Di Grazia, Coyle & Stanton, Ltd.,
Elko, Nevada, for Respondent

Before: Judge Moran

In this section 105(c)(3) action under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), Complainant, Matthew A. Varady, asserts that he was fired by Veris Gold USA, Inc., because of safety and health complaints he voiced related to his job at Veris’ Jerritt Canyon Mill.

A hearing was held in Elko, Nevada, from June 8-10, 2015. Although Varady’s *pro se* complaint contained several discrimination claims that are not cognizable under the Mine Act,¹ his claim that he was discharged because of safety/health complaints he made during September 2013 is cognizable. In connection with those complaints, it is undisputed that Varady was overexposed to ammonia gas while performing his work at Veris and suffered adverse health effects from that. While many issues are discussed in this decision, it must be highlighted that Veris defends its firing of Varady on a single basis, namely that Varady published an adverse Facebook post about a Veris supervisor and that this was the sole ground for his termination. For the reasons that follow, the Court finds that Varady was fired for invoking his safety and health rights under the Mine Act and rejects Veris’ claim that he was fired for a Facebook post.

¹ At the commencement of the hearing, the Court explained to Complainant that some of his grounds for discrimination claim were not cognizable. Tr. 13. One example noted by the Court was Varady’s assertion that information he had posted on a social website was protected activity, on the theory that the adverse action (i.e., his termination) taken by Veris for such a posting violated his First Amendment speech rights. Tr. 14.

The Basics of a 105(c) Discrimination Claim

The basics of a discrimination claim under the Mine Act are well-established and clear. In order to establish a prima facie violation of §105(c)(1) of the Mine Act, Complainant must prove, by a preponderance of the evidence, (1) that he engaged in protected activity; (2) that he suffered an adverse action; and (3) that the adverse action taken against him by the mine operator was motivated in any part by that protected activity. In order to rebut a prima facie case, the operator must either show that no protected activity occurred or that the adverse action was in no part motivated by the miner's protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). If the operator cannot rebut the miner's prima facie case in this manner, it nevertheless can defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activity and (2) it would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof in such an affirmative "mixed motive" defense. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982).

The current action is brought under section 105(c)(3) of the Mine Act. That section provides that if the Secretary determines that a violation of section 105(c)(1) has not occurred, "the [C]omplainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination." 30 U.S.C. § 815(c)(3). As the Commission stated in *Jaxun v. Asarco, LLC*, 20 FMSHRC 616, 620 (Aug. 2007), "[t]he Mine Act, the Administrative Procedure Act ('APA'), and the Commission's Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation."

Findings of Fact

Overview

Veris is a large operation, with about 400 direct employees in November 2013. In addition, Veris had about 50 contractors that were employed in the mill area and about 200 contractors in the mining area. Tr. 362.

Mr. Varady's complaint of discrimination was filed on or about November 11, 2013. Ex. R-1.² Varady was discharged by Veris on November 8, 2013. He was employed as a mill "CIL" operator. CIL or "CIL circuit" refers to the carbon-in-leach circuit and pertains to a process for removing gold out of the slurry after it has been roasted. Tr. 669. The complaint asserted that Varady engaged in protected activity when he made safety/ health complaints related to exposure to toxic chemicals. It named several individuals as associated with the alleged discrimination, including Kiedock Kim, Chris Jones, and Josh Culver, each of whom, Varady alleged, knowingly and willfully required him to work in a toxic atmosphere against company policy, resulting in his overexposure to toxic substances. Varady maintains that, after he made complaints about that CIL circuit, he had a bull's-eye on his back and, in fear of losing his job, he

² Respondent's exhibits are designated with an "R," and Complainant's exhibits are designated with a "C."

then kept to himself and made no other complaints. Tr. 41. Varady contends that the culture at Veris put production over safety. Although Varady did not make a *formal* safety or health complaint at the time of his exposures to the ammonia gas, the Court notes that, as this is a section 105(c)(3) action, it must liberally interpret the *pro se* complaint.³ That complaint included his claim that that he “tried in earnest to discuss [health and safety] issues with supervisors and management, only to be threatened with disciplinary action up to and including termination.” Tr. 17-18.

It is important to bear in mind that Veris’ sole defense to this discrimination complaint is that Varady was fired because of his Facebook post, in which post, Varady stated: “Wouldn’t it be nice to be the assistant manager and sleep in the company truck on the job while ev1 [sic] else is freezing their asses off actually working.” Ex. R-2.

Testimony of Complainant Matthew Varady

Matthew Varady’s job at Veris was essentially to monitor the machinery at the CIL, as part of the leaching process for gold. His responsibilities included overseeing that equipment to make sure that the chemicals used in the process were at appropriate levels and also included mechanical operations and functions, inspections, and chemical sampling. These duties were performed in a semi-open environment. Those, such as Varady, who were working the CIL were subject to exposure to ammonia and hydrogen cyanide gas. Until he became ill, Varady had believed that his only risk was to the cyanide gas, for which there were monitors, measuring emission levels for that gas. However there was another chemical exposure risk, that of ammonia gas, for which there were no monitors. It is undisputed that at the time of Varady’s ill health reactions from exposure to ammonia gas there were no monitors for that chemical.

As mentioned, on or about September 17, 2013, Varady began prominently feeling the effects from his exposure to the toxic chemicals at the CIL tank. He would later learn that his illness stemmed from exposure to ammonia. Varady worked on top of the CIL tanks and as such he was exposed to the fumes and steam coming off the tops of those tanks. Tr. 47. He asserted that the adverse effects he experienced from the exposure were the result of cumulative effects over time. Tr. 48.

As his health worsened, on September 17th Varady met with Veris safety personnel, who directed that he see Dr. Mattern in order for a blood analysis to be performed. Tr. 51. Varady learned of the test results a few days later. Those results are reflected in Exhibit C-12 and show that Complainant’s ammonia plasma was 56. The normal range for that value is 11 to 35. Tr. 54-55. Veris had no discussions with Varady following this result. Instead they simply removed him from the CIL area, transferring him over to the primary crusher, per Doctor Mattern’s orders. Tr. 55. At some point in late October the doctor released Varady from this work location restriction,

³ At the hearing, it was noted that MSHA conducted three interviews of individuals in connection with its investigation of the safety complaint, and the Court held that it would allow testimony related to those interviews because, by reasonable inference, they were related to and became part of Varady’s discrimination complaint, as the investigator’s interviews necessarily had to be spawned by allegations communicated to MSHA by Varady in connection with his complaint. Tr. 25.

though it was against Varady's wishes. Still, after his adverse health event, he never worked more than one shift at the CIL at a time somewhere between a month and a half and two months after his overexposure. Tr. 55.

Subsequently, on November 8, 2013, Complainant was fired. Tr. 57. When the firing occurred, Varady was told by phone that his termination was due to the two write-ups he received, both of which were issued to him on the same day of his exposure to the ammonia gas, September 17, 2013. Tr. 58. Those write-ups involved his alleged intemperate communication with another employee and his alleged failure to follow the chain of command in terms of reporting his original health issue, at least that is what a Veris human resources representative, Joe Stoddard, told him.⁴ *Id.* Varady maintains that those write-ups were actually generated by his safety and health complaints. Tr. 60. That Varady received two write-ups on the same day he became ill cannot be viewed as coincidental. As explained *infra*, the Court finds that Varady's safety/health complaints did spawn the write-ups. Varady made it clear that he had complained about not feeling well multiple times before September 17th, but that he was told that he would be all right, and that it was simply a time of year when sickness was going around. Tr. 62.

Regarding the September 2013 incident, when he became ill while working at his CIL work post, Varady stated that he verbally reported his unwell condition multiple times, informing his supervisor, Scott Mansanarez, that he had not been feeling well. Varady asserted that Mansanarez did not take his claim seriously and that his condition became worse. Subsequently, he met with Ms. Cheryl Garcia, who is a member of the safety department, and she noted that he looked very poor.⁵ Tr. 29. Varady maintained that there had been an increase in the cyanide in the carbon-in-leach circuit above the regular amount, that there was associated cyanide off-gassing for long periods, and that they were of a sufficient degree that alarms were sounding. Tr. 30. Prior to that event, Varady asserted that he made verbal safety and health complaints about similar concerns in July 2013 and that these were made to Charles Walker and Mansanarez. Tr. 31-32. Varady alleged that neither of those individuals addressed his complaints, telling him instead that he should continue doing his job. Varady also asserted that Kiedock Kim and Mr. Culver would countermand any reaction to the issue, if Walker or Mansanarez were to act upon his complaint. Tr. 33.

Dwayne Ward, Veris' human resources manager, was evasive in his testimony on the issue of whether Varady made safety complaints. When asked if he recalled whether Varady made any complaints of a safety or health matter, his response was "Not to my knowledge directly, no." The Court, displeased with the equivocal answer, then asked Ward if he knew whether Varady made any such complaints to any other department. His answer to that question was quite different, as he then admitted that he knew of Varady's complaints to the safety department in September 2013. Asked by the Court, he then admitted that he knew indirectly of

⁴ Only later did Varady learn from Shawn Rose, a safety department training coordinator at Veris, that his firing stemmed from a Facebook posting. Tr. 59.

⁵ Exhibit C-23 pertains to a report done by Cheryl Garcia regarding Varady's over-exposure. It reflects the time line of the events. It also reflects that Garcia started to investigate the matter and recommended that Varady see a doctor. Tr. 111.

safety complaints involving ammonia made by Mr. Varady during September of 2013. Tr. 494-95.

Varady stated that he was threatened with termination if he left his job post at the circuit. He did not then file a discrimination complaint, because he was insufficiently informed about what was transpiring at the CIL, asserting that he did not learn about the procedures that were involved at that location until later on, after he had been terminated. Tr. 33. Varady testified that he

told them [he] didn't feel safe in that environment. I mean, it was hard to control. It was — the pH was hard to control to prevent against off-gassing in one direction or another. And they were fully aware of it. I mean, we had alarms going off nonstop, so everybody on the mine site knew that there was an unsafe environment up there, yet we were forced by Mr. Kiedock Kim to remain in that environment in fear of reprisal of some sort. He threatened flat out for termination.

Tr. 34.

Preliminarily, the Court found Varady's claims to be credible and subsequent testimony only served to confirm that determination. From the exposure, Varady stated that he had various adverse health effects. Tr. 34. Those symptoms, he asserted, began in late August and became worse in September of that year. This prompted him to meet with Ms. Garcia and Mr. Danny Lowe, both with the safety department, on September 17th, and, as noted, the upshot of this meeting was that he was sent to a doctor for evaluation. Tr. 35.

In sum, Varady told originally Scott Mansanarez and Charles Walker for several shifts that he wasn't feeling well and then told Ms. Garcia about the problem, but Mansanarez simply told him to take it easy and suggested that he probably had the flu or a cold. Thus, Varady believed they did not take his concerns seriously. Varady affirmed that, while he could not know what was going on with his health, he was asserting a safety or health adverse reaction at that time, and thereby making a safety and health complaint, though it was not until later that he learned it was from his exposure to chemicals.

As noted, the Court also finds that it was not coincidental that Varady received two disciplinary actions described as "employee warning notices," or "write-ups," on September 17, 2013, which was the same day he made his safety/health complaints with the safety department. Tr. 35-37. In reaction to his safety/health complaints, Varady stated that Veris responded adversely, claiming through the issuance of one of the write-ups that he did not follow the "chain of command" for reporting this issue. Responding to the claim that he violated the company's chain of command policy, Varady asserted that Veris Gold has an open door policy which states that at any time an employee can complain to anybody about safety or health complaints. Tr. 37-38. The record is undisputed that Veris in fact had such an open door policy. Varady added that Mansanarez stated that he was embarrassed that Varady didn't go through him in making the

complaint and therefore contends that he was written up as an act of reprisal.⁶ The Court finds, as set forth in more detail *infra*, and based on the entire evidence of record, that in fact the disciplinary write-ups issued by Veris were a façade, which were manufactured and came about because of Varady's safety/health complaints.

Regarding Varady's assertion in his discrimination complaint that Graham Dickson, Kiedock Kim, Chris Jones, and Josh Culver knowingly and willfully required him to work in a toxic atmosphere, resulting in overexposure to toxic substances, Varady stated that Kim threatened him with termination if he left his work station for any period of time. Mr. Kim did not testify. Varady also maintained that Graham Dickson knowingly and willingly provided a toxic environment by not having the proper monitors in place, and by not having a way to extract the toxic fumes from the environment, with no exhaust fan or induced fresh air entering into that work atmosphere. The absence of such fans is also undisputed. Thus, Varady believed that those individuals knew the environment was unsafe but would not countenance objections, adding that Chris Jones was another supervisory person who was chronically confrontational when interacting with miners. Employees understood, Complainant maintains, that they were to do as told, or they would be terminated. Tr. 45-46.

Recalling that Varady is not a lawyer and was acting *pro se*, the Court inquired if there were any other aspects to his discrimination complaint that had not yet been raised. Varady stated that he sent an email to Veris' Dr. Barry Goodfield, who was brought in after a new president was installed at the company. Goodfield was identified as a contact source within the company for any employees who did not feel comfortable contacting an immediate supervisor. That such an intermediary was created, to address the problem of employees who were in fear of speaking up, is instructive of the hostile atmosphere towards workers at Veris. Varady acted on that invitation, contacting Goodfield about Kiedock Kim's lack of concern over environmental issues and Kim's omnipresent threat to terminate anyone who left his work post. Varady told Goodfield about these concerns a few weeks after his chemical exposure. Goodfield made one

⁶ Varady further stated that another act of reprisal was Veris' claim, in the other write-up he received the same day, that he had a confrontation with Mr. Josh Culver, who was employed as a metallurgical technician by Veris at the time. The write-up asserted that Varady yelled at Culver and used profanity. Varady conceded that he may have been yelling at Culver, but that the ambient noise in the work environment made speaking loudly essential. As for the swearing, he essentially admitted to that, noting that he was working at a mine site where such terms are common usage. As noted, this event also occurred the same day he made his safety complaint, September 17th. Tr. 38-39. The exchange occurred in the context of Varady asking Culver why they were using so much cyanide. Culver did not take the inquiry from Varady well, viewing it as a complaint about how he, Culver, was performing his duties, which he believed was none of Varady's business. Importantly, Varady confirmed that it came at a point in time *after* he made a safety complaint about his safety and health reaction to these chemicals. As noted, only later did Varady learn that his adverse health reaction was due to ammonia exposure, not cyanide. Tr. 40.

response to Varady but the communications then stopped.⁷ Tr. 64-65. Varady then also noticed a change in attitude towards him from Mr. Mansanarez. Of note, Mr. Varady had no disciplinary issues with Veris in a year's time before his discharge.⁸ Tr. 67.

At the conclusion of Mr. Varady's testimony, the Court announced that it found that Varady had identified protected activity: his safety/health complaints of September 17, 2013, and earlier. Those complaints could not have come sooner, as Varady did not know until then what was going on, adversely, with his health. Tr. 73. The Court finds, based on Mr. Varady's credible testimony, that he began vocalizing his adverse health symptoms prior to September 17th. Tr. 73-74. This meant that the next issue to resolve is whether the adverse action which ensued was brought about by his complaints.

To emphasize this finding, the Court announced at that point in the proceeding that Varady had established that element of his claim, and that it was within the four corners of his discrimination complaint before MSHA, where Varady identified four or five individuals who required him to work in a toxic atmosphere against company policy and in which he experienced an overexposure to toxic substances. Thus, Varady made a valid safety or health complaint, which was later brought to MSHA's attention and formed part of the basis of their investigation. Tr. 74.

Veris' Narrow Defense to the Discrimination Complaint

As noted in the Overview, Veris' defense is that Varady was fired for his Facebook posting and for no other reason. Veris stipulated that on or about September 17th, or some period of days before that time in 2013, in fact, Mr. Varady suffered an adverse health impact from exposure to ammonia gases at the CIL location. Veris also stipulated that there was no equipment on the CIL that monitored ammonia levels. Tr. 95. Thus, the sole basis for Veris' discharge of Varady was his Facebook post. Tr. 97. Separate from its defense, Veris also argued, procedurally, that Varady never actually made a safety complaint. Instead, Mr. Varady was asked to report to the industrial hygienist, Ms. Garcia, who initiated an investigation and was

⁷ Exhibit C-5, an email to Dr. Goodfield, dated September 27, 2013, reflects Varady's communication that he was exposed to the toxic fumes. Tr. 87. The email includes the contention that Varady was forced by Kim to remain in the circuit under fear of being fired if he left that post. Ex. C-6 is a response from Dr. Barry Goodfield to Varady's email, relating that he recognizes Varady's concern and that he passed it along to members of senior management, evidencing that they were fully aware of Varady's complaints.

⁸ In December 2012, Varady was disciplined for damage to a skid steer but, even from Veris' perspective, this formed no basis for his discharge. His record was otherwise unblemished. Another oddity, among many in Veris' putative defenses, Ward claimed Varady's skid steer incident was a write-up that should have been in his 2013 personnel file but it was not. Dwayne Ward, Human Resources manager with Veris, did not know of the document being removed from Varady's personnel file. Tr. 468-469. R-10 is a document relating to the skid steer incident investigation. Ward asserted that the last page of the three page document was the "writeup" pertaining to Varady. The Court noted that it considered the whole skid steer business to be too tangential to the issues in the case. Tr. 513.

concerned that Varady might have had a cyanide gas exposure issue. Thus, Veris argues that only Garcia, if anyone, made a safety complaint and that all Varady did was appear to be ill.

The Court believes this inaccurately represents the events and finds instead that Varady did make complaints about his health but that he was constrained by his understandable fear of losing his job, a fear brought about by an atmosphere of intimidation directed toward employees who considered complaining about safety or health issues to supervisors. The Court also observed at the hearing, that an individual such as Mr. Varady can only report what he knows at a given point in time, and there is no requirement for a complainant to formally declare, as if an incantation, that he or she is “making a safety or health complaint.” Instead, the Court expressed that, in the context of the evidence in this case, a miner effectively makes such a complaint when asserting that he is ill. That set in motion a chain of events that eventually included going to the doctor. The Court then had to determine if the reason advanced by Veris for Varady’s firing, which occurred within a relatively short time period following his safety/health complaints, was valid or instead brought about by his complaints. As discussed below, the Court also finds that the two write-ups issued to Varady were trotted out as a pretext for his firing and that Veris’ fallback position of firing him for his Facebook post cannot withstand scrutiny.

Having found that Varady did make safety or health complaints, the reality is that Veris’ sole defense is an affirmative one, in that it asserts that Mr. Varady was fired for one reason — the Facebook post he made relating to a Veris supervisor sleeping in his truck at the mine. Thus, Veris procedurally relinquished, by the declaration of its attorney at the hearing, any claim disputing that there was protected activity by Varady and that adverse action resulted from his engaging in such protected activity. As long as Complainant put forward a prima facie case, which the Court finds that Mr. Varady did, Veris’ defense was limited to its affirmative claim that it fired Varady for reasons unrelated to his safety and health complaint.

Veris’ Shifting Reasons⁹ for Varady’s Termination and Its Ultimate Claim that Varady Was Fired Because of His Facebook Post

⁹ Yet another claim of Veris, despite its assertion that Varady was fired solely for his Facebook posting, is that he was lax in performing his duties at the CIL. But the Court finds that Veris cannot simultaneously assert there was one reason for firing Varady, while inferring that there were other problems with his work performance. One such contention was that Varady would wander away from his work post for 20 minutes and without notifying his supervisor. Veris claimed that bad things could develop if the CIL was left unattended for such periods. However, even testimony from one of Veris’ witnesses contradicts the claim that 20 minutes away from the CIL would risk problems. COO Dickson stated that leaving the post for 5 or 10 minutes was not an issue, but that problems could arise if one left that post for *over a half-hour*, as there could be some pH changes occurring. Tr. 397. In addition, witness Nicholas Garcia stated there are two operators in the CIL circuit, so there is always a person present there. Tr. 300-21. Veris’ Counsel, with no testimony to support his claim, suggested that Josh Culver was monitoring Varady in this regard. Tr. 140-42. However, Varady had a different perspective about Culver, who did not testify. Varady asserted that Culver, who was only a technician, not a metallurgist, was doing things with the circuit that created an unsafe environment. Tr. 145. Mention of this issue is included only for completeness; the Court views the issue both as collateral and without substance.

Veris' Initial Position that Varady Was Fired for Write-Ups

As alluded to earlier, the write-ups, originally issued as the grounds for Varady's firing, involved two separate alleged infractions. One involved an alleged intemperate verbal exchange by Varady with another employee, Josh Culver,¹⁰ who was not a supervisor, but only a peer on the same level as Varady. Tr. 98-99, 476. The other write-up was the claim that Varady did not follow the proper chain of command for reporting a safety or health issue.¹¹ Despite limiting its defense to the claim that Varady was fired for his Facebook Post, Veris tried to have it both ways, by making claims that Varady had these other failings as an employee. Varady responded to these, and in doing so established that those other claims had no merit. The effect of his rebuttals to the other claims had the collateral effect of diminishing Veris' claim that he was fired for the Facebook posting. Thus, the write-ups, which Veris later tried to walk away from as the reason for Varady's termination, are important to the decision because they tend to demonstrate the overall hollowness of Veris' defense.

Cecil Pranke, Veris' mill superintendent in 2013, testified. Tr. 665-66. Above him were mill manager Kim and Jones, the assistant mill manager. Consistent with Veris' approach of attempting to show that Varady was a problem employee per the two write-ups, Pranke's testimony continued that theme, but in a different regard, by trying to place the blame for the ammonia overexposure on Varady, asserting that he "overshot his pH and created ammonia off-gasses." Tr. 673-74. Despite this serious claim, Pranke did not tell others that something should be done about that claimed error, nor was any adverse employment action taken against Varady. Tr. 675. Unbelievably, Pranke believed that Varady should be written up for this error, yet he didn't express that view to anyone. Tr. 676. Assuming for the sake of argument that his claim was credible, given the seriousness of the charge and Pranke's view of it, it does not follow that Pranke would then do nothing about it. Casting further doubt on Pranke's claim that Varady was the source of the ammonia problem, Pranke admitted that he never produced documentation to support his investigation that the blame belonged on Varady. Tr. 692.

Regarding the claim that Varady improperly left his work station, Pranke conceded he had no documentation to support that assertion and that, as to any eyewitness to the claim, Pranke could only offer "Scott [Mansanarez]. I'm assuming." Tr. 698. As to the dispute between Culver and Varady, which formed the basis for one of the two write-ups Varady received on September 17th, Pranke admitted that *only one side* (Culver) was interviewed about the event

¹⁰ Among other significant deficiencies with the claim, it is also ironic that Varady's second write-up involved abusive conduct in his interaction with Culver, as Chris Jones was consistently identified by witnesses at the hearing as engaging in such conduct with many Veris employees and without adverse consequences.

¹¹ Introduced in connection with this write-up was Exhibit C-33, a declaration by Mansanarez expressing embarrassment at paragraph 13 that Varady went to the safety department with his complaint, instead of going directly to him. This was offered to show that his embarrassment was the motivating factor for the write-up, not a failure to follow chain of command. Varady also established at the hearing that because of Veris' open door policy, there was no required chain of command that had to be observed where health and safety issues were involved.

and that normally both sides would be questioned. Tr. 699. As yet another example of the overall lack of credibility of Veris' witnesses, when Pranke was asked if he ever received reports or documentation of poor work performance by Varady, Pranke responded that he could not recall. Tr. 699.

The Court inquired as to the basis for Pranke's conclusion that Varady and not some other employee was the source for the ammonia problem, a problem he attributed to Varady overshooting his pH. Pranke stated his conclusion was based on the trends. When the Court inquired what prompted Pranke to investigate and determine the reason for the excessive ammonia, he responded that Kim asked him to do that. Tr. 700-701. Demonstrating doubt on the credibility of Pranke's claim, when the Court inquired of Pranke as to the number of years in total that he had been involved in dealing with the CIL tanks, Pranke responded that his experience with this had been since 1983 and that the process, where one adds chemicals as part of the process of removing the ore from the raw material has been the same process over all those years. The Court then inquired how many other occasions in all those years had there been instances of other individuals operating the CIL tanks of overshooting the pH and Pranke responded this was the sole occasion in his entire experience. Further, Pranke, despite this being the sole such event in 30 years, never discussed his determination with Mr. Varady and he reaffirmed that, despite placing the blame at Varady's doorstep and believing that he should have been written up for the lime overshoot, he told no one about the alleged event. Tr. 703. Simply put, Pranke was not a credible witness.

It was Joe Stoddard, with Veris' HR (human resources) department, who called Varady on November 8, 2013, informing him that he had been fired. As Varady confirmed, Stoddard advanced but one reason for his termination, the previously described write-ups, alleging infractions. Tr. 144. Stoddard informed Varady that he was terminated because of the two write-ups, as previously described; one for not following the chain of command and the other for his confrontation with Josh Culver. Tr. 132-33. Human resources officer Dwayne Ward claimed that the "open door" policy was not as Varady interpreted it, asserting that the preference was to follow the chain of command and that, in any event, an employee must still first report to his supervisor before leaving his work area. Tr. 484. The write-up based on the chain of command infraction was patently inconsistent with Veris' own open door policy, which allowed any safety or health-related issue to be reported by employees to any member of management. Tr. 216-18, 242-43; Exs. C-3 and C-4. Yet another problem with that claim is that the write-up does not declare that Varady left his work area. Ex. C-36.

At the hearing Veris claimed that, while the write-ups were announced to Varady as the basis for his discharge, this was all a grand mistake and that the real reason he was fired was for his Facebook post.¹² Tr. 107. Despite that new stance, Veris maintained they were valid write-

¹² Understandably, Varady was upset at Veris' revised basis for discharging him, noting that initially his termination letter didn't even state a reason, and after that, the write-ups were advanced as the reason, and still later that the claim was that he was fired for his Facebook post. As the Court pointed out to Varady, to allow Respondent to shift from initially providing no basis for Varady's firing and then to assert that his firing was due to write-ups and even later to light upon yet a new basis — the Facebook posting — is very different from implying that the Court was buying into such evolving claims.

ups. It was not, the Court has determined, credible that the write-ups were “miscommunicated to Mr. Varady as the basis for the termination decision.” Tr.104. For his part, as noted, Varady asserts that the write-ups came about due to his making a safety and health complaint.¹³ Tr. 105; Exs. C-35, C-36. The Court so finds that was the case.

When Dwayne Ward was asked if Kiedock Kim demanded that Varady be fired and that he didn’t care how it was accomplished, Ward’s memory failed him, stating that he didn’t “remember that.” Tr. 503. The Court inquired further whether Ward’s answer meant that it was possible that Kim did say that but that he forgot, and Ward responded that it “could be.” *Id.* In a related inquiry, as to whether Kim interrupted a meeting between Shawn Rose and Ward stating that someone needed to be fired and that he wanted to beat someone to death with a hockey stick, Ward stated that he didn’t remember the event. Tr. 504. When the Court inquired whether one would be apt to remember if someone said that he wanted to beat a person with a hockey stick, Ward admitted that “[i]t could be but, you know, a year and a half is a long period of time to remember a lot of different conversations.” Tr. 504-05. Ward also could not explain why Varady was written up on the same day he was injured, answering only, “I have absolutely no idea.” Tr. 508. Ward’s memory failed him again on the subject of whether Ward had a discussion with Mr. Lowe regarding Varady’s write-up as violating his rights under the Mine Act, stating again that he could not recall, nor could he recall if either Kim or Jones ever gave him anything to support a claim of poor work performance by Varady. Tr. 515-16.

Ward stated that the decision to write-up Varady on September 17, 2013, came from Scott Mansanarez. Tr. 495-96. In Ward’s statement to the MSHA special investigator, he stated that Mansanarez told him that he issued Varady the write-ups but that Varady refused to sign them. Thus, Ward admitted that he had the write-ups in his possession from Mansanarez. When asked how Mansanarez could have issued the write-ups to Varady if he didn’t have physical possession of them, Ward could only state that that was a “good question” and that he didn’t have an answer for that. Tr. 499. The typical process for write-ups, Ward informed, is that a supervisor writes it up and then presents it to the employee. A witness is supposed to be present when a write-up is presented. Ward stated that Varady refused to sign the write-ups. Tr. 502. Ex. C-26. As noted below, this claim was contradicted by Scott Mansanarez, who stated that he did not show the write-ups to Varady.

Ward characterized the process of terminating Varady, as carried out by Stoddard, as a “learning process” for Stoddard and he also described it as “on-the-job training.” Tr. 461-62. Ward then stated that Stoddard went to his office to “put[] together” the termination letter. Ward stated that Stoddard terminated Varady “but not for the correct reasons.” Ward claimed that “the following week” he found out that Stoddard terminated Varady “for performance issues.” Ward

¹³ Further establishing the dubious nature of the write-ups, Exhibit C-37 was admitted for the purpose of demonstrating that the recent write-ups did not adhere to Veris’ customary past practice. The skid steer write-up incident shows that such documents are signed by a supervisor and presented to the employee. Tr. 106-08. The two write-ups issued on the day Varady made his safety/health complaint did not follow Veris’ practice.

then claimed this was contrary to the instruction he gave Stoddard.¹⁴ Tr. 462. Continuing with what the Court viewed to be a very tall tale, Ward stated that “about two weeks later” Stoddard gave him a letter apologizing for his action in the Varady matter and other matters. Tr. 464. The Court inquired about this, asking if the apology letter was ever disclosed to Varady. It was not. Tr. 464.

Ward was presented with Exhibit C-30, which is a company-wide e-mail that was sent encouraging open door policies as well as communication with Dr. Barry Goodfield, if employees didn't feel comfortable communicating with anybody else. Tr. 510. He agreed that the email from Goodfield stated that any concern could be brought to him at any point in time and that the policy applied to any complaint from anybody at any time. Tr. 511.

With oddities abounding, Ward revealed that Varady's write-ups were not placed in his personnel file, but rather in a “sort of separate filing system,” as Veris' attorney expressed it. Tr. 482. The claimed justification was that this was a more secure place for the second file, but at best this amounted to keeping two sets of books. Ward maintained that Varady's firing was strictly for his Facebook posting. Tr. 483. The Court did not view Ward's testimony to be credible.

Scott Mansanarez also testified. He is the mill shift supervisor. In that position, he supervises 8 to 10 people, including those working the CIL. Tr. 536. In what the Court considered to be an odd response, when he learned of Varady's exposure to ammonia, around September 17, 2013, he did not believe that presented an issue affecting miner safety. Tr. 542. Mansanarez, referring to Exhibits R-3 and R-4, the Varady write-ups, acknowledged that he wrote them and gave them to Dwayne Ward. He did not show them to Varady. Tr. 543-44. Regarding the write-up involving Varady's verbal exchange with Culver, Mansanarez conceded that one would need to speak loudly due to the noisy environment at the mine and also that Culver commonly used profanity. Tr. 555. He then conceded that Culver's competency as a med lab tech, was only “to a point” and that some of his decisions adding chemicals to the circuits were “maybe questionable.” All of this supports Varady's position that he had a basis for being upset with Culver. Tr. 556. Further, Mansanarez agreed that on September 17, 2013, the cyanide usage increase decision by Culver may have possibly created a toxic environment. Tr. 557. Mansanarez also agreed that Culver should have been equally disciplined over the same matter for which Varady was disciplined. However, Mansanarez had no authority over Culver. Tr. 564.

Regarding Varady's job performance as a CIL operator, Mansanarez praised Varady multiple times for the job he was doing and expressed that he was a sufficient and competent CIL operator. Tr. 558-59. Mansanarez also agreed that on September 17, 2013, Varady was doing his job properly. Tr. 562-63. Lastly, Mansanarez never witnessed Varady leave his post unattended for any long duration. Tr. 564.

¹⁴ In an ironic twist, Ward then revealed that Stoddard was later fired for insubordination, but for a matter not related to the Varady issue. Tr. 463.

In sum, the Court concludes that neither of the write-ups, even apart from their more than strange issuance on the date Varady became ill, were sound. The write-up for failure to adhere to the chain of command is flatly contradicted by Veris' own policy, and the alleged intemperate exchange by Varady with a peer did not follow Veris' own procedure for addressing the subject. Clearly, by both their timing and lack of substance, the write-ups were created in response to Varady's adverse health reaction.

Veris' Subsequent Claim that Varady Was Fired Because of His Facebook Posting

On November 8, 2013, Matthew Varady posted on his Facebook page the following: "Wouldn't it be nice to be the assistant manager and sleep in the company truck on the job while ev1 [sic] else is freezing their asses off actually working." Ex. R-2. There is no dispute that Varady posted this and that he was referring to Assistant Manager Chris Jones whom he saw sleeping in a Veris truck at the mine not long after that same manager confronted some Veris employees who were resting in the lunch room.¹⁵ Tr. 121. The posting, Varady agreed, referred to Chris Jones and eventually was seen by some twenty co-workers at Veris. Tr. 124. Varady stated that his Facebook posting is private, allowing only friends to see it. Tr. 279. Varady agreed that he and Jones did not have a good relationship. Tr. 124-25.

As noted, Veris eventually presented Varady's Facebook posting as the sole reason for discharging him. Tr. 119; Ex. R-2. His firing occurred on November 8, 2013, which was the same day that Varady posted his Facebook message regarding Chris Jones sleeping in the company truck. Subsequent to Veris' first contention that Varady was fired for the write-ups he had been issued, Varady heard from Veris' Dr. Goodfield that he was fired for the Facebook post.¹⁶ Tr. 134.

¹⁵ The incident, which was raised by both sides, involved an occasion when Jones saw several employees sleeping in the lunchroom. The versions of this encounter differed, with Varady maintaining that Jones was abusive to the resting employees and that they were on unpaid lunch anyway. Jones then apparently spoke to Scott Mansanarez, complaining that the miners were sleeping on the job. Tr. 128. Varady and other employees felt they had been unfairly accused by Jones. This confrontation had an effect on a subsequent event when, a few nights later, Varady and other employees observed Jones sleeping in a company truck. Tr. 129. Varady took this as a double standard, even while he maintained that the employees Jones criticized were not sleeping, whereas Jones was asleep. This prompted him to post the Facebook statement, as Jones himself was doing what he criticized others doing. As discussed *infra*, more important than this particular lunchroom set-to and Varady's reaction by the Facebook posting, is the character and credibility of Chris Jones and the aggressive, confrontational, environment he cultivated at Veris.

¹⁶ One of the claims by Veris in its attempt to show that Varady's firing was only for the Facebook posting was its assertion that Graham Dickson knew nothing about Varady's ammonia exposure. However, apart from the other evidence showing that Veris was motivated by Varady's safety and health complaints, Varady noted that Dickson was copied on an email from Dr. Goodfield about that subject. Tr. 134-35. The Court finds that it is reasonable to conclude that Dickson in fact did know about the ammonia exposure issue.

It was fellow employee Tia Monahan who forwarded Varady's private Facebook post to Ward and Stoddard, but her intention was not to create problems for Varady but rather to give those individuals a heads up that someone was sleeping on the job. Ward and Stoddard then forwarded the Facebook post to Kim and Dickson, after which Varady's termination was discussed. Tr. 282. She could not recall any other instance of a person being terminated for a social network post. Tr. 286. Monahan was of the view that company policies were applied unevenly at Veris.

Graham Dickson, who is the Chief Operating Officer (COO) at Veris, stated that he and Dwayne Ward, human resources manager, have the authority to fire employees. Tr. 353. Dickson stated that he first saw the Varady Facebook posting referring to Chris Jones sleeping in his truck on November 8th and that he considered it to be mocking the assistant manager, Jones. Tr. 355. Within *seconds* of viewing the Facebook posting, Dickson made the decision to fire Varady, and he asserted it was made without any discussion with Chris Jones. Dickson affirmed that it was only *after* he made his snap decision that he spoke with Chris Jones as to whether Jones had, in fact, been sleeping. Tr. 366-67. Dickson stated that he took the Facebook post down to the human resources officer, Dwayne Ward, and informed him that he wanted Varady fired for the posting. Tr. 365.

Critically, when Dickson was asked if he had ever fired anybody other than Matt Varady for insubordination at Veris, his answer was no. Tr. 384. This encompassed quite a significant period of time, as Dickson admitted, covering eight years. In fact, he had never fired anyone for insubordination: Varady was the first. Tr. 384. Nor has anyone subsequently been fired for insubordination during his tenure at Veris, although that claim conflicts with Ward's statement that Stoddard was fired for insubordination. Dickson attempted to explain his brash act as reflecting the importance of chain of command, a consideration he apparently believed was threatened by the Facebook posting. Tr. 385. Oddly, in view of the parade of witnesses presented by Mr. Varady, Dickson asserted that defending his supervisor, Jones, was critical because such individuals are Veris' "safety stars." Tr. 386-88. As discussed *infra*, Dickson's characterization of Jones as one of his "safety stars" is at odds with the preponderance of testimony of Jones' attitude towards safety matters, and it flies in the face of Dickson's admission that Veris was having significant safety problems in late 2013 and that health issues were not being addressed, to the point that Veris was put on a potential pattern of violations notice by MSHA. Tr. 401-06.

Dickson then offered up another reason to explain his intense and immediate reaction to the posting. That involved a prior incident involving another Veris employee who was sleeping on the job, in that instance, due to sleep apnea. That person was also photographed sleeping on the job but Dickson could not determine who distributed the photo. Therefore, Varady was also paying the price of Dickson's pent up anger from the earlier event. In fact, Dickson expressed, upon seeing Varady's posting,

I got someone. I'll make an example of him. I will fire him and everyone will understand that this kind of behavior is not acceptable. That's why I was so quick to act. I had been incensed by the fact that I couldn't find who passed around the photograph of [the other employee] sleeping, and now I had someone I could make an example of, and that's what I did.

Tr. 386-87. Therefore, Dickson himself conceded that Varady's firing was not for that conduct itself but rather to set an example. That admission, by itself, demonstrates that Veris' action was not motivated by Varady's activity by itself and that it did not take for that reason alone.

Dickson asserted that he considered the Facebook posting to be a violation of Veris' company policy. *See* Ex. R-5 (containing applicable pages from the Veris Employee Handbook addressing work rules). However, it is of significance that Dickson admitted that he was not familiar with the Veris employee handbook, nor did he consult it before deciding to fire Varady. Tr. 380-81. Later, he attempted to repair that damaging admission by then asserting that he was generally familiar with the handbook pertaining to insubordination and that one could be fired for that. Dickson then defined insubordination as "[a]nything that reduced the effectiveness of the chain of command," which he further defined as demeaning or mocking a supervisor. Tr. 381. This "definition" was also made without his consultation or knowledge of the employee handbook, and whether it had anything to say about that. Tr. 382. Thus, the Court took note that not only did Dickson not consult the handbook, he did not even know what it said about the issue. Tr. 383.

On the subject of the appropriateness of firing an employee for a Facebook post, the Court posed the following hypothetical to Dickson: If he had an employee in a supermarket checkout line, and that employee, speaking to another Veris employee, said exactly the same words that appeared in Varady's post, upon learning of the remark, would Dickson fire that employee? Dickson demurred, stating that it was only a hypothetical and that he didn't know the answer. Then, when pressed, he believed there is a distinction in that he deemed the supermarket conversation to be private and he did not believe he could have much to say about it, whether he liked it or not. This is an appropriate time to remind that Varady's posting was private, distributed to a select group of friends and was not posted for consumption by the general public. Given that limiting distribution, it was no different than if Varady had telephoned each of those Facebook friends and instead spoke the same words of criticism. Another hypothetical was then posed by the Court, this time asking about a cookout at an employee's home where a number of employees are invited to the gathering, and again the same information as the Facebook post is conveyed. In that hypothetical, Dickson said the communication was "getting closer" to a firing. In the Court's view, Dickson's responses to the hypotheticals demonstrate that his action was arbitrary and unjustified.

Fatally to Respondent's defense, Dickson admitted that if there had been no history of the earlier, embarrassing photo of the other employee and Varady's photo was the first time one had taken a picture of a sleeping supervisor, he *would not* have fired Varady, but instead would have brought him in, had a conversation, and maybe had him apologize.¹⁷ Tr. 441-44.

¹⁷ When asked if, in effect, there was a double standard applied to employees at Veris sleeping on the job, Dickson responded, "Other people can be fired for sleeping on the job." Tr. 359. Dickson, evidencing his dual standard, then went on to state:

The reality is, I expect people to show up at Jerritt Canyon and to be able to do the work they are being paid for, and that does not mean they sleep on the

(continued...)

In trying to deal with the problem of the emails from Dr. Goodfield to Dickson that established Dickson's knowledge of the events involving Varady, Dickson claimed that he did not read all of the emails Goodfield sent him during that time frame. This is most curious because, to believe Dickson's claim, one would have to simultaneously believe that he was very much attuned to some issues, like his supervisors sleeping on the job, but quite inattentive about things like Varady's ammonia overexposure and selectively inattentive to some of Goodfield's emails to him. Tr. 389. Thus, Dickson claimed that he was not aware of emails between Goodfield and Varady, even though he was copied on them. Tr. 390. To be plain, the Court found Mr. Dickson's testimony to lack credibility.

Dickson agreed that the managers' conduct within the company policy handbook allows miners to report a violation without fear of retaliation and that that protection extends to regular or email communication. Dickson, however, tried to distinguish social networking emails from other methods of reporting violations, an illusory distinction in this Court's view. Tr. 420. When presented with Veris' policy and the section titled "unacceptable conduct," which includes sleeping on duty as willful misconduct, and asked how one could be fired for a social network posting when that subject is not addressed in Veris' policy, but not fired for sleeping on the job, Dickson asserted there were distinctions. Tr. 422-23.

Dwayne Ward, the Veris human resources manager, also testified about Varady's Facebook post. Ward first saw the post on November 8, 2013, having received it from Tia Monahan that morning. Tr. 453. Ward stated that Dickson came to his office and told him to fire Varady because of the post. Joe Stoddard was also present when this occurred. Tr. 458.

Speaking to the Veris employee handbook, Ward, noted that insubordination is defined there to include refusal to follow the reasonable direction of a supervisor and/or conduct

¹⁷ (...continued)

job. So, yes, if people show up and they are not in a fit state to do the job and they sleep, they will be fired. There is no doubt about that.

Id. But then, Dickson applied his other standard:

The difference about [Jones] is, he was sleeping on the job because he had been on the job for over 48 hours. Okay. He was living and working on the job. That's the reality. That's why he's sleeping there, not because he's not putting in enough performance, it's because he's over performing.

Id. Yet, he simultaneously asserted that he was

not happy about him doing it. I can't reprimand him because he knows very well that I have spent too long at the mine site and ended up sleeping under my desk. So the reality is, there is two different reasons for sleeping; one is you are not doing what you are paid for, and the other is you are just there too long to be able to go on safely and so you sleep on the job. There is a difference.

Tr. 360. Jones admitted to him that he had been sleeping in the company truck. Tr. 365.

demeaning the authority of the company or its supervisors, for which disciplinary action can be up to and including termination. Tr. 456-58. Ward was asked if there is a social media policy in the employee handbook, and he admitted there is none. He then agreed that employees have a right to have and use and post social media. Tr. 494. Over the objection from Veris' Counsel, Ward was asked about the provision in Veris' policy addressing off-duty misconduct. Ex. R-5. The objection was understandable, since that part of the policy does not address social media posting and focuses on crime, traffic tickets when using Veris vehicles, and the like. Further, it ties discipline for off-duty misconduct to "applicable law." Ward had a different interpretation of the policy, expressing his view that, as it referenced Veris' reputation, it included acts of insubordination. Ward believed that an employee who demeans a member of management hurts the company's reputation. However, Ward admitted that he arrived at that interpretation only *after* speaking with Dickson. Tr. 460.

The Circumstances Surrounding Varady's Termination

In the Court's view, Ward's recounting of the directions given when assigning the task of terminating Varady to Stoddard was not credible. Supposedly, Ward checked with Stoddard to see if he was "okay" with firing Varady and that Stoddard responded he was okay with it. Ward then was asked if he gave Stoddard instructions about the task. Ward responded that he did not remember testifying to that and that he did not give explicit instructions to terminate him for the Facebook post, as Stoddard had just heard the basis for the firing from Graham Dickson. The Court inquired further about this, with Ward confirming that Dickson only came in to the office and said to fire Varady. Ward agreed that both he and Stoddard assumed that the firing was due to the Facebook posting even though Dickson made no reference to it. This assumption was made because Dickson had the Facebook posting in his hand. Ward maintained that following that direction from Dickson, he only inquired of Stoddard if he was okay with that. When the Court asked why he asked that, as opposed to simply directing him to take care of it, Ward stated it was because Stoddard was a newer employee. Odder still, Ward maintained that while Stoddard had been in HR both at Veris and at other employment jobs, he kept telling Ward that he "would like to terminate someone." To say the least, this was a peculiar request from someone working in HR, and Ward offered that Stoddard wanted the task in order to "build his resume." Tr. 521.

According to Ward, he then learned the following Monday, having assigned Stoddard with the job of preparing the firing notice the previous Friday, that it was carried out but he maintained that their discussions were all verbal and apparently non-substantive, and that Stoddard did not show him the termination notice. However, Ward was vague about how the notice was issued, professing that he did not recall how communication of the notice was carried out. Then, Ward amended his answer, asserting that Stoddard told him he fired Varady for performance issues. Thus, Ward agreed that Varady was given a reason for his firing and that it was performance issues. The Court inquired of Ward if Stoddard advised what those performance issues were but Ward professed that he didn't remember, and that he only remembered Stoddard stating that he terminated Varady for performance issues. Yet, upon further inquiry by the Court, Ward admitted that Varady was given a termination letter but that the letter did not contain a reason for his firing. Ward professed to have an issue immediately upon Stoddard stating that he fired Varady for performance issues. Ward then stated that he

inquired what the performance issues were and that Stoddard advised that he had a conversation with Chris Jones about Varady's performance and Stoddard went with that basis for the firing. Thus, Ward confirmed that Stoddard did not simply proceed to fire Varady, as directed, but instead first had a conversation with Jones. Tr. 523-26. The Court had to remind Ward to look at the Court when answering its questions. Adding to the peculiarity of this story, Ward confirmed that he was immediately unhappy that Varady was terminated for performance issues even though at that point in time Mr. Varady did not know the reason for his termination, as the termination letter did not provide a reason. When Ward was asked why Varady's termination letter provided no basis for his firing, he answered: "That's a good question. I'll have to ask Mr. Stoddard." Tr. 494. Pressed about this, as Ward is the human relations manager, he admitted it is *not* common for no reason to be stated. *Id.*

Ward expressed that, while Stoddard knew that Varady was to be fired for the Facebook post, he did not believe he could fire him for that reason because it was "a free speech matter." Adding to the lack of credulity of this story, Ward then stated that there was no correction or paper issued or anything else generated to reflect that Varady was fired because of his Facebook post. In fact, Ward agreed that, *even now*, if one were to review Varady's present employment records with Veris, there would still be no statement that Varady was fired for his Facebook post. Tr. 529.

Regarding the incident of Jones' sleeping in his truck and to Exhibit R-2, that exhibit was first brought to Jones' attention by Joe Stoddard, who handed the document to Jones. Stoddard told Jones that Varady was the source. Tr. 617. Jones placed the document on a table in his office. He then stated that Dickson saw the Facebook post, took it, and left. Jones claimed he had no discussion with Dickson about it and that he merely laughed about it. Tr. 618. According to Jones, Dickson said *nothing* to him about it. Tr. 619.

Based on the foregoing, the Court concludes that Mr. Varady made safety and health complaints prior to and on the day that he became so ill that medical attention was directed. Veris took adverse action in reaction to that event, issuing two bogus write-ups to Varady. Thereafter, using the pretext of Varady's Facebook posting, Veris latched onto that posting to terminate him. However, Veris did not establish that the Facebook posting was an independent and justified basis for Varady's firing.

Other Evidence Supporting the Court's Conclusion that the Culture at Veris Put Production over Safety

In addition to the core issues discussed above, other evidence of record supports the Court's conclusions that the culture at Veris put production over safety and further informs its conclusions that Veris took the action against Varady because of his safety complaints.

As noted, Cheryl Garcia also testified. She was the industrial hygiene coordinator at Veris. Tr. 172. Her employment ended in February 2014. She was not fired, but the circumstances of her departure were not pleasant either. She asserted that she was being discriminated against and harassed by Chris Jones and others at Veris and that she could not take those problems any longer. Tr. 174. Garcia investigated the cyanide alarms in the CIL circuit, an

investigation that was prompted by Varady appearing at her office, complaining of various health problems. On that day, MSHA was on site and she found an “abundance” of hydrogen cyanide gas. Tr. 175. She stated that, even when the gas alarm sounded at levels of concern, some of the workers told her they were forced to stay in the areas to finish what they were doing because, a reflection in her view, of Veris’ exalting production over safety. These workers, she asserted, told her that if they left their circuit for any duration they would be disciplined or terminated, and that Chris Jones was typically the person who made such threats. Tr. 176. Ms. Garcia also had a negative view of Chris Jones, expressing that he intimidated people, was rude and would yell at employees, a fact that COO Dickson implicitly admitted. Tr. 177. Garcia also stated that “often” personal protection equipment (“PPE”) was not available to the miners. Tr. 178. She believed that Dickson did not provide a safe environment for employees. Tr. 179.

Danny Lowe stated that the investigation into Varady’s illness began before they knew his exposure had been to ammonia, with a working assumption that he had cyanide gas exposure. Tr. 232-33. Although Veris’ Counsel attempted to show that Veris otherwise conducted an extensive investigation, apart from the efforts of the safety department, Lowe’s take was that it was an attempt to stifle the inquiry, citing as an example the safety department’s learning that a number of times the cyanide alarms went off and that there was no ammonia monitor. Tr. 240-41. Lowe confirmed Mark Butterfield’s account that his safety investigation of the Varady overexposure was terminated by Chris Jones. Jones, in the presence of Dwayne Ward, told Lowe that the investigation was over and that it was an HR matter, not a safety and health issue. Tr. 219.

Shawn Rose, who was employed with the safety department as a training coordinator in September 2013, testified that Mr. Kim was present in Dwayne Ward’s office during a conversation between Rose and Ward. Tr. 263-64. According to Rose, Kim became increasingly upset as the conversation continued. He told Ward that someone needed to be fired. Tr. 265. No express reference to Varady was made by Kim, but Rose deduced that was the person being referenced and about whom Kim expressed a wish to “beat somebody to death with a hockey stick.” Tr. 266. Rose also stated that he was told by Chris Jones to stop an investigation involving safety or health matters. Tr. 268-69. The Court viewed the testimony of Rose as consistent with that of other witnesses and as probative of Jones’ aggressive, confrontational attitude towards those who raised safety issues.

Another witness, Tia Monahan, was employed at Veris for three years, with Dwayne Ward as her direct supervisor. Tr. 273-75. Monahan then left Veris on her own accord because of the poor environment there, which included Chris Jones behaving inappropriately toward her by making unwanted sexual talk. Tr. 282-85. Monahan related that several employees told her they were afraid to talk to the safety department or to HR for fear of being terminated or having some other adverse employment action result. Based on her experience, she concluded that Ward could not be relied upon to follow through on complaints made to HR and safety. Tr. 275.

Yet another witness was Nicholas Garcia. He worked for Veris at different times for a total of about 3 years, including work at the CIL circuit. Garcia stated that one would receive little to no training for chemicals one would encounter for that job. He did have a trainer, but described that person as “just another incompetent operator trying to teach me how to run the

CIL, pretty much.” Tr. 288-90. He affirmed that there were times when PPE was not available for him. Tr. 292. He also stated there were times when he was asked to do unsafe acts, as directed by Todd Peterson, Cecil Pranke, and Chris Jones.¹⁸ Tr. 293. In terms of his training, Garcia explained that, while there was training on the CIL *operation*, he had no training regarding chemicals. Tr. 313; Ex. R-9.5. Even for the training that was given, however, Garcia disparaged it, explaining that a new operator was simply told to hang out with an experienced operator for a few days, and even at that, his training occurred when the circuit wasn’t even running. Tr. 314. The Court finds that overall Garcia’s testimony supports the expression of other witnesses that the Veris operation was run sloppily and safety issues were not received favorably by management. *See, e.g.*, Tr. 319-321 (providing one, of many examples). Garcia’s opinion of Chris Jones fit with those expressed by most of the other witnesses. Tr. 296.

Dwayne Ward stated that he learned of Varady’s ammonia exposure in mid-September 2013 being informed by the safety department’s Mr. Lowe. Tr. 471. Ward stated that the safety department and the mill did an investigation about this. Tr. 472. Ward was asked if he saw any of the results of these investigations. His response was revealing, as he advised that he only quickly reviewed them. Tr. 473. Yet, he said it was part of his job to learn about things such as CIL operators becoming sick due to working in the CIL circuit. Tr. 474. Also instructive about Veris’ overall lack of concern for such health and safety matters, when Ward was asked if he knew whether any proactive steps were taken in the CIL circuit to make any improvements or to change anything, he admitted he did not. Tr. 474.

In the Court’s estimation, the fact so many employees had safety and other issues with Veris is indicative that there was a genuine systemic problem at the mine. Based on the credible testimony of record, from various witnesses, the Court concludes that there was a callous attitude towards safety and health issues at Veris. Tr. 203-206.

Veris’ Questionable Activities Regarding the Investigation of Varady’s Ammonia Overexposure

Mark Butterfield, who was then employed as a health and safety supervisor at the mine, was initially directed to investigate Varady’s exposure to ammonia, but then was told to stop, an order that came from Chris Jones. Tr. 154. Initially, he refused Jones’ order to stop his investigation, but then human resources officer Dwayne Ward told him to stop the investigation, which he obeyed. Tr. 158.

¹⁸ Garcia offered an example of an unsafe act, stating that he was required to climb inside to clean the quench pit at a time when the mercury levels were so high that the Jerome meter read “high level.” This task was still required so that production could keep running. He refused at first, waiting until he acquired a full face mask, but as he could not wear his glasses under the mask, he couldn’t see well. Still, he was told to perform the job or to go home. Tr. 294. In another incident Garcia was told by Cecil Pranke to falsify a document, the subject of which involved removing a safety device off some machinery. The report noted that Todd Peterson tried to incorrectly fix a problem but Garcia was told to remove the reference to Peterson. Again, not complying with the directive would mean Garcia would be fired. Tr. 298-99.

Chris Jones and Veris' Culture of Employee Intimidation

Testimony from both sides revealed that Chris Jones was a central figure on the subject of the work atmosphere at Veris. COO Dickson admitted that in dealing with subordinates, Jones was "rough and direct." Tr. 357. In fact, Dickson acknowledged that he has discussed with Jones the approach he employed in dealing with subordinates, suggesting that he be more diplomatic. Tr. 357. He also directed that Jones discuss this issue with Dr. Goodfield. Dickson believes Jones is *now* a very different person today as a result of this, but this subsequent action also informs as to Jones' behavior at the earlier point in time when the Varady issues arose.

Safety supervisor Mark Butterfield, consistent with Dickson's description of Jones, expressed that Chris Jones conducted himself in a very unprofessional manner. Tr. 159. He alleged that several times he caught Jones doing "unsafe acts" but that Jones just shrugged it off. When he would come in and tell him about safety problems, he didn't want to hear about it. Numerous times Jones told Butterfield, "F that, I don't have time for this." Tr. 161. Significantly, Butterfield expressed that he was not able to perform the complete scope of his safety duties under the management of Mr. Jones, Mr. Dickson, and Mr. Kim. Tr. 160.

Witness Danny Lowe, a certified mine safety professional, was employed by Veris for about a year and a half.¹⁹ Lowe also had a very negative view of Chris Jones. Tr. 207-12. Lowe denied that he had a contentious relationship with Jones. Instead, he stated that the issue was one of insubordination, as Jones was caught going through a window when he was specifically told how to correctly and safely enter a building. Lowe maintained that Jones reacted aggressively upon being caught entering the building inappropriately. Lowe took the matter about Jones' act to the general manager. Tr. 246-48.

It did not come as a surprise that Veris human resources manager Ward contradicted the COO's testimony and ultimately his own about Chris Jones, stating at first that "[h]e [Jones] treats everybody the same." Tr. 486. Yet, he admitted that he has had disagreements with Jones himself and in fact that most people that interact with Jones have had disagreements with him. Tr. 486. Ward then added that Jones behavior has improved, but not until 2014. Tr. 487.

Chris Jones also testified.²⁰ He is presently the process mill manager at Veris. At the time in issue, he was the assistant mill manager and Kiedock Kim was the mill manager. Jones stated that at that time his job was focused more on maintenance of the mill, as opposed to its actual operation. Tr. 588. While there were also others in the chain of authority over Varady, Jones was within that chain. He described his interactions with Varady as contentious, asserting that Varady was "constantly complaining" about his supervisors. Tr. 591-92. The Court notes that by that

¹⁹ Lowe was later fired on November 21, 2013, although he stated that he did not learn of the reason for his termination until after he filed his own MSHA discrimination case. Tr. 256.

²⁰ Jones' testimony began on a very odd note, as Veris' attorney requested that certain witnesses, all of whom had completed their testimony, be removed from the courtroom on the basis that Jones felt "uncomfortable" with those witnesses being present during his testimony. The request was denied. Tr. 583-84.

testimony Jones was unwittingly conceding that Varady was making safety complaints. Jones brought Varady to Pranke regarding these complaints but, as Jones put it, “it just went downhill from there.” Tr. 592.

There is no doubt about Jones’ view of Varady. When asked if any of Varady’s supervisors ever told him that Varady had poor work performance, Jones’ non-answer was that he never heard anything good about Matt Varady. Tr. 627. However, Jones’ assertion that Varady was simply a chronic complainer was not credible, as he offered no detail about the subjects of Varady’s complaints, making only making general statements.²¹ Tr. 593. When Jones was asked if Varady ever made any safety complaints to him, Jones’ indirect response was that “Mr. Varady was, was very vocal about a lot of things, if I recall.” Tr. 628. The Court, perplexed by the lack of responsiveness, noted that this was not a complicated question and required a simple yes or no answer, which could then be explained further, or the witness could assert that he did not understand the question. Jones then responded to the question, asserting that Varady never made any safety complaints to him.²² Tr. 628-29.

Jones admitted that he was getting a lot of citations from MSHA and though he first asserted that his emphasis was on the maintenance side of operations, not safety, he later stated that his responsibility did include the safety of the mill. Tr. 607.

²¹ Jones’ take on Mr. Lowe was also negative, stating that Lowe’s approach towards MSHA was to fight them. This was an odd assertion, as COO Dickson stated that Lowe was hired as part of Veris’ effort to have the safety department become effective. Tr. 404.

²² When asked about the details of his interaction with Varady in his office, Jones stated, “I remember that it was a lot of complaints about his supervisor.” Tr. 629. However, when questioned about the nature of those complaints, Jones answered, “I don’t recall that.” *Id.* Pressed further, Jones was asked if Varady’s complaint involved Todd Peterson charging a pressured line and the line rupturing, resulting in fragmented metal being discharged at Varady. Jones responded that he didn’t recall that at all. Yet, he admitted that he took Varady up to Peterson’s office, where Pranke and other Veris employees worked. Despite the admission that the event happened, when Jones was asked to then concede that Varady did make a safety complaint about the line rupture event, Jones stated that the complaint was not made *to him*. Tr. 630. Pursuing the issue further, when asked if Varady asked that the pipe be fixed properly, and not simply with a weld patch, Jones again could not recall. Jones denied that the line issue was the reason Varady was brought to Peterson and Pranke, contending that he was brought there because “Mr. Varady was always complaining about his supervisors.” *Id.* When asked if Varady’s complaint involved safety, again Jones’ answer was that he could not recall. Tr. 630. The Court concluded that Jones’ answers lacked credibility because Jones’ contention was that Varady was constantly complaining about his supervisors, but that Jones didn’t know what the complaints were about. Jones affirmed, upon questioning by the Court, that he is a meticulous person who pays attention to details. This was asked because many of Jones’ answers seemed to contradict his admitted attention to details, and the Court then asked if Jones had any problems with his memory. Jones responded that he did not have any medical issues with his memory. Tr. 645.

The Lunchroom Incident

In terms of Jones' involvement with the lunchroom incident, when he observed employees sleeping just before a shift change, Jones' memory was surprisingly poor. Despite insisting that he considered it a safety issue due to insufficient employees being at their work posts, Jones' version was dubious because when the Court inquired of Jones what happened after he saw all the employees in the lunchroom, he responded, "Well, nothing. I left. I exited." Perplexed by the odd response, the Court then inquired if Jones waited to see if the miners went back to work but his answer was that he did not wait and went out to check on the mill instead. Nor could he recall if any of the miners he spoke to about sleeping responded to him. These answers were hard to accept and therefore the Court inquired further, asking, "You mean you asked them why they were all there, and you can't recall anything that was said in response to your question?" Jones continued with his stance, asserting, "No, sir. I don't know – no, sir. I didn't stay there that long. I went out to check the mill. . . . So I left and went out to the mill and started walking the mill." The Court expressed surprise over Jones' answer, stating:

[Y]ou tell me that you asked your — you were a supervisor, in effect, of these people. You asked them a question. You didn't ask them a question just for the sake of asking, you were expecting an answer, and yet you either didn't get an answer or you didn't stay around to hear an answer. . . . Is that what you're telling me?

Jones replied, "You're right, Your Honor." The Court observed that normally when it asks a question of someone, it is looking for a response. 609-12.

Jones' Involvement with Varady's Firing

When Jones was asked if he ever asked anyone to discipline or fire Varady, his response was "Not that I, not that I can remember, no." Tr. 619. Contrary to his testimony at the hearing, Jones told the MSHA investigator that he could hire and fire employees. Tr. 626-27. In terms of Jones' apparent conflict about his ability to fire employees, Veris' attorney tried to have him explain that away, and Jones accommodated that effort by then stating that he has to go through human resources to fire someone. Tr. 658. Thus, he claimed he could not direct that an employee be fired, but he could set such a procedure in motion. Given Jones' position at Veris, one can reasonably conclude there would likely be an outcome consistent with his wishes.

The Incident of Jones Sleeping in His Truck

The Court inquired of Jones about this incident. Jones agreed that he was at the site and was concerned about the proper installation of a piece of equipment and that he wanted to be sure that everything was completed before he left the mine site. Jones stated that this involved the replacing of an underflow pump in the north thickener, a task which he stated involved "probably six employees." He agreed that he fell asleep before that installation was completed. When asked about the time of night this occurred, Jones initially stated that he did not know, then he stated that it could have been at two or three in the morning. He could not recall if he then went home, but that generally he would stay and work into the next day to make sure

everything was well and then leave. He then stated that he saw that the pump was installed. Although Jones stated that before he went to his truck there were just details to be completed, such as installing belts, the Court noted that he had said he would remain until the job was completely done and Jones confirmed that was the case. However, when asked if, after he awoke, he then assessed the situation to be sure the task was fully completed, Jones responded that he couldn't exactly remember. Yet he maintained that the tasks were completed before he fell asleep. Jones then stated that he was satisfied with what he saw when he awoke. On redirect Jones attempted to distinguish his sleeping on the job from the Veris policy that one may not sleep while on duty on the basis that he was not willfully sleeping. He had no intention to sleep while on duty. The Court pointed out that the policy does not distinguish between willfully sleeping on the job and simply sleeping on the job. Tr. 651-53.

Conclusion

The foregoing establishes that Matthew Varady established by a preponderance of the evidence, that he engaged in protected activity; that he was fired from Veris and that his firing was motivated by that protected activity. Veris failed to establish that no protected activity occurred and similarly failed to show that the adverse action was in no part motivated by the protected activity. Further, Veris, which presented only an affirmative, mixed-motive defense, failed to show that it was also motivated by the miner's unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone.

ORDER

The concept of damages is to "make whole" a person who has been unlawfully discharged. Because Mr. Varady is not an attorney, the Court offers the following general guidance as to allowable damages. At the hearing, Varady stated that he is no longer seeking reinstatement, but is seeking, among other items, reimbursement for expenses in seeking reemployment. Tr. 19. Such expenses are recoverable. Lost wages plus interest²³ are also part of the recognizable damages and would cover the period between the date of Complainant's discharge and the time when he again became employed. Because the "make whole" concept of relief does not contemplate a windfall to such individuals, any unemployment benefits received for the period between the unlawful discharge and the date of new employment are offsets to the damages that may be awarded. Litigation-related expenses are awardable. As examples, these would include copying expenses; any costs related to subpoenaing witnesses; medical expenses, including premiums, that would have been covered by Complainant's medical insurance, if applicable; and lost vacation pay, if applicable. Mileage, telephone calls, and postage are other examples of awardable damages. These are examples only. The guiding principle is for a complainant to recover the financial reimbursement for items he would have received had his employment continued and the expenses in pursuing this litigation, minus benefits received such as unemployment compensation.

²³ In *Local Union 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988), the Commission directed that in discrimination cases it would use the short-term Federal rate applicable to the underpayment of taxes as the rate for calculating interest for periods commencing after December 31, 1986.

Some damages are not recognized for relief under the Mine Act. For example, there is no authority or precedent for awarding compensatory damages for damage to reputation and/or pain and suffering. *Bewak v. Alaska Mech., Inc.*, 33 FMSHRC 2337, 2338 (Sept. 2011) (ALJ); *Peterson v. Sunshine Precious Metals, Inc.*, 24 FMSHRC 810, 811-12 (Aug. 2002) (ALJ); *Casebolt v. Falcon Coal Co.*, 6 FMSHRC 485, 503 (Feb. 1984) (ALJ).

Complainant Matthew Varady is directed to provide his itemized and documented damages within 30 days of this decision.

Commission Rule 44(b), 29 C.F.R. § 2700.44(b), provides that the Judge shall notify the Secretary in writing immediately after sustaining a discrimination complaint brought by a miner pursuant to section 105(c)(3) of the Act.²⁴ Consequently, the Secretary shall be provided with a copy of this decision so that he may file a petition for assessment of civil penalty with this Commission. The Secretary of Labor is directed to commence a civil penalty proceeding against Veris for this matter.

This case has now become complicated by the fact that Veris sought and received bankruptcy protection. The hearing in this matter concluded June 10, 2015. As this decision reflects, the hearing did not go well for Respondent, Veris Gold. No doubt, counsel for Respondent recognized this. A harbinger of this, the day after the hearing ended, counsel for Veris requested a conference call “to discuss a procedural issue that [he] believe[d] affect[ed] both the Varady and Lowe cases.” Therefore, it did not come as a surprise to the Court that two days after the hearing concluded, Respondent’s attorney advised, via email on June 12, 2015, that he was requesting withdrawal from his representation of Respondent.

Based on news reports, it is the Court’s understanding that the mine resumed operations immediately following the ownership change and that most of the same personnel continue to

²⁴ The provision, 29 C.F.R. § 2700.44, “Petition for assessment of penalty in discrimination cases,” states, in relevant part:

(b) Petition for assessment of penalty after sustaining of complaint by miner, representative of miners, or applicant for employment. Immediately upon issuance of a decision by a Judge sustaining a discrimination complaint brought pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), the Judge shall notify the Secretary in writing of such determination. The Secretary shall file with the Commission a petition for assessment of civil penalty within 45 days of receipt of such notice.

work at the mine.²⁵ It is hoped that, rather than attempt to hide behind successorship barriers, the new entity, which literally mines gold, will accept responsibility and pay Mr. Varady such damages as the Court may award, which are expected to be modest.

This Court retains jurisdiction of this proceeding pending the issuance of a final order granting relief.

So Ordered.

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

²⁵ The *Elko Daily Free Press* reported on June 25, 2015, that Veris Gold Corp. “sold its Elko County gold mines Thursday to Jerritt Canyon Gold LLC, but most of the miners will remain on the job. The assets sold include the Jerritt Canyon facilities. . . . Jerritt Canyon Gold President and CEO Greg Gibson said the majority of the 250 Veris Gold employees at the site were hired. . . . Jerritt Canyon Gold is a subsidiary of Spratt Mining which is controlled by Canadian billionaire Eric Spratt. Jerritt Canyon Gold owns 80 percent of Veris Gold’s assets and the other 20 percent is owned by Whitebox Asset Management, Gibson said. ‘Mining was not suspended. Mining will be increased,’ Gibson said. . . . He said the site is on track to produce 185,000 to 200,000 ounces of gold this year. The sale of the site happened after a Canadian bankruptcy court ordered Veris Gold to sell its assets. Veris Gold had filed under Companies’ Creditors Arrangement Act in Canada, which is a type of bankruptcy protection, in June of last year. It was operating under the protection of the CCAA and the U.S. Bankruptcy Code since June 9, 2014.”

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 9, 2015

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

v.

WM J CLARK TRUCKING SERVICE,
INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2015-55
A.C. No. 04-04119-361451

Mine: Clark Pit

DECISION

Appearances: Timothy Turner, United States Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

William J. Clark, *pro se*, King City, California, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor against William J. Clark Trucking Service, Inc., (“Clark”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“the Act”). This docket involves eight alleged violations, seven of which were issued pursuant to section 104(a) of the Act, and one of which was issued pursuant to section 104(g)(1) of the Act. The Secretary originally proposed penalties totaling \$8,752.00. Prior to the hearing, the parties reached a settlement of seven of the alleged violations. Respondent contests the sole remaining violation, Order No. 8703429. The parties presented testimony and evidence at a hearing held on July 30, 2015, in Monterey, California.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Order No. 8703429 was issued by MSHA Inspector Bryan Chaix on July 23, 2014, pursuant to section 104(g)(1) of the Act. The order alleges that Respondent violated 30 C.F.R. § 46.5(a) by failing to ensure that a mechanic at the mine had received new miner comprehensive training. The inspector determined that the condition was reasonably likely to result in a fatal injury, was significant and substantial, and was a result of the operator’s high negligence. The Secretary has proposed a penalty of \$6,624.00 for this alleged violation.

The parties have stipulated to the jurisdiction of the Mine Safety and Health Administration (“MSHA”) and the Federal Mine Safety and Health Review Commission. The

parties agree that Clark is a small operator and that Secretary's Exhibit 1 accurately reflects its history of assessed violations.

The primary issue before the Court is whether a mechanic who worked at the mine on an intermittent basis is required to have comprehensive training. I find that he does, and that the Secretary has proven the violation as cited.

The Clark Pit

Wm. J. Clark Trucking Service's Clark Pit is a surface sand and gravel mine in Monterey County, California. The mine is a small operation with twelve or fewer employees. The mine does not have a full-time mechanic, but rather contracts with an independent mechanic, Hans Wittström, when repairs are needed. The mine employees perform minor maintenance on mine equipment, and Wittström is called for more complex repairs. Wittström testified at hearing that when he is working in the pit, he is always within sight of the foreman or another miner, and that if the other miner is not in his immediate presence, it is because there are no hazardous conditions present.

The Secretary introduced Wittström's work orders for jobs done for Clark in the two years prior to the violation at issue. Sec'y Ex. 25. The work orders show that Wittström worked for Clark twelve days in June 2014, the month prior to the inspection resulting in the alleged violation. Wittström worked on a crane, a scale, a scraper, a gate, a car lift, and a pickup truck that month, as well as on a Mercedes. On most of the days, he worked between six and eight hours and work was done either in the mine shop or in the pit area. In May 2014, Wittström worked fifteen days for Clark, usually between six and eight hours. He worked on a water truck, the plant gear box, a forklift, a load truck, and a cone crusher, as well as on a boat and the Mercedes. In April 2014, Wittström worked for Clark ten days on a truck as well as the boat, the Mercedes, a Land Rover, and a Porsche. In March 2014, he worked for Clark thirteen days, including on a trap wagon, several trucks, a compactor, a cone crusher, loaders, and the Mercedes. Wittström worked only one day for Clark in February 2014, and five in January 2014. This is consistent with the seasonal operation of most sand and gravel mines in the region. The remaining work orders extending back to August 2012 indicate a similar pattern of work: Wittström worked for Clark an average of thirteen days per month from April through November, and an average of three days per month from December through March. The most he worked in one month was nineteen days, in both April 2013 and October 2012. He worked zero days in January and February 2013.

The work orders along with Wittström's testimony at hearing demonstrate that the mechanic had, over the course of the past few years, worked on mobile and stationary equipment at the mine, including loaders, dozers, the crusher, guards and conveyors, as well as personal vehicles. Some of the work was done in the pit and some was done in the shop located at the mine.

MSHA's Inspection

On July 22, 2014, MSHA Inspector Bryan Chaix traveled to the Clark Pit to conduct an inspection. Chaix has been a mine inspector for eight years, and has had training and experience not only as an inspector but also as a miner. In his initial inspection, Chaix issued a number of citations for faulty equipment and withdrew three miners who had not been adequately trained. The next day, July 23, 2014, he was driving by the pit on the way to another mine when he observed a number of miners working in the pit area. Chaix decided to revisit the mine, since he did not believe the three miners could have received the required annual refresher training in the time since he withdrew them the previous day. As he approached the mine, Chaix observed a truck engaged in dumping, which the foreman later told him was recycling work. Chaix next encountered Wittström, the mechanic, working to repair the equipment that Chaix had cited the previous day. Chaix had not observed Wittström on his previous visit to the mine.

Chaix discussed with the foreman and Wittström the duties assigned to Wittström, the hazards he was exposed to, and the amount of time he spent at the mine. They informed Chaix that Wittström had received no mine safety training at all. At hearing, Chaix noted that he had cited a number of violations on mobile equipment on July 22 and testified that, in his view, the equipment was not being maintained by a person who knew and understood the requirements of the MSHA regulations. Based on his observations at the mine, Chaix issued Order No. 8703429, alleging a violation of 30 C.F.R. § 46.5(a) for failure to provide comprehensive new miner training to Wittström. According to Chaix, the mine operator was aware of the training requirement and had been cited under the same standard during a previous inspection. Chaix ordered the mine to withdraw the mechanic until he had completed new miner training.

A. Violation

The Secretary alleges that Clark violated 30 C.F.R. § 46.5(a), which requires a mine operator to provide any “new miner” with 24 hours of specified training within 90 days of his first day of work. A “new miner” is defined as “a person who is beginning employment as a miner with a production-operator or independent contractor and who is not an experienced miner.” 30 C.F.R. § 46.2(i).

Clark does not argue that Wittström is an “experienced miner,” but rather that he is not a “miner” at all. Persons who are present at the mine but do not fall under the definition of “miner” are subject to less demanding training requirements: they must either receive site-specific hazard awareness training or be accompanied at all times by an experienced miner. 30 C.F.R. § 46.11.

A “miner” for purposes of § 46 is defined as follows:

- (1)(i) Any person, including any operator or supervisor, who *works at a mine* and who is *engaged in mining operations*. This definition includes independent contractors and employees of independent contractors who are engaged in mining operations; and
- (ii) Any construction worker who is exposed to hazards of mining operations.

(2) The definition of “miner” does not include scientific workers; delivery workers; customers (including commercial over-the-road truck drivers); vendors; or visitors. This definition also *does not include maintenance or service workers who do not work at a mine site for frequent or extended periods.*

30 C.F.R. § 46.2(g) (emphasis added).

Here, there is no dispute that Wittström was a mechanic who regularly repaired and maintained mobile and stationary mining equipment at the mine site. Accordingly, I find that he was engaged in “mine operations,” and that he was a “maintenance worker.” The issue of whether he was required to have comprehensive new miner training thus turns on whether he worked “at a mine site for frequent or extended periods.” 30 C.F.R. § 46.2(g).

“Frequent” and “extended” are not further defined in the regulations. The MSHA Program Policy Manual provides some guidance, defining “frequent” as “a pattern of exposure to hazards at mining operations occurring intermittently and repeatedly over time.” III MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 46, at 20 (2014) (“PPM”). The manual defines an extended period as “exposure to hazards at mining operations of more than five consecutive work days.” *Id.* The terms are also discussed in the ALJ decision *Kent Coal Mining Company*, 12 FMSHRC 126 (Jan. 1990) (ALJ).¹ In that case, the judge found that two workers who had performed most of the drilling at a surface coal mine in the previous five years, averaging three or four days per week at the mine, had worked at the mine for “frequent or extended periods.” *Id.* at 131. In contrast, two workers who had drilled at the site only once prior to the violation were governed by a separate training provision for short-term workers. *Id.*

In this case, Wittström’s testimony and work orders show that in the two years prior to the violation, he worked for Clark an average of thirteen days per month from April through November, and three or four days per month from December through March. He sometimes worked only a few hours, but more often worked a full day. This is the type of “intermittent and repeated” presence described in the MSHA Program Policy Manual as “frequent.” *See* III PPM, Part 46, at 20. It is also similar in scope to the three or four days per week worked by the drillers who were found to be “miners” in *Kent Coal Mining Company*. 12 FMSHRC at 131.

Clark argues that Wittström should not be considered a miner because much of his work was done in the shop adjacent to the pit rather than in the pit itself. However, a “mine site” for purposes of the training regulations is “an area of the mine where mining operations occur.” 30 C.F.R. § 46.2(f). Since the shop is used for the “maintenance and repair of mining equipment,” a type of “mine operation” under the regulations, it clearly qualifies as a “mine site.” 30 C.F.R. § 46.2(f), (g), (h). Clark also insists that it is impossible to tell from Wittström’s work orders whether he was working at the mine or at another location, such as Clark’s separate landscaping yard. However, the work orders normally indicate an alternate location when Wittström was not

¹ *Kent Coal Mining Company* was decided under the separate training requirements for surface coal mines, 30 C.F.R. § 48, but those regulations include a provision similar to the one at issue, which requires that maintenance workers “contracted by the operator to work at the mine for frequent or extended periods” obtain new miner training. 30 C.F.R. § 48.22(a)(1).

working at the Clark Pit. Jobs with those indications were not included in the calculation of Wittström's time at the mine.

Based on the above analysis, I find that Wittström worked at the mine site on a "frequent" basis and so was a "miner" under § 46 who was required to have comprehensive new miner training.

Clark additionally argues that the mine has complied with regulations by ensuring that when Wittström is at the mine, he is always accompanied by another miner. Clark directs the Court's attention to an ALJ decision in which a mine was found not to be in violation of hazard training standards where workers were accompanied by an experienced miner with knowledge of the specific hazards in the mine. *Apex Quarry LLC*, 36 FMSHRC 211 (Jan. 2014) (ALJ). But while regulations governing hazard training permit this arrangement, the new miner training provision does not: new miner training is mandatory for miners. Because I find that Wittström was a miner who was required to have but did not receive comprehensive training, I conclude that Clark violated 30 C.F.R. § 46.5(a).

B. Gravity and S&S

The Secretary asserts that Clark's violation created the reasonably likely risk of fatal injury and that it was significant and substantial ("S&S"). A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained:

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

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an

S&S violation for using an inaccurate mine map). The Commission clarified that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury,” but rather that the hazard created would cause an injury. *Id.* at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal*, 33 FMSHRC 2357, 2365 (Oct. 2011).

In *Lehigh Southwest Cement*, 33 FMSHRC 3229, 3243 (Dec. 2011) (ALJ), Judge Paez upheld the S&S designation for a violation of § 46.5(a), finding that the failure to provide new miner training resulted in “the hazard of a partially-trained miner[.]” Specifically, the judge noted that the miner was working in close proximity to heavy mobile equipment, which created a reasonably likely risk that a fatal injury would occur. *Id.* at 3242. The judge also relied on a provision of the Mine Act, which recognizes that a miner who has not received the requisite safety training is “a hazard to himself and to others.” 30 U.S.C. § 814(g)(1).

Applying the *Mathies* test to the case at hand, I find that the Secretary has established the first element by demonstrating the violation of a mandatory safety standard. The Secretary has also established that the failure to provide new miner training created the hazard of an untrained miner, satisfying the second element of the *Mathies* test. Here, the untrained miner was working on and around mining equipment and in the area where crushing and mining activities were taking place without understanding the attendant hazards and safety requirements. Additionally, he was responsible for repairing equipment for others to use, but had not been trained in the safety regulations applicable to that equipment. This hazard was a danger both to the miner himself and to others at the mine, and was reasonably likely to result in a serious injury, establishing the third and fourth elements of the *Mathies* test. Accordingly, I conclude that this violation was S&S.

C. Negligence

MSHA Inspector Chaix determined that the violation was a result of high negligence on the part of the operator. He based his determination on the fact that the mine had numerous prior training violations, including several under the standard at issue here. The Secretary introduced at hearing a record of a previous violation under § 46.5 from March 2013 involving two miners who had not received new miner training. Sec’y Ex. 6. Chaix further expressed that he believed training was a pervasive problem at the mine: he witnessed multiple safety violations during his inspections, including one involving a miner who claimed to have received safety training the day before. The mine foreman also admitted to Chaix that training had been a problem at the mine for several years.

In *Lehigh Southwest Cement*, Judge Paez upheld the high negligence designation for a violation of § 46.5(a) for failure to provide training to a construction worker, noting that the mine’s safety director had admitted that he was familiar with the requirements of § 46 and that the status of construction workers as “miners” was clearly outlined in the regulations. 33 FMSHRC at 3243. Here, while the mine owner does not claim to have special expertise in the training regulations, the operator still had reason to know that training was required for Wittström. The operator was put on notice by its previous training violations that training was an area that needed to be addressed, and this should have led it to inquire whether training was required for all of its workers, including Wittström. While Wittström may not have been a

“miner” in the layperson’s sense of the term, he was very clearly exposed to mine hazards on a regular basis. A reasonably careful mine operator would have taken note of this and provided the necessary training. I affirm the Secretary’s determination that Clark was highly negligent in committing this violation.

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 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 “[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria which include the history of violations, the size of the operator, negligence, gravity, the ability to continue in business, and good faith abatement. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is “bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a history of three training violations in the past two years for this mine. Sec’y Ex. 1. The mine is a small operator. The parties have stipulated that the penalty as proposed will not affect its ability to continue in business, and that Respondent demonstrated good faith in abating the citations and orders. Jt. Stip. ¶ 7. The gravity and negligence of the citations and orders are discussed above. I find a penalty of \$6,624.00 is appropriate for Citation No. 8703429.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$6,624.00. The other citations and orders in this docket are addressed in a separate order granting the Secretary’s motion for partial settlement. Accordingly, William J. Clark Trucking Service, Inc., is **ORDERED** to pay the Secretary of Labor a total penalty of \$6,624.00 within 30 days of the date of this decision.

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

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William J. Clark, Wm. J. Clark Trucking Service, P.O. Box 682, King City, CA 93930

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 9, 2015

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

v.

WOLF MOUNTAIN COAL, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-882
A.C. No. 24-00839-354603 Q131

Decker Mine

DECISION

Appearances: Daniel R. McIntyre, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
David Bettcher, Wolf Mountain Coal Company, Sheridan, Wyoming, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Wolf Mountain Coal, Inc. (“Wolf Mountain”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony and documentary evidence at a hearing held in Billings, Montana, and presented oral argument following the hearing. One section 104(a) citation was adjudicated at the hearing. Wolf Mountain is an independent contractor that operates a coal processing facility near Decker, Montana.

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

Citation No. 8477208

On May 19, 2014, MSHA Inspector David Maynard¹ issued Citation No. 8477208 under section 104(a) of the Mine Act, alleging a violation of section 77.502 of the Secretary’s safety standards. (Ex. G-2). The citation alleges that the pull-cord switch on the Silo Gathering Conveyor immediately restarted the conveyor when returned to the reset position. The conveyor should have not restarted until someone restarted it at a different location. The malfunction of

¹ Maynard has been a coal mine inspector with MSHA for about four years. (Tr. 6). Prior to his employment with MSHA, he earned a Bachelor of Science degree in civil engineering. Upon graduation, he worked for several engineering companies doing structural design for industrial facilities, including a coal processing facility. (Tr. 6-9).

the pull-cord system leaves miners conducting weekly and monthly examinations of the system susceptible to entanglement-type injuries when returning the pull-cord switch to the reset position, which would result in lacerations, fractures, and dismemberment.

Inspector Maynard determined that an injury was reasonably likely to occur, that the violation was of a significant and substantial (“S&S”) nature, and that any injury could reasonably be expected to be permanently disabling. He determined that Wolf Mountain’s negligence was moderate and that one person would be affected. Section 77.502 provides:

Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

30 C.F.R. § 77.502. The Secretary proposed a penalty of \$207.00 for this citation.

Discussion and Analysis

1. Evidence

Wolf Mountain operates a coal processing facility at the Decker Mine but the coal it processes comes from the Spring Creek Mine, which is a short distance away. (Tr. 15). During his inspection on May 19, 2014, Inspector Maynard asked the operator to pull the pull-cord on each conveyor at the facility to check to see if it functioned properly. (Tr. 14). He also asked the operator to restart each conveyor. The inspector testified that a conveyor is not supposed to automatically restart when the pull-cord switch is reset. (Tr. 34-35). Instead, for safety reasons, the operator needs to reset the pull-cord switch and then go to the control room or another location to restart the conveyor. The pull-cord switch is inside a box mounted on the frame of the conveyor. (Ex. R-1, p. 4). The pull-cord is attached to a red lever on the outside of the box. When the cord is pulled, the lever turns counter-clockwise, pops out, and locks in that position. That action opens the electrical circuit and the conveyor stops. To reset the pull-cord switch, the operator pushes in the red lever while turning it in a clockwise direction.

All the pull-cord switches at Wolf Mountain’s facility functioned properly when the pull-cords were pulled; each conveyor immediately stopped upon a pull of its cord. Except for the Silo Gathering Conveyor, none of the conveyors restarted when the pull-cord switch was reset. In the case of the Silo Gathering Conveyor, however, the belt immediately restarted when the pull-cord switch was reset. (Tr. 16). The entire length of the belt is not visible from that position. The inspector stated that the “belt should get re-energized from another location or from the main start-up switch.” *Id.* The belt should restart once the switch is flipped at the control panel. (Tr. 25, 28-29; Ex. R-1 p. 6).

As stated above, Inspector Maynard testified that when he asked the Wolf Mountain employee who was accompanying him on his inspection to pull the cord for the Silo Gathering

Conveyor, the conveyor stopped immediately. (Tr. 31). The company representative seemed surprised when the belt started as soon as he reset the pull-cord switch. (Tr. 33). Inspector Maynard testified that “[i]t was apparent that [the employee] knew that was not the way it was supposed to function.” *Id.*

Inspector Maynard cited Wolf Mountain for a violation of section 77.502 because the pull-cord switch, which is electric equipment, did not function correctly when it was reset. The operator failed to “maintain electrical equipment in safe operating condition.” (Tr. 34). The inspector testified that the violation created a discrete safety hazard. Someone could easily become entangled in the moving belt as he reset the switch because he would be “in very close proximity to the conveyor” and he would not be expecting the belt to restart. (Tr. 36). The belt would be about eight to twelve inches from where the individual would be standing. (Tr. 50). He could be crouching down beside the framework of the conveyor as he reset the switch and he might be holding onto the framework for leverage or to keep his balance. (Tr. 36-37, 53-54). Because the pull-cord switch is located at the end of the conveyor, if someone were to be caught in the moving belt, he would be pulled into a pulley. (Tr. 37, 63-64). The types of injuries the inspector would expect to see are “strains, sprains, dislocations, and small digit dismemberment.” *Id.*

Someone might use the pull-cord to stop a conveyor in a number of situations, such as when cleaning up under the belt or in an emergency situation. A rake with a long handle for cleaning up accumulations was leaning against the frame of the conveyor system. (Tr. 46; Ex. G-4). If someone’s clothing, such as a coat, becomes entangled between the belt and the rollers, the pull-cord could be used to shut down the belt. It is also possible that coal fines could start to smolder if frictional heat is being generated and someone would use the pull-cord to shut down the belt. Finally, an electrician is required to test the pull-cord switch on a monthly basis. At this facility, the system is checked on a weekly basis. (Tr. 58-59). The pull-cord switch would need to be reset to put the belt back into production every time the cord is pulled. The inspector believed that an injury was reasonably likely to occur assuming continued mining operations. (Tr. 46-48).²

2. Violation

The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). “[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty.” *Id.* at 1197. The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

The Commission interprets safety standards to take into consideration “ordinary human carelessness.” *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). “Even a skilled

² Wolf Mountain did not present any testimony at the hearing except in response to questions posed by the judge. (Tr. 62-65) The Secretary introduced two of Wolf Mountain’s exhibits, which were admitted into evidence. (Ex. R-1 pgs. 1-6; Video Exhibit).

employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions[.]” *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

I find that the Secretary established a violation of section 77.502. Although the pull-cord switch was frequently tested by a qualified person, it was not functioning properly at the time of MSHA’s inspection. The belt shut down immediately when the cord was pulled. As a consequence, the greatest hazard presented by a faulty pull-cord switch was not present. Nevertheless, the belt immediately started when the pull-cord switch was reset. This fact creates a hazard because the person resetting the switch would not expect the belt to start. He might be positioned close to belt as he resets the switch and, because he would not be expecting the belt to start, he could become entangled and injured by the moving belt.

Wolf Mountain argues that a miner would more likely reset the pull-cord switch from a standing position away from the belt as illustrated in its photograph. (Ex. R-1, p. 1). The miner accompanying Inspector Maynard reset the switch from a crouched position near the belt, however. Given that a miner would not be expecting the belt to start, it is entirely foreseeable that a miner would not think it would be necessary to be a safe distance from belt when resetting the switch.

3. Significant and Substantial

I find that the Secretary established that the violation was S&S.³ There was a violation of a safety standard that created a discrete safety hazard. The hazard included the risk that someone would get caught in the moving belt when resetting the pull-cord switch. He would not expect the belt to move so he would not feel it necessary to be in a safe position.

Whether it was reasonably likely that the hazard contributed to by the violation will result in an injury is a close issue in this case. The “reasonably likely” requirement does not require the Secretary to prove that an injury was “more probable than not.” *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). The “Secretary need not prove a reasonable likelihood that the violation itself will cause injury” but, rather, that the hazard contributed to by the violation will cause an injury. *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011). For the reasons discussed above, I find that the hazard contributed by the violation would reasonably be expected to result in an injury. I credit Inspector Maynard’s testimony on this issue. An experienced MSHA inspector’s opinion that a violation is S&S is entitled to substantial weight. *Harlan*

³ An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d) (2006). In order to establish the S&S nature of a violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Cumberland Coal Co., 20 FMSHRC 1275, 1278-79 (Dec. 1998). Any injury would be of a reasonably serious nature. I credit Inspector Maynard's testimony that expected injuries would include strains, sprains, dislocations, and small digit dismemberment.

4. Negligence

Wolf Mountain was represented at the hearing by David Bettcher, who is a plant foreman. He argued that the violation was not S&S. In closing arguments he stated:

I just feel that this shouldn't have been an S&S, it should have been written up as a non-S&S. I mean, we could have tested it the day before, and it worked great. We could have, which we did several days prior to that, and everything worked fine.

(Tr. 73). I conclude that this argument relates to the negligence of Wolf Mountain rather than to the issues of S&S and gravity. Given that Wolf Mountain was not represented by counsel and that I must enter negligence findings based on the evidence introduced at the hearing, I have considered all the evidence presented when applying the negligence criterion to the facts of this case. The Secretary does not dispute that Wolf Mountain checked its pull-cord switches weekly and that the most recent test was performed on May 12, 2014. (Tr. 58-59; Ex. G-2). There is no evidence that the switch malfunctioned when tested on that date. The fact that all the other pull-cord switches worked properly when tested during MSHA's inspection, and that Wolf Mountain's employee acted surprised because the belt restarted when he reset the pull-cord switch during the inspection, supports a finding that the malfunction occurred sometime since the previous test.

The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of that standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted).

I find that Wolf Mountain was not negligent with respect to this violation. It fully met its duty of care. It frequently examined and tested the cited pull-cord switch. It performed these examinations weekly rather than monthly as required by safety standard. 30 C.F.R. § 77.502-2. There is no evidence that it did not properly maintain its electric pull-cord switches; indeed the evidence clearly shows that it did all that it could to maintain its pull-cord system. A potentially dangerous condition had not been discovered during Wolf Mountain's previous test of the pull-cord switch. A reasonably prudent person familiar with the mining industry, the salient facts, and the protective purpose of the safety standard would agree that Wolf Mountain met its duty of care with respect to compliance with the safety standard.

I **MODIFY** Citation No. 8477208 to indicate that the violation of was not the result of Wolf Mountain's negligence. In all other respects the citation is affirmed. Although I am not

bound by the penalty point system developed by MSHA, I note that if the penalty is recalculated using MSHA's system taking into consideration my no negligence finding, the penalty would be about \$100.00 with the reduction for good faith abatement. 30 C.F.R. § 100.3. I find that a penalty of \$100.00 is appropriate for this violation. I considered all of the penalty criteria in assessing this penalty.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The parties stipulated that Wolf Mountain has a history of three violations during the previous 15 months, only one of which was designated as S&S. (Ex. G-1). Respondent is a small to medium-sized independent contractor. The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect upon its ability to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

Citation No. 8477208 is **MODIFIED** to show that Wolf Mountain was not negligent with respect to the cited violation. Wolf Mountain Coal, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$100.00 within 30 days of the date of this decision.⁴

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

Distribution:

Daniel R McIntyre, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204-3518 (Certified Mail)

Wolf Mountain Coal, Attention: David Bettcher, P.O. Box 6206, Sheridan, WY 82801 (Certified Mail)

RWM

⁴ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

September 11, 2015

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

v.

AMERICAN COLLOID COMPANY,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2011-0805M
A.C. No. 48-00594-247740

Docket No. WEST 2011-1395M
A.C. No. 48-00594-260938

Mine: Colony East Mill

DECISION AND ORDER

Appearances: Nadia Hafeez, Esq., U.S. Department of Labor, Office of the Solicitor,
Denver, CO., for Petitioner;

Laura Beverage, Esq., Jackson Kelly PLLC, Denver CO., for Respondent.

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves one section 104(d)(1) citation, two 104(d)(1) orders, and one 104(d)(2) order, 30 U.S.C. § 814(d)(1),(2), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to American Colloid Co. (“American Colloid” or “Respondent”) at its Colony East Mill. The parties presented testimony on October 30 and 31, 2012, in Rapid City, South Dakota.

Originally, there were five dockets in this case, but three of them settled: WEST 2010-1561, WEST 2011-0775, and WEST 2011-1453. (Tr. 8:7-14)

In summary, and for the following reasons, I conclude that:

- American Colloid did not violate 30 C.F.R. § 56.14207. Therefore, I vacate Citation No. 6329226 and Order No. 6329235.
- For Order No. 6427277, there was a violation of 30 C.F.R. § 56.15005; an injury was highly likely; it could reasonably be expected to result in a fatality; the violation was significant and substantial; a single person was affected; the negligence level was high; and, the violation was the result of an unwarrantable failure.
- For Order No. 6588114, there was a violation of 30 C.F.R. § 56.15005; an injury was reasonably likely; it could reasonably be expected to result in a fatality; the violation was

- significant and substantial; a single person was affected; the negligence level was high; and, there was no unwarrantable failure.

Stipulations

The following stipulations were read into the record at the hearing: (Tr. 8:15 – 9:19)

1. At all times relevant to the above referenced matters, American Colloid admits that it is the operator of Colony East Mill, Mine I.D. 48-00594, located in Crook County, Wyoming;
2. American Colloid is subject to the jurisdiction of the Mine Act;
3. The Administrative Law Judge has jurisdiction in this matter;
4. The subject orders and citation were properly served by the duly authorized representative and Secretary bond agent of American Colloid on the dates and places stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein;
5. The exhibits to be offered by American Colloid and the Secretary are stipulated to be authentic, but no stipulations are made as to the relevance or the truth of the matters asserted therein;
6. American Colloid demonstrated good faith in the abatement of the violations; and
7. The proposed penalties will not affect American Colloid's ability to remain in business.

Preliminary Matter: MSHA Did Not Deny American Colloid its Walkaround Rights

American Colloid argues that it was denied its walkaround rights in violation of 30 U.S.C. § 813(f) when Citation No. 6329226 and Order No. 6427277 were issued, and asks that those citations be vacated. (Resp. Br. at 2-3; Tr.199:13-19; Tr. 272:13-18; Tr. 277:18-23; Tr. 313:17-24) The Secretary alleges that the inspectors were on their way to find mine management when they observed the hazard cited in Citation No. 6329226, and under the Mine Act were obligated to address it. (Sec. Br. at 11-12; Tr. 54:19 – 55:4; Tr. 138:23 – 139:7; Tr. 273:4-11) The Secretary also alleges that while the inspectors were driving back onto mine property to continue their inspection, they observed the condition described in Order No. 6427277, pulled over, and issued a verbal imminent danger order to a truck driver. (Sec. Br. at 19-20; Tr. 45:11-22; Tr. 46:22-24; Tr. 122:23 – 123:18; Tr. 220:9 – 221:15) The Secretary argues that the inspectors did not deny the operator its right to be present during an inspection, and therefore did not violate 30 U.S.C. § 813(f). (Sec. Reply Br. at 19-20)

Section 103(f) of the Mine Act states in pertinent part:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners *shall be given an opportunity* to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine.

30 U.S.C. § 813(f) (emphasis added). The right of a mine operator to accompany an inspector has been “consistently recognized by the Commission and the courts.” *Consolidation Coal Co.*, 16 FMSHRC 713, 719 (Apr. 1994); *SCP Investments, LLC*, 31 FMSHRC 821, 827 (Aug. 2009); *DJB Welding Corp.*, 32 FMSHRC 728, 730 (June 2010)(ALJ Paez). The Commission has concluded, however, that walkaround rights under section 813(f) are “for the purpose of aiding such inspection” and only “grant a qualified right” because the statute states that operators “shall be given an opportunity to accompany” inspectors during mine inspections. *SCP Investments, LLC*, 31 FMSHRC at 827, 831; 30 U.S.C. § 813(f).

Additionally, there is a difference between an outright refusal to allow an operator to participate in an inspection, which is a violation of Section 813(f), and the issuance of a citation without a mine representative present. *Id.*; *See DJB Welding Corp.*, 32 FMSHRC at 730-31; *See Veris Gold USA, Inc.*, 2013 WL 8505727, at *12 (Sept. 2013)(ALJ Miller).

Further, under Section 104(a) of the Mine Act, if upon inspection or investigation, an inspector believes that an operator has violated the Mine Act, “or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to the Act, he *shall* [...] *issue a citation to the operator.*” 30 U.S.C. § 814(a) (emphasis added). Therefore, if an inspector observes a hazard, he does not have the discretion to not issue a citation.

There is no requirement under the Mine Act that the operator must be present during every inspection. There is also no requirement that an inspector who observes a hazard must delay the issuance of a citation or order until he makes contact with the operator. To the contrary, an inspector who observes a violation of the Mine Act or health and safety regulation is required to issue a citation or order. There is no evidence in this record that the inspectors either intentionally or inadvertently denied the Respondent its walkaround rights.¹ In both instances the inspectors observed a hazard and took the action required by statute to remedy it as soon as possible. The inspectors had a duty under the Mine Act to respond to the hazards they observed and did so by issuing Citation No. 6329226 and Order No. 6427277. (Tr. 23:1-13; Tr. 45:11-22; Tr. 46:22-24)

The operator does not have an absolute right to accompany an inspector during an inspection, and under the circumstances of this case it was reasonable for the inspector to issue the citation and order in the absence of a mine representative. Therefore, I conclude that the

¹ The findings of fact here and below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness’s testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness’s testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

Secretary did not deny American Colloid its walkaround rights under Section 103(f) of the Mine Act for Citation No. 6329226 and Order No. 6427277.

Basic Legal Principles

Significant and Substantial

The citation and order in dispute and discussed below have been designated by the Secretary as significant and substantial (“S&S”). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) (“The Secretary’s burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.”)

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

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

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

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that “the absence of an injury-producing event when

a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005)); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

Negligence

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” *Id.* Reckless negligence is present when “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” *Id.* High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence is when “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.*

The Commission has provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that:

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

5 FMSHRC 13, 15 (Jan. 1983) (citations omitted).

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), “is often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984) and *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 673, 681

(Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ Fauver). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Unwarrantable Failure

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); *see also Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

See Manalapan Mining Co., 35 FMSHRC 289, 293 (Feb. 2013). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. *Big Ridge, Inc.*, 34 FMSHRC 119, 125 (Jan. 2012) (ALJ Zielinski). These include:

(1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999).

Manalapan Mining Co., 35 FMSHRC at 293; *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637, (Oct. 2014); *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 4 (Jan 2015); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813;

Midwest Material Co., 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidated Coal*, 22 FMSHRC at 353; *IO Coal*, 31 FMSHRC at 1351; *Manalapan Mining Co.*, 35 FMSHRC at 293. "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." *Big Ridge, Inc.*, 34 FMSHRC at 125; *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

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 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 said penalty. 29 C.F.R. § 2700.28.

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (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 in abatement of the violative condition. 30 U.S.C. § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ Zielinski).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the Section 110(i) criteria. *E.g.*, *Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC at 725 (appropriate for judge to raise a penalty significantly based upon findings of

extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC at 713 (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving “extreme gravity” and/or “gross negligence,” or, as stated in the former section of 105(a), “an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances,” may dictate higher penalty assessments. *See* 30 C.F.R. Part 100 Final Rule, 72 Fed. Reg. 13592-01, 13,621.

In addition, Commission ALJs are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. As explained in *Sellersburg Stone Co.*, 5 FMSHRC at 293:

When ... it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves that Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Special Assessment

Through notice and comment rulemaking, the Secretary promulgated regulations specifying the “Criteria and Procedures for Proposed Assessment of Civil Penalties.” 30 C.F.R. Part 100. Those regulations provide two options for determining the amount of a civil penalty to be assessed by the Secretary: regular assessment and special assessment. 30 C.F.R. §§ 100.3, 100.5(a), (b). Penalties for the vast majority of violations are determined through the “regular assessment” process whereby penalty points are assigned pursuant to criteria and tables that reflect the factors specified in sections 105(b) and 110(i) of the Act. 30 C.F.R. §100.3.

The regulations also allow MSHA to bypass the regular assessment process if it determines that conditions warrant a special assessment. 30 C.F.R. §100.5(a), (b). The regulations do not further explain what conditions may warrant a special assessment.² Nor do they identify how the amount of a special assessment will be determined, other than to state that “the proposed penalty will be based on the six criteria set forth in 100.3(a). All findings shall be in narrative form.” *Id.* The narrative findings for special assessments are typically brief and conclusory. The lack of transparency in the Secretary's special assessment process coupled with the Secretary's refusal to disclose the bases for specially assessing a penalty, can frustrate attempted explanations. However, whether the Secretary proposes a regularly or a specially

² In 2007, the Secretary substantially amended the penalty regulations, significantly increasing penalties for most violations, eliminating the single penalty assessment, and deleting language from section 105(a) that specified eight categories of violations that would be reviewed to determine whether a special assessment is appropriate including, violations involving an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances. 72 Fed. Reg. at 13,621.

assessed penalty is of little consequence and is not binding on the Commission because the Commission imposes civil penalties *de novo*.

Citation No. 6329226 and Order No. 6329235

On May 11, 2010, MSHA Inspectors Shane Julien³ and Alan Roberts⁴ were dispatched to the mine to respond to a hazardous condition complaint alleging that the mine's roads and walkways were extremely slippery from a coating of water and bentonite⁵ material. (Tr. 20:19 – 21:9) As they were looking for mine management, they observed a truck in a condition which prompted Julien to issue Citation No. 6329226, alleging a violation of 30 C.F.R. § 56.14207 pursuant to Section 105(d)(1) of the Mine Act. The regulation states that:

Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.

Unattended mobile equipment parked on a grade must have the wheels or tracks chocked or turned into bank in addition to setting the park brake (if provided) in order to prevent equipment from unexpectedly rolling and striking miners working in the area.

Grade can be determined a number of ways, to include testing the equipment to determine if it rolls when the transmission is placed in neutral. This standard applies to all off-road and on-road self-propelled equipment used on mine property, including vehicles such as vans, suburbans, and pick-up trucks that are used at mine sites. Any piece of mobile equipment used on the mine site will have to comply with the standard. The standard would allow for mobile equipment parked on a grade to be turned into a bank, chocked, parked with the front or rear wheels in a ditch or trough.

30 C.F.R. § 56.14207 (emphasis added). Section 56.14207 is a mandatory safety standard and is

³ At the time of the hearing, Julien had been a mine safety and health inspector at MSHA for 10 years. (Tr. 16:17-24) Prior to working for MSHA, Julien worked for nine years in an underground zinc mine and ended his career there as a shift foreman. After that he spent two years running a small crusher for a company in New York. (Tr. 17:2-9) He is also a certified accident investigator and is a member of the National Mine Rescue team. (Tr. 17:23 – 18:5)

⁴ At the time of the hearing, Roberts had been an MSHA mine inspector for nine years. (Tr. 118:25 – 119:7) Prior to joining MSHA, he worked for 21 years at the Hutchinson Salt Mine, and at the end of his employment there, he was the mine superintendent. (Tr. 119:13-23)

⁵ Bentonite is a clay-based material that is used for products such as kitty litter and floor spill absorbent. (Tr. 19:16-19) Colony East focuses on the processing of a powdered bentonite. (Sec. Br. at 1)

one of the priority standards under the Rules to Live By initiative that began in March, 2010. (Ex. S-10) Julien's citation alleges:

The Freightliner flatbed truck was parked and unattended on a 4% grade without the wheels being chocked. The truck was in neutral, the air break applied and was being loaded by two company forklifts with pallets containing bags of product. The area is accessed several hundred times per day to load trucks. The area is directly beside a main stairway access into the warehouse that is used by foot traffic. The concrete in the area is extremely slippery from accumulation of Bentonite, company product. Based upon continuous mining operations[,] this condition poses a crushing hazard to miners that would reasonably result in a fatality. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that they told the driver to park on the grade and knew of the requirement to chock wheels yet did not provide the miner with chocks or ensure the use of them on graded areas. The violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-1.

On May 13, 2010, at 10:16 am, Inspector Julien issued Order No. 6329235 to American Colloid at the Colony East Mill alleging a violation of 30 C.F.R. § 56.14207 pursuant to Section 105(d)(1) of the Mine Act. The order alleges:

The Western Star over the road truck was parked, unattended on a 3% grade without chocks on any of the wheels. The truck was on site to obtain a load of product and was informed by company installed signs to proceed to the area to park. The truck was idling, transmission in neutral and the air brake [was] applied. The driver stated that no one from the company had told him of the need to chock his wheels and he had signed in at the Shipping Department as told by the operator installed signs. The area is directly across from the plant[']s office where management and the safety representative travel several times while on site. The area is exposed to foot and mobile equipment traffic at all hours of the day to include during the dark. Based upon continuous mining operations this condition poses a contact hazard to miners that would reasonably result in a [sic.] fatal crushing injuries. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that they observed the condition, knew of the requirement to chock on a grade, told the driver to park there and even talked to him upon arrival[,] yet failed to ensure that wheel chocks were used, supplied[,] or enforced to protect the miner. This violation is an unwarrantable failure to comply with a

mandatory standard. This standard was cited 2 times in two years at this mine.

Ex. S-13.

The Violations

Both the citation and order allege that an injury was reasonably likely, the violating condition could reasonably be expected to result in a fatality, the violations were S&S, a single person was affected, and the negligence level was high. (Ex. S-1; Ex. S-13)

Respondent was cited twice within three days for violating Section 56.14207 for failing to chock the wheels of an unattended vehicle parked on a grade. (Tr. 22:5-14; Tr. 52:20-24; Tr. 45:11-22) American Colloid argued that it did not violate the standard because the grade was insufficient in both locations to trigger the chocking requirement. (Resp. Br. at 12-13) The Secretary countered that the standard makes no mention of “sufficient” or “insufficient” grades, but rather the chocking requirement comes into play any time mobile equipment is parked on a grade, even a one percent grade. (Sec. Reply Br. at 6; Tr. 115:8-12)

On May 11, Julien observed an unattended flatbed truck parked on a grade; the truck’s wheels were not chocked. (Tr. 23:1-13; Ex. S-6) Julien testified that the flat-bed loading area had a visually noticeable grade. (Tr. 114-18 – 119:3) Julien and Inspector Roberts measured the grade with an Abney level⁶ and detected a four percent grade in the loading area. (Tr. 23:14-19)

On May 13, upon arrival at the mine to complete his investigation, Julien observed several managers standing outside the office when a truck pulled into the parking lot. The driver left the truck idling as he entered the shipping department. He did not chock the wheels. (Tr. 45:11-22; Tr. 46:22-24; Tr. 220:9 – 221:15) Julien testified that he could visually perceive a grade in the area. (Tr. 113:6-9) He measured the grade with an Abney level and determined that it was three percent. (Tr. 46:25 – 47:2; Tr. 48:20-23; Tr. 1112:71-13)

Casey Doolan,⁷ the environmental health and safety coordinator at the mine, disagreed with Julien’s grade measurements; he did not perceive a visual grade. After-the-fact (2011), Respondent hired a professional surveying company to measure the grade in the area. (Tr. 221:16-20; Tr. 224:2-13) Exhibit R-3 shows the instrument-measured grade levels. (Tr. 225:12-

⁶ An Abney level is “a surveying clinometer consisting of a short telescope, bubble tube, and graduated vertical arc [...]” *Abney Level definition*, MIRIAM- WEBSTER.COM, available at <http://www.merriam-webster.com/dictionary/abney%20level>.

⁷ At the time of the hearing, Doolan was the regional environmental health and safety (“EHS”) manager for all U.S. facilities at Amcol International, the parent company of American Colloid Company. (Tr. 187:4-12) At the time the citation was issued, he was the EHS coordinator for the Colony East and Colony West facilities. (Tr. 187:13-19) As the EHS coordinator, he ensures all of the safety programs are implemented properly and that the company is in compliance with the regulations. (Tr. 187:22 – 188:4)

18) The grade in the load-out bay was one percent, and the grade in the parking area ranged from 1.2 percent to 2.4 percent. (Tr. 228:20-25; Ex. R-3) The grade in the location relevant to this citation was 1.2 percent. (Tr. 228:12-15; Ex. R-2) The survey company performed the same measurements in 2012 and got the same results. (Ex. R-2)

Given the disparity between the evidence from the Secretary's witnesses and that from the operator's survey company, I must first determine from the preponderating evidence what the grade was. I find that the grade measured by the professional surveying company is more reliable than the Abney level measurements taken by Inspector Julien at the time the citation and order were written. It is significant that the surveying company used more sensitive instruments to make their measurements, and their results repeated from one year to the next. I also find it questionable that the Julien's measurement of the loading area was higher than that of the parking lot, when the professional surveying company's measurements found the opposite to be true. Therefore, I find that the loading dock had a one percent grade and the parking lot where the truck was parked had a 1.2 percent grade.

Commission judges have found that chocking is not required when mobile equipment is parked on a *de minimis* or insignificant grade. *Excel Mineral Co.*, 1 FMSHRC 2001, 2003 (Dec. 1979) (ALJ Michels) ("It surely meant, or means, a grade of some significance so that if the equipment does begin to roll, it will keep rolling."); *Construction Materials*, 23 FMSHRC 321, 326-27 (Mar. 2001)(ALJ Feldman). The *de minimis* rule is also supported by the regulation, which states that a "[g]rade can be determined a number of ways, to include testing the equipment to determine if it rolls when the transmission is placed in neutral." 30 C.F.R. § 56.14207 (emphasis added). Additionally, in *Excel Mineral Co.*, the court found that a one percent grade was insufficient to trigger the chocking requirement. 1 FMSHRC at 2003. However, in *Gary Sisk Drilling Co., Inc.*, the court found that a two to three percent grade was significant enough to require chocking. 35 FMSHRC 1311, 1315-16 (May 2013)(ALJ Manning).

These authorities establish a *di minimis* rule, however the exact gradient required to constitute a violation is still unclear. It seems appropriate to find, in the absence of evidence to the contrary, that any gradient sufficient to cause a vehicle to roll when in neutral and with the brakes released is enough to trigger the chocking requirement. Here, in the absence of specific evidence that the vehicle would start to roll on such a slight grade, I apply the *di minimis* rule.

Yet that does not rule out the possibility that a measured grade, appropriately interpreted by a qualified witness, could escape the *di minimis* rule and require chocking, even if the vehicle will not roll on its own. Variations in surface and mechanical friction could prevent a vehicle from rolling on its own on a *di minimis* grade, but that is not the only focus of the regulation. Qualified witness testimony could conceivably convince a fact finder that even if a vehicle at free rest will not roll away on its own, a force foreseeable in the course of normal operations could impart enough momentum to the vehicle to move it, thereby creating the exact hazard the regulation addresses.

Grade measurements of 1.0 percent and 1.2 percent alone do not trigger the chocking requirement because, in the absence of evidence establishing that a vehicle in neutral would start rolling on such a minimum grade, they are *de minimis*. There is nothing in the record that would

justify departing from this *di minimis* finding. Julien's testimony about vehicles coming and going from the area during continuing mining operations is not specific or weighty enough to justify a departure from our precedent. For these reasons, I find that American Colloid did not violate 30 C.F.R. § 56.14207, and I vacate Citation No. 6329226 and Order No. 6329235. As such, I need not determine negligence, gravity, S&S, unwarrantable failure, or penalty determinations for either.

Order No. 6427277

On May 11, 2010, at 1:43pm, Inspector Roberts issued Order No. 6427277 to American Colloid at the Colony East Mill alleging a violation of 30 C.F.R. § 56.15005 pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[s]afety belts and lines shall be worn when persons work where there is danger of falling [...]." 30 C.F.R. § 56.15005. Section 56.15005 is a mandatory safety standard. The citation alleges:

Safety belts and lines are not being used when there is a hazard of falling. A truck driver was observed working 8 feet 9 inches above ground while securing his load of palletized product on his flatbed trailer. The truck drivers [*sic.*] boots are covered with wet Bentonite and there is other mobile equipment working in the area on extremely slick roads. This condition exposes the truck driver to a fall hazard with obstructions he could strike his head on and would be expected to cause fatal injuries. The mine operator had supplied fall protection but refuses to require it, train in it's [*sic.*] use or maintain it in functional condition. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that he is aware of this practice but refuses to take corrective action to protect miners. This violation is an unwarrantable failure to comply with a mandatory standard. This condition was a factor that contributed to the issuance of imminent danger order no. 6427275 dated 5/11/2010. Therefore no abatement time was set. This standard was cited 1 time in two years at this mine.

Ex. S-16.

Violation

The order alleges that an injury was highly likely, could reasonably be expected to result in a fatality, the violation was S&S, a single person was affected, and that the negligence level was high. *Id.* Roberts issued this order because he observed a contract truck driver on top of his palletized load without wearing a safety belt line. (Tr. 122:15-22; Tr. 122:25 – 123:4; S-20) The driver was standing eight feet nine inches from the ground. (Tr. 123:19-21) Roberts verbally issued an imminent danger order to the driver and instructed him to get down safely from the top of his load. (Tr. 123:6-18)

Based upon the above, I find that American Colloid violated Section 56.15005 because a driver was working on top of his load where there was a danger of falling and was not wearing a safety belt or line.

Negligence

High negligence occurs when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3(d). The Respondent had a tarping station for drivers to tie off their loads before exiting the mine. (Tr. 163:8-13; Tr. 206:18 – 208:2) The station was intended to service two trucks at a time, with two safety lanyards, one on each side of the station, and there were three adjustable harnesses on the catwalk for drivers to attach to the lanyards. (*Id.*; Tr. 133:16-24) If a miner fell, the lanyard is supposed to catch and stop the miner from falling. (Tr. 127:17 – 128:7) Exhibit S-22 is a photograph of a broken retractable lanyard. The truck driver was tying off his load on the side of the station with the broken lanyard. *Id.* Another truck was using the other side where the lanyard was in working condition.⁸ (Tr. 142:6-9)

Bill Rhoads⁹ admitted that one of the lanyards was broken. (*Id.*; Tr. 127:17 – 128:7; Tr. 136:18-24; Tr. 283:5-8) He also testified that he did not receive any information that the tarping station had one inoperable lanyard that morning after the visual inspections were complete. (Tr. 285:19 – 286:3) However, Rhoads did observe that the broken lanyard was wrapped around the I-beam at the top of the tarping station at the time of the inspection. (Tr. 283:5-8) It can be inferred from this that the Respondent knew that the lanyard was not operational, and instead of fixing the problem, tied it off so as to put it out of reach of miners. Since the Respondent knew that the lanyard cable for attaching the harness was broken, it should have blocked the area off and not allowed the trucks to tarp their loads on that side of the station. (Tr. 153:11-13)

The mine did not provide any evidence to show mitigating circumstances. (Tr. 130:24 – 131:2) I find American Colloid’s negligence to be high.

Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Roberts designated the citation as highly likely. (Tr. 123:22-24) The driver was standing eight feet nine inches above the ground when the verbal imminent danger order was issued. (Tr. 123:19-21) Roberts testified that the hazard he was addressing was the driver falling to the ground from the top of his load. (Tr. 130:17-19)

⁸ The truck driver was not on top of his load and was walking on the ground when the inspector viewed the imminent danger of the other driver. (Tr. 142:14-23)

⁹ At the time of the hearing, Rhoads was the plant supervisor and had been for three years. (Tr. 270:9-13) At the time of the hearing, he had worked for American Colloid for 22 years and had various jobs, including plant manager at two different plants. (Tr. 270:15-23) As the plant supervisor, Rhoads oversees the day-to-day operations, schedules production on a weekly and monthly basis, upholds policies and procedures, and does billing. (Tr. 271:2-6)

Roberts marked the citation as potentially fatal because in his experience there have been many fatalities from miners falling from this and even lower heights. (Tr. 124:18-25) Additionally, there were numerous objects in the area that could strike a miner's head if he fell. *Id.* It is highly likely that falling from a height of eight feet nine inches could result in serious injury or a fatality, especially if a miner were to hit his head as he was falling. Therefore, I find that it is highly likely that the injury would be serious in nature. Additionally, I agree that one person was affected – the driver. (*See Ex. S-16*)

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been met. The broken lanyard constituted a measure of danger to safety and a discrete safety hazard which could have resulted in serious injuries to a miner. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

Roberts testified that the truck driver had bentonite caked onto his shoes as he was walking on plywood and paper bags on the top of his load. (Tr. 123:25 – 124:13) He also testified that it was windy and had been raining the past few days before the order was issued. *Id.* Bentonite is slippery when wet. (Tr. 62:23-24) Additionally, the driver was parked in a high traffic area, and the roads were slick from wet bentonite. (Tr. 124:6-8)

It is reasonable to conclude that a driver walking on top of his load wearing shoes caked with bentonite, which becomes slippery when wet, could slip and fall over the edge to the ground, without safety equipment. A fall from that height could be fatal. Moreover, the truck was parked in a heavily traveled area, and the roads were slick. Another vehicle could have slid on the bentonite/water mixture on the ground and hit the driver's truck as he was tarping off his load without wearing a safety harness. The Secretary has proved by a preponderance of the evidence that there was a reasonable likelihood that the hazard contributed to would result in an injury. The S&S designation was warranted here.

Unwarrantable Failure

The Commission has determined that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence and is determined by looking at all the facts and circumstances to see if any of the seven aggravating factors exists.

The Extent of the Violating Condition and the Length of Time the Violating Condition Existed

The record reflects that the violating condition was not extensive. The driver of the truck was the only person affected. Rhoads testified that the morning exam did not note the defective lanyard. It can be inferred that the lanyard was not broken for a long time.

The High Degree of Danger

It is clear the lanyard was broken. There was no safety equipment for the contract driver to wear. The tarping station had two bays, each with a safety lanyard. The operator failed to block access to the bay with the broken lanyard. This omission gave anyone using that side of the tarping station access to the fall hazard under continuing mining activity.

The Violation was Obvious

Truck drivers used the tarping station often. Mine employees were regularly in the area. It was obvious that the lanyard was broken and wrapped around the I-beam. A driver walking on top of his load without safety equipment would be obvious to anyone walking by or observing the taping area, especially to mine employees and management.

The Operator's Knowledge

Unwarrantable failure is characterized by “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.”

Contemporaneous notes and Robert's testimony show that the operator refused to require contract truck drivers to use fall protection. (Ex. S-16; Tr. 129:25 – 130:8; Tr. 155:12-21) Rhoads showed a clear understanding of both the requirement and the operator's failure to comply by referring to a state court case in which a driver sued the company over an injury sustained while using a safety harness and implying that it had made an affirmative decision not to require the use of safety harnesses as a result. (Ex. S-16; Ex. R-23; Tr. 130:9-13; Tr. 152:2-7) Rhoads and Troy Mills¹⁰ denied this position at the hearing. They stated that although they had mentioned the court case, they did not mean that it case prevented them from requiring the use of fall protection. (Tr. 295:3 -296:6; Tr. 302:16 – 303:16; Tr. 314: 16-25)

Rhoads' and Mills' testimony denying the company's reaction to the state court case was not credible. I am convinced that mine management mentioned the state court case at the time the order was written to offer the inspector an excuse why the mine did not have to require miners to wear safety equipment. This is consistent with Roberts' testimony that he spoke with a driver who stated that he had been loading at the mine for years and had never put on a safety harness while loading. (Tr. 128:11 – 129:2) I am convinced that the Respondent believed it did not have to enforce the fall protection standard.

¹⁰ At the time of the hearing, Mills was the interim plant manager for the Gascoyne North Dakota Operation at American Colloid, and prior to that he was the operation supervisor of Colony West. (Tr. 307:23 – 308:6) He also served as the environmental health and safety manager for Colony East and Colony West for approximately eight months. (Tr. 308:12 – 309:3) At the time of the hearing, Mills had been working for American Colloid for approximately 10 years. (Tr. 309:9-11)

I find that the Respondent's failure to require the use of safety equipment was intentional. Respondent showed a lack of reasonable care by not repairing the faulty lanyard or not blocking off that side of the tarping station.

The Operator's Efforts to Abate the Violating Condition

American Colloid abated the citation by changing its company policy and getting rid of the tarping station. Truck drivers were required to use the docking bay inside the warehouse which makes it possible to tarp their loads from ground level, and would eliminate the need for drivers to get on top of their loads. (Tr. 131:11-18)

Conclusion

The Secretary proved by a preponderance of the evidence that American Colloid engaged in aggravated conduct constituting of more than ordinary negligence, and therefore, an unwarrantable failure existed.

Penalty

The Secretary specially assessed the penalty for this citation at \$40,300.00. American Colloid operates 609,078 hours per year. Additionally, Section 56.15005 was cited one time in the two years preceding issuance of the order. As noted above, American Colloid was highly negligent and acted intentionally. Regarding gravity, I found the violation was S&S. According to the stipulations agreed to by the parties, American Colloid demonstrated good faith in abatement of the violative condition and its business would not be significantly affected by the proposed penalty.

The Secretary proved a high degree of operator negligence and the existence of aggravating circumstances. The special penalty assessment was justified. Therefore, I assess a penalty in the amount of \$40,300.00.

Order No. 6588114

On February 8, 2011, at 11:21am, Inspector James Peck¹¹ issued Order No. 6588114 to American Colloid at the Colony East Mill alleging a violation of 30 C.F.R. § 56.15005 pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[s]afety belts and lines shall be

¹¹ At the time of the hearing, Peck had been working as a CLR for MSHA for approximately a year. (Tr. 157:16-25) Prior to that, he worked for MSHA as an inspector for approximately three years. (Tr. 158:2-9) Before working for MSHA, Peck was in the South Dakota National Guard. (Tr. 158:11 – 159:2) As part of the South Dakota National Guard, he commanded a horizontal construction company that contained a quarry section. *Id.* Concurrently, he worked for Home State Mining Company for 13 years underground as a miner, and the last six years on the surface in the metallurgical department. *Id.*

worn when persons work where there is danger of falling [...]” 30 C.F.R. § 56.15005. Section 56.15005 is a mandatory safety standard. The order alleges:

The mine operator failed to ensure that safety belts and lines were worn when a truck driver was working where there was a danger of falling. At the truck bay of the warehouse, a truck driver was not wearing fall protection while on top of a pallet load of bagged bentonite, product name Premium Gel. The driver was in the process of tarping the load on the back of a flat bed [*sic.*] semi-trailer. The fall to ground hazard was approximately 68 inches to a cement floor. The pallet loads were covered in plastic and the tops of the loads were uneven making a slick surface for slips and falls. Also, recent snow would make for the bottoms of foot wear to be wet. With continued normal mining operations, a truck driver would reasonably likely suffer a foreseeable fatal injury from a fall. The mine operator has a facility for tarping truck loads with overhead fall protection, but has discontinued use of the facility stating difficulty in getting truck drivers to use the fall protection. The mine operator’s site specific hazard awareness training did not include fall protection requirements or not to get on top of the loads. Standard 56.15005 was cited 2 times in two years at mine 4800594 (1 to the operator, 1 to a contractor). Management engaged in aggravated conduct constituting more than ordinary negligence in that they did not ensure safe tarping of truck loads. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-30.

Violation

The order alleges that an injury was reasonably likely, could reasonably be expected to result in a fatality, the violation was S&S, a single person was affected, and the negligence level was high. *Id.* Peck cited the mine for Section 56.15005 because safety lines and belts must be worn where there is a danger of falling. (Tr. 162:2-8)

Peck was walking into the loading area with Doolan when he observed a truck driver standing on top of her load of pallets, approximately 68 inches from the ground, without using safety equipment. (Tr. 161:19-25; Tr. 162:11-15; Ex. S-32) The driver was in danger of falling. (Tr. 162:11-15) Peck asked the driver why she was on top of her load, and she responded that she was tarping off her load. (Tr. 181:16-18)

Based upon the above, I find that American Colloid violated Section 56.15005 because the driver was working on top of her load where there was a danger of falling and was not wearing a safety belt or line.

Negligence

High negligence occurs when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3(d). Peck marked this citation as high negligence because the mine was on notice that the standard existed from the previous order issued. (Tr. 171:18 – 172:12) Peck testified that he felt the operator did not take any actions to ensure the contractors were not getting on top of their loads. *Id.* The mine was also not using its tarping station, citing concerns about state litigation, and was disregarding miner safety. *Id.*

In mitigation, the company told Inspector Peck that the loading area was intended and designed to allow miners to tarp off their loads without having to get on top of their loads. (Tr. 173:4-10) However, the mine no longer had fall protection equipment for miners to use when they got on top of their loads, and its training handout did not ban miners from getting on top of their loads. (Tr. 172:13 – 173:3) Additionally, while the mine might have intended that miners would no longer have to get on top of their loads to tarp off, this was clearly not the case here. If the Respondent wanted to prevent this action from occurring, it should have indicated that via the site specific training or signage.

Based on the above, I find that American Colloid’s acted with high negligence.

Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. If a miner were to slip and fall from 68 inches and hit her head on the way down, or hit her head on the concrete floor, it could result in a serious injury, i.e. a fatality. There have been fatalities from falls of this distance in the past. (Tr. 164:25 – 165:8) I agree that the injury could reasonably result in a fatality and one person was affected here – the driver. (*See Ex. S-30*)

Significant and Substantial

The first and the fourth prongs of the *Mathies* test have been met. There was a measure of danger to safety; a discrete safety hazard, was contributed to by the slippery conditions and lack of safety equipment, which could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

Peck marked the citation as reasonably likely because the loads were uneven and covered in plastic, making them dangerous to walk on. (Tr. 164:8-18) Additionally, it had recently snowed, potentially causing slippery conditions on top of the plastic. *Id.* Also, bentonite and snow on the driver’s shoes while she was walking on top of the load could cause slippery conditions, *Id.*, which could cause a person to fall. A fall from 68 inches could reasonably be expected to cause fatal injuries, particularly because the driver could hit her head on something on the way down (Tr. 164:19 – 165:8) or could have hit her head on the concrete floor. *Id.* Therefore, I find that there was a reasonable likelihood of a fatal injury.

The Secretary proved by a preponderance of the evidence that the S&S designation was warranted here.

Unwarrantable Failure

The Commission has determined that an “unwarrantable failure” is aggravated conduct constituting more than ordinary negligence and is determined by looking at all the facts and circumstances of each case to see if any of the seven aggravating factors exist. Peck testified that he marked the order as an unwarrantable failure because the Respondent should have been on high alert from their previous order relating to Section 56.15005 and because the safety training did not warn miners not to get on top of their loads. (Tr. 172:13 – 173:3) This was the only testimony given as to why the unwarrantable failure designation was assessed. I do not find this to be such conduct as to constitute “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.”

Some of the unwarrantable factors can be inferred by other testimony, such as the extent of the violation and the degree of danger. The record reflects that the violative condition was not extensive because there was only one person affected – the driver. Here, a driver was tarping off her load with muddy, slippery boots at a height of 68 inches, without the use of safety equipment, which was highly dangerous. It is also clear that a miner walking on top of her load at a height where there was a danger of falling without safety equipment was obvious to anyone in the taping area, especially to mine employees and mine management.

To abate the order, American Colloid changed its site specific hazardous training form by adding a statement that truck drivers were not allowed to get on top of their loads. (Tr. 173:11-17)

Based on the above, I find that the Secretary did not prove that American Colloid engaged in aggravated conduct constituting more than ordinary negligence. Therefore, I find that an unwarrantable failure designation is inappropriate here.

Penalty

The Secretary specially assessed the penalty for this citation as \$30,200.00. American Colloid operates 707,333 hours per year. Additionally, Section 56.15005 was cited two times in the two years preceding issuance of the order. As I found above, American Colloid was highly negligent. As to the gravity of the violation, I found the violation was S&S. According to the stipulations agreed to by the parties, American Colloid demonstrated good faith in abatement of the violative condition and its business would not be significantly affected by the proposed penalty.

The Secretary, however, did not prove that an unwarrantable failure existed, and therefore, I cannot uphold the specially assessed penalty of \$30,200.00. Based on the above, I assess a penalty amount of \$7,000.00 for this order.

WHEREFORE, it is **ORDERED** that American Colloid pay a penalty of **\$47,300.00** within thirty (30) days of the filing of this decision.

It is further **ORDERED** that Order No. 6427277 be modified from a 104(d)(1) order to a 104(d)(1) citation and Order No. 6588114 be modified from a 104(d)(2) order to a 104(a) citation.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 15, 2015

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

v.

STAKER & PARSON COMPANIES,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-1044
A.C. No. 42-02130-360000

Mine: Lehi Point East

DECISION AND ORDER

Appearances: Robert Ankeney, CLR, U.S. Department of Labor, MSHA, Denver, CO,
for Petitioner;

Brad Kinkeade, Esq., Oldcastle Law Group, Atlanta, GA, for Respondent.

Before: Judge L. Zane Gill

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves a 104(a) citation, 30 U.S.C. § 814(a), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Staker & Parson Companies (“Staker” or “Respondent”) at its Lehi Point East mine. The Secretary of Labor’s Conference and Litigation Representative (“CLR”) filed a notice of unlimited appearance with the penalty petition. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The Secretary submitted a brief and documentary evidence. The Respondent did not file a response in opposition, which was due to the court on September 10, 2015. The motion for summary decision outlines two issues: 1) whether an injury that occurred on the mine site on September 7, 2010, was reportable under Section 50.20(a), and 2) at what time the injury became reportable. For the reasons stated below, I find that there is no genuine issue of material fact, and the Secretary is entitled to summary decision as a matter of law.

Undisputed Facts

On July 28, 2014, MSHA Inspector Timothy Hannifin traveled to Staker’s Lehi Point East mine to conduct an investigation into a hazard complaint. (Ex. S-A1) Citation No. 8824803 alleges that the Respondent failed to report an injury that occurred at the mine. *Id.* At some point during his investigation Hannifin inspected the operator’s incident/injury investigation reports. On July 31, 2014, at 11:00 am, Hannifin cited the Respondent for violating Section 50.20(a). Pet.

at p. 13. The citation alleges no likelihood of injury, no lost workdays, not significant and substantial, low negligence, and no persons affected. *Id.* The citation alleges:

A MINER G.H. REPORTED A[N] INJURY ON 09/07/10. THE MINE OPERATOR FAILED TO COMPLETE AND SUBMIT AN MSHA #7000-1 (MINE, ACCIDENT, INJURY, AND ILLNESS REPORT) FOR THE INJURY. THIS INJURY BECAME REPORTABLE ON JULY 2, 2013 WHEN THE UTAH LABOR COMMISSION DETERMINED THAT A PORTION OF THE INJURY WAS RELATED TO WORK ACTIVITIES.

Id.

As indicated in the Respondent's Incident/Injury investigation report, a truck driver complained of pain and tingling in her upper back, legs, toes, fingers, and arms on September 7, 2010. (Ex. S-A2) The driver complained that the seat in her John Deere 26-1006 truck was not properly set in place and she was jostled around on rough roads. *Id.* The report indicates the injury was a "medical treatment injury" and a "first aid injury." *Id.* When the driver reported her back problems to her supervisor, she was sent to the Work Care Clinic for treatment. *Id.* Physical therapy and medications were recommended. (Ex. S-A3, p. 3) A cervical MRI was performed on Sept. 15, 2010. *Id.* The driver sought workers compensation for her injuries, and in 2012, the Utah State Labor Commission Adjudication Division found that 50% of her injuries were due to workplace activity. (Ex. S-A3, p. 6) In 2013, these findings were affirmed by the Utah State Labor Commission Board of Appeals. (Ex. S-A4)

The Secretary alleges that the operator should have reported the injury to MSHA in 2013, in response to the Labor Commission's decision, and because the operator did not, it violated the standard.

Standard of Review

The Commission has held that "summary decision is an extraordinary procedure." *Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). It is "granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67. When weighing the parties' arguments, all inferences are "viewed in the light most favorable to the party opposing the motion." *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted).

Section 50.20(a)

Part 50 regulations require mine operators to report to MSHA any "occupational injury" within ten days of its occurrence. 30 C.F.R. § 50.20(a). Part 50 defines "occupational injury" as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day

after an injury, temporary assignment to other duties, or transfer to another job.” 30 C.F.R. § 50.2(e).

Analysis and Conclusion

Commission case law indicates that the operator should have reported the injury in September, 2010, when the injury occurred. In the seminal case regarding the injury reporting requirement, the Commission found that when read together, sections 50.2(e) and 50.20(a) “require the reporting of an injury if the injury—a hurt or damage to a miner—occurs at a mine and if it results in any of the specified serious consequences to the miner. *These regulations do not require a showing of a causal nexus.*” *Freeman United Coal Mining Co.*, 6 FMSHRC 1577, 1578-79 (1984). In the *Freeman* case, a miner experienced back pain when putting on his work boots in the wash house, and the operator was required to report the injury under Section 50.20(a). *Id.* at 1578.

The D.C. Circuit upheld MSHA’s interpretation of the statute as reasonable and found “the Secretary’s interpretation here, *requiring reporting of all injuries to miners at the mine regardless of causal nexus*, is a permissible interpretation of § 50.2(e).” *Energy W. Min. Co. v. Fed. Mine Safety & Health Review Comm’n*, 40 F.3d 457, 464 (D.C. Cir. 1994)(emphasis added). In that case, the mine was cited for failure to report an employee’s injury suffered when his personal vehicle rolled into a ditch near a mine parking lot. *Id.* at 459.

Here, even viewed in the light most favorable to the Respondent, there is no genuine issue of material fact and the Secretary is entitled to summary decision as a matter of law. This is based on the Respondent’s own Incident/Injury Investigation Report completed on September 8, 2010. The driver was injured on the mine site because she experienced “a hurt or damage,” i.e. pain and tingling, to her back, legs, arms, fingers, and toes, due to the bad seat in her haul truck and the rough mine roads. The Respondent designated the injury as a “medical treatment injury” and a “first aide injury.” Medical treatment was administered at the Work Care Clinic. No causal nexus must be shown between the injury and work performed, and therefore, the Respondent should have reported the injury within ten days after the injury was reported on September 7, 2010. The operator violated Section 50.20(a) by not reporting the injury within 10 days.

Penalty

The proposed penalty is \$100.00. The mine operates 56,295 hours per year. The negligence designation was low. There were no repeat violations in the previous two years. No persons were affected. The mine was given a 10% reduction for good faith. Based on the above, I assess the penalty at \$100.00.

WHEREFORE, it is **ORDERED** that the Respondent pay a penalty of \$100.00 within thirty (30) days of the filing of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 15, 2015

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

v.

TRAPPER MINING, INC.,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2015-214
A.C. No. 05-02838-366343

Docket No. WEST 2015-317
A.C. No. 05-02838-368857

Trapper Mine

DECISION

Appearances: Michelle A. Horn, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Karl C. Koehler, Safety Manager, Trapper Mining, Inc., Craig, Colorado, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Trapper Mining, Inc. (“Trapper”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony and documentary evidence at a hearing held in Steamboat Springs, Colorado, and presented oral argument following the hearing. Three section 104(a) citations were adjudicated at the hearing. Trapper operates a surface coal mine in Moffat County, Colorado.

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

My findings of fact in this decision are based on the record as a whole and my observation of the witnesses. Although I have not included a summary of all the evidence presented at the hearing in this decision, I fully considered all of the evidence.

The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). “[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty.” *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a

valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, 666 F.2d 890, 892-93 (5th Cir. 1982) (footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

The Commission interprets safety standards to take into consideration “ordinary human carelessness.” *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). “Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions[.]” *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

A. Citation No. 8478965; WEST 2015-214

On September 20, 2014, MSHA Inspector Art C. Gore¹ issued Citation No. 8478965 under section 104(a) of the Mine Act, alleging a violation of section 77.513 of the Secretary’s safety standards. (Ex. G-1). The citation alleges that there was no dry wooden platform, insulating mat, or other electrically nonconductive material kept in place at the electrical boxes and power-control switch for the aerator at a pond near the pit.

Inspector Gore determined that an injury was unlikely, that the violation was not of a significant and substantial (“S&S”) nature, but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that Trapper’s negligence was moderate and that one person would be affected. Section 77.513 provides, in part, that “[d]ry wooden platforms, insulating mats, or other electrically nonconductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist.” (30 C.F.R. § 77.513). The Secretary proposed a penalty of \$100.00 for this citation.

Discussion and Analysis

1. Evidence

Inspector Gore issued the citation at a pond, often called Trapper Lake, which is used as a source of water for water trucks. (Tr. 10-11). Trapper uses a snow-making machine to aerate the pond to increase the evaporation rate when the water level gets too high. (Tr. 45-46). The cited electrical boxes were mounted on a stand with two metal poles in the ground. (Ex. G-3). This installation provided power to a barge floating on the pond. A pump and the aerator were mounted on the barge. There is a switch on one of the two electrical boxes. The inspector testified that the metal stand for the boxes was probably grounded. (Tr. 12). Nothing had been placed in front of the electrical boxes that would insulate anyone operating the switch from the earth. A dry wooden platform, insulating mat, or other nonconductive material would have

¹ Inspector Gore is currently the supervisor of MSHA’s Craig, Colorado, Field Office. He has been an inspector since 1992. (Tr. 9). He previously held numerous positions in the coal mining industry including as a mechanic, electrician, and electrical supervisor. He is an electrical specialist with MSHA. (Tr. 9-10).

protected a miner from a shock hazard. (Tr. 12-13, 22). The inspector believed that there was a chance that, if an electrical component in one of the boxes failed, the box could become energized even though it was grounded. (Tr. 18-19). Inspector Gore testified whether someone would receive a shock would depend on various factors including “body resistance, the type of shoes the person was wearing, [and] the ground moisture[.]” (Tr. 13). It does not take much current to damage someone’s heart. (Tr. 13-14). Although the surface of the earth appeared dry at the time of the inspection, conditions can change and it can be wet just beneath the surface when it is dry on top. The condition was abated by moving a wooden pallet in front of the stand. (Ex. R-3). If this same installation had been inside a building, there would not have been a violation. (Tr. 28).

Inspector Gore determined that it was not reasonably likely that anyone would be injured by the violation. (Tr. 16). He said that he reached that conclusion because it was unlikely that the electrical components would fail and he did not believe that anyone used the switch very often. “[I]t’s pretty much mostly automated.” *Id.* He determined that Trapper’s negligence was moderate because the “mine has a very safe history” and a “very good crew that maintains their electrical system.” (Tr. 17). The electrical “equipment is well maintained” at this mine. *Id.*

Chet Steele², the electrical supervisor at the mine, testified that section 77.901 requires that three-phase portable electrical equipment be held to a higher standard than non-portable equipment. Because the equipment on the barge is portable, the circuit employs neutral ground resistors that limit ground fault current to 15 amps. (Tr. 45). This ground phase protection will trip if there is any current at all flowing on the ground wire. *Id.* It also employs a ground monitor circuit that continuously monitors the grounding system, and it opens if there is any failure of the grounding conductors. *Id.* Steele testified that the electrical installation did not present an electric shock hazard. (Tr. 48). A series of unlikely events would have to occur before a shock hazard would be present. (Tr. 48-49, 58, 61).

He also testified that, whenever the water level in the pond gets too high, the pump and aerator are activated in order to increase the evaporation rate. Once the water level recedes, the system is turned off. (Tr. 45-46). Someone comes to the installation about once a week to turn the system on or off.

Trapper introduced into evidence the Secretary’s Program Policy Manual (“PPM”) for section 77.513. The PPM states “[e]nclosed power-control switches such as portable circuit breakers of switch houses that are supplied power from a resistance-grounded system, as required by Section 77.802 or 77.901, are not considered to pose a shock hazard.” (Ex. R-1, V MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 77, at 180 (2015)). Trapper contends that the cited electrical installation fits within this exception to the safety standard because the power-control switch was enclosed and it was supplied power from a resistance-grounded system as required by section 77.901. (Tr. 51, 61-62). As a consequence, it believes that the Secretary has administratively determined that the installation did not present a shock hazard.

² Steele has worked in the coal mining industry since 1980. (Tr. 42). He has been an MSHA qualified electrician since 1981. (Tr. 43). He has extensive experience working with MSHA’s electrical standards to make sure that the mine is in compliance with these standards.

The Secretary agrees that the switch in question was a “power-control switch” and that power to the switch was supplied from a resistance-grounded system. (Tr. 31). The factual dispute concerning the application of this provision of the PPM concerns whether the switch was “enclosed” as that term is used in the PPM. Steele testified that the switch for the pump was enclosed and only the switch operator was outside the box. “The only thing that protrudes on the outside of this box is a switch operator made of plastic.” (Tr. 49). The electrical switch is totally enclosed and protected by the box. (Tr. 49-50). What Steele called the “switch operator” is the plastic knob for the switch. To use the analogy of a light switch, the electrical components of the switch are enclosed but the plastic device used to activate the switch protrudes outside the enclosed box. In this case the plastic device was a red knob. (Exs. G-3, R-3). Steele testified that he has been confused about the requirements of the safety standard his entire career and he has received conflicting advice from MSHA inspectors. (Tr. 50-51, 55). He believes, however, that the PPM makes it quite clear that an insulating mat or dry wooden platform was not required at the cited electrical installation. (Tr. 51-53).

Inspector Gore admitted that the language in the PPM is confusing. (Tr. 30, 40). He testified, however, that in his opinion the switch includes the red knob that protruded outside the box. (Tr. 39; Exs. G-3, R-3). Thus, it is his belief that the sentence from the PPM quoted above does not apply to the facts of this case because the switch was not an “enclosed” power switch.

2. Violation

This alleged violation raises a number of legal issues. This standard, unlike some other standards, specifically requires that the Secretary prove that a hazard existed, in this case an electric shock hazard. Without proof of an electric shock hazard, there is no violation.

The safety standard does not limit its application to “enclosed power-control switches.” Rather it provides that insulating material must be provided at “all switchboards and power-control switches where shock hazards exist.” In the PPM, the Secretary attempted to give some definition as to when a shock hazard exists. First, the PPM makes clear that the standard applies “only if a shock hazard exists.” (Ex. R-1). It then lists examples of situations where a shock hazard does exist and it provides the example cited above and states that such an installation does not present a shock hazard.³

I credit the testimony of Inspector Gore that situations could arise in which a platform or mat would be necessary to prevent an electric shock to a person using the switch at issue here. He determined that it was unlikely that anyone would receive an electrical shock, but it was possible. (Tr. 16). A number of safety devices would have to fail for a shock hazard to be present. Consequently, Inspector Gore determined that the condition created was not S&S. Although both the inspector and Steele had extensive experience in electrical safety issues, I credit the testimony of the inspector that an electric shock was possible but unlikely.

³ It appears that Inspector Gore does not agree with the PPM. He believes that there are situations where a shock hazard can be present even if an enclosed electrical switch is powered from a resistance-grounded system. (Tr. 32).

The difficulty comes from the fact that there has been confusion about the application of this standard at the mine. Inspector Gore admitted that the PPM is confusing. (Tr. 30, 40). Inspector Gore testified that “[s]ometimes when they say power switch [in safety standards or the PPM] it’s not actually talking about like a light switch that you throw. It’s talking about a disconnect that is inside this box, a line starter or some form of disconnect that will disconnect the power.” (Tr. 40). I find that this PPM contemplated switches that are fully enclosed, including the knob for the switch. Otherwise, a significant number of switchboards and other power-control switches would be exempted from the requirements of the safety standard. The broad interpretation of the exception in the PPM suggested by Trapper would defeat the purpose of the safety standard. The intent was to carve out a narrow exception for fully enclosed switches.

Trapper is, in essence, raising a fair notice defense. It is arguing that it was not able to determine when insulating material is required at switchboards and power-control switches under the safety standard. When evaluating a party’s fair notice argument the judge should first look to see if the language of the standard “provides clear and unambiguous notice of its coverage and requirements[.]” *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3087 (Dec. 2014) (citing *Bluestone Coal. Co.*, 19 FMSHRC 1025, 1029 (June 1997) and *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1061 (Sept. 2000)). Here, the language of the standard is clear and unambiguous. It requires that operators place dry wooden platforms, insulating mats, or other nonconductive materials at switchboards and power control switches where shock hazards exist. The only question is whether an installation presents a shock hazard.

The confusion arises because the PPM attempted to provide guidance as to the risk of a shock hazard at different types of installations in a clumsy manner. The Commission has explained that a PPM is not binding on either the Secretary or the Commission. *D. H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996); *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981). While the PPM may provide guidance on an issue, it “lack[s] legal effect and thus cannot be used against the Secretary as grounds to estop a finding of violation.” *Consolidation Coal Co.*, 22 FMSHRC 340, 364 n. 31 (Mar. 2000) (citing *King Knob Coal Co.*, 3 FMSHRC at 1419-1422). Moreover, where the PPM creates an exception to the clear language of a standard, the standard controls and operators must comply with the express language of the mandatory standard. *King Knob Coal Co.*, 3 FMSHRC 1417, 1420-1421 (June 1981); *See Jim Walter Res., Inc.*, 27 FMSHRC 757, 824 (Nov. 2005) (ALJ). In this instance, the exception in the PPM must be narrowly construed to effectuate the objectives of the safety standard.

Because the PPM could be construed as granting an exemption to the requirements of 77.513 at the cited electrical installation, I find that Trapper was not negligent with respect to this violation. Inspector Gore admitted that the Secretary’s interpretation of the safety standard is confusing. Trapper relied on the language of the PPM when it determined that it was not required to place an insulating mat at the cited location. In *King Knob Coal Co.*, the Commission explained that, while an operator’s reliance on an exception set forth in MSHA’s policy guidance will not prevent the finding of a violation of a mandatory standard, the judge may properly address that reliance in his negligence findings. 3 FMSHRC at 1421-1422.

The gravity of the violation was low and Trapper was not negligent. A penalty of \$100.00 is appropriate for this violation.

B. Citation No. 8479045; WEST 2015-317

On October 7, 2014, MSHA Inspector James E. Ellenberger⁴ issued Citation No. 8479045 under section 104(a) of the Mine Act, alleging a violation of section 77.1007(a) of the Secretary's safety standards. (Ex. G-4). The citation was subsequently modified to allege a violation of section 72.620. The citation alleges that a drill being used at the L-Dip Pit was not effectively controlling the drilling dust being generated. The citation notes that a surveyor was observed on the ground at the same drill pattern and a corner of the front dust curtain had been tied in an up position with a rope.

Inspector Ellenberger determined that an injury was unlikely, that the violation was not S&S, but that any illness or injury would reasonably be expected to be permanently disabling. He determined that Trapper's negligence was moderate and that one person would be affected. Section 72.620 provides, in part, that "[h]oles shall be collared and drilled wet, or other effective dust control measures shall be used, when drilling non-water-soluble material." (30 C.F.R. § 72.620). The Secretary proposed a penalty of \$127.00 for this citation.

Discussion and Analysis

1. Evidence

Inspector Ellenberger testified that he was at the top of the L-Dip Pit observing the drill pattern when he saw that the drill was "putting out a lot of drill dust as it was drilling." (Tr. 67). The drill is a large piece of mobile equipment on caterpillar tracks. (Ex. G-5). The operator of the drill sits in an enclosed cab. Rubber skirting material was mounted on the underside of the framework of the drill to contain dust. It was drilling on "sandy clay-type overlay material" with solid rock underneath. (Tr. 67). The material being drilled was not water soluble. "[C]ompressed air blows the drill cuttings out of the hole and they inject water into that system so it goes into the hole and suppresses the dust." (Tr. 67-68). The inspector observed dust escaping from under the drilling machine because a corner of the rubber skirting had been tied so that it was lifted off the ground. (Tr. 69; Ex. G-5).

Inspector Ellenberger observed someone walking on the drill pattern. This person was a surveyor and he was within 120 feet of the drill and downwind from the dust. (Tr. 70). The inspector asked the drill operator why he had the dust skirt tied up and was told that he encountered wet conditions as he was drilling so he turned the water sprays down and lifted a corner of the dust curtain. (Tr. 71).

Justin Fedinec⁵, a safety engineer at the mine, is a certified dust sampler. (Tr. 83). He was with the inspector when this citation was issued. He said that the surveyor was at a lower

⁴ Inspector Ellenberger has been a coal mine inspector with MSHA since January 2008. (Tr. 64). He has worked in the mining industry since 1970 in a wide variety of positions. (Tr. 64-66). He is a certified dust sampler. (Tr. 100).

⁵ Fedinec has about 15 years' experience in the mining industry with Peabody Twentymile and Trapper. (Tr. 82).

elevation at the time the citation was issued. (Tr. 85). He testified that the drill operator said that muddy conditions were making drilling difficult so he turned the water down. He pulled back part of the dust curtain so he could look down from the cab and see whether he had hit the coal seam by looking at the cuttings. (Tr. 86-87, 91-92). The drill operator is protected because he works in an environmental cab with seals around the door and windows and the air entering the cab is filtered. (Tr. 92).

Inspector Ellenberger testified that an injury or illness was unlikely and that the violation was not S&S. (Tr. 71). The surveyor was not close to the drilling machine, the drill operator was in an enclosed booth and was not exposed, and not all of the dust was escaping into the atmosphere. (Tr. 72). Inspector Ellenberger marked the citation as “permanently disabling” because silicosis is a serious disease. (Tr. 77-78, 101). He marked the negligence as moderate because there was no supervisor around and when he showed the drill operator the photo he took of the escaping dust, the operator responded that he did not know that he “was making that much dust.” (Tr. 73). The inspector did not take a dust sample.

Fedinec testified that the conditions he observed did not create a health risk for anyone and that other activities at the mine were producing dust as well, such as a dozer clearing off brush and top soil at a different location. (Tr. 87-88). A dust sample is necessary to determine whether a health hazard has been created. (Tr. 88). When Trapper takes its own dust samples, the results are typically ten times below MSHA’s requirement for silica dust. (Tr. 89-90). The surveyor would not have spent more than 20 minutes on the drill pattern that day so he was not exposed in any meaningful way.

2. Violation

I find that the Secretary established a violation. The safety standard does not require the inspector take a dust sample or the Secretary to establish that the dust observed exceed the threshold limit value for coal or silica dust. The Secretary established that Trapper had elevated one of the dust curtains around the drill, which allowed dust to escape. As a consequence “effective dust control measures” were not being “used” at the time the citation was issued. 30 C.F.R. § 72.620. *See Hobet Mining Inc.*, 20 FMSHRC 889, 898 (Aug. 1998) (ALJ). In this instance, raising the corner of the dust curtain rendered a dust control device ineffective and it was permissible for the inspector to make this determination by visual examination alone.⁶

The Secretary is not contending that the violative condition was reasonably likely to result in an injury or illness. The violation was serious because overexposures to silica or coal dust can, over time, have a significant negative effect on the lungs of miners. The exposure was

⁶ The preamble to the health standard provides: “Under the final rule, MSHA will cite a mine operator when a dust control is missing, defective, or obviously ineffective by visual inspection.” 59 Fed. Reg. 8318, 8324 (Feb. 18, 1994).

minimal in this instance because the only affected miner, the surveyor, was a considerable distance away and he was only in the area for a short time.⁷

I find that the evidence establishes that Trapper's negligence was low in this instance.⁸ Management was not aware of the condition and the drill operator did not realize that he was producing so much dust. A penalty of \$100 is appropriate for this violation.

C. Citation No. 8479046; WEST 2015-317

On October 7, 2014, MSHA Inspector Ellenberger issued Citation No. 8479046 under section 104(a) of the Mine Act, alleging a violation of section 77.405(a) of the Secretary's safety standards. (Ex. G-6). The citation alleges that several miners were observed working on or from the Queen Ann dragline, located at the K-Strike Pit, with the bucket suspended in the air as they rerouted the trailing cable and then reconnected it at the pothead on the dragline's tub, under the drag rope fairleads.

Inspector Ellenberger determined that an injury was unlikely, that the violation was not S&S, but that any injury would reasonably be expected to result in lost workdays or restricted duty. He determined that Trapper's negligence was moderate and that one person would be affected. Section 77.405(a) provides:

Men shall not work on or from a piece of mobile equipment in a raised position until it has been blocked in place securely. This does not preclude the use of equipment specifically designed as elevated mobile work platforms.

(30 C.F.R. § 77.405(a)). The Secretary proposed a penalty of \$100.00 for this citation.

⁷ Because he was in a climate-controlled cab, the drill operator was not affected. In this regard, the Secretary stated in the preamble to the health standard: "MSHA agrees that positive pressure cabs are effective in controlling exposures to dust for persons located within the cabs. However, other miners may be working in the area. Because cabs do not control drill dust at the source of generation, they are not adequate to protect the health of miners located outside the cabs who are exposed to the drill dust." 59 Fed. Reg. at 8324

⁸ The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of that standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted).

Discussion and Analysis

1. Evidence

Inspector Ellenberger testified that he was at the K-Strike Pit when he saw people working around the large dragline known as the Queen Ann and the bucket was suspended in the air. (Tr. 104). The bucket is very large and heavy but it did not have any material in it. The inspector saw electricians in the area. The miners had disconnected the trailing cable from the dragline. He understood that the electricians had inserted another section of trailing cable and they were about to reconnect the trailing cable to the dragline. There were also mechanics present. (Tr. 107). Nobody was working on the bucket or using the bucket as a work platform. (Tr. 124). Everyone was on the ground near the dragline. (Tr. 128). The power was off at this time. The inspector testified that when the power is off, the bucket should be on the ground. (Tr. 106, 112). He saw them working in the fairleads area.⁹ He was “astounded” when he saw that the bucket was in a raised position because he had “never seen that before.” (Tr. 107). He did not observe anyone walking under the bucket. *Id.*

The inspector believed that the only thing holding up the bucket were the brakes on the hoisting mechanism. *Id.* The Queen Ann was equipped with a disc braking system. The disc brakes clamp a rotor by way of mechanical components. (Tr. 108). All of these parts are subject to wear and tear. (Tr. 108, 119). The bucket is suspended from cables that go up through the boom. (Tr. 109). Inspector Ellenberger’s primary concern was that the dragline operator no longer had any control over the bucket because the power was off. (Tr. 110-11). The entire hoist system was under load. (Tr. 132-33; Ex. G-9). The inspector saw “energy that [was] not controlled.” (Tr. 110). If this energy was released and the bucket fell, it would be “catastrophic.” (Tr. 111). Parts and wire rope would be flying around and someone could be injured. (Tr. 111, 120-23).

He determined that failure of any of the numerous components helping to hold up the bucket was unlikely, however. (Tr. 111, 131-32). He also did not observe anyone in the machine house or underneath the suspended bucket. (Tr. 112). If someone were to be injured as a result of this violation, he would suffer lost workdays or restricted duty at the very least. (Tr. 112-13). He determined that the violation was a result of the Trapper’s moderate negligence because management personnel were not present. *Id.*

Brian Smith,¹⁰ a maintenance manager for Trapper, testified that he disagreed with the inspector’s characterization of the disc brakes on the dragline as a “service brake” because in normal operations the disc brakes are not used. (Tr. 138). The bucket load is controlled by the

⁹ A “fairlead” is a “device that lines up cable so that it will wind smoothly onto a drum.” Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 199 (2d ed. 1997). This term applies to “the swivel pulley on the drag rope of a dragline[.]” *Id.*

¹⁰ Smith has been working in the maintenance department at Trapper since 1984. (Tr. 137). He has a bachelor’s degree in mechanical engineering and he holds a professional engineering certificate from the State of Colorado. *Id.*

dynamic braking system using the direct current motors on the dragline. *Id.* The disc brakes are rarely used and are not subject to much wear. They are only used in an emergency. *Id.* Given the testing that Trapper performed on the disc braking system on draglines, he believes that the disc brakes were capable of safely holding the bucket in the air for a lengthy period of time. (Tr. 140-41, 145-46). Whenever the power is off, including during an unexpected power failure, the disc brakes automatically set. (Tr. 148).

Trapper regularly completes preventative maintenance on its draglines, including the Queen Ann, after about 168 hours of operation. (Tr. 142). The disc brakes are carefully examined for wear during these examinations. The rigging for the boom and bucket are also examined and replaced, as necessary. Smith has never seen rigging fail in a static condition. (Tr. 143). If the bucket had fallen while the miners were working on the drag line, it would have fallen straight down and the drag ropes would not have snapped back towards the machine. (Tr. 144). Because the miners were working at the base of the dragline, they were not located in the zone of danger. (Tr. 149). They were about 100 feet away. *Id.*

2. Violation

I find that the Secretary established a violation. The safety standard states that “men shall not work on . . . a piece of mobile equipment in a raised position until it has been blocked in place securely.” As stated above, the Secretary is not required to establish that a violation of a safety standard created a significant safety hazard. If conditions exist which violate a standard, a citation is proper. There is no allegation that miners were working from the bucket, but they were performing work on the dragline while the bucket was in a raised position. Although they were not working directly under the bucket, they were working on the same side of the dragline as the boom and bucket. I find that it was unlikely that anyone would have walked directly under the bucket while it was in a raised position, but I credit the inspector’s testimony that, if there was any sort of mechanical failure that caused the bucket to fall, it could be catastrophic. The cables could snap about and strike someone working in the vicinity of the boom. The photograph introduced by Trapper shows the general position of the miners when the citation was issued. (Ex. R-5). Although the miners were about 100 feet from the bucket, there was a chance that something could go terribly wrong and one of the men could have been injured in the event of a catastrophic failure.

Trapper relies, in part, on the language in the Secretary’s PPM. The PPM states with respect to section 77.405 that “[m]echanical means that are manufactured as an integral part of the machine for the purpose of securing a portion of the machine in a raised position are acceptable as meeting the requirements of this section.” (Ex. R-4, PPM, Part 77, at 173). It is quite obvious that this provision is not contemplating braking systems. As stated by Inspector Ellenberger, this provision is directed to mechanical locks or other devices that block the raised component from movement. (Tr. 114-15). I credit his testimony in this regard. Allowing miners to work on or about raised equipment that is kept in place only by means of a mechanical brake would defeat the purpose of the safety standard.

The inspector determined that it was unlikely that anyone would be injured as a result of the violation. He reached this conclusion because he determined that it was unlikely that the disc

brakes or any other component on the dragline would fail. I credit the testimony of Smith concerning the strength of the disc brakes and their use in day-to-day operations. I find that the violation did not significantly contribute to the risk of an injury. I affirm the inspector's gravity determinations.

I also affirm Inspector Ellenberger's negligence determination. Trapper's negligence was moderate with respect to this violation because a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the safety standard would have recognized that the bucket should have been lowered to the ground before any work was performed on the bucket side of the dragline. The Secretary's proposed penalty of \$100 is appropriate for this violation.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Trapper had a history of 30 violations during the 15 months preceding the issuance of subject citations but only six were designated as S&S. (Ex. G-8). Respondent is a large coal mine operator. The violations were abated in good faith. The penalty assessed in this decision will not have an adverse effect upon its ability to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

Citation No. 8478965 is **MODIFIED** to show that Trapper was not negligent with respect to the cited violation. Citation No. 8479045 is **MODIFIED** to show that Trapper's negligence was low with respect to the cited violation. In all other respects the citations are **AFFIRMED**. Trapper Mining, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$300.00 within 30 days of the date of this decision.¹¹

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

¹¹ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 17, 2015

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

v.

BUCKLEY POWDER COMPANY,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2013-1023
A.C. No. 48-00086-325274

Mine: Kemmerer Mine

DECISION

Appearances: Sean J. Allen, United States Department of Labor, Office of the Solicitor,
Denver, Colorado, for Petitioner;

Benjamin Ross, Jackson Kelly, PLLC, Denver, Colorado, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This docket involves one citation issued pursuant to section 104(a) of the Mine Act with a proposed penalty of \$687.00. The parties presented testimony and evidence regarding the citation at a hearing held in Denver, Colorado, on August 26, 2015.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Kemmerer Mine is a surface coal mine located in Lincoln County, Wyoming. Buckley Powder Company (“Buckley”) is an independent contractor performing services at the mine, and the parties have stipulated that Buckley is therefore an “operator” as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d). Jt. Stip. ¶ b. The parties have also stipulated to the jurisdiction of MSHA and the Commission. Jt. Stip. ¶¶ a, d.

Citation No. 8478099 was issued by Inspector James Ellenberger on May 7, 2013, pursuant to section 104(a) of the Act for an alleged violation of 30 C.F.R. § 77.410(b). The citation alleges that the backup alarm on a Buckley ANFO truck did not provide an audible alarm that could be heard above surrounding noise levels. The inspector determined that the condition was reasonably likely to result in an injury causing lost workdays or restricted duty, was significant and substantial, affected one person, and was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$687.00 for this alleged violation. For the reasons discussed below, I find that the Secretary has proven the violation as cited.

MSHA's Inspection

James Ellenberger is a mine inspector who has been with MSHA since 2007. Prior to becoming an inspector, he worked for 36 years in the mining industry in a number of positions, including as a laborer and in management. As part of his duties as an inspector, he has frequently inspected the Kemmerer Mine in Wyoming. The mine is a large, open-pit coal mine that uses explosives to blast through the overburden and coal. Miners drill bore holes into the rock in a pre-determined grid sequence, known as the blast pattern, then set a charge. Next the coal is loaded and hauled out of the mine. Some of the blasting work at Kemmerer mine is done by a contractor, Buckley Powder Company.

At issue in this case is a truck used by Buckley during the blasting sequence to mix and load ANFO (ammonium, nitrate, and diesel) into the blasting holes. The ANFO trucks are similar to large trash trucks and carry liquid and powder that is mixed and then loaded into the blasting hole. The truck typically follows a large mobile drill down a line of holes and, once a hole has been drilled and primed, pumps ANFO into the hole. Miners on foot work alongside the ANFO truck to prepare the holes and assist the driver in loading them.

On May 7, 2013, during the course of a regular inspection at Kemmerer Mine, Ellenberger observed a Buckley ANFO truck driving down a lane of holes on the blast pattern. A drill was working on a line of holes in the adjacent lane. Ellenberger also observed a front-end loader, a second drill, a second ANFO truck, and three members of the mine's powder crew working on the blast pattern. The pattern was located next to a haul road that regularly carried heavy equipment, including dozers, graders, and other haul trucks. After observing the blasting sequence, Ellenberger asked the driver of the ANFO truck to stop for a safety check. As part of the check, he asked the driver, Scott Ellis, to put the truck in reverse in order to test the backup alarm. Ellenberger stood behind the truck far enough back that Ellis could see him in the rear-view mirror. When Ellis put the truck in reverse, Ellenberger thought that the alarm sounded weak and questioned whether it could be heard over the other equipment.

The noise level in the area where the truck had been working was quite high. The drills, especially, were very loud: Ellenberger testified that he wears earplugs when he inspects them, and Ellis testified that they are the loudest pieces of equipment at the mine. The drills are at their noisiest when drilling into rock, but the engine noise is also loud. Additional noise comes from the engine of the ANFO truck itself, from loaders and other trucks on the pattern, and from other large equipment driving on the haul road.

Ellenberger told Ellis that the backup alarm should sound much louder in order to be heard when working on the pattern. Ellis disagreed with his assessment, saying he believed the alarm to be adequate. In his pre-shift safety inspection in the shop, Ellis had tested the alarm by listening from the cab with the windows down and the engine running and had found no problem.

Because there was disagreement, Ellenberger decided to perform a second test. He went to the area where he had first seen the truck operating on the pattern and measured between tracks that he believed had been left by the truck and the drill, measuring a distance of 17 feet.

He asked the drill operator to put the drill into high idle mode, and then instructed Ellis to back up to within 17 feet of the drill as he stood about 15 feet behind the truck. He described the test as “conservative,” since the drill was idling rather than performing its loudest function of drilling into rock. Ellenberger testified that under these conditions he could hear the alarm faintly, but it did not provide an adequate warning. He believed that it was defective and faded in volume the longer it sounded. He also testified that the miners’ representative and the mine’s safety manager both agreed after this test that they could not hear the alarm, though at hearing the safety manager, Mike Archibald, did not recall such an agreement.

At hearing, Archibald testified that the mine’s safety procedures for blasting require that miners keep at least one row of blast holes between the drill and the ANFO truck while they are working, a distance of 48 feet. Buckley suggests that the tracks Ellenberger looked at when designing his test were not actually made by the two pieces of equipment at the same time, and thus the test did not accurately reflect how close together the machines actually worked. Ellenberger, however, testified that he was very sure that he had measured the correct distance based on where he had seen the drill and truck operating at the beginning of his inspection.

Ellenberger concluded that the alarm posed a serious hazard, since the truck could potentially back into crew members working in the area. Based upon his observations, he issued Citation No. 8478099 for a violation of 30 C.F.R. § 77.410(b).

A. The Violation

Section 77.410(a) requires that “Mobile equipment such as front-end loaders, forklifts, tractors, graders, and trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that (1) Gives an audible alarm when the equipment is put in reverse.” 30 C.F.R. § 77.410(a). Section 77.410(b) provides that “Alarms shall be audible above the surrounding noise levels.” 30 C.F.R. § 77.410(b).

The Secretary argues that, because the alarm was difficult to hear over the noise of the blast hole drill and other vehicles in the area, the mine violated § 77.410(b). Buckley argues that there was no violation because the alarm was partially audible. The mine also argues that because the truck was not typically used within 17 feet of the drill, the inspector’s test did not accurately reflect the “surrounding noise levels.”

A number of other Commission judges have decided cases involving backup alarms that were not loud enough to hear amid the surrounding noise and found that the regulatory standard was not satisfied. In *Oil-Dri Production Co.*, 32 FMSHRC 1761, 1768 (Nov. 2010) (ALJ), Judge Manning found that the Secretary had established a violation where a forklift backup alarm could be heard in quieter areas of the mine but not “around some of the noisiest equipment in the plant such as blowers and dryers,” where it was sometimes used.¹ Similarly, in *Lesueuer-Richmond Slate Corp.*, 20 FMSHRC 854, 857 (Aug. 1998) (ALJ), Judge Melick found a violation where

¹ This case, along with several of the others cited here, was decided under the standard for backup alarms applicable to surface metal and nonmetal mines, § 56.14132, which provides in part, “Alarms shall be audible above the surrounding noise level.” 30 C.F.R. § 56.14132(b)(2).

the inspector could not hear the backup alarm on a loader over the noise of the loader's engine and nearby trucks. Judge Feldman affirmed a similar citation in *East Coast Limestone, Inc.*, 19 FMSHRC 761, 764-65 (Apr. 1997) (ALJ), where the inspector could hear the cited truck's backup alarm when he stood beside the truck, but not when the driver revved the engine.

Buckley urges the Court to distinguish the above cases, since they involved alarms that could not be heard at all when tested against the surrounding noise level, whereas in this case the inspector could hear the alarm but did not think it was loud enough. Buckley cites *Walker Stone Co.*, a case involving two pieces of mobile equipment with mechanical bell alarms that, when tested against the surrounding noise levels, could be heard only "faintly." 16 FMSHRC 1955, 1957-58 (Sept. 1994) (ALJ). The judge in that case found that the mine had nevertheless satisfied the standard, writing,

There is no specific standard beyond "audible above the surrounding noise level." My interpretation is that if the alarm meets that standard, even if only "faintly," it still complies with the mandatory standard and there is no violation It is either audible or it is not audible above the surrounding noise level.

Id. at 1958.

Under the *Walker Stone* interpretation, the standard is satisfied if the sound of the alarm can be differentiated at all from the surrounding noise. I decline to adopt that interpretation. The standard requires that the alarm be "audible *above* the surrounding noise level." 30 C.F.R. § 77.410(b) (emphasis added). Here, Inspector Ellenberger testified that he could hear the alarm only when he concentrated on it and only because it was at a different frequency than the drill. That is not a sound heard "above" the surrounding noise level, but rather at or below it. Moreover, the standard requires not just that the alarm device be audible, but that it "give[] *an audible alarm* when the equipment is put in reverse." 30 C.F.R. § 77.410(a)(1) (emphasis added). An "alarm" in that sense is "a warning of existing or approaching danger." *The American Heritage Dictionary* (5th ed. 2011). A sound that can only be heard if the listener strains to do so may be "audible," but it does not "give an alarm," in the sense of providing a warning. I hold that the two provisions are best interpreted together: § 77.410(a)(1) requires that the alarm provide an audible warning, and § 77.410(b) clarifies that "audible" means in the context of the surrounding noise. An alarm that is not loud enough to provide a warning above the surrounding noise does not satisfy the standard.

Here, Inspector Ellenberger credibly testified that he checked the backup alarm twice and could barely hear the alarm amid the noise in the area. Ellis, the driver, testified that he heard the alarm when he conducted his pre-shift inspection and that it was working fine. Archibald, the safety manager, testified that the alarm was loud during Ellenberger's first test and that he could hear it during the second test along with the drill. I credit the testimony of Ellenberger regarding the volume of the alarm during both checks. In both instances, Ellenberger is quite sure that the alarm could not be heard above the noise in the area of the blasting pattern.

Buckley also introduced evidence about the conditions under which the truck is normally used. Ellis testified that he normally does not operate the truck on an adjacent lane of blast holes to the drill, since the mine's own safety procedures require that there be a row of blast holes between a truck and a drill. Buckley introduced a diagram of the blast pattern showing that this would be a distance of 48 feet. Resp. Ex. A. Ellis testified that when he does work closer to the drill, a spotter is always present. Additionally, he does not ordinarily work next to the drill's cooling fans, the loudest part of the drill, where the inspector tested the truck. Buckley thus argues that the inspector's second test did not accurately reflect the surrounding noise levels where the vehicle works.

Buckley's theory is that the alarm's effectiveness should be judged based on where the truck primarily works. This is a narrow reading of the phrase "surrounding noise level." The truck here is mobile throughout the entire shift at the mine, filling blast holes, driving around the mine site, parking, going in and out of the shop, and traveling on the haul road. I find that its surroundings include all areas and equipment where it sometimes works. I do not read the standard to be limited to the specific conditions where it works most frequently. Rather, the standard requires that the alarm be capable of providing a warning around all equipment that the truck encounters during the day. Because I find that the alarm could not do so here, I conclude that Buckley violated § 77.410(b).

B. Gravity and S&S

The Secretary asserts that Buckley's violation created the reasonably likely risk of injury causing lost workdays or restricted duty, and that it was significant and substantial ("S&S"). A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" to be:

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.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that

the hazard will result in an injury. The Commission has explained that the third element of the formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission clarified that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury” but that the hazard created would cause an injury. *Id.* at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal*, 33 FMSHRC 2357, 2365 (Oct. 2011).

In *Tide Creek Rock, Inc.*, 24 FMSHRC 201, 208 (Feb. 2002) (ALJ), Judge Barbour upheld an S&S designation for an inaudible backup alarm on a haul truck. He observed that backup alarms are required because of the limited rear visibility on much mobile equipment. *Id.* He also noted that “miners working in the vicinity of mobile equipment may be more intent on the job they are doing than on equipment moving near them,” and the alarm serves the important function of alerting them to the moving vehicle. *Id.* *Tide Creek Rock* involved a haulage truck with a faulty backup alarm that collided with a loader in the presence of an inspector. Judge Barbour noted that this was “the type of accident that is reasonably likely to occur when a backup alarm cannot be heard,” and that such an accident could be expected to injure a miner on foot or the operator of another piece of equipment involved in an accident. *Id.* Other judges to address the issue have also looked to the factors of whether the vehicle had a rear blind spot and whether miners were present on foot in deciding whether a faulty backup alarm was an S&S violation. See *Lesueuer-Richmond Slate Corp.*, 20 FMSHRC 854, 857 (Aug. 1998) (ALJ); *East Coast Limestone, Inc.*, 19 FMSHRC 761, 764-65 (Apr. 1997) (ALJ); *Hollow Contracting, Inc.*, 18 FMSHRC 2044, 2049 (Nov. 1996) (ALJ).

In this case, Inspector Ellenberger observed many of the factors that make an ineffective backup alarm dangerous. For one, the ANFO truck had a significant rear blind spot. Ellis testified that while the truck has side mirrors, there is no rear-view mirror because of the truck’s long bed. There is a “red zone” directly behind the truck where a person standing cannot see the truck’s mirrors. Secondly, Ellenberger observed three miners on foot in the blast pattern area where the truck was operating, and Ellis confirmed that this is the usual practice at the mine. The miners work close to the truck to assist the driver in filling the holes for blasting. They are likely to be focused on their own work of checking the condition of the holes and making sure they are filled properly, and may not immediately notice the truck backing up if they do not hear the alarm. These miners were in danger of being backed into by the truck, and such an accident could cause crushing injuries, broken bones, or even death. Third, Ellenberger observed the truck maneuvering in reverse to back up to a hole in the presence of miners on foot without using a spotter. Ellis confirmed that the truck regularly operates in reverse to perform loading work throughout the day. Finally, Ellenberger observed other mobile equipment operating in the vicinity of the truck, including drills, loaders, and other trucks. This equipment also had the potential to collide with the truck as a result of the faulty alarm.

Buckley asserts that the violation was not S&S because the mine had a policy requiring that a spotter be present when the truck was working on the blast pattern near the drill. In *Qmax Co.*, a judge found that a nonfunctioning backup alarm was a “purely technical” violation and not

S&S where the mine had a written policy requiring trucks to use a spotter when reversing, and the miners had complied with the policy on the day of the citation. 28 FMSHRC 848, 857-58 (Sep. 2006) (ALJ); *see also Boart Longyear Company*, 36 FMSHRC 106, 124 (Jan. 2014) (ALJ) (finding violation not S&S despite less clear evidence of compliance with spotter policy).² In this case, however, Ellenberger witnessed the truck backing up on the pattern without a spotter. Additionally, Buckley did not provide clear evidence of the specific requirements of the mine's spotter policy. The testimony of the truck driver suggested that spotters may only have been used when the truck was working very close to the drill. I find that Buckley has not shown that the spotter policy at the mine reduced the hazard created by the inaudible backup alarm.

Applying the *Mathies* test to the case at hand, I find that the Secretary has established the first element by demonstrating the violation of a mandatory safety standard. The Secretary has also established that the inaudible backup alarm contributed to the hazard that a miner or piece of mobile equipment would not hear a truck nearby and be struck by the reversing truck. Such an accident is reasonably likely to seriously injure the miner who is hit. This is especially true when the miner is on foot, as the blast crew miners were here. Buckley argues that an accident was unlikely to occur because the truck was not normally used in the conditions Ellenberger arranged in his test. I do not find that the hazard was limited to those circumstances, however. Rather, the faulty alarm was a hazard in all loud areas of the mine. The third and fourth elements of the *Mathies* test are therefore also established. Accordingly, I conclude that the violation was S&S.

C. Negligence

Inspector Ellenberger determined that the violation was the result of moderate negligence on the part of the operator. He based his determination on the fact that, while the driver had inspected the truck at the start of his shift, the truck had numerous problems in addition to the alarm, including defective seals. Ellenberger also noted that the alarm was obviously weak, and that it probably had been that way for a while. The driver testified at hearing that he had tested the alarm in the garage before his shift on the morning of the inspection and found no problem.

In *Oil-Dri Production Co.*, Judge Manning upheld a moderate negligence designation for a backup alarm on a forklift that could not be heard above the surrounding noise, even though the equipment operator had tested the alarm in a quieter location at the start of his shift and concluded that it was audible. 32 FMSHRC 1761, 1768 (Nov. 2010) (ALJ).

Here, while the driver conducted a pre-shift test of the alarm, the test was inadequate, since the driver did not notice that the alarm had weakened and did not account for the surrounding noise where the truck was ordinarily used. I affirm the Secretary's determination that the violation was a result of moderate negligence.

² These cases were decided under § 56.14132, which allows mines to comply by using an "observer to signal when it is safe to back up," though if alarms are provided they must be "maintained in functional condition." 30 C.F.R. § 56.14132. Section 77.410 does not provide for compliance through use of an observer. 30 C.F.R. § 77.410. However, I do not find that this distinction is relevant to the S&S determination.

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 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 “six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff’d*, 736 F.2d 114 7 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is “bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this operator. Buckley Powder is a medium-sized operator. The penalty as proposed will not affect its ability to continue in business, and Buckley demonstrated good faith in abating the citation. The gravity and negligence are discussed above. I find that a penalty of \$687.00 is appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$687.00 for Citation No. 8478099. Buckley Powder Company is **ORDERED** to pay the Secretary of Labor the sum of \$687.00 within 30 days of the date of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 18, 2015

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

v.

BARDO MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2008-570
A.C. No. 15-18694-136543

Mine: Bardo No. 1

DECISION

Appearances: Angele Gregory, U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee, for the Petitioner
LaTasha Thomas, U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee, for the Petitioner
Thomas Grooms, U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee, for the Petitioner

James Bowman, Bowman Industries, Midway, West Virginia, for the
Respondent
George Bowman, Bowman Industries, Midway, West Virginia, for the
Respondent

Before: Judge Sippel

Background

This proceeding was commenced by the Secretary of Labor, United States Department of Labor. It seeks civil money penalties for violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (“Mine Act”). An evidentiary hearing set by the Federal Mine Safety and Health Commission (FMSHRC) was held in Cumberland, Kentucky, with Administrative Law Judge Richard L. Sippel presiding.

Respondent Bardo Mining, LLC, (“Bardo”) owns and operates underground coal mine Bardo No. 1 in Harlan, Kentucky. The charges for decision consist of nine citations which were issued incident to a federal mine safety inspection.¹ For the reasons stated below, the Presiding

¹ Prior to hearing, the parties agreed to vacate Citation Nos. 7522921 and 7522924 and settle Citation Nos. 7503275, 7522928, 7522911, and 7522923, leaving nine citations at issue in the hearing.

Judge affirms all Citations, with corresponding levels of gravity, negligence, and mitigation, and imposes civil penalties, as modified, totaling **\$73,799.00**.

FINDINGS OF FACT

The Mine Safety and Health Administration (MSHA) conducted an inspection of Bardo's Mine No. 1 on November 5, 2007, and thereafter. Findings of the inspection are as set forth below.

Citation No. 7502246

Defective Structural Supports

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

On December 5, 2007, MSHA Inspector Kevin Doan² issued Citation No. 7502246. He observed and reported draw rock³ hanging from a roof above the track haulageway at the Bardo Mine. Tr. I at 59-60.⁴ The Citation provides:

Persons working or traveling along the track haulage way are not protected from roof falls. Loose and overhanging draw rock was apparent between crosscuts 4 and 6 on the track haulage way parallel to the number 6 belt conveyor. The draw rock is from 1 to 4 inches thick and is above the travel way used by miners. The Bardo mine uses open top type mantrips.

GX 9. This Citation designated violations of 30 C.F.R. § 75.202(a). Inspector Doan designated the risks in this Citation as significant and substantial, caused by Bardo's moderate negligence, and reasonably likely to result in lost workdays or restricted duty. GX 9.

² At the time of hearing, Inspector Doan had approximately 30 years' experience in the mining industry. He had worked in coal mines in a number of capacities, including jobs as a roof bolter, belt shoveler, equipment operator, and section foreman. Tr. I at 30. He began employment with MSHA in November 1999, where he works as a roof control specialist. Tr. I at 30-31.

³ Draw rock is material from the mine roof that becomes separated from the rock above it and is prone to fall while in this loose state. Tr. I at 61.

⁴ The hearing in this case was held over the course of two days. A separate volume of the transcript was released for each day. Each volume begins with page one. To avoid confusion, the Presiding Judge ("Judge" or "the Court") will cite to each of the two transcript volumes as "Tr. I" and "Tr. II."

Inspector Doan rode a rail runner mantrip⁵ into the mine. Tr. I at 64. On the return trip, he noticed loose draw rock along the trackway. Tr. I at 65. Doan stopped the mantrip and had the rock taken down. Tr. I at 67. He and miners used a four-foot steel bar to scale the roof and remove the draw rock. Tr. I at 68-69. Doan stated that he issued the Citation because “if [this rock] hit a person, they would be injured, and it’s obviously delaminated, separated from the overlying roof strata, so it’s just a question of when before it actually comes all the way down.” Tr. I at 67. Inspector Doan noted that this condition encompassed several pieces of rock “through a two crosscut area between crosscut No. 4 and crosscut No. 6.” *Id.* He estimated that the loose draw rock was spread out across an area of 120 feet along the trackway. Tr. I at 68-69. The affected area would be traveled at least six times a day. Tr. I at 70-71.

The Citation noted that injury was reasonably likely to occur from this condition. Tr. I at 73; GX 9. Given the frequency with which miners traverse the area and the amount of rock that had already separated from the roof, Inspector Doan considered it reasonably likely that a piece of rock could fall on someone in the mantrip and cause an injury. Tr. I at 73. He noticed several areas in the 120-foot area of the two crosscuts where the rock had separated and was hanging from the roof over the track. Tr. I at 73, 81. He removed a variety of large and small rocks and estimated that the largest rock that was pulled measured four feet by three feet and a few inches thick. Tr. I at 80, 82, 147. He estimated that the largest rock weighed 325 pounds, while the smallest rocks weighed five to six pounds. Tr. I at 76, 148, 150. He characterized this condition as significant and substantial and reasonably likely to result in lost workdays. Tr. I at 76, 148. *Id.*

Inspector Doan found moderate negligence. Tr. I at 76. He overlooked the condition on his way into the work section, but noted it as he exited:

The condition was obvious but it could have been overlooked on the way in. For instance I traveled under it as we discussed and that would be an extenuating circumstance, or I thought that it . . . didn’t qualify as high negligence

Tr. I at 76-77. He concluded that the condition had existed for several shifts prior to his examination. Tr. I at 77, 81. He recognized that “[w]eathering of rock and the separating of rock . . . can happen quickly, but [because] this area was quite a distance from the face, it had been developed for some time.” Tr. I at 77. The condition had not recently developing because there were multiple pieces of draw rock and the breaks were not fresh. He concluded:

If you see a piece of rock that is obviously fresh . . . and if you have fresh rock dust on the floor and you see small pieces or flakes of rock on the floor on top of rock dust, that would indicate that it had happened very recently.

Tr. I at 120. The mine did not have overhead lighting, but it did have directional lighting from miners’ cap lamps and lights on the mantrip. Tr. I at 124. Either the preshift examiner or the section foreman who would travel out with his crew at the end of the day should have seen the hanging rock that Inspector Doan saw as he came out. Tr. I at 78, 84-85.

⁵ A “mantrip” is a vehicle that hauls miners and supplies to and from the work area. Tr. I at 92. A “rail runner mantrip” is a battery-powered, rail mounted mantrip. Tr. I at 64.

On cross-examination, Inspector Doan agreed that the Bardo mine was not required by the terms of its roof control plan to install straps without adverse roof conditions. Tr. I at 86. He agreed that Bardo installed five roof bolts per row, which exceeds the four-bolt minimum required by the plan. Tr. I at 93. Given the location of the roof bolts and the metal straps that secure the roof, the maximum width of a fallen piece of draw rock would be four feet. Tr. I at 98.

The Citation, however, was not issued for a violation of Bardo's roof control plan. Tr. I at 100. The rock was cantilevered, laying atop a metal strap and supported against the roof at one end but hanging down on the other end. Tr. I at 104-06. Inspector Doan determined that rock would fall if those mining conditions continued. Tr. I at 105. Due to the cantilevering, he did not notice the hanging draw rock on his way into the work section, but he did notice it on his way out of the mine. Tr. I at 105-06. He conceded that a supported loose roof does not need to be taken down, provided "it's adequately supported . . . with wire mesh or some other type of roof support." Tr. I at 106.

Bardo took only eight minutes to abate the condition. Tr. I at 108-10. Inspector Doan, the Bardo Superintendent, and the rail runner operator simply pulled down loose rock to abate the condition. Tr. I at 115, 123. Inspector Doan believed that these conditions existed for some time and the mine operator had opportunity to correct the conditions. Tr. I at 113.

Superintendent Shepherd⁶ testified that he had accompanied Inspector Doan on his examination of the Bardo Mine. Tr. I at 129. They rode the rail runner into Bardo's work section. On their return, Inspector Doan observed loose draw rock hanging above the track. *Id.* Mr. Shepherd pointed out that the track entry was supported by fully grouted 5-foot pins, straps, and some cribs. Tr. I at 130. Mr. Shepherd, like Inspector Doan, failed to notice the loose draw rock while traveling into the mine. *Id.* Mr. Shepherd described the size of the rocks as "little small cracks [which] wasn't really thick." Tr. I at 130-31. He thought the roof was adequately supported with the straps that were in place. Tr. I at 131.

But, Mr. Shepherd further testified that he found it difficult to pull down the draw rock, observing: "Some of it was hard to break loose, because that laminated stuff is like sandstone rock." Tr. I at 131. The rock "really wasn't what you would say hanging down, but you could tell it dropped down a little." Tr. I at 133. Estimating size, he testified: "I would say anywhere from 2 inches wide to 6 inches wide—and . . . probably 2 inches thick to maybe 4 inches thick . . . and length maybe 2 foot, 3 foot." Tr. I at 134. He stated that because of the supplemental support, the roof bolts were separated by three to four feet. *Id.* He estimated the smaller pieces of rock to be about two inches wide and one to three feet long. *Id.*

On cross-examination, Mr. Shepherd confirmed that he saw rock hanging from the roof. Tr. I at 136. He testified that it was separated one inch from the roof. *Id.* Incredibly, he did not believe that a rock that is three feet by four inches would hurt someone. Tr. I at 139-40. He also thought that a rock measuring two to three feet long, two inches thick, and two inches wide would weigh 15 to 20 pounds. Tr. I at 141. Mr. Shepherd believed that defective roof conditions

⁶ Mr. Shepherd had 28 years of experience in the mines. Tr. I at 128. He worked as a repairman, a face boss, and the Bardo Superintendent who manages the mine. Tr. I at 129.

could have occurred between the preshift examination, which occurred at 4:00 a.m., and 1:40 p.m. when Inspector Doan issued the Citation. Tr. I at 142.

Citation No. 7522909

Failure to Follow Roof Control Plan

Each mine operator shall develop and follow a roof control plan . . . that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered. 30 C.F.R. § 75.220(a)(1).

On November 6, 2007, Inspector Kenny Dixon⁷ conducted an earlier inspection at the Bardo Mine No. 1. Tr. I at 160. He issued Citation No. 7522909, citing Bardo's violation of its roof control plan which is required by § 75.220(a)(1). Tr. I at 163; GX 1; GX 10. Bardo had failed to comply with its roof control plan when its roof bolter machine installed roof bolts without the ATRS⁸ placed firmly against the mine roof in the No. 5 heading.⁹

The Citation resulted from an improper use and application of a twin-head roof bolter used to install bolts in the roof of a mine. Tr. I at 163. The twin-head feature refers to two separate heads, one on each side. *Id.*; *see also* GX 19. Each head has a halo ring to provide temporary roof support while operators install bolts. Tr. I at 165. In an area that has been mined and is not yet supported by roof bolts, mine operators will use a twin-head roof bolter to provide protection and support of the mine roof while operators are installing roof bolts. Tr. I at 167. The halo rings are a part of an ATRS that comes into contact with the mine roof to buttress support as the operators install roof bolts. Tr. I at 166-68. The equipment includes a "canopy" under which the operators stand for safety while installing. Tr. I at 168-69.

Inspector Dixon watched a continuous miner take a cut out of the No. 5 heading. Tr. I at 171. It was removed from the area soon after the coal was cut. *Id.* He then observed the twin-head roof bolter while it was in operation. Tr. I at 172. He noticed that the halo rings had

⁷ Inspector Dixon has worked in coal mines since 1997. He worked in an underground coal mine as a maintenance worker and greaser with Adena Fuels. Tr. I at 155. He then worked for Harlan Cumberland Coal Company until 2006. Tr. I at 156. He learned how to operate a ram car, a shuttle car, a scoop, and a roof bolter. Tr. I at 157. Mr. Dixon has been an inspector for MSHA since 2006. *Id.*

⁸ "ATRS" is an "Automatic Temporary Roof Support" that can be used as an intermediate solution to secure loose ceiling rocks.

⁹ Inspector Dixon's notes indicate that the hazardous condition occurred in the No. 1 heading. GX 10A. He clarified at hearing that he had mistakenly inverted the No. 1 and No. 5 for the headings while recording contemporaneous notes. Tr. I at 197.

extensions installed which allowed them to reach higher. *Id.* The extensions were mounted directly on top of the halo rings. When he came upon the pinner¹⁰ he saw it was equipped with 24-inch extensions. Tr. I at 173. Since this machine only extends to a certain height that will reach and contact the roof, extensions permit reaching higher while supporting the roof. Tr. I at 173-74.

The mine's roof control plan calls for the ATRS to be set firmly against the roof while bolting. The machine must also be compatible with height needs. Tr. I at 174; GX 15. According to the Bardo roof control plan:

During bolting operations the ATRS shall be set firmly against the mine roof at a distance not to exceed 5 feet from the last row of installed roof bolts The controls to position and set the ATRS shall be located where they can only be operated from beneath permanently supported roof and the ATRS is placed firmly against the mine prior to drilling and installing roof bolts.

GX 15A.

Inspector Dixon noticed that the right-side ATRS was not in contact with the mine roof. Tr. I at 177. The left-side was able to swivel back and forth because only one part of it was contacting the roof. *Id.* The extensions had four metal blocks, measuring from four to six square inches around each ring which were the blocks that were supposed to be in contact with the roof. Tr. I at 178. On the right side of the pinner, none of the blocks contacted the mine roof; on the pinner's left side, only one of the four blocks was in contact with the mine roof: "The one block on the front of the machine was touching the mine roof, [but] the two on the sides and one in back were not in contact with the mine roof at all." Tr. I at 178-79. In addition, the roof bolter operators had 4-inch crib blocks under the stab jack¹¹ of the drill head to further increase the height. Tr. I at 179.

Inspector Dixon found it to be a hazard for the roof bolter to be in use while the pinner's halo rings were not flush with the roof, which exposed the roof bolter operators to an unsupported mine roof. Tr. I at 179-80. There also was the added risk of the mine roof falling in on them. Tr. I at 180. He ordered the miners to stop the bolting process. *Id.* By this time, they had already installed two roof bolts. *Id.* The operator on the left side had installed an outside bolt and was in the process of installing his inside bolt to complete the sequence. *Id.* Next, Inspector Dixon took height measurements around the pinner. Tr. I at 181. He determined that extensions

¹⁰ "Pinner" is another name for a roof bolter machine. Tr. I at 173.

¹¹ A "stab jack" is an adjustable support that more down to contact a floor to stabilize a drill. Tr. I at 179. As the ATRS reaches up and compresses against the mine roof, the stab jack stabilizes the machine to keep it from pushing the drill head down. *Id.*

on the bolter could not reach the roof. Tr. I at 183. Bardo needed to obtain longer extensions or ramp up¹² equipment to effect a shorter mine height for bolting the roof. Tr. I at 183-84, 187.

Inspector Dixon noticed that ramping up had appeared in other entries: “There [were] ridge lines along the ribs where it appeared that they had . . . bolted and then later took that bottom layer out. There [were] also some headings across the section . . . where they had started ramping back up.” Tr. I at 184-85. He noticed that ramping up had occurred in both the No. 4 and No. 2 entries, and each had roof heights where the pinner could not have reached the roof. Tr. I at 187. The evidence in these other areas show that there had been ramping up, which was proof that Bardo knew ATRS could not reach the top. *Id.*

Inspector Dixon told Superintendent Shepherd and Section Foreman Steve Crouch that he would be issuing a citation. Tr. I at 188, 228. He testified that neither the No. 5 nor the No. 3 headings¹³ were ever bolted, because “the operator could not obtain extensions to put on the machine to reach the top; therefore, they literally had to move the section out of that area because they didn’t have anything capable of bolting that mining height.” Tr. I at 188. Bardo tried to replace the 24-inch extensions with 30-inch extensions to reach the roof heights, but even the 30-inch extension did not reach the roof. Tr. I at 188-89.

The Citation was marked “reasonably likely,” as it presented a hazard to miners traveling under the unsupported roof that would likely result in an injury. *Id.* The draw rock cracks and test holes that Dixon observed in the roof further indicated that this was a substandard roof condition. *Id.* He located a test hole in the intersection where the bolt machine was sitting, while he saw draw rock “all over the section.”¹⁴ Tr. I at 190. In his notes, the Inspector recorded that he detected draw rock cracks between two and six inches long in various test holes across the section. Tr. I at 248. These conditions increased the danger because the “ATRS won’t contact the roof and that [shows] the potential of this draw rock falling on one of the roof bolter operators.” Tr. I at 190. The Inspector designated this Citation as permanently disabling since broken bones and crushing injuries were expected from a roof fall in this area. Tr. I at 190-91. The Citation stated “significant and substantial,” as the condition “created a risk to miners that would result in a significantly substantial injury to a miner.” Tr. I at 192-93. He designated the condition as “high negligence.” Ridges were left on rib lines and the operator knew those facts or should have

¹² “Ramping up” means reaching the mine roof then pulling back in order to remove the coal from the bottom. Tr. I at 187.

¹³ Inspector Dixon noted that the “No. 3 was not bolted. It was 10 feet, 2 inches. The pinner couldn’t reach it either.” Tr. I at 187.

¹⁴ Inspector Dixon did not issue a citation for this draw rock because the strapping along the roof appeared adequate. Tr. I at 248.

known that this condition existed. Tr. I at 193. Inspector Dixon concluded that the Section Foreman should have discovered this condition during his on-shift examination. Tr. I at 194.¹⁵

Inspector Dixon further explained that the phrase “firmly against the roof” does not provide a precise definition of “firm” as far as the degree of pressure that the ATRS should have against the mine roof. “Tech support recommends a thousand pounds per square inch on the ATRS, but firm does mean position affixed to the top.” Tr. I at 207. When Inspector Dixon checks for whether an ATRS is firmly against the mine roof, he uses a bar, or will test by hand to see if the ATRS can be moved. Tr. I at 209.

He recollected the roof being flat with no major rolls. Tr. I at 210. It was only when he arrived in the area and saw that the pinner was not touching the roof after three bolts had been installed, Inspector Dixon issued the Citation. Tr. I at 240. He noted that a canopy in use afforded some protection. Tr. I at 246.

Superintendent Shepherd had accompanied Inspector Dixon on the inspection. Tr. I at 255. Mr. Shepherd estimated that the height of the seam, which was a double seam, measured between eight and nine feet high. Tr. I at 256. He testified that the mine ramped on the bottom seam so that the bolt machine could reach the top. Tr. I at 257. He estimated that the mine had “probably ramp[ed] up 20 inches or better.” Tr. I at 262.

Mr. Shepherd recalled that three of the four pegs on the extension attached to the halo ring touched the roof. Tr. I at 259. He confirmed that both 18-inch and 24-inch extensions were used on the ATRS. Tr. I at 258. He and Inspector Dixon disagreed. “We had . . . a little bit of disagreement because he said it wasn’t reaching the way it should, and it—it was touching. I thought it was touching.” Tr. I at 260. On cross-examination, Mr. Shepherd acknowledged that he did not take notes on the day of the inspection. Tr. I at 265. There were no photos of the condition presented to the Court.

Citation Nos. 7522914, 7522917, and 7558110

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. 30 C.F.R. § 75.202(a).

Inspector Dixon issued Citation Nos. 7522914, 7522917, and 7558110 on November 8, 2007. As noted, this is a roof control standard that requires adequate support and control of the mine roof, face, and ribs. Tr. I at 269.

¹⁵ When an operator realizes that the ATRS will not reach the mine roof, the operator is supposed to shut the roof bolting operations down until they can obtain equipment that can reach the mine roof. Tr. I at 195. In order to abate the citation, Bardo had to move into another area of the mine that was shorter where the bolters could reach the top. Tr. I at 196.

Citation No. 7522914

Inspector Dixon issued this Citation after observing two pieces of rock hanging from the ceiling over the No. 5 conveyor belt. Tr. I at 271-72. One measured “4 feet in length by 4 feet in width by 8 inches thick.” The second measured “4 and a half feet in length by 2 and a half feet in width by three inches thick.” Tr. I at 269; GX 3. Both portions of rock had broken from the mine roof despite installation of metal straps. Tr. I at 272-73. The bolt supporting two metal straps installed in the area had dislodged, leaving about an eight-inch gap between a bolt plate and roof. Tr. I at 273. Inspector Dixon observed: “[T]he material around this bolt and these straps had broken away and actually had [fallen] out leaving this bolt and bearing plate approximately 8 inches from the mine roof.” Tr. I at 274. Draw rock had dislodged from the roof; only a strap catching a corner of rock was holding it up. *Id.* A metal strap alone was holding up the rock. Tr. I at 275.

Inspector Dixon determined that the portion of roof hanging between two straps was hazardous. Tr. I at 276. The rocks hung over the No. 5 belt and extended to the belt’s off side. Tr. I at 277.¹⁶ That side of the belt is traversed twice daily by an on-shift examiner. Belt shovelers also clear coal and perform rock dusting on both sides of the belt. *Id.* Mr. Dixon also reported that other portions of the roof in that area had fallen, showing additional roof problems. Tr. I at 277-78.

The Citation was designated significant and substantial with the notation that the condition was reasonably likely to cause a permanently disabling injury. Moderate negligence was found. GX 3. The condition presented a hazard that was reasonably likely to result in severe crushing-type injuries or broken bones. Tr. I at 278. These roof conditions should have been discovered during an on-shift examination. Tr. I at 279. He concluded that “with the examination of the belt lines, the operator knew or should have known that this condition existed.” Tr. I at 279-80. To abate the Citation, Bardo installed cribbing and wooden cross collars that were placed to hold the draw rock up. Tr. I at 280. When pressed, Mr. Dixon recalled that some cribs may have been present during his inspection on the walkway side of the belt against the rib. Tr. I at 284. But nothing more was noted than a non-conclusive “may have.”

Benny Hensley, a certified surface and underground foreman/instructor, and Superintendent Shepherd testified for Bardo. Mr. Hensley was employed by Bardo. He worked 32 years in the mining industry as a surface and underground foreman. Tr. I at 287-88.

Mr. Hensley testified that when Inspector Dixon inspected the mine, Bardo was using 5 foot resin fully grouted roof bolts, with metal strapping installed in the roof. Tr. I at 288. Cribs were installed on the off side of the belts. Tr. I at 289. Fewer people move along the off side, these being the belt shovelers and rock dusters. *Id.* The No. 5 belt had an entry width of 18 to 20 feet, while the belt itself was 36 inches wide. *Id.* Mr. Hensley built a double row of cribs on the wide side of the belt and a single row of cribs on the off side. Tr. I at 290. Cribs were built on four-foot centers and spaced approximately three feet from each other. *Id.* He did not know how much weight the cribs could hold but knew they were said to be very strong. Tr. I at 292.

¹⁶ Conveyor belts have two sides: the travelway side and the off side. Tr. I at 277.

Mr. Shepherd accompanied Inspector Dixon at the time this Citation was issued. He recalled the dangling roof over the top of the No. 5 belt. Tr. I at 293. He also recalled that a bolt and a strap were holding the dangling roof. Tr. I at 294. He confirmed that Bardo had abated the Citation by installing cross collars. Tr. I at 293-94.

Citation No. 7522917

Inspector Dixon also issued Citation No. 7522917. He cited another roof control issue and charged another violation of § 75.202(a). GX 5. A portion of the mine roof measuring 12 feet in length by 6 feet in width, and ranging from 6 to 8 inches thick, “had busted and fallen out from between the bolts in this area.” Tr. I at 296-97. The mine roof in this area “had also deteriorated and there [were] several visible vertical cracks.” Tr. I at 297. The cracks were one-eighth inch to one-half inch wide, and loose material had fallen between the bolts. Tr. I at 297-98, 306. Inspector Dixon noted that persons would be in this area at least twice daily and belt shovelers would clean up there throughout the day. Tr. I at 299, 307-08.

Defects specified were “reasonably likely” to cause a “permanently disabling” injury. Tr. I at 299. Inspector Dixon determined “moderate negligence” because on-shift examinations along the belt gave notice or reason to know that this condition had existed. *Id.* He also considered the deterioration of the mine roof and chunking between the bolts were a hazard. Tr. I at 300. He characterized the Citation as significant and substantial because this condition “created a hazard to miners that could reasonably result in a serious injury.” *Id.* Specific injuries that could arise from a rock fall included broken bones and injuries resulting from being crushed under rock. Tr. I at 301. If the threatening piece of rock (12 feet by 6 feet by 6 to 8 inches thick) were to fall on a person, Inspector Dixon would expect fatal injuries. *Id.* To abate the Citation, the operator installed wooden cribs and wooden cross collars as additional roof support. Tr. I at 301-302.

On cross-examination, Inspector Dixon testified that even with bolt spacing in place rocks could fall between the bolts. Tr. I at 303. He did not cite the mine for rock that had already fallen; but fallen rock served as a warning of problems with roof crackings. Tr. I at 305-06. Deteriorating rock was evident throughout the entire roof in this area. Tr. I at 307.

Superintendent Shepherd confirmed that rock had fallen on the return side¹⁷ of the No. 2 conveyor belt. Tr. I at 311. The rock fell between the bolts and the ribs, so a number of cribs were installed. Tr. I at 312-13. He also noticed cracks in the roof, but did not believe that this indicated that there were problems with the roof. Tr. I at 313. He recalled that cribs with four to five-foot centers were installed on both sides of the No. 2 belt, and that the mine had abated the Citation by constructing the additional cribs. *Id.*

¹⁷ “Return side” and “off side” were interchangeable terms used throughout the hearing. *See, e.g.*, Tr. I at 312.

Citation No. 7558110

Inspector Dixon observed a defective roof condition. GX 8, 13; Tr. I at 315-16. The defect was at crosscut 6 of the No. 2 return entry belt that was used as an alternate escapeway. Tr. I at 317-18.¹⁸ Here he took note of a roof section that was 12 feet by 4 feet ranging from 2 to 14 inches thick. It had “busted and fallen out from between the bolts on the lifeline in this area.” Tr. I at 318. The fallen rock had pinned the lifeline¹⁹ against the floor. Tr. I at 318, 322. Anyone using this escapeway, would come into contact with this roof condition. Tr. I at 318. A mine examiner walks this area once a week, and miners participate in an emergency drill twice a year using this escapeway. Tr. I at 319. The defect condition was only 80 feet away from a defective condition noted in the No. 3 entry between the No. 7 and 8 crosscuts. Tr. I at 321.

The Inspector noted here that cutters²⁰ appeared between the No. 6 and 7 crosscuts along the rib. Tr. I at 322. He found cracks, separations, and cutters in a test hole along one pillar. Tr. I at 324. These cracks measured 14 inches and 30 inches. *Id.* They indicated clearly that the roof was not adequately supported, and that a portion of beam from the pillar block was failing. Tr. I at 325.

Inspector Dixon marked the defect as reasonably likely to result in permanently disabling injuries. Given the cracking in the roof, there was a reasonable likelihood that portions of roof would fall and injure a miner, resulting in broken bones. Tr. I at 326-27. He concluded that the weekly examiner, or anyone doing routine maintenance or rock dusting, was at risk. Tr. I at 327. He found that the violation resulted from moderate negligence. Deteriorating roof conditions “had been there for weeks” and therefore an examiner or miner moving through the area would have noticed it. Tr. I at 327-28. The Inspector also viewed a portion of fallen roof at the No. 1 entry at crosscut 6 as “an indication of deterioration that was occurring in this area which carried over to the No. 3 entry.” Tr. I at 328. No cribbing and no metal straps had been installed in this area at the time of the inspection. Tr. I at 339-40.

On cross-examination, Inspector Dixon testified that cracks in the mine roof here were similar to the condition he cited along the No. 2 belt, leading him to conclude that the condition had existed for several weeks. Tr. I at 336-37. The deterioration led him to conclude that there was moderate negligence. *Id.*

Superintendent Shepherd confirmed that a certified foreman is required to conduct weekly inspections of the “return air courses” and against “hazardous conditions.” Tr. I at 341. A foreman also must record the results. Tr. I at 342. Mr. Shepherd co-signs the report. *Id.* He saw

¹⁸ The mine is required to have a primary escapeway and an alternate escapeway. Tr. I at 317.

¹⁹ A “lifeline” is a nylon rope that is required to be installed in each escapeway. It is used for directional purposes so miners can find their way out of a mine in an emergency. Tr. I at 318.

²⁰ A “cutter” is a linear fracture that occurs next to a rib line where roof meets pillar, and is a significant indication that a beam may be failing. Tr. I at 319-320.

that rock had fallen between the bolts and the rib, some of which had advanced to the bolts. Tr. I at 342-43. He did not see the rock hanging down along a pillar block which protruded toward the ground. Tr. I at 343.

Citation Nos. 7558107 and 7558108

Solicitor's counsel moved to consider Citation No. 7558107 (effective ventilation plan) together with Citation No. 7558108 (failure to conduct shift examination). The two Citations are related and should be taken together. Respondent had no objection and the motion was granted. Tr. II at 20-21. The Secretary provided Government Exhibits 16 and 16A, which contain Bardo's mine ventilation plan and a color coded diagram of a continuous miner machine showing locations of necessary sprays, the coal conveyor, and that all 84 sprays must be inspected prior to each lift. Tr. II at 23-34.

Citation No. 7558108

A person designated by the operator shall conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan. . . . The examination shall include air quantities and velocities, water pressures and flow rates, excessive leakage in the water delivery system, water spray numbers and orientations, section ventilation and control device placement, and any other dust suppression measures required by the ventilation plan. 30 C.F.R. § 75.362(a)(2).

Inspector Dixon issued Citation No. 7558108,²¹ citing an inadequate on-shift examination of dust control parameters²² in violation of § 75.362(a)(2). GX 7. After conducting a respirable dust survey, Inspector Dixon found two sprays on the continuous miner that were not functioning properly. Tr. II at 10. The dust control plan required a minimum of 60 pounds of water per square inch (PSI), but he found the water pressure level to be only 25 PSI. *Id.* Also, one of the sprays was blown out, leaving an open port in the spray block; another spray was stopped up. *Id.* Inspector Dixon issued the Citation because Bardo should have discovered these conditions during an on-shift examination. Tr. II at 10-11. The facts and circumstances are detailed below.

²¹ All transcript references for the remaining citations in this summary are found in Volume II of the transcript. Citation No. 7558108 was the first violation discussed on the second day of this hearing, prior to Citation No. 7558107. The citations were considered in the order in which they were presented.

²² Dust control parameters are incorporated into a mine's ventilation plan, which prescribes the methods that operators use to control dust in the mine atmosphere in order to prevent miners' exposure to excessive amounts. Tr. II at 9.

Bardo's examiners mark the date and time of on-shift exams that are completed on a section of conveyer belt and initial next to the date and time. Tr. II at 14-15. Inspector Dixon examined the board for the last on-shift inspection, noting the date, time, and initials designating completion of the examination. Tr. II at 16. He believes that he heard verbal affirmation that the on-shift examination was completed so that he could begin his inspection. But he could not recall who at was. Tr. II at 35, 39. Inspector Dixon recalled that Mr. Shepherd and the continuous miner operator were with him when he heard that the machine was ready to mine. Tr. II at 39. Neither Mr. Shepherd, nor the machine operator, nor anyone else in the section, had warned that the continuous miner was not ready to be inspected. Tr. II at 71. In confirming the date, time, and the initial board, Inspector Dixon testified that all this had indicated to him that the "continuous miner was ready to begin producing coal," and therefore was ready for inspection. Tr. II at 39-40.

Inspector Dixon testified on dust control regulations. Tr. II at 17. Miners could suffer respiratory injury from coal dust in the form of lung diseases, monocosis, silicosis, and black lung. *Id.* Citation No. 7558108 reflects conditions that are reasonably likely to result in a permanently disabling injury that would affect the people working in the affected area. GX 7; Tr. II at 18-19. The condition was marked as significant and substantial with moderate negligence. Tr. II at 19. Inspector Dixon concluded that the operator should have had knowledge that this condition existed. *Id.*

Citation No. 7558107

Failure to Follow Ventilation Plan

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be suitable to the conditions and mining system at the mine. 30 C.F.R. § 75.370(a)(1).

Inspector Dixon issued Citation No. 7558107 for Bardo's failure to comply with the mine's ventilation plan. GX 6. As noted in Citation No. 7558108, one spray on the continuous miner was missing while another was inoperative, which were the bases for issuing both Citations. Inspector Dixon noted that the continuous miner had a series of sprays on it placed in a pattern across the heads of the machine. GX 16A; Tr. II at 26. The machine contained three spray blocks designated A, B, and C. Spray Block A was comprised of three smaller blocks running along the atop the cutting heads of the miner, each block containing five sprays, for a total of 15 sprays. Tr. II at 26-27. Spray Block B was comprised of two blocks with five sprays each, located under the left and right side of the head of the miner. Tr. II at 29-30. Spray Block C had three blocks of three sprays each. GX 16A. Two were located at the back of the pan, one on each side; the third was in the conveyor. GX 16A. The inoperable spray was located in Spray Block C on the back of the pan, while the missing spray was located in Spray Block A. GX 16A.

Inspector Dixon opined that it was important for all 34 to work simultaneously because sprayed water is the main dust suppressant. Tr. II at 32. All 34 sprays had to be functioning prior

to each “lift of coal.”²³ Tr. II at 63. The dust control plan required that sprays operate at a minimum water pressure of 60 PSI. Tr. II at 10. Inspector Dixon measured the miner’s water pressure on the miner at 25 PSI. Tr. II at 33. He explained that the missing spray caused a decrease. The decrease in water pressure was a result of water flowing out of a port. *Id.*

The Citation indicated it was reasonably likely to cause a permanently disabling injury such as lung disease or black lung. Tr. II at 37. Inspector Dixon testified that his dust survey on the date of this violation showed .17 milligrams, a calculation well below the 2.0 milligram allowable limit. Tr. II at 68.²⁴

He concluded that this condition would affect five miners, the number of miners in the area of the machine cutting coal. Tr. II at 38. He concluded that the condition was moderate negligence since it should have been detected during on-shift examination. *Id.* Bardo did abate the Citation by replacing the missing spray, fixing the inoperable spray, and increasing the water pressure to 65 PSI. *Id.* Bardo also adjusted the booster pump to insure reaching the proper pressure. Tr. II at 67.

Bardo next called Randall (Randy) Bowman²⁵ to testify. Mr. Bowman had 25 years’ experience in mining, and he operated continuous miners for the past 18 years. Tr. II at 74. Mr. Bowman worked at Bardo No. 1 where he operated the continuous mining machine. Tr. II at 75. On November 20, 2007, he was conducting dust parameters on the continuous miner prior to Inspector Dixon’s examination. Tr. II at 79. He testified that the continuous miner stood 150 feet from the working face. Tr. II at 77. While operating, the sprays would emit loud hissing/spraying sounds that could be heard from 70 feet away. Tr. II at 78. If these sprays were not working, it would be obvious. Tr. II at 78. It would not be difficult to tell the difference between 25 and 60 PSI of water pressure. *Id.*

When Inspector Dixon arrived at the location, Mr. Bowman was conducting his on-shift examination. Tr. II at 79. An electrician and two workers were also present. *Id.* Mr. Bowman testified that he did not tell the Inspector that his inspection was completed and that he was ready to put the machine into operation. *Id.* But on cross-examination, Mr. Bowman admitted that after he completed his examination, he told the Section Foreman that the exam was complete. Tr. II at 80. The Foreman marked the date and time and initialed on the board provided. *Id.*

Superintendent Shepherd testified that he did not hear anyone say that Bardo’s examination was completed. Tr. II at 84. He agreed that the loud noise of the sprays’ hissing sound was an indicator of a drop in water pressure. Tr. II at 86. When the miner machine is 30

²³ A “lift of coal” is the run that the continuous miner takes along the coal seam before backing up and starting again on another run. Tr. II at 63.

²⁴ MSHA’s measurement at the Bardo No. 1 Mine on July 31, 2007, showed the largest milligram standard to be .47 milligrams, four times below the 2.0 milligram limit. Tr. II at 68.

²⁵ Mr. Randy Bowman is not related to Mr. James (Jim) Bowman, Respondent Bardo’s in-court representative in this matter. Tr. II at 74.

feet from the face, the operator turns on the sprays to wet the approach. Tr. II at 87. While moving these 30 feet with the water pressure on, a reduction in PSI would be obvious. *Id.* If such an event were to occur, the mining machine “would be backed up and checked.” *Id.* He opined that one malfunctioning spray would affect the overall operation. Tr. II at 86.

Mr. Shepherd also confirmed that someone told Inspector Dixon that the continuous miner was ready to run. But he was unsure who might have said that “we’re about ready.” Tr. II at 88. Mr. Shepherd was referred to his deposition, where he testified that Trent Waller, the third shift electrician, told Inspector Dixon they were ready, Tr. II at 90. But Mr. Bowman, who was examining the dust parameter, still had the spray out and was not ready: “I remember Trent saying, yeah, we were ready; but I never remember Randall [Bowman] saying anything.” Tr. II at 90. Trent was not designated to declare when the on-shift examination was complete. Tr. II at 91.

Citation Nos. 7522912 and 7522915

Defective Safeguards of Machine Parts

Gears; sprockets; chains; drive; head; tail; and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded. 30 C.F.R. § 75.1722(a).

Inspector Dixon issued Citation No. 7522912 because a “guard that covers the discharge roller drive and drive sprocket and shaft was missing.” Tr. II at 96; GX 2. The discharge roller on the end of the feeder is the area where mined coal is deposited. Tr. II at 98. A conveyor chain runs through the center of the feeder, and a guard is installed to cover the moving parts of the shaft, sprocket, and drive chain. Tr. II at 98-99. A valve body with control levers and a panic bar are both located near the moving parts. Tr. II at 99-100. Inspector Dixon testified that the control levers control the functions of the machine and the panic bar provides an emergency shutoff switch. Tr. II at 100; *see also* Demonstrative Evidence GX 20 (schematic drawing of machinery to be graded).

Inspector Dixon found this violation to be significant and substantial and the result of moderate negligence. GX 2. He found the violation to be reasonably likely to result in a permanently disabling injury. GX 2. He concluded that the exposed moving parts created an “entanglement-type” hazard that could lead to permanently disabling injuries such as broken hands, broken bones, or dismemberment of fingers. Tr. II at 105. Miners using the valve body controllers and the panic bar would be in the area, as would miners performing routine maintenance and cleaning work, such as shoveling out under the feeder. *Id.* He testified that “the operator should have seen this condition. The operators must do a weekly examination on electrical equipment. . . . [I]t should have been corrected.” Tr. II at 108. To abate, the operator installed a guard over the cited area while Inspector Dixon was still in the mine. Tr. II at 108-09.

On cross-examination he admitted that the end of the shaft with six Allen bolts was exposed, but that the sprocket itself was not visible. Tr. II at 110. He agreed that the sprocket and the chain to the sprocket were therefore guarded. *Id.* Only the end of the shaft with the six bolts was exposed. Tr. II at 110-11. He confirmed that no miner at Bardo was assigned regular duties as the feeder operator. Tr. II at 112. He estimated that the shaft was about four to five feet from the ground. *Id.*

Roger Baker testified for Bardo. He had 33 years' mining experience and worked as a maintenance foreman at Bardo. Tr. II at 115-16. Mr. Baker testified that the drive sprocket and the sprocket chain are located behind the hub that is covered by a guard. Tr. II at 126. He also testified that the speed of the feeder is very slow. Tr. II at 126. The hub contains shear pins and protects the machine against damage. Tr. II at 125. In order to be caught by the exposed bolts, a person would have to reach over the top of the valve chest, then behind it. Tr. II at 130. He did not believe there was a threat to injury from the operating feeder. Tr. II at 131.

Citation No. 7522915

The final citation was also issued for a failure to safeguard as required by 30 C.F.R. § 75.1722(a). GX 4. Inspector Dixon observed that a portion of the guard on the oil bath²⁶ covering the chain and sprocket drive box on the No. 3 head drive was missing. Tr. II at 136; GX 4. The guard had worn away, thereby exposing the chain and sprocket drive. *Id.* The head drive turns the conveyor belt. Tr. II at 136. In order to keep the belt functioning properly, there is a pool of oil through which the chain turning the belt passes. *Id.* A piece of conveyor belt had been placed over the unguarded portion of the oil bath. Tr. II at 139. Inspector Dixon concluded that the exposed sprocket and chain on the oil bath posed a hazard because "they are constantly rotating while the head drive is running." Tr. II at 140, 141. He testified that belt examiners and miners conducting maintenance on the head drive were routinely in the area. Tr. II at 141. Also, miners take water for disposal from a 12-inch depth beneath the head drive, thus putting them next to an exposed moving chain and sprocket. *Id.*

Inspector Dixon further concluded that Bardo was aware of this condition since it had placed part of a conveyor belt to "cover" the exposed area. Tr. II at 142. Exposure on the left side of the metal frame was four inches wide. Tr. II at 143. Exposure behind the belt left an exposed gap three and one-half inches wide. *Id.* The gap "tapered off at the end of the oil bath." *Id.* The violation was reasonably likely to cause permanent disabling dismemberment-type injuries. Tr. II at 143-44. In finding moderate negligence, at least two examinations, which occur daily, should have discovered what was "pretty obvious." Tr. II at 144-45. To abate the Citation, Bardo welded pieces of metal over the exposed parts. Tr. II at 145.

On cross-examination, Inspector Dixon testified that the area where the conveyor belt was hanging over the oil bath was sufficiently guarded until a permanent solution was found. Tr. II at 149. He testified that the condition was still problematic because it could disengage. *Id.*

²⁶ The "oil bath" turns the tandem rollers inside the head drive; a "head drive" is a unit that pulls a conveyor belt and enables the belt to turn and rotate. Tr. II at 136.

While a person's entire body would not fall into the unguarded area, a person could come into contact with the hazard while reaching to break a fall. Tr. II at 150.

Superintendent Shepherd testified for Bardo. He recalled that the guard covering the drive sprocket of the No. 3 belt drive was where "[t]he chain had rubbed a hole through the side of the middle guard on . . . [the] oil bath. . . . It rubbed a hole where the chain comes around the bottom of the oil bath [which] was probably a couple inches wide." Tr. II at 153-54. Bardo was building a new oil bath or ordering one and the belt was used as temporary coverage. Tr. II at 154. He estimated that the unguarded area was two to three inches wide and three feet long. *Id.* He did not think that a miner would have reason to be near the exposed guard. Tr. II at 155.

Mr. Shepherd testified that the belt covered the exposed opening. Tr. II at 156. The beltline only was used temporarily just before Inspector Dixon arrived. Tr. II at 157. Apparently, less than a week had passed between the time the problem was noticed and the problem was remedied. Tr. II at 159.

Summary of Secretary's Arguments

Unsupported Roof Systems

In Citation No. 7502246 Bardo failed to comply with 30 C.F.R. § 75.202(a) in four of the roof violations at issue. The Secretary asserts that a reasonably prudent person in the mining industry would have immediately removed the loose draw rock that Inspector Doan discovered. *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987); Secretary's Proposed Findings of Fact, Brief and Argument 20-21. Significant and substantial applies to the draw rock spanning an area of 120 feet that is used by miners six times each day. Sec'y's Br. 22. Noting the deteriorating roof, Inspector Doan's designation of moderate negligence is convincing and will be accepted.

The Secretary argues a similar rationale for the remaining three charges under § 75.202(a). None passed the reasonably prudent person test; in each case, hazardous conditions reported had a reasonable likelihood of contributing to a serious injury; and all adverse conditions should have been detected. Citation No. 7522914 charges an inadequate roof support was blocking two hanging rocks. Sec'y's Br. 28-29; Tr. I at 269. Miners and safety examiners traverse the area twice each day. Sec'y's Br. 29. Fallen portions of the roof indicated that this should have been discovered during a shift examination. *Id.* at 30. Citation No. 7522917 charges a life-threatening rock had fallen between roof bolts along a conveyor belt. *Id.* at 31. Deteriorating roof conditions were reasonably likely to result in serious injury and should have been discovered and corrected during a shift examination. *Id.* at 32. And Citation No. 7558110 charged that a large rock had fallen between the roof bolts and pulled a lifeline to the ground. The fallen rock showed cracks and cutters indicating that the roof was unsafe. *Id.* at 33. Such conditions were extensive, all failed the reasonably prudent person test, all were reasonably likely to result in serious injury, and all should have been discovered and corrected. *Id.* at 34-35.

Disregarded Roof Plan

Citation No. 7522909 charged violations of the roof control plan required by 30 C.F.R. § 75.220(a)(1), citing *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987) (standard for finding violation of mine plan). The Secretary presented Bardo's roof control plan mandating that an ATRS be set firmly against a roof. Proof was presented that a roof bolter operator violated this provision. Sec'y's Br. 24-25. Operation of a roof bolter without the ATRS set firmly against the mine roof exposed operators to falling rock. *Id.* at 25-26. Superintendent Shepherd agreed that a hazard was created by an unsupported roof. The Secretary accepted Inspector Dixon's high negligence designation because the roof bolter was equipped with 24-inch extensions which indicated that the operator knew the ATRS could not reach the mine roof. *Id.* at 26. Other areas of mine roof were unreached by the ATRS. *Id.* at 27. Despite evidence of the ATRS's inability to reach the roofs, miners were permitted to continue to install roof bolts without adequate protection.

Disregarded Dust Control

Citation No. 7558107 (related to Citation No. 7558108) alleged a failure to comply with a ventilation plan. Bardo's failure to ensure that sprays were functioning constituted a violation of 30 C.F.R. § 75.370(a)(1). Significant and substantial and moderate negligence designations were warranted for reasons similar to those the Secretary offers in support of Citation No. 7558108, which was issued for failure to complete an examination of dust control parameters in accordance with 30 C.F.R. § 75.362(a)(2). Sec'y's Br. 35. Inspector Dixon gave the mine operator an opportunity for pre-examination of all hazards before beginning his own inspection. Still, he discovered two water sprays that were malfunctioning and measured only 25 PSI water pressure. *Id.* at 36. Mr. Shepherd had not informed Inspector Dixon that their inspection was incomplete. *Id.* at 37. The situation was designated serious and significant and the failure was reasonably likely to result in serious illness, injury, or death to miners. *Id.* The moderate negligence designation was appropriate because Bardo had certified that an examination had been conducted prior to Inspector Dixon's exam and no one had objected, which indicates that Bardo knew or should have known of the hazardous condition. *Id.* at 38.

Unguarded Machinery

Citation Nos. 7522912 and 7522915 charge Bardo with violations of 30 C.F.R. § 75.1722(a). Citation No. 7522912 charges Bardo with failing to provide an adequate guard on a Stamler Feeder. Inspector Dixon discovered that a guard cover for the discharge roller and drive sprocket shaft was missing. A valve with control levers was located near the exposed portion. Sec'y's Br. 42. The hazard was designated significant and substantial since a panic bar and valve body were in close proximity to exposed moving parts. A miner using either device would likely make contact with the unguarded portion and suffer serious entanglement injuries. *Id.* at 43. The Citation charged moderate negligence because the Stamler Feeder has been equipped with a guard from the manufacturer with grooves allowing the guard to be removed. In Citation No. 7522915, the guard covering the chain and sprocket box was missing, and moving machine parts were exposed in violation of the designated standard. *Id.* The Respondent knew that the guard was missing. The part was on order while the head drive was still being used. *Id.* at 45. The

significant and substantial designation with moderate negligence should be affirmed and upheld for reasons akin to those articulated for Citation No. 7522912, *supra*.

Summary of Bardo's Reply Arguments

Positive Roof Plan

Bardo argues that it complied with § 75.202(a) because its miners could work safely in the cited areas. Respondent's Post Hearing Brief Findings of Fact and Conclusions of Law *passim* (collectively "Bardo Brief"). Citation No. 7502246 does not allege the roof was falling. While some loose rock was in the area, they were small in comparison with larger rocks that were later pulled down. The situation was not found to be significant and substantial because the loose rocks were small. Bardo Br. at 24. In Citation No. 7522914, the roof was supported and the rock was lying on supports that were to hold the roof. The "loose roof" area was not where miners work so there was no likelihood of injury. In Citation Nos. 7522917 and 7558110, the roof material was found on the floor. It was in an area that was traveled infrequently. It did not pose a hazard because it had already fallen without incident. *Id.* at 20. The Citation was not designated significant and substantial because it was not reasonable to expect serious injury from a rock that was already fallen. *Id.* at 24.

Properly Positioned ATRS

Bardo contends that Citation No. 7522909 cannot support a penalty because Bardo had complied with § 75.220(a)(1). Bardo argues that the ATRS was properly placed. Bardo Br. 20. According to Bardo, Inspector Dixon's testimony was mixed and conflicted. The evidence shows that the mining height in the No. 5 entry at 9 feet 5 inches. The ATRS could reach up to 9 feet 11 inches. The highest measurement the Inspector took was 10 feet 2 inches. He testified that one halo ring was touching the roof and the other was not, which indicated that there must have been some difference in mining height. *Id.* at 21. Assuming the Inspector was correct in his measurements, the ATRS would still have been within 3 inches of the roof which would have provided canopy protection. *Id.*

Bardo also contends that the ledges along the mine ribs evidenced that the operator was ramping up to reduce the mine height so that roof bolts could be safely installed. *Id.* A significant and substantial designation is unwarranted because three roof bolts had been installed in the area. The roof was supported 6 feet from the right rib and 3 feet from the left rib. *Id.* at 24. Three of five roof bolts were installed and the halo ring was no more than three inches from the metal strap, showing that there was no likelihood that the roof would fall. *Id.* Bardo's argument is not supported by the record.

Adequate Maintenance and Dust Control

Bardo asserts that Citation No. 7558107 cannot be sustained for lack of evidence of violating § 75.370(a)(1). Miners were working to clean and repair water sprays in accordance with the standard. Bardo Br. 21. As Bardo would have it, coal removal operations had not yet started at the time of the Inspector's examination. The safety standard and the mine's dust

control plan require that the water sprays be operating before production begins. *Id.* at 22. If defects are repaired prior to production, there can be no violation. *Id.* That argument doesn't fit because the work was not completed when the Inspector began his checks of the system. But, this is where the story becomes murky. Bardo asserts three miners were cleaning the 34 water sprays when the Citation was issued. *Id.* Bardo also asserts that there is no evidence that its designee Mr. Bowman had completed the on-shift examination. *Id.* at 23. There also is no evidence that the Foreman received a report from Mr. Bowman. *Id.* But convincing contrary evidence indicates that Mr. Dixon acted reasonably in assuming he had been cleared to begin the inspection. *See Summary of Secretary's Arguments, supra.*

Adequate Machinery Guards

Finally, as to Citation Nos. 7522912 and 7522915, Bardo argues that it has complied with § 75.1722(a). Bardo claims that the cited areas were guarded as required by the regulation. In Citation No. 7522912, Inspector Dixon conceded that the discharge roller and drive sprocket were guarded, that the end of the shaft was neutralized by its location, and that miners could not make contact with it. Bardo Br. at 23-24. In Citation No. 7522915, the oil bath was guarded by a one-half inch rubber belt as a temporary guard. *Id.* at 24. Since the discharge roller and drive sprocket were guarded in Citation No. 7522912, and a piece of the conveyor belt was guarding the area cited in Citation No. 7522915, neither of these violations justified being designated significant and substantial. Therefore, no penalties should be assessed.

CONCLUSIONS OF LAW

Standard of Proof

The Secretary has the burden of proving all elements of each alleged violation by a preponderance of the evidence. *Steadman v. S.E.C., 101 S. ct. 999, (1981) In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1301, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary also has the burden of going forward with the evidence. *U.S. Dep't of Labor v. Greenwich Collieries*, 114 S. Ct. 2251, 2252 (1994).

Legal Standards

Reasonable Prudent Person

Factors that a reasonably prudent person would know include accepted safety standard requirements that are unique to the mining industry, and surrounding conditions at the mine. *BHP Minerals Int'l, Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). The standard is used to test conclusions reached by an objective observer with knowledge of the relevant facts. *U.S. Steel Mining Co. L.L.C.*, 27 FMSHRC 435, 439 (May 2005) (quoting *U.S. Steel Corp.*, 5 FMSHRC 3, 4-5 (1983)). The standard is always applied to the totality of the factual conditions and circumstances involved. *Id.*; *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992).

Significant and Substantial

Section 104(d) of the Mine Act, 30 U.S.C. § 814(d), designates more serious violations as “significant and substantial” where facts surrounding the violation show that there exists a reasonable likelihood that the hazard to which the violation contributed will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has definitively held:

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

Mathies Coal Co., 6 FMSHRC 1, 3 (Jan. 1984); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); see also *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (adopting *Mathies* criteria).

Negligence

The Secretary defines negligence as “conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d) (2011). Under the Mine Act a “mine operator is required to be on the alert for conditions and practices in the mine that affect the safety and health of miners and to take steps necessary to correct or prevent previous hazardous conditions or practices.” *Id.* Moderate negligence is found when an “operator knew or should have known of the violative condition or practice, but there are mitigating circumstances,” while high negligence exists when an “operator knew or should have known of the violative condition or practice, but there are *no* mitigating factors.” *Id.* (emphasis added).

Penalty Assessments

The Judge determines the appropriate penalty amounts *de novo*. In considering penalties, she/he must provide a clear explanation of any substantial deviation from the Secretary’s proposed penalties. *Cantera Green*, 22 FMSHRC 616, 622-23 (May 2000). However, Commission Rule 2700.30(b) instructs that “[i]n determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary.” 29 C.F.R. § 2700.30(b). Therefore, the Judge must independently determine an appropriate penalty.

Consideration must be given to the following factors contained in section 110(i) of the Mine Act:

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

30 U.S.C. § 820(i). The parties have stipulated under section 110(i) that (1) Bardo is a large operator, (2) the proposed penalties are appropriate for its size, and (3) the proposed penalties will not affect the ability of Bardo to continue in business. Tr. I at 14. The Presiding Judge finds that Bardo has demonstrated good faith in abating the Citations, and that there is no showing that Bardo had more or fewer violations than would be expected of a large operator.

Analysis of Violations

Citation Nos. 7502246, 7522914, 7522917 and 7558110

Recognizable Roof Hazard Conditions

Four citations were issued for violations of the roof condition standard under § 75.202(a). It is found that the Secretary has proven the violation of each citation. The preponderance of the evidence shows that Bardo failed to comply with the reasonably prudent test discussed above. Therefore, the Court upholds the violations alleged in each citation, as well as each proposed significant and substantial and moderate negligence finding. Evidence and arguments are discussed below.

Inspector Doan's testimony with regard to Citation No. 7502246 conveyed the extensiveness, obviousness, and duration of the hazardous condition. Loose and overhanging draw rock did not occur in one isolated place. Tr. I at 68, 70. Separated rocks found in a number of areas ranged in weight from 6 to 325 pounds. Tr. I at 76, 148, 150. The expanse of the condition indicated that it existed for a substantial period of time. Inspector Doan and Superintendent Shepherd noticed this hazard simultaneously. Immediate action to abate was taken without objection. Attempts by Mr. Shepherd to downplay the extensiveness of the condition were unconvincing. His testimony that loose rocks were small, only comprising a thin layer along the roof, and were difficult to extricate from the roof, did not convince. None of Bardo's arguments refute Inspector Doan's consistent and credible testimony.

Bardo's argument that the mine was in compliance with its roof control plan is neither explicated nor persuasive and is rejected. The Citation was not for violating the roof control plan. Tr. I at 102. The Citation was based on Bardo's failure to provide measures that a reasonable person familiar with the mining industry would take. Inspector Doan identified a hazardous roof condition. Rocks were separated from the roof. The extensiveness of the condition was ascertained prior to issuance of the Citation. Yet, Bardo failed to take steps that a reasonably

prudent person familiar with the mining industry would have taken when faced with such hazardous circumstances.

Citation Nos. 7522914, 7522917, and 7558110 are also proven. Two large portions of rock had broken away from the roof leaving an eight-inch gap. Tr. I at 273-74. Two large rocks had dislodged and were hanging from the roof. Tr. I at 269, 277. Other portions of the roof had fallen. Tr. I at 277-78. Dislodged rocks gave a reasonably ascertainable indication to miners and on-shift examiners that the Bardo mine roof was seriously deteriorating. Mr. Shepherd confirmed that he saw fallen rock and cracks in the roof. His exculpatory testimony—that this evidence of deterioration did not mean that there were problems with the roof—does not outweigh Inspector Dixon’s delineated conclusions to the contrary and fails to convince this fact finder. Tr. I at 313.

The sizes of rock described as detached or fallen, together with obvious vertical cracks and cutters, constituted conditions that were obvious, pervasive, extensive, and ongoing. The Inspectors’ testimonies were not rebutted. They established that the deterioration was not remedied prior to issuance of the Citations. The conditions found showed numerous problems that were reasonably ascertainable prior to inspection. A reasonably prudent person familiar with the mining industry would have taken the necessary remedial steps. Bardo failed to do so.

Significant and Substantial

Each citation described conditions found at Bardo’s mine that violated the safety standard prescribed by § 75.202(a). The hazard—a roof fall—was prominently noted in each citation. The significant and substantial designations in Citation Nos. 7522914, 7522917, and 7558110 are affirmed and approved. Citation No. 7522914 involved two large dangling pieces of rock that hung over the No. 5 belt and its offside. Citation No. 7522917 involved an even larger rock that had fallen along a conveyor belt. Inspector Dixon noted evidence of roof deterioration in areas under which miners, on-shift examiners, and belt shovelers regularly pass. These roof problems in areas being mined were reasonably likely to result in an injury-producing event, and any resulting injuries would be serious.

In Citation No. 7558110, rock had fallen on a lifeline, and cutters and vertical cracks were found indicating problems with the roof near an alternate escapeway. That area is used in the event of an emergency. The nature of the hazard and the critical need for the area’s access makes it reasonably likely that an injury could have occurred had the conditions continued. Such injuries would be of a reasonably serious nature.

Moderate Negligence and Mitigation

The moderate negligence designations for the above violations are approved. The convincing case presented by the Secretary proved that Bardo knew or should have known of the violations. The hazardous conditions in areas frequented by miners show further that Bardo should have known of each hazard, with one exception. In Citation No. 7502246, the hazardous condition found was only visible when exiting the mine. A cantilever condition reduced all ability to observe one angle of the defect which constitutes a mitigating factor. Tr. I at 105-06.

In Citation Nos. 7522914 and 7522917, conveyor belts left uncovered were observable only on the offside of the belts, an area that is less frequently populated than the onside. This positioning of the hazards mitigates because fewer miners could be aware of the hazards than if they were onside of the belt.²⁷ Also, the location of the hazard in Citation No. 7558110 is a mitigating factor since the escapeway is only traveled weekly. Mitigating circumstances were present in each of the three violations. The Inspectors' designations of moderate negligence are accepted for the four violations of § 75.202(a).

Penalty Determinations

The Secretary proposes a penalty of \$4,689.00 for Citation No. 7502246. The proposed penalty is appropriate. Cantilevering of the draw rock mitigates the negligence and such mitigation was taken into account by the Secretary in concluding that the violation showed just moderate negligence. But, because the area was frequently traveled, its gravity precludes any lowering of the penalty. Therefore, after considering the section 110(i) factors, a penalty of \$4,689.00 is assessed.

The Secretary proposes penalties of \$3,689.00 each for Citation Nos. 7522914 and 7522917. Each of the cited hazards was located on the offside of the belt which slightly diminishes their gravity. Therefore, a lesser penalty of \$3,000.00 is assessed for each citation for a total of \$6,000.00.

The Secretary proposes a penalty of \$6,996.00 for Citation No. 7558110. The hazard's location presents a substantial mitigating factor which affects both the negligence and gravity of the hazardous condition. The area was not frequently traveled which lowers the negligence of failing to remedy the hazard, and also lowers any likelihood of injury. Therefore, a penalty in the lesser amount of \$3,500.00 is assessed for Citation No. 7558110.

Citation No. 7522909

Roof Control Plan

Bardo failed to follow its roof control plan. The plan required that any roof bolter be set firmly against the mine roof. Citation No. 7522909 alleges that it was set in an ineffective position while roof bolting was undertaken. Tr. I at 178-79. Two bolts were installed on the right side while the left side had one bolt installed with a second in process of installation. Tr. I at 180. At a roof height of ten feet, two inches, the machine could not have reached the roof, even with an extension. Tr. I at 188-89. Inspector Dixon saw evidence of ramping up which indicated other efforts being made to reach the roof. This use of multiple remedies is a strong indication that Bardo recognized its roof bolter had a problem that needed a solution.

²⁷ There are differences between "offside and onside" when belt factors are applied in analyzing negligence and mitigation. But, the distinction has no place in significant and substantial analysis. Even if fewer miners are exposed to a hazardous condition, miners were present and, as an absolute, were exposed to hazard and risk of injury.

Yet, Bardo disputes the plain meaning of “firmly against the roof” in disputing the Inspector’s determination. This Judge agrees with Inspector Dixon. Simply stated, the roof bolter must be in contact with the roof. The roof bolter must be placed in a position it will not shift. Tr. I at 208.

There is competing testimony on the whether the roof bolter reached the roof. Inspector Dixon saw no blocks reaching the roof on the right side, and he saw just one of four blocks touching on the left. Mr. Shepherd saw three of four blocks touching the roof. He estimated the height as between 8 and 9 feet; Inspector Dixon calculated of 10 feet 2 inches. Tr. I at 256. Inspector Dixon’s testimony tends to be credible. Both Dixon and Shepherd acknowledge that the bolter was not flush with the roof which shows that it was not set firmly and would not protect the miners who were bolting the roof. Mr. Shepherd produced no written note or other writing. Inspector Dixon on the other hand had made ample notes and prepared a same day Citation Report which did not conflict with his notes.²⁸

Significant and Substantial

Citation No. 7522909 constituted a violation of a mandatory safety standard. *See Mathies*, 6 FMSHRC at 3. The fallen roof was caused by a failure to follow the roof control plan. This hazard was reasonably likely to result in injury. The roof bolter position was on an unstable footing and was not firmly set against a cracking roof. Tr. I at 190. Bardo’s failure to comply with its roof control plan in an area containing a substandard roof was reasonably likely to produce an injury that would be serious.

High Negligence

Inspector Dixon’s finding of “high negligence” is approved and accepted. There was evidence that Bardo either knew or should have known of the condition, but there was no mitigating evidence presented. Tr. I at 193. Proof shows that Bardo made efforts to overcome the problem and therefore was aware of the problem. Yet Bardo continued to bolt the roof using a roof bolter that could not support a roof that was in the subpar condition.

Penalty Determination

The Court finds Inspector Dixon’s testimony to be more credible regarding the height of the roof and the extent to which the bolter failed to reach the mine roof. Bardo had ramped up the mine floor which is convincing evidence that its problem was known. Based on the high negligence and the significant and substantial nature of this violation, the penalty is set as proposed by the Secretary in the amount of \$31,988.00.

²⁸ Inspector Dixon’s methodology was to prepare same-day citations immediately following inspection. He relied on contemporaneous notes that he made of potential violations. The Citations and notes together were seen as reliable and regularly prepared as business records.

Citation Nos. 7558107 and 7558108

Citation No. 7558107 was issued for Bardo not meeting its dust control ventilation plan, and Citation No. 7558108 followed an inadequate on-shift examination, in violation of §§ 75.370(a)(1) and 75.362(a)(2), respectively. Both violations involved two malfunctioning sprays on a continuous miner. *See* GX 16A (demonstrative description of machine). Pressure was found by Inspector Dixon at 25 PSI, far below the plan's accepted minimum of 60 PSI. Tr. II at 10.²⁹

A question remains as to whether Inspector Dixon prematurely began his inspection of the continuous miner machine. Inspector Dixon testified that he properly gave notice of his intentions prior to inspecting. His notes showed that he informed Mr. Shepherd that he would conduct dust and noise surveys and that he checked the preshift/on-shift book, which showed no hazards, both before beginning his inspection. GX 12. He recalls receiving word from an unidentified person that Bardo had done its pre-exam of the dust parameters. Tr. II at 35. Bardo thinks that because the Inspector cannot identify by name or job title who gave an oral go ahead, there was doubt cast on whether the operator had sufficient time to conduct its own examination beforehand. Tr. II at 47-51. It is evident that Inspector Dixon was not rushing anyone and that he gave Bardo ample time and opportunity to examine the continuous miner. Certainly no one from Bardo objected when Inspector Dixon began his inspection. Neither Shepherd nor Bowman took notes that would contradict Inspector Dixon's clear recollection that no objection was voiced to starting his examination. Neither Shepherd nor Bowman denied that a spray was malfunctioning, or denied that another was missing. Bardo's unsupported argument is unpersuasive. It certainly cannot rebut unrefuted evidence that sprays on Bardo's continuous miner machine were missing, inoperable, or malfunctioning, resulting in a spray PSI of 25, below a set minimum PSI of 60.

Bardo presented no evidence or testimony denying that sprays were inoperable, or that the PSI level was at 25 instead of the required 60. The Secretary has established these violations by a preponderance of the evidence. Bardo certified that an examination had taken place and never objected to so certifying.

The two violations are linked. Significant and substantial designations with moderate negligence are properly assigned to both Citations. The failure to conduct an adequate on-shift examination allowed the water pressure to measure substantially below the 60 PSI level required in the mine's ventilation plan and increased the exposure to coal dust inhalation. Bardo management had sufficient time to check the continuous miner and discover conditions of inoperable sprays and low water pressure. However, the broken and non-functioning sprays were located in spray blocks that may not have been readily visible to a pre- or on-shift examiner. Bardo had conducted the examination, but an adequate examination, if made prior to Inspector Dixon's inspection, should have caught these hazardous conditions.

²⁹ As noted *supra*, testimony both pro and con is in the second volume of the court transcript.

Penalty Determination

The Secretary has proposed penalties of \$14,373.00 and \$6,458.00 for violations of Citation Nos. 7558107 and 7558108. Based on the above findings and the mitigating circumstance that the broken sprays were not readily visible, Bardo is assessed lesser penalties of \$10,000.00 for Citation No. 7558107 and \$6,000.00 for Citation No. 7558108.

Citation Nos. 7522912 and 7522915

The last two violations in this docket are considered in tandem. Both are alleged violations of § 75.1722(a) for failing to provide adequate guarding, albeit the two incidents were factually different. The Secretary established that the absence of guarding machinery was properly designated significant and substantial and resulted from moderate negligence. But as explained below, mitigating circumstances present in each violation warrant reductions in penalty.

Citation No. 7522912 charged that a guard covering a discharge roller and drive sprocket shaft on a Stamler Feeder³⁰ was missing. The discharge roller is located at the end of a feeder. A conveyor chain runs through the center of the feeder. Inspector Dixon found that the lack of a guard created a likelihood of entanglement-type injuries. Although the guard was missing, the drive sprocket and chain on the feeder were covered and that only the shaft with an assembly of six bolts was exposed. Tr. II at 110-11. The lack of a guard in this area exposed miners to entanglement with uncovered moving parts. The hazard was a violation of § 75.1722(a).

Miners performing routine maintenance were exposed to the hazardous condition. Tr. II at 105. Their presence in the area created a reasonable likelihood that any entanglement would result in an injury of a reasonably serious nature. Injuries ranged from broken bones to dismemberment, all of which are injuries of a reasonably serious nature. The moderate negligence designation is accepted and approved, for Bardo either knew or should have known about these unguarded machines parts. However, the covering on the discharge roller, drive sprocket, and a chain constitutes a mitigating factor justifying a reduced penalty.

An analysis of Citation No. 7522915 merits a similar result. The guard on the oil bath covering the chain and sprocket drive box on the No. 3 head drive was found missing, which exposed the chain and sprocket drive. Tr. II at 136. Inspector Dixon noted that a piece of conveyor belt had been placed over an unguarded portion of the oil bath, which provided some protection. Tr. II at 139. However, the remaining exposed parts caused by the missing guard created a hazard which violated § 75.1722(a).

Significant and Substantial

Inspector Dixon cited these hazards as significant and substantial since belt examiners, maintenance miners, and miners accessing water from a 12-inch hole under the head drive would be exposed to the hazard. Tr. II at 141. Anyone kneeling down to get water would use his hand

³⁰ See Tr. II at 117 (describing Stamler Feeder).

as a brace on the unguarded oil bath. There would be a reasonable likelihood that any entanglement would cause a reasonably serious injury. And even though part of the conveyor belt covered exposed parts, there were still exposures on the left side of the metal frame behind the belt. Such a makeshift effort to cover unguarded parts did not fully protect from injury. Such a condition would be significant and substantial, and it is so found.

Inspector Dixon saw this as an obvious hazard. It was out in the open and only partially covered with a piece of belt. Bardo knew about the problem prior to Inspector Dixon's inspection. Mr. Shepherd admitted that Bardo knew of the condition, noting that only a piece of belt covered the opening. Tr. II at 153-54. Bardo, being aware of the problem, took steps to fix it in part, thus earning a mitigating factor. The moderate negligence determination is partially offset by Bardo's temporary guard which permits a reduction in penalty.

Penalty Determination

The Secretary proposes a penalty of \$3,689.00 for Citation No. 7522912. Mitigating factors warrant a reduction in penalty. Therefore, the penalty is reduced to \$2,000.00.

The Secretary proposes a similar penalty of \$3,689.00 for Citation No. 7522915. Bardo's makeshift, temporary guard was insufficient, but its attempt to remedy the danger merits a moderate act of negligence for this Citation. Having considered the 110(i) factors and Bardo's moderate negligence, a penalty of \$1,000.00 is assessed for Citation No. 7522915.

ORDER

At the hearing, in addition to the citations contested by the operator, the parties presented a proposed settlement of six citations. Tr. I at 10-13. Upon consideration of the 110(i) factors, the settlement approved on-the-word is documented by written order as follows:

Citation No.	Assessment	Settlement Amount
7503275	\$8,209.00	\$3,143.00
7522928	\$2,901.00	\$ 900.00
7522911	\$2,473.00	\$2,473.00
7522923	\$2,106.00	\$2,106.00
7522921	\$3,996.00	(vacated) ³¹
7522924	\$3,689.00	(vacated)
TOTAL:	\$23,374.00	\$8,622.00

SO ORDERED.

³¹ The Secretary's decision to vacate a citation is an exercise of prosecutorial discretion. *RBK Constr., Inc.*, 15 FMSHRC 2099 (Oct. 1993).

IT IS FURTHER ORDERED that Citation No. 7503275 be **MODIFIED** to reduce the number of persons affected from twelve to four.

IT IS FURTHER ORDERED that Citation No. 7522928 be **MODIFIED** to reduce the number of persons affected from twelve to two.

The following penalties are assessed for the remaining nine citations as analyzed and ruled on in this Decision:

<u>Citation No.</u>	<u>Assessment</u>
7502246	\$4,689.00
7522914	\$3,000.00
7522917	\$3,000.00
7558110	\$3,500.00
7522909	\$31,988.00
7558107	\$10,000.00
7558108	\$6,000.00
7522912	\$2,000.00
7522915	\$1,000.00
TOTAL	\$65,177.00

SO ORDERED.

Finally, **Respondent Bardo Mining is ORDERED TO PAY** a total penalty of \$73,799.00 within forty (40) days of this decision.³²

/s/ Richard L. Sippel
Richard L. Sippel
Administrative Law Judge

³² 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.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 25, 2015

SHERWIN ALUMINA COMPANY, LLC,
Contestant,

v.

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

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

v.

SHERWIN ALUMINA COMPANY, LLC,
Respondent,

v.

UNITED STEELWORKERS, LOCAL 235A
Intervenor.

CONTEST PROCEEDINGS

Docket No. CENT 2015-0151-RM
Citation No. 8778065; 11/13/2014

Docket No. CENT 2015-0152-RM
Order No. 8778066; 11/13/2014

Mine: Sherwin Alumina, L.P.
Mine ID No: 41-00906

CIVIL PENALTY PROCEEDING

Docket No. CENT 2015-0185
A.C. No. 41-00906-371548

Mine: Sherwin Alumina, L.P.
Mine ID: 41-00906

DECISION AND ORDER

Appearances: Mary Kathryn Cobb, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, and Derek Baxter and Philip Mayor, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia (on brief) for the Secretary of Labor

Christopher V. Bacon, Esq., and Samantha D. Seaton, Esq., Vinson & Elkins LLP, Houston, Texas for Sherwin Alumina Company, LLC

Susan J. Eckert, Esq., Santarella & Eckert, LLC, Littleton, Colorado for United Steelworkers Local 235A

Before: Judge McCarthy

I. Statement of the Case

This matter is before me upon a Notice of Contest and related Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

This is a case of first impression. The precise issue presented is whether Sherwin Alumina Company (“Sherwin”) violated section 103(f) of the Mine Act by refusing to allow the properly designated representative authorized by miners to accompany MSHA during physical inspection of the mine after Sherwin locked out and temporarily replaced the miners during an ongoing, economic labor dispute. That refusal prevented the representative from aiding inspections and participating in pre-and post-inspection conferences since the lockout.

Twenty-two years ago, Chairman Holen and Commissioners Backley, Doyle and Nelson affirmed Administrative Law Judge Morris’ conclusion that “striking employees ... were not miners because they were not working in the mine at the time of the inspection” and held that “striking employees ... were not entitled to have their previously designated walk-around representative accompany the MSHA inspector during his inspection of the mine.” *Cyprus Empire Corp.*, 15 FMSHRC 10, 15 (Jan. 1993). Contestant/Respondent Sherwin Alumina argues that *Cyprus Empire* is controlling Commission precedent, and that under the doctrine of *stare decisis*, I must dismiss and vacate the citation and the concomitant failure-to-abate order at issue. Sherwin Br. 1, 21. Sherwin contends that the locked-out employees who designated their walkaround representative are no different than the striking employees in *Cyprus Empire*, because they are not actively working in a mine and therefore they are not miners under the plain language of section 3(g) of the Act. *Id.* at 8. In *Cyprus Empire*, the Commission concluded that the “safety purposes of section 103(f) were not diminished in this instance” because the striking miners were not working at the time and would be entitled to designate a walkaround representative once they returned to work. *Id.*, citing *Cyprus Empire*, 15 FMSHRC at 14. Similarly, Sherwin argues that once the locked-out employees return to work, they too will have the right to designate their own representative. In the meantime, Sherwin argues that the locked-out miners’ safety is not being compromised, they continue to have access to safety information through MSHA’s District Office, and MSHA’s District Office has discretion to review and alter any training that they will receive prior to returning to work. *Id.*, citing Tr. 139, 140, 156-57; 30 C.F.R. part 48. Also, to the extent that section 103(f) serves the secondary purpose of providing information regarding ongoing health and safety conditions to the MSHA inspector, Sherwin argues that such purpose is better served by offering the inspector unlimited access to speak with replacement workers actually working in the mine. Sherwin Br. 8.

The Secretary argues that *Cyprus Empire* is not binding, and that the Secretary’s current interpretation of sections 3(g) and 103(f) of the Mine Act must replace the Commission’s prior interpretation in that case. Sec’y Br. 24, 26, citing *National Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983-84 (2005) (*Brand X*) (permitting agencies to provide authoritative interpretations of ambiguous statutory language even after a contrary judicial interpretation). The Secretary emphasizes that only the United Mine Workers (as an intervenor), and not the Secretary of Labor, advanced the Secretary’s interpretation beyond the trial level and appealed the judge’s adverse decision in *Cyprus Empire* to the Commission. Sec’y Br. 25.

Hence, the Commission did not have the benefit of considering the Secretary's current interpretation that the statutory definition of the term "miner" in section 3(g) of the Act, defined to mean "any individual working in a coal or other mine," is ambiguous. Accordingly, under *Chevron*, the Secretary's argues that his interpretation of "miner" in the context of section 103(f) to include employees currently locked out or on strike, who have not been permanently replaced and reasonably expect to return to work at the end of the labor dispute, is permissible and entitled to deference. See Sec'y Br. 7; *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). The Secretary contends that his current interpretation is consistent with the overall remedial purpose of the Act, the specific purposes of the walk-around provision, and Commission and judicial precedent giving a broad interpretation to the walk-around provision so that a locked-out miner representative can continue to protect the safety and health of miners who reasonably expect to return to the mine and resume active work. Sec'y Br. 16-24.

Intervenor, United Steelworkers Local 235A ("Steelworkers"), agrees with the Secretary that the Mine Act's definition of "miner" under section 3(g) is ambiguous, and should be interpreted in the context of section 103(f) to include workers who are on strike or locked out, but who reasonably expect to return to the mine at the end of a labor dispute. Intervenor Br. 8. The United Steelworkers further asserts that there is no evidence that the Secretary of Labor improperly issued the section 104(a) Citation and section 104(b) Order at issue in order to affect the balance of power in the labor negotiations between Sherwin and the Steelworkers. *Id.* at 12-16. Finally, the Steelworkers argue that including a locked-out miners' representative in the inspection party assists with ensuring, and does not compromise, safety at the mine. *Id.* at 20-23.

Early procedural background in this matter was set forth in my January 21, 2015 Order Consolidating Proceedings and Denying Motions. Thereafter, a hearing was held in Corpus Christi, Texas on February 17, 2015. During the hearing, the parties introduced testimony and documentary evidence. Witnesses were sequestered. The Secretary's Motion in Limine to exclude evidence of sabotage was denied. Tr. 16-19. After the hearing, the parties submitted briefs and reply briefs.

For the reasons set forth below, I find that *Cyprus Empire* does not govern disposition of this case because in that matter the Commission left open the prospect of remaining ambiguity in the statutory definition of the term "miner" and the Secretary proffered no position to which the Commission could accord weight. In this case, by contrast, the Secretary persuasively argues that in the context of Section 103(f), the statutory definition of "miner" in the phrase "representative authorized by his miners" is ambiguous and should include locked out miners, who have been temporarily replaced and reasonably expect to return to work at the end of the labor dispute. Such miners are still working in a mine, they have just been temporarily prevented from doing so during the lockout.

My decision is limited to the context of a lockout in which locked out miners cannot be permanently replaced and may be considered still working in the mine, albeit locked out. As such, they retain an ongoing interest in the primary purpose of the Mine Act, to protect the health and safety of the miners working in, and not permanently replaced from, the mine.

The Secretary obviously plays to a larger audience when he abandons his pre-hearing “lockout” versus “strike” basis for distinguishing *Cypress Empire* and instead argues that both locked out *and* striking miners who have not been permanently replaced are still working in the context of the walk-around provision because they can reasonably expect to resume active work in the foreseeable future, and help protect the safety of temporary replacements during the interim labor dispute. Sec’y Br. 30-31. I decline the Secretary’s invitation to extend his current interpretation to striking miners, who have not been permanently replaced. In my view, that would bog the Commission down in resolving intricate and complex labor relations issues such as temporary versus permanent replacement and the nature of the underlying walk out, either an economic or unfair labor practice strike, which mandate different outcomes on the permanent replacement issue under the National Labor Relations Act.

An economic strike is one neither prohibited by law or collective-bargaining agreement nor caused or prolonged by an employer unfair labor practice and generally has an object of enforcing economic demands on the employer. *See e.g., NLRB v. Transport Co. of Texas.*, 438 F.2d 258, 262 n.6 (5th Cir. 1971). The strike in *Cyprus Empire* was clearly an economic strike over the terms of a new collective-bargaining agreement, in which the strikers could have been, but were not, permanently replaced. Rather, the operator resumed mining operations with salaried employees. *See Cyprus Empire Corp.*, 13 FMSHRC 1040, 1044 ¶ 13 (ALJ)(“The hourly employees commenced the strike on or about May 13, 1991, related to the negotiations over a new collective-bargaining agreement.”). There was no mention of any underlying unfair labor practice.

The Commission has never addressed an unfair labor practice strike, where miners striking, at least in part over an unfair labor practice, cannot be permanently replaced and must be reinstated to existing positions upon their unconditional offer to return to work even if the employer has hired permanent replacements. *See, e.g., NLRB v. International Van Lines*, 409 U.S. 48, 50 (1972). The nature of an unfair labor practice strike, however, may turn on protracted litigation of the alleged underlying unfair labor practice. Further, a strike that is economic at its inception may be converted into an unfair labor practice strike by the employer’s subsequent commission of an unfair labor practice. *See e.g., Citizens Publ’g & Printing Co., v. NLRB*, 263 F. 3d 224 (3d Cir. 2001) (false statement that economic strikers had been replaced converted strike to unfair labor practice strike). Such difficult legal determinations lie exclusively within the technical expertise of the National Labor Relations Board (NLRB).

Thus, rightly or wrongly, *Cypress Empire* controls in the context of an economic strike in which strikers walk off the job and can be permanently replaced, but are entitled to be placed on a preferential rehire list.¹ The Commission is certainly free to revisit *Cypress Empire*, but this

¹ *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938)(economic strikers may be permanently replaced and denied a request for reinstatement until vacancy arises); *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970)(economic strikers, who unconditionally apply for reinstatement when their jobs are filled by permanent replacements, remain employees, and are entitled to full reinstatement upon the

(continued...)

judge cannot do so.² I can, however, differentiate between an offensive lockout, in which an operator withholds employment from his miners for the purpose of resisting their demands or gaining concessions, but may not permanently replace them, and an economic strike, in which miners voluntarily choose to withhold their services and may be permanently replaced. Such differentiation is particularly appropriate here in order to resolve whether a lockout renders the term “miner” ambiguous in the context of section 103(f)’s walkaround provision. I find that the statutory phrase “representative authorized by his miners” in section 103(f) is ambiguous in the context of a lockout, and that the Secretary’s interpretation is reasonable, consistent with the underlying purpose of the Act and the purposes of the walk-around provision, and entitled to deference.

Accordingly, based on a careful review of the entire record, including the parties’ post-hearing briefs and my observation of the demeanor of the witnesses,³ I make the following:

¹ (...continued)

departure of replacements, unless they have acquired regular and substantially equivalent employment or employer can establish that failure to offer full reinstatement was for legitimate and substantial business justifications).

² *Cypress Empire* may be criticized for a simplistic failure to reconcile the reasonable expectation of reinstatement rights under federal employment statutes such as the National Labor Relations Act (NLRA) with the entirely discrete yet compatible purpose of the Mine Act to protect the health and safety of miners. In any event, as explained herein, locked out miners, cannot be permanently replaced, are entitled to reinstatement at the conclusion of the labor dispute, and have specialized and experiential knowledge of health and safety concerns at the mine, which knowledge augments the protection of both replacement workers and miners entitled to return to work after resolution of a labor dispute. As the Supreme Court has recognized, “[w]hen two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.” *POM Wonderful LLC v. Coca-Cola Co.*, 134 S.Ct. 2228, 2238 (2014) (citing *J.E.M. Ag. Supply, Inc. V. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 144 (2001) (“[W]e can plainly regard each statute as effective because of its different requirements and protections”). See also, *Wyeth v. Levine*, 555 U.S. 563, 578-579 (2009). Compare *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892-93 (1984) (“[c]ounterintuitive though it may be, we do not find any conflict between application of the NLRA to undocumented aliens and the mandate of the Immigration and Nationality Act (INA)” since enforcement of the NLRA with respect to undocumented alien employees is compatible with the policies of the INA). For the reasons explained herein, given the ambiguity of the statutory term “miner” as one who works in a mine, one could perceive statutory warrant in the Mine Act for treating an operator’s locked out employees as “miners,” particularly in the context of section 103(f) dealing with a “representative authorized by his miners.”

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

II. Findings of Fact

Sherwin operates a large alumina refinery in Gregory, Texas, which encompasses 1200 acres. The facility utilizes hundreds of valves and tanks and miles of piping, and usually employs about 2,000 miners. Tr. 10, 96-97. Of the 2,000 miners operating the plant in 2014, 450 of the “hourly employees” were represented by the United Steelworkers Local 235A (“Steelworkers”) under the terms of a collective bargaining agreement set to expire on October 1, 2014. About 500-600 other miners were contract workers. Tr. 97, 113; Jt. Stip. 10; Jt. Ex. 11, Exh. A.

In June of 2013, Joe Guzman was designated by miners working at Sherwin, as an authorized representative under Section 103(f) of the Mine Act. Jt. Ex. 19, Stip. No. 12; Jt. Ex. 4. Guzman typically accompanied MSHA inspectors and provided information to inspectors about mine processes and gave them the names of other miners to be consulted. Tr. 28-29. Guzman also participated in post-inspection conferences and kept miners apprised of inspection results. Tr. 28-29, 31-32, 104-05. There is no evidence that Guzman ever engaged in misconduct or sabotage at the Sherwin Mine.

From September 2013 until the hearing, Sherwin received about 458 citations and about 119 of them were designated significant and substantial (S&S) violations by MSHA. Tr. 180. Around November 2013, in response to the large number of S&S citations, Sherwin submitted a corrective action plan (CAP) to MSHA. Tr. 143. About September 2014, MSHA gave Sherwin notice that it was a pattern-of-violations (POV) candidate under Section 104(e) of the Mine Act. Tr. 61, 141.

For several months prior to October 2014, Sherwin and the Steelworkers engaged in unsuccessful negotiations over a successor collective-bargaining agreement. Jt. Ex. 11, Declaration of Paul English, safety, health, and industrial-hygiene manager, at ¶ 3. During negotiations, verbal and written hazard complaints to MSHA increased, but only about a quarter of them were deemed to have any merit. Tr. 80-83, 129. MSHA, the Steelworkers, and Sherwin management and counsel, met in June 2014 to evaluate the CAP plan. Tr. 143. Sherwin’s labor relations counsel at the time, Henry Chajet, from Patton Boggs (now merged with Jackson Lewis), raised several general allegations of sabotage with MSHA District Manager, Michael Davis. Tr. 143-44.

Indeed, during the summer of 2014, Sherwin documented several incidents of suspected sabotage at the facility. Tr. 81, 164, 175. Electrical substation panels and switch house cabinets were loosened or unscrewed, and machine guarding was missing or taken off and laid on the floor. Tr. 81, 164, 175. Air was turned off on a pneumatic overflow alarm in the rod mills. Sherwin purchased a lock to keep the valve open. Tr. 81. Weeks later, the lock was cut and the alarm turned off again. Tr. 81. To prevent any further tampering, Sherwin enclosed the valve with steel, and welded the enclosure shut. Tr. 81.

About mid-June 2014, after an anonymous complaint to MSHA, a pile of presumed asbestos-containing material (PACM) was dumped on the powerhouse floor, just one day after the same area had been examined by MSHA. Tr. 88-90. Also, someone broke into several supervisor offices. A safety relief valve was bent, and seemed to have been forced into

a position that would not allow it to work properly. Tr. 167. A medical lancet was stuck into a suction unit in the plant ambulance, resulting in a finger injury to a miner. Tr. 165. Photographs of a 1999 explosion at the Kaiser Aluminum and Chemical Corporation Gramercy plant in Louisiana were left in the Sherwin administration building with a note stating words to the effect that “This could happen to you.” Tr. 165-66.⁴

Absent security cameras in the mine, which likely had to be negotiated with the Steelworkers as a change in working conditions under Section 8(a)(5) of the NLRA, Sherwin was unable to discover who committed the alleged sabotage. Tr. 176-177. Sherwin reported the incidents to government agencies, law enforcement, and several MSHA inspectors. Tr. 88, 167, 176-79, 185.

On Friday, October 10, 2014, the Steelworkers rejected Sherwin’s final offer for a new collective-bargaining agreement. Tr. 183. On Saturday, October 11, 2014, Sherwin locked out approximately 450 miners represented by the Steelworkers in furtherance of its labor dispute with the Steelworkers. Jt. Stip. No. 11. Joe Guzman, and the two miners who designated him as their miner representative under section 103(f), were among those miners locked out by Sherwin. Tr. 55; Jt. Ex. 19, Stip. No. 13.

In anticipation of the lockout, Sherwin had trained management personnel as field supervisors and hired hourly, temporary replacement miners, who had done observational training in the plant during the month prior to the lockout, but performed no hands-on mining. Tr. 184. During the lockout and in response to picketing, Sherwin hired additional security, and bussed the temporary replacement workers into the plant. Tr. 42-43.

Two days after the lockout, Sherwin discovered that about 18 of its 30 hydraulic presses, essential equipment used in the clarification process, were damaged by water that had been introduced into the hydraulic systems. Tr. 178. On questioning from the undersigned,

⁴ Sherwin opened the door to this tragic accident at trial. Tr. 165-66. I take judicial notice that this 1999 explosion injured 29 miners, blinded one, and occurred during a lockout of the United Steelworkers when the Kaiser Aluminum plant was being operated by temporary replacement workers. MSHA later produced a public report regarding this disaster. See MSHA, Report of Investigation, <http://www.msha.gov/disasterhistory/gramercy/report/reportdept.htm>.

Under Commission precedent, judicial notice can be taken of the existence or truth of a fact or other extra-record information that is not the subject of testimony but is commonly known, or can safely be assumed, to be true. *Union Oil*, 11 FMSHRC 289, 300 n.8 (Mar. 1989). Also, the Commission has recognized that the existence and content of MSHA public documents are subject to judicial notice. *Brody Mining, LLC*, 36 FMSHRC 2027, 2030 n. 4 (Aug. 2014) (Inspector General Report); *Black Diamond Constr. Inc.*, 21 FMSHRC 1188, 1202 n. 3 (Nov. 1999) (MSHA handbook); *Jim Walter Resources*, 7 FMSHRC 1348, 1355 n. 7 (Sept. 1985) (MSHA policy memorandum).

This disaster occurred about 6 years after *Cyprus Empire* was decided by the Commission. Perhaps that’s why the Secretary of Labor now asks the Commission to re-examine *Cyprus Empire*.

Stephen Hoey, Sherwin's director of environment, safety and health, acknowledged that either the pre-lockout miners represented by the Steelworkers or the post-lockout replacement workers could have committed the alleged sabotage of the presses. Tr. 185.

On October 14, 2014, MSHA inspector Francisco Velma arrived at the Sherwin Mine to continue a regular inspection. Jt. Stip. No. 14; Tr. 36. Velma asked Guzman to accompany him, but Sherwin (English) informed Velma that it would not permit Guzman to enter the mine and assist Velma because of the lockout. Jt. Stip. No. 15. Sherwin provided Velma with legal authority (presumably *Cyprus Empire*) supporting its position. Jt. Stip. No. 15. Velma conducted the inspection without Guzman and chose not to cite Sherwin at that time for preventing Guzman's participation, but Velma did not provide any future assurances that MSHA would not do so in the future. Jt. Ex. 19, Stip. No. 15.

On October 20, 2014, MSHA inspector Brett Barrick informed Sherwin that he wanted Guzman to accompany him on an MSHA inspection. Jt. Stip. No. 16. English again refused to allow Guzman to serve as the designated section 103(f) miners' walkaround representative. English told Barrick that Sherwin was tired of being asked that question and that if MSHA persisted, Sherwin would sue MSHA. Tr. 32-33. According to Barrick, English further told Barrick that Sherwin was excluding Guzman because he "was no longer an employee of the mine."⁵ Tr. 33. English did not deny that he made this statement. I credit Barrick's testimony regarding the exchange, given English's rather vague and non-specific description of this discussion with Barrick, and Sherwin's failure to proffer Barrick's notes. Tr. 47, 84-85.

Barrick completed an inspection without Guzman and did not issue any 103(f) citation to Sherwin at that time. Jt. Ex. 19, Stip. No. 16. Barrick credibly testified that he believed that Sherwin had violated Section 103(f) on this occasion (October 20) by refusing to permit Guzman to accompany the inspection party, but Barrick did not express this view to Sherwin because he thought he needed permission from a supervisor to issue such a citation. Tr. 43-44, 47, 72. Barrick did not provide any assurances to Sherwin that its continued refusal to permit Guzman to accompany an MSHA inspector during the lockout would not result in a future citation. Jt. Ex. 19, Stip. No. 16.

Michael Davis, MSHA's South Central District Manager for Metal/Nonmetal Administration, became aware of Sherwin's refusal to accord Guzman section 103(f) miner representative status shortly after Velma's October 14, 2014 inspection. Tr. 123. Davis opined that Sherwin's conduct violated section 103(f) and that a citation should be issued. Tr. 123, 155, 160-61. Davis, however, did not direct Velma or Barrick to issue citations for the October 14 or 20 incidents because of adverse Commission precedent (*Cyprus Empire*) relied on by Sherwin. Tr. 124, 154-55. Rather, Davis spoke with superiors at MSHA headquarters to determine whether a miners' representative appointed by locked-out miners should be permitted to accompany an MSHA inspector during a lockout, and whether a citation should issue. Tr. 155-56, 160-61.

⁵ English's statement was not accurate. Guzman remains an employee of Sherwin, but he had been locked out and was not actively engaged in mining because of the lockout.

The Secretary's interpretation of Section 103(f) in this lockout context was formalized in a letter drafted at MSHA headquarters and provided to Davis. Tr. 132-34, 160-61; Jt. Ex. 2. Davis signed the letter and gave the letter and consonant citation to Barrick to issue to Sherwin should Sherwin continue to deny Guzman the right to accompany Barrick during his next inspection during the lockout. Tr. 132-34.

On November 13, 2014, Barrick returned to the Sherwin mine to perform another inspection. Jt. Ex. 19, Stip. No. 17; Tr. 34. Barrick met with English and requested that Guzman accompany Barrick as miners' representative during the inspection. Tr. 34. Barrick provided Sherwin with Davis' letter, which indicated that Sherwin's refusal to permit Guzman to accompany the inspection team contravened section 103(f). Tr. 34-35; Jt. Ex. 19, Stip. No. 18; Jt. Ex. 2. Barrick told English that Sherwin had 30 minutes to comply with his request or he would issue a 104(a) citation under section 103(f). Tr. 35. English consulted with counsel and informed Barrick that Sherwin still refused to permit Guzman to accompany the inspection team. Tr. 35.

Barrick then issued Citation No. 8778065. Tr. 35; Jt. Ex. 19, Stip. No. 19; Jt. Ex. 3. That Citation states:

On November 13, 2014 the mine operator refused to allow the miners' representative to accompany the Secretary in inspection of this mine for the purpose of aiding such inspection. This constitutes a violation of section 103(f) of the Mine Act. The condition has not been designated as "significant and substantial" because the conduct violated a provision of the Mine Act rather than a mandatory safety or health standard. The Secretary respectfully disagrees with the reasoning contained in the Federal Mine Safety and Health Review Commission decision in the Cyprus Empire Corporation, 15 FMSHRC10 (Jan. 1993), addressing section 103(f) of the Act. The Secretary has also determined that this case should not appropriately apply to the present situation. The interest that underlie the concept of miners' representatives remain important during a lockout, as miners' [sic] who have been locked out have a continued interest in the health and safety at the mine and miners' representatives play a crucial role in safeguarding this interest.

Jt. Ex. 3.

The violation was designated as non-S&S, with no likelihood of injury or illness, no lost workdays, and low negligence. Jt. Ex. 19, Stip. No. 7; Jt. Ex. 3. The Secretary proposed a penalty of \$112 for the alleged section 103(f) violation. Jt. Ex. 19, Stip. No. 8.

Thereafter, Barrick notified English that he would give Sherwin an additional 30 minutes to abate the Citation No. 8778065 by permitting Guzman to accompany Barrick on

an inspection, otherwise Barrick would issue a section 104(b)(1) Order for failure to abate. Tr. 35. Thirty minutes later, when Sherwin continued to refuse to permit Guzman to accompany the inspection party, Barrick issued Order No. 8778066. Tr. 35; Jt. Ex. 19, Stip. No. 19; Jt. Ex. 3, pp. 3-4. That Order states:

The mine operator continues to refuse the miner's [sic] representative to accompany the Secretary in inspection of this mine for the purpose of aiding such inspection. Mitigating circumstances have not been provided that would justify extension.

Jt. Ex. 3.

The failure to abate order listed no area affected, which is in accordance with an MSHA Interpretive Bulletin (IB) on the issue. Jt. Ex. 3; MSHA Interpretive Bulletin, Section 103(f) of the Federal Mine Safety and Health Act of 1977, 43 Fed. Reg. 17,546, (Apr. 25, 1978) (“However, actual withdrawal of miners will not *ordinarily* occur in cases arising under section 103(f), because section 104(b) also requires the inspector to determine the extent of the area the mine affected by the violation. In most cases, the area(s) of the mine affected by an operator’s refusal to permit participation ... under section 103(f) would be a matter of conjecture and could not be determined [with] sufficient specificity.”).

No failure-to-abate penalties were assessed by MSHA, although MSHA’s Section 103(f) Interpretive Bulletin states:

“...failure to abate [section 103(f)] violations subjects an operator to additional civil penalties for each day during which the failure to abate continues. (section 110(b).) Under circumstances where an operator refuse[s] to allow participation by a representative of miners, each day thereafter during which an inspector is carrying out activities covered by section 103(f) will be considered a day during which the failure to correct the violation continues, for purposes of proposing additional civil penalties.”

43 Fed. Reg. 17547.

Guzman did not file a discrimination complaint with MSHA alleging that Sherwin’s “interference” with his exercise of section 103(f) statutory participation rights violated section 105(c). *See id.* at 17,547.

On December 12, 2014, Sherwin filed a timely notice of contest concerning the Citation and Order. Jt. Ex. 5. On December 22, 2014, the Secretary filed a Motion for Expedited Proceedings. Jt. Ex. 7. On December 24, 2014, the Secretary filed a Motion for Summary Decision. Jt. Ex. 10. Sherwin filed Oppositions to both requests. Jt. Exs. 8 and 10. On January 21, 2015, the undersigned set a hearing date for February 17, 2015, ordered expedited discovery, and otherwise denied the Secretary’s motion to expedite proceedings. My January 21, 2015 Order also denied the Secretary’s Motion for Summary Decision.

On January 23, 2015, after the undersigned inquired during a conference call about whether the temporary replacement miners had designated a miners' representative, some temporary replacement miners designated Francisco S. Alvarez as their miners' representative. Tr. 53, 105, 130-31; Jt. Ex. 19, Stip. No. 20; Jt. Ex. 1. Alvarez is a management official for CCC Group, a contractor that provides about 100 temporary replacement workers for Sherwin. Tr. 107-109, 113.

Alvarez reports to CCC lead manager, Steve Whitehouse, who reports to English. Tr. 106-107. English then provides third-hand feedback about MSHA inspections to the replacement and other non-locked-out miners. Tr. 99, 108, 111-12. At the time of the hearing, although Alvarez had accompanied inspection teams, he was "on a learning curve" and generally did not convey information about MSHA inspections directly to the miners as Guzman had done. Alvarez did not distribute or post MSHA citations and/or orders at control stations in the Mine, and did not point out hazards to MSHA inspectors. Tr. 98-99, 106-08, and 110. Barrick credibly testified and the Act provides that the representative of miners is supposed to assist MSHA in its inspection of the Mine to ensure that the miners have a voice in the health and safety of the Mine. Tr. 29-30.

Neither the locked out miners nor the temporary replacement miners had the benefit of any representative of miners from the time of the lockout on October 11, 2014 until Alvarez's designation on January 23, 2015. Jt. Ex. 19, Stip. 20; Jt. Ex 1; Tr. 75-76, 105-06. MSHA records still identify Guzman as a designated miners' representative. There has been no termination of his designation as representative of miners pursuant to 30 C.F.R. § 40.5(a) or (b). Tr. 56, 62, 144. Those regulations provide:

§ 40.5 Termination of designation as representative of miners.

- (a) A representative of miners who becomes unable to comply with the requirements of this part shall file a statement with the appropriate District Manager terminating his or her designation.
- (b) Mine Safety and Health Administration shall terminate and remove from its files all designations of representatives of miners which have been terminated pursuant to paragraph (A) of this section or which are not in compliance with requirements of this part. The Mine Safety and Health Administration shall notify the operator of such termination.

III. The Applicable Statutory and Regulatory Framework

As noted, MSHA issued Citation No. 8778065 for an alleged violation of section 103(f) of the Mine Act and issued Order No. 8778066 for failure to abate that alleged violation. Jt. Ex. 3.

Section 103(f) provides:

Subject to regulations issued by the Secretary, a representative of the operator and a *representative authorized by his miners shall be given an opportunity to accompany* the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to subsection (a), *for the purposes of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine.* Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. *To the extent that that Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives.* However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 U.S.C. § 813(f) (emphasis added).

Section 103(f) grants miners and their representatives the opportunity to participate in physical inspections and conferences conducted by MSHA inspectors pursuant to section 103(a) for the purpose of observing or monitoring safety and health conditions as part of direct safety and health enforcement activity. In enacting section 103(f), Congress made clear that effective implementation of the Act depends upon active and orderly participation by miners and representatives of miners in the physical inspection process, including both pre and post-inspection conferences. Section 103(f)'s "walk-around provision" promotes this goal by ensuring that an MSHA inspector will benefit from the assistance and participation of a representative authorized by an operator's miners when conducting inspections and post-inspection conferences. *See* 29 U.S.C. 113(f); *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 1260 & n.4 (D.C. Cir. 1994); *Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447, 451-52, 455 (10th Cir. 1990); *see also* Tr. 29-30, 104-05 (describing how miners' representative Guzman assisted in inspections and post-inspection conferences, thus fulfilling this role).

The Senate Reports concerning the 1977 Act indicate that the Act's walk-around provisions are intended to enhance miner safety and awareness by assuring that miners are apprised of relevant inspection results by their representative. S. Rep. No. 95-181, at 26 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 3401, 3428, *reprinted in* Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2d Sess. Legislative History of the Federal Mine

Safety and Health Act of 1977 at 616 (Comm. Print 1978) (“Presence of a representative of miners at opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness.”).

The status of walk-around rights provided by section 103(f) is discussed at length in MSHA’s Interpretive Bulletin (IB) published on April 25, 1978, which notes:

Section 103(f) provides an opportunity for the miners, through their representatives, to accompany inspectors during the physical inspection of the mine, for the purpose of aiding such inspection and to participate in pre-or post-inspection conferences held at the mine. As the Senate Committee on Human Resources stated, “If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act.” S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35 (1977).” Several important purposes are served by affording representatives of miners the opportunity to accompany Mine Safety and Health Administration (MSHA) inspectors. Participation by miners’ representatives will enhance miner safety and health awareness and contribute to greater understanding by miners of the safety and health requirements of the Act. In addition, participation in the inspection process by representatives of miners will directly aid inspection itself by providing information through individuals familiar with day-to-day conditions at the mine site.

43 Fed. Reg. 17546.

The Mine Act, MSHA regulations, and MSHA’s Interpretive Bulletin are all silent about whether a representative of striking or locked-out miners may serve as a representative of miners during an inspection that occurs amid a strike or lockout. Through regulation, the Secretary of Labor has defined a “representative of miners” as “(1) Any person or organization which represents two or more miners at a coal or other mine for purposes of the Act, and (2) Representatives authorized by the miners, miners or their representative, authorized miner representative, and other similar terms as they appear in the Act.” 30 C.F.R. § 40.1(b)(1) and (2). Part 40 of the Code of Federal Regulations contains regulations governing the Representative of Miners. The regulations contain requirements for the filing of specified identification data to be posted at each mine, the designation of persons to exercise the functions of a representative under provisions of the Mine Act, and the termination of such representatives. 30 C.F.R. §§ 40.2-5; *see also Utah Power*, 897 F.2d at 453.

The Preamble to the Part 40 regulations expressly rejected narrow interpretations of the terms “representative of miners” and broadly interpreted “representative of miners” to encourage miner participation in the health and safety of the mine because Congress deemed it vital to have

miners freely participate in health and safety matters at the mines. 43 Fed. Reg. 29,508 (July 7, 1978). The Preamble expressly states:

First, there is no clear statement in the legislative history of the Mine Act defining who is to be a representative of miners for a specific purpose, nevertheless, Congress believed it was vital to have miners freely participate in health and safety matters at the mines. Second, the frequent use of the term “representative” throughout the Mine Act in different contexts suggests that a broad definition would be preferable to a narrow one. Additionally, any attempt to limit the manner in which representatives are selected would be intrusive into labor/management relations at the mine and not in keeping with the spirit of miner participation. Finally, it would be very difficult to put forth a more detailed or restrictive rule which would be applied to all the varied situations at all mines--large and small, union, multi-union and nonunion, coal and metal/nonmetal, which would still be equitable in all situations.

43 Fed. Reg. 29508.

In rejecting the more narrow NLRB definition of “Representative” based on the “majority rule” concept inherent in the context of collective bargaining, “which contemplates only one union miner representative at each mine,” MSHA emphasized the following:

...The purposes of the Mine Act are better served by allowing multiple representatives to be designated. This ensures that all miners have the opportunity to exercise their right to select the representative of their choice for the purpose of performing the various functions of a representative of miners under the Act and within the framework of each provision.

Finally, based on experience under the Federal Coal Mine Health and Safety Act of 1969 and Part 81, it is reasonable to expect that miners will choose representatives with a substantial amount of experience, and problems are not anticipated with this broad interpretation of the term representative of miners. If problems do arise MSHA will propose appropriate revisions.

43 Fed. Reg. 29508.

I conclude that section 103(f) of the Mine Act, as reinforced by the Preamble to the Part 40 regulations, authorizes a broad interpretation of the statutory phrase “*representative authorized by his miners*” as set forth in section 103(f) to achieve the statutory purpose of facilitating the miners’ voice in health and safety matters at a mine.

To properly and broadly interpret the phrase “representative authorized by his miners” in section 103(f), it is necessary to examine the statutory definition of the term “miner” under section 3(g) the Act in the context of section 103(f) of the Act. Section 3(g) of the Act defines “miner” as “any individual *working* in a coal or other mine.” 30 U.S.C. § 802(g) (emphasis added). Thus, a “representative authorized by his miners” under section 103(f) is any individual who is properly designated by two or more individuals “working” in a mine of an operator.

It is undisputed that Guzman was properly designated by two or more Sherwin miners who were working in the Sherwin mine at the time of the designation. Jt. Ex. 4. That designation was never terminated pursuant to MSHA regulation. 30 C.F.R. § 40.5. As further explained herein, it would be inconsistent with the fundamental purpose of the Mine Act in protecting miner safety and health to terminate that designation by operation of law because a mine operator invoked an offensive lockout, thereby preventing his unionized miners from returning to work, unless their collective-bargaining representative, who continues to represent locked out miners with respect to mandatory terms and conditions of employment, including safety and health issues, capitulated to the operator’s demands in a labor dispute.

The Secretary of Labor has determined that the Act’s definition of “miner” under section 3(g) in the section 103(f) context is ambiguous, and should be interpreted broadly to include workers who are on strike or have been locked out, but who reasonably expect to return to the mine at the end of the labor dispute. Jt. Exs. 2 and 16; Sec’y Br. 9-10. Intervenor Steelworkers agrees with the Secretary’s “context-specific” interpretation. Intervenor Br. 2, 8. Respondent Sherwin disagrees with this interpretation, and posits that miners entitled to a walkaround representative during an inspection are only those “actively working in a mine at the present time.” Sherwin Br. 8.

In resolving this dispute, I find that, for better or for worse, the Commission’s decision in *Cyprus Empire* controls in the context of a strike, particularly an economic strike, until overruled. It does not, however, bind the undersigned in the context of the instant lockout. Rather, I give *Chevron* step 2 deference to the Secretary’s reasonable interpretation that the statutory phrase “*representative authorized by his miners*” in the context of the walk-around provision of section 103(f) includes a representative authorized by miners who are locked out by the operator.⁶ Accordingly, I find that Joe Guzman is a “representative authorized by [Sherwin] miners,” who continues to represent “two or more miners at a coal or other mine” pursuant to 30 C.F.R. § 40.1(b)(1) during the lockout for purposes of section 103(f) walk-around rights. Thus, on November 13, 2014, Respondent Sherwin violated section 103(f) of the Act by denying

⁶ The Secretary’s proffered interpretation of “representative authorized by his miners” is admittedly broader than a representative selected by locked-out miners. As discussed *supra*, the Secretary also argues that striking miners who are permanently replaced should likewise be considered working miners and entitled to have their designated representative participate in inspections and conferences. The instant matter, however, deals only with locked-out, not striking miners, and the deference afforded to the Secretary is therefore limited to the facts presented here. It is unnecessary to reach the issue of whether the Secretary’s broader interpretation is also entitled to deference.

Guzman an opportunity to accompany inspector Barrick, and violated section 104(b) by failing to abate that violation during a subsequent inspection effort 30 minutes later.

IV. Legal Analysis

A. The Statutory Phrase “Representative Authorized by His Miners” in Section 103(f) Is Ambiguous

When analyzing the Secretary’s interpretation of the phrase “representative authorized by his miners” in section 103(f) of the Mine Act, the Commission applies the two-step approach set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); *Performance Coal Co. v. Fed. Mine Safety & Health Review Comm’n*, 642 F. 3d 234, 238 (D.C. Cir. 2011); *Simola, emp. by United Taconite, LLC*, 34 FMSHRC 539, 543-5 (Mar. 2012). Under that approach, if the statutory language is plain, the Commission must enforce such language according to its terms. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171 (Sept. 2010). On the other hand, if the statute is silent or ambiguous, the Commission asks whether MSHA’s interpretation is reasonable and permissible. *Chevron*, 467 U.S. at 843-44; *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 n.2 (Apr. 1996); *Joy Technologies, Inc. v. Sec’y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997). If the Secretary and the Commission have conflicting, reasonable interpretations of the Mine Act, the Secretary’s interpretations rather than the Commission’s interpretations are entitled to deference under *Chevron*. See, e.g., *Joy Technologies, supra*, 99 F.3d at 995; see also *Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003); *Sec’y of Labor v. Mutual Mining, Inc.*, 80 F.3d 110, 113-15 (4th Cir. 1996).

Thus, if a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation. *National Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)(*Brand X*), citing *Chevron*, 467 U.S. at 843-44, and n. 11. Put differently, a reviewing court or tribunal, like the Commission, must “accept [the Secretary’s reasonable] construction of the [Mine Act], even if the [the Secretary’s] reading differs from what the [Commission] believes is the best statutory interpretation.” *Id.* at 980 (2005)(federal agencies can reverse judicial statutory interpretations of ambiguous statutory interpretations under certain circumstances); *cf.*, *Martin v. OSHRC*, 499 U.S. 144, 152-53 (1991)(reviewing court should defer to Secretary’s interpretation when the Secretary and the Commission furnish reasonable but conflicting interpretations of *ambiguous regulation* promulgated by the Secretary under the Occupational Safety and Health Act).

Similarly, a reviewing court’s or tribunal’s prior construction of a statute does not trump a new and permissible agency construction entitled to *Chevron* deference, absent clear and unequivocal terms of the statute leaving no room for ambiguity and agency discretion. See *Brand X*, 545 U.S. at 982; see also *NLRB v. Iron Workers Local 103 (Higdon Construction Co.)*, 434 U.S. 335, 351 (1978)(agency’s pre-*Chevron* resolution of conflicting claims represented a

defensible construction of the statute entitled to considerable deference even though courts may prefer a different application; moreover, “[a]n administrative agency is not disqualified from changing its mind, and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo*, and without regard to the administrative understanding of the statutes.”).

In short, deference is given to the Secretary’s interpretation of the Mine Act when that interpretation is reasonable. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844); *Twentymile Coal Co.*, 36 FMSHRC 2009, 2012 (Aug. 2014). *Chevron* deference is usually granted to reasonable statutory interpretations that the Secretary advances on behalf of MSHA during litigation before the Commission, even though such interpretations are not promulgated in formal rulemaking. *Martin v. OSHRC*, 499 U.S. 144, 156-7 (1991); *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 512 (8th Cir. 2012); *Olson v. FMSHRC*, 381 F.3d 1007, 1011 (10th Cir. 2004); *Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 115 (4th Cir. 1996); *Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003); *but see North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 742 (6th Cir. 2012) (only *Skidmore* deference is owed positions taken by the Secretary during enforcement actions). The fact that the Secretary has waited since 1993 to exercise his interpretive authority and considered judgment on the issues presented in anticipation of the instant litigation, does not lessen the deference owed. *See Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011).

Finally, even where the Commission has previously interpreted an ambiguous statutory term or ambiguous statutory terms, the Secretary of Labor, on behalf of MSHA, “may, consistent with the [Commission’s] holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason)” *Brand X*, 545 U.S. at 983; *see, e.g., Sec’y of Labor v. Nat’l Cement Co. of Cal., Inc.*, 573 F.3d 788 (D.C. Cir. 2009). When the Secretary does so, he does not say that the Commission’s prior interpretation was necessarily wrong, he simply chooses a different permissible interpretation that is reasonable and consistent with the purposes of the Act. *See Brand X*, 545 U.S. at 983. As further explained below, I find that statutory language “representative authorized by his miners” in section 103(f) is ambiguous in the context of a lockout and I give deference to the Secretary’s interpretation under *Chevron*.

In *Cyprus Empire*, the United Mine Workers of America (UMWA) argued that the erstwhile Commission must defer to the Secretary’s interpretation of the statutory term “miner” in section 3(g) of the Act as applied to walk-around rights in section 103(f). *Cyprus Empire*, 15 FMSHRC at 15. In rejecting this argument, the 1993 Commissioners noted that the Secretary’s analogous construction of the term “miner” was rejected as unreasonable by the D.C. Circuit in *Brock v. Peabody Coal Co.*, 822 F.2d 1134, 1151 (D.C. Cir. 1987)(*Peabody*).⁷ Moreover, those

⁷ In *Peabody*, the D.C. Circuit affirmed the Commission’s holding that laid-off individuals were not miners for purposes of the training rights granted under section 115 of the Act because they were not working in a mine, exposed to the hazards of mining, *or employed* by a mine operator. *Peabody*, 822 F.2d at 1147-49 (emphasis added). The laid off miners in *Peabody* were contractually entitled under the collective-bargaining agreement to be placed on a panel for recall on the basis of “seniority,” which was contractually defined as “length of service (continued...)”

Commissioners emphasized that the Secretary did not appeal the judge's adverse decision or otherwise participate in the appeal; that "the wording of the statute sets forth Congress' intent as to the definition of miner; and that "[e]ven if there were remaining ambiguity, the Secretary has presented no position to which the Commission could accord weight." *Cyprus Empire*, 15 FMSHRC at 15. In this case, by contrast, the Secretary has clearly exercised his informed judgment, after consultation with his client MSHA, to argue before the Commission that the definition of "miner" under section 3(g) of the Act is ambiguous in the context of section 103(f), and the terms "representative authorized by his miners" in section 103(f) should include miners who have been locked out and reasonably expect to return to work at the end of the labor dispute.

When deciding whether the statutory language "representative authorized by his miners" in section 103(f) is plain or ambiguous, the Commission must examine the text of the language itself, the specific context in which the words or phrases are used in section 103(f), and the broader structure of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *King v. Burwell*, 135 S. Ct. 2480, 2484 (2015). As Chief Justice Roberts recently noted in upholding the Affordable Care Act tax credits on federal exchanges:

But often times the "meaning -- or ambiguity-- of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 132. So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." *Id.*, at 133 (internal quotation marks omitted). Our duty, after all, is "to construe statutes, not isolated provisions." *Graham County Soil*

⁷ (...continued)

and the ability to step into and perform the work of the job at the time it was awarded." *Id.* at 1139. The operators passed over some miners at the top of the recall list because they lacked the necessary training or work experience to qualify as "experienced miners" and therefore could not begin working without first receiving "new miner training." *Id.* The court majority concluded that the laid-off individuals did not, in failing to obtain safety training, exercise any right granted a miner by section 115(a) of the Mine Act. Accordingly, the Secretary's position that the operators refused to employ them because of the exercise of a statutory right thereby engaging in prohibited discrimination, was not a reasonable interpretation of sections 105(c)(1) and 115(a) of the Act. *Id.* at 1151.

In her concurrence, then Judge Ruth Bader Ginsburg astutely observed that one need not exclude laid-off miners from the section 3(g) definition of "miner" for all statutory purposes, nor did she read the majority opinion to make so sweeping a disposition, and she rejected the Secretary's position solely on the language and structure of section 115 of the Act dealing with training rights. *Id.*, (Ginsburg concurring). Judge Ginsburg concluded that the word "miner" as employed in section 115 could not reasonably be read to encompass persons laid-off because the training provisions were directed to miners on the job and could not comprehensively be read to accommodate miners "who stand and wait." *Id.* at 1152.

and Water Conservation Dist. v. United States ex rel. Wilson, 559 U.S. 280, 290 (2010) (internal quotation marks omitted).

135 S. Ct. at 2489.

The Supreme Court has also recognized that "... the same words, placed in different contexts, sometimes mean different things," and that identical language may convey varying content even when used in different provisions of the same statute. *Yates v. United States*, 135 S.Ct. 1074, 1082 (2015) (Ginsburg, J., plurality opinion). Furthermore, the Court has stated that once a statutory term has an established meaning in some sections of a statute but not in other sections, the term is ambiguous and each section must be examined to determine whether context provides further meaning that would resolve the dispute. *Robinson*, 519 U.S. at 343-44; *see also Brody Mining LLC*, 36 FMSHRC 2027, 2036 (Aug. 2014) *appeal docketed*, No. 14-1171 (D.C. Cir. Sept. 2014) (deference accorded Secretary's interpretation of ambiguous term "violation" where various statutory provisions could only refer to conditions alleged to be violations).

I agree with the Secretary that the present participle "working" as used in section 3(g)'s statutory definition of "miner" is ambiguous in the section 103(f) context because it connotes both ongoing activity in which the miner is actively engaged in the present, and interrupted activity from which the miner may temporarily be absent, but to which he has a reasonable expectation of returning. See Sec'y Br. 10-11, citing for comparison, *United States v. Hersom*, 657 F.3d 77, 79, n.2 (1st Cir. 2011) (adopting analogous reasoning with respect to the present participle "receiving"). For example, the undersigned might accurately say that I am working on Monday even though it is the Friday before, as I draft this example. Certainly, a miner who takes temporary leave is still working at the mine, although on leave status, and not engaged in work at the present moment. Similarly, the Fourth Circuit has recognized that miners who designated a union official as their representative while the mine was closed during investigation of an accident were "miners [who] currently work at the . . . [m]ine" for purposes of ruling on a preliminary injunction. *Dep't of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 287 (4th Cir. 2006).

In fact, as the Secretary enumerates, the Mine Act frequently uses the word "miner" to cover individuals who were working in the mine, but may not be actively working at the time that their statutory rights or obligations are triggered. Sec'y Br. 12-13, citing, *inter alia*, Sections 105(c)(2), 104(g)(1), 111, 115, 201, 203(c) and (d) of the Mine Act. The Commission in *Cyprus Empire* recognized that the statutorily-defined term "miner" must be interpreted in the context of the particular section in which it arises to effectuate the safety purposes of each section, but as noted, that Commission interpretation did not have the benefit of the Secretary's new and informed judgment in the context of a lockout. 15 FMSHRC at 15; *see also KenAmerican Resources, Inc.*, 35 FMSHRC 1969, 1973 (July 2013) (laid-off worker was "miner" for purposes of section 105(c)(2)'s anti-discrimination provision distinguishing cases like *Peabody* where laid-off workers were not "miners" under other statutory provisions); 35 FMSHRC at 1975 (definition of "miner" "cannot be applied literally" throughout the Act)(Chairman Jordan, concurring).

Thus, contrary to Sherwin’s argument, several provisions of the Mine Act would make little sense if the term “working,” as used to define “miner,” was confined to times when actual mining work was presently being performed. Rather, I find that the term “miner” as used in section 3(g) of the Act is ambiguous, and encompasses times when workers are temporarily disengaged from the actual act of mining. Accordingly, I reject Sherwin argument that the plain meaning of the term “miner” in section 103(f) must mean an individual actually working in the mine at the time of the inspection, i.e., “[t]he term ‘working’ . . . refer[s] ‘to action that is happening at the time of speaking or a time spoken of.’” Sherwin Br. 10. While such a strict construction, as adopted by the Commission in *Cyprus Empire*, may seem plain when viewed in isolation, the Secretary has determined that such a reading is untenable in light of the primary purpose of the Mine Act to most effectively promote miner safety and health. *Cf. Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 343 (1994); *see also New York State Dept of Social Servs. v. Dublino*, 413 U.S. 405, 419-420 (1973) (federal statutes cannot be interpreted to negate their stated purposes). Rather, as noted, “the fundamental canon of statutory construction [requires] that the words of a statute must be read in their context and with a view toward their place in the overall statutory scheme.” *Utility Air Regulation Group v. EPA*, 134 S.Ct. 2427, 2441 (2014), *citing FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Given that the text of the statutory phrase “representative authorized by his miners” in section 103(f) is ambiguous as discussed above, the Commission must look to the broader structure of the Act to determine whether the Secretary’s current interpretation of the statutory walk-around provision produces a substantive effect that is consistent with the overall purpose of the Mine Act. *Cf., United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). Ambiguity should be resolved by looking to the context and purpose of the walk-around provision and eschewing a construction that would undermine the purpose of the provision or lead to absurd results. *See, e.g., Sec’y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005); *Emery Mining Corp v. Sec’y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984); *Consolidation Coal*, 15 FMSHRC 1555, 1557 (Aug. 1993). I conclude that the context and structure of the statutory walk-around provision within the Mine Act fully supports the Secretary’s interpretation that the designated representative of locked out miners shall be given an opportunity to participate in inspections during the lockout because this interpretation is reasonable, permissible, and advances the primary purpose of the Act to protect miner safety and health.

B. The Secretary’s Interpretation is Consistent with the Overall Purpose of the Mine Act to Protect Miner Safety and Health and the Specific Purposes of Section 103(f) by Ensuring the Rights of Locked-Out Miners to Aid MSHA’s Inspection and Participate in Pre-and Post-Inspection Conferences

The Mine Act’s overall purpose is to protect the health and safety of the mining industry’s most precious resource, the miner. *Peabody*, 822 F.2d at 1146, citing section 2(a) of the Act, 30 U.S.C. § 801(a). Thus, the Mine Act must be interpreted to achieve the overarching goal of protecting the safety and health of miners. *See United Mine Workers of Am. v. Dep’t of Interior*, 562 F.2d 1260, 1265 (D.C. Cir. 1977) (“Should a conflict develop between a statutory

interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise to safety, the first should be preferred.”)

Section 103(f) plays a critical role in the overall enforcement scheme of the Act and the Commission will not restrict 103(f) rights, absent a clear indication in the statutory language or legislative history, or appropriate limitation imposed by regulation. *SCP Investments, LLC*, 31 FMSHRC 821, 827 (Aug. 2009) (opinion of Commissioners Young and Cohen); *Consolidation Coal Co.*, 3 FMSHRC 617, 618 (Mar. 1981). As explained above, the definition of “miner,” as set forth in the statutory phrase “representative authorized by his miners” in section 103(f), is ambiguous as applied to locked-out miners. The Secretary’s interpretation that the phrase “representative authorized by his miners” should include a representative authorized by locked out miners is favored and entitled to deference. This is because that interpretation is fully protective of mine safety and health and best advances the overall purpose of the Act to protect miners, and the specific purposes of section 103(f) in furtherance of that overall statutory goal.

A fundamental purpose of the walk-around rights set forth in section 103(f) is to encourage miner awareness of health and safety concerns. *Kerr-McGee*, 40 F.3d at 1260, 1264 & n.13; *Consolidation Coal*, 3 FMSHRC 617, 618 (Mar. 1981); S. Rep. No. 95-181, at 28; MSHA Interpretive Bulletin, 43 Fed. Reg. 17,546, (Apr. 25, 1978). As inspector Barrick testified, this is the most important aspect of the miners’ representative function. Tr. 29. This fundamental purpose of section 103(f) is advanced by permitting the authorized representative of locked-out miners to participate in physical inspections and pre- and post-inspection conferences under section 103(f). The reason is manifest. Participation by a miners’ representative in physical inspections and pre and post-inspection conferences permits dissemination of knowledge concerning safety and health hazards or conditions to other miners throughout the mine, particularly the locked-out miners, who have a reasonable expectation of returning. Locked-out miners have an actual and continuing interest in staying abreast of existing, continuing, developing, or abating safety and health issues at the mine where they reasonably expect to return and resume the inherently dangerous work of mining. *See Performance Coal Co.*, WEVA 2010-1909, Unpublished Order at 11, (Dec. 17, 2010) (ALJ) (miners who were employed at time of Upper Big Branch explosion and thereafter were involuntarily relocated to a sister mine have an ongoing interest in the safety of the mine where they were working and will return to work).⁸

⁸ In *Performance Coal*, the judge found that “[t]he purpose of . . . section 103(f) is to allow miners the opportunity to be involved in the safety and health of the mine where they are employed,” and it would “circumvent the purpose of the statute” to deny the miners a representative at the closed mine. *Performance Coal Co.*, WEVA 2010-1909, Unpublished Order at 11, (Dec. 17, 2010) (ALJ). The judge persuasively reasoned that the “miners who were employed at the Mine at the time of the accident have an ongoing interest in the safety of the mine where they were working and will potentially return to work. This safety interest is at the heart of the statute and regulations.” *Id.* The judge further concluded that the operator’s “narrow reading” of section 103(f) would permit mines “to unilaterally prevent” miners’ involvement in safety oversight. *Id.*

Similarly here, Sherwin’s interpretation of the phrase “representative authorized by his miners” to exclude a lawfully designated, but locked-out representative, unilaterally prevents
(continued...)

Although lockouts may last for an extended period of time,⁹ locked-out miners cannot be permanently replaced and have a reasonable expectation of returning to work after the conclusion of the lockout because the operator may only hire temporary replacement miners during a lockout, not permanent replacement workers that are permissible in the economic-strike context, such as *Cyprus Empire*. See e.g., *Ancor Concepts*, 323 NLRB 742, 744 (1997) (use of permanent replacements is inconsistent with a declared lawful lockout in support of bargaining position) *enforcement denied on other grounds*, 166 F.3d. 55 (2d Cir. 1999); *Harter Equipment, Inc.*, 280 NLRB 597 (1986)(absent specific proof of antiunion motivation, employer did not violate Section 8(a)(3) and (1) by hiring temporary replacements during offensive lockout), *aff'd sub nom. Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987)(employer's hiring of temporary employees was not unfair labor practice, where employer intended to return regular employees to work at conclusion of dispute, employer was in financial straits, and employer did not have hostile motive); cf., *Harter Equipment, Inc.*, 293 NLRB 647 (1989) (only locked out "employees" in bargaining unit at time of lockout, and not temporary replacements, are eligible to vote in subsequent decertification election). Accordingly, the locked-out miners legally are still "working" at the Sherwin Mine, much like a miner on vacation or sick leave, albeit they will not return to work until the end of the lockout. Given the locked-out miners' reasonable expectation of returning to the Mine at the conclusion of the lockout, they retain an interest in the health and safety of the Mine and should be allowed to have a representative of miners participate in section 103(f) walk-around activities because such participation serves the statutory purposes set forth in section 103(f) of ensuring the rights of miners to assist MSHA in inspections and pre- and post-inspection conferences to maintain the health and safety of all miners working in the mine.

As noted, the Preamble to the Part 40 regulations authorizes a broad interpretation of the phrase "*representative authorized by his miners*" in section 103(f) to achieve the statutory purpose of facilitating the miners' voice in health and safety matters at a mine. 43 Fed. Reg. 29,508 (July 7, 1978). The Secretary's interpretation that section 103(f) covers a miners' representative designated by locked-out miners, who cannot be permanently replaced and

⁸ (...continued)

miners' involvement in safety oversight. In fact, as noted herein, there was no miners' representative permitted to participate in inspections for three months after the lockout, until Alvarez was eventually designated after inquiry from the undersigned. By contrast, as in *Performance Coal*, the Secretary's interpretation of the phrase "representative authorized by his miners" fosters the overarching safety interest at the heart of the statute and regulations by ensuring that an operator cannot use a lockout to unilaterally preclude miners, through their designated representative, from participating in inspections and conferences to help ensure a safe mine environment where they reasonably expect to return to work.

⁹ For example, a lockout lasted for two years (1991-92) at the Ravenswood Aluminum plant in West Virginia, chronicled by Kate Bronfenbrenner and Tom Juravich in *Ravenswood: The Steelworkers Victory and the Revival of American Labor* (1999), and a lockout lasted for two years at the Kaiser Aluminum refinery in Gramercy, Louisiana, during which a tragic explosion injured 29 miners on July 5, 1999. MSHA, Report of Investigation, <http://www.msha.gov/disasterhistory/gramercy/report/reportdept.htm>.

reasonably expect to return to work, is reasonable because it furthers the specific and primary “purposes of aiding [MSHA’s] inspection and to participate in pre- or post-inspection conferences held at the mine.” See 30 U.S.C. § 813(f); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1278 (10th Cir. 1995); *Kerr-McGee*, 40 F.3d at 1263; 43 Fed. Reg. 17,546 (Apr. 25, 1978); cf., *KenAmerican Resources*, 35 FMSHRC at 1973 (July 2013) (majority panel held that laid-off worker was “miner” for purposes of section 105(c)(2)’s anti-discrimination provision, distinguishing cases like *Peabody* where laid-off workers were not “miners” under other statutory provisions) (Chairman Jordan, concurring).

Another purpose of the walk-around provision is to assure miners that inspectors will uncover violations and hazards. 115 Cong. Rec. S27,287-88 (Sept. 26, 1969), *reprinted in* Subcommittee on Labor of the Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 393 (Comm. Print 1975) (statement of Sen. Metcalf introducing walk-around provision amendment in Coal Mine Health and Safety Act of 1969) (“[I]t might well happen that that miner working in that mine would help the inspector by calling attention to certain safety violations. He is familiar with the operation of the mine, and he would be able to represent his fellow union members or his fellow mine workers to reveal safety violations.”). Participation in inspections and conferences by locked-out miners’ representatives, who reasonably expect to return to work at the conclusion of the lockout, helps promote this purpose because such representatives, as demonstrated in this case, have site-specific knowledge and expertise to aid the Secretary in ensuring mine safety and health during a physical inspection. After all, “... it is reasonable to expect that miners will choose representatives with a substantial amount of experience ...” 43 Fed. Reg. 29,508. Such a representative will aid MSHA inspectors in their efforts to protect both the current safety of temporary replacement miners and the future safety of the locked-out miners when they return to work.

Based on the record evidence presented in this case, it is likely that inspection participation by the representative of the locked-out miners will enhance mine safety and health more effectively than participation by a representative designated by temporary replacement miners, who will typically lack equivalent site-specific experience and technical knowledge, at least at the outset of the labor dispute. As explained below, the record in this case suggests that the representative designated by the temporary replacement workers at the outset of the lockout typically will be on a significant “learning curve,” and therefore will be less qualified to identify hazards and assist the inspector by providing site-specific technical knowledge about the mine’s production processes. It is significant that the temporary workers did not participate in mining or actively engage with the mine environment before the lockout began, and instead only observed the locked-out workers. Tr. 184.

On the other hand, the record establishes that since his designation, Guzman had significant mine-specific experience and familiarity with the hazardous processes of refining alumina under pressure using corrosive chemicals and caustic liquids. Tr. 28-29, 40, 104-05, 178. Specifically, inspector Barrick testified that the miners’ representative, usually Guzman unless another representative was substituting, would travel with an inspector “to help us by providing information, typically on technical or process-type questions that we might have. Also, he could identify other miners in the area for us. And, of course, his most important job ... is to

take that ... information back to his ... miners and let them know what ... he observed during an inspection.” Tr. 29. In fact, Paul English, Respondent’s safety, health and industrial hygiene manager, testified that Guzman would answer an inspector’s questions about mine processes or how equipment worked, provide an opinion about possible allegations, and point out dangers or hazards to an inspector. Tr. 104-105. English confirmed that Guzman actively participated in post-inspection conferences by expressing agreement or disagreement with citations. Tr. 105. English also testified that Guzman would report inspection results back to the miners and that Guzman was a full-time miners’ representative pursuant to the corrective action plan (CAP). Tr. 108.

When asked why he would consult a miners’ representative like Guzman about processes or technical issues, inspector Barrick testified that “[a] lot of times that miner may have performed that work. He has ..., at times, a better understanding of the processes than sometimes operational folks will” because he has “a working knowledge of ... some of the processes. And if he doesn’t, he knows those that do, and we can get those people.” Tr. 29. Inspector Barrick further testified, “[w]hen we’re evaluating conditions, we want all the facts; we want as much information as we can possibly get about what we’re dealing with at that time.” Tr. 29-30. Barrick further explained, “... Sherwin is a very complex process; there’s a lot there to learn; there’s a lot there to understand. So again, the more people we could involve, you know, in that process of trying to garner the right information and make evaluations, and if, indeed we needed to, you know, issue citations, that we ... try to do that in a fair manner.” Tr. 30. Barrick also credibly testified that the miners’ representative plays a very useful role at closeout conferences, particularly through input regarding the appropriate level of abatement to get at the root cause[s] for cited conditions. Tr. 30-31.

Although English attempted to paint a picture that temporary replacement miners’ representative, Francisco Alvarez, a management official with replacement contractor CCC Group, performed the same or comparable miners’ representative role as Guzman at the time of the hearing, I discredit this effort. Tr. 106. Alvarez, the new, post-lockout miners’ representative for replacement miners, lacked the same or comparable site-specific technical and process knowledge as Guzman since English conceded that Alvarez was “on a learning curve.” Tr. 106. In fact, for 105 days during numerous inspections after the commencement of the lockout, no miners’ representative was given the opportunity to accompany MSHA inspectors until Alvarez was eventually designated on January 23, 2015, after inquiry from the undersigned. This factual scenario is antithetical to the encouragement of miner participation in the health and safety of the mine, which Congress deemed so vital to effective safety and health enforcement. See 43 Fed. Reg. 29508.

When CCC Group manager Alvarez was eventually designated as the replacement miners’ representative, he did not report inspection results back directly to miners as Guzman had done. Tr. 29, 108. Rather, such information was filtered through English and other Sherwin and CCC management before reaching miners. Tr. 108. Nor did Alvarez point out hazards to an MSHA inspector, as Guzman had done. Tr. 105, 109-10. Further, when English was asked whether English had ever pointed out a hazard to an inspector, English evaded the question. Tr. 105. I find on this record that Alvarez’s representative role was not comparable to Guzman’s representative role, and because Sherwin excluded Guzman from participating in physical

inspections and conferences during the lockout, the purposes of section 103(f) were flouted for more than 3 months.

I further find, consistent with the appropriate broad interpretation of the statutory phrase “representative authorized by his miners” in section 103(f), that “[t]he purposes of the Mine Act are better served by allowing multiple representatives to be designated” in the context of a lockout because “[t]his ensures that all miners have the opportunity to exercise their right to select the representative of their choice for the purpose of performing” section 103(f) representative-of-miner functions. See 43 Fed. Reg. 29508. Thus, Guzman must or “shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection” of the Sherwin mine during the lockout, and Alvarez must or shall be given the same opportunity. In the words of section 103(f), “[t]o the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection....” 30 U.S.C. § 813(f). Sherwin’s attempt to cabin MSHA’s section 103(f) discretion and “to limit the manner in which representatives are selected would be intrusive into labor/management relations at the mine, and not in keeping with the spirit of miner participation.” 43 Fed. Reg. 29508.

During a lockout, the designated miners’ representative cannot effectively keep involuntarily locked-out miners apprised of the dynamic, ongoing, and constantly evolving safety and health conditions prevalent at the mine, absent participation in physical inspections and conferences. It may be too late to wait until the lockout concludes to bring the specialized knowledge or concerns of the locked-out miners’ representative to bear on the physical conditions, hazards, or dangers prevailing at the mine during the lockout because decisions regarding such mine safety issues may be finalized by the time locked-out miners resume active work. For example, citations were written during post-lockout inspections from which Guzman was excluded. Tr. 99. Therefore, Guzman could neither assist MSHA to understand the alleged violations and uncover additional hazards, nor keep the locked-out miners informed about such conditions to which they may be exposed when they return to work. Furthermore, Sherwin faced the prospect of being placed in POV status and challenging such notice and any subsequent section 104(e) withdrawal order during the lockout. Tr. 61, 141. The locked-out miners’ representative should be allowed to participate in inspections and conferences related to such POV proceedings, if any, since the locked-out miners reasonably expect to resume work at the Mine.

Sherwin argues that inspectors can speak to other miners during the lockout. Sherwin Br. 4. Sherwin also argues that the locked out miners have not been precluded from staying abreast of safety issues and citations during the lockout because they can access MSHA’s website and submit Freedom of Information Act (FOIA) requests. Further, Sherwin asserts that the locked-out miners are required to receive part 48 training prior to their return, including training on any new safety procedures and concerns that have arisen during the lockout. Sherwin Br. 4-5; Tr. 140; 30 C.F.R. part 48. All that may be true, but Sherwin is essentially substituting its own view

of safety and health policy for the expert view of the Secretary of Labor (see Sec’y Reply Br. 5,) and Sherwin’s reasonable-alternative-means argument is no substitute for Congress’s decision that a properly designated miners’ representative be granted the opportunity to invoke the statutory right to accompany inspectors during physical inspections and to participate in pre-and post-inspection conferences.

Nor, as the Secretary points out, is it sufficient to rely on the ability of the miners’ representative to request a hazard inspection under section 103(g) when the lockout ends. Sec’y Br. 18-19; *but see Cyprus Empire*, 15 FMSHRC at 15 (economic strikers, subject to permanent replacement, were not entitled to a section 103(f) walk-around representative during the strike because they were not presently exposed to hazards and could request an inspection under section 103(g) if they returned to work). A section 103(g) hazard inspection focuses on an imminent danger or particular violation of a mandatory health or safety standard. 30 U.S.C. § 813(g)(1) (“a special inspection shall be made as soon as possible to determine if such violation or danger exists”). The special inspection may be needed during the lockout and the locked-out miners’ representative should be there at MSHA’s discretion for the limited purpose of assisting such inspection. If the locked-out miners’ representative is unable to participate and assist in regular inspections and conferences during the lockout, he or she may be unaware upon return to work of subtle or dynamic changes in the mine environment likely to cause hazards, or unaware of particular conditions likely to create hazards. Indeed, hazards themselves may go unnoticed before they worsen and increase danger. Such danger is particularly acute at a large alumina refinery that encompasses 1200 acres, and utilizes hundreds of valves, tanks, and miles of piping (Tr. 96), and Sherwin’s contrary interpretation of section 103(f) does not promote the safety and health purposes of the statute. The Gramercy explosion at the Kaiser alumina refinery referred to in the record by Sherwin, grounds this concern in reality. Tr. 165-66; *see supra*, n. 4.

Consequently, actual participation by the locked out miners’ representative in inspections and conferences during the lockout is crucial to maximizing mine safety and health during the lockout. As the Secretary persuasively argues on brief:

“... subsequent review by the [locked out] miners of a cold record of citations is no replacement for the robust, eye-witness experience the representative has when accompanying the inspection team and seeing for him or herself how conditions are evolving. Any suggestion that miners can simply get up to speed on how conditions at the mine have changed during their temporary absence by reviewing such records ignores the reality that most people learn and retain information better by witnessing live events than by reviewing notes. Furthermore, not every evolving condition that impacts miner health and safety will be something that leads to a citation. Only by accompanying the inspection team will the miners’ representative stay apprised of conditions that may yet evolve into health or safety hazards.

Sec’y Br. 18.

The fact that replacement miners and returning locked-out miners must undergo training before commencing work, and that MSHA is able to speak to other miners during the lockout, is weak justification for excluding a locked-out miners' representative from participating in physical inspections and pre- and post-inspection conferences. As the Secretary again persuasively argues on brief, "[t]elling miners what has happened at a mine after the fact is no replacement for their having had a voice in the dialogue in the first place." Sec'y Reply Br. 5. Furthermore, as explained herein, MSHA need not choose from amongst sources of information or between designated representatives. Rather, MSHA has discretion to broadly gather information from as many sources as possible. Thus, an experienced locked-out miners' representative, such as Guzman, and an inexperienced temporary replacement miners' representative, such as Alvarez, should both be given the opportunity to participate in physical inspections and conferences during the lockout, at MSHA's discretion. Sherwin must give each representative the requisite training to fulfill their statutory responsibilities.¹⁰

The broad discretion conferred on the authorized MSHA inspector when determining the statutory participation right during the particular inspection at issue is aptly captured in the following passage from MSHA's Interpretive Bulletin concerning section 103(f) of the Mine Act.

Considerable discretion must be vested in inspectors in dealing with the different situations that can occur during an inspection. While every reasonable effort will be made in a given situation to provide opportunity for full participation in an inspection by a representative of miners, it must be borne in mind that the inspection itself always takes precedence. The inspector's primary duty is to carry out a thorough, detailed, and orderly inspection. The inspector cannot allow inordinate delays in commencing or conducting an inspection because of the unavailability of or confusion surrounding the identification or selection of a

¹⁰ Under 30 C.F.R. §48.3, operators must have an approved training plan that covers, *inter alia*, experienced miner training (30 C.F.R. §48.6) and annual refresher training (30 C.F.R. §48.8). Operators may receive citations for failure to properly conduct these trainings. See e.g., *Emery Mining Corp.*, 5 FMSHRC 1400 (Aug. 1983)(Commission held a civil penalty was appropriate when miners did not receive annual refresher training for 15 months in violation of 30 C.F.R. §48.8); *Sally Ann Coal Company, Inc.*, 37 FMSHRC 246 (Feb. 2015)(ALJ Harner)(citation under 30 C.F.R. §48.6 affirmed). As shown herein, unlike laid-off miners seeking to invoke training rights under section 115 of the Act, locked-out miners' representatives like Guzman remain "miners" for the purposes of the section 103(f) of the Act during the course of the lockout. Further, a miners' representative, who works at the mine and regularly assists an MSHA inspector during inspections, would be "regularly exposed to mine hazards," and therefore be a "miner" for training purposes under 30 C.F.R. §48.2. But for Respondent's unlawful exclusion of Guzman as the designated miners' representative under section 103(f) of the Act, Guzman presumably would not have experienced any lapse of training requirements after the lockout began. Accordingly, to the extent that any training of Guzman's has lapsed, Respondent is responsible for retraining him.

representative of miners. Where necessary in order to assure a proper inspection, the inspector may limit the number of representatives of the operator and miners participating in an inspection. The inspector can also require individuals asserting conflicting claims regarding their status as representatives of miners to reconcile their differences among themselves and to select a representative. If there is inordinate delay, or if the parties cannot resolve conflicting claims, the inspector is not required to resolve the conflict for the miners and may proceed with the inspection without the presence of a representative.

43 Fed. Reg. 17546. In this case, Sherwin unlawfully removed such discretion from inspector Barrick when it denied Guzman section 103(f) rights, as requested by Barrick on November 13, 2014.

Respondent's additional argument that the safety interests of the temporary replacement workers have been protected during the lockout, and that the interests of the locked-out employees will be protected when they eventually return to work is unconvincing and falls short of the requisite, broad interpretation of section 103(f) favoring a representative for each group of miners, whose interests may not always align. Sherwin's argument ignores the fact that no miners' representative participated in inspections after the lockout for over three months. Fortunately, no accident occurred during this period when the plant was operated with replacement workers, who were primarily newly trained miners, with no previous mining experience. Tr. 58-59; *compare* Tr. 165-66 and n. 9 (referring to Gramercy explosion).

Furthermore, it is arguable in a labor dispute context, such as a lockout, that *temporary* replacement workers may be less concerned about appointing an aggressive advocate to represent their safety interests and may be more easily intimidated because of their temporary status than a permanent, albeit locked-out, miners' representative. Even if the temporary replacement workers are concerned with advocating on safety issues, they likely lack the site-specific knowledge possessed by permanent workers, as discussed above. Furthermore, the Mine Act is concerned about the safety of all miners, both permanent and temporary alike, and temporary replacement miners are entitled to benefit from the knowledge possessed by locked-out miners and their representative, even if the interests of the two groups do not always align in the labor relations context.

Finally, as noted above, only after inquiry from the undersigned during a pre-hearing conference call, did the temporary replacement workers eventually designate a member of the replacement contractor's management team to serve as a representative of miners and report through another manager to Sherwin's safety and health manager, who filtered the message back to the rank and file miners. Tr. 107 -08. In effect, two management representatives purported to "aid" the MSHA inspectors to uncover hazards during lockout inspections, although neither ever apparently pointed out a hazard, while management excluded Guzman, the miners' representative from the locked-out rank and file, who often pointed out hazards. Surely, section 103(f) was not designed to malfunction this way.

I discount Sherwin's attempt to claim that safety has improved because miners represented by the Steelworkers were locked out, and that the temporary replacement workers' commitment to safety has resulted in a noticeable improvement in Sherwin's safety record. Sherwin Br. 4. English testified that since the replacement workers began mining there has been an increased emphasis on safety, the overall health of the facility has improved, and he has received several compliments from various inspectors regarding the replacement workers. Tr. 86-87. In the absence of any concrete data provided by Sherwin, I must weigh English's testimony against inspector Barrick's testimony regarding the underlying impetus for any apparent improvement in safety.

Inspector Barrick testified that mine safety had been improving during the year prior to the lockout due to several factors. Barrick had seen improvement in 2014, after Sherwin developed a corrective action plan (CAP) in September 2013 and re-evaluated workplace examination requirements in conjunction with discussions with the MSHA district office. Tr. 38-39. As noted, the Mine had been informed that it was a POV candidate under section 104(e) because of its pattern of significant and substantial violations, primarily involving housekeeping matters such as guarding issues, electrical issues, and safe access issues. Tr. 40, 61, 141. After the lockout, MSHA changed its historical wall-to-wall inspection procedure to have an inspector present almost every day to intensify evaluation of small areas. Tr. 39. Sherwin was legally obligated to provide the temporary replacement miners with comprehensive training prior to their temporary employment, which it did. Tr. 140, 184; 30 C.F.R. part 48. Although Barrick acknowledged that the replacement workers had done a good job addressing housekeeping issues, most of the replacements were new miners with no previous mining experience. Tr. 58-60. In these circumstances, I reject any argument by Sherwin that mine safety improved because of the lockout and the exclusion of Guzman in contravention of section 103(f) of the Mine Act.

I also reject Sherwin's arguments that the Secretary's interpretation conflicts with federal labor policy under the NLRA. Sherwin Br. 19-20. Specifically, Sherwin argues that the Secretary's interpretation purportedly requires an operator to compensate a locked-out miners' representative in contravention of a non-precedential Advice memorandum from the NLRB's Office of General Counsel. Sherwin Br. 19-20, citing *Brighton Corp.*, 1984 WL 47445 (Feb. 29, 1984) (Advice Memorandum in Case 13-CA-23492). Sherwin further argues that the Secretary's interpretation forces Sherwin to allow a locked-out miners' representative to enter onto Sherwin's private property, and undermines Sherwin's ability to use an offensive lockout to exert lawful economic pressure during a labor dispute. Sherwin Br. 19-20.

Sherwin's arguments lack merit. As the Secretary persuasively rejoins on reply brief, section 103(f) does not require that a miner's representative receive pay; rather, it only requires that the miners' representative "suffer no loss of pay during the period of his participation in the inspection." Sec'y Reply Br. 6, citing 30 U.S.C. § 813(f). Since a locked-out miner is not entitled to be paid wages and fringe benefits during the lockout, even under the NLRB "authority" relied on by Sherwin itself, Sherwin need not pay the locked-out miners' representative for performing section 103(f) functions during the lockout because such a miner will not suffer a *loss* of pay while locked out. *Cf.* Sec'y Reply Br. 6. Further, Sherwin need only pay the temporary replacement representative, not the locked out representative, even though both participate in the inspection, because section 103(f) explicitly provides that "only one such

representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection.” 30 U.S.C. § 813(f).

Sherwin also argues, this time without citation to any NLRA authority, that the Secretary’s interpretation forces Sherwin to allow locked-out employees to enter its mine, thereby effectively interfering with its lawful right to use the lockout as an economic weapon. Sherwin Br. 20. *See generally, American Ship Building*, 380 U.S. 300, 311 (1965)(employer does not violate section 8(a)(1) or 8(a)(3) of the NLRA after a bargaining impasse has been reached by temporarily laying off or locking out employees for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position); *Harter Equipment, supra*, 280 NLRB at 597, *aff’d sub nom. Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987).

The Secretary counters:

It is unclear how permitting a miners’ representative to enter a mine for the exclusive purpose of joining a (supervised) inspection team noticeably diminishes an operator’s ability to use “the tools that the NLRB has allowed employers and unions to use.” *Id.* [citing Sherwin Br. 20] Even though the Secretary’s interpretation has the effect of allowing a union member to enter a mine when he would not otherwise be able to, the same was true in *Utah Power & Light* and *Kerr McGee*, which permitted union representatives who are not “miners” to serve as miners’ representatives. As those cases hold, the solution is not to invalidate the Secretary’s interpretation, but to permit the operator to protest if the miners’ representative engages in any (mis)conduct that goes beyond his or her role as an advocate for miners’ safety.

Sec’y Reply Br. 6.

I once again find myself in full agreement with the Secretary of Labor. As the Steelworkers persuasively argue on brief, there is no evidence that the Secretary improperly issued the Citation and Order at issue to affect the balance of power in the ongoing labor dispute or negotiations between Sherwin and the Steelworkers. Steelworkers Br. 12-15. In fact, I permitted Sherwin to pursue such inquiry at trial over objection from the Secretary and the Steelworkers. Tr. 15. Had there been proof that this was the Secretary’s actual motivation and not advancement of miner safety and health, the Secretary would arguably have been acting *ultra vires*. Tr. 15-19; *Compare NLRB v. Insurance Agents (Prudential Insurance Co.)*, 361 U.S. 477 (1960)(economic weapons are “part and parcel” of peaceful resolution of collective-bargaining disputes and NLRB exceeded its power by attempting to regulate the choice of economic weapons to equalize disparity in bargaining power).

Furthermore, Sherwin’s poorly articulated reliance on its private property rights under NLRA precedent to trump the statutory rights of an *employee* miners’ representative to represent

the interest of locked-out miners, and advance the purposes of mine safety and health under section 103(f) during a labor dispute, is not persuasive for several reasons. First and foremost, under the Mine Act, such property rights yield to a warrantless MSHA inspection. *Donovan v. Dewey*, 452 U.S. 594, 602 (1981). The miners' representative participates in an inspection party solely to aid that inspection. 30 U.S.C. § 813(f). In the pervasively regulated mining industry, the warrantless intrusion of an MSHA inspector and representative "aides" to ensure miner safety and health trumps private property rights. *Donovan v. Dewey*, 452 U.S. at 599-600; compare *Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447, 450 (10th Cir. 1990)(even nonemployee union representative entitled to exercise walkaround rights under section 103(f)). Sherwin has advanced no compelling reason why this result should not hold true for an employee miners' representative like Guzman during a lockout.

As shown above, Respondent's arguments rely heavily on issues directly related to the National Labor Relations Act (NLRA). For the reasons discussed *supra*, there are adequate and independent logical and Mine Act bases for rejecting Respondent's labor law claims. However, even if I address Respondent's inchoate arguments under the NLRA, I see no reason why Guzman's walkaround rights should be limited. Rather, allowing Guzman to participate in the inspection party during a lockout is compatible with the NLRA.

By its plain terms, the NLRA confers statutory rights on employees, not unions or nonemployee organizers. *Lechmere, Inc. v. NLRB*, 502 U.S. 522, 532 (1992). There, the Supreme Court stated:

Thus, while "[n]o restriction may be placed on the employees' right to discuss self-organization *among themselves*, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline," [citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)](emphasis added) (citing *Republic Aviation Corp. v. NLRB*, 324 U. S. 793, 803 (1945)), "no such obligation is owed nonemployee organizers," 351 U. S. at 113.

Lechmere, 502 U.S. at 533. Thus, under the NLRA, as opposed to the Mine Act, an employer need not be compelled to allow *nonemployees* (usually union organizers) onto its property, except in the rare instance where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." *Id.* at 537, citing *Babcock*, 351 U.S. at 112 (1956). Significantly, in *Lechmere*, the Court reiterated *Babcock's* admonition that accommodation between *employees'* statutory rights and employers' property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Id.* at 534, citing *Babcock*, 351 U. S. at 112.

In the Mine Act section 103(f) context, the statutory right of a miners' representative to be given an opportunity to accompany the inspector to aid the inspection and to participate in pre- or post-inspection conferences held at the mine during a lockout can be maintained with little destruction of the employer's property interests, which already must yield to a warrantless inspection. In this case, Guzman, the miners' representative for the locked-out miners, is still an employee, who cannot be permanently replaced, and is exercising a statutory right at the

discretion of the MSHA inspector under section 103(f) in furtherance of the overall purpose of the Mine Act to ensure miner safety and health.

Finally, Sherwin has failed to establish that the exclusion of Guzman as a miners' representative during a post-lockout inspection is necessary to maintain production or discipline. *Cf., NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 113, *citing Republic Aviation Corp. v. NLRB*, 324 U. S. at 803. Although given a full opportunity to create a factual record, Sherwin failed to offer any evidence that Guzman, or any other miner represented by the Steelworkers, engaged in sabotage. Further, Sherwin has not cited a single instance where a miners' representative has engaged in sabotage, an act that is made less likely by the fact that miners' representatives usually join inspection teams that include an MSHA inspector and an operator's representative(s). As noted, the Secretary's implementing regulations and MSHA's Interpretive Bulletin concerning section 103(f) of the Mine Act give MSHA inspectors' broad discretion and control over proper inspection procedures in order to promote safety and avoid worksite disruptions. This is sufficient to counter Sherwin's unsubstantiated concern about abuse during inspections or conferences by locked-out miners' representatives. *Cf., In the Matter of Establishment Inspection of Caterpillar Inc.*, 55 F.3d 334, 339-40 (7th Cir. 1995).¹¹

¹¹ Although interpreting a differently worded statute, it is instructive that the Seventh Circuit and the Occupational Safety and Health Review Commission (OHSRC) have rejected similar concerns with respect to strikers invoking the walk-around provision set forth in the Occupational Safety and Health Act. That provision, 29 U.S.C. § 657(e), states:

“[s]ubject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) of this section for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.”

Although the OSHA walk-around provision applies to “employees” without reference to whether they are “working,” the Secretary has consistently determined that strikers are still employees who must be allowed to accompany OSHA inspectors to aid their inspections and ensure that inspection procedures are unaffected by labor disputes. *See In re: Establishment Inspection of Caterpillar Inc.*, 55 F.3d 334, 338-39 (7th Cir. 1995); *Rockford Drop Forge Co. v. Donovan*, 672 F.2d 626, 631-32 (7th Cir. 1982). In *Caterpillar*, the Seventh Circuit, recognized that “[t]he purpose of the [Occupational Safety and Health Act] is to inspect for safety hazards and violations of OSHA regulations,” and declined to “force employees to choose between exercising their National Labor Relations Act right to strike and their OSHA right to accompany inspections.” *Caterpillar Inc.*, 55 F.3d at 340, (citing *Marshall v. Barlow's Inc.*, 436 U.S. 307, 309 (1978)). Similarly, as the Seventh Circuit in *Rockford Drop* recognized, “[s]urely [striking] employees like these should not be disenfranchised from preserving the safety of the workplace where they hope to return.” *Rockford Drop*, 672 F.2d at 632.

Furthermore, as the Secretary highlights on reply brief, “courts have held that “[w]hile . . . walk-around rights may be abused by nonemployee representatives, the potential for abuse does not require a construction of the Act that would exclude nonemployee representatives from exercising walk-around rights altogether. The solution is for the operator to take action against individual instances of abuse when it discovers them.”” Sec’y Reply Br. 4, quoting *Utah Power & Light Co. v. Sec’y of Labor*, 897 F.2d 447, 450 (10th Cir. 1990); see also *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1278 (10th Cir. 1995) (same); *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 1264 & n.12 (similar); see also *Kerr-McGee Coal Corp. v. Sec’y of Labor*, 15 FMSHRC 352, 361 (Mar. 1993). Here, Sherwin failed to establish any pre-lockout misconduct by Guzman in his role as miners’ representative, and Sherwin deprived itself of the opportunity to take post-lockout disciplinary action against Guzman for any misconduct because Sherwin unlawfully excluded Guzman from the inspection party.

Finally, the Secretary’s statutory interpretation in this case, at least in the context of a lockout, is consistent with Commission and judicial precedent giving a broad interpretation to the walk-around provision to permit miners to designate non-miner, third parties as walk-around representatives in order to effectuate the safety purposes of the Mine Act. See *Thunder Basin*, 56 F.3d at 1280 (deferring to the Secretary’s interpretation that the Act permits a nonemployee union agent to serve as a miners’ representative); *Utah Power & Light*, 897 F.2d at 450 (concluding that section 103(f) “confers upon the miners the right to authorize a representative for walk-around purposes without any limitation on the employment status of the representative”); *Kerr-McGee*, 40 F.3d at 1263 (granting deference to Secretary’s interpretation allowing non-elected labor organization to serve as miners’ representative at non-unionized mine because “in view of Congress’ clear concern about miners’ safety, the Secretary’s broad interpretation of the term is consistent with congressional objectives.”). These cases demonstrate the validity and consistency of the policy concerns supporting the Secretary’s current and reasonable interpretation of the Mine Act during a lockout.

In short, the Secretary’s interpretation recognizes the “important role section 103(f) plays in the overall enforcement scheme,” *Consolidation Coal*, 3 FMSHRC at 618, as well as the key position that both miners and miners’ representatives serve in furthering the “general health and safety purposes of the Mine Act,” *Thunder Basin*, 56 F.3d at 1278. As explained herein, the Secretary’s interpretation in the context of a lockout is permissible and fully consistent with the Mine Act’s overarching purpose to protect miner safety and health at all times, and with the specific purposes of the walk-around provision in furtherance of that primary statutory objective. Accordingly, I affirm the 104(a) Citation and 104(b) Order, as written, and I affirm the proposed penalty of \$112.

V. Civil Penalty

The Act requires that when evaluating a civil monetary penalty the Commission shall consider six statutory penalty criteria: 1) the operator’s history of previous violations; 2) the appropriateness of the penalty to the size of the business; 3) the operator’s negligence; 4) the operator’s ability to stay in business; 5) the gravity of the violation; and 6) any good faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). The Commission is not required to give equal weight to each of the criteria, but

must provide an explanation for a substantial divergence from the proposed penalty under the criteria. *Spartan Mining Co.*, 30 FMSHRC 699. 723 (Aug. 2008).

Here, the Secretary provided a proposed assessment of \$112. The Commission has frequently recognized that section 110(i) of the Mine Act confers upon the Commission the authority to assess all civil penalties provided under the Act. See *Wade Sand & Gravel Company*, Docket No. SE 2013-120-M, slip op. (Sep. 16, 2015); and *Mining & Property Specialists*, 33 FMSHRC 2961, 2963 (Dec. 2011). Neither the Judge nor the Commission is bound by the proposed assessment. 29 C.F.R. § 2700.30(b); *Wade Sand & Gravel Company*, *supra*; *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) (“[Neither] the ALJ nor the Commission is bound by the Secretary's proposed penalties... we find no basis upon which to conclude that [MSHA's Part 100 Penalty regulations] also govern the Commission.”). However, while the Secretary’s proposed penalty is not binding, the Commission has recognized that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *Performance Coal Co.*, 2013 WL 4140438, *2 (Aug. 2, 2013); *Spartan Mining Co.*, 30 FMSHRC *supra*; *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000).

In light of the Commission authority described above, I take pains to ensure that my penalty assessments are as transparent as possible. As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary’s assessment formula as a reference point. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Further, unique aggravating or mitigating circumstances may call for higher or lower penalties, and will be taken into account under my independent analysis of the criteria set forth in section 110(i) of the Mine Act and Commission precedent. Here, I find that the penalty proposed by the Secretary of \$112 is consistent with the statutory criteria in section 110(i) of the Mine Act. 30 U.S.C. § 820(i). Accordingly, I assess a \$112 civil penalty against Respondent. If Sherwin continues to refuse to abate the violation, MSHA may assess daily failure-to-abate penalties. See 30 U.S.C. § 820 (b)(1), 30 U.S.C. § 813(f), and Interpretive Bulletin 43 Fed. Reg. 17,547, *supra*.

VI. ORDER

For the reasons set forth above, I **AFFIRM** Citation No. 8778065 and Order No. 8778066, as written. It is **ORDERED** that the operator provide Joe Guzman with any training that he needs since the lockout to perform his miners' representative functions under section 103(f) of the Mine Act. It is further **ORDERED** that the operator pay a civil penalty of \$112 within 30 days of this decision.¹²

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

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¹² Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 25, 2015

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

v.

WARRIOR INVESTMENTS COMPANY,
INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE-2014-347
A.C. No. 01-03419-349329

Mine: Maxine-Pratt Mine

DECISION AND ORDER
AND ORDER APPROVING SETTLEMENT

Appearances: C. Renita Hollins, Esq., U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee for Petitioner

J.D. Terry, Esq., Warrior Investments Company, Inc., Jasper, Alabama for
Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon 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. § 815(d). This case involves 12 citations, Nos. 8526290, 8526291, 8526292, 8527596, 8527598, 8528533, 8528534, 8528535, 8528536, 8528537, 8528538, and 8528539. An evidentiary hearing was held in Birmingham, Alabama on August 19, 2015. The parties introduced testimony and documentary evidence, and witnesses were sequestered.¹

In my view, as expressed to the parties in three pre-hearing conferences, this case should not have been tried. Unfortunately, both parties were intransigent and unwilling to compromise, even during a formal settlement conference conduct by my clerk at my office. Accordingly, unnecessary time and resources were devoted to this litigation. After extensive prodding, the

¹ P. Exs. 1-13, R. Exs. 2-6, and Joint Exhibit 1 were received into evidence. Tr. 9-11, 15, 30, 136-139. Respondent's Exhibit 1 was marked at hearing, but was later withdrawn. Tr. 12, 136.

parties announced shortly before the outset of the hearing that five of the citations had settled. After opening statements at the hearing, I suggested possible settlement terms and again strongly suggested that the parties settle the remaining citations. The parties agreed to settle an additional six citations. Only Citation No. 8528536 remained in dispute. The outline of a Settlement Agreement encompassing the other 11 of those 12 citations was placed on the record and the undersigned left the record open for receipt of the written Settlement Agreement.² Tr. 14, 18.

The remaining citation, No. 8528536, alleges that a non-functioning parking brake on a scoop at Warrior Investments Company, Inc.'s Maxine Pratt Mine constituted a violation of 30 C.F.R. § 75.523-3(b)(4). That regulation requires that "(b) Automatic emergency-parking brakes shall— (4) Hold the equipment stationary despite any contraction of brake parts, exhaustion of any non-mechanical source of energy, or leakage..."

The issues presented are whether Respondent violated 30 C.F.R. § 75.523-3(b)(4), whether any such violation would be highly likely to result in a fatality, whether the violation was properly designated as significant and substantial (S&S), and whether the proposed penalty of \$2,282.00 is appropriate.

As explained herein, I find that the cited parking brake failed to hold the scoop stationary as required. Accordingly, I find a violation of 30 C.F.R. § 75.523-3(b)(4). On the instant record, I further find the violation to be significant and substantial, and I affirm the inspector's findings of moderate negligence, with one person highly likely to suffer fatal injury. Accordingly, Citation No. 8528536 is affirmed, as written, and the proposed penalty of \$2,282.00 is assessed after consideration of the criteria set forth in section 110(i) of the Act.

Based on the entire record, including the parties' post hearing briefs and my observation of the demeanor of the witnesses³, I find the following:

II. Stipulations

1. Warrior Investments Company, Inc., Mine ID 01-03419, is subject to the Federal Mine Safety and Health Act of 1977 (the "Mine Act") as amended.
2. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Mine Act.

² In a further display of uncooperative behavior, the parties continued to fight over the terms of the settlement after the hearing. As a result, the settlement documents were not filed until September 22, 2015, well over a month after the hearing.

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.

3. Warrior Investments Company, Inc., is an “operator” as defined in Section 3(d) of the Mine Act.
4. Warrior Investments Company, Inc. operations affect interstate commerce.
5. Citations at issue in this proceeding were served by certified mine inspectors acting in their official capacity as authorized representatives of the Secretary of Labor during the time of the inspection and when the citation was issued.
6. Warrior Investments Company, Inc. demonstrated good faith in abating the cited conditions.
7. These matters would not affect Warrior Investments Company, Inc.’s ability to remain in business.

P. Ex. 11; Tr. 20.

III. Motions to Dismiss

A. First Motion to Dismiss

Before addressing the substantive issues in this matter, it is first necessary to deal with two Motions to Dismiss filed by Respondent. For the reasons that will follow, both of those motions are without merit and are hereby denied.

Respondent filed its initial Motion to Dismiss on August 13, 2015. In that motion, Respondent alleges that the Secretary’s counsel failed to comply with the Order of Assignment and Pre-Hearing Order as well as the Order of Assignment to Settlement Attorney. R. Ex. 3. Specifically, Respondent argues that the Secretary refused to discuss settlement, failed to participate in the settlement conference in good faith, failed to file a subpoena in a timely fashion, and filed the Pre-Hearing Report on August 6, 2015, two days after the filing date. *Id.*

On the day the Motion to Dismiss was filed, I held a conference call with the parties. In that conference call, the Secretary’s counsel refuted the allegations made in the Motion and offered to provide documentation to support her positions. Specifically, Secretary’s counsel claimed that she had discussed settlement and made offers in good faith when her client was available, Conference Call (CC) Transcript at 7-9 of 35. In fact, she demonstrated the Secretary’s willingness to compromise by averring that five of the citations had settled. CC Tr. at 8 of 35.

During the call, I rejected Respondent’s arguments in that call and stated that the Motion would be denied. CC Tr. at 10 & 34 of 35. I explained that the denial was appropriate because the Secretary had settled several citations and I was not convinced that she was violating my Orders. CC Tr. at 30 of 35. At hearing, I further explained that I did not observe any violation of any Orders and that I was precluded from ruling on issues arising from the confidential settlement negotiations with the settlement attorney. Tr. 142-143. Also, with respect to the Pre-

Hearing Order, Commission records conclusively show that the Secretary filed the required document on the deadline, August 4, 2015. In short, Respondent's first Motion to Dismiss was without merit and appropriately denied.

B. Second Motion Dismiss

1. Allegations And Testimony Regarding Second Motion To Dismiss

On August 18, 2015, the first day of the hearing, Respondent filed a Second Motion to Dismiss. In that motion, Respondent argues that on February 27, 2015, former foreman Josh Holbrook was deposed by the Secretary's counsel. R. Ex. 2. Respondent's counsel was not available for that deposition because of a pre-existing conflict, of which the Secretary was aware. Respondent argues that during that deposition, Holbrook provided the Secretary with notes that Holbrook took contemporaneously with Smith's investigation of Citation No. 8528536. R. Ex. 2. Respondent further argues that the Secretary never returned those notes to Holbrook. More importantly, Respondent argues that the Secretary refused to make those notes available during discovery. *Id.* As a result, Respondent asks for dismissal of the Secretary's civil penalty proceeding with respect to Citation No. 8528536.

In order to determine the validity of Respondent's allegations, I subpoenaed Holbrook and he testified at hearing. Tr. 128-130, 191. Holbrook was questioned extensively regarding his notes. Specifically, Holbrook testified that he took notes every day for his personal records while working at the Mine, and he placed extra emphasis on those notes when inspectors were present. Tr. 92, 154, 165-167. His notes covered the citations received in this matter, as well other information, and said notes ranged from detailed to vague. Tr. 153-154, 165. Holbrook kept his notes in a leather wallet, and changed the paper as necessary. Tr. 155, 166.

Holbrook testified that he took notes on the day of the instant citation. Tr. 152-153. However, those notes were later lost and he could not recall when that occurred. Tr. 152-153, 156. Holbrook recalled the notes and characterized them as a "rough estimate" of the citation. Tr. 161. He testified that the notes included no additional descriptions of the conditions present. Tr. 156, 191. The notes also included loose copies of the inspector's citations. Tr. 156. At times, Holbrook's notes included points of disagreement with the inspector, but Holbrook testified that there were not any points of disagreement with respect to the citation at issue. Tr. 191-192. If he had disagreed with the citation, there would have been notes to that effect, but Holbrook testified that his lost notes did not reflect anything other than his agreement with the instant citation. Tr. 192-93.

Holbrook did have possession of his notes and discussed them when he was deposed by the Secretary's counsel in February 2015. Tr. 153, 165-168, 189. At that time, all of Holbrook's notes were in his notebook in chronological order. Tr. 168. At the deposition, the Secretary's counsel asked if she could make a copy of his notes, although Holbrook could not recall if copies

were actually made. Tr. 153-154, 168-169. Holbrook believed he pulled the notes out of the notebook and gave the loose notes to CLR Brandon Russell to make copies.⁴ Tr. 157, 169, 190.

After Holbrook testified pursuant to subpoena, Russell was called to testify by the undersigned. Tr. 194-195. When asked whether Holbrook had given Russell his notes for copying at the deposition, Russell testified that that was possible, but Russell did not recall ever receiving the notes or making copies. Tr. 195-196. Russell opined that if he had taken the notes for copying, he would have given them back to Holbrook afterwards. Tr. 196-197. Holbrook testified that his notes may have been returned to him, but Holbrook could not locate them after his deposition. Tr. 169, 190-191. Holbrook testified that he never had reason to look at his notes again after the deposition. Tr. 154, 190.

At hearing, at the request of the undersigned, the Secretary's counsel made a representation as an officer of the court as to her recollection about what happened to Holbrook's notes at the deposition. She stated that she saw Holbrook reviewing his notes and initially asked if she could make copies. Tr. 197-198. As the deposition progressed, however, it became apparent that his notes were not detailed and did not contain any worthwhile information. Tr. 198. As a result, no copies of the notes were made and the Secretary's counsel never took possession of them. Tr. 199-200.

2. Denial Of Respondent's Second Motion To Dismiss

Under Commission Rule 56, "[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56. Clearly, an eyewitness' contemporaneous notes would be relevant, non-privileged, and generally admissible. Therefore, Respondent made a proper discovery request. Further, it is undisputed that the Secretary failed to provide the requested notes. However, despite these circumstances, Respondent's Second Motion to Dismiss must fail for two reasons.

First, a party can only provide requested discovery documents that are in its possession or control. At hearing, Russell testified that he did not recall receiving Holbrook's notes or making copies. Tr. 195-196. Similarly, the Secretary's counsel as officer of the Court, represented that although she initially asked to make copies of the notes, she ultimately decided not to do so. Tr. 197-200. Finally, Holbrook testified that he thought that he may have given his notes to Russell, and that Russell may have returned them. Tr. 169, 190-191, 196-197. Holbrook simply did not recall what happened to his notes after the meeting and had no reason to look for them. Tr. 154, 169, 190. Based on this testimony, I find it most likely that Holbrook simply misplaced his loose notes after his deposition.

Regardless of what actually happened to Holbrook's notes, Respondent failed to establish that the Secretary was withholding evidence. The motion was based solely on Respondent's uncorroborated suspicion. Therefore, dismissal of this matter is inappropriate.

⁴ Brandon Russell was an MSHA Conference and Litigation Representative, who was present at Holbrook's deposition and at the hearing. Tr. 195.

In addition, Commission Rule 59 provides that “[u]pon the failure of any person, including a party, to respond to a discovery request or upon an objection to such a request, the party seeking discovery may file a motion with the Judge requesting an order compelling discovery.” 29 C.F.R. § 2700.59. Only after a party has failed to comply with an order compelling discovery may the judge take actions that are “just and appropriate, including ... dismissing the proceeding in favor of the party seeking discovery.” *Id.* In the instant matter, Respondent never filed a motion requesting an order to compel discovery. Therefore, I lack the authority to dismiss this matter in the manner urged by Respondent.

Essentially, Respondent decided to spring the Motion to Dismiss on the Secretary without following the proper procedure. If Respondent wishes to sanction the Secretary for allegedly failing to follow the rules, Respondent must also follow the rules in pursuing such sanction. Further, if Respondent had followed the proper procedure, and worked with the Secretary toward amicable resolution of outstanding issues rather than quarrel with the Secretary every step of the way, it may have learned sooner that the Secretary was not in possession of the documents.

I further note that the consequences of the missing notes were somewhat mitigated by my issuance of a subpoena compelling Holbrook to testify at hearing. While Holbrook’s notes may have shed light on Holbrook’s testimony, he was able to testify to the general content of his notes, if not the details. He credibly testified that the notes contained rough descriptions of the citations and that the notes would only confirm that he agreed with the inspector’s assessments in all respects. Tr. 156, 191-193. Accordingly, based on this testimony, I find alternatively that any failure by the Secretary to turn Holbrook’s notes over during discovery was harmless error that does not warrant granting Respondent’s eleventh-hour motion to dismiss. Accordingly, Respondent’s motions to dismiss are denied.

Having determined that dismissal in this matter is inappropriate, I now turn to the substantive matters at issue here.

IV. Findings of Fact

MSHA Inspector Todd Smith⁵ conducted an EO-1 inspection of Maxine-Pratt Mine on March 6, 2014.⁶ Tr. 69-70, 91. The mine ranges between 30 inches and 56 inches in height with an average height of 42 inches. Tr. 79, 160. The terrain in the mine is largely flat with some small, rolling hills. Tr. 85, 93-94, 182-183. There is between 40 and 200 feet of cover above the mine and at least two additional mines 60 and 460 feet below. Tr. 94.

⁵ At the time of the hearing, Smith had been employed as a coal mine inspector at MSHA for about three years. Tr. 65. His prior mining experience was limited to about a year working as a general laborer at CONSOL Buchanan No. 1 Mine. Tr. 67-69. He also spent time at a mine owned by his father, although he did not work there. Tr. 68.

⁶ An EO-1 inspection is a normal, quarterly, general inspection. Tr. 70.

During the instant inspection, inspector Smith and Josh Holbrook, approached a scoop located at the feeder in Section 35 West and found the scoop operator and helper preparing to load supplies or material into the scoop bucket.⁷ Tr. 73, 75-76, 91, 93, 95-96, 108, 115, 158, 160. The scoop was approximately two feet tall, 16-22 feet long, 8-12 feet wide, and likely weighed around 2,000 pounds when unloaded, and 3,500 pounds when loaded. Tr. 79-80, 86-87, 160-161. This particular scoop was not loaded and it was unclear what supplies or material the miners were preparing to place in it. Tr. 86-87, 97-98. The scoop did not appear to be moving, and it was unclear whether it was energized when Smith and Holbrook approached. Tr. 96, 113, 117. There was a great deal of equipment in the area around the scoop, including section pumps, power boxes, belts, park rides, crib blocks, and toolboxes. Tr. 89-90, 179.

Smith and Holbrook decided to conduct an inspection of the scoop's braking system at the location in which they found the machine. Tr. 73, 86, 98, 106, 108, 158. The scoop was sitting on a small roll, or hill, in the mine. Tr. 79, 86, 108. There were two brakes on the scoop, a service brake and a parking brake. Tr. 174. The parking brake was also used as an emergency braking system. Tr. 174. The inspection was designed to test whether the parking brakes were capable of stopping the machine and holding it stationary within five seconds of application. Tr. 74, 101, 107. During the test, inspector Smith told the scoop operator to avoid the service brake to ensure that only the parking brake was tested. Tr. 110.

To conduct the inspection, Smith told the scoop operator to tram the machine forward and hit the "panic bar." Tr. 73, 77, 98, 106, 162. The panic bar was designed to de-energize the scoop and automatically set the brake. Tr. 73-74. Smith and Holbrook both testified that during the test, the operator hit the panic bar and the machine continued to move; it did not stop within five seconds. Tr. 74, 78, 86, 101, 162, 173. Smith believed the panic bar did not set the brake. Tr. 98-99, 101. Holbrook believed that the parking brake set, but failed to stop the scoop. Tr. 174, 184. Smith recalled that he then asked the scoop operator to reverse, set the brake manually, and try again.⁸ Tr. 78. When the operator did so, the de-energized scoop rolled once again. Tr. 74-75, 78-79, 101-102, 104-105, 108-109. Smith testified that the scoop rolled 5 to 10 feet, and Holbrook testified that it rolled between 3 and 8 feet and only stopped when the scoop operator lowered the bucket. Tr. 79, 104, 109, 162, 175, 184, 193. Smith never tested the scoop without the operator in it because the brakes could not hold the machine while the operator was controlling it. Tr. 111.

After the test, the scoop operator began to back up and Smith and Holbrook noticed that the scoop moved despite the fact that the brake was still engaged. Tr. 74, 102-105, 111, 159.

⁷ As noted, Holbrook testified at the outset of the second day at the hearing pursuant to a subpoena issued by the undersigned after the first day of hearing. See Tr. 128-130, 191. At the time of the hearing, Holbrook was employed at North Pratt Mine. Tr. 146. He had previously worked as a foreman and assistant to Warrior's superintendent from August 2012 to March 2014. Tr. 146-147, 164. Holbrook had 14 years of mining experience and held a variety of jobs and certifications at various mines in three states. Tr. 148-150, 163-164.

⁸ Holbrook did not recall this second part of the test, and he was not sure that the scoop had a manual activation for the parking brake. Tr. 176-178, 184.

Holbrook testified that the machine would not stop “whatsoever.” Tr. 159. Smith recorded these facts in his inspection notes.⁹ Tr. 100.

After the testing, Smith issued a section 104(a) Citation No. 8528536 (P. Ex. 5). Tr. 71, 99. The citation alleged a violation of 30 C.F.R. § 75.523-3(b)(4) and states:

The parking brake for the S&S 482 scoop (Co#1) located on 35 West section would not hold the equipment stationary. When inspected, the parking brake would set but would not prevent the equipment from further movement. This violation poses a hazard to miners working near or around the scoop of being struck or pinned by the machine if left unattended. This scoop is the primary scoop for the 35 West section.

P. Ex. 5. Smith testified that he issued the citation because the brakes were supposed to hold a fully-loaded piece of equipment on the steepest grade at the mine, and they could not hold an empty scoop on a small incline. Tr. 87, 106. At hearing, former Warrior representative Holbrook testified that he agreed with Smith’s determination regarding the issuance of the citation. Tr. 162, 192.

The citation was designated as “highly likely” to result in injury. P. Ex. 5. Smith testified that this designation was appropriate because the brakes on the scoop did not work, there were people working around and loading the scoop, and the low height of the mine limited visibility, create multi-directional sound, and increased exposure. Tr. 83, 90-91, 119-120. Smith testified that the scoop, if left unattended, would roll, strike a miner, and cause crushing injuries. Tr. 80-81. Smith testified that a miner could be crushed between the scoop and the rib or between the scoop and another piece of equipment. Tr. 90. Further, he testified that miners often left their scoops while working, and it was normal for the scoop to be left energized at those times. Tr. 80-81, 113. Although miners were supposed to de-energize the scoop, it would take 20-30 seconds to re-energize the scoop if it was turned off and they did not always do so. Tr. 114-118, 180-181. Smith testified that several fatalities occurred each year in this manner. Tr. 81. At hearing, Holbrook agreed with Smith’s determination regarding likelihood of injury. Tr. 163. However, neither Smith nor Holbrook could recall any serious injuries involving equipment at the Maxine-Pratt mine. Tr. 119, 186.

Holbrook testified that Respondent trained its miners in the proper procedure for operating scoops. Tr. 179. Under industry best practices, the scoop bucket should be on the ground and facing the rib. Tr. 115-116, 118-119, 180-182. Holbrook testified that placing the bucket down would take pressure off the tires and render movement and injury impossible. Tr. 183, 185-186. He opined that taking such safety precautions would insure that the scoop would not hurt anyone. Tr. 188.

⁹ Specifically, Smith wrote, “[t]he parking brake on the S&S 482 scoop, company No. 1, located on 35 West section would not hold the equipment stationary when inspected. Parking brake would set, but would not prevent further movement. The scoop would roll after set and would tram when operator applied power.” Tr. 100.

In the instant matter, the bucket was down when Smith arrived and it was raised for the test. Tr. 117, 184. However, both Smith and Holbrook testified that miners did not always follow best practices. Tr. 121, 180-182. In fact, Holbrook recalled instances where miners failed to follow their training and jumped out of scoops without putting their buckets down. Tr. 193. Further, in the instant situation, the scoop was not facing the rib. Tr. 117-118.

The citation was also designated as S&S. P. Ex. 5. Smith testified that this designation was appropriate because the parking brake would not hold the equipment on uneven terrain and contributed to the hazard that the scoop would move and crush a miner. Tr. 83-84. At hearing, Holbrook testified that he agreed with Smith's determination regarding the S&S designation. Tr. 163.

The citation was also designated as "fatal." P. Ex. 5. Smith testified that this designation was appropriate because the 42-inch height of the mine meant that miners would be crawling and their vital areas (head and chest) would be exposed to the crushing force of moving or rolling equipment. Tr. 84-85, 120. Further, Smith emphasized the history of such fatalities in the industry. Tr. 85. In addition, the size of the equipment supported his "fatal" designation. Tr. 121-122.

The citation was also designated as affecting "one" person. P. Ex. 5. Smith testified that this designation was appropriate because either the scoop operator or another miner would be in the area. Tr. 88. Smith testified that generally at this mine, scoop operators work alone and exit their machines to collect material. Tr. 88-89. While doing so, they typically leave the machine on, with the brake set. Tr. 88-89. Smith testified that the cited scoop with the defective parking brake would have struck the operator in such a scenario. Tr. 89.

The citation was also designated as resulting from Respondent's "moderate" negligence. P. Ex. 5. Respondent's counsel conceded that if the citation was valid, it resulted from Warrior's moderate negligence. Tr. 88.

Finally, a \$2,282.00 civil penalty was proposed by MSHA. P. Ex. 5.

V. The Parties' Closing Arguments

At the close of the hearing, the parties agreed to forego post-hearing briefs. Tr. 200-201. Instead, the parties offered closing statements in which they summarized their legal arguments.

The Secretary contends that Respondent violated the cited standard because the parking brake on the cited scoop failed and would not hold the equipment. Tr. 201. The Secretary also argues that a fatal injury was highly likely because of the mine height, the size of the scoop, the fact that miners were on foot nearby, the fact that other equipment was near the scoop, the fact that nothing was present to secure the scoop, and the fact that the scoop was tested while unloaded and only on a slight incline. Tr. 201-203. The Secretary emphasizes that both inspector Smith and Holbrook agreed that the Citation was properly written. Tr. 203.

The Respondent argues that the Citation should be vacated because the scoop was improperly tested while energized. Tr. 205-206. Respondent argues that it was improper to test the scoop while it was unloaded in the location where cited with an operator at its controls, rather than when loaded and unattended on the steepest incline at the Mine. Tr. 42-43, 205. Respondent also notes that Smith and Holbrook testified inconsistently on whether the panic bar that is used to activate the cited parking brake was effective. Tr. 204. Respondent further argues that an injury was not highly likely to occur because it was common practice for the scoop operator to de-energize the scoop, face the scoop toward the rib, and place the scoop bucket on the ground when exiting, thereby making movement impossible. Tr. 207-208.

VI. Conclusions of Law and Legal Analysis Re-Affirming Preliminary Bench Decision

Following the hearing, and after considering record evidence and opening and closing statements from both parties, I made preliminary conclusions and findings regarding Citation No. 8528536. Specifically, I stated the following at hearing:

I am going to affirm the citation as written and the proposed penalty unless there's any aggravating factors that would increase the penalty. I will fully explain my decision in my written decision which will follow. The testimony of the inspector was essentially un rebutted by any witness from the Respondent. It was essentially corroborated by the testimony from Mr. Holbrook this morning. And the Court doesn't have any choice in light of those facts except to affirm the citation as written. And that's what I'm going to do. I'm going to find that the violation was—was a violation of the standard because it did not hold the equipment stationary despite any contraction of brake parts. It was a discrete safety hazard that the equipment would move in a mine which was only 40 to 56 inches in height. There was exposure of the scoop operator and a miner at the time of the incident. I'm going to find that it was highly likely under the facts as set forth by the inspector, and as affirmed by Ms. Hollins in her closing remarks, that highly likely that the violation contributed to a hazard; i.e., the scoop moving, that was highly likely to result in injury to a miner, the injury would be serious in nature. There would be crushing injuries either when the scoop moved and pinned the miner against another piece of equipment or against a rib. And I am likely to affirm the penalty as written, \$2,282.00, consistent with the criteria in Section 110(i).

Tr. 209-210. Having carefully reviewed the record, I affirm my preliminary findings and conclusions, as set forth below.

Based upon further reflection and review of the transcript, I find that Respondent violated 30 C.F.R. § 75.523-3(b)(4) because the parking brake on the 482 scoop (Co#1) failed to hold the

machine stationary after application. Smith and Holbrook's testimony regarding this violation is essentially un rebutted. Specifically, during a test of the parking brake, the operator hit the panic bar and the scoop continued to move. Tr. 74, 78, 86, 101, 162, 173. Smith testified that the scoop was then stopped and the parking brake was manually set. Tr. 78. The parking brake, however, failed to hold the machine in a stationary position; it began rolling again while it was de-energized. Tr. 74-75, 78-79, 101-102, 104-105, 108-109. Holbrook testified that the machine rolled at least three feet and Smith testified that it roiled perhaps as much as ten feet. Tr. 79, 104, 109, 162, 175, 184, 193.

I reject Respondent's argument that the scoop was improperly energized during the test and therefore the citation should be vacated. As discussed *supra*, Smith testified credibly that the scoop was de-energized during the test. Tr. 79, 104. Respondent presented no evidence at hearing to rebut this testimony. Respondent's entire argument apparently rests on a section of Smith's notes where he wrote, "[t]he scoop would roll after set and would tram when operator applied power." Tr. 100. However, Smith credibly explained that this reference in his notes described the fact that the scoop easily reversed under power while the brake was set, showing the degree to which the brake's stopping power was diminished. Tr. 74, 102-105, 111. The note did not refer to the test itself.

I similarly reject Respondent's argument that the scoop was improperly inspected because it not tested while loaded and left unattended on the steepest incline at the Mine. As I explained at hearing, the fact that the inspector did not test on the steepest grade while the scoop was fully loaded showed that the brakes were in a worse condition than necessary to prove a violation of the cited standard. Tr. 112. Similarly, when inspector Smith was asked whether he tested the scoop while unattended, Smith replied, "Lord no," and explained that because the scoop would not remain stationary with an operator, he did not want to risk testing it when unattended. Tr. 111. I find that the failure of the parking brake to hold the machine stationary at grade, with less than full load or weight, necessarily meant that the parking brake would fail a more stringent test under the requirements of the standard.

Finally, I reject Respondent's argument that the witnesses differed on whether the panic bar used to activate the cited parking brake was effective. Respondent is correct that there were some minor differences in Smith and Holbrook's testimony regarding the panic bar. Specifically, Smith testified that the panic bar did not set the brake, while Holbrook testified that the parking brake set, but failed to stop the scoop. Tr. 98-99, 101, 174, 184. Holbrook also did not recall whether Smith had the scoop operator manually set the brake to conduct a re-test. Tr. 176-178, 184. These apparent inconsistencies, however, were substantially immaterial. As discussed at length *supra*, the un rebutted testimony of both Smith and Holbrook showed that at some point, the brake was activated and failed to hold the de-energized scoop in a stationary position. Neither witness had any doubt that the scoop failed the test. Whether each witness could recall the exact minutiae of the inspection a year and a half after the fact is not significant. As such, Respondent's arguments in no way undermine the substantial evidence in the record that the scoop's parking brake flunked the test.

In sum, based on my review of the entire record, I find that the Secretary has proven by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.523-3(b)(4) because the parking brake on the scoop failed to hold the machine stationary after application

I similarly conclude that the violation of 30 C.F.R. § 75.523-3(b)(4) was significant and substantial in nature. The violation contributed to a discrete crushing hazard that was reasonably likely to result in injury, and the injury was reasonably likely to be of a serious nature.

The Mine Act describes 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). The Commission has held that 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). Consistent 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.*, 6 FMSHRC at 1575.

To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the Commission’s subsequent *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*, *supra*, 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 S&S determination must be based on the particular facts surrounding the violation and in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

For the reasons explained above, I have found the underlying violation of mandatory safety 30 C.F.R. § 75.523-3(b)(4).

With regard to the second *Mathies* factor, the violation contributed to a discrete crushing hazard from the scoop when it was left unattended, and to a discrete hazard of being unable to stop the equipment in an emergency, both measures of danger to safety.

With respect to the crushing hazard, inspector Smith offered credible, un rebutted testimony that miners were working on foot in front of the machine. Tr. 76. The miners were working in low coal and with limited visibility and hearing. Tr. 83, 90-91, 119-120. Smith persuasively testified that the scoop, if left unattended, would roll, and crush a miner. Tr. 80-81. He further credibly testified that a miner could be crushed between the scoop and the rib, or between the scoop and another piece of equipment. Tr. 90.

With respect to the emergency hazard, my finding rests on the Commission’s decision in *Consolidation Coal Co.*, 35 FMSHRC 2326 (Aug. 2013). In that case, the operator violated 30

C.F.R. § 75.523-3(b) “because the emergency brake on a scoop, when applied using the panic bar, did not engage and bring the equipment to a complete stop.” *Id.* at 2332. The Commission affirmed the judge’s decision that this violation contributed to the hazard of being unable to stop the equipment in an emergency. *Id.* at 2333, citing *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2364. The Commission found that, much like the lifeline issue addressed in *Cumberland*, the need for the panic bar on a scoop would arise in the context of an emergency that required use of the emergency brake. *Id.* The Commission noted, “[t]hus, as the judge concluded, the relevant hazard contributed to by the panic bar violation is the inability to stop the scoop in an emergency.” *Id.*, citing *Maple Creek Mining Inc.*, 27 FMSHRC 555, 563 n.5 (Aug. 2005). In the instant matter, the panic bar either failed to activate the emergency brake or once activated, the brake failed to stop the scoop or hold it in a stationary position. Therefore, the violation contributed to the hazard of the scoop being unable to stop in an emergency.

With respect to the third *Mathies* factor, the Secretary must “a reasonable likelihood [that] the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985). “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (quoting *Musser Engineering, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). Moreover, the Secretary is not required to prove that the hazard contributed to will actually result in an injury causing event. *Youghioghemy & Ohio Coal Co.*, 9 FMSHRC 673, 678 (April 1987). Rather, the Secretary need only establish that the hazard contributed to is reasonably likely to result in an injury. See *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014) (“the question is not whether it is likely that the hazard... would have occurred; instead, the ALJ had to determine only whether, if the hazard occurred (regardless of the likelihood), it was reasonably likely that a reasonably serious injury would result.”).

In the instant matter, the Secretary established that a miner being crushed by a scoop would be reasonably likely to suffer injury. The scoop was extremely large, and even when unloaded it weighed about 2,000 pounds. Tr. 79-80, 86-87, 160-161. A miner, who was pinned to other equipment or to the ribs by the movement of such a massive piece of machinery, would easily suffer crushing injuries. Tr. 80-81, 90. Further, a large scoop that could not be stopped in an emergency situation could easily strike other miners in the area and endanger the scoop operator. Therefore, there was a reasonable likelihood that the discrete hazards contributed to by this violation would result in injury.

Finally, with regard to the fourth *Mathies* factor, I find a reasonable likelihood that the injury resulting from the instant violation would be of a reasonably serious nature and most likely fatal. Smith’s un rebutted testimony established that the height of the mine, the position of the miners, the vulnerability of the miners’ heads and vital organs, and the large size and heavy weight of the equipment, made a fatal injury likely. Tr. 84-85, 120-122. Accordingly, I find that the fourth element of the *Mathies* test has been established. Consequently the Secretary has established that the cited condition was S&S.

In an issue that is related to, although not subsumed by, the S&S determination, I further conclude that the violation of 30 C.F.R. § 75.523-3(b)(4) was highly likely to result in a fatal

injury to one miner. It would be unnecessarily repetitive to discuss the likelihood of a fatal injury to one miner at length, given the S&S analysis above. It suffices to note that while the S&S analysis required only a finding that an injury was “reasonably likely,” the facts shown above go much further and a finding of “highly likely” is appropriate. I note further that Holbrook testified that he agreed with the gravity assessment. Tr. 163. Therefore, I find that this citation was reasonably likely to result in fatal injuries to one miner.

Respondent argues that an injury was not highly likely because it was common practice for the scoop operator to de-energize the scoop, face the scoop toward the rib, and place the scoop bucket on the ground when exiting, thereby rendering scoop movement impossible. Tr. 207-208. At hearing, Holbrook confirmed that taking such actions were industry best practices. Tr. 115-116, 118-119, 180-182. Further, Holbrook agreed that taking all of these precautions would make an injury unlikely or impossible. Tr. 188.

Both Smith and Holbrook testified, however, that miners do not always follow such practices. Tr. 121, 180-182. Smith testified that miners were supposed to de-energize scoops before leaving them, but that re-energizing took 20-30 seconds, and that miners often left scoops energized. Tr. 80-81, 114-118, 180-181. Similarly, Holbrook testified that he was familiar with situations where miners failed to follow prescribed training and exited their scoops without putting their buckets down. Tr. 193. Further, the record establishes that the cited scoop was not turned so that it was facing the rib. Tr. 117-118. In short, in the dynamic mining environment like the one prevailing at the Maxine-Pratt Mine, it was highly likely that a miner would exit the scoop while it was energized, with its bucket up, and while it was not facing the rib. As a result, a fatal injury to one miner would be highly likely. As such, Respondent’s argument in no way undermines my findings.

For all of the foregoing reasons, Citation No. 8528536 is affirmed, as written.

VI. Civil Penalty

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

Here, as is typical, the Secretary provided a proposed assessment. The Commission has frequently recognized that section 110(i) of the Mine Act confers upon the Commission the authority to assess all civil penalties provided under the Act. See *Wade Sand & Gravel Company*, Docket No. SE 2013-120-M, slip op. (Sep. 16, 2015); and *Mining & Property Specialists*, 33 FMSHRC 2961, 2963 (Dec. 2011). Neither the Judge nor the Commission is bound by the proposed assessment. 29 C.F.R. § 2700.30(b); *Wade Sand & Gravel Company, supra*; *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) (“[Neither]

the ALJ nor the Commission is bound by the Secretary's proposed penalties... we find no basis upon which to conclude that [MSHA's Part 100 Penalty regulations] also govern the Commission.”). However, while the Secretary’s proposed penalty is not binding, the Commission has recognized that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *Performance Coal Co.*, 2013 WL 4140438, *2 (Aug. 2, 2013); *Spartan Mining Co.*, 30 FMSHRC *supra*; *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000).

In light of the Commission authority described above, I take pains to ensure that my penalty assessments are as transparent as possible. As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary’s assessment formula as a reference point. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Further, unique aggravating or mitigating circumstances may call for higher or lower penalties, and will be taken into account under my independent analysis of the the criteria set forth in section 110(i) of the Mine Act and Commission precedent.

I find that the penalty proposed by the Secretary of \$2,282.00 is consistent with the stipulated findings and my findings herein regarding the statutory criteria set forth in section 110(i) of the Mine Act. 30 U.S.C. 820(i). Accordingly, I assess a \$2,282.00 civil penalty against Respondent for Citation No. 8528536.

In addition to this citation, I have reviewed the parties’ Joint Motion to Approve Partial Settlement. With respect to the 11 citations discussed in that Motion, a reduction in penalty from a reduction in penalty from \$5,091 to \$3,313.00 is proposed.

Specifically, the parties request that Citation Nos. 8527596, 8527598, 8528534, 8528539, 8526290, 8526291, and 8526292 be modified to reduce the likelihood of injury or illness from “Reasonably Likely” to “Unlikely” and to delete the significant and substantial designation. The parties request that Citation No. 8528537 remain unchanged, but request a reduction in penalty by stating that there are legitimate factual and legal disputes regarding gravity and negligence. Finally, the parties agreed to accept Citation Nos. 85285333, 8528535, and 8528538, as written.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.¹⁰ The settlement amounts are as follows:

¹⁰ Pursuant to 29 C.F.R. 2700.1(b) and Federal Rule of Civil Procedure 12(f), I strike paragraphs three and four of the motion as immaterial and impertinent to the issues legitimately before the Commission. The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlement under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the Act.

Citation No.	Assessment	Settlement
8526290	\$634.00	\$375.00
8526291	\$634.00	\$375.00
8526292	\$499.00	\$100.00
8527596	\$460.00	\$275.00
8527598	\$460.00	\$275.00
8528533	\$499.00	\$499.00
8528534	\$308.00	\$100.00
8528535	\$224.00	\$224.00
8528537	\$499.00	\$450.00
8528538	\$540.00	\$540.00
8528539	\$334.00	\$100.00
Total:	\$5,091.00	\$3,313.00

VII. Order

Wherefore, it is **ORDERED** that Citation Nos. 8528533, 8528535, 8528536, and 8528538 be **AFFIRMED**, as written.

It is **ORDERED** that Citation No. 8527596, 8527598, 8528534, 8528539, 8526290, 8526291, and 8526292 be **MODIFIED** to reduce the likelihood of injury or illness from “Reasonably Likely” to “Unlikely” and to delete the significant and substantial designation

It is **ORDERED** that Citation No. 8528537 be **MODIFIED** to reduce the civil penalty.

To the extent Respondent has not already done so, within 40 days of the date of this decision, Respondent Warrior Investments Company, Inc., is **ORDERED TO PAY** a total civil penalty of \$5,595.00 in this matter.¹¹

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

¹¹ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

September 28, 2015

MICHAEL K. MCNARY,
Complainant,

v.

ALCOA WORLD ALUMINA, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. CENT 2015-279-DM
SC-MD 14-05

Mine: Bayer Alumina Plant
Mine ID: 41-00320

SUMMARY DECISION

Before: Judge Moran

This discrimination proceeding is before the Court under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (2012) (“Mine Act”). Michael K. McNary (“Complainant” or “McNary”) alleges that his employer, Alcoa World Alumina, Inc., (“Respondent” or “Alcoa”) discriminated against him in response to his protected activities as a miner.

Respondent has filed a Motion for Summary Decision, providing two grounds on which the motion should be granted: first, that Complainant did not timely file his complaint; and second, that Complainant failed to identify an adverse action in response to any protected activity. Related to this second ground, Respondent also asserts that several of the claims in the complaint were not asserted in the original complaint to the Mine Safety and Health Administration (“MSHA”), nor were they investigated by MSHA. Therefore, those claims are not properly before the Court, and the remaining allegations are insufficient to survive the motion. For the reasons that follow, because McNary never established any adverse action cognizable under the Mine Act, the Court grants Respondent’s Motion for Summary Decision.

I. Background

Michael K. McNary is a gland manager in the Digestion Department at Alcoa’s Bayer Alumina Plant in Point Comfort, Texas. Resp’t’s Ex. E¹ at 1. He has also been a miners’ representative since June 2013. *Id.* As the second lead plantwide representative, one of McNary’s responsibilities is to accompany MSHA inspectors when the lead plantwide miners’

¹ Respondent’s Exhibit E contains McNary’s interview with MSHA Special Investigator Travis Shore.

representative is unavailable. Resp't's Ex. A at 19 ("McNary Dep.").² On January 8, 2014, McNary was going through his work route when he saw a valve on the 5L5 pump blowing out hot slurry, which can reach a temperature of 480 degrees. McNary Dep. at 52, 55. Other Alcoa employees were in the area, and Steve Emig, the Digestion supervisor, arrived and helped them put on special suits to protect them from the slurry so they could knock out (close) the pump, but they did not have tape to prevent slurry from getting under their gloves. McNary Dep. 55; Resp't's Ex. B at 10 ("Emig Dep."). Emig approached McNary, who was standing next to another miners' representative, Delton Luhn, and asked McNary to get tape from the tool room. McNary Dep. 56. McNary found none, and after leaving the tool room, he asked another miner to ask Kelly Grones, the health and safety manager, to go to the 5L5 pump. McNary Dep. 56-57. Before he could return to the 5L5 pump, however, McNary was asked by another supervisor, Miguel Gonzales, to check on another pump to see if it was blowing out. *Id.* at 57. McNary checked the other pump, which was not blowing out, on his way back to the 5L5 pump. *Id.* at 57-58.

Upon McNary's return, he saw that two employees had attempted to close the pump. *Id.* at 63. McNary did not see them enter the area with the hot slurry, but suspected that Emig had sent them in to attempt to close the pump. *Id.* at 62. McNary became concerned for the employees' safety and gestured to his supervisor, Emig, to come to the side. *Id.* at 59. McNary told Emig that Kelly Grones, the health and safety manager, was on her way over. *Id.* at 62. In McNary's deposition, he recounted Emig's reaction and the subsequent confrontation:

[W]hen I told him that Kelly was on her way over there and he said, "You shouldn't have . . . called anyone, because this is my department and I direct the workforce," and I asked Steve [Emig], "Well, why did you direct . . . the operators into the hot slurry?" And Steve says, "I didn't direct them in there." I say[], "Well, you watched them go in there and you didn't stop them." And I asked him, "How did they get in there?" And Steve said, "They volunteered."

. . . .

When . . . Steve said they volunteered to go in there . . . I basically told Steve, "You watched them go in there. You didn't stop them."

And Steve . . . said, "You shouldn't be involved in these matters." And I told him, "I'm an MSHA rep and I'm concerned for the safety of these operators. I should be. I should be concerned with these matters."

And that's when Steve told me, "I will remove you as MSHA rep. I will remove you . . . from this department, and I will remove you from the plant."

Id. at 62-63.

² Mr. McNary and the digestion supervisor, Steve Emig, were each deposed on July 8, 2015. Alcoa has attached selections from those depositions to its motion as Exhibits A and B, respectively. The Court will cite to the original page numbers of the depositions.

McNary filed a complaint with MSHA on January 24, 2014, alleging discrimination in violation of section 105(c)(1) of the Mine Act. In his complaint, the only adverse action he identified was that he was verbally threatened by Emig. Resp't's Ex. D³ at 2. During his interview with the MSHA Special Investigator, McNary identified three other adverse actions: Emig sent him to get tape to get him away from the scene; Miguel Gonzalez asked him to check another pump to get him away from the scene; and his overtime had been questioned in early December 2013, over a month before the January 8, 2014, incident. Resp't's Ex. E at 2.

MSHA sent a letter to McNary on May 2, 2014, informing him that MSHA would not be pursuing his case, and stating that McNary had thirty days to bring his own case before the Commission. McNary filed a Complaint with the Commission ten months later on March 2, 2015.

II. Respondent's Motion for Summary Decision

Alcoa first argues in its memorandum in support of its motion for summary decision that McNary's complaint is untimely because he filed it nine months after the statutory deadline. Resp't's Mem. Supp. Summ. Decision 9. In support of this position, Alcoa argues that McNary had thirty days to file his Complaint following receipt of MSHA's letter stating that MSHA would not be pursuing a discrimination case on his behalf, and McNary has shown no justifiable circumstances to excuse the late filing. *Id.*

Alcoa also argues that McNary has not alleged any adverse action in this case. Preliminarily, Alcoa asserts that the only adverse actions properly before the Court are those "which were included in McNary's original complaint to MSHA or those based on evidence developed during the Secretary's investigation of the Complaint." *Id.* at 11 (citing *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991); *Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997)). McNary alleged several adverse actions in his amended complaint, but only four were investigated by MSHA: (1) a December 2013 overtime issue; (2) Emig's request to McNary to get tape; (3) Gonzalez's request to McNary to check another pump; and (4) Emig's threat to remove McNary. *Id.* Accordingly, Alcoa argues that those are the only four actions properly before the Court.

Alcoa then argues that none of those four actions constitutes an adverse action motivated by his protected activity. First, Alcoa asserts that McNary's allegation that he was denied overtime or had his overtime questioned in December 2013 fails for three reasons: he was not actually denied overtime, his overtime was questioned because he was not seeking pre-approval for overtime, and he has provided no evidence that "Alcoa took any adverse action against him related to overtime in response to his protected activity on January 8, 2014." *Id.* at 18. Additionally, McNary worked 48 hours of overtime for the seven weeks before January 8, 2014, 42 hours in the seven weeks after that date, and 44 hours in the seven weeks after that. *Id.* Because his overtime did not change dramatically after the January 8, 2014, incident, Alcoa asserts that there is no evidence that he was denied overtime due to that event. *Id.*

³ Respondent's Exhibit D contains McNary's original discrimination complaint to MSHA.

As for the two requests from McNary's supervisors, Alcoa states that Emig's request to get tape was a reasonable one, and could not have been intended to subvert McNary's role as a miners' representative because Delton Luhn, the miners' representative for that department, remained at the scene of the pump blowout. *Id.* at 14. Gonzalez's request that McNary check another pump for a blowout on his way back to the scene was similarly not an adverse action. Even if it had been intended to interfere with McNary's miners' representative duties, Alcoa argues, McNary was able to "visually assess it *on his way back to an active emergency scene* at the [5L5] pump." *Id.* at 15.

Finally, regarding Emig's threat, Alcoa states that Emig had threatened to remove McNary from the scene because he attempted to take charge of a situation when he did not have the authority to do so. *Id.* at 15. Additionally, although Emig yelled during the emergency situation, McNary was never removed from the scene, "as a miners' representative or from the plant, or disciplined in any way, that day or any other." *Id.* Emig's threat did not subject McNary to any "discipline or detriment in his employment relationship." *Id.* (citing *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2540 (Dec. 1990)). Consequently, Alcoa argues that the threat was not an adverse action motivated by McNary's protected activity.

III. Complainant's Response to the Motion for Summary Decision

On September 9, 2015, Mr. McNary filed his response to Alcoa's motion for summary decision.⁴ McNary first asserts that he filed a complaint with the Commission in June 2014, not in March 2015. *Resp. to Def.'s Mot. Summ. Decision* 2-3. In support, he provides emails between him and a member of the Commission's docket office from June 2014, and McNary further states that he was in contact with the Commission periodically, but was given no explanation for why his case was not docketed until March 2015. *Resp. to Def.'s Mot. Summ. Decision* 23-24.

Regarding the additional allegations in his amended complaint that were not investigated by MSHA, McNary states that, although "all were not mentioned in his original MSHA complaint or brought to MSHA's attention during the Secretary's investigation," they should not be discredited. *Id.* at 3. At the time he was interviewed by MSHA, he did not understand what "adverse actions" were and was not prepared for the investigation. *Id.* at 3-4. McNary lists several additional allegedly discriminatory actions that he did not bring up during the MSHA investigation, including: (1) after he threatened to call MSHA from the hospital after a workplace injury in December 2011, he was denied "return to work" privileges; (2) his activities as an MSHA Representative resulted in Alcoa denying him fair overtime; (3) he was harassed by his coworkers; (4) his coworkers tried to fight him under the direction of his supervisor; (5) his department supervisors created a hostile work environment; (6) his supervisor kicked him out of safety meetings; (7) he suffered humiliation, anguish, and a relapse of post-traumatic stress disorder; and (8) his character was at odds with the plant manager and the human resources

⁴ McNary's response and supporting exhibits were filed by mail on September 9, 2015. A day before the Court received these, on September 8, 2015, McNary emailed the Court a corrected section of his response titled "Response to Defendants [sic] Proposed Findings of Fact and Motion for Summary Decision," which he submitted to correct typos in the original submission. The Court accepted the corrected version.

personnel. *Id.* at 4. McNary argues that he has been “under the fog of protected activity” after his hospital stay in December 2011 arising out of burns suffered at Alcoa. *Id.* at 27; *see also id.* at 18-19. Because he has almost continuously suffered adverse actions since his hospital stay, McNary appears to argue that all of the adverse actions he has complained of, not just those investigated by MSHA, are properly before the Court.

As for Emig’s threat to McNary on January 8, 2014, McNary states that he intervened in an unsafe act by telling Emig that Kelly Grones, the Health and Safety Manager, was on her way to the scene, and this should not have resulted in adverse actions or threats of reprisal. *Id.* at 4. When McNary told Emig that, as a miners’ representative, he should be involved when miners’ lives are at risk, he should not have been discouraged from rendering his opinions, and, McNary asserts, the hostility and chilling effect on miners was apparent. *Id.* at 4. Finally, McNary argues that his complaint was not simply that Emig yelled at him. His complaint was that Emig said that McNary “should not have called anyone,” that it was Emig’s department, that McNary should not be involved in the matter, and the ultimate threat that he would be removed as a miners’ representative, from the department, and from the plant. *Id.* at 4-5.

McNary argues that the threat constituted harassment, tacitly recognized by the Commission in *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (Aug. 1982). Resp. to Def.’s Mot. for Summ. Decision 29. McNary states that hostility to protected activity alone is an adverse action, and that he was not concerned about being asked to get tape so much as he was concerned about the *reason* he was asked to do so, which he states was to get him out of the area so Emig could send miners into harm’s way, with inadequate protection, knowing that the remaining miners’ representative, Delton Luhn, was “inexperienced at recognizing the potential hazard in its entirety.” *Id.* Similarly, McNary argues that the other supervisor, Gonzalez, conspired with Emig prior to asking McNary to check another pump on his way back to the 5L5 pump. *Id.*

IV. Additional Filings

On September 8, 2015, Alcoa filed a reply to McNary’s response, addressing two points. First, Alcoa concedes that the Court is likely to excuse McNary’s late filing of his complaint given McNary’s June 2014 communications with the Commission, even if those, too, were initiated more than thirty days after McNary’s receipt of MSHA’s May 2, 2014, letter. Resp’t’s Reply to Pet’r’s Resp. to Alcoa’s Mot. for Summ. Decision 2. Alcoa then argues that McNary’s evidence that he contacted the Commission in June 2014 provides further reason to restrict his current action to the adverse actions investigated by the Secretary, because even at the time of the emails, McNary did not mention that he was denied overtime or any of his other claims arising between 2011 and 2013, prior to the January 8, 2014, incident. *Id.* Alcoa also addresses the claim that McNary received less overtime than another miner, *Id.* at 2-3, which, as discussed below, is not properly before this Court.

McNary filed two additional responses after Alcoa’s reply. In the first, filed on Monday, September 14, 2015, he renews his argument that “the court should take all claims, accusations and complaints into consideration despite Alcoa’s argument that it was not raised within the MSHA investigation.” Pet’r’s Rebuttal to Resp’t’s Reply to Pet’r Reply of Summ. Decision 2. In support, McNary states that the actions taken by Alcoa amount to one to two years of continuous

harassment and discrimination. *Id.* The remainder of his rebuttal, and the entirety of his additional response, filed on Monday, September 21, 2015, address matters that are not germane to this proceeding. *See generally* Add'l Resp. to Def.'s Mot. Summ. Decision.

V. Discussion

This discrimination complaint is brought under section 105(c)(3) of the Mine Act, alleging a violation of section 105(c)(1), which states, in relevant part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner [or] representative of miners . . . because such miner [or] representative of miners . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine.

30 U.S.C. § 815(c). In order to establish a prima facie violation of section 105(c)(1) of the Mine Act, a complainant must show “(1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity.” *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). In order to rebut a prima facie case, the operator must either show that no protected activity occurred or that the adverse action was in no part motivated by the miner's protected activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

Section 105(c)(3) of the Mine Act provides that if the Secretary of Labor determines that a violation of section 105(c)(1) has not occurred, “the complainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination.” 30 U.S.C. § 815(c)(3). As the Commission stated in *Jaxun v. Asarco, LLC*, 20 FMSHRC 616, 620 (Aug. 2007), “[t]he Mine Act, the Administrative Procedure Act (‘APA’), and the Commission's Procedural Rules permit a [c]omplainant to proceed with an action under section 105(c)(3) of the Mine Act without representation.”

As this case is before the Court on a Motion for Summary Decision, Commission Procedural Rule 67(b) governs, providing the grounds upon which a motion for summary decision shall be granted:

(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission has long analogized Rule 67(b) to Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). Accordingly, the Court must draw all inferences in the light most favorable to the nonmoving party. *Id.* (citations omitted). A genuine issue of material fact exists when the non-moving party produces evidence that would allow a reasonable fact-finder to return a verdict in its favor. *Greenberg v. Bellsouth Telecomm., Inc.*, 498 F.3d 1258 (11th Cir. 2007). If Alcoa prevails on either of the grounds asserted in its motion, that McNary's complaint is untimely or that he did not identify any adverse action motivated by his protected activity, Alcoa is entitled to summary decision.

A. McNary's Complaint Is Not Untimely

McNary's Complaint was filed nine months after the original due date following MSHA's decision not to proceed with his case, but circumstances exist in this case to excuse McNary's failure to file a claim within 30 days of his receipt of MSHA's letter. Commission Procedural Rule 41(b) states that a "discrimination complaint may be filed by a complaining miner . . . within 30 days after receipt of a written determination by the Secretary that no violation has occurred." 29 C.F.R. § 2700.41(b). Section 105(c)(3) has this same 30 day requirement. *See* 30 U.S.C. § 815(c)(3).

The legislative history of the 30 day requirement states that this "limitation may be waived by the court in appropriate circumstances for excusable failure to meet the requirement." S. Rep. No. 95-181, at 37 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3437. The Commission has stated that those circumstances "could include situations where a miner is misinformed or misled as to his compensation rights and procedural responsibilities, *or has taken some timely, although incorrect, action to vindicate those rights*, or presents some other potentially justifiable excuse for late filing." *Farmer v. Island Creek Coal Co.*, 13 FMSHRC 1226, 1230 (May 1991) (emphasis added). However, where serious delay "prejudice[s] the respondent's right to due process in an adversarial proceeding . . . [that] may override the opportunity for vindication of the complainant's rights." *Id.* at 1230-31.

MSHA sent a letter dated May 2, 2014, to McNary informing him that MSHA would not be filing a discrimination case with the Commission on his behalf. Resp't Ex. F at 1. In June 2014, McNary engaged in an email conversation with a member of the Commission's docket office, although, from the emails actually received by the Commission and provided by McNary, it is unclear what relief he was requesting. *See generally* Compl't's Ex. 9. McNary first attempted to email the Commission on Thursday, June 12, 2014, stating clearly that he had been threatened in response to "representing miners['] safety," and that MSHA had not found discrimination. *Id.* at 3. Unfortunately, he emailed the wrong address, and he made the same mistake the following day. *Id.* at 4. Although it is unclear from the evidence provided how McNary eventually contacted the Commission, the Commission's docket office sent McNary a responsive email on June 16, 2014, requesting additional information from him. *Id.* at 5. On August 14, 2014, he emailed the Commission again, *Id.* at 8, and McNary contends that he contacted the Commission multiple times by phone, but was "always informed it is in the Judge's hands." Resp. to Def.'s Mot. Summ. Decision 24.

If McNary's first communication with the Commission in June 2014 was late, it was excusably so, and McNary subsequently attempted to vindicate his rights several times, which the Court finds is a justifiable excuse for the late filing. As Alcoa has alleged no prejudice due to the delay, there are no competing interests of fairness to balance. Accordingly, the Court excuses the late filing of McNary's complaint with the Commission.

B. McNary Has Alleged No Adverse Action in Response to His Protected Activity of January 8, 2014

McNary alleged four adverse actions in his original complaint to MSHA and associated MSHA interview: his supervisor, Steve Emig, threatened him; Emig sent him away from the broken pump to get tape; another supervisor, Miguel Gonzalez, asked him to check another pump to get him away from the scene; and his overtime was questioned in early December 2013.

As stated earlier, a miner can establish a prima facie violation of section 105(c)(1) of the Mine Act if he can show that he engaged in protected activity and suffered an adverse action, and the adverse action taken against him by the mine operator was motivated in any part by that protected activity. Alcoa concedes that McNary "engaged in protected activity in his role as a miner's representative on January 8, 2014." Mem. Supp. Summ. Decision 13. Therefore, the Court is left with two issues: Did McNary suffer an adverse action, and, if so, was that adverse action motivated in any part by his protected activity?

When considering allegations made in a 105(c)(3) complaint, the Court may only consider those matters included in the Secretary's investigation of the miner's prior complaint to MSHA: "If the Secretary's determination was based upon an investigation that did not include consideration of the matters contained in the . . . complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met." *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991). Consequently, all matters listed in McNary's Amended Complaint *not investigated by the Secretary in this case* are not properly before the Court. The Court has jurisdiction to review only the instances of alleged discrimination identified by McNary in his original discrimination complaint to MSHA and his MSHA interview, as those are the only matters that MSHA investigated.

The Commission states that "an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). The Commission has also recognized that, although "discrimination may manifest itself in subtle or indirect forms of adverse action . . . an adverse action 'does not mean any action which an employee does not like.'" *Id.* at 1848 n.2 (quoting *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981)). In determining whether adverse action has occurred, the Commission applies the test articulated in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). *See Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012).

The Supreme Court in *Burlington Northern* articulated the following standard for finding an adverse action: "[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which [in the context of Title VII retaliation claims] means

it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington N.*, 548 U.S. at 68 (quoting *Rochon v. Gonzales*, 428 F.3d 1211, 1219 (D.C. Cir. 2006)). Material adversity is required because “it is important to separate significant from trivial harms.” *Id.* In the context of the present case, Alcoa’s actions will be found to be adverse actions if they would dissuade a reasonable miner from engaging in protected activity.

The adverse actions before the Court, taken separately or together, do not rise to the level of being “materially adverse.” The first two adverse actions that McNary alleges are that Emig and Gonzales procured his absence by sending him away from the area of the broken pump so that they could send miners into harm’s way. McNary has not provided any evidence that he was sent away because he was a representative. In fact, if Emig and Gonzales had wished to remove McNary from the area because he was a miners’ representative, they would have done the same to Delton Luhn, the other miners’ representative at the 5L5 pump at that time. Instead, Luhn, the miners’ representative *for that section*, stayed in the area with the broken pump, although McNary asserts that this was to take advantage of Luhn’s inexperience. *See* Resp. to Def.’s Mot. for Summ. Decision 29. Regardless, asking McNary to get tape for the protective suits and to check the status of another pump do not amount to materially adverse employment actions because they would not dissuade a reasonable miner from engaging in protected activity.

The third adverse action McNary alleges, the questioning of his overtime in early December 2013, fails because that also does not rise to the level of a materially adverse action, nor is it traceable to his protected activity on January 8, 2014. McNary had been taking overtime and was questioned about who had approved it: He admitted that no one had. McNary Dep. at 44. He complained to the MSHA inspector that “it was because [he] was a miner’s rep. that they were trying to cut [his] hours,” and that he had never had to get permission for overtime in the past. Resp’t Ex. E at 2. McNary never alleged to MSHA that he was being denied fair overtime either before or after the January 8th event, and there is no indication that MSHA investigated such allegations. Consequently, those issues are not before the Court. As for questioning McNary’s overtime in early December 2013, that incident is not traceable to McNary’s protected activity on January 8, 2014, nor can Alcoa’s requiring McNary to seek approval for his overtime be considered an adverse action under these circumstances.

The Court now turns to McNary’s fourth alleged adverse action, Emig’s threat on January 8, 2014, which McNary has equated to harassment. In *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982), *aff’d*, 770 F.2d 168 (6th Cir. 1985), the Commission stated that “harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act.” Harassment can “not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights.” *Id.* at 1478. The Commission stated, however, that

[t]his is not to say that an operator may never question or comment upon a miner's exercise of a protected right. Such question or comment may be innocuous or even necessary to address a safety or health problem and, therefore, would not amount to coercive interrogation or harassment. Whether an operator's actions are

proscribed by the Mine Act must be determined by what is said and done, and by the circumstances surrounding the words and actions.

Id. at 1479 n.8.

Looking at the circumstances in this case, it is clear that Emig's threat to McNary does not amount to prohibited harassment under the Mine Act. Emig's vague threat, not clearly directed at protected activity, occurred during an emergency situation. McNary, in his deposition, recalled the exchange that immediately followed the threat:

A. And the MSHA . . . inspector, Brett Barrett, was walking up a couple of steps behind . . . Carlos Delgado, and I informed Carlos and Brett that Steve had just threatened me. And Carlos said, "Yeah, I heard it."

Q. And then what happened?

A. Steve [Emig] started . . . explaining something to . . . Carlos and Brett that actually didn't happen that way. And, yes, I butted in.

. . . .

A. Well, actually, he was telling Carlos and Brett that he didn't threaten me, which I know he did threaten me. And I said, you know, "it didn't happen that way." And Steve says, "I'm done with you."

Q. And then what happened?

A. And I asked Steve . . . , "Are you done with me? Are you done with me for good?" Because the threat was still there. He had threatened me prior. And when I asked him, "Are you done for good", I'm asking him, are you carrying out your threat? And he says, "No, I'm not done for good."

McNary Dep. at 64. As McNary stated in his deposition, when he asked Emig if he would be carrying out his threat, Emig assured McNary that he would not. *Id.* McNary, in his response to Alcoa's motion for summary decision, recharacterized this exchange, stating that by saying that he was "not done for good," Emig was instead keeping the threat of reprisal alive. Resp. to Def.'s Mot. Summ. Decision 8. However, even inferring that Emig's threat remained live in that moment, subsequent events quickly showed that McNary was in no danger of retribution. McNary was not removed in any way that day, he is still employed at Alcoa in the same position, he remains a miners' representative, he was never disciplined for the incident, and Emig has not threatened him at any point in the year and a half between that day and the taking of McNary's deposition. McNary Dep. at 76-78. Quite simply, McNary never suffered adverse action from any of his protected activity.

VI. Conclusion

Respondent's Motion for Summary Decision is **GRANTED**. There is no dispute of material fact in this case, and Respondent is entitled to summary decision as a matter of law. Making all inferences in favor of the nonmoving party, Complainant has not presented evidence of any adverse action properly before the Court that would dissuade a reasonable miner from engaging in protected activity.

Should Mr. McNary wish to appeal the Court's determination, pursuant to Commission Procedural Rule 70(a), 29 C.F.R. § 2700.70(a), he may file a petition for discretionary review, which should be received by the Commission within 30 days of the issuance of this decision.

This discrimination proceeding is hereby **DISMISSED WITH PREJUDICE**.

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

Distribution:

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/mrs

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 10, 2015

SECRETARY OF LABOR, MSHA,
on behalf of MATTHEW G. TOTTEN,
Complainant,

v.

TK MINING SERVICES, LLC, and
THE MARSHALL COUNTY COAL
COMPANY,
Respondents.

SECRETARY OF LABOR, MSHA,
on behalf of JOSEPH A. WHIPKEY,
Complainant,

v.

TK MINING SERVICES, LLC, and
THE MARSHALL COUNTY COAL
COMPANY,
Respondents.

TEMPORARY REINSTATEMENT
PROCEEDINGS

Docket No. WEVA 2015-101-D
MORG-CD-2014-22

Docket No. WEVA 2015-102-D
MORG-CD-2014-25

Mine ID: 46-01437
Contractor ID: K393
Mine: McElroy Mine

ORDER DENYING MOTION TO DISSOLVE

Before: Judge Rae

This matter is before me upon two applications for temporary reinstatement filed by the Secretary of Labor on behalf of Matthew G. Totten and Joseph A. Whipkey (“the Complainants”) pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(2).

Background

The Complainants were formerly employed by TK Mining Services, LLC (“TK”), a contractor that provided services to mine operator The Marshall County Coal Company (“Marshall”). The Complainants were discharged on August 18, 2014. They filed discrimination complaints against both Respondents under the Mine Act on October 28, 2014. On November 18, 2014, I determined that the Complainants’ underlying discrimination complaints were “not frivolously brought” and ordered the Respondents to temporarily reinstate the Complainants effective the date they were discharged. On December 17, 2014, I approved the parties’ agreements for economic reinstatement whereby Marshall agreed to provide payments to TK beginning November 18, 2014, and TK would then process the payments and distribute them to

the Complainants. A hearing on the merits of the underlying discrimination claims is set to go forward in November 2015.

In March 2015, Marshall filed a motion requesting dissolution of the temporary reinstatement and settlement orders on the grounds that its parent company, Murray American Energy, had discontinued all business with TK as of December 5, 2014. Marshall submitted an affidavit from mine superintendent Eric Lipinski, who is alleged to have been involved in the Complainants' discharge, attesting that the decision to discontinue business with TK was unrelated to the discrimination complaints.

The Secretary opposed Marshall's motion and requested an opportunity to conduct discovery to address it. I granted that request. Marshall has now renewed its motion.

Parties' Positions

In support of the renewed motion to dissolve, Marshall has submitted an affidavit from another superintendent, Eric Koontz, attesting that the reason Murray American Energy decided to discontinue business with TK was because it wanted to switch to a less expensive contractor with whom it had a longstanding business relationship. Koontz attests that this decision affected more than one hundred contract workers at five different mines and was not based upon the Complainants' discrimination complaints. Accordingly, Marshall argues that its temporary reinstatement obligation should be tolled because irrespective of their discrimination complaints, the Complainants would have stopped receiving wages from work at Marshall's mine as of December 5, 2014.

The Secretary responds that Marshall's motion should be denied because Marshall's decision to terminate its contract with TK was potentially a discriminatory act. In support of this contention, the Secretary points to evidence that Marshall displayed hostility toward the protected activity alleged by the Complainants and asserts there is a coincidence in time between the filing of the temporary reinstatement complaints and Marshall's decision to terminate its contract with TK. Alternatively, the Secretary argues that more discovery is needed.

TK has not responded to Marshall's motion.

Discussion

The Commission has recognized that the occurrence of certain subsequent events, such as a layoff or similar event caused by a change in economic or business circumstances, may toll an operator's obligation to continue providing reinstatement under a temporary reinstatement order. *Sec'y of Labor o/b/o Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009), citing *Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 1638 (Sept. 1989). The operator bears the burden of proving by a preponderance of the evidence that work is not available for the complainant due to the changed circumstances. *Id.* at 1054-55. However, if the operator's objectivity is called into question, the "not frivolously brought" standard must be applied, meaning that the Secretary may prevent tolling by establishing facts which could support a claim that the changed circumstances may have been caused at least in part by the complainant's

protected activity. *Sec'y of Labor o/b/o Rodriguez v. C.R. Meyer & Sons Co.*, 35 FMSHRC 1183 (May 2013); *Sec'y of Labor o/b/o Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394 (Feb. 2013), *appeal dismissed*, 742 F.3d 82 (4th Cir. 2012).

Although the Commission has not previously confronted a situation identical to the facts at hand, the Commission has indicated that the spirit of the Mine Act's discrimination provision is to make the miner whole until the case can be decided on the merits. *See Sec'y of Labor o/b/o Rieke v. Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1258 (July 1997) (discussing pertinent legislative history). At this stage in the proceedings, the case law is clear that the Secretary's burden of proof is only to demonstrate that the evidence as a whole supports a "non-frivolous" claim that the changed economic circumstance Marshall has identified – namely, its decision to terminate its contract with TK – may have been motivated in any way by the Complainants' alleged protected activity. The Secretary has pointed to evidence that could support this claim, including a coincidence in time between the temporary reinstatement claims, (which were filed on October 28, 2014 and granted on November 18, 2014), and Marshall's terminating its contract with TK effective December 5, 2014. Accordingly, tolling must be denied.

It is **ORDERED** that Marshall's motion to dissolve its temporary reinstatement obligation is **DENIED**.

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

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September 14, 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf
of LEONARD MADRID,
Complainant,

v.

AMERICAN MINING & TUNNELING,
LLC, & CHRIS CORLEY,
Respondents.

DISCRIMINATION PROCEEDING

Docket No. WEST 2015-549-DM
RM-MD-15-04

Mine: Midas Mine
Mine ID: 26-02314

ORDER DENYING MOTION FOR SUMMARY DECISION

Before: Judge Moran

This case is before the Court upon a complaint of discrimination filed by the Secretary of Labor on behalf of Leonard Madrid under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2012) (“Act” or “Mine Act”). Respondents American Mining & Tunneling, LLC, (“AMT”) and Chris Corley have filed a motion for summary decision, stating that there is no evidence in the record that Respondents knew of Leonard Madrid’s hazard complaint to MSHA. Consequently, they argue, they are entitled to summary decision as a matter of law. For the reasons that follow, their motion is **DENIED**.

Legal Standards

This discrimination complaint is brought under section 105(c)(2) of the Mine Act, alleging a violation of section 105(c)(1), which states, in relevant part:

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

30 U.S.C. § 815(c). The Commission reviews section 105(c) cases according to the *Pasula-Robinette* framework. In order to establish a prima facie violation of section 105(c)(1), a complainant must “establish[] a prima facie case of discrimination by showing (1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity.” *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). An operator may rebut the complainant’s showing by demonstrating “either that no protected activity occurred or that the adverse action was in no part motivated by protected

activity.” *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). Failing that, the operator may have an affirmative defense if it can prove “that it also was motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone.” *Id.* at 329.

Commission Procedural Rule 67(b) provides the grounds upon which a motion for summary decision shall be granted:

(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission has long analogized Rule 67(b) to Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). Accordingly, the Court must draw all inferences in the light most favorable to the nonmoving party. *Id.* (citations omitted).

Factual Background

The Secretary’s Amended Complaint provides two instances of protected activity engaged in by Madrid in December 2014: (1) Madrid told his supervisor and Project Superintendent Christopher Corley that he refused to bypass a non-functioning safety switch on a tractor, and (2) Madrid told Corley that his supervisor performed welding on a man basket when he was not certified to do so and AMT did not have the proper facilities to make the modifications. Am. Compl. ¶ 8. On December 27, 2014, Madrid made a hazard complaint to MSHA, which was investigated on December 29, 2014. Sec’y’s Mem. Opp. Summ. J. 4; Resp’ts’ Mem. Supp. Summ. J. 2. On December 30, 2014, Madrid was terminated. Am. Compl. ¶ 8; Resp’ts’ Mem. 3.

Respondents’ Motion

In their motion and accompanying memorandum, Respondents argue that they are entitled to summary decision because the Secretary will not be able to satisfy his burden of proof as a matter of law. Resp’ts’ Mem. 2. First, they contend that the two instances of protected activity alleged in the Amended Complaint are no longer at issue because “Madrid testified . . . that he was terminated only because he made a complaint to MSHA and that upon finding out that he made a complaint to MSHA, AMT terminated his employment.” *Id.* Second, they argue that “there is no evidence that anyone knew that Madrid had made a complaint to MSHA until after his termination.” *Id.* at 4. Without showing knowledge on the part of Respondents that Madrid made a hazard complaint to MSHA, Respondents argue that they could not have been motivated by that protected activity to terminate him.

Discussion

As noted, the Secretary, in his amended complaint, alleges two instances of protected activity: Madrid's work refusal and Madrid's safety complaint to Corley about Madrid's direct supervisor. Am. Compl. ¶ 8. The Secretary also states, and Respondents do not dispute, that Madrid was terminated on December 30, 2014. Sec'y's Mem. 4; Resp'ts' Mem. 3.

As stated by the Commission in *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." Where direct evidence of motivation is unavailable, the Commission has identified several indicia of discriminatory intent, including, but not limited to: "(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Chacon*, 3 FMSHRC at 2510).

There remains a factual dispute regarding Respondents' motivation for terminating Madrid. Respondents argue that there is no evidence that Corley or Woelki were aware that Madrid made a complaint to MSHA, but the MSHA complaint is not the only protected activity alleged in this case. *See* Am. Compl. ¶ 8. Madrid has stated that in December 2014, he refused to bypass a safety switch, and, later, when he refused to do work on a man basket because he was not certified, Woelki told him that he could not refuse the work, because Woelki was his supervisor. Sec'y's Mem. 3-4. Completely distinct from those events, on December 27, 2014, he made a hazard complaint to MSHA. *Id.* at 4. MSHA investigated on December 29, 2014, and Madrid was terminated on December 30, 2014. *Id.* at 4-5; Am. Compl. ¶ 8.

The Respondents' Motion suffers from a crucial deficiency. First, the Secretary has not amended the Complaint a second time to confine the claim to Respondents' knowledge of Complainant's communications with MSHA, and Madrid's deposition does not do that either. Respondents fail to realize that there is no obligation for a complainant to allege that his or her safety complaint was transmitted to MSHA at all. Thus, if the two grounds declared in the Complaint are established, and there is a nexus between those alleged instances of protected activity and Madrid's termination, a *prima facie* case will have been established. At that point the *Pasula-Robinette* framework, as summarized above, is applied. Accordingly, Respondents have misapprehended the process for assessing discrimination complaints and consequently failed to show that there is no genuine issue as to any material fact. The Secretary's Response makes these points as well, although the result reached here would have been the same, even in the absence of a response. Given the identified deficiencies, summary decision is inappropriate.

Conclusion

Accordingly, for the foregoing reasons, the motion for summary decision is **DENIED**. At the hearing, set to begin on September 22, 2015, in Reno, Nevada, the Court will hear evidence from the parties relating to the protected activity alleged by Complainant, Respondents' motivation for terminating Leonard Madrid, and any affirmative defenses claimed by Respondents.

SO ORDERED.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 16, 2015

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

v.

RANDALL H. FLEMING, employed by
CONSHOR MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2009-189
A.C. No. 15-18861-164718A

Mine: No. 1

ORDER OF DISMISSAL

Before: Judge Feldman

This proceeding concerns the matter of the personal liability of Randall H. Fleming under section 110(c) of the Federal Mine Safety and Health Act of 1977, as amended (“Mine Act”), 30 U.S.C. § 820(c), for the violative condition cited in 104(d)(2) Order No. 7503263 issued to Conshor Mining, LLC, (“Conshor”) on July 17, 2007, for an alleged violation of the mandatory standard in 30 C.F.R. § 75.202. Section 75.202 prohibits miners from working or traveling under unsupported roof. 30 C.F.R. § 75.202. Order No. 7503263 was contested by Conshor in civil penalty Docket No. KENT 2008-481.¹ Un-adjudicated Order No. 7503263 was vacated on August 6, 2015, as a consequence of a Chapter 7 bankruptcy proceeding that dissolved Conshor as a corporate entity, effective December 31, 2012. *See Conshor Mining, LLC*, 37 FMSHRC ___, slip op., at 4-5 (Aug. 6, 2015). The Secretary did not appeal the vacation of Order No. 7503263 in Docket No. KENT 2008-481. Thus, the vacation of Order No. 7503263 has become final.

Remaining for disposition is the Secretary’s personal liability action against Fleming brought pursuant to section 110(c), alleging that Fleming, as an agent of Conshor, “knowingly authorized, ordered, or carried out [the] violation of 30 C.F.R. § 75.202” that was cited in Order No. 7503263. The Secretary has proposed a civil penalty of \$5,000.00 to be assessed against Fleming for the alleged violative condition cited in Order No. 7503263.

Section 110(c) liability is predicated upon prohibited conduct undertaken by an agent on behalf of a principal. This proceeding presents the issue of whether a personal liability case against an agent (Fleming) can survive the dismissal of the underlying citation issued against a principal (Conshor). In *Kenny Richardson*, the Commission was confronted with the question of

¹ KENT 2008-481 was stayed pending resolution of the novel question of the evidentiary criteria necessary for demonstrating a repeated flagrant violation under section 110(b)(2) of the Mine Act, as amended by the Mine Improvement and New Emergency Response Act of 2006, 30 U.S.C. § 820(b)(2). *See Conshor Mining, LLC*, 37 FMSHRC ___, slip op., at 2 (Aug. 6, 2015).

personal liability in a case where the mine operator's liability for the underlying citation *was not adjudicated* because of the operator's failure to contest the alleged underlying violation. The Commission held that "[w]hether or not the operator is found liable in a separate proceeding, the Secretary must still fully prove his case in a [personal liability] proceeding against the agent." *Kenny Richardson*, 3 FMSHRC 8, 10 (Jan. 1981). In *Kenny Richardson*, although the uncontested citation issued to the mine operator remained un-adjudicated, the underlying citation remained viable in that it was not formally dismissed by the Commission. In the instant case, unlike *Kenny Richardson*, the underlying citation against the operator is no longer viable because the Commission dismissal has become final.

Here, agency liability is based on a derivative liability—from the mine operator to the agent for violative conduct committed by the agent on behalf of the mine operator during the regular course of his employment. If the principle has been determined to not be liable for the agent's conduct by virtue of the Commission's *dismissal* of the underlying violation, so too, the agent cannot be found to be liable for the same conduct. See *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 270 (Feb. 1997) (vacating and remanding a 110(c) liability decision for further determination based on the Commission's vacation and remand of a judge's finding of liability against the operator for the underlying violation). Liability against the principal having been dismissed in Docket No. KENT 2008-481, there is no predicate liability of the mine operator that can serve as a basis for the personal liability of the agent. Consequently, the 110(c) proceeding seeking to impose personal liability on Fleming for the violation cited in Order. No. 7503263, which has previously been vacated, must be dismissed.

ORDER

In view of the above, **IT IS ORDERED** that the captioned matter seeking to impose 110(c) personal liability against Randall H. Fleming **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Certified Mail)

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September 21, 2015

LAWRENCE PENDLEY,

Complainant,

v.

HIGHLAND MINING CO. AND JAMES
CREIGHTON,

Respondent.

DISCRIMINATION PROCEEDING

Docket No. KENT 2013-606-D

MSHA Case No.: MADI-CD 2010-07 & 11

Mine: Highland 9 Mine

Mine ID: 15-02709

**ORDER GRANTING REMEDIES AND
GRANTING ATTORNEYS FEES**

This case is before me upon a complaint of discrimination brought by Lawrence Pendley (“Complainant”), a miner, against Highland Mining Co. and James Creighton, (“Respondents”), pursuant to § 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(3).

On February 12, 2015, I issued a decision finding that Pendley had been discriminated against by the Respondents. However, due to the unique circumstances of the case, I ordered the parties to confer on the appropriate damages. The Complainant, by and through his attorneys, requested specific affirmative relief, as well as payment of attorneys’ fees and costs. Specifically, Wes Addington requested fees of \$39,140.00 for 157.8 hours at a rate of \$250.00 per hour, and Tony Oppeward requested fees of \$28,200.00 for 56.4 hours at a rate of \$500.00 per hour.¹ Each attorney provided a detailed billing report that showed their use of time in 6-minute increments. In addition to these fees, Mr. Oppeward and Mr. Addington requested a combined total of \$3,477.00 in travel and other administrative costs. Following these Position Statements, I ordered the parties to brief a number of questions relevant to making a remedies determination. The parties each submitted two additional briefs, focusing almost entirely on the attorneys’ fee issue

Respondent, Highland Mining, took no position concerning the affirmative remedies, but objected to the attorneys’ fees as “excessive and/or redundant.” *Highland Mining Company LLC’s Position Statement on Remedies*. Specifically, Highland argued that the fees should be calculated at the prevailing rate for similar work in the communities where they practice law, and

¹ The total fees in this case have since been increased due to the Complainant’s counsels defense of its attorney’s fees.

asked the Court to cap the fees at \$150.00 per hour. Highland further argues that some of the time billed was for two attorneys, when one attorney would have sufficed. Lastly, Highland argues that the rate for preparing and defending a fee request should be lower than the rate for prosecuting the merits of the case.

With regards to the relief in the underlying discrimination case, I grant the Complainant's request. Highland Mining has closed the Highland 9 Mine, but it is ordered that if Highland ever reopens the mine, it must post the original decision in this case for 60 days and conduct specialized miners' rights training for all management officials, as described in the Order below.

With regards to attorneys' fees and costs, Section 105(c)(3) of the Mine Act provides that:

Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (*including attorney's fees*) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or *in connection with*, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

30 U.S.C. §815(c)(3) (emphasis added). The legislative history of the Act makes clear that Congress intended for the Commission to provide "all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct," and that such relief includes attorney's fees that ensure that a miner can find adequate counsel. S.Rep. No. 181, 95th Cong., 1st Sess. (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978).

The United States Supreme Court has held in other fee-shifting statutes that the court should determine a reasonable attorney fee using the "lodestar method." *See Perdue v. Kenny A., ex rel. Winn*, 559 U.S. 542, 551-552 (2010); *Blum v. Stenson*, 465 U.S. 886 (1984). Using this approach, "the Court must determine: (1) the reasonableness of the hourly rate charged; and (2) the reasonableness of the hours expended on the litigation." *Woodland v. Viacom Inc.*, 255 F.R.D. 278, 280 (D.D.C.2008) (citing *Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C.Cir.1995)). Often, "an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" *Covad Communications Co. v. Revonet, Inc.*, 267 R.R.D. 14, 29 (D.D.C. 2010), (citing *Kattan ex rel. Thomas v. District of Columbia*, 995 F.2d 274, 278 (D.C.Cir.1993)). The burden is on the fee petitioner to submit evidence that supports the hours worked, and such evidence must be detailed enough to allow the court to independently assess whether the hours are justified. *Id.*

The underlying discrimination case here presented a fairly complex and unique set of facts. The case involved one of the "more subtle forms of interference," that Congress sought to address in the Mine Act, which differs from the more standard discrimination cases that employ

the usual *Pasula/Robinette* analysis. S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978). The Secretary of Labor declined to prosecute this case, and it is unlikely that even an attorney that practices regularly before the Commission would have recognized the merits of this case. Indeed, Highland's counsel are highly skilled attorneys with a combined 46 years of experience representing operators, and yet their Post-Hearing Brief did not even contemplate that the Complainant was presenting an interference claim. *Highland Brief in Response*, Ex-3. This fact is raised not to insinuate any defect in Highland's counsel's court performance, but rather to highlight the unusual nature of this case and to show the difficulty in applying the lodestar method. The evidence presented by Complainant's counsel, as well as the facts of this case, show that the community of private attorneys that represent miners in discrimination cases is quite small, and very few are as skilled or experienced as Mr. Oppegard or Mr. Addington.

According to the Affidavit and Curriculum Vitae (C.V.) submitted by Mr. Oppegard, he has over 32 years litigating mine safety issues, and over 28 years of experience litigating mine safety discrimination cases. *Pendley Response*, Ex-1. During this time, he has litigated over 225 cases arising under §105(c) of the Act, at the ALJ, Commission, and Circuit Court levels, making him the most experienced attorney in the nation in representing miners in discrimination cases. *Id.* Similarly, Mr. Addington has over 10.5 years of experience representing miners in discrimination cases. *Pendley Response*, Ex-3. During this time, he has represented 55 miners in more than 110 docketed cases, 100 of which were as co-counsel with Mr. Oppegard. *Pendley Response*, Ex-1, 3. Mr. Oppegard attests in his Affidavit that, aside from him and Mr. Addington, he is not aware of any other attorneys in Kentucky that regularly litigate miner discrimination cases. *Pendley Response*, Ex-1. Indeed, Arthur Traynor, the Associate General Counsel of the United Mineworkers of America, submitted an Affidavit attesting that "Counsel for the UMWA, the Appalachian Citizens' Law Center and Kentucky attorney Tony Oppegard are, to my knowledge, the only lawyers who regularly represent coal miners in proceedings commenced under Section 105(c)(3). *Pendley Response*, Ex-5.

Highland argues that the going rate for an attorney in Lexington, Kentucky (where Mr. Oppegard practices) is between \$185.00-\$240.00, and the going rate for an attorney in Whitesburg, Kentucky (where Mr. Addington practices) is \$150.00 per hour. In support of the Lexington rate, an affidavit was submitted by a private Lexington employment attorney named Katherine J. Hornback, who attests that \$200.00 per hour is a reasonable fee for an attorney in the Lexington area. *Highland Brief in Response*, Ex-2. In support of the Whitesburg rate, an affidavit was submitted by a private Whitesburgh civil and criminal attorney named Jenna R.S. Watts, who attests that \$150.00 per hour is a reasonable fee for an attorney in the Whitesburg area. *Highland Brief in Response*, Ex-1. However, it appears that neither of these attorneys have ever litigated a case before the Commission, let alone represented a miner in a discrimination case, so their affidavits concerning general hourly rates for the geographic regions are not particularly relevant.

Highland also submitted an affidavit from its counsel, Melanie Kilpatrick, wherein she attested that from the time of the Complaint until the February 12, 2015 Decision, she billed

Highland for 181 hours in this matter at a rate of \$185.00 per hour, her co-counsel billed Highland for 11.9 hours in this matter at a rate of \$240.00 per hour, and her paralegal billed Highland for 8.65 hours at a rate of \$90.00 per hour. *Highland Brief in Response*, Ex-3. These rates are similarly not particularly relevant to determining a reasonable rate for a private attorney representing miners in discrimination cases.² It has been the experience of this court that there is a much larger community of attorneys that represent mine operators than those that represent miners. This market for mine operator attorneys, which likely does not require attorneys to take cases on a contingency basis, must certainly lead to more competitive rates among such attorneys. Based upon all the evidence submitted by both sides in this case, no such market exists for attorneys representing miners in discrimination cases.

Courts have held that “where there is only a relatively small number of comparable attorneys, like here, an adjudicator can look to prior awards for guidance in determining a prevailing market rate.” *B & G Min., Inc. v. Director, Office of Workers' Compensation Programs*, 522 F.3d 657, 664 (6th Cir. 2008); *See also Eastern Associated Coal Corp. v. Director, Office of Workers' Compensation Program*, 724 F.3d 561, 572 (4th Cir. 2013). Mr. Addington was awarded a rate of \$200.00 and Mr. Opeppard was awarded \$400.00 in 2010 in *Charles Scott Howard v. Cumberland River Coal Co.*, KENT 2008-736-D (ALJ) (Dec. 8, 2010) and in 2011 in *Charles Scott Howard v. Cumberland River Coal Co.*, KENT 2009-595-D (ALJ) (March 3, 2011). *Pendley's Response to ALJ's Order*, Ex-1, 3, 7. Furthermore, Mr. Addington has submitted evidence that in at least 10 federal black lung benefits cases he has been awarded \$225.00 per hour. *Pendley's Response to ALJ's Order*, Ex-3, 6. Considering that some of these attorneys' fee awards were granted up to five years ago, it is not unreasonable that Mr. Addington's rate has increased in the intervening period to \$250.00 per hour and Mr. Opeppard's rate has increased to \$500.00 per hour. Indeed, even UMW Associate General Counsel Arthur Traynor attested that based upon his experience litigating miner discrimination claims, \$500.00 per hour is a reasonable rate for an experienced lead attorney and \$300.00 is a reasonable rate for an assisting attorney. *Pendley's Response to ALJ's Order*, Ex-5.

² In *B & G Min., Inc. v. Director, Office of Workers' Compensation Programs*, 522 F.3d 657, 665-666 (6th Cir. 2008), the Court held that the judge did not err when he did not credit the evidence of what the coal company routinely paid its attorneys. (“B & G further argues that the adjudicators ignored its evidence of market rates. B & G submitted evidence that attorneys performing legal work for insurance companies in these types of cases typically earn \$125/hour. Yet, the rates received by those attorneys are undoubtedly affected by several factors, including volume of work and prompt payment. Attorneys who represent claimants, on the other hand, likely do not benefit from the same high volume of work. Moreover, as evidenced by the briefs and letters submitted by claimant's attorney asking for expedited payment, attorneys who represent claimants often face a significant delay in getting paid. A delay in payment can justify a higher hourly rate. *Barnes*, 401 F.3d at 745 (citing *Missouri v. Jenkins*, 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) for the proposition that a higher rate to compensate for a delay in payment was “within the contemplation of the attorneys fees statute”). Accordingly, B & G has not shown that the adjudicators abused their discretion in failing to comment upon the company's countervailing evidence.”)

With regards to Highland's argument that the amount of time Mr. Opegard and Mr. Addington expended on the case was excessive, and that the use of two attorneys was redundant, I find that the number of hours billed was reasonable. Between February 5, 2013 and February 12, 2015, Mr. Addington billed a total of 157.8 hours and Mr. Opegard billed a total of 56.4 hour, for a combined total of 214.2 hours. *Statement Regarding Relief for Lawrence Pendley*, Ex-1. The total amount of hours billed for the difficult underlying discrimination case is not *per se* excessive. Indeed, according to Ms. Kilpatrick's affidavit, Highland's attorneys billed a total of 201.55 hours in defending this case. *Highland's Brief in Response to Court Order*, Ex-3. Furthermore, I have reviewed the detailed billing logs submitted by Mr. Opegard and Mr. Addington, and they appear to represent an appropriate use of time in litigating this case. See *Statement Regarding Relief for Lawrence Pendley*, Ex-1.

Highland further argues that it was unnecessary to have both Mr. Addington and Mr. Opegard working on this case, and that much of their work was duplicative. In support of this position, it cites *Ricky Hays v. Leeco, Inc.*, 13 FMSHRC 670 (ALJ) (April 19, 1991), where Judge Koutras held that the use of two attorneys was unnecessary and discounted the rate of one attorney. The issue of whether it was reasonable to use two attorneys is of course a matter that depends upon the unique facts of the case. Indeed, in *Hays*, Judge Koutras rejected the Complainant's reliance on cases where multiple attorneys were used because "the difficulty and complexity level of the complainant's case does not rise to the level of the cited cases." *Id.* at 691.

As discussed above, the underlying discrimination case here was unique and complex. Though Mr. Opegard and Mr. Addington both billed for legal research, reviewing pleadings, reviewing trial transcripts, and writing and reviewing briefs, there is no indication that such efforts were duplicative. It is quite common for attorneys to work together on a case, and collaborate on strategy, especially in a complex case. To do so, each attorney must perform research and review pleadings and court documents. "While duplication of effort is a proper ground for reducing a fee award, 'a reduction is warranted only if the attorneys are *unreasonably* doing the *same* work.'" *Jean v. Nelson*, 863 F.2d 759, 772-73 (11th Cir. 1988), quoting *Johnson v. University College of University of Alabama in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis in original). Simply because two attorneys undertake complementary tasks in the course of litigating a case does not make such effort duplicative. In this case it was not unreasonable.

Highland's argument further suffers from the fact that it utilized three attorneys in this case (with one serving as a paralegal). *Highland's Brief in Response to Court Order*, Ex-3. It is unclear why it would be unreasonable for the miner to have the benefit of two attorneys working on his case, when the operator has at least as many. See e.g. *Lenard v. Argento*, 808 F.2d 1242, 1245 (7th Cir. 1987) ("The defendants should not have wasted our time with this argument, nor with complaining that Lenard was represented by three lawyers. The defendants were also represented by three lawyers, and while we do not lay down a flat rule that it is always reasonable for one side to have as many lawyers as the other side, neither shall we lay down a flat rule of one plaintiff's lawyer per case."). Based upon a careful review of the billing logs

submitted by the Complainant's attorneys, I find that the use of two attorneys in the tasks billed for was not unreasonable.

Lastly, Mr. Opegard and Mr. Addington are awarded attorneys' fees for the time spent preparing and defending the fee request. "Hours reasonably devoted to a request for fees are compensable." *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant*, 771 F.2d 521, 528 (D.C. Cir. 1985); see also *Schuenemeyer v. United States*, 776 F.2d 329, 333 (Fed.Cir.1985).

For the foregoing reasons, the Respondent, Highland Mining, is **ORDERED** to pay Complainant's attorney Wes Addington \$48,347.15 and attorney Tony Opegard \$35,778.00 within 30 days of this Order.

It is **FURTHER ORDERED** that if Highland ever reopens the Highland 9 Mine, it must post the original decision in this case for 60 consecutive days in conspicuous, unobstructed places where notices to employees are customarily posted.

It is **FURTHER ORDERED** that if Highland ever reopens the Highland 9 Mine, all management officials must undergo comprehensive specialized training by MSHA personnel in the safety rights of miners under §105(c) of the Mine Act.³

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

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³ This decision does not constitute the final disposition of KENT 2013-606-D until the Secretary's penalty assessment is resolved, which will be done in a subsequent Order.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 24, 2015

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

v.

UNITED SALT CORPORATION,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. CENT 2015-98
A.C. No. 41-02478-000364520

Mine: Hockley Mine

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

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). United Salt Corporation (hereinafter "United Salt" or the Respondent) has contested the two enforcement actions covered by the Secretary's penalty petition, a citation and order both issued pursuant to section 104(d)(1) of the Mine Act. On August 21, 2015, United Salt Corporation filed a Motion for Partial Summary Decision under Rule 67 of the Commission's Procedural Rules, 29 C.F.R. § 2700.67. The Respondent's motion includes as exhibits copies of the disputed citation and order, and excerpts from deposition testimony of the issuing inspectors. On September 2, 2015, the Secretary filed a Motion for Partial Summary Decision and an accompanying Brief in Support of Cross-Motion for Summary Decision and in Opposition to Respondent's Motion for Summary Decision. The Secretary's brief in support of his motion includes as exhibits copies of the inspectors' notes on the disputed citation and order (designated as "Documentation"), the complete transcripts of the deposition testimony of the issuing inspectors, and sworn declarations made by the inspectors and their supervisor. United Salt responded to the Secretary's cross motion on September 15, 2015. For the reasons set forth below, I **DENY** United Salt's motion and **GRANT** the Secretary's motion.

On August 20, 2014, the Secretary issued section 104(d)(1) Order No. 8769489 and section 104(d)(1) Citation No. 8776991 at United Salt's Hockley Mine. The violations charged in both the citation and order were designated as having been the result of United Salt's unwarrantable failure to comply with the cited standards.¹ Both motions made by the parties concern what is

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

commonly referred to as the section 104(d) chain. Section 104(d) creates a “chain” of increasingly severe sanctions that serve as an incentive for operator compliance. *See Naaco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sept. 1987). Under section 104(d)(1), if an inspector finds a violation of a mandatory standard during an inspection, and finds that the violation is significant and substantial (S&S)² and that it is also caused by an unwarrantable failure to comply with a mandatory standard, the inspector issues a citation under section 104(d)(1). 30 U.S.C. § 814(d)(1). That citation is commonly referred to as a section 104(d)(1) citation or a predicate citation. *See Greenwich Collieries, Div. of Pa. Mines Corp.*, 12 FMSHRC 940, 945 (May 1990).

If, during the same inspection or any subsequent inspection within 90 days after issuance of the predicate citation, the inspector finds another violation caused by unwarrantable failure to comply with a standard, the inspector issues a withdrawal order under section 104(d)(1). 30 U.S.C. § 814(d)(1); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1622 n.7 (Aug. 1994). If an inspector “finds upon any subsequent inspection” a violation caused by unwarrantable failure, he issues a withdrawal order for the violation under section 104(d)(2). 30 U.S.C. § 814(d)(2). The issuance of withdrawal orders under section 104(d)(2) does not cease and an operator remains on probation “until such time as an inspection of such mine discloses no similar violations.” *Id.*; *see Naaco*, 9 FMSHRC at 1545.

In this case, MSHA issued both a predicate citation and a withdrawal order to United Salt. The issue for decision is whether the predicate citation must be reduced to writing and handed to the mine operator prior to the issuance of the (d)(1) order, the next step in the chain. I find that the predicate citation may be issued verbally, and before it is reduced to writing, the next order in the chain may be issued, also verbally.

The uncontroverted facts relating to the issuances of these enforcement actions are taken from the file, the citations and the documents filed by the parties. On August 20, 2014, MSHA Inspectors Brandon Olivier and David Smith were conducting a regular quarterly inspection of United Salt’s Hockley Mine. At 10:15 A.M., Inspector Olivier found that United Salt had failed to cover an energized transformer in violation of 30 C.F.R. § 57.12032. He also found that the violation was S&S and the result of United Salt’s unwarrantable failure to comply with the standard. In the presence of Inspector Smith, Olivier verbally notified the mine superintendent David Frost of the findings. Sec’y Ex. C. United Salt took immediate actions to abate the violative condition, and the citation was terminated by 11:00 A.M. The violation is described in Citation No. 8776991. Later that same day, Inspector Smith found that United Salt had failed to guard the motor on the drag chain to an elevator, in violation of 30 C.F.R. § 57.14107(a). He also found that the violation was S&S and the result of United Salt’s unwarrantable failure to comply with the standard. Because he knew of Inspector Olivier’s earlier section 104(d)(1) enforcement action, Smith issued a verbal section 104(d)(1) withdrawal order. Sec’y Ex. F. During the evening of August 20, 2014, Inspectors Olivier and Smith reduced their findings to writing after leaving the mine site. Sometime between 7:00 and 8:00 A.M. the following morning, August 21, 2014, Olivier and Smith delivered written Citation No. 8776991 and Order No. 8769489 to Frost. Sec’y Exs. C

² 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).

& F.³ Thus, both the citation and order were issued verbally on one day, reduced to writing later, and handed to the mine at approximately the same time the next morning. Respondent argues that handing the citation and order, without proving that the citation was handed in writing first to the operator, violates the requirements of the Act. The Secretary argues that the citation and order were issued verbally in the correct order, and that reducing them to writing and handing them to the mine operator at nearly the same time, does not invalidate the requirement regarding the order in which they are issued.

In its motion, United Salt asserts that section 104(d)(1) requires that a predicate citation must “be issued in writing before the withdrawal order,” and that in this instance, it is entitled to summary decision because the Secretary “has no evidence” that the predicate section 104(d)(1) citation, No. 8776991, was issued before the section 104(d)(1) withdrawal order, No. 8769489. Mot. at 4, 6. The company characterizes its assertion as to the “lack of evidence” regarding the sequence in which Citation No. 8776991 and Order No. 8769489 were issued, as an undisputed material fact. Mot. at 1-2. United Salt relies on deposition testimony taken from Inspectors Olivier and Smith. Olivier, who issued Citation No. 8776991, testified during his deposition that he issued the written citation on August 21, 2014, in the “[e]arly morning, approximately 7:30ish.” Smith, who issued Order No. 8769489, testified that he issued the written order also on August 21, 2014, “between 7:00 and 8:00 in the morning.”

In support of his cross motion, the Secretary argues that an MSHA inspector has the discretion to issue a section 104(d)(1) withdrawal order verbally before the predicate citation on which the order is based is reduced to writing and given to the operator. The Secretary maintains that the section 104(d)(1) order Inspector Smith issued verbally on August 20, 2014, (Order No. 8769489) is therefore valid, and that as such, the Secretary is entitled to summary decision as a matter of law.

The Commission’s Procedural Rule 67(b) sets forth the grounds for determining whether a party is entitled to a summary decision:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission “has long recognized that[] ‘[s]ummary decision is an extraordinary procedure,’” and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which “the Supreme Court has indicated that summary judgment is authorized only ‘upon proper showings of the lack of a genuine, triable issue of material fact.’” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

Here, I find that the basic facts pertaining to the issuance of Citation No. 8776991 and Order No. 8769489 are not in dispute, and thus that there is “no issue as to any material fact,” satisfying Rule 67(b)(1). The parties both agree that the citation was issued verbally on August 20, 2014, that the subsequent order was issued verbally later that same day, and that both the citation and order were reduced to writing and handed to mine management the following morning. In view of the analysis that follows, I find that the sequence in which the written citation and order were physically handed to the Respondent does not invalidate either enforcement action.

The argument of both parties is that they are entitled to summary decision “as a matter of law,” 29 C.F.R. § 2700.67(b)(2), based upon the statutory language at the center of the dispute. Section 104(d)(1) states as:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary *finds* that there has been a violation of any mandatory health or safety standard, and if he also *finds* that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he *finds* such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such *finding* in any citation *given* to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary *finds* another violation of any mandatory health or safety standard and *finds* such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall *forthwith issue* an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1) (emphasis added).

The essential inquiry here is to determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is *silent* or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.” *Chevron U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (emphasis added, footnotes and citations omitted).

Here, the “precise question at issue” is whether a *written* predicate section 104(d)(1) citation must precede the issuance of a section 104(d)(1) withdrawal order. The statute requires that the inspector make “findings,” but nowhere does it specify that these must be in writing. The closest the statute comes to referring to a writing is the requirement that the inspector include his findings in a citation “given” to the operator. But while this might refer to a physical document, the statute is by no means unambiguous on the point. Indeed, notwithstanding United Salt’s arguments to the contrary, any explicit reference to a writing is conspicuously absent from section 104(d)(1), including any explicit requirement to reduce a finding to writing prior to issuing a withdrawal order. Most of the references to an inspector’s actions are to making findings, and without any requirement that any such findings be in writing. There is also a reference to the forthwith issuance of a withdrawal order, which, again, does not include any requirement that the issuance be in writing. The silence of the statute on the “precise question at issue” is obvious: Congress simply did not address it.

I find that as to the manner in which the Secretary exercises his discretion to issue unwarrantable failure citations and orders, section 104(d)(1) is ambiguous to whether and to what extent such issuances must be in writing. I find further that the Secretary’s reading of section 104(d)(1) as allowing him to verbally issue section 104(d)(1) withdrawal orders based on the verbal issuance of a predicate citation is reasonable and, as such, entitled to deference.

The primary purpose of the Mine Act is to ensure the health and safety of miners. It would defy reason and the very purpose of the Mine Act to require MSHA to delay issuing a withdrawal order so that a predicate citation could be committed to writing. The purpose of a withdrawal order is to protect miners from hazards, and the hazards that led the inspector to issue a withdrawal order should not be placed on hold while the inspector takes the time to prepare a written predicate citation. Though the Commission has never ruled that section 104(d)(1) withdrawal orders may be issued based upon a verbal predicate citation,⁴ such an interpretation reasonably follows from the text of the Mine Act, which requires that withdrawal orders be issued “forthwith” and permits them to be issued “during the same inspection” as the citation. 30 U.S.C. § 814(d)(1). Verbally issued citations and orders are consistent with the scheme outlined in section 104(d) for protecting miners from the repeated unwarrantable failure of an operator to comply with mandatory standards – i.e., violations attributable to the operator’s aggravated negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) (unwarrantable failure is aggravated conduct constituting more than ordinary negligence).

United Salt argues that its interpretation of section 104(d)(1) is compelled by the language of the statute. But as I have already noted, the text of section 104(d)(1) does not explicitly, or even implicitly, require that MSHA serve a *written* citation upon a mine operator before it issues “forthwith” a subsequent withdrawal order. Furthermore, United Salt’s interpretation would lead to the absurd result of exposing miners to hazards while an inspector rushes out of the mine to his car and prepares a written citation before returning to hand it to the mine operator and only then continue his inspection.

⁴ In roughly analogous circumstances, in the face of hazardous conditions, the Commission recently affirmed as a matter of course a verbal order that was only subsequently given in writing to the mine operator. *See Mill Branch Coal Corp.*, 37 FMSHRC ____, slip op. at 4 (July 23, 2015) (affirming verbally issued section 107(a) imminent danger order).

United Salt also argues that the requirement set forth in section 104(a) of the Mine Act that “[e]ach citation shall be in writing,” 30 U.S.C. § 814(a), “unambiguously indicates that there can be no such thing as an oral citation.” United Salt Resp. at 1. I find no such clarity in the statutory language, and do not discern any prohibition against MSHA acting in the first instance through verbal directives so long as such actions are reduced to writing as soon as is practicable. In this regard, the Commission has recognized that the purpose of the requirements of section 104(a) is to “allow [] the operator to discern what conditions require abatement, and to adequately prepare for a hearing on the matter.” *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993). In this instance, it appears that the verbal issuance of Citation No. 8776991 and its subsequent written transmission to United Salt both put the company on notice of the conditions it needed to abate (the cited condition was terminated before the written citation was given to United Salt) and allowed it to prepare for a hearing. Furthermore, MSHA mine inspectors must act to protect miners from harm, and often must act quickly and without the impediment of reducing their findings to writing *before* ordering a mine operator to correct a hazard. If the discretion of inspectors to take such immediate action was constrained as United Salt argues, the Mine Act would be eviscerated.⁵

Even if I determined that the Secretary was not entitled to summary decision, I could not grant United Salt’s motion. United Salt’s argument depends on finding that the written Citation No. 8776991 was given to the operator before it received the written Order No. 8769489. But United Salt relies on indefinite deposition testimony as proof of this fact; it is by no means an undisputed material fact as to which both parties can agree. It is clear, after examining the deposition testimony upon which United Salt relies, that it is not certain exactly when either the written citation or written order was given to United Salt on August 21, 2014. What is clear from the deposition testimony is that these two pieces of paper were issued to the Respondent very close to – if not exactly – at the same time. Even if the sequence in which *written* section 104(d)(1) citations and orders are given to a mine operator is relevant to the validity of such paper, that sequence is obviously unsettled and would be in need of further factual development, rendering summary decision inappropriate.

Moreover, even if, as a matter of law, the issuance of a written predicate citation *must* precede the issuance of a subsequent section 104(d)(1) order for that order to stand, I note that it is within my power to modify either the predicate citation or the subsequent order to satisfy a “sequence rule” of the sort United Salt argues for. *See Lodestar Energy, Inc.*, 25 FMSHRC 343, 345-46 (July 2003). Section 105(d) of the Mine Act states that “the Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary’s citation, order, or proposed penalty, or directing

⁵ I reject out of hand United Salt’s novel assertion that section 104(d)(1) must be strictly construed under the rule of lenity because “a section 104(d)(1) withdrawal order is punitive.” United Salt Resp. at 2. Withdrawal orders are not issued to punish mine operators. They are issued to protect miners from potential harm. As to the penalty petition that is before me in this proceeding, the legislative history of the Mine Act sets forth the purpose of the Act’s civil penalty provision, section 110(I), 30 U.S.C. § 820(I), as follows: “[T]he purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.” S. Rep. No. 95-181, at 40-41 (1977). The legislative history of section 110(I) makes clear that civil penalties are remedial in nature, not punitive, and are assessed to induce effective and meaningful compliance with safety and health standards.

other appropriate relief.” 30 U.S.C. § 815(d). The Commission has explained that this provision “permits a judge to modify a citation or order so long as the essential allegations necessary to sustain the modified enforcement action are contained in the original citation or order.”

Mechanicsville Concrete, Inc., 18 FMSHRC 877, 880 (June 1996). Under *Mechanicsville*, I do not have the authority to “add new findings to create a 104(d)(1) citation.” *Id.* But I do have the authority to modify withdrawal Order No. 8769489 here to a predicate citation, and modify predicate Citation No. 8776991 to a withdrawal order, that is if the circumstances surrounding the issuance of these two enforcement actions so warrants, either on my own motion or if moved to do so by the Secretary. I note particularly that withdrawal Order No. 8769489 meets all the prerequisites for a predicate citation: findings by the inspector that the violation was S&S and caused by an unwarrantable failure to comply with the cited standard. See *Lodestar*, 25 FMSHRC at 345.

Having considered all of the documents, briefs, and exhibits, I find that the Secretary is entitled to summary decision as a matter of law, and that section 104(d)(1) Order No. 8769489 was validly issued based upon the verbal issuance of predicate section 104(d)(1) Citation No. 8776991. I do not reach the merits of the citation and order and therefore leave that matter for hearing and grant a partial decision in favor of the Secretary. Accordingly, the Motion for Partial Summary Decision of United Salt Corporation is **DENIED**, and the Motion for Partial Summary Decision of the Secretary of Labor is **GRANTED**.

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

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