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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

September 12, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. CENT 2016-95-M
v.	
ARNOLD STONE, INC.	

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

DECISION

BY: Althen, Acting Chairman; Jordan and Young, Commissioners

This 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 citation issued to Arnold Stone, Inc. ("Arnold Stone") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). MSHA alleged that a malfunctioning lockout system on a skid loader constituted a violation of 30 C.F.R. § 56.14100(b). MSHA further alleged that the violation was reasonably likely to cause a permanently disabling injury, was significant and substantial ("S&S"),[1] was the result of reckless disregard for the safety of miners, and was an unwarrantable failure to comply with the relevant standard.[2]

The Judge found that the violation was S&S. However, she held that the violation was not an unwarrantable failure and was the result of high negligence rather than reckless disregard and imposed a reduced penalty of $10,000. The Secretary of Labor filed a petition for discretionary review challenging the Judge's determination as to unwarrantable failure and the penalty assessment, which we granted.

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

All four Commissioners would reverse the Judge's unwarrantable failure determination. Acting Chairman Althen, Commissioner Young, and Commissioner Jordan would find that the operator failed to abate a known, obvious, S&S danger encountered daily by miners. Therefore, they would conclude that the operator's failure to protect its miners from the danger was the result of its unwarrantable failure. However, while Commissioner Cohen would also reverse the Judge's unwarrantable failure determination, he writes separately on the issue of unwarrantable failure.

Acting Chairman Althen and Commissioner Young would affirm the Judge's penalty assessment, while Commissioners Jordan and Cohen would vacate and remand the Judge's penalty assessment. The position of Commissioners Jordan and Cohen on remanding the penalty is set forth in Commissioner Cohen's separate opinion. Therefore, because there is no majority on this issue, the Judge's assessment of penalty shall stand as if affirmed. *Pennsylvania Elec. Co.,* 12 FMSHRC 1562, 1563 (Aug. 1990), *aff'd on other grounds,* 969 F.2d 1501 (3d Cir. 1992).

I.

Factual and Procedural Background

A. Facts

The mine in question is a surface limestone mine located in Texas and owned by Mike Arnold. 38 FMSHRC 1746, 1746-47 (July 2016) (ALJ). In August 2015, an MSHA inspector inspected a skid steer loader used at the mine since 2014. The loader utilized a large bucket to haul stone to a splitter 100 feet away. Tr. 20. The loader had four wheels, and was operated by a driver in a small compartment with controls and a seat.

Because of the tight space in the compartment, a driver could accidentally touch the controls while entering or exiting the loader. The loader had a lockout system comprised of a seatbelt lockout and a lockout switch. The purpose of the lockout system was to prevent the equipment from functioning if an operator touched the controls while not wearing a seatbelt. 38 FMSHRC at 1747.

The inspector met with two miners: the driver of the skid loader, Marcus Sanchez, and the site supervisor, Dennis Sorrells. *Id.* The inspector testified that only two miners typically work at the mine. Tr. 27. Sanchez informed the inspector that there had been an intermittent problem with the lockout system for a lengthy period but that the defect had become permanent in the months preceding the inspection. Specifically, Sanchez demonstrated to the inspector that the lockout system was not working. Therefore, if the loader's engine was running and a driver accidentally touched the controls, the loader would move forward even if the seat belt were unbuckled. 38 FMSHRC at 1748.

Sanchez told the inspector that miners were aware of the lockout defects on the loader and exercised safety precautions when working near the loader. Sanchez claimed that miners generally kept their distance from the equipment and that the driver turned off the engine of the

loader before exiting the machine. *Id*. As long as the engine was turned off, the loader would not move, even if a driver accidentally touched the controls.

Although Sorrells, the site supervisor, knew about the longstanding lockout defects, the operator did not try to fix the defects prior to the inspection on August 12. *Id.* at 1749-50. According to the testimony, only Mike Arnold, the owner, had authority to provide for the repair of the defects, and Sorrells never informed him of the problem. *Id.* at 1753.

The inspector believed that if the loader unexpectedly lurched forward, it could throw the driver from the machine and also might hit anyone standing nearby, resulting in injury to miners. *Id.* at 1747-48, 1751. Moreover, he noted that inspection records of the operator did not identify the defect, even though the loader was used daily and was subject to a routine pre-operation inspection. *Id.* at 1748; Resp't Ex. D. He issued the citation alleging that the violation was significant and substantial, and an unwarrantable failure to comply with the cited standard. MSHA proposed a special assessment of $63,000 for this violation. 38 FMSHRC at 1746.

B. The Judge's Decision

The Judge found that the operator had violated section 56.14100(b).[3] *Id.* at 1749-50. In addressing the unwarrantable failure issue, the Judge applied each factor of the traditional seven-factor unwarrantable failure test to the facts presented. *Id.* at 1751-54; *see also IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). Specifically, the Judge considered the length of time the violation existed, extensiveness of the violation, whether the operator had received notice that greater efforts were necessary for compliance, the operator's efforts (or lack thereof) to abate the violation, the degree of danger posed by the violation, the obviousness of the violation, and the operator's knowledge of the existence of the violation. 38 FMSHRC at 1751-54.

The Judge found key factors significantly aggravating. According to the Judge, "the violation was obvious to the miners who operated the machine. Instead of having the switch repaired, they learned to work carefully around it to avoid injury." *Id.* at 1754. Moreover, the violation had existed, at least intermittently, for 18 months prior to the inspection – a factor the Judge specifically cited as aggravating. *Id.* at 1753, 1754. Further, the Judge recognized the "well-settled law that an operator's knowledge of the existence of a violation may be established not only by demonstrating actual knowledge, but also by showing that the operator 'reasonably should have known of the violative condition.'" *Id.* at 1754 (quoting *IO Coal*, 31 FMSHRC at 1356-57). Applying this principle, the Judge found knowledge to be an aggravating circumstance because Sorrells, the site supervisor and an agent of the operator, knew that the lockout system was broken. 38 FMSHRC at 1754. In sum, the Judge found the operator, through its agent, knew for 18 months of an obvious and S&S violation, and, nonetheless took no action to abate the violation.

[3] 30 C.F.R. § 56.14100(b) states: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

Regarding other unwarrantable failure factors, the Judge did not make any findings that mitigated the known, obvious, and longstanding S&S violation. Indeed, the Judge essentially only found other factors not especially aggravating. For example, because the individual owner lacked knowledge of the violation, the Judge held that the failure to abate was not "significant[ly] aggravating" and that, because only two miners worked around the equipment, the degree of danger was not "especially high." *Id.* at 1753-54. These are not "mitigating" findings. Finally, the Judge found that because MSHA had not previously cited the operator for this type of violation, the operator had not been placed on notice that greater efforts were necessary for compliance. *Id.* at 1753.

Despite finding several factors highly aggravating and other factors either not relevant or only not especially aggravating, the Judge concluded that the violation was not the result of an unwarrantable failure. *Id.* at 1754. She assessed a penalty of $10,000 rather than the proposed penalty of $63,000. *Id.* at 1755.

II.

Unwarrantable Failure to Comply

In *Emery Mining Corporation.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission explained that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The operator has not disputed on review that the violation existed for many months, that it had knowledge of the violation through its site supervisor, and that the violation was obvious. Nor does the operator dispute that the violation was reasonably likely to result in reasonably serious injuries. Therefore, these findings by the Judge constitute the law of the case, and demonstrate the occurrence of a known and obvious violation that resulted for more than a year in a reasonable likelihood of a miner being hit by the skid loader thereby causing serious injury or death. *See Manalapan Mining Co.,* 36 FMSHRC 849, 852 (Apr. 2014) (stating that when a Judge's decision on certain issues is not challenged on appeal, the Judge's decision on such issues continues to govern); *see also Concrete Works of CO, Inc. v. City and Cty. of Denver,* 321 F.3d 950, 992-93 (10th Cir. 2003); *United States v. Bell,* 988 F.2d 247, 250 (1st Cir. 1993).[4]

Under these facts, there is no need for a mechanical recitation or lengthy discussion of other unwarrantable failure factors. Without doubt, the violation was the result of the operator's unwarrantable failure.

[4] In recounting the facts, the Judge noted that the site supervisor informed the inspector that management had told the miners to continue to use the skid loader because it was too expensive to fix. The testimony did not specify who in management was told of the problem.

Here, the Judge found and the operator has not challenged that the operator had actual knowledge of an obvious S&S violation for a period as long as 18 months and did not take any actions to abate the violation or the danger. It is difficult to conceive of circumstances in which other factors could serve to mitigate such conduct.[5] If mitigation were somehow possible, it certainly is not present here.

The Judge found lack of abatement was "not a significant aggravating factor" because only the owner had authority to authorize repair, and he did not know of the violation. 38 FMSHRC at 1753. It may be correct that, under the operator's policies, the corporate owner was the only person with authority to fix the defect. An operator, however, may not insulate itself against the duty to address known hazards by placing the authority to authorize repairs necessary for safety in one (or several individuals) and then permit agents with knowledge of the defects to fail to report the defects in a timely manner to individuals responsible for authorizing repairs. It is the duty of the operator to make agents aware of their obligation to prevent and correct violations, especially when the violations are S&S. Therefore, the operator's failure to abate a long-existing, obvious, known, dangerous violation is an aggravating factor lending additional support to an unwarrantable failure finding.

The violation was S&S – that is, reasonably likely to result in a serious injury – and the degree of danger increases when an operator ignores a chronic problem. The Judge's finding that "only" two miners were exposed to this obvious and known danger over a lengthy period does nothing to mitigate the neglect demonstrated in this case. Under the facts of this case, substantial evidence does not support the Judge's decision. To the contrary, the facts mandate an unwarrantable failure designation.

When the evidence presented on the record supports no other conclusion, remand is unnecessary. *Am. Mine Servs., Inc.* 15 FMSHRC 1830, 1834 (Sept. 1993). Because the evidence overwhelmingly weighs in favor of an unwarrantable failure determination, it is unnecessary to remand this issue. Therefore, we reverse the Judge's determination. The violation in this case is an unwarrantable failure.

[5] We do not see the need to rely on the Secretary's suggestion that we adopt a presumption of unwarrantable failure in these circumstances. Our decision rests upon and is limited to the facts of this case, which support only the conclusion that the violation was unwarrantable.

III.

Penalty Assessment[6]

The Judge below properly based the penalty assessment upon the statutory criteria. Further, the Commission and the Secretary have accepted the Judge's determinations on the penalty criteria. Therefore, we do not find any basis for remanding the Judge's discretionary determination of the appropriate penalty.

Under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), Judges must consider six criteria in assessing a 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 of the person charged in attempting to achieve rapid compliance after notification of a violation."

The Commission has held that Judges must make findings of fact based on these statutory penalty criteria. *Sellersburg Stone Co.,* 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once these findings have been made, a Judge's penalty assessment is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). A penalty assessment is reversible if it lacks record support, is plainly erroneous, or otherwise constitutes an abuse of discretion.

The record supports the Judge's penalty assessment, and we do not find any basis to find the Judge erred or abused her discretion in setting the penalty. Indeed, she explicitly considered all penalty criteria.

The Judge found expressly that the operator had "little history of violations," was a small family operated business, had recently emerged from bankruptcy so the proposed penalty would constitute a hardship, and abated the violation in good faith. 38 FMSHRC at 1755. Record evidence introduced by the Secretary or a stipulation of the parties supports each of these findings. Obviously, these factors support the Judge's assessment.

Regarding negligence, MSHA asserted that the violation exhibited reckless disregard. The Judge found that the violation was a result of the operator's high negligence. The Secretary did not petition for review of this modification to MSHA's assessment and, thus, did not dispute this modification for purposes of the penalty assessment.

Finally, there is some discordance in the Judge's decision regarding degree of danger analysis for purposes of unwarrantable failure versus the penalty assessment. As found in our

[6] Commissioner Jordan would remand the penalty assessment to the Judge and joins in Commissioner Cohen's opinion with regard to this issue. Therefore, this portion of the opinion represents only the views of Acting Chairman Althen and Commissioner Young.

common decision, in considering degree of danger in the unwarrantable failure context, the Judge found the "degree of danger" was not "especially high," whereas in the penalty consideration, the Judge affirmed the inspector's finding of a reasonable likelihood of a permanently disabling injury. Of course, for purposes of evaluating the Judge's penalty determination, her finding in the penalty portion of her decision is the important finding. There, the Judge accepted the inspector's evaluation of gravity.

Although the gravity evaluation in the penalty portion of her opinion works to the detriment of the unwarrantable failure determination, it does not adversely affect but, in fact, sustains the penalty determination. In the Judge's unwarrantable failure analysis, she focused upon the "degree" of danger. She found that the exposure of only two miners to the defective equipment tempered the degree of danger rather than the gravity of the violation. The Judge's findings on S&S and gravity confirm that she found the violation created a grave danger, albeit to two miners. We find no basis to remand with a suggestion that in assessing a penalty the Judge should find gravity greater than the assessment of the inspector.

Assessment of penalties is not science. The Judge must consider and address the six specific criteria. Here the Judge conducted the necessary analysis addressing every penalty criterion. MSHA has not argued for error in any of her findings, including her reduction of reckless disregard to high negligence. Certainly, MSHA cannot object to her acceptance of the inspector's gravity determination in her penalty analysis. We cannot find an abuse of discretion in an assessment of a $10,000 penalty upon a small and financially endangered operator that abated the penalty in good faith and whose pre-citation failure to abate, the Judge found, resulted from a flawed system for reporting equipment defects — a flaw that a $10,000 penalty to a small operator should be sufficient to correct.

Moreover, the Secretary has not challenged, and we have accepted, all of the Judge's findings on the statutory penalty criteria related to the penalty assessment. Indeed, the Secretary did not even argue that the Judge erred in evaluating any of the penalty criteria but simply requested in the last paragraph of his petition for discretionary review and brief that "for similar reasons" we should remand for a new penalty determination. PDR at 32.

An unwarrantable failure determination is a separate and distinct finding under the Mine Act. Such a violation results in its own distinct and separate enhanced sanction under section 104 of the Act.[7]

The record and the Judge's findings amply support the $10,000 assessment, and the decision most certainly is not plainly erroneous. We conclude that the Judge's penalty assessment does not constitute an abuse of discretion and find no reason for a remand to reconsider an issue the Judge has thoroughly considered and adequately explained. Therefore, we would affirm the Judge's assessment of a $10,000 penalty.

[7] The Commission has held repeatedly that 30 C.F.R. Part 100, which governs the Secretary's proposal of penalties, does not bind Commission Judges. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-04 (Aug. 2015); *Wade Sand & Gravel Co.*, 37 FMSHRC 1874, 1876-77 (Sept. 2015); *Excel Mining, LLC*, 37 FMSHRC 459, 468-69 (Mar. 2015). That determination applies with full force to the penalty conversion calculator in Table XIV of Part 100. At the same time, we have held that when a Judge's penalty assessment varies substantially from MSHA's proposed assessment, the Judge should explain the reason for the variance. *Cantera Green*, 22 FMSHRC at 622; *Sellersburg Stone*, 5 FMSHRC at 293. Although the Judge did not offer such an explanation here, the reason for the variance is readily ascertainable.

MSHA specially assessed the penalty proposal pursuant to 30 C.F.R. § 100.5. That decision had the effect of increasing the MSHA-proposed penalty by approximately 600 percent over application of the regular point table — that is, from approximately $11,000 to $63,000. However, if the accepted change from reckless disregard to high negligence were taken into account, the MSHA proposed penalty under the regular point schedule would have been about $3,500 and under its special assessment calculation approximately $24,000. Under these circumstances, the MSHA proposed assessment should not disturb the Judge's eminently reasonable final assessment.

IV.

Conclusion

In sum, we hereby reverse the Judge's determination that the violation was not the result of an unwarrantable failure. The Judge's assessment of penalty for this violation shall stand as if affirmed.[8]

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

[8] As stated above, while Acting Chairman Althen and Commissioner Young would affirm the Judge's assessment of penalty, Commissioners Jordan and Cohen would remand the penalty assessment. *See* slip op. at 2, 5 n.6.

Commissioner Cohen, concurring in part:

I agree with the majority that the record in this case compels a finding that Arnold Stone demonstrated an "unwarrantable failure . . . to comply with . . . mandatory health or safety standards" within the meaning of section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). However, I disagree with my colleagues, Acting Chairman Althen and Commissioner Young, that, in view of the reinstatement of the unwarrantable failure designation, the Judge's assessment of the penalty as $10,000 should not be vacated and remanded for further consideration.

I write separately on the unwarrantable failure issue because I believe that the majority decision does not represent an adequate and complete analysis of this issue. The Judge's Decision and Order contains a complete description and analysis of the seven factors which the Commission repeatedly has identified as central to an understanding of why the designation of unwarrantable failure is or is not appropriate in a particular case. *See, e.g., San Juan Coal Co.,* 29 FMSHRC 125, 128 (Mar. 2007); *IO Coal Co.,* 31 FMSHRC 1346, 1351 (Dec. 2009); *Manalapan Mining Co.,* 35 FMSHRC 289, 293 (Feb. 2013). However, the majority, under the rubric of "substantial evidence", has short-circuited the analysis which we require of Commission Judges. In doing so, the majority decision, in my view, fails to fulfil the Commission's institutional responsibility to specifically review the Judge's legal conclusions for error.

A. The Judge's Decision

The Judge found that Arnold Stone, Inc. violated 30 C.F.R. § 56.14100(b). In addressing the unwarrantable failure issue, the Judge applied each factor of the traditional seven-factor unwarrantable failure test to the facts presented. *See IO Coal*, 31 FMSHRC at 1350-57. Specifically, the Judge considered the length of time the violation existed, extensiveness of the violation, whether the operator had received notice that greater efforts were necessary for compliance, the operator's efforts (or lack thereof) to abate the violation, the degree of danger posed by the violation, the obviousness of the violation, and the operator's knowledge of the existence of the violation.

First, the Judge found that the violation had existed, at least intermittently, for 18 months prior to the inspection. Therefore, the Judge found that the violation had existed for a lengthy period and treated the length of time as an aggravating circumstance.

Second, the Judge found that "only one miner operated the skid loader at a time and there were only a handful of [miners] working around the machine at any given time." 38 FMSHRC at 1753. Citing *Dawes Rigging and Crane Rental*, 36 FMSHRC 3075, 3079-80 (Dec. 2014), the Judge found that the number of miners affected by a violation is relevant to determining extensiveness. The Judge then concluded that the violation was not extensive because few miners were affected. Therefore, the Judge weighed the extensiveness factor against an unwarrantable failure designation.

Third, the Judge found that because MSHA had not previously cited the operator for this violation or for similar violations, the operator lacked notice that greater efforts were necessary for compliance. As a result, the Judge concluded that the notice factor weighed against finding an unwarrantable failure.

Fourth, the Judge found that the operator did not seek to abate the citation prior to the inspection. However, the Judge found that the site supervisor's failure to inform the individual owner of the corporate operator of the violation hampered any potential abatement efforts because only the owner had authority to order repairs of equipment defects. Finding the individual owner lacked knowledge of the violation, the Judge held that the failure to abate was "not . . . significant[ly] aggravating". 38 FMSHRC at 1753.

Fifth, the Judge found that the violation did not pose an "especially high" degree of danger despite separately finding that the violation was "significant and substantial' ("S&S") and chronic.[1] *Id.* at 1754. The Judge reasoned that the violation did not pose a high degree of danger because few miners worked at the mine, a small family run operation, and thus the violation affected only a few miners. The Judge found that degree of danger did not weigh in favor of an unwarrantable failure finding.

Sixth, the Judge found that "the violation was obvious to the miners who operated the machine. Instead of having the switch repaired, they learned to work carefully around it to avoid injury." *Id.* The Judge treated obviousness as an aggravating circumstance.

Seventh, the Judge found that the operator was aware of the violation prior to the inspection. The Judge recognized the "well-settled law that an operator's knowledge of the existence of a violation may be established not only by demonstrating actual knowledge, but also by showing that the operator 'reasonably should have known of the violative condition.'" *Id*. Applying this principle, she found knowledge to be an aggravating circumstance because Sorrells, the site supervisor and an agent of the operator, knew that the lockout system was broken.

After reviewing each of the seven factors separately, the Judge weighed them together, and concluded that the violation was not the result of an unwarrantable failure because the mitigating circumstances offset the aggravating circumstances. She assessed a penalty of $10,000 rather than the proposed penalty of $63,000. *Id.* at 1755.

B. Unwarrantable Failure

In *Emery Mining Corporation.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission explained that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard,"

[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."

"intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).[2]

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk 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 was placed on notice that greater efforts were necessary for compliance. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013) (citing *Manalapan Mining*, 35 FMSHRC at 293; *IO Coal,* 31 FMSHRC at 1350-57). These seven factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

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[2] On appeal the Secretary states that the term "unwarrantable failure" in section 104(d) of the Mine Act, should include any failure by an operator to abate an obvious and known S&S violation for a significant period of time absent unusual mitigating circumstances. Leaving aside the question of whether we should consider this proposed statutory interpretation given that the Secretary raises it for the first time on appeal, I reject it.

Essentially, this is an attempt to create a new presumption: If "an operator [fails] to abate an obvious and known S&S violation for a significant period of time," the violation is necessarily an unwarrantable failure "unless unusual mitigating factors are present." PDR at 14. Under the Secretary's formulation, the factors of extensiveness, notice and efforts to abate the violation do not have to be considered. Additionally, the Secretary offers no explanation of the meaning of "unusual mitigating factors."

I do not think that the Secretary's attempt to establish a new presumption is at all helpful. The Commission has a well-established and quite serviceable approach: the Judge looks at seven factors. He or she does not have to give them equal weight. Indeed, the Judge is free to determine that in the particular circumstances of the case, one or more of the factors may be irrelevant. The Commission rightly has concluded that consideration of all seven factors serves two very important functions – first, it focuses the attention of the parties and the Judge on those factors which may be relevant to a determination of unwarrantable failure; second, it provides a full basis for the Commission to fulfill its review function if the Judge's decision is appealed.

The Secretary's proposal would add a new level of analysis. The Secretary would be able to prove unwarrantable failure through the traditional method of analysis, or – if he was unable to do so – if the violation was S&S, he could take a shortened approach to his burden of proof, and place a rebuttal obligation on the operator. This would greatly complicate analysis of unwarrantable failure issues, with no gain in clarity or accuracy.

In this case, the Judge found that the defective safety switch had not functioned properly for 18 months and that the mine supervisor, and thus the operator, knew of the violative condition during this period. The Judge also found that the violation was obvious, was reasonably likely to result in reasonably serious injuries, and that no efforts had been made to address the defects. There is no reason to disturb these findings by the Judge. However, the Judge erred in determining that the abatement, extensiveness, degree of danger, and notice factors weigh against an unwarrantable failure determination.[3]

The majority relies on the factors of duration, knowledge and obviousness, together with the fact that the violation was S&S. The majority then states, "[u]nder these facts, there is no need for a mechanical recitation or lengthy discussion of other unwarrantable failure factors." Slip op. at 4. In so saying, the majority undercuts the system of unwarrantable failure analysis which the Commission has carefully crafted over many years. The discussion of the factors is not "mechanical", and it certainly need not be "lengthy".[4] Rather, it serves to focus the parties and the Judge on a set of factors which may be relevant to a determination of unwarrantable failure. As the Commission said in *Manalapan Mining*:

> These seven factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist.

35 FMSHRC at 293 (citations omitted).

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[3] The majority characterizes the Judge's decision as finding that these factors were "either not relevant or only not especially aggravating". Slip op. at 4. This description is grossly incorrect. While the Judge did find that the operator's efforts to abate the violative condition "was not a significant aggravating factor," and that the degree of danger was not "especially high," she expressly found that the violation was not extensive and that the operator had not been placed on notice that greater efforts were necessary. 38 FMSHRC at 1753-54. Moreover, in the paragraph where she weighed all of the factors together, the Judge expressly stated that "there are a number of factors that weigh against a finding of unwarrantable failure." *Id.* at 1754. In this regard, she stated, "[t]he extent of the violation was limited and it did not pose a high degree of danger. Further, the person with authority to repair the defect, Mike Arnold, was not aware of it, and had no notice that greater efforts toward compliance were necessary." *Id.* The majority ignores the fact that the Judge clearly considered the factors of danger and efforts to abate the violation as mitigating, and weighed them, along with extensiveness and notice, against the factors she found to be aggravating.

[4] My discussion of the four factors where I believe the Judge erred, *infra,* is quite brief.

I conclude that the Judge erred in considering that abatement, extensiveness, danger and notice were factors cutting against a finding of unwarrantable failure, and further conclude that a finding of unwarrantable failure is required in this case, for the following reasons:

1. Abatement

In discussing the operator's knowledge of the existence of the violation in a separate part of her opinion, the Judge concluded that the operator reasonably should have known of the violation because the site supervisor was aware of it. 38 FMSHRC at 1754. That finding is consistent with our precedent that an operator's knowledge is established when an operator reasonably should have known of the violation. *See Emery,* 9 FMSHRC at 2002-04; *Drummond Co.,* 13 FMSHRC 1362, 1367-68 (Sept. 1991). Indeed, the Judge found knowledge to be an aggravating factor. Despite finding the operator had knowledge of the violation, however, the Judge concluded that the operator's lack of abatement efforts was excusable because the individual owner of the corporate operator was the only person with authority to fix the defects and he was unaware of the violation.[5]

This finding constitutes error. An operator may not avoid, intentionally or unintentionally, the duty to address known hazards by placing an institutional firewall between the agents with knowledge of the violative conditions and the individuals with the authority to authorize necessary repairs. Such corporate balkanization cannot serve as a defense to an unwarrantable failure allegation. Regardless of the size of an operator, when an agent of the operator becomes aware of violations, a system must exist to authorize and undertake necessary repairs. Specifically, when an agent of the operator becomes aware of an equipment defect violating a mandatory safety standard, the operator must undertake repairs or discontinue use of the equipment. The operator must make its agents aware of their obligation to prevent and correct violations. In the present case, the mine owner's professed ignorance of this long-standing, known, obvious and dangerous defect is not an excuse for inaction, but rather an

[5] In support of their abbreviated analysis, the majority finds that an unidentified manager of Arnold Stone told the miners to continue using the defective skid loader because the defect was "too expensive to fix". Slip op. at 4 n.4. Such a fact, if true, would indeed be damning. But the Judge's decision cannot support such a finding. The Judge found that Arnold Stone is a "family-operated business", 38 FMSHRC at 1755, and further determined that owner Mike Arnold – the only person with authority to authorize repairs – "credibly testified that he did not know about the defect." *Id.* at 1753. In view of these findings, which neither the Secretary nor the majority challenged, no other manager could have the authority to determine whether the defect would be repaired, and Mike Arnold could not have made the statement because he was unaware of the problem. In her description of the testimony, the Judge noted that MSHA Inspector Fitzgerald testified that site supervisor Sorrells told him that "management had told the miners to continue using the machine because it was too expensive to fix." *Id.* at 1748. However, in her actual fact-finding, the Judge did not credit this double-hearsay statement, or even mention it. Indeed, to have credited it would have been inconsistent with the Judge's credibility finding that Mike Arnold was not aware of the problem.

indictment of the operator's insufficient procedures for reporting and addressing hazards at the mine.

Therefore, I reject the Judge's finding that the operator's lack of abatement efforts was excusable. Instead, the failure to abate this known violation for several months is an aggravating factor. *IO Coal,* 31 FMSHRC at 1350-51 ("Aggravating factors include . . . the operator's efforts in abating the violative condition").

2. Extensiveness

The Judge found that if the loader unexpectedly lurched forward, it could throw the driver from the machine and hit anyone standing nearby. 38 FMSHRC at 1751. Nonetheless, the Judge concluded that the violation was not extensive because it would only affect a small number of miners.

We have held that extensiveness "is a fact question concerning the material increase in the degree of risk to miners posed by the violations." *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1196 (Oct. 2010). The extensiveness of violative conduct has traditionally been determined by examining the extent of the affected area, as it existed at the time of the citation. Extensiveness does not involve the degree of danger or obviousness but rather it measures the magnitude or scope of the violation. *See* at 1195.

Typically, extensiveness deals with such issues as the size of a violation (e.g., accumulation violations) or extent of area affected (e.g., roof control violations). The Judge's finding that the violation was not extensive incorrectly focused on the absolute number of affected miners. It failed to take into account that the loader was used every day that the mine was in operation. Tr. 29. Hence, one or both of the miners were exposed to the hazard every day, a factor that in this case bears directly upon extensiveness because it is a measure of the magnitude of the violation.

Every miner is entitled to the protection of the Act and regulations. When a known violation that creates a reasonable likelihood of serious injury persists for several months, a finding that only two miners worked under such an ongoing danger does little to diminish the magnitude – that is, the extensiveness – of the violation.

Our decision in *Dawes,* 36 FMSHRC at 3079-80, does not dictate a different result. *Dawes* involved a contractor that was constructing a large crane for a mine operator. During this process, one of the contractor's employees passed directly beneath the boom of the crane to protect another employee from a hazard, resulting in a violation of the relevant standard. That movement was momentary – two or three seconds at most. The Commission ruled that this circumstance was not extensive for purposes of an unwarrantable failure designation because the danger to that one employee was very brief and occurred in the context of reflexive protection of a fellow employee. The Commission's finding on extensiveness, therefore, was that the scope of the very brief (momentary) hazard to one employee was not extensive. In contrast, the violation in this case had effectively endangered everyone working in or around the skid steer loader for 18 months.

Under these circumstances, the fact that at a given time only one or two miners faced the hazard does not mean such ongoing hazard was not extensive. Therefore, I reject the Judge's finding that extensiveness was a mitigating factor and instead conclude that it was aggravating.

3. Danger

The operator has not disputed the Judge's finding that the violation was S&S and "chronic." Further, the Judge recognized that the degree of danger increases when an operator ignores a chronic problem.[6] She also found that the violation would be reasonably likely to result in a serious injury. 38 FMSHRC at 1750-51, 1754. Nonetheless, the Judge found that "[w]hile the violation was S&S, I do not find the degree of danger to be especially high given the small number of miners working at the mine." *Id*. at 1754.[7] For the reasons discussed in my analysis of the extensiveness factor, *supra,* this was error.

The danger that a miner would be reasonably likely to be seriously injured or killed supports rather than undercuts an unwarrantable failure designation.

4. Notice that Greater Efforts Were Needed for Compliance

The Commission has held that "[r]epeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard." *Amax Coal Co.,* 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.,* 23 FMSHRC 588, 595 (June 2001). We have also recognized that '"past discussions with MSHA"' about a problem '"serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard.'" *IO Coal,* 31 FMSHRC at 1353 (quoting *San Juan,* 29 FMSHRC at 131; *Consol,* 23 FMSHRC at 595). In addition, however, the Commission has held that an operator's own notes and knowledge of a violation can provide it with notice that greater efforts are necessary to ensure compliance with a safety standard. *See Peabody Coal Co.,* 14 FMSHRC 1258, 1262 (Aug. 1992).

In this case, it is undisputed that MSHA had not previously cited Arnold Stone for this violation or similar violations. In addition, the record does not indicate that MSHA personnel had

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[6] Indeed, the Commission has found that ignoring a "chronic" problem can increase the level of danger. *See Manalapan Mining,* 35 FMSHRC at 294 (remanding the Judge's analysis of degree of danger in light of S&S finding); *Consolidation Coal Co.,* 35 FMSHRC at 2343, 2344 (citation omitted) (stating that "chronic" problem is relevant to degree of danger because "the more times you do something wrong, you increase the likelihood of something bad happening because of you doing something wrong").

[7] In setting the penalty, however, the Judge stated that she affirmed the inspector's finding of gravity. 38 FMSHRC at 1755. As noted above, the inspector found the gravity of the violation was reasonably likely to result in a permanently disabling injury. Gov't Ex 1. This later finding by the Judge obviously conflicts with the Judge's earlier findings and supports an unwarrantable failure finding.

previously discussed this violation with Arnold Stone. At the same time, however, the failure to maintain the seatbelt lockout is a clear violation that, in this case, was obvious to and known by the operator. Under these circumstances, the absence of a prior citation is of no relevance in the unwarrantable failure analysis.

5. The Record Mandates a Conclusion of Unwarrantable Failure

The Commission has previously determined that when all of the factors except notice are aggravating, the record supports a determination of unwarrantable failure. *Cam Mining, LLC.,* 38 FMSHRC 1903, 1909-10 (Aug. 2016). Specifically, we held that "[t]he evidence . . . overwhelmingly weigh[ed] in favor of . . . unwarrantable failure" when an operator, who lacked notice, did not make any efforts to abate a violation which should have been known to the operator, existed for a lengthy period of time, was obvious, extensive, and posed a high degree of danger. *Id* at 1909.

In this proceeding, all unwarrantable failure factors other than the irrelevant notice factor support a finding of an unwarrantable failure. I thus conclude that the evidence in this case mandates a determination of unwarrantable failure. When the evidence presented on the record supports no other conclusion, remand is unnecessary. *Am. Mine Servs., Inc.* 15 FMSHRC 1830, 1834 (Sept. 1993). Because the evidence overwhelmingly weighs in favor of an unwarrantable failure determination, it is unnecessary to remand this issue. Therefore, I join with the majority in reversing the Judge's determination. The violation in this case was an unwarrantable failure to comply with mandatory safety standards.

C. Penalty Determination[8]

In this case the Judge found that the violation, involving a dangerous malfunctioning lockout system on a skid loader, was not the result of the operator's unwarrantable failure to comply with the relevant standard. She then lowered the proposed penalty from $63,000 to $10,000 – a reduction of over 70%.[9] The Commission has unanimously reversed the Judge's

[8] Commissioner Jordan joins in this section of Commissioner Cohen's opinion.

[9] I acknowledge that there were other reasons, in addition to the deletion of the unwarrantable failure designation, for the Judge's lowering of the penalty. In pertinent part, the Judge stated:

> There was limited evidence as to the size of the mine, but the operator asserts that it is a family-operated business with a number of pits located in Texas. The mine has little history of violations. Respondent indicated that it recently emerged from bankruptcy and is paying debts according to the bankruptcy plan, and that paying a penalty as high as suggested by the Secretary would therefore be a hardship for the mine. The parties stipulated that the citation was abated in good faith.

38 FMSHRC at 1755.

unwarrantable failure determination, concluding that the record in this matter cannot support any other result. In light of that ruling, I find that the Judge's penalty assessment needs to be revisited. Consequently, I would vacate the penalty and remand for the assessment of a new penalty.

The Commission's reinstatement of the unwarrantable failure finding is an important modification, reflecting a much higher level of operator responsibility than was found by the Judge. My colleagues' reluctance to vacate the Judge's penalty and remand to permit her to factor this into a penalty determination ignores the significance of the unwarrantable failure designation.

The Commission has consistently considered the unwarrantable failure determination to be relevant in assessing a penalty. *See, e.g.*, *Consolidation Coal*, 22 FMSHRC at 334 (reversing the Judge's finding that the violation was not an unwarrantable failure and remanding the proceeding for assessment of an appropriate penalty); *Kellys Creek Res., Inc.*, 19 FMSHRC 457, 465 (Mar. 1997) (reversing the Judge's determination that the violation was not S&S or the result of unwarrantable failure and remanding the case for assessment of an appropriate civil penalty in light of those determinations); *see also Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (holding that it was appropriate for the Judge to raise the penalty significantly based on his findings of extreme gravity and unwarrantable failure).

Acting Chairman Althen and Commissioner Young contend that for purposes of determining a penalty assessment, consideration of unwarrantable failure is subsumed in the other section 110(i) factors, particularly negligence. I note that Commission Judges regularly combine their analyses of negligence and unwarrantable failure. Indeed, the Judge did just that in this case. *See* 38 FMSHRC 1751 ("C. Negligence and Unwarrantable Failure"). After a detailed analysis of the seven unwarrantable failure factors, the Judge concluded, "Based upon my review and consideration of all of the factors, I find that the negligence of the operator was high, but I do not find the violation to be a result of an unwarrantable failure to comply." *Id.* at 1754. The Commission has said in decisions that a finding of high negligence suggests an unwarrantable failure. *See, e.g., San Juan,* 29 FMSHRC at 136. Here, in finding high negligence *but not* unwarrantable failure, the Judge seems to have indicated that in her view the violation had a lesser degree of severity than if she had found high negligence *with* unwarrantable failure. Perhaps not. Perhaps the Judge would have assessed the same $10,000 penalty if she had found unwarrantable failure. But we cannot know unless we remand the case and give the Judge the opportunity to assess a penalty with the understanding that the violation was an unwarrantable failure.

For the reasons set forth above, I would vacate the Judge's penalty assessment and remand for the reassessment of a penalty.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 14, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket Nos. VA 2012-42 VA 2013-192
CONSOLIDATION COAL COMPANY	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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" or "Act"). It concerns Citation No. 8189820 issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") to Consolidation Coal Company ("Consol") for a violation of 30 C.F.R. § 75.220(a)(1).[1] The citation was issued after Consol failed to comply with the requirement of its roof control plan to limit cuts of coal to a maximum length of 20 feet in the presence of adverse roof conditions. The Secretary designated the citation as significant and substantial ("S&S").[2]

After a hearing on the merits,[3] a Commission Administrative Law Judge issued a decision concluding that the evidence demonstrated that the roof control plan was violated but did not establish that the violation was S&S. 37 FMSHRC 2396 (Oct. 2015) (ALJ). The Secretary of Labor filed a petition for discretionary review of the Judge's decision to vacate the S&S designation, which we granted.

[1] Section 75.220(a)(1) requires that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine."

[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).

[3] The hearing involved Citation Nos. 8202408 and 8197859 in Docket No. VA 2013-192, as well as Citation No. 8189820 in Docket No. VA 2012-42, considered herein. Neither the Secretary nor Consol sought review of the Judge's decision relating to the two citations in Docket No. VA 2013-192.

The Commission is split on whether the Judge's decision on the S&S issue is supported by substantial evidence. Therefore, the Judge's decision stands as if affirmed. *Pennsylvania Elec. Co*., 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

Acting Chairman Althen and Commissioner Young vote to affirm the Judge and conclude that her decision that the violation was not S&S is supported by the record evidence. In contrast, Commissioners Jordan and Cohen conclude that the record evidence demonstrates that the violation was S&S and, accordingly, would reverse the Judge and hold that the violation was S&S.

I.

Factual and Procedural Background

In July 2011, an MSHA inspector, W. Gregory Ratliff, conducted an inspection at Consol's Buchanan Mine # 1, an underground mine located in Virginia.

Inspector Ratliff, accompanied by Robert Baugh, Consol's safety inspector, visited a development panel where miners had recently cut a crosscut from the No. 3 entry into the No. 2 entry. When they arrived, miners were in the process of bolting the unsupported roof after taking the final cut of coal at the intersection of the crosscut and the No. 2 entry.

The inspector observed multiple adverse roof conditions in and around the crosscut. These conditions included sections of bolted roof with visible cracks in the roof and where rock had fallen during previous mining. Additionally, he observed that the unsupported roof had partially collapsed toward the end of the final cut. Tr. 238-39. Terry Hamilton, the section foreman, testified that the roof rock fell directly onto the continuous miner, breaking its chain. Tr. 268. The inspector measured about 29 to 36 inches of rock missing from the left side of the roof, and up to 42 inches of rock missing from the right side of the roof. Tr. 238.

The mine's roof control plan states that when there is "[a]ny detectable condition which is known to indicate the presence of adverse roof conditions," subsequent cuts must "be limited to 20 feet." Sec. Ex. 8 at 6. The inspector believed that the final cut of coal exceeded the 20-foot limit imposed when adverse roof conditions are present.

The inspector took two measurements of the cut. First, he measured from the second to last row of bolts installed after the previous cut. He began the measurement at this row because the last row of bolts contained damaged bolts, and the roof control plan dictates that cuts must be measured from the last row of *permanent* support. *See* Sec. Ex. 8 at 5. He measured the cut from the second to last row of bolts to be 26 feet. Second, he took a measurement from the damaged row of bolts; he recorded this measurement as 23.5 feet. Baugh returned to the area the following day and independently measured the cut's length to be about 22 feet from the last row.

As a result of his observations, Ratliff issued a citation for a S&S violation of 30 C.F.R. § 75.220(a)(1). Consol contested the citation and the proposed civil penalty of $3,405. [4] A hearing took place before a Commission Judge.

The Judge ruled that the Secretary established that Consol took an extended cut of coal in violation of its roof control plan. She relied on the measurements taken from the last row of bolts, and credited both Baugh and Hamilton's testimony that the last row of bolts was uncompromised when the final cut was being mined and, therefore, was the appropriate place from which to take a measurement of the cut.[5] 37 FMSHRC at 2407-08. She did not make an exact finding on the cut's length, instead finding that it measured somewhere between 22 feet (as measured by Baugh) and 23.5 feet (as measured by Ratliff). *Id*. at 2409.

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[4] The citation states that:

> The Approved Roof Control Plan was not being complied with on the 17 Right Panel mmu. The crosscut from the No. 3 entry to the No. 2 entry inby SS # 28383 had a last cut out that measured 26 feet from the last row of permanent support to the corner in the No. 2 entry. There were 2 roof bolts that had been cut out on the left side and measurement were taken from the next full row of supports 2.5 feet back. There were adverse conditions present in the previous cut (visible cracks in the roof, rock that had fallen from the roof, and evidence of cracks in the test hole at 64 inches). In the adjacent entries (No. 2 and No. 3) there had been rock that had fallen when cuts were taken. The approved Roof Control Plan limits cut depths to 20 feet when adverse conditions are present in the previous cut or in adjacent entries. There was rock that had fallen during this cut that measured from 29 to 42 inches thick the entire cut. This condition exposes miners to the hazards associated with roof falls.

Sec. Ex. 6.

[5] Baugh and Hamilton both maintained that all the bolts in the last row were intact at the time the miners initiated the final cut. Tr. 269-70, 292-293. The Judge accepted that testimony, stating:

> I find Hamilton's testimony to be credible. The bolts were likely dislodged or otherwise damaged by the roof fall or by the continuous miner as it was trimming the roof afterward, as Hamilton and Baugh stated. Tr. 269-70, 292-93. The cut depth should be measured from the last row of bolts because it was fully intact when the cut was taken.

37 FMSHRC at 2408.

The Judge concluded that the evidence failed to demonstrate that the violation was S&S. While she found that the violation "contributed to the discrete safety hazard of a roof fall occurring due to the extended span of unsupported roof at an intersection," she also found that the Secretary had failed to establish a reasonable likelihood that the hazard, i.e., a roof fall, would result in an injury as required by the test in *Mathies Coal Co*., 6 FMSHRC 1 (Jan. 1984).[6] 37 FMSHRC at 2409.

In support of her finding that an injury was unlikely, the Judge reasoned that miners are not permitted to stand under unsupported roof and were in fact working a substantial distance from the unsupported roof. In addition, the Judge cited the mine's use of an Automated Temporary Roof Support ("ATRS")[7] and a "tighter" bolting pattern as reasons why it was unlikely that a roof fall in the extended cut would affect the supported roof that the miners were standing under.[8] *Id*. Finally, she concluded that under continued normal mining operations the roof would have been fully supported within a short period of time and, therefore, the miners' exposure to the hazard would have been brief. *Id*. at 2410.

On review, the Secretary challenges the Judge's S&S analysis. He asserts that the Judge erred by relying on the presence of redundant safety measures, by assuming the exercise of miner caution, and by overlooking evidence regarding the scope of the roof fall at the last row of bolts.

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[6] The Commission explained in *Mathies* that:

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

6 FMSHRC at 3-4*, accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc*. v. *Sec. of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

[7] Mine operators are required to use an ATRS system while miners install roof supports. 30 C.F.R. § 75.209(a) ("an ATRS system shall be used with roof bolting machines and continuous-mining machines with integral roof bolters operated in a working section"). "ATRS systems are usually composed of one or more hydraulically-actuated cylinders with a bar, ring, or other support device that can be lifted and pressed against the mine roof." Safety Standards for Roof, Face and Rib Support, 53 Fed. Reg. 2354, 2363 (Jan. 27, 1988).

[8] The Judge, following a transcription error by the court reporter, mistakenly referred to the "tighter" bolting pattern used on the section as a "tiger" bolting pattern. 37 FMSHRC at 2409-10.

II.

Statement of Law

This case concerns the Judge's application of *Mathies* step 3, which requires the Secretary to prove *a reasonable likelihood that the hazard contributed to will result in an injury.* The Judge is required to determine, *if the hazard occurred*, was it reasonably likely that a reasonably serious injury would result? *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014) ("[T]he ALJ had to determine only whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result."). "The third step is primarily concerned with *gravity*. At this stage, the analytical focus shifts from the violation to the hazard . . . and whether it would be reasonably likely to result in injury." *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 (Aug. 2016) (citing *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011)) (citations omitted) (emphasis added).

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)).

Acting Chairman Althen and Commissioner Young, affirming:

We would affirm the decision.

Legal Principles

The Secretary bears the burden of proving an S&S violation by a preponderance of the evidence. *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)). As the finder of fact, the Administrative Law Judge determines whether the Secretary has carried his burden of proof. *See Morales v. ASARCO, Inc.*, 22 FMSHRC 947, 948 (Aug. 2000); *Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 181 (Feb. 2000).

Applying *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981), and *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Judge found that the Secretary did not demonstrate that the hazard was reasonably likely to result in a reasonably serious injury to a miner. 37 FMSHRC at 2397-98, 2409-10.[9] We are bound to respect that decision.

Our review of the ALJ's conclusion is constrained by the substantial evidence standard — that is, whether the Judge's finding is adequately supported by sufficient relevant evidence that a reasonable mind would accept. *Rochester & Pittsburgh Coal Co*., 11 FMSHRC 2159, 2163 (Nov. 1989). A Judge is not required to discuss all the evidence submitted, and a failure to cite

[9] The Judge issued the decision before the Commission decided *Newtown Energy, Inc.*, 38 FMSHRC 2033 (Aug. 2016). After the Judge's decision in this case, the Commission clarified the relationship between the second and third steps of the *Mathies* test. Under the Commission's *Newtown* formulation of S&S, the S&S analysis requires determinations of four factors:

> (1) whether there has been a violation of a mandatory safety standard;
>
> (2) whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed;
>
> (3) whether, based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury; and
>
> (4) whether any resultant injury would be reasonably likely to be reasonably serious.

Id. at 2036-40.

specific evidence does not indicate that the Judge did not consider that evidence. *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).[10]

We are not a supervening fact finding panel and may not reverse a Judge's decision merely because evidence in the record could have supported a contrary outcome. *Id.* If the Judge's decision is one a reasonable fact finder could reach based upon the evidence, we must accept the Judge's determination even though, were we the fact finder, we might have reached a different outcome. *Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) ("While voicing an understanding of the statutory standard, however, the Commission did no more than substitute a competing view of the facts for the view the ALJ reasonably reached. There can be little doubt that the ALJ's findings were amply supported by substantial evidence, and even if the Commission's own view found support in the record as well, it was bound to uphold the ALJ's determinations." (footnote omitted)). Thus, our role on review is limited to considering whether a reasonable mind could have concluded that the Secretary did not prove it more likely than not that the roof fall was reasonably likely to result in a serious injury to a miner.

Application of Legal Principles

The Judge's holding is clear on this point: "The Secretary has not established that a roof fall was likely to result in injury in this case." 37 FMSHRC at 2409. Based on her review of the evidence, the Judge concluded that the Secretary did not prove by a preponderance of the evidence that, under the specific circumstances of this case, it was reasonably likely a roof fall would strike a miner because of the 2 to 3.5 foot variance from the depth of the cut specified in the roof control plan. Substantial evidence supports that conclusion. Indeed, the record demonstrates that the decision is eminently reasonable.

The inspector issued the citation based upon his measurement of a deep cut of 26 feet, Sec. Ex. 6, and the Secretary relied upon that measurement in his post-hearing brief. Sec. Post-Hearing Br. at 26. Contrary to the inspector's citation and Secretary's assertion at the hearing and afterwards, the Judge found (and the Secretary does not contest on review) that the cut was actually between 22 and 23.5 feet, thereby nearly cutting in half the depth of the excess cut upon which the Secretary had rested his case.

Robert Baugh, Consol's safety inspector, testified that he measured the cut from the last row of roof bolts from the prior cut and found the cut in question to be 22 feet. Tr. 294-95. He further testified that due to rib conditions, the cut might have been less than 22 feet. Tr. 296. In

[10] There is no reason to cite the many cases affirming the indisputable proposition that a Judge need not discuss every fact that might be opposed to his or her decision to pass the substantial evidence test. Of course, appellate courts sometimes reverse agency decisions on substantial evidence grounds, citing the evidence that does not support the decision and finding that the trier of fact should have considered such evidence or reached a different conclusion based upon it. Such cases do not contradict the principle that the Judge need not discuss every fact in order to arrive at a decision. The issue is whether it was reasonable for the Judge to reach that decision in light of the evidence presented.

response to cross examination, he testified, "[i]t's not likely that it was less than 20, but there's no certainty that it was more than 20." Tr. 316.

The MSHA inspector, on the other hand, measured the cut from the next to last row of roof bolts to the corner of the entry into which the crosscut mined. That measurement was 26 feet. Tr. 230. At the hearing, when the inspector subtracted 2.5 feet from 26 feet based upon his understanding of the distance between the last row and the next to last row of bolts, he concluded the cut's depth was 23.5 feet from the last row of roof bolts. Tr. 242. As the Judge found, the proper place for measurement was from the last row of roof bolts, all of which were intact when mining began. Therefore, the Judge found the cut was 22 to 23.5 feet. 37 FMSHRC at 2409. Again, the Secretary does not dispute this finding upon review.[11] Starting with the inspector's mistaken reading of the cut, the evidence clearly supports the reasonableness of the finding that the violation was not S&S.

First, the mine's MSHA-approved ventilation plan recognizes that the mine may experience roof falls in the area being mined under normal operating conditions. It provides, "[m]aterial which falls on top of the continuous miner from the roof shall not be allowed to prevent the flow of air through the throat of the machine." Sec. Ex. 3, Part 1 at 1. Obviously, a fall of material from the roof even in an area actively being mined is undesirable. However, the ventilation plan anticipates such events. There is no evidence that a fall during active mining creates a likelihood of injury to miners who operate the mining machine far from the mining area.

Second, the inspector testified that the principal stress from a deep cut arises from the weight put on remaining coal and emphasized that such weight would be most important at the intersection of the crosscut with entry No. 2, stating that "[t]he extended cut right here puts a lot of weight in the intersections, particularly intersections." Tr. 251. According to the inspector, therefore, the particular stress point resulting from a deep cut was in the intersection and not at the bolted position twenty feet from that intersection.

Third, the Secretary did not establish any cause and effect relationship between the extra length of the cut and the roof fall. There is no evidence on whether the deep cut played a role in the roof fall, whether the roof fall played a role in the deep cut through a collapse of the last two

[11] The operator's witness testified that the distance between bolts was 3 feet to 3 feet 8 inches. Tr. 312. If the inspector had subtracted those distances from his measurement, his analysis from the last row of bolts would have been 22 feet four inches to 23 feet. Those measurements essentially are consistent with the 22 foot distance measured by the operator. In any event, substantial evidence supports the Judge's unchallenged finding of a cut of 22 to 23.5 feet rather than 26 feet.

feet of the coal,[12] or whether the two were wholly unrelated. In short, the record does not contain evidence establishing that this cut had any effect upon the roof.

We do not suggest that a roof fall does not create a hazard. *See* slip op. at 22. The issue in this case, as the Judge and we recognize, is the third step of *Mathies/Newtown* — namely, whether the fall of material near the intersection in this case created a reasonable likelihood of serious injury.

Our colleagues correctly note that we "deny that rock fell in the bolted section." *Id*. We do so because it is uncontested. No rock fell in the bolted area. The inspector testified that no rock fell in the bolted section, and the Secretary himself expressly disclaimed any such occurrence in his post-hearing brief. The Secretary admitted no rock fell in the bolted area and asserted instead only the possibility of such a fall in a different case: "While the fall [near the intersection] did not break through the bolts in this instance, it could have." Sec. Post-Hearing Br. at 26. Indeed, the Secretary did not claim that rock was reasonably likely to fall in the bolted area, instead asserting that it "could have."[13]

Fourth, even had the Judge found or assumed a connection between the cut and the "roof fall," no witness testified whether the roof fall in the unbolted area during the mining sequence would exacerbate, alleviate, or be neutral regarding the potential for a further roof fall in the

[12] An operator witness testified that when mining toward an opened entry, the last few feet of coal sometimes collapses without mining. Tr. 281-83. Indeed, the operator's report suggests that the coal beyond a 20 foot cut may have fallen simply as mining progressed and then been cleaned out when the miner reentered the cut to clean rock and coal from the prior fall. R. Ex. 3 at 6.

[13] Rather than merely reweighing the evidence to fit their conclusion, our colleagues subtly insinuate conclusions that are not contained in the record. For example, the Judge credited Hamilton's testimony for the proper place from which to measure the deep cut thereby discrediting the starting point chosen by the inspector for measurement of the deep cut. 37 FMSHRC 2408. That action has nothing to do with the inspector's testimony that no rocks fell through any bolted area. The Judge also cited Hamilton in finding that "bolts were likely dislodged or otherwise damaged by the roof fall or by the continuous miner as it was trimming the roof afterward, as Hamilton and Baugh stated." *Id*. The majority attempts to convert the Judge's finding that the roof fall at the intersection may have caused damage to bolts to a finding that rock fell through and/or near the bolted area — an event that the inspector testified did not happen and that the Secretary conceded did not happen in his post-hearing brief. This inaccuracy is repeated throughout their opinion.

unbolted mined area, let alone a previously bolted area.[14] In the absence of any evidence, the prior roof fall does not constitute evidence one way or the other regarding the likelihood of a subsequent roof fall in any area, bolted or unbolted.

Fifth, as the Judge noted, the operator was using a tighter bolting pattern and elongated roof bolts with resin, thereby providing increased roof strength in the bolted area. As the Judge found, the mine's use of a tighter bolting pattern made it unlikely that a roof fall would work back into the bolted area. 37 FMSHRC at 2409. The Judge also found that the inspector did not provide any explanation or any example of how the deep cut would cause a fall through or beyond the last row of roof bolts or the next to last row of roof bolts. *Id.* at 2409-10.

The record supports this conclusion. The Secretary provided no testimony from an inspector or expert, or any geo-mechanical evidence, identifying how a cut with an excess length of 2 to 3.5 feet would cause a roof fall in an area of previously-placed, elongated, resin-coated roof bolts. Indeed, the Secretary did not identify any prior event at any mine in which an excess cut caused a bolted roof, specially strengthened or not, to fall under the same or similar circumstances as this event.

Sixth, the roof fall occurred during the mining cycle of the cut. As Baugh testified, this commonly occurred as part of the mining process. Tr. 292-93.[15] The inspector affirmatively testified that no rock fell in any bolted area. Consistent with his testimony about where roof stress occurs, the inspector testified the fall occurred inby the bolts and, thus, closer to the intersection toward which the mining was moving:

> The roof had not fallen in this area where these bolts were at. The bolts were cut, folded over, damaged, the plates were missing, indicates that the miner cut the bolts out instead of the rock fall, which there was no rock that had fallen right

[14] In their attempt to draw inferences that were never requested of the Judge and that the Judge did not draw, our colleagues refer to a statement in Baugh's report on the roof fall that "[o]ne could look at the cavity in the roof and know without a shadow of a doubt that the roof had fallen." Slip op. at 19 (emphasis removed) (quoting R. Ex. 3 at 5). Baugh, however, did not specify the location of the cavity in the roof, and no witness testified that the roof fall created a cavity in the bolted area. Instead, the roof fall may have caused damage to two or three bolts on the last row of bolts, but both parties agreed that the rock did not fall through the bolts, and no witness testified that it did. If this issue had actually been litigated, perhaps there would be testimony to support our colleagues' inference, but that is not the case before us.

[15] We pointed out that the ventilation plan anticipates the occurrence of roof falls during active operation of a continuous mining machine to note that the operator and MSHA anticipate roof falls during mining. For that reason, procedures are in place and used to make sure miners are not in danger from a fall in the unbolted area. We do not start with a presumption of an S&S violation.

there at this location. It was more further into the cut. It indicated that the miner cut them out.

Tr. 234. Elsewhere, he testified, "like I said, there was no rock had fallen in this particular spot where these bolts was [sic] at." Tr. 235.

Seventh, there is no testimony that the roof fell in any bolted area. Nowhere is there evidence that the roof fell into the area of the last row of bolts, let alone into the next to last row of roof bolts, the closest place any miner may have briefly come during the mining cycle. The inspector testified that damage to two bolts on the last row of roof bolts caused by the mining machine resulted in missing plates. However, in response to a question whether missing plates affected the integrity of the roof bolts in terms of the beam it creates into the roof, he testified, "No. The plate missing is basically skin control for draw rock, thin stuff." Tr. 261. A bolting crew replaced the damaged bolts.

Unlike the inspector who attributed the damaged roof bolts to the mining process because "no rock . . . had fallen" at the area where the bolts were damaged (Tr. 234), an operator witness, Robert Baugh, who investigated the roof fall attributed the damage to the bolts to an effect of the roof fall. Tr. 307. But Baugh did not testify that any rock fell under the last row of bolts and could not tell one way or the other whether the roof fall had caused the remaining two feet of the coal to fall in resulting in the deep cut. Tr. 307-08. The drawing with his report shows, in accordance with the inspector's testimony, that the roof fall occurred at the entry toward which the mining machine was moving — that is, as far as possible from the miner. R. Ex. 3 at 5. This is consistent with the inspector's notes that did not report any roof material fell in the bolted area and with his testimony that the area deepest into a cut is the area of roof stress.

As one would expect, the roof fall occurred as active mining was occurring with the miner operator located at least 7 rows of bolted roof from the last row of bolted roof. Further, as noted above, there was no testimony as to any roof instability after the fall.

Thus, as Baugh pointed out, no miner was near where the roof fell and would not at any point, even later during required methane testing, have come closer than the next to last row of roof bolts.[16] Regardless of whether the inspector or Baugh was correct regarding the cause for dislodgement of roof bolts, no one testified to any loss of roof integrity by damaged bolts, a reasonable likelihood of a fall of roof material in a bolted area, or that the roof was reasonably likely to fall again when mining was not actively occurring.

To the extent that the Secretary now relies on this evidence to support a different theory of S&S on appeal, we reject the Secretary's argument because he failed to preserve it for appeal. Before the Judge, the Secretary relied solely on the theory that the excessive cut put additional strain on the pillars and roof, particularly given the location near the intersection and the adverse roof conditions such as "visible cracks" and "portions of the mine roof that had fallen out." Sec.

[16] Our colleagues have suggested that "[t]he force of the roof fall certainly caused some rock to shatter and ricochet short distances upon impact with the ground." Slip op. at 24. First, there was no fall of rock in any bolted area. Second, there is no evidence of the fallen material ricocheting in any way that endangered miners.

Post-Hearing Br. at 23. He does not mention the roof fall "breaking back" into bolted area or the disputed cause of the missing bolts as evidence of a reasonable likelihood of the hazard of a roof fall in that area causing the violation to be S&S. In fact, the Secretary only mentioned the adverse roof conditions and the missing bolts to establish his position that the length of the cut was 26 feet, in excess of the length permitted under the mine's roof control plan (20 feet). *Id.* at 26.

The Secretary now appears to argue that a roof fall did, in fact, occur in the bolted area. He asserts that this demonstrates that the roof was compromised by the excessive cut, and that it was error for the Judge to find otherwise. *See* Sec. Br. 22-24. However, this argument was never presented to the Judge below. In fact, as we noted previously, the Secretary stated precisely the opposite in his post-hearing brief: "While the fall did not break through the bolts in this instance, it could have." Sec. Post-Hearing Br. at 26.

Because this argument was not made before the Judge, the argument is not properly before us, and we should not consider it. As the First Circuit has stated, "[i]t is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991). The Commission has long adhered to this principle under the Mine Act's analogous requirement: "Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii); *see Black Beauty Coal Co.*, 37 FMSHRC 687, 693-95 (Apr. 2015) (concluding that "the Secretary did not present to the Judge the theory that the maintenance shift was a 'coal producing' shift that required a separate on-shift examination," that "the Judge was never 'afforded an opportunity to pass' on the question of whether the coal produced after 11:00 p.m. by the afternoon shift constituted coal production during the separate maintenance shift that required a separate on-shift examination," and that, therefore, the Secretary's argument had not been preserved for review and the Commission would not consider it).

For example, in a trio of cases decided in August 1992, the Secretary presented a different S&S theory before the Commission than he presented before the ALJ. *See Beech Fork Processing, Inc.*, 14 FMSHRC 1316 (Aug. 1992); *Shamrock Coal Co.*, 14 FMSHRC 1306 (Aug. 1992); *Shamrock Coal Co.*, 14 FMSHRC 1300 (Aug. 1992). In each case, under the same reasoning, the Commission unanimously held that the Commission was barred from considering the Secretary's newly asserted theory. "[I]n general," the Commission stated, "a matter must have been presented below in such a manner as to obtain a ruling or order to be considered on review." *Beech Fork Processing*, 14 FMSHRC at 1320. Not only must it be raised, but it "must be raised with 'sufficient specificity and clarity [so] that the [judge] is aware that [he] must decide the issue.'" *Id.* (alterations in original) (quoting *Wallace v. Dept. of the Air Force*, 879 F.2d 829, 832 (Fed. Cir. 1989)). The Commission continued, stating that "[t]he rationale for requiring lower tribunals to first pass upon questions is that subsequent review is not hindered by the lack of necessary factual findings and the lack of application of the lower court's expertise or discretion." *Id.* at 1321.

The Secretary conceded below that the roof did not fall in the bolted area. Therefore, the Judge was never asked to find that the roof did actually break back through the bolted area. It is

absurd for the Secretary to now argue that the Judge erred by failing to make a factual finding that neither party argued and that the Secretary *specifically disclaimed* in his post-hearing brief. Sec. Post-Hearing Br. at 24 n.19, 26.

Accordingly, the Secretary forfeited the argument that the roof actually fell in the bolted area by failing to raise it below. We would disregard that new argument. Even if we were to consider it, however, substantial evidence exists in this case that the roof did not fall in the bolted area.

Eighth, S&S determinations consider the continuation of normal mining. In this case, however, as noted above, there was no testimony or evidence that the roof in the area just mined, let alone in the area already bolted, was made less stable by the prior fall. Thus, on this record, there is no evidence that the roof was not stable after the initial fall.

Ninth, there is no evidence that a miner, including any miner taking a methane reading, would or did go out from under fully bolted roof prior to the roof bolting process. Indeed, the closest a miner may have come is the next to last row of roof bolts. As noted above, there was no evidence of any enhanced danger from the roof after the completion of the mining cycle or that damage to the last row of bolts affected the integrity of the roof.

That being the case, the operator undertook normal roof bolting operations. Given the absence of any evidence of enhanced danger, a claim that miners undertaking roof bolting were reasonably likely to be injured is clearly not meritorious. The roof bolting crew was undertaking a normal roof bolting cycle.

Tenth, the operator was required to take a "remote methane reading" every 10 minutes during mining.[17] However, as the witnesses testified, and as the ventilation plan required, a miner would use an extendable probe to take such a reading. Sec. Ex. 3 at 2; Tr. 254, 265. Further, the undisputed evidence from the operator was that it does not allow a miner making a gas check to go beyond the next to last row of roof bolts. Tr. 297-98. The Judge accepted that testimony, finding that miners taking methane readings did not go beyond the second to last row of roof bolts. 37 FMSHRC at 2409 (citing Tr. 297-98, 314).

To summarize, the record supports the following findings:

1. The excess cut was half the distance relied upon by the inspector and Secretary for the S&S designation.

2. The principal stress from such a cut was at the intersection and not at the bolted area.

[17] This requirement is contained in the operator's ventilation plan, the relevant portion of which provides, "[o]n continuous miner sections, in all working places where coal is being cut, mined, drilled, or loaded, the face shall be examined for methane every ten (10) minutes using extendable probes or other remote means." Sec. Ex. 3 at 2.

3. The operator was using a tighter bolting pattern.

4. The operator was using elongated resin bolts.

5. The "fall" that did occur took place inby the last row of roof bolts and did not fall through into any bolted area.

6. The Secretary did not establish any connection between the cut and the roof fall.

7. The Secretary did not provide any explanation by exhibit or witness of how a marginal excess cut would cause a backward roof fall through elongated bolts on a tightened pattern.

8. The Secretary did not provide any example of a backward fall through bolts ever having occurred due to a 2 to 3.5 foot excess cut under conditions similar to this mine.[18]

9. The Secretary did not submit evidence showing that the roof fall during mining, regardless of whether it had a connection with the cut, had any continuing affect upon roof stability or conditions.

10. The Secretary admits that continuous miner operators would have been seven rows of elongated bolts on a tightened pattern away from the unsupported area.

11. Assuming a miner performed a remote methane measurement with an extended probe, he would have been under the next to last row of bolts for only the few moments necessary to get a reading using an extendable remote probe.

Although we find it unlikely, perhaps a Judge with our colleagues' view of the evidence could have found the violations S&S. However, we do not reweigh the evidence. The record in this case is more than sufficient to conclude a reasonable mind could find that the Secretary did not prove that there was a reasonable likelihood of a reasonably serious injury from the roof fall under the circumstances of this case.

The Secretary's Alternative Arguments

Recognizing the weakness of his position under a substantial evidence standard of review, the Secretary argues before the Commission that he is entitled to de novo legal review. He asserts the Judge violated legal standards applicable to the evaluation of alleged S&S

[18] In its brief to the Commission, the Secretary for the first time referenced an investigation report involving a roof fall resulting from a 30-foot unbolted area. That reference was not presented to the Judge or operator and, thus, there could not be and was not any inquiry involving it at the hearing before the Judge.

violations. In his Petition for Discretionary Review, the Secretary asserts the violation is significant and substantial because the Judge credited redundant safety features as mitigating the likelihood of injury and that the Judge should have considered a possibility that a miner might walk past the bolted area into an area without roof support. PDR at 10-13. We reject those arguments.

Our colleagues assert that all mandatory safety standards are redundant, dismissing any difference between roof bolting or ATRS systems and such devices as fire extinguishers. To them, "there are only safety standards" meaning all safety standards are redundant. Slip op. at 25. Surely, we have not strayed so far from common sense as to find the most fundamental form of roof support, especially when tightened, is a "redundant safety measure."[19] Roof bolts are the primary safety measure for roof support. Further, the basic notion of redundant safety measures is that when the primary safety measures fail, we do not count on secondary — that is, redundant — safety measures that must then come to life (such as sprinklers) to attenuate the danger.

Although we suppose one may argue over the ATRS, when the roof bolter must be near or under unbolted roof in order to insert bolts, the ATRS system becomes a primary safety measure designed to guard against hazards in the first place. Without doubt, we cannot fault the Judge's completely reasonable decision for finding that miners remained at all times in places of safety.

Criticism of the Judge's consideration of the ATRS is off-target for three other reasons. First, the operator presented testimony at the hearing about the use of Automated Temporary Roof Support that, obviously, related to an argument that roof bolters would not face a reasonable likelihood of harm. Nonetheless, the Secretary did not present either of those arguments in his post-hearing brief. Certainly, such claims do not intertwine with the factual question of whether the roof was reasonably likely to roll back into a fully bolted area, injuring a miner. Therefore, such arguments are not properly before the Commission and may not serve as a ground for reversal. 30 U.S.C. § 823(d)(2)(A)(iii); *Black Beauty Coal Co.*, 37 FMSHRC 687, 693-94 (April 2015); *Beech Fork Processing, Inc.*, 14 FMSHRC 1316 (Aug. 1992); *Shamrock Coal Co.*, 14 FMSHRC 1300 (Aug. 1992).

Second, even if the arguments were properly before us, they would not alter our decision. The Judge's reference to the use of Automated Temporary Roof Support was clearly appropriate. The roof control plan expressly provided for and approved the use of Automated Temporary Roof Support during roof bolting. The plan specifically provides that such a device "is

[19] The danger of roof falls is a constant hazard in underground mining. Because our colleagues think mandatory safety standards are all the same and indistinguishable, they must think roof bolting is a "redundant" safety measure that does not attenuate sufficiently the hazard of a fatal roof fall. Similarly, the ATRS provides protection to roof bolters. The alternative is no roof bolting or bolting under unsupported roof. Their example of a fireproof belt is almost as strange as the proposition that roof bolting is a redundant, and therefore legally insignificant, safety measure. The danger of a violative accumulation of coal is that the coal may ignite resulting in a coal fire. If a fire retardant belt is a redundant safety measure that does not attenuate the hazard of a belt fire, then, presumably, our colleagues would not permit conveyance of coal on a beltline because the danger of fire is not sufficiently abated.

acceptable support during roof bolting operations." Sec. Ex. 8 at 5. Baugh testified that the operator anticipated some loose material following the cut and had procedures in place to clean, trim and rake the loose material. Tr. 292-93 These procedures, and the use of the ATRS, protect miners from the fall of loose material as they advance the bolting process. During bolting, the ATRS is the primary means of protecting miners from roof falls under unsupported roof.

We do not find any impediment to considering an expressly accepted roof control measure in evaluating whether a violation created a reasonable likelihood of a roof fall upon a miner in the area where the mandated roof control support was in place. The Automated Temporary Roof Support was not in any sense of the word a "redundant" safety feature. Such support was a required and accepted aspect of the roof plan. Failure to use it would have been a violation; certainly, actual use of the prescribed roof control device bears upon the reasonably likely result of a roof fall.

Third, as noted, there was no evidence of an enhanced danger from the roof after the completion of the deep cut mining cycle. That being the case, the operator undertook normal roof bolting operations. There is no evidence that the miners bolting the roof were exposed to any abnormal dangers. Given the absence of any evidence of enhanced danger, if the Secretary's claim were correct, roof bolting in every instance would expose miners to a reasonable likelihood of serious injury. Certainly, that is not the law.

Conclusion

The issue before the Judge was whether the Secretary proved the violation involved in this case was reasonably likely to cause serious injury. In turn, the issue before us is whether substantial evidence supports the Judge's decision. Our colleagues engage in a classic reweighing of the evidence and drawing of inferences different from the trial Judge. They know what they would have found and insist upon it at the appellate level. That is not their or our role. More than enough evidence supports the Judge's decision. Certainly, it is a decision that a reasonable mind could reach. Accordingly, there is no basis to disturb the Judge's findings, and we would affirm the decision.

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

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

Commissioners Jordan and Cohen, in favor of reversing:

The Judge in this case determined that although the operator made an extended cut in violation of its roof control plan, and a fall of unsupported roof occurred which "broke back" to a bolted section where miners were working, the violation was not significant and substantial ("S&S").[1] We conclude that the Judge erred in vacating the S&S designation for the violation, and would reverse her decision.

The Judge held that the Secretary had failed to prove that a roof fall in this instance was reasonably likely to cause an injury. Her finding is not supported by substantial evidence, particularly in view of her previous findings relating to the violation.[2]

The only issue before us on review is whether the Judge erred in concluding that the evidence failed to demonstrate that the hazard of a roof fall was reasonably likely to result in injury under the facts in this case. *See Mathies Coal Co.,* 6 FMSHRC 1, 3-4 (Jan. 1984).[3] The

[1] 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).

[2] In *Mathies Coal Co.,* 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted), the Commission set forth the following four-step test 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.

Our colleagues, at footnote 9 of their opinion, slip op. at 6, set forth a restatement of the *Mathies* test based on *Newtown Energy, Inc.,* 38 FMSHRC 2033 (Aug. 2016). In that case, a majority of the Commission articulated the second step of *Mathies* as applying a "reasonably likely" analysis to determine whether a violation significantly and substantially contributes to a hazard. *Id*. at 2038. We applied a "somewhat likely" standard. For purposes of this case, this distinction is irrelevant in view of the Judge's uncontested finding that the violation contributed to the hazard of a roof fall. However, for the record, we note our continued disagreement with the majority's formulation of step 2. *See id*. at 2051-53.

[3] The Secretary filed a petition for review of the Judge's decision to vacate the citation's S&S designation, which we granted. Consol did not file a petition to review the Judge's finding of a violation and, therefore, the factual findings related to the underling violation are not before us. *See* Commission Procedural Rule 70(g), 29 C.F.R. § 2700.70(g) ("If a petition is granted, review shall be limited to the issues raised by the petition . . .").

findings the Judge made with respect to the violation are relevant to this inquiry, and thus we begin our analysis with a review of that section of the Judge's opinion.

The Judge's Factual Findings on the Violation

The Judge's findings regarding the time, scope, and manner in which bolts on the last row were damaged are especially pertinent to the S&S determination. Notably, in ruling that the operator violated its roof control plan, the Judge found that the last row of bolts was "fully intact" when the extended cut was mined. 37 FMSHRC 2396, 2408 (Oct. 2015) (ALJ). She found that "[t]he bolts [on the last row] were likely dislodged or otherwise damaged by the roof fall or by the continuous miner as it was trimming the roof afterward," crediting the testimony of Robert Baugh, Consol's safety inspector, and Terry Hamilton, the section foreman. *Id*. (citing Tr. 269-70, 292-93).

At the hearing, Baugh testified that the roof fall at the end of the extended cut rolled back 20 or so feet and caused rock above the last row of permanent roof bolts to fall, damaging three of the bolts. Tr. 292-93, 307. A fourth bolt on the last row was damaged by the continuous miner as it was trimming the roof after the roof fall occurred. Tr. 292-93. Hamilton corroborated this account. Hamilton believed that the bolts were either damaged when "rock fell around [them]" or by the continuous miner trimming the roof afterward. Tr. 269-70. Importantly, this testimony was explicitly credited and *cited* by the Judge in her factual findings. 37 FMSHRC at 2408.

Baugh had previously interviewed the bolting crew and the continuous miner operator who cleaned up the section. He documented his findings in a report entitled "Report on 17 Right Roof Control Violation Citation 8189820," which is consistent with his testimony. R. Ex. 3. The report states:

> The [miner] operator told me that 3 bolts in the last row of bolts in the crosscut being mined were damaged when he first entered the crosscut with the miner to clean up rock that had fallen in the cut mined by the day shift crew. He also informed me that a fourth bolt was damaged by him when he was trimming top of the mined cut to remove the loose roof during the clean-up cycle.
> . . .
>
> He said he cleaned the rock off of the miner before he cleaned the fallen rock in the crosscut to enable the bolt crew to bolt the mined cut.
> . . .
>
> From the conversation with the miner operator it is also reasonable to deduct that *the damaged bolts found in the last row of bolts became damaged when the rock fell from the roof*. The damaged row of bolts was intact when the cut was being mined and until the coal of the cut was removed. Once the coal was removed, the

> adverse roof had no support underneath it, and the bad section of the roof fell damaging three bolts of the last row as it fell.

Id. at 4 (emphasis added). Baugh believed that "[o]ne could look at the cavity in the roof and *know without a shadow of a doubt that the roof had fallen*." *Id*. at 7 (emphasis added).

Because the Judge credited Baugh and found that the bolts were "fully intact" when the extended cut was mined, the Judge effectively rejected Inspector Ratliff's contradictory testimony.[4] Ratliff had speculated that the last row of bolts was damaged by the continuous miner either *prior to or when* the extended cut was mined. Tr. 234-35. Ratliff, unlike Hamilton and Baugh, believed that the bolts on the last row were not damaged by a rock fall. Tr. 234. He also believed that it was unlikely that the bolts were damaged during the clean-up cycle. Tr. 235.

In summary, in her analysis of the violation of the safety standard, the Judge made the following factual findings: Unsupported roof fell at the end of the extended cut. The roof fall "broke back" causing additional rock to fall around the last row of bolts. The rock fall damaged three bolts on the last row. The continuous miner operator damaged an additional bolt on the last row when he was trimming the roof following the rock fall.

[4] A Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co*., 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.,* 3 FMSHRC 2767, 2770 (Dec. 1981). We have recognized that, because the Judge has an opportunity to hear the testimony and view the witnesses, he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp*. v. *NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom*., *Sec'y of Labor v. Keystone Coal Mining Corp*., 151 F.3d 1096 (D.C. Cir. 1998).

The Judge's S&S Findings Are Not Supported by Substantial Evidence

Although the Judge found a violation of the safety standard, she concluded that the violation was not S&S. The Judge stated that an injury was not reasonably likely to occur because a roof fall was not likely to "spread into or significantly affect the bolted roof areas behind it." 37 FMSHRC at 2409. For the following reasons, we conclude that the Judge's decision on S&S is not supported by substantial evidence.[5]

On review, the Secretary correctly argues that the Judge's S&S analysis is inconsistent with the findings that the Judge previously made when she upheld the violation. In addition, the Secretary properly asserts that the Judge failed to fully consider countervailing evidence before reaching her conclusion.

In her discussion of the violation, specifically in rejecting Inspector Ratliff's opinion that the deep cut measured 26 feet, the Judge found that the last row of roof bolts was undamaged prior to the beginning of mining the cut. Her finding in this regard was as follows: "[t]he bolts were likely dislodged or otherwise damaged by the roof fall or by the continuous miner as it was trimming the roof afterward, as Hamilton and Baugh stated." 37 FMSHRC at 2408 (citing Tr. 269-70, 292-93). However, in her S&S analysis, the Judge entirely disregarded her previous finding that the roof fall damaged some of the roof bolts. Instead, she exclusively focused on the testimony of Inspector Ratliff and found that the Secretary had failed to provide evidence explaining how a fall of unsupported roof would affect the supported roof.

It was inconsistent for the Judge to find that a roof fall "broke back" and dislodged rock in the bolted area in discussing the violation, and then conclude that there was no evidence that a roof fall would affect the bolted area when determining if an injury was reasonably likely to occur in accordance with *Mathies* Step 3. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1690-91 (Aug. 2015) (concluding that substantial evidence did not support a Judge's S&S conclusion because his factual findings were inconsistent). Simply stated, a Judge may not "re-set" her factual findings for purposes of Step 3.

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[5] The Commission requires that "[a] judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision." *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (Jun. 1994) (citation omitted). 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)). S*ee also Washington* v. *Shalala*, 37 F.3d 1437, 1439 (10th Cir. 1994) (The "'[s]ubstantiality of evidence must be based upon the record taken as a whole,' we must 'meticulously examine the record' to determine whether the evidence in support of the [ ] decision is substantial and 'take into account whatever in the record fairly detracts from its weight.'") (citations omitted).

Furthermore, the Judge ignored the fact that both the inspector and Baugh *agreed* that a roof fall in the extended cut would affect the supported roof behind the extended cut. Ratliff testified that he was worried about the roof "breaking back in through the adverse conditions back to where the miners are working." Tr. 238-39.[6] He considered the extended cut to be particularly dangerous because it terminated at an intersection. The extended cut put a lot of weight on the roof in the intersection.

Baugh noted that it was not uncommon for an area of unsupported roof that falls to result in damage to the bolted portion of the roof. Tr. 293. In fact, he testified that the unsupported roof fall that occurred *in this case* "broke back" and dislodged rock in the bolted section. Tr. 293 ("Q- When that piece of rock fell, it damaged three bolts? A-[Baugh] Right"), Tr. 307 ("Q- And basically your contention here with those damaged bolts is that the roof did roll back and damaged those bolts, right? A- [Baugh] Yes."). Hence, Baugh's testimony was that the roof fall rolled back and that additional rock fell in the bolted area which damaged the three roof bolts.

It was error for the Judge to simply ignore evidence – which she had already determined to be probative – in making her S&S analysis. *See Smith v. Schweiker*, 728 F.2d 1158, 1162 (8th Cir. 1984) (*citing Brand* v. *Sec'y of HEW*, 623 F.2d 523, 527 (8th Cir. 1980) ("[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.") (quoting *Universal Camera Corp*., v. *NLRB*, 340 U.S. at 488); *see also Kirby v. Sullivan*, 923 F.2d 1323 (8th Cir. 1991). At the very least, the Judge was required to address and attempt to reconcile countervailing evidence. *See Whitmore v. Dept. of Labor*, 680 F.3d 1353, 1376 (Fed. Cir. 2012) (finding error because "countervailing evidence was manifestly ignored, overlooked, or excluded.") In this case, the Judge simply ignored previously-credited evidence that detracted from her S&S conclusion.[7]

At least one miner regularly works near the area where some of the rock fell. The Judge found that the continuous miner operator stood a few feet from the last row of bolts (at the second to last row) every 10 minutes; he used a probe to check methane levels at the working face. *See* 37 FMSHRC at 2409; Tr. 240, 250, 253, 297-98. Certainly a miner within a few feet of a rock fall is reasonably likely to be injured. Even standing in close proximity to roof with severely damaged bolts is a significant danger. The fortuitous fact that he was not in the vicinity of the roof fall when it occurred is irrelevant to our S&S inquiry.

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[6] Although he believed that the damage here was actually caused by the continuous miner when the extended cut was mined, Tr. 234-35, this did not diminish his concern that a fall of unsupported roof would compromise supported roof. Tr. 238-39.

[7] Citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000), and other Court of Appeals decisions, our colleagues state "[a] Judge is not required to discuss all the evidence submitted, and a failure to cite specific evidence does not indicate that the Judge did not consider that evidence." Slip op. at 6. This statement of black letter law is not applicable here. Unquestionably, in the context of her findings on the existence of a violation (a point contested by Consol before the Judge), the Judge considered the evidence of the roof fall "breaking back" and causing rock to fall around the last row of bolts which damaged the roof bolts. Her error was ignoring this same evidence she had credited when she considered the S&S issue.

For all the aforementioned reasons, we conclude that the Judge's Step 3 *Mathies* conclusion is not supported by substantial evidence in the record. Instead, we would hold that the Judge's own factual findings on the violation and the weight of the evidence compel the conclusion that a roof fall in these circumstances was reasonably likely to result in a reasonably serious injury.

Response to the Separate Opinion Affirming the Judge

We disagree with the reasoning of Acting Chairman Althen and Commissioner Young in several respects.

First, they contend that because the mine's ventilation plan anticipates roof falls, the extended cut and resulting roof falls that occurred here were somehow less serious. Slip op. at 8. Their reliance on the ventilation plan is a red herring.[8] The citation at issue concerns a violation of the mine's *roof control plan*. The fact that the ventilation plan provides contingencies in the event of a roof fall does not make roof that falls as a result of a violative cut less dangerous to miners.

Second, our colleagues claim that the inspector testified that the principal stress inflicted by the extended cut was at the intersection, not on the bolted roof. Slip op. at 8. However, they ignore the inspector's testimony that he was *also* concerned about the roof "breaking back in through the adverse conditions back to where the miners are working." Tr. 238-39.

Third, they assert that the violation of the roof control plan did not contribute to the hazard of the roof falling. Slip op. at 8. This ignores the Judge's finding that "[t]his violation contributed to the discrete safety hazard of a roof fall occurring due to the extended span of unsupported roof." 37 FMSHRC at 2409. Consol has not contested this finding and, therefore, it is not presently before us. In any event, the evidence from Hamilton and Baugh, as well as Inspector Ratliff, was that the roof fall occurred as the cut was being extended into Entry No. 2. Tr. 238, 267; R. Ex. 3 at 4.

Fourth, Acting Chairman Althen and Commissioner Young state that no witness testified that a roof fall in the unbolted area would exacerbate roof problems in the bolted section. Slip op. at 9. However, Baugh repeatedly testified that he believed the roof fall in the extended cut "broke back" and caused the resulting rock fall to damage bolts on the last row. *See, e.g.*, Tr. 307 ("Q – And basically your contention here with those damaged bolts is that the roof did roll back and damaged those bolts, right? A- [Baugh] Yes."). As previously mentioned, Baugh's testimony was corroborated by Hamilton, who testified that the bolts were either damaged by rock that fell around the bolts or by the continuous miner that trimmed the roof afterwards. The Judge credited and cited this testimony. 37 FMSHRC at 2408 (citing Tr. 269-70, 292-93). Importantly, this testimony attributes the falling rock to be the direct cause of the damage sustained by some of the bolts. Additionally, the roof was trimmed in close enough proximity to the last row of bolts to damage an additional bolt on that row. Indeed, Baugh referred to this area as "the edge" of the

[8] The ventilation plan was introduced by the Secretary as evidence for an entirely separate citation; a citation that alleged the continuous miner was operating with clogged water sprays. 37 FMSHRC at 2399-2401.

roof fall in his Report. R. Ex. 3 at 4. Our colleagues ignore the testimony explicitly credited by the Judge in favor of the Inspector's discredited account.

Fifth, our colleagues assert that the tighter bolting pattern used by Consol prevented the roof from breaking back to the bolted area. Slip op. at 9. As stated, the facts of this case demonstrate otherwise.

Sixth, our colleagues deny that rock fell in the bolted section. Slip op. at 10. Our colleagues cite to the testimony of Inspector Ratliff to support their assertion. However, as we previously discussed, the Judge specifically rejected this aspect of the Inspector's testimony in her finding of a violation. *See supra,* slip op. at 19.

Our colleagues' decision is unmoored from the Judge's credibility determinations and therefore fatally flawed. Rather than accepting the Judge's uncontested factual findings with respect to the violation, they have mixed-and-matched credited testimony with uncredited testimony to create alternative factual findings. For example, compare our colleagues' reliance on uncredited testimony from the inspector at slip op. at 10 ("[t]he roof had not fallen in this area where these bolts were at") with their decision to ignore the following testimony of Consol's Safety Inspector Baugh that the Judge expressly credited. 37 FMSHRC at 2408 (citing Tr. 292-93).

> Q- When that piece of rock fell, it damaged three bolts?
>
> A- Right.
>
> Q- And then when he was cleaning the place up and trimming it up to make it safe for the bolters to come in he damaged one of the bolts?
>
> A- Correct. And it's not uncommon for it to damage bolts when it falls. A lot of times it'll come past - - come outby the last installed row of bolts. It's not unusual at all.

Tr. 293.

Seventh, our colleagues maintain that Baugh did not testify that the roof fall in the extended cut "broke back" causing rock to fall around the last row of bolts. Slip op. 10. This is inconsistent with the record testimony.[9] Baugh's report repeatedly referenced the roof breaking back and rock falling, damaging the last row of bolts.

Acting Chairman Althen and Commissioner Young also contend that the issue of whether a roof fall was responsible for damaging the last row of bolts is not properly before us. They claim that the Judge had not been afforded an opportunity to pass on this question of fact. Slip

[9] *See, e.g.*, Tr. 293-94 ("Q- When that piece of rock fell, it damaged three bolts? A [Baugh] –Right").

op. at 11 (citing 30 U.S.C. § 823(d)(2)(A)(iii)); *see also* 29 C.F.R. § 2700.70(d).[10] This is a curious argument in view of the fact that the Judge's Decision discusses the roof fall damaging the last row of bolts. 37 FMSHRC at 2408. We note that evidence of the rock fall was elicited by counsel for Consol. Therefore, the Judge had the opportunity to pass on the question of fact and, in fact, relied on it by *crediting* this testimony. Because the issue of fact was placed squarely before the Judge, our case is readily distinguishable from the cases cited by our colleagues in which the Commission refused to consider an issue that was first raised on review.[11]

Eighth, our colleagues assert that there is no evidence that the roof was unstable after the initial fall. Slip op. at 12. Of course, the fact that the roof "broke back" to the bolted area and dislodged rock demonstrates instability.

Ninth, our colleagues assert that no miner was in a position of danger, including the miner required to take a methane reading every ten minutes. Slip op. at 12. However, the Judge concluded that the methane readings were conducted within several feet of the section of roof that fell which is certainly within the zone of danger. The record establishes that the next to last row of bolts was about three feet from the rock fall. The force of the roof fall certainly caused some rock to shatter and ricochet short distances upon impact with the ground. It is fortunate that a miner was not checking for methane at the moment rock fell merely a few feet from his presence.

The Judge Erred in Considering Redundant Safety Measures in her S&S Analysis

The Judge's errors are not confined to the failure to reconcile her factual findings. As we will demonstrate, there were additional errors that affected her analysis. In particular, the Judge relied on safety features that were employed pursuant to MSHA's mandatory safety standards and the mine's own roof control plan. This reliance on redundant safety measures conflicts with longstanding precedent.

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[10] The Commission has also recognized that a matter urged on review may have implicitly been raised below or may be so intertwined with something before the Judge that it may be properly considered on appeal. *See San Juan Coal Co*., 29 FMSHRC 125, 130 (Mar. 2007).

[11] For instance, in *Black Beauty Coal Co*., 37 FMSHRC 687 (Apr. 2015), the Commission concluded that the Secretary did not preserve the issue of whether coal was produced on a specific shift for review (which would have obligated the mine to conduct an on-shift examination). The Commission relied on the complete absence of evidence of coal production in the record when it concluded that the Judge was not afforded the opportunity to pass. *Id*. at 695.

The Commission decisions in *Beech Fork Processing, Inc.*, 14 FMSHRC 1316 (Aug. 1992), *Shamrock Coal Co.*, 14 FMSHRC 1300 (Aug. 1992), and *Shamrock Coal Co*., 14 FMSHRC 1306 (Aug. 1992), are also distinguishable. In each of these cases the Secretary made a legal argument on review that was never presented to the Judge. In contrast, the issue presently before us is an issue of fact that was presented to the Judge.

Specifically, the Judge concluded that an injury was not reasonably likely to occur on the section because: (1) miners were not under unsupported roof and were in fact standing under bolted roof; (2) the mine was using an ATRS, and (3) the supported roof was bolted in a "tighter pattern."[12] 37 FMSHRC at 2409.

The Judge erred in her analysis: she failed to recognize that each of these safety measures is required pursuant to the Secretary's regulations. For instance, the mandatory safety standard at 30 C.F.R. § 75.202(b) prohibits miners from working or traveling under unsupported roof. The mandatory safety standard at 30 C.F.R. § 75.209 requires the use of an ATRS system with roof bolting machines. In addition, the roof control plan which must be complied with pursuant to 30 C.F.R. § 75.220(a)(1) requires that the mine provide "additional support" when "abnormal roof conditions are encountered."[13] Sec. Ex. 8 at 9.

It is settled law that redundant safety measures are not to be considered in determining whether a violation is S&S. *See Black Beauty Coal*, *Co.*, 38 FMSHRC 1307, 1312 (June 2016) (citing *Knox Creek Coal Corp*., v. *Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016)); *Cumberland Coal Res., LP*, 717 F.3d 1020, 1029 (D.C. Cir. 2013). In *Black Beauty*, the Commission concluded that a Judge erred in considering redundant safety measures as part of his S&S analysis for ventilation and accumulation violations, specifically including his consideration of the "the methane monitor, fire suppression system and devices, water sprays, CO monitors, fire brigade, breathing devices and turnout gear for firefighters." 38 FMSHRC at 1314. In *Cumberland*, the D.C. Circuit emphasized that "redundant safety measures . . . are irrelevant to the significant and substantial inquiry." 717 F.3d at 1029 (citing *Sec'y of Labor* v. *FMSHRC*, 111 F.3d 913, 917 (D.C. Cir. 1997)).[14]

Citing no authority, our colleagues read a new exception into this body of case law. They assert that the longstanding precedent stating that we do not take redundant safety measures into

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[12] The mine's roof control plan requires that "[i]n areas where abnormal roof conditions are encountered, indicated or anticipated additional support shall be provided where necessary." Sec. Ex. 8 at 9. As a result of the adverse roof conditions, the mine reduced the distance between rows from four feet to anywhere from three feet to three feet and eight inches. In addition, extra bolts were added between rows. Tr. 312-13.

[13] We note the irony of citing a mine's implementation of roof control plan provisions that are required in the presence of adverse roof conditions as evidence of roof stability.

[14] Our colleagues argue that the Judge's erroneous consideration of the required safety measures is not properly before the Commission on review. Slip op. at 15. However, we have previously considered a Judge's erroneous application of longstanding Commission precedent even when the party appealing that ruling did not raise the legal issue before the Judge. *See, e.g., Paramont Coal Co*., 37 FMSHRC 981, 985 (May 2015) (concluding that the Judge erred by ignoring long standing Commission case law "that an S&S determination must be made at the time the citation is issued 'without any assumptions as to abatement'") (citations omitted). Here too the Judge erred by ignoring black letter Commission case law. The Secretary properly sought review by identifying this issue in his petition for review.

account in an S&S analysis only applies to "secondary" safety measures, and not to "primary" safety measures.

This effort to create a dichotomy between types of safety standards has no legal basis. Neither the Mine Act nor MSHA regulations nor Commission case law make a distinction between "primary" safety measures that prevent an incident and "secondary" safety measures that seek to control a danger once it occurs.[15] For purposes of S&S analysis, there are only safety standards.[16]

For example, consider fire dangers along a belt line. MSHA's standard at 30 C.F.R. § 14.20 requires conveyors belts used in mines to be flame-resistant. At the same time, 30 C.F.R. § 75.1100-2(b) requires the installation of waterlines equipped with firehoses parallel to all underground beltlines.

If the conveyor belt works properly, then it should not catch on fire. The waterlines would never be necessary. However, if an operator is cited for a damaged waterline, the Commission will not consider the existence of a flame-resistant belt in determining whether the damaged waterline "significantly and substantially contributed to the cause and effect" of a mine fire. The question is the level of danger posed by the damaged waterline. In that case, the fact that the conveyor belt is flame-resistant is a redundant safety measure. So it isn't considered.

On the other hand, if a waterline is functioning properly, fire should not pose a danger because it can be instantly extinguished. Whether the belt was flame resistant or not wouldn't matter. However, if the Secretary designates the citation for failing to install a flame-resistant

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[15] It fact, it may not always be clear which standards are designed to prevent a danger from occurring and which are designed to control a danger once it has occurred.

[16] Our colleagues, in footnote 19 of their opinion, slip op. at 14, grossly misstate our position. Our discussion of redundant safety standards is limited to the context of whether a particular violation is S&S. In this analysis, we simply would hold that the Secretary need not demonstrate multiple violations of complementary safety standards in order to demonstrate that a hazard, such as a roof fall, is reasonably likely to result in a serious injury. We do not suggest that any standard is "legally insignificant." In fact, the thrust of our opinion is just the opposite. With respect to S&S determinations, the hazard posed by a violation cannot be discounted because of the existence of other, related safety measures. An operator cannot argue that its failure to comply with one standard is not hazardous simply because it complied with another standard. That preserves the integrity of the violated standard; no standard is secondary or superfluous, and operators must comply with all of them.

Further, we in no way suggest that a safety measure, (such as a flame retardant belt), does nothing to attenuate the hazard at which it is directed. We simply state that that attenuation is irrelevant when considering whether the violation of a different standard is S&S. That does not mean, as our colleagues suggest, that under our view mining is somehow rendered impossible. Operators, of course, must operate their mines. But they must do so while complying with all mandatory standards and face the full consequences prescribed by the Mine Act when they fail to do so. The Mine Act's purpose is to enhance safe mining and to deter unsafe mining.

belt as S&S, the Commission will not consider the existence of the waterlines. In that case, the waterline is a redundant safety measure. So it isn't considered.

Hence, under the Mine Act, there are no primary or secondary protections, only protections. The Secretary may promulgate several standards to help prevent and/or control a given danger. Each standard is therefore complementary – but, in an S&S analysis, redundant – to all the others directed at the same danger. When the Commission zeroes in on the danger posed by a given violation, it ignores these redundant measures. The Fourth Circuit noted in *Knox Creek Coal Corp. v. Sec'y of Labo*r:

> "[i]f mine operators could avoid S&S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply." Respondents' Br. at 37. Such a policy would make such standards "mandatory" in name only. It is therefore unsurprising that other appellate courts have concluded that "[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S&S] inquiry." *Cumberland Coal*, 717 F.3d at 1029; *see also Buck Creek*, 52 F.3d at 136.

811 F.3d at 162.

Accordingly, we conclude that the Judge additionally erred when she relied on the operator's compliance with separate mandatory safety standards as part of her determination that an injury was not reasonably likely to be sustained by miners.

The Judge Erred in Relying on the Exercise of Miner Caution

The Judge found that a roof fall was unlikely to result in injury, in part because miners were not allowed to enter the "red zone" (a space unsafe for miners to enter) beyond the next-to-last row of bolts. She specifically noted that the continuous miner operator is not allowed to go beyond the next-to-last row of bolts even when performing gas checks. 37 FMSHRC at 2409.

The Commission has held that "relying on [the] skill and attentiveness of miners to prevent an injury 'ignores the inherent vagaries of human behavior.'" *U.S. Steel Mining Co*., 6 FMSHRC 1834, 1838 n.4 (quoting *Great W. Elec. Co*., 5 FMSHRC 840, 842 (May 1983)); *see also Eagle Nest, Inc*., 14 FMSHRC 1119, 1123 (July 1992) (a miner's exercise of caution is not a factor in considering whether a violation is S&S). Furthermore, the Commission has recognized that "[e]ven a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions." *Great W. Elec*., 5 FMSHRC at 842.

Accordingly, we conclude that to the extent the Judge relied on the exercise of caution by miners in her *Mathies* Step 3 analysis, she erred.

Conclusion

As stated, the evidence establishes that a roof fall affecting the bolted area was not only reasonably likely to occur, it did occur. Furthermore, the evidence establishes that any injury that would result from roof rock falling onto a miner would be reasonably serious, if not fatal. Inspector Ratliff testified that the roof rock weighed approximately 150 pounds per square foot. Tr. 239. Accordingly, we conclude that the record compels the conclusion that the violation was S&S. *See Am. Mine Servs*., *Inc*., 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

For these reasons, we would reverse the Judge and find that the violation was significant and substantial.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 6, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2016-511-M A.C. No. 41-04570-408288-B3319
BAM HEAVY EQUIPMENT & REPAIR	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 August 17, 2016, the Commission received from BAM Heavy Equipment & Repair ("BAM") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was addressed to BAM and dated April 19, 2016. The Secretary states the proposed assessment was delivered on April 25, 2016, and that it

became a final order of the Commission on May 25, 2016. The Secretary did not provide any proof of delivery of the proposed assessment.

BAM asserts that it did not receive any notice of the citation until August 10, 2016. According to BAM, the initial citation was served only to the owner of the mine, B.V.S. Construction, Inc., but not to the contractor, BAM. BAM asserts that its employee, who was the subject of the citation for not having received new miner training, was told to leave the job site, and was never given any verbal or written documentation stating that he was to receive a citation. We note that the citation, which had been issued on March 1, 2016, included a correction noting that it had been issued to the wrong company. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed BAM's request and the Secretary's response, under the facts of this case, BAM's failure to timely contest the proposed assessment was excusable because of the operator's confusion over the citation's issuance. 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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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September 6, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. OAK GROVE RESOURCES, LLC	Docket No. SE 2016-204 A.C. No. 01-00851-404467

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 April 28, 2016, the Commission received from Oak Grove Resources, LLC ("Oak Grove") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was sent on March 3, 2016, and became a final order of the Commission on or about April 8, 2016. Oak Grove asserts that its safety manager, who is in charge of reviewing citations and recommending which should be contested, forgot to forward his recommendations or the Notice of Contest to the company's counsel. Oak Grove argues that it demonstrated a good faith effort to comply by timely paying the remainder of the citations. The Secretary confirms that he received the timely payment, and does not oppose the request to reopen. However, he urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Oak Grove's request and the Secretary's response, we find that the safety manager's isolated failure to forward the contest forms to the company's counsel qualifies as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1), especially in that Oak Grove discovered its mistake and filed a motion to reopen the penalty assessment very quickly. 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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 6, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2017-19-M A.C. No. 26-01941-417234
COEUR ROCHESTER, INC.	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 October 7, 2016, the Commission received from Coeur Rochester, Inc. ("Coeur") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 18, 2016, and became a final order of the Commission on September 19, 2016.

Coeur asserts that it failed to timely contest the proposed assessment due to the resignation of the mine's Safety Coordinator, who had been following a routine and reliable system for reviewing and responding to proposed assessments. Upon the Safety Coordinator's resignation, the mine's Safety Manager took over the Safety Coordinator's duties of handling all aspects of MSHA assessment correspondence. The Safety Manager inadvertently misplaced one of the pages of the proposed assessment listing two citations that the operator had intended to contest, while paying the remaining citation, which was on a non-misplaced page. According to the operator, it discovered this mistake on October 6, 2016, while preparing to file a penalty contest in another case, and filed its motion to reopen the following day. The operator offers a Declaration from the Safety Manager in support of these assertions.

The operator further explains how it has since revised its procedures for handling proposed assessments to ensure that contests will be filed timely. The Secretary does not oppose the request to reopen.

Having reviewed Coeur's request and the Secretary's response, we find that the operator's failure to timely contest the proposed assessment was the result of the Safety Manager misplacing one of the pages of the proposed assessment. We further find that this mistake occurred in the wake of disruption caused by the Safety Coordinator's resignation. 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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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September 14, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. HANSON AGGREGATES BMC, INC.	Docket No. PENN 2017-35-M A.C. No. 36-09286-414172

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 November 16, 2016, the Commission received from Hanson Aggregates BMC, Inc. ("Hanson Aggregates") 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), an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment became a final order of the Commission on August 30, 2016. Hanson Aggregates asserts that the mine where this citation was issued was shut down for business reasons on June 24, 2016 and the workers were laid off. During the

shutdown, Hanson Aggregates claims it was unable to investigate the citations or interview the workforce. As a result, management could not make an informed decision as to whether the citations should be contested.

Documents provided by Hanson Aggregates confirm that the operation was reopened on September 2, 2016. Hanson Aggregates also alleges that it filed a Freedom of Information Act request for the inspector's notes, photographs, and other information, but received no response. The Secretary does not oppose the request to reopen.

Having reviewed Hanson Aggregates request and the Secretary's response, we determine that the operator failed to contest this assessment because the operation was shut down when the assessment was issued. As a result the operator failed to collect relevant information to make a determination on which citations to contest. The operator's actions are best characterized as excusable neglect. Therefore, 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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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September 14, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. REVELATION ENERGY, LLC	Docket No. VA 2016-70 A.C. No. 44-07087-398370

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 October 3, 2016, the Commission received from Revelation Energy, LLC ("Revelation") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On March 23, 2016, the Chief Administrative Law Judge issued an Order to Show Cause in response to Revelation's failure to answer the Secretary of Labor's January 27, 2016 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on April 25, 2016, when it appeared that the operator had not filed an answer with the Judge within 30 days. The Secretary issued a delinquency letter in this matter on July 19, 2016. Revelation's motion to reopen was not filed until 76 days after the delinquency letter was sent.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here became a final order of the Commission on June 6, 2016.

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).

In the instant matter, Revelation claims that it failed to timely answer the petition for assessment or respond to the Show Cause Order because the docket had been misplaced "due to changes in personnel within [their] office and due to large volume [sic] of dockets being received. . . ." As of the date of the request to reopen, Revelation claims that it "recently discovered the docket" and thus became aware that the Petition and Order to Show Cause had not been answered.

The Secretary opposes Respondent's request to reopen, asserting that Revelation has failed to identify "exceptional circumstances" warranting reopening. The Secretary argues that the reasons given by the operator amount to an acknowledgement that Revelation had an inadequate or unreliable internal processing procedure, which is not a valid basis for granting reopening. The Secretary asserts that Revelation's lack of diligence was particularly inexcusable because it had contested the issuances and therefore knew a petition involving significant penalties would be arriving. In response to Revelation's contention that it had received a large number of dockets, the Secretary argues that such an occurrence should have led the operator to be more diligent, rather than less. Finally, the Secretary argues that Revelation's delay in filing a request to reopen is unexplained and militates against granting that request.

Revelation's complete absence of attention to the present enforcement matter appears to be part of a pattern of neglect. While having contested the initial penalties, Revelation failed to respond to the Petition, the Order to Show Cause, and the delinquency notice for a significant amount of time. Revelation only appears to have taken action after the matter was escalated to the U.S. Treasury for collection. In addition, we note that Revelation has filed three other motions to reopen with the Commission in the last two years.[1]

Furthermore, Revelation's motion does not address numerous questions we have repeatedly flagged as important for operators to address when seeking relief from a default order. Revelation's motion fails to state how and when the failure to timely respond to the Order to Show Cause was discovered or how it responded once it found out that the case was in default. *See Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3345 n. 3 (Nov. 2013). Revelation does not explain why it took over 30 days to file a motion to reopen with the Commission upon receiving a delinquency notice. *See Concrete Mobility, LLC*, 37 FMSHRC 1709, 1710 (Aug. 2015); *Lone Mountain Processing, Inc.*, 33 FMSHRC 2373 (Oct. 2011); *Highland Mining*, 31 FMSHRC 1313, 1317 (Nov. 2009). Revelation does not provide any indication that it had taken steps to address any of the problems that lead to it mishandling of the present case. *See Highland Mining Co*., 31 FMSHRC 1313, 1316 (Nov. 2009).

The facts that Revelation did provide lacked specificity as to the grounds justifying relief. *See Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 & n. 2 (May 2008) (operators filing a motion to reopen must "provide a sufficiently detailed explanation for its failure to timely contest

[1] Revelation filed motions to reopen in Docket Nos. KENT 2015-410, KENT 2016-310, and KENT 2016-311.

the proposed penalty assessment" and "disclose with specificity its grounds for relief."). From Revelation's motion, we know only that, during some undefined period of time, there were personnel changes in Revelation's office and that they were involved with a large number of dockets before the Commission.

Given Revelation Energy's repeated failures to respond in this case and the operator's insufficient motion, we conclude that the operator had an inadequate or unreliable internal processing system. As the Commission has consistently held, explanations for failures to answer an order to show cause founded upon a lack of internal procedures constitute inexcusable neglect and are an insufficient basis for reopening an assessment. *See, e.g., Lone Mountain Processing, Inc.*, 35 FMSHRC at 3346 (Nov. 2013); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588 (Dec. 2010).

Revelation failed to establish that it had good cause for its failure to file a timely contest to the assessment in this matter. In fact, the operator's behavior evidences a serious lack of care regarding enforcement actions under the Mine Act. Moreover, the operator consistently failed to provide any reasonable explanations for its substantial delays in this matter. At best, the operator's excuses amounted to an acknowledgement that it had an inadequate internal processing system. We therefore deny the motion.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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September 14, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. PETE LIEN & SONS, INC.	Docket No. WEST 2016-556-M A.C. No. 05-03222-405208

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 June 23, 2016, the Commission received from Pete Lien & Sons, Inc. ("Pete Lien") 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), an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment became a final order of the Commission on April 16, 2016. Pete Lien asserts that it promptly mailed its notice of contest regarding the two citations at issue here, along with payment for six other citations, to MSHA's payment processing office in St. Louis. Pete Lien states that it only realized its mistake upon receipt of a

delinquency notice from MSHA. Pete Lien asserts that it has revised its contest procedures to ensure that notices are sent to the correct address in the future. The Secretary does not oppose the request to reopen.

Having reviewed Pete Lien's request and the Secretary's response, we determine that the operator inadvertently mailed the contest notice to the wrong address and has since corrected the company contest procedures to ensure that it does not happen again. Therefore, 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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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September 14, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2016-657-M A.C. No. 26-02406-409449
CHASE CRUSHING, LLC	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 August 18, 2016, the Commission received from Chase Crushing, LLC ("Chase") 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), an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 11, 2016, and thus became a final order of the Commission on June 10, 2016. On July 26, 2015, the Secretary mailed a delinquency notice to Chase regarding the civil penalty.

Chase asserts that it mistakenly believed that it had contested this matter. It states that two other penalty assessments related to the same inspection as the instant matter were issued on the same day as this assessment and were timely contested. Chase argues that it always intended to contest this assessment. Chase's General Manager believed that the instant assessment had also been previously contested. Upon learning of the mistake through a delinquency notice, Chase immediately requested reopening. The Secretary does not oppose the request to reopen.

Having reviewed Chase's request and the Secretary's response, we determine that the operator failed to timely contest this assessment because it mistakenly believed that it had already filed its notice. Therefore, 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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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September 14, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. U.S. SILICA COMPANY, LLC, - BERKELEY PLANT	Docket No. WEVA 2016-389-M A.C. No. 46-02805-397860

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 April 15, 2016, the Commission received from U.S. Silica Company, LLC – Berkeley Plant ("U.S. Silica") 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).

On March 31, 2016, the Chief Administrative Law Judge issued an Order to Show Cause in the related contest proceeding (WEVA 2015-903-RM[1]) after determining that the citation at issue had been paid in full by the operator. U.S. Silica responded to that Show Cause Order on April 15, 2016. In that response, U.S. Silica conceded that it had not filed a timely contest to the proposed assessment in this matter. If the operator fails to contest the Secretary's proposed penalty assessment, the 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] U.S. Silica had contested the citation referenced by the proposed assessment.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment became a final order of the Commission on January 15, 2016. U.S. Silica asserts that the plant never received the proposed penalty assessment and the operator therefore was unaware of the deadline. U.S. Silica avers that the operator's accounting department inadvertently paid the penalty for the citation. U.S. Silica argues that it further demonstrated its intent to contest the proposed penalties by corresponding with the MSHA District Manager about settlement negotiations and by promptly filing the instant Motion to Reopen upon receiving the Show Cause Order in the related contest case.

The Secretary does not oppose the request to reopen, and does not dispute the operator's contention that the plant did not receive the proposed assessment.

Having reviewed U.S. Silica's request and the Secretary's response, we determine that U.S. Silica's failure to contest this assessment was excusable because the operator did not receive the proposed penalty assessment. U.S. Silica consistently demonstrated its intent to contest the citation. Therefore, 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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 29, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2016-300-M A.C. No. 41-05054-399318
CSA MATERIALS, INC.	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 April 5, 2016, the Commission received from CSA Materials, Inc. ("CSA Materials") 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), an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on December 23, 2015, and became a final order of the Commission on January 22, 2016. CSA Materials asserts that it had always intended to contest the instant citation but that it mailed the contest form to MSHA's St. Louis office along with the payment for a separate citation, rather than to the MSHA office in Arlington, Virginia. The operator subsequently received a delinquency letter from MSHA dated

March 8, 2016. CSA Materials has not filed any other motions to reopen with the Commission in the last two years and filed its motion to reopen on April 5, 2016, less than 30 days after MSHA sent the delinquency notice.

The Secretary filed a Response on April 27, 2016, and confirmed that a payment for the separate citation was sent by CSA Materials on January 6, 2016. The Secretary included a copy of a certified mail envelope for that payment. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed CSA Materials' request and the Secretary's response, we find that inadvertently mailed its contest to the wrong MSHA office. 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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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September 29, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2017-109-M A.C. No. 29-02278-419312
HORIZON AG PRODUCTS	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 December 9, 2016, the Commission received from Horizon AG Products ("Horizon") 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), an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 10, 2016, and became a final order of the Commission on October 11, 2016. Horizon asserts that it sent a contest letter to MSHA on September 23, 2016. The operator included a UPS tracking slip

showing that a package was sent on September 23, 2016, and delivered on September 27, 2016.[1] On December 5, 2016, a representative from MSHA's Dallas office wrote an e-mail to Horizon acknowledging receipt of contest from Horizon but informing the operator that it should have mailed the documents to the Arlington, Virginia office. Horizon's motion to reopen is dated the same day. Horizon claims it misunderstood the contest instruction sheet. Its safety director averred that he was unfamiliar with the contest procedures, having never contested a citation before. Horizon has not filed any other motions to reopen with the Commission in the last two years, and the operator responded immediately upon discovering its mistake. The Secretary does not oppose the request to reopen.

Having reviewed Horizon's request and the Secretary's response, we find that Horizon mistakenly mailed the contest to the wrong address. 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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

[1] The UPS tracking slip shows that a package was sent on September 23, 2016 and delivered to "Gonzalez" in "Dallas, TX" on September 27, 2016. It does not state the exact address to which the package was sent. A representative of MSHA's field office in Dallas acknowledged receipt of a contest form, but did not state the date of receipt.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 29, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2017-79-M A.C. No. 23-00196-415609 V161
INDEPENDENCE RECYCLING, INC.	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 November 21, 2016, the Commission received from Independence Recycling, Inc. ("Independence") 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), an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was dated July 19, 2016, and became a final

order of the Commission on September 19, 2016.[1] Independence asserts that that it inadvertently sent the contest form to MSHA's St. Louis office with a check for an uncontested citation instead of to the Arlington Office. The operator only learned of its mistake when it received a delinquency notice from MSHA, which was mailed on November 4, 2016. Independence asserts that it then promptly filed the contest with the Arlington, Virginia office. Independence filed its motion to reopen on November 21, 2016, less than 30 days after it learned that it had failed to contest the proposed assessment. The operator has not filed any other motions to reopen with the Commission in the last two years. The Secretary does not oppose the request to reopen.

Having reviewed Independence's request and the Secretary's response, we find that Independence inadvertently mailed its contest to the wrong MSHA office. 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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

[1] The exact date of delivery of the proposed assessment is unclear The operator's representative signed the Notice of Contest Rights and Instructions form on July 29, 2016. The operator wrote a check to partially satisfy the penalty in this matter on August 2, 2016. The Commission cannot determine the basis for the Secretary's representation that the proposed assessment became a final order on September 19, 2016.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 29, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. PENN 2016-219-M A.C. No. 36-08913-403846 A9812
JOSE RODRIGUEZ	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 May 13, 2016, the Commission received from Jose Rodriguez ("Rodriguez") 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).[1]

Under section 105(a), 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] "Jose Rodriguez" is apparently the name of a company offering contracting services (employing on average 2-3 employees from 2015-2017 according to the Mine Date Retrieval System) as well as the individual responsible for compliance for that contractor.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 27, 2016, and became a final order of the Commission on April 26, 2016.[2] Rodriguez asserts in an affidavit (written in Spanish and translated into English) dated May 12, 2016, that he is unable to read English and therefore did not understand the meaning of the documents or the procedural requirements he needed to fulfill to contest the citation. He repeatedly attempted to call MSHA, but was unable to reach anyone who could help him. Rodriguez further states that he will have future MSHA issuances translated so that he can understand them. Significantly, documents filed by the parties show that Rodriguez filed his request to reopen just 17 days after the assessment became final and Rodriguez has not filed any other motions to reopen with the Commission in the last two years. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

[2] The Secretary's Response states that the proposed assessment was delivered on March 27, 2016, via USPS certified mail. However, no receipts were included in the Secretary's filing confirming the delivery date. The alleged delivery date is a Sunday. Regardless, Rodriguez concedes, in his request to reopen, that he did not file an Answer to the proposed assessment until after became final on or about April 26, 2016.

Having reviewed Rodriguez's request and the Secretary's response, we find that he inadvertently failed to contest the instant matter because he was unable to read English, and then was unable to reach MSHA to attain assistance. He has agreed to take actions necessary to prevent this issue from reoccurring. 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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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September 29, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2016-404-M A.C. No. 39-01494-401433
CROELL REDI-MIX	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 April 13, 2016, the Commission received from Croell Redi-Mix, ("Croell") 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), an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 22, 2016, and became a final order of the Commission on February 22, 2016. Croell asserts that it received two different proposed penalty assessments on separate dates following a single inspection of its mine. The operator avers that it did not return its contest regarding the first assessment until it

had already received the second, believing that they would have the same deadline. The Secretary confirmed that MSHA received the late-filed contest in this matter postmarked March 1, 2016. The operator did not learn of its error until it received a delinquency letter, which was sent March 17, 2016.

The Secretary does not oppose the request to reopen, but notes that his sole reason for not opposing reopening is because the contest was mailed only nine days late. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Croell's request and the Secretary's response, we find that it mistakenly waited until it had received a related assessment before filings its contest. 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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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September 29, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2016-465-M A.C. No. 04-05857-402321
UPLAND ROCK	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 May 10, 2016, the Commission received from Upland Rock 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), an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on February 10, 2016, and became a final order of the Commission on March 11, 2016. Upland Rock asserts that it mailed its contest back to MSHA on February 12, 2016. The operator included certified mail receipts to

show it attempted to send this form.[1] Similarly, Upland Rock argues that it mailed a letter to MSHA evidencing its intent to contest the citations on March 10, 2016. However, the mailing receipts accompanying the letter show that the document was sent to a local MSHA office in Vacaville, California, instead of to the MSHA office in Arlington, Virginia.[2] The Vacaville MSHA office received the letter on March 14, 2016. Upland Rock claims that it only learned that the Secretary had not properly received the documents it filed when it received a notice of delinquency on April 29, 2016. Upland Rock has not filed any other motions to reopen with the Commission in the last two years. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

[1] The certified mail receipt provided by the operator does not contain a mailing address but indicates that the contest was sent to Washington, D.C. USPS records further indicate that the contest never left the mail processing facility in Rancho Cucamonga, CA. As contests are required to be mailed to MSHA's headquarters in Arlington, VA, it is likely that USPS was unable to deliver the contest to the proper address.

[2] Adding to the confusion in this matter, the March 10, 2016, letter listed the correct Assessment Control Number, No. 00402321, and the correct Order Number, No. 8788069, but an incorrect docket number. The docket listed in the mailed response, No. WEST 2016-241, does not contain the citation at issue here.

Having reviewed Upland Rock's request and the Secretary's response, we find that mistakenly sent its contest documents to the wrong address. 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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 6, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of **LARRY GROVES**, Complainant, v. CON-AG, INC., Respondent.	DISCRIMINATION PROCEEDING Docket No. LAKE 2017-0117 NE-MD-2016-12 Mine: Con-Ag, Inc. Mine Mine ID: 33-03825

DECISION AND ORDER

Appearances: Stephanie Adams, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Complainant;

Timothy Cowans, Attorney, Columbus, Ohio, for Respondent.

Before: Judge Miller

This case is before me on a complaint of discrimination brought by the Secretary of Labor on behalf of Larry Groves against Con-Ag, Inc., pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) (the "Act"). The Secretary alleges that Groves was discharged from his employment at the mine because of his participation in an MSHA investigation and because of safety complaints he made to MSHA. Con-Ag denies these allegations and states that Groves was instead discharged because he made threatening comments to a coworker and the mine owner. The parties presented testimony and documentary evidence at a hearing on June 21, 2017, in Findlay, Ohio. Based on the testimony and exhibits presented at hearing, the stipulations of the parties, my observation of the demeanors of the witnesses, and the post-hearing briefs of the parties, I make the following findings and order.

I. FINDINGS OF FACT

The Con-Ag, Inc., Mine is a surface limestone mine located in St. Marys, Ohio. Jt. Stips. ¶ e. Con-Ag, Inc. ("Con-Ag"), is the operator of the mine and is subject to the jurisdiction of the Act. Jt. Stips. ¶¶ f, g. Larry Groves was an employee of Con-Ag from September 14, 2015, until August 2016. Jt. Stips. ¶ m. The termination of his employment at the mine is the subject of this case.

Larry Groves was hired to work at Con-Ag by the owner and manager, John Hirschfeld, on the recommendation of Wesley Mann, a friend of Groves who worked at Con-Ag. Groves worked as a heavy-equipment operator at the Con-Ag plant in St. Marys, which involved operating excavators, front-end loaders, and other equipment, and performing some maintenance. He typically worked the day shift with six or seven other employees. He had no disciplinary actions prior to his termination and got along well with his supervisor, Brian Henning, who notably did not testify. The mine owner, Hirschfeld, testified that Groves was a "middle-of-the-road" employee who did his job but was not a problem-solver, but agreed he had no issues with Grove's performance.

During his employment at Con-Ag, Groves reported a number of safety concerns to MSHA. The first complaint occurred in May 2016 during a regular inspection of the mine. An MSHA inspector observed Groves bringing loose material down from the high wall. Groves told the MSHA inspector that he was concerned because some of the material he was bringing down was larger than the excavator he was operating. He feared that the material could fall and crush the equipment. The high wall conditions are shown in photographs taken during the course of the inspection and introduced by the Secretary. Comp. Ex. 21. Groves, at the request of the inspector, wrote out a statement saying that Henning had asked him to work within a safe distance of the high wall, but Hirschfeld had later asked him to move closer and bring the high wall down. Comp. Ex. 1. The mine received a citation for the loose material on the high wall, and the citation refers to a miner working in an excavator near the wall at the direction of Hirschfeld. Comp. Ex. 13-B. Groves testified that Henning and Hirschfeld both observed him speaking to the inspector that day. Hirschfeld admitted that he had seen Groves talking to the inspector, but said that other employees spoke to him as well.

Groves' next interactions with MSHA occurred about a month later in June 2016. While working on the night shift from June 6 through June 17, Groves observed a coworker climbing into the crusher without shutting down the equipment and tagging out. Groves spoke to the employee, but he continued to climb into the crusher without shutting it down. Groves stated that the employee's conduct was common practice at the mine, and Hirschfeld and Henning had also observed it. *See* Comp. Ex. 21-C. Groves ultimately wrote out a statement for MSHA concerning the unsafe actions of the employee. Around the same time, Groves learned that there were problems with the brakes on a mixer truck at the mine. Groves testified that the mixer continued to be operated after the brake problem was discovered. The day after the issue was discovered, the brakes failed while an employee was using the mixer to water the road into the quarry, causing the truck to roll over. As a result, Groves drafted a statement addressing the issues of the mixer and the employee working in the crusher for MSHA and discussed the issues with an MSHA inspector. Comp. Ex. 2. The inspector typed a statement describing Groves' observations, which Groves then signed on or about July 19, 2016. Comp. Ex. 3. On July 7, 2016, the mine received citations for the mixer brakes and for access to the crusher while it was energized. Comp. Ex. 13-B, 13-C.

In addition to the written complaints, Groves made a number of phone calls to MSHA reporting other safety hazards and spoke with the inspectors who came through the mine to conduct inspections. He was confident that both Henning and Hirschfeld had seen him talking to inspectors. Finally, Groves met with an MSHA special investigator outside of work to discuss

safety issues at the mine on August 5, 2016, five days before he was terminated. The meeting took place during Groves' lunch hour and lasted an hour and a half. Upon returning to the mine, Groves reported the meeting to his supervisor as an explanation for exceeding his 30 minute lunch break. Hirschfeld testified that he was unaware of the meeting.

The night before his termination, Groves was involved in an incident with his friend, Wesley Mann. Mann and Groves knew each other socially and worked together occasionally at Con-Ag, and Mann had recommended Groves for the job at Con-Ag. Mann visited Groves' home around 9:30 p.m. on August 9, 2016. Groves and his wife were sitting on the back porch when Mann arrived and both men had a beer. Shortly after, Groves' wife went inside and the two men were joined by a neighbor, Trey Huber. The conversation eventually turned to work, and Groves and Mann began discussing safety at Con-Ag. Mann claims that Groves made disparaging remarks about Hirschfeld, saying that Hirschfeld didn't know what he was doing and was going to run the company into the ground. Groves, on the other hand, credibly testified that he recalled discussing safety at the mine, and how it had improved with MSHA involvement. At some point, the discussion escalated into argument. Groves and Mann testified to differing versions of the incident, but I credit the testimony of Groves. Huber testified that both Groves and Mann were intoxicated at the time, but that Mann was more so. The two argued over which of them could run a piece of equipment better than the other. Groves testified that Mann became agitated, and Groves then asked him to leave. Groves and Huber agree that Mann was the aggressor and that Groves did not threaten Mann as he alleges.

On his drive home the night of the incident, Mann decided to report the encounter with Groves to the police. Respondent's Exhibit A is the dispatch log showing that Mann reported that Groves had threatened to beat him up. Mann recalls that he pulled over to make the call to the police, then continued home. He did not file a written report with the police and no further action was taken. When he arrived home, Mann called Con-Ag to leave the following message for Hirschfeld:

> Hello. Uh, this message is for John. Uh, this is Wesley Mann. Umm. This is, uh, in referral to, uh, Larry Groves. Uh, he's in some trouble tonight. I wanted to let you know you might want to ask him about it tomorrow. Uh, he threatened my life. Ah, he's starting a lot of trouble. You might want to ask him about it before you keep him employed, uh. He's crooked—crooked dude. He's going to lie about John. He wants to stab John in the back. Give this message to John. Thank you. M'bye.

Resp. Exs. B, C. At hearing, Mann clarified that Groves never threatened Hirschfeld, but Mann had the impression that Groves was "unappreciative of working for" Hirschfeld.

Hirschfield learned of the message from Mann when he arrived to work the next morning. He listened to it and was "taken aback, stunned." Tr. at 147. He felt that threatening to kill someone was a serious matter, and his understanding was that Groves had threatened him as well as Mann. He claims that he understood Mann's statement that Groves would "stab John in the back" as a literal threat of physical violence. Hirschfeld is responsible for personnel decisions

at the mine and decided it was best for Groves not to be on the work site. He thus sent Groves a text message telling him not to come in to work. Comp. Ex. 6. When Groves replied that he was already at work, Hirschfeld told him to go home. *Id*. Groves asked if he should come back tomorrow, and Hirschfeld replied, "I don't know yet." *Id*. Hirschfeld testified at hearing that after deciding that he didn't want Groves on site that day, he "needed a couple of days to really have time—to give myself enough time to make a decision, so I sent him another text that he didn't need to come in the next day either." Tr. at 149. A message saying "No work tomorrow" was sent approximately 25 minutes after the first set of messages. Comp. Ex. 6.

Hirschfeld testified that he talked to "quite a few" people at the site in making the decision whether to terminate Groves. Tr. at 123. He recalled speaking with Henning, the mine supervisor, on August 10, the day Hirschfeld received the message from Mann. He also recalled speaking with Mann the day prior to sending discharge papers to Groves, but could not remember what date that was. The papers are dated August 9, the day of Groves' altercation with Mann. Comp. Ex. 7. Hirschfeld learned through the conversations with Henning and Mann that Groves had had an altercation with someone else who was not associated with the mine. He believed that altercation alone was grounds for termination under the policies in the company employee handbook. Hirschfeld testified that he did not discharge Groves until he conducted a thorough investigation, and that he discussed the situation with several other people, including Sylvia, the company's bookkeeper, and Terri, Hirschfeld's sister and vice president of the company. However, only 45 minutes after his first text message to Groves, Hirschfeld sent a message saying "I'll mail you on [sic] paperwork today, don't come back in." Comp. Ex. 6. Hirschfeld asserts that he did not discharge Groves over text message, but the message suggests he had already decided to send the discharge paperwork to Groves. This leaves less than an hour in which Hirschfeld could have conducted his investigation. Hirschfeld did not speak to Groves prior to or following his termination.

Hirschfeld believes he was justified in terminating Groves because he has an obligation to protect the other employees on the work site. He noted that the mine has a non-harassment policy, which is outlined in the employee handbook provided to employees during orientation at the mine. Resp. Ex. G, at 8. The policy states in part that "making false, vicious or malicious statements concerning any employee, suppliers or customers[,] the company management, or its products or methods of manufacturing is not acceptable conduct." *Id*. The company promises to investigate any reports of harassment, and "[s]hould there be a determination that harassment has occurred, the offending party(s) will be disciplined appropriately, up to and including termination." *Id*. The handbook also includes a list of prohibited actions "that may result in immediate discharge, even for a first offense." Resp. Ex. G, at 21. One of the actions listed is "Threatening another employee, supervisor or manager." *Id.* Hirschfield stated that he views threats of violence as an offense that would lead to immediate termination. Hirschfeld has terminated employees in the past for issues such as poor attendance and unsafe work practices. There was no evidence introduced of previous terminations for bad conduct or for any conduct outside of work.

Groves received discharge paperwork in the mail four or five days after he was told to leave the mine site. Comp. Ex. 7. The document is dated August 9, 2016, and states that Groves was discharged for "threatening people." *Id*. It further states, "Employee was threatening people

at work to kill them. Co-workers. Threats were made after hours. I do not feel comfortable with him working here." *Id*. Groves has not had contact with Hirschfeld since his discharge except to return his uniform.

Groves was unemployed for several months after being discharged from Con-Ag. He received unemployment benefits during some of that time. Con-Ag contested the claim for unemployment benefits, saying that Groves had threatened employees at work. Groves disputed the allegation and ultimately received unemployment compensation. Groves contacted MSHA after his termination to complain of discrimination; MSHA conducted an investigation, concluding that discrimination had occurred.

II. ANALYSIS

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator … of an alleged danger or safety or health violation" or "because of the exercise by such miner … of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1). In order to establish a prima facie case of discrimination under Section 105(c)(1), a complaining miner must present evidence sufficient to support a conclusion that he engaged in protected activity, that he suffered an adverse employment action, and that the adverse action was motivated at least in part by that activity. *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981). The operator may rebut the prima facie case by showing "either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner*, 33 FMSRHC at 1064. The operator may also defend affirmatively by proving that "it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone." *Id*.

a. Protected Activity

In order to sustain a complaint of discrimination, Groves must first demonstrate that he has engaged in activity protected by Section 105(c) of the Mine Act.

Between May and August 2016, Groves made a number of complaints to MSHA regarding working conditions at the Con-Ag Mine. In May 2016, he spoke to an inspector who was on site about being asked to bring down loose material from the high wall. Groves felt he was being asked to work too close to the high wall and to bring down material that was too large for the excavator he was operating. At the request of the inspector, he put his concerns in writing. He raised additional concerns with MSHA in July 2016. A few weeks earlier, he had observed a coworker climbing into the crusher to work without first shutting down the equipment and tagging out. He also learned that a mixer truck was being operated despite a problem with the brakes. Groves discussed these issues with an MSHA inspector in July and the mine was issued a number of citations related to the complaints. Finally, Groves met with an inspector on his lunch hour to discuss safety issues at the mine on August 5, 2016, five days before his discharge.

While Con-Ag emphasizes in its post-hearing brief that the record is unclear as to when Groves' communications occurred with respect to the July citations involving the crusher and the mixer truck, there is nevertheless substantial evidence that Groves gave safety-related information to MSHA. Groves' communications with MSHA constituted "complaint[s] under or related to" the Mine Act, which are a protected activity under Section 105(c)(1). Groves has proven that he engaged in protected activity.

b. Adverse Action

Hirschfeld sent Groves a text message on August 10, 2016, telling him not to come back to work. Groves received a formal letter of discharge from Con-Ag on or about August 12, 2016. Discharge is an adverse action under Section 105(c).

c. Discriminatory Motive

To establish a prima facie case, the complainant is not required to provide direct evidence of discriminatory motive; "circumstantial evidence … and reasonable inferences drawn therefrom may be used to sustain a prima facie case." *Turner*, 33 FMSHRC at 1066 (quoting *Bradley v. Belva Coal Co*., 4 FMSHRC 982, 992 (June 1982)). Factors that may tend to prove a discriminatory motive for the adverse action include the operator's knowledge of the protected activity, the operator's hostility or animus towards the protected activity, the timing of the adverse action in relation to the protected activity, and disparate treatment as compared to other employees. *Turner*, 33 FMSRHC at 1066; *Sec'y 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).

In this case, the factors of knowledge and timing are most persuasive. Groves believed Hirschfeld had seen him speaking with inspectors. While Hirschfeld stated that he was aware that Groves had spoken to the MSHA inspectors, he did not specifically recall seeing it. Instead he recalled that the inspectors talked to everyone on site. In addition, Hirschfeld would know about Groves' conversations with inspectors based on citations issued to the mine, as well as the statements written by Groves and provided to MSHA. Notably, the high wall citation issued May 23, 2016, specifically refers to Groves' work in the excavator and his conversation with Hirschfeld about working closer to the wall, though it does not refer to Groves by name. The citation is an unwarrantable failure citation that singles out Hirschfeld's conduct, specifically his instructions to Groves. Hirschfeld would have been able to tell by reading the citation that Groves had told the inspector about Hirschfeld's instructions.

Further, it is fair to say that Hirschfeld was aware of Groves' meeting with an MSHA investigator in early August 2016, several days before his discharge. Groves testified that he was late returning from his lunch break because of the meeting and so told his supervisor, Henning, about it. While Hirschfeld denied knowing about the meeting, he mentioned in his testimony that Groves "was gone a lot for lunch." Even if Henning did not tell Hirschfeld about the meeting, Hirschfield consulted Henning in his decision to terminate Groves. Henning's knowledge of the meeting is therefore imputed to Hirschfeld pursuant to Commission case law. *See Turner*, 33 FMSHRC at 1059 (finding that where a manager relied on a supervisor's recommendation in making a hiring decision, the supervisor's knowledge of an employee's protected activity was

imputed to the manager). The timing of this incident days before Groves was discharged is particularly noteworthy.

Con-Ag notes in its post-hearing brief that there is little evidence that would have led Hirschfeld to connect Groves to the July citations involving the mixer and crusher. However, Groves spoke to the employee about his actions, and he not only wrote out a statement for MSHA but also spoke to the inspectors about it prior to the issuance of citations. Resp. Br. at 20. Moreover, even if Hirschfield did not directly link Groves to the citations, there is enough evidence regarding the May and August incidents to support an inference that Hirschfeld knew of Groves' interactions with MSHA. Given Groves' multiple safety complaints and the coincidence in time between the complaints and his termination, I find that there is sufficient evidence from which to conclude that Groves' termination was motivated at least in part by his protected activity. The Secretary has established a prima facie case.

d. Operator's Rebuttal

Con-Ag denies that Groves was terminated because of his protected activity, stating that the sole reason for his termination was his threatening remarks in the confrontation with Mann. I find that Con-Ag has failed to provide evidence sufficient to rebut the prima facie case.

The Commission considered an employer's claim that it had fired a miner for threats and profanity in *Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820 (Aug. 2012). In that case, a miner with a long history of safety complaints was fired after he became angry and aggressive and used profanity in a meeting with a corporate HR manager. *Id*. at 1822-23. The Commission affirmed the ALJ's finding that the operator had rebutted the miner's prima facie case. *Id*. at 1828. The finding was based on the judge's credibility determination that the miner had acted inappropriately and used profane language at the meeting; evidence of the miner's history of angry and inappropriate behavior, including a warning in his personnel file and descriptions of his character from coworkers; and the fact that other employees had made similar safety complaints and not experienced retaliation. *Id*. at 1826-27.

In this case, Hirschfeld states that he fired Groves solely because Groves made threatening remarks to Mann and Hirschfeld outside of the workplace. By Hirschfeld's account, he heard the message from Mann on the morning of August 10 and decided that he needed to have Groves off of the work site. Within an hour, he had sent Groves text messages telling him not to come back to work and that he would send discharge paperwork. I find Hirschfeld's investigation of the matter with Mann to be unreasonably brief and therefore I do not find his account to be credible. Notably, Hirschfeld did not speak to Mann to clarify the message or learn what prompted the message before deciding to send Groves home. After that initial decision, he did little to nothing to investigate Mann's claims. Hirschfeld sent a text message to Groves referencing discharge papers within an hour of when he claims to have started his investigation, and he provided little information as to what the investigation uncovered. At no point did he discuss the matter with Groves in an effort to determine the facts surrounding the incident. He made no attempt to ascertain the motive underlying Mann's phone message to him. He spoke to Groves' supervisor Henning , but indicated only that he learned that Groves had had "an altercation with somebody else" at some point, presumably the incident with a neighbor referred

to by Mann. Tr. at 149. Hirschfeld suggested at hearing that the incident involving Groves' neighbor was on its own grounds for termination, yet at the same time he admitted that construction employees are a "rougher crowd," among whom physical altercations would likely not be unusual. In contrast with the investigation in the *Metz* case, Hirschfeld did not find that Groves had any history of aggressive or other unacceptable behavior at work, nor were there any records of disciplinary actions against Groves. Groves testified that he got along well with everyone at work up until his termination, and Con-Ag produced no evidence to the contrary.

Additionally, Hirschfield's reaction to Mann's message seems overblown. Hirschfeld testified that he interpreted Mann's statement that Groves would "stab John in the back" as a literal threat on his life. I find it highly unlikely that a person in Hirschfeld's position would be unfamiliar with the nonliteral usage of the phrase "stab him in the back." Further, when asked whether anyone else at the mine felt threatened by Groves, Hirschfeld claimed that his sister Terri did. However, Mann's message said nothing about Terri or any other employees at the mine, and Hirschfeld provided no other basis for why she would have felt that way.

Finally, Con-Ag emphasizes that it had a policy prohibiting "vicious or malicious statements concerning any employee" and "threatening or obscene language in addressing fellow workers." Resp. Ex. G, at 8, 20. However, it produced no evidence of workers being disciplined for such conduct in the past. The only evidence introduced at hearing regarding terminations of past employees involved attendance and workplace safety issues. There is no claim made by the mine that Groves was treated like other employees who may have been discharged or otherwise disciplined for alleged threats outside the workplace.

On the whole, I find Hirschfeld's explanation for his decision to fire Groves to have no credibility. The fact that he accepted Mann's account of the incident without speaking to Groves first especially stands out. When considered against the timing of Groves' safety complaints and the fact that the mine had recently received a large number of citations, I find it more likely than not that Hirschfeld fired Groves at least in part because of his safety complaints.

e. Affirmative Defense

Con-Ag argues that even if I find that Groves' safety complaints were a motivating factor in his termination, his termination was motivated in part by the incident with Mann, and Con-Ag would have fired him based on that incident alone.

The Commission has determined that "An operator may defend affirmatively by proving that the adverse action also was motivated by the miner's unprotected activity and the operator would have taken the adverse action against the miner for the unprotected activity alone." *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1919 (Aug. 2016); *Robinette*, 3 FMSHRC at 817-18; *Pasula*, 2 FMSHRC at 2799. The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

The essential inquiry in evaluating the affirmative defense is whether the operator's asserted reason for the adverse action was legitimate or whether it was merely pretext. The Commission has explained that pretext may be found "where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). In contrast, a legitimate non-discriminatory reason is more likely when there is evidence of "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co*., 4 FMSHRC 982, 993 (June 1982).

Here, there is no evidence that Groves had a record of discipline or unsatisfactory work at the company. Hirschfeld commented that Groves was a "middle-of-the-road" employee and took too much time for lunch, but no actions had been taken to address those issues prior to Groves' termination. There is no evidence that Groves had an unsatisfactory work record or had any past warnings or issues with the mine. Con-Ag also produced no evidence of similar discipline meted out to other employees. Hirschfeld discussed four other terminations at the company, but they involved workplace safety and attendance issues.

Con-Ag relies on evidence of the company's Non-Harassment Policy, which prohibits making "vicious or malicious statements concerning any employee, suppliers or customers [or] the company management." Resp. Ex. G, at 8. The policy states that the company will "immediately conduct a thorough and complete investigation" of any reports of harassment, and if it determines that harassment occurred, "the offending party(s) will be disciplined appropriately, up to and including termination." *Id*. The company's employee handbook also includes a list of actions that may result in immediate discharge, which includes "Threatening another employee, supervisor or manager." *Id.* at 21. It is clear from these policies that termination is within the range of possible outcomes for an employee who uses threatening language with a co-worker or supervisor. However, Hirschfeld did not conduct a "thorough and complete investigation" of the incident with Groves as outlined in the handbook. His investigation lasted less than an hour and did not include a conversation with Groves. Nor is there any credible evidence that Groves engaged in any conduct that would meet the requirements of the company policy. Therefore, I am not persuaded that Groves would have been fired for any reason listed in the company policy. I find instead that the operator's stated reason for terminating Groves was pretext.

III. 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 duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The Secretary calculates penalties using the penalty regulations set forth in 30 C.F.R. § 100.3 or following the guidelines for special assessments in 30 C.F.R. § 100.5. When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary then petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. Commission Judges are not bound by the Secretary's penalty regulations or his special

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

The history of assessed violations has been admitted into evidence and shows no prior history of discrimination violations. Respondent is a small operator and has raised no defense of inability to pay. The violation is the result of intentional conduct by the operator and is serious, as it could affect miners' willingness to report safety hazards in the future. While the Secretary proposed a penalty of $15,000.00, I find that a penalty of $10,000.00 is appropriate given the size of the mine, along with its previous history.

IV. DAMAGES

The Mine Act gives the Commission the authority in proceedings under Section 105(c)(2) "to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." 30 U.S.C. § 815(c)(2). The Commission has explained that back pay "is the sum a miner would have earned but for the discrimination, less his net interim earnings. Gross back pay encompasses not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral parts of an employer's overall wage-benefit package." *Ross v. Shamrock Coal Co.*, 15 FMSHRC 972, 976 (June 1993).

The parties were given the opportunity to submit calculations of back pay and other damages potentially owed to Groves prior to hearing. The Secretary submitted proposed relief including back pay calculations on May 1, 2016. Con-Ag did not submit back pay calculations after several requests from the court. Con-Ag was also given another opportunity to object to the Secretary's calculations at hearing but raised no objection. I therefore base my assessment of damages on the Secretary's submissions. The parties stipulated that Groves earned $15.45 per hour plus $23.18 per hour for overtime at the time of his termination. Jt. Stips. ¶¶ m, n. The Secretary seeks the following amounts in back pay for Groves:

1. Back pay: $31,776.47
    a. $12,925 while unemployed from August 10, 2016, through November 13, 2016
    b. $8,163.87 while employed earning $11 per hour from November 14, 2016,

through March 7, 2017
    c. $10,687.60 while employed earning $12 per hour from March 8, 2017, through August 9, 2017
2. Lost vacation pay: $618.00
3. Lost medical benefits: $6,100.00
    a. $1,000.00 fine imposed for loss of medical insurance
    b. $4,500.00 lost medical insurance for self and family September 2016 through June 2017
    c. $600 lost medical coverage for family July 2017 through August 2017
4. Late fees incurred due to loss of income: $20.00
    a. $20.00 late fee for car payment

The Secretary's calculations amount to a total of $38,514.47, with a weekly rate of approximately $955.00 while Groves was employed with Con-Ag and $475.00 when the current wages are deducted. I find that the requests for back pay, lost vacation pay, lost medical benefits, and consequential damages are appropriate. I further find that Groves is entitled to an additional sum of $1,900.00 in back pay for the days between August 9, 2017, and the date of this decision. Under Commission case law, Groves is also entitled to interest until the amount is paid at the short-term federal underpayment rate, which is currently four percent. *See Local Union 2274, District 28, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1504-05 (Nov. 1988).

V. ORDER

Respondent is hereby **ORDERED** to reinstate Larry Groves to his former position with Con-Ag, Inc. with the same pay and benefits as he would have accrued had he remained employed. The mine shall remove any mention of his termination from his employment file, provide a neutral reference, and post a notice at the mine, in a conspicuous location for 30 days indicating that the mine has been found in violation of the Mine Act and restating the rights of miners as found in section 105(c) of the Act.

Respondent is further **ORDERED** to pay back pay to Groves in the amount of $33,676.47 and an additional $6,738.00 in lost benefits and fees for a total payment to Groves in the amount of $40,414.47. Respondent is **ORDERED** to pay Groves interest on these amounts through the date of payment at the federal underpayment rate using the calculation method outlined in *Sec'y of Labor on behalf of Bailey v. Ark.-Carbona Co.*, 5 FMSHRC 2042, 2051-54 (Dec. 1983).

Respondent is **ORDERED** to pay the Secretary a civil penalty of $10,000.00. All payments shall be made within 30 days of the date of this decision.

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

Distribution: (U.S. First Class Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 12, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. WEVA 2011-283 A.C. No. 46-09231-235522-01
v.	
NEWTOWN ENERGY, INC., Respondent.	Mine: Coalburg No. 2

DECISION ON REMAND

Appearances: Benjamin D. Chaykin, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;

Christopher D. Pence, Esq., Hardy Pence PLLC, Charleston, West Virginia, for Respondent.

Before: Judge L. Zane Gill

This case is before me on remand from the Commission. 38 FMSHRC 2033 (Aug. 2016). On August 7, 2013, I issued a decision after hearing for the single section 104(d)(1) citation contained in this docket. 35 FMSHRC 2494 (Aug. 2013) (ALJ). On appeal, the Commission reversed several aspects of my decision and remanded others. 38 FMSHRC at 2050.

On remand, I must revisit Citation No. 8110086, which was issued to Newtown Energy, Inc. ("Newtown") for failing to lock out and tag out the power cable connector for the Number 34 shuttle car in Newtown's Coalburg No. 2 mine. The citation alleged the violation was significant and substantial ("S&S")[1] and an unwarrantable failure[2] to comply with the mandatory safety standard in 30 C.F.R. § 75.511, requiring that disconnecting devices be properly locked

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

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

out and tagged out before engaging in electrical work. The Secretary of Labor proposed a penalty of $7,578.00.

I. PROCEDURAL BACKGROUND AND ISSUES ON REMAND

In my August 7, 2013, decision, I found a violation of 30 C.F.R. § 75.511 but concluded that the violation was not S&S or an unwarrantable failure on the part of the mine operator. 35 FMSHRC at 2506, 2508. These determinations were based on my findings that the violation was unlikely to result in an injury and reflected a low degree of negligence, due to mitigating circumstances. *Id.* at 2501–03, 2506.

On appeal, the Commission upheld the violation but found that it was S&S and that Newtown had demonstrated high negligence. 38 FMSHRC at 2049–50. The Commission concluded there was insufficient evidence supporting several of my findings reducing the likelihood of the violation and mitigating Newtown's negligence. *Id.* at 2042–44, 2047–48. The Commission further held that I erred by failing to discuss the established unwarrantable failure factors and directed me to consider the supervisor's involvement as an additional aggravating factor in my unwarrantable failure determination. *Id.* at 2046.

Consequently, the issues before me on remand are (1) whether the violation was an unwarrantable failure, and (2) what is the appropriate penalty assessment.

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

MSHA Inspector Russell Richardson issued Citation No. 8110086 on May 25, 2010, during an inspection of Newtown's Coalburg No. 2 mine. (Tr.26:10–12) Richardson wrote the citation for Newtown's failure to properly lock out and tag out the "cathead"[3] power cable connector for the number 34 shuttle car. (Tr.36:8–10, 53:18–54:3)

A. Further Findings of Fact

Mine Superintendent Robert Herndon accompanied Richardson on his inspection of the mine. (Tr.30:2–3) As mine superintendent, Herndon directed the workforce, ensured compliance with federal laws and regulations, and was responsible for the health and safety of the miners. (Tr.93:18–23, 119:1–6) He was second in command at the mine and had the power to discipline and fire employees. (Tr.31:15–19, 118:8–14) Herndon was also a certified electrician at the time of the inspection. (Tr.119:7–9) He completed specialized training that included proper procedures for locking out and tagging out electrical equipment. (Tr.119:10–24)

Inspector Richardson directed Herndon to lock out and tag out the cathead for the number 34 shuttle car before they inspected its power cable. (Tr.36:14–18) Herndon procured a lock, de-energized the cathead, and attached the lock but was unable to remove the key from the lock

[3] A cathead is the "connecting plug" through which an electrical cable is attached to a receptacle at a power station. (Tr.15:15–24, 17:15–24)

without breaking it. (Tr.103:1–6, 104:11–22) He did not inform Richardson that he had left the key in the lock upon returning from the power center. (*See* Tr.46:10–20, 137:23–138:13) Herndon subsequently repaired damage to the cable, including an exposed copper conductor, using a knife. 35 FMSHRC at 2497–98. The repair of the cable, while the cathead was not properly locked out, constituted electrical work in violation of section 75.511. *Id.* at 2498–500.

Herndon and one other miner started the repairs after the damage to the cable was discovered at 9:15 a.m. (*See* Tr.56:24–57:7; G. Ex. 2) The lock out tag out violation was discovered at 9:30 a.m. and terminated five minutes later. (Tr.49:1–7; G. Ex. 3) I credit Richardson's undisputed testimony that repairs stopped upon discovery of the lock out violation until it was terminated. (Tr.46:15–20) I also credit Herndon's undisputed testimony that applying a new insulating wrap to the cable took 10 minutes. (Tr.108:5–9) In light of the foregoing, I conclude that the violation existed for approximately 10 to 15 minutes, between 9:15 a.m. and 9:30 a.m., while the repairs were being conducted.

Newtown has suggested that the danger of the violation was mitigated by the short distance between the shuttle car and power center. (Resp't Post-Hr'g Br. at 16) However, the distance is only relevant if miners could see that repairs were ongoing.[4] Richardson testified that the power center was not visible from the shuttle car, as there were blocks of coal in the way. (Tr.37:2–9) Although part of Herndon's testimony implies visibility, he also testified on cross examination that the shuttle car was not visible from the power center. (Tr.127:22–128:8, 134:14–20) I therefore credit Richardson's testimony and conclude that there was no visibility between the shuttle car and power center.

B. Unwarrantable Failure

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 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 133, 136 (7th Cir. 1995) (approving the Commission's unwarrantable failure test). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. *IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009). The Commission has identified several such factors, including: the length of time a violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and the operator's knowledge of the existence of the violation. *Id.* Because supervisors are held to a high standard of care, their involvement in a violation is another important factor supporting an unwarrantable failure determination. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) (citing *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998)). Furthermore, "[i]t is well established that a

[4] The Commission found insufficient evidence to support Newtown's assertion that miners approaching the power center could be warned away by Herndon, at the shuttle car, regardless of the distance or visibility. 38 FMSHRC at 2043.

supervisor's violative conduct, which occurs within the scope of his employment, may be imputed to the operator for unwarrantable failure purposes." *Capitol Cement Corp.*, 21 FMSHRC 883, 893 (Aug. 1999) (citation omitted), *aff'd*, 229 F.3d 1141 (4th Cir. 2000) (unpub.). All relevant facts and circumstances of each case must be examined to determine whether an actor's conduct is aggravated or if mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

The Secretary asserts that the violation was an unwarrantable failure. (Sec'y Post-Hr'g Br. at 19) In support, he argues that Herndon was subject to a higher standard of care as a supervisor and his actions were an intentional, knowing breach of the safety standard. (*Id.* at 19–22) The Secretary further asserts that the violation was extensive, long-lasting, obvious, and posed a high degree of danger, and that Newtown was on notice. (*Id.* at 20–22) In response, Newtown argued that Herndon made a good faith attempt to comply with Inspector Richardson's request to lock out and tag out the shuttle car power cable and that he did not believe electrical work was being done. (Resp't Post-Hr'g Br. at 5, 16) Newtown further asserts that the short time period, lack of danger, lack of notice, and extensive safety training are all mitigating factors that support removal of the unwarrantable failure designation. (*Id.*)

On appeal, the Commission concluded that Newtown's conduct constituted high negligence. "The Commission has also previously recognized that a finding of high negligence suggests unwarrantable failure." *Eagle Energy Inc.*, 23 FMSHRC 829, 839 (Aug. 2001). In analyzing an unwarrantable failure, I must consider the Commission's factors for determining aggravated conduct. *IO Coal Co.*, 31 FMSHRC at 1350–51.

1. Involvement of a Supervisor

The direct involvement of a supervisor in the creation of a violation is an aggravating factor. *Lopke Quarries*, 23 FMSHRC at 711. Herndon's position as mine superintendent is not disputed. (Tr.93:12–13) He was responsible for the health and safety of the miners and for ensuring compliance with federal laws and regulations. (Tr.93:18–23, 119:1–6) As a supervisor, Herndon was in a position to set an example for his miners and must be held to a high standard of care. Nevertheless, while escorting Inspector Richardson, Herndon improperly locked out and tagged out the cathead by leaving the key in the lock during electrical repairs. 35 FMSHRC at 2500. Herndon's role as mine superintendent is a critical aggravating factor that I weigh heavily in my unwarrantable failure determination.

2. Operator's Knowledge; Obviousness of the Violation

As a supervisor, Herndon's knowledge of the violation may be imputed to Newtown. *Capitol Cement*, 21 FMSHRC at 893. Herndon suggested he was unaware of the violation because he believed that repairing the power cable's protective outer jacket did not constitute electrical work. (Tr.111:2–21, 115:22–116:5, 120:9–15) He further testified that leaving the key in the lock while conducting the repair was a safe practice, as there were no miners located near the power center. (Tr.123:7–124:3; *See* Tr.113:23–114:18) However, the repairs involved cutting into the insulation of the power cable with a knife, which exposed the cable's copper conductor. (Tr.59:21–60:14) I have previously determined that such repairs constitute electrical work. 35

FMSHRC at 2497–98. Herndon, who was a certified electrician trained in lock out and tag out procedures, at a minimum should have known that cutting into a power cable constitutes electrical work, given the obvious danger. (Tr.119:15–24) Indeed, Herndon admitted that leaving the key in the lock while conducting electrical work is not a safe practice. (Tr.119:15–24, 120:9–21) Despite conducting repairs knowing that the cathead was not properly locked out, he did not tell the inspector of his inability to properly lock out and tag out the cathead. (*See* Tr.46:10–20, 137:23–138:13) Thus, I believe Herndon took a calculated risk in performing electrical repairs on the cable that he knew were in violation of section 75.511. Herndon's knowledge of the violation, imputed to Newtown, is an aggravating factor that I accord significant weight in my determination.

Additionally, the existence of the violation should have been obvious to Herndon. He was aware from his electrician training that leaving the key in the lock was an improper lock out and only did so after trying to forcibly remove it. (Tr.55:16–56:6, 104:11–22, 119:15–24) I find the violation's obviousness to be an aggravating factor but accord it minimal weight, as its relevance is subsumed by Herndon's knowledge of the violation's existence.

3. Degree of Danger

The facts and circumstances establish that the violation posed a high degree of danger. Herndon repaired a power cable with an exposed copper wire conductor using a knife. (Tr.59:21–60:14, 124:12–23) If the cable were re-energized, touching the exposed conductor with a knife or hand would ground the cable's 277 volts, which could prove fatal. (Tr.41:12–20, 60:15–22) Newtown asserts that the violation was not dangerous, as there was no likelihood that a miner would re-energize the shuttle car's cable. (Resp't Post-Hr'g Br. at 16) The Commission rejected this argument, finding the violation was S&S and reasonably likely to result in a potentially fatal injury to one miner. 38 FMSHRC at 2045, 2049. Newtown also argues that the closeness of the power center to the shuttle car is a mitigating factor. (Resp't Post-Hr'g Br. at 16) I find the distance between them is not mitigating, based on the established lack of visibility between the power center and shuttle car. Furthermore, Newtown's training program and compliance with other safety standards are not mitigating considerations. *See Buck Creek Coal*, 52 F.3d at 136. Based on these findings, and in line with the Commission's determination of high gravity, I find that the violation posed a high degree of danger and therefore accord this factor considerable weight in my determination.

4. Length of Time Violation Existed; Extent of the Violation

As for the length of time, the violation existed for approximately 10 to 15 minutes while the cable was being repaired. (*See* Tr.46:15–20, 48:20–49:7, 56:24–57:7, 108:5–9; G. Ex. 2, 3) This was a relatively short window of time in which the shuttle car cable could be re-energized, and I therefore find it to be a mitigating factor. However, I accord this factor little weight, given the high degree of danger created by the violation and the direct involvement and knowledge of the mine superintendent.

The extent of the violation is that it posed a risk of fatal injury to the two miners repairing the shuttle car power cable.[5] (Tr.58:11–24, 108:3–4) Considering the high degree of danger but limited period of exposure to that danger, I find the extent of the violation to be neither aggravating nor mitigating. I therefore accord it nominal weight in my determination.

5. Notice That Greater Efforts Are Necessary for Compliance; Abatement of the Violation

The two remaining unwarrantable failure factors are less relevant. The Secretary concedes that Newtown was not contemporaneously cited for 30 C.F.R. § 75.511 or otherwise put on notice by MSHA that greater efforts were required for compliance. (Sec'y Post-Hr'g Br. at 21) The Secretary's argument that Herndon had notice due to his training as a certified electrician is misplaced: his training goes to his knowledge of the violation. Newtown did not have notice. I therefore find this factor mitigating but accord it minimal weight, as any tendency to mitigate is far outweighed by the involvement and knowledge of a supervisor, imputed to Newtown.

Finally, the record establishes that no abatement efforts were made prior to the citation's issuance. When Herndon discovered that the power cable would require electrical repairs, he had an opportunity to correct the improper lockout by alerting Richardson that the lock needed to be replaced. He failed to act. I find his failure to act an aggravating factor in light of his knowledge of the violation, but accord it minimal weight in comparison to the other aggravating factors discussed.

In reaching my unwarrantable failure determination, I note that the Commission found insufficient evidence to support the remaining mitigating considerations argued by

[5] On appeal to the Commission, the Secretary raised the argument that the long-term implications of Herndon's attitude towards this violation should be considered, and suggested that continuing violations were likely. (Sec'y Pet. for Discretionary Review at 9) My review of the record does not convince me that this was an ongoing problem at Newtown, as opposed to a temporary lapse of judgment by Herndon.

Newtown, which I see no need to repeat here.[6] 38 FMSHRC at 2041–44, 2046–48. On remand, I find that the short time the violation existed and the lack of notice to Newtown were mitigating factors. Nevertheless, those factors are greatly outweighed by the high level of danger, the direct involvement of the mine superintendent, and his knowledge that he was violating the regulation. Upon weighing all the evidence as a whole, I conclude that the violation of section 75.511 was an unwarrantable failure by Newtown to comply with a mandatory health or safety standard.

C. Penalty

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

The parties stipulated to the operator's history of previous violations, the size of its business, and its good faith in rapidly abating the violation. (Sec'y Pre-Hr'g Rep., Stip. 9, 10) Newtown further stipulated that any resulting penalty will not affect its ability to remain in business. (Sec'y Pre-Hr'g Rep., Stip. 5) The Commission determined the violation was S&S, and characterized the gravity as high, that is, reasonably likely to result in a potentially fatal injury to one miner. 38 FMSHRC at 2049–50. The Commission also concluded that Newtown demonstrated high negligence based on the involvement of a supervisor who should have known, as a certified electrician, that he was violating federal safety regulations. The Commission's findings are the law of the case, and I have further determined that the violation was an unwarrantable failure to comply with a mandatory health or safety standard. *See E. Ridge Lime Co*., 21 FMSHRC 416, 421–22 (Apr. 1999). In light of the foregoing, I conclude that a penalty of $7,578.00 is appropriate for Citation No. 8110086.

[6] Newtown has consistently asserted that Herndon acted in a good-faith attempt to comply with the inspector's request when he de-energized the cathead but left the key in the lock. (Resp't Post-Hr'g Br. at 16.) While the Commission addressed related claims in the context of its S&S and negligence determinations, I feel obligated to directly address Newtown's assertion as an unwarrantable failure defense. The Commission has previously held that an operator's good faith "objectively reasonable" belief that cited conduct complied with the law is a defense to an unwarrantable failure. *IO Coal*, 31 FMSHRC at 1357–58 (citation omitted). Here, however, the Commission determined that Herndon "failed to demonstrate good faith because he did not inform Richardson that he was unable to procure a functional lock." 38 FMSHRC at 2047–48. Furthermore, as noted above, Herndon did not have a reasonable belief that his conduct complied with the standard, as he is a certified electrician and should have known that his repairs constituted "electrical work." Because the violation did not result from Herndon's reasonable good faith belief that his conduct complied with section 75.511, I reject Newtown's "good faith" argument as a defense or mitigation of its conduct.

III. ORDER

WHEREFORE, it is hereby **ORDERED** that Citation No. 8110086 be **AFFIRMED** as written. It is further **ORDERED** that Newtown **PAY** a penalty of $7,578.00 within forty (40) days of the date of this decision on remand.

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

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September 13, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. REX COAL COMPANY INC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2016-0455 A.C. No. 15-18869-415097 Mine: CVB No. 1

DECISION APPROVING SETTLEMENT MOTION WHICH COMPLIES WITH SECTION 110(k) OF THE MINE ACT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement[1] which motion provides sufficient information to support the proposed penalty reduction; the originally assessed amount was $285.00, and the proposed settlement is for $228.00.

The parties presented the following basis for the proposed reduction of the single citation at issue:[2]

> Basis of compromise: A reduction in the amount of the proposed penalty by the Office of Assessments. There are factual disputes regarding the level of negligence on behalf of the operator and/or an agent of the operator. The Respondent contends that the operator was unaware of the cited condition. The Pre-shift examinations were being conducted as required by law. According [to] the foreman who conducted the preshift for the OU 10 MMU, the ribs were not showing any signs of taking weight in any areas from the feeder inby to the face of each working place. The cited condition was that the coal ribs were not being adequately controlled at crosscut # 33 in the No. 3 Entry loose ribs were present. On the outby corner of the crosscut between No. 3 and No. 4 Entries the rib was 12 feet in length and 8 inches in thickness. On the inby corner of the crosscut a

[1] It is **DETERMINED** that the Conference and Litigation Representative (CLR) is accepted to represent the Secretary in accordance with the notice of unlimited appearance she has filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

[2] Citation No. 8413818 alleged a violation of 30 C.F.R. § 75.202(a), and stated that loose ribs presented the risk of a rib fall. Citation No. 8413818.

> loose rib was present that measured after the rib was pulled down 18 inches thick, 3 feet in length and 2 ½ feet in height. Additionally, the Petitioner stated in the daily inspection notes for this citation that the mining height ranged from 8 foot to 12 foot and consisted of rock and coal partings, as we11 as, 1700 to 1900 foot of cover with sandstone roof rolling in and out across the section and that the coal ribs are constantly taking pressure due to the amount of cover over the coal seam. However, the Petitioner was unable to determine how long the cited condition had existed and stated that it was undetermined. Furthermore, the Petitioner stated that the rest of the ribs on the 0010 MMU appeared ok. Therefore, based on the facts presented, The Secretary is requesting a revised penalty based on a justification that the condition cited was an isolated incidence/hazard which occurred just as likely as not after the foreman had pre-shifted the area. Especially, with the amount of cover and including the sandstone rolling in and out across the 0010 MMU, it is probable that the ribs took on more pressure and weight after the examination of this specific area was completed. Also, the Petitioner issued the cited condition at 10:55am which was long after the pre-shift examination was conducted. Consequently not only the operator but the Section Foreman would not have been aware. For the purpose of settlement, the Petitioner proposes and the Respondent accepts a reduction in the proposed penalty by the Office of Assessments. Based on the facts presented, the ALJ may find merit with the Respondent's contention that the negligence of the violation should have been less than was originally evaluated. A reduction in the proposed penalty assessed is reflected by the compromised penalty amount.

Joint Motion at 3-4.

The Court has considered the representations submitted in this case, and takes note that this motion is an example of the Secretary providing genuine facts in dispute, and an acknowledgment that the Respondent presented plausible contentions, which weighed upon and supported a reconsideration of the proposed penalty. The motion also demonstrates that it is not burdensome for the Secretary to present the kind of information the Commission needs in order to carry out its responsibility under section 110(k) of the Mine Act. With the information provided in the motion, the Court is able to conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The settlement amounts are as follows:

Citation No.	Assessment	Settlement Amount
8413818	$285.00	$228.00
TOTAL:	**$285.00**	**$228.00**

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

It is **ORDERED** that Respondent pay a penalty of $228.00 within 30 days of this order.[3] Upon receipt of payment, this case is **DISMISSED**.

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 14, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2008-666 A.C. No. 11-02752-161958
v.	Docket No. LAKE 2009-006A A.C. No. 11-02752-162890-05
THE AMERICAN COAL COMPANY, Respondent	New Era Mine

DECISION ASSESSING PENALTIES UPON REMAND

Before: Judge Manning

On January 24, 2017, the Commission issued its decision in the above-captioned cases. *The American Coal Company,* 39 FMSHRC 8 (Jan. 2017). In that decision, the Commission reversed the findings of former Commission Administrative Law Judge Michael Zielinski with respect to Order No. 6673874 in LAKE 2008-666 and Order No. 6673876 in LAKE 2009-006A. Both orders were issued under section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). 30 U.S.C. § 814(d)(2). The ordering paragraph of the Commission's decision provides, in pertinent part:

> We reverse the Judge's decision with regard to the accumulations and on-shift examination violations, Order Nos. 6673874 and 6673876 respectively, and conclude that they resulted from an unwarrantable failure to comply, with high negligence and gravity as set forth above. We remand Order Nos. 6673874 and 6673876 for the imposition of penalties consistent with this opinion.

39 FMSHRC at 23. Thus, the only issue on remand is the amount of the penalty that should be assessed for each order. These cases were assigned to me on June 27, 2017. By order dated June 29, 2017, I directed the parties to enter into negotiations in an attempt to agree upon appropriate penalties for the two orders. I twice granted requests for extensions of time, but the parties were unable to reach agreement on appropriate penalties.

The Secretary originally proposed a penalty of $188,000 for Order No. 6673874 as a flagrant violation using his special assessment procedure. *See* 30 C.F.R. § 100.5. Judge Zielinski determined that the violation was not flagrant and the Secretary did not appeal his

finding in that regard to the Commission. 39 FMSHRC at 9 n. 3. The Secretary originally proposed a penalty of $60,000 for Order No. 6673876 using his special assessment procedure.

Because the parties were unable to agree upon an appropriate penalty for the two orders upon remand, I am assessing a penalty based upon the record in the cases and the decisions of Judge Zielinski and the Commission.

Order No. 6673874

With respect to Order No. 6673874, Judge Zielinski determined that The American Coal Company ("AmCoal") violated section 75.400, that the violation was significant and substantial ("S&S"), and AmCoal's negligence was "moderate to high," but was not the result of its unwarrantable failure to comply with the safety standard. *The American Coal Company*, 36 FMSHRC 1311, 1340-52 (May 2014). He reduced the gravity from "fatal" to "reasonably likely to result in lost work days injuries to two miners." *Id.* at 1345, 1368. He also determined that the violation was not flagrant, which finding was not appealed by the Secretary. *Id.* at 1362-63; 39 FMSHRC at 9, n. 9. Judge Zielinski assessed a penalty of $7,500 for this violation.

The Commission reversed the judge's "findings of no unwarrantable failure and his negligence and gravity determinations." 39 FMSHRC at 17. With respect to negligence, the Commission determined that AmCoal's negligence was high. *Id.* at 20. With respect to gravity, the Commission concluded that "the level of gravity from the occurrence of a fire in the [applicable] section of the mine is a reasonable likelihood of serious or fatal smoke inhalation or burn injuries to a number of miners." *Id.* at 21.

Order No. 6673876

With respect to Order No. 6673876, Judge Zielinski determined that AmCoal violated section 75.363(b), the violation was S&S, and AmCoal's negligence was "moderate to high," but was not the result of its unwarrantable failure to comply with the safety standard. 36 FMSHRC at 1352-54, 1369. As with the previous order, he reduced the gravity from "fatal" to "reasonably likely to result in lost work days or restricted duty injuries to two miners." *Id.* at 1353. Judge Zielinski assessed a penalty of $4,000 for this violation.

The Commission reversed the judge's finding that the violation was not the result of AmCoal's unwarrantable failure. 39 FMSHRC at 21-22. The Commission also reinstated the Secretary's high negligence designation. *Id.* at 23. Finally, the Commission determined that the gravity for the violation was "a reasonable likelihood of serious or fatal smoke inhalation or burn injuries to a number of miners." *Id.*

Appropriate Civil Penalties

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 food faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The parties stipulated that AmCoal demonstrated good faith in abating the violations in a timely manner and that the proposed penalties would not affect its ability to remain in business. Stips. 8 &10; 36 FMSHRC 1364. Judge Zielinski determined that "AmCoal is a very large operator, as is its controlling entity[.]" 36 FMSHRC 1364. Based on his review of the record, the parties' briefs, and the Secretary's Part 100 regulations, Judge Zielinski concluded that AmCoal's history of previous violations should be characterized as "a moderate overall violation history." 36 FMSHRC at 1364-65. The findings with respect to these four elements are not in dispute at this stage of the proceeding.

Penalty for Order No. 6673874

This order was issued because, in part, the MSHA inspector found float coal dust, loose coal, paper, cardboard, wood and plastic under and along an energized conveyor belt and adjoining crosscuts. Taking into consideration the four penalty criteria discussed above plus the Commission's determination that the violation was the result of AmCoal's unwarrantable failure to comply with the safety standard, AmCoal's high level of negligence and the violation's high level of gravity, I conclude that a penalty of $40,000 is appropriate.

As stated above, the Commission held that there was a "reasonable likelihood of serious or fatal smoke inhalation or burn injuries to *a number of miners*." 39 FMSHRC at 21 (emphasis added). The Secretary alleged that ten miners were exposed to the hazard but Judge Zielinski found that two miners were affected. 36 FMSHRC at 1345 n. 36. In using the phrase "a number of miners," the Commission did not specifically address this dispute. Under the Secretary's penalty point system, the number of persons potentially affected can significantly influence the amount of the proposed penalty. The penalty point system is not binding on the Commission.[1] The Commission has "consistently considered gravity holistically, considering 'factors such as

[1] The Commission is responsible for assessing final penalties. The Commission has held that:

> Commission Judges are not bound by the Secretary's penalty regulations set forth at 30 C.F.R. Part 100 or his special assessments. Their duty is to make a de novo assessment based upon their review of the record. The Commission does require an explanation of any substantial divergence from the penalty proposal of the Secretary. However, the Judge's assessment must be independent, and the Secretary's proposal is not a baseline or starting point that the Judge should use a guidepost for his/her assessment.

The American Coal Company, 38 FMSHRC 1987, 1990 (Aug. 2016).

the likelihood of injury, the severity of an injury if it occurs, and the number of miners *potentially* affected.'" 39 FMSHRC at 20, *quoting Newtown Energy Inc*., 38 FMSHRC 2033, 2049 (Aug. 2016) (emphasis added). The crucial point is that the Commission determined that in the event of a fire it was reasonably likely that at least some of the miners working inby the ignition point would have been seriously or fatally injured. The penalty initially proposed by the Secretary was quite high because the Secretary deemed the violation to be flagrant, but Judge Zielinski rejected that determination and his finding was not appealed. 30 U.S.C. § 820(b)(2). In assessing the penalty, I placed considerable weight on the gravity of the violation, the negligence of AmCoal, and the fact that AmCoal is a very large mine operator.

Penalty for Order No. 6673876

This order was issued because hazardous conditions, including those described in Order No. 6673874, were not recorded in the examiners' on-shift book, as required. Taking into consideration the four penalty criteria discussed above plus the Commission's determination that the violation was the result of AmCoal's unwarrantable failure to comply with the safety standard, AmCoal's high level of negligence and the violation's high level of gravity, I conclude that a penalty of $40,000 is appropriate.

As discussed above with respect to Order No. 6673874, the Commission took a holistic approach in determining that the gravity of this violation was serious. The Commission determined that "the dangers described in our analysis of the accumulations violation apply to this violation as well, and the dangers affected additional crews." 39 FMSHRC at 23. The penalty differs from that initially proposed by the Secretary because he used his special assessment procedure in calculating the proposal and Commission judges are not bound by that regulation. 30 C.F.R. § 100.5. In assessing the penalty, I placed considerable weight on the gravity of the violation, the negligence of AmCoal, and the fact that AmCoal is a very large mine operator.

ORDER

For the reasons set forth above, The American Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $80,000 within 30 days of the date of this decision.[2]

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

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

Distribution:

Barbara Villalobos, Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604-1502 (Certified Mail)

Jason W. Hardin, Esq., Fabian VanCott, 215 South State Street, Suite 1200, Salt Lake City, UT 84111-2323 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710
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September 28, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. COAL FIELD CONSTRUCTION COMPANY LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2017-0264 A.C. No. 11-03189-436532 MC#1 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). The Conference and Litigation Representative ("CLR") has filed a motion to approve settlement.[1] The originally assessed amount was $15,700.00, and the proposed settlement is for $5,009.00. The Secretary's Motion is an example that, when inclined to put aside his recalcitrant behavior, the Secretary can easily and fully provide the type of information the Commission needs in order to carry out its Congressional mandate per section 110(k) of the Mine Act.

The single citation at issue, Citation No. 9039259, was issued on January 4, 2017 due to an alleged a violation of 30 C.F.R. § 77.1710(g). In December 2016, a miner was injured when he lost his balance on a six-inch water pipe and fell backwards onto the concrete floor of the coal preparation plant. Citation No. 9039259. The citation alleges that the miner was eight feet above the floor and was not wearing a safety belt or harness as fall protection. *Id*. This injury led to lost workdays or restricted duty, and the violation was specially assessed. *Id*.

The parties have proposed a penalty reduction based on the Respondent's arguments that the operator was not highly negligent, and that the violation should not have been specially assessed.[2]

[1] It is **DETERMINED** that the CLR is accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

[2] The proposed penalty is the amount that would have been assessed under Part 100.

Regarding the operator's allegedly high negligence:

> The Respondent would argue that there are mitigating circumstances that justify an evaluation of "Low" negligence. The Respondent states that mine management provided a ladder and safety harness for the subject miner and both were at the location where the miner fell. The inspection notes on page 8 support the Respondent's statement which affirms the fact that a ladder and safety harness were provided by mine management. Also, the inspector's written statement to the CLR does not refute the fact that the subject miner had a ladder and safety harness at the time of the fall. The Respondent further states that on page 15 of the inspection notes the inspector states "extreme aggravated conduct not observed but High Negligence due to management person directly supervising." However, the Respondent contends that a foreman did not observe or instruct the miner to work on a pipe suspended eight feet above the Preparation Plant floor and management had provided the necessary safety equipment (a ladder and safety harness) for the miner to perform his work duties safely. The inspection notes state on page 14 that "lead person/supervisor witnessed accident as relayed (via radio) to Potter Processing Management." Potter Processing Management is a separate contractor at the same mine site. The fall accident occurred on 12/12/2016 at 3:00 PM based on the company's "Report of Injury Investigation" form. The MSHA inspection and issuance of Citation 9039259 occurred on 01/04/2017, which was nine days after the accident event.

Motion at 4-5.

Regarding the special assessment:

> The Respondent contends that the citation should be assessed using the penalty points assigned based on the gravity and negligence evaluations commensurate with the penalty points found in Part 100. The Respondent submits the following justifications for withdrawing/removing the "Special Assessment" penalty assessment; 1) There was not a high degree of negligence on the part of mine management and the negligence evaluation should have been "Low" based on the justification provided in Part 1. 2) The miner did not receive a serious injury and returned to work on 12/26/2016, the day after the fall occurred. 3) The citation was not evaluated as an "Unwarrantable Failure." 4) An "Order of Withdrawal" was not issued to the mine operator. 5) There was not an "Extraordinarily High Degree of Negligence" or "Extraordinarily High Gravity or Other Unique Aggravating Circumstances" on the part of the mine operator. The Respondent would reference 35 FMSHRC 1774 and contend that he has met the burden of proof to justify the

> withdrawal of the Special Assessment identified on page 31 of Judge Zielinski's *1774 decision and ask the penalty amount be regularly assessed per Part 100.[3]

Motion at 5-6.

And finally:

> The Respondent contends that the "Special Assessment Narrative Form" (SANF) provided by the MSHA Civil Penalty Compliance Office is not in agreement with the gravity evaluations made by the inspector and identified on the citation, MSHA Form 7000-3, line 10 A and 10 B. Line 10 A, Injury or Illness, of the citation is evaluated at "Reasonably Likely" which is assigned 30 penalty points per Part 100 while on the SANF the "Likelihood of Occurrence Points" is evaluated at "Occurred" with a 50 penalty point assessment per Part 100. On Line 10 B, Severity of Injury or Illness, the citation is evaluated at "Fatal" which is assigned 20 penalty points per Part 100 however the SANF shows the evaluation at "Lost Workdays" with a 5 penalty point assessment per Part 100. The Respondent argues that the regular assessment penalty points assigned per Part 100 should be five points less than is stated on the SANF or 102 Penalty Points total for a total regular assessment of $3,357…. The Secretary acknowledges that any or all of the Respondent's arguments may be persuasive at hearing on the merits. Based on the facts in evidence, the Special Assessment should be withdrawn, the violation assessed commensurate with the penalty points found in Part 100, and the citation remain unchanged and evaluated as written.

Motion at 6.

[3] Here the motion refers to a 2013 decision in which Judge Zielinski concluded that a rib support violation was incorrectly assessed as S&S. *American Coal Co.*, 35 FMSHRC 1774, 1804 (June 2013) (ALJ Zielinski).

The Court has considered the representations submitted in this case and concludes that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The settlement amounts are as follows:

Citation No.	Assessment	Settlement Amount
9039259	$15,700.00	$5,009.00
TOTAL:	**$15,700.00**	**$5,009.00**

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

It is **ORDERED** that Respondent pay a penalty of $5,009.00 within 30 days of this order.[4] Upon receipt of payment, this case is **DISMISSED**.

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

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

Distribution:

TERRENCE W. LEDFORD
Terrence W. Ledford
Conference and Litigation Representative
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Mine Safety and Health Administration
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Vincennes, IN 47591

Wm. Allen McGilton, Assistant Corporate Safety Director
Kathy Bartek, Paralegal
William H. Snider, Assistant Manager of Assessments
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/JM

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September 29, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. KENAMERICAN RESOURCES, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2014-753 A.C. No. 15-17741-357963 Mine: Paradise #9

DECISION

Appearances: Michele A. Horn, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;

Jason W. Hardin, Esq., Fabian VanCott, Salt Lake City, Utah, for Respondent.

Before: Judge Paez

This case is before me upon the Petition 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 issued by the Mine Safety and Health Administration ("MSHA") to KenAmerican Resources, Inc. ("KenAmerican" or "Respondent"), as the owner and operator of the Paradise #9 mine in Muhlenberg County, Kentucky. To prevail, the Secretary must prove the cited violations "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).

I. STATEMENT OF THE CASE

The Secretary initially charged KenAmerican with four section 104(a) citations as part of Docket No. KENT 2014-753. The parties settled one of the four citations, for which I issued a Decision Approving Partial Settlement on November 16, 2015. Three section 104(a) citations remain at issue.

Citation Nos. 8513258 and 9041084 allege violations of 30 C.F.R. § 75.380(d)(7)(iv) for improperly hung lifelines.[1] Citation No. 9041085 alleges a violation of 30 C.F.R. § 75.1722(b) for an inadequately guarded tail roller.[2] The Secretary has designated each violation as significant and substantial ("S&S").[3] The Secretary characterizes KenAmerican's negligence as moderate for Citation Nos. 8513258 and 9041085, and as high for Citation No. 9041084. The Secretary proposes penalties of $15,570.00 for Citation No. 8513258, $48,472.00 for Citation No. 9041084, and $1,795.00 for Citation No. 9041085, for a total of $65,837.00.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. KENT 2014-753 to me, and I held a hearing in Nashville, Tennessee.[4] The Secretary presented testimony from MSHA inspectors Abel DeLeon and Jon Ryan Newbury. KenAmerican presented testimony from Shift Foreman James Pendegraff and Safety Director Shannon Baker. The parties each filed post-hearing briefs, and the Secretary filed a reply brief.

II. ISSUES

For Citation No. 8513258, the Secretary asserts that Respondent failed to comply with 30 C.F.R. § 75.380(d)(7)(iv) by locating the lifeline near a moving belt return roller and by

---

[1] Section 75.380(d)(7)(iv) provides, in relevant part:

> Each escapeway shall be –
> . . .
> (7) Provided with a continuous, durable directional lifeline or equivalent device that shall be –
> . . .
> (iv) Located in such a manner for miners to use effectively to escape

30 C.F.R. § 75.380(d).

[2] Section 75.1722 provides, in relevant part:

> . . .
> (b) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

30 C.F.R. § 75.1722.

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

[4] In this decision, the hearing transcript, the joint exhibit, the Secretary's exhibits, and KenAmerican's exhibits are abbreviated as "Tr.," "Joint Ex. #," "Ex. GX–#,"and "Ex. R–#," respectively.

routing the lifeline near a communications cable and a carbon monoxide monitoring cable. (Sec'y Br. at 6–8.) The Secretary asserts that the violation was S&S and claims KenAmerican's actions constituted moderate negligence because two months prior an MSHA inspector had warned the operator about commingling the lifeline with similarly sized cables. (*Id.* at 8, 12–13.)

For Citation No. 9041084, the Secretary similarly asserts that Respondent failed to comply with 30 C.F.R. § 75.380(d)(7)(iv) by routing the lifeline alongside the communications cable and the miner location tracking cable near an active mining section. (Sec'y Br. at 8–9.) The Secretary asserts that the violation was S&S and claims KenAmerican's actions constituted high negligence because the operator developed the area after the inspector's prior warning and citation. (*Id.* at 13.)

In contrast, KenAmerican argues that the cited lifeline conditions did not constitute violations of section 75.380(d)(7)(iv) because the Secretary's interpretation and enforcement of the regulation are improper. (Resp't Br. at 3–25, 35–41.) Alternatively, Respondent argues that the gravity and negligence of the citation should be reduced and that the Secretary's proposed penalties are too high. (Resp't Br. at 25–35, 41–48.)

For Citation No. 9041085, the Secretary asserts that Respondent failed to comply with 30 C.F.R. § 75.1722(b) by using hog wire fencing with excessively large openings as guarding on top of a motorized belt tail roller. (Sec'y Br. at 14–17.) The Secretary asserts that the violation was S&S and that KenAmerican's actions constituted moderate negligence. (*Id.*)

Respondent argues that the cited conditions were not a violation of section 75.1722(b) because the guarding would prevent miners from contacting moving components of the belt. (Resp't Br. at 44–45.) Respondent alternatively contends that the gravity and negligence determinations should be lowered and the Secretary's assessed penalty reduced. (*Id.* at 45–47.)

Accordingly, the following issues are before me: (1) whether Respondent violated the Secretary's mandatory health or safety standard on locating lifelines in an underground coal mine; (2) whether Respondent violated the Secretary's mandatory health or safety standard regarding the installation of guards for mechanical equipment; (3) whether the record supports the Secretary's assertions regarding the gravity of the alleged violations, including the S&S determinations; (4) whether the record supports the Secretary's assertions regarding KenAmerican's negligence in committing the alleged violations; and (5) whether the Secretary's proposed penalties are appropriate.

For the reasons that follow, it is hereby **ORDERED** that Citation Nos. 8513258, 9041084, and 9041085 are **AFFIRMED.**

III. FINDINGS OF FACT

The parties stipulated to the following:

> 1. KenAmerican Resources, Inc. ("KenAmerican") at all times relevant to these proceedings, engaged in mining activities and operations at the Paradise #9 Mine in Muhlenberg County, Kentucky.
>
> 2. KenAmerican is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et. seq.* (the "Mine Act").
>
> 3. The Administrative Law Judge has jurisdiction over these proceedings pursuant to [section] 105 of the [Mine] Act.
>
> 4. Abel DeLeon was[,] at the times the citations were issued, an authorized representative of the United States of America's Secretary of Labor, assigned to MSHA, and was acting in his official capacity when issuing the citations at issue in these proceedings.
>
> 5. The citations at issue in these proceedings were properly served upon KenAmerican as required by the Mine Act.
>
> 6. The exhibits offered by the parties are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.
>
> 7. The penalties assessed in this case will not affect the ability of KenAmerican to remain in business.
>
> 8. KenAmerican demonstrated good faith in abating the violations.

(Joint Ex. 1.)

A. Background of the KenAmerican Mine

KenAmerican's Paradise #9 mine is a room-and-pillar coal mine located in Muhlenberg County, Kentucky. (Joint Ex. 1; *see* Ex. R–7 at 1.) KenAmerican has developed the mine by cutting a series of entries and perpendicular crosscuts that form a grid if viewed from above. (Tr. 34:9–12; Ex. R–7.) The Paradise #9 mine is a large mine, with the working sections located five to seven miles from the mine's entrance. (Tr. 26:22–27:2.) Driving from the mine's active face to the exit takes 45 minutes to an hour, while walking the distance can take several hours. (Tr. 26:15–21.) KenAmerican has three working sections in Paradise #9 and operates on three rotating shifts: two are production shifts and one is a maintenance shift. (Tr. 21:1–10, 39:24–25,

40:1–3.) To ensure coal production is uninterrupted, KenAmerican overlaps the shifts at Paradise #9. (Tr. 40:6–15.)

At the Paradise #9 mine, KenAmerican is required to maintain two entries as designated escapeways for miners to use in case of an emergency. (Tr. 41:3–13, 103:25–104:9, 111:11–22.) The primary escapeway also acts as the mine's main intake ventilation entry, providing clean air to sweep away methane, carbon dioxide, and dust at the active mining section. (Tr. 41:14–42:2.) Paradise #9's secondary escapeway has neutral air and doubles as the mine's main travelway. (Tr. 86:7–15, 90:13–19.) In portions, the secondary escapeway also contains the mine's coal conveyor belt. (Tr. 35:15–36:5, 57:1–25; Ex. R–7.)

Each entry in Paradise #9 is approximately 18 to 20 feet wide. (Tr. 29:20–30:3.) To support the mine roof in excavated entries, KenAmerican has installed a series of roof bolts drilled into the mine ceiling with roof bolt plates attached at the end of the bolt. (Tr. 31:11–24.) KenAmerican typically installs roof bolts in four rows across the width of an entry. (*Id.*) KenAmerican pins the roof bolt plates firmly against the mine roof with a bolt through the center of each plate. (Tr. 51:8–18.) Each roof bolt plate is square or rectangular and has two eyelets located on opposite corners of the plate. (Tr. 50:19–23, 51:19–52:1.) In the escapeways, KenAmerican strings several different cables along the mine roof by attaching the cables to the roof bolt plates' eyelets. (Tr. 52:2–8, 55:17–25.) On one side of the entry, KenAmerican suspends its high-voltage power cables from the roof with coated hangers specially designed for these cables. (Tr. 83:24–85:1, 124:25–125:3, 125:10–23, 128:15–25.) On the other side of the entry, KenAmerican hangs its carbon monoxide detection cable, miner tracking cable, and communications cable using strong plastic zip ties or metal wire ties. (Tr. 123:8–17, 126:6–9, 141:9–14, 153:1–14.)

KenAmerican must also run lifelines down the primary and secondary escapeways. (Tr. 103:25–104:13); 30 C.F.R. § 75.380(d)(7)(iv). KenAmerican attaches the lifelines to the eyelets with smaller plastic zip ties that break with eight to 11 pounds of force. (Tr. 121:9–20.) The coal seam at Paradise #9 is approximately five feet deep, so the lifeline is hung within reach of standing miners. (Tr. 53:4–8.) If necessary, miners can break the zip ties and pull the lifeline down toward the mine floor. (Tr. 157:15–23.) Miners on each unit are trained to first gather at the unit's fire center in an emergency. (Tr. 121:21–122:2.) There, the miners would discuss their route of escape with their section foreman before grabbing the lifeline and proceeding out of the mine with their foreman. (Tr. 122:3–10.)

Altogether, KenAmerican has 24 to 28 miles of lifelines in Paradise #9. (Tr. 143:6–12.) Lifelines are made of braided nylon rope and contain a number of cones, balls, and swirls directing miners to safety in case smoke in the mine limits visibility. (Tr. 20:9–13, 28:4–10, 136:5–12; Exs. R–10, R–13.) Every 100 feet, the lifelines have directional cones pointing miners toward the mine's exit. (Tr. 22:17–23:5.) A ball on the lifeline indicates an upcoming branch in the line leading to a main door for passage to the next entry. (Tr. 23:6–24:13.) A swirly cone indicates the direction to a refuge chamber, where miners can take shelter if escape is not possible. (Tr. 23:8–10.) Two diamond-shaped cones indicate a nearby cache of self-contained self-rescuers ("SCSRs"), i.e., personal respirators that miners must rely upon if the mine becomes inundated with smoke and other fumes. (Tr. 25:1–12, 21:11–15, 26:12–14,

150:15–25.) Because each SCSR contains only up to an hour's worth of oxygen, workers escaping the mine on foot could require multiple SCSRs. (Tr. 27:3–9.)

In addition to housing miles of lifelines, the Paradise #9 mine contains a long series of conveyor belts that KenAmerican uses to bring coal to the surface of the mine. (Tr. 44:4–8.) To transfer coal between belts, coal is dumped from the head of one belt onto the tail of the next. (Tr. 185:22–186:9.) At this exchange point, an electric motor propels the conveyor belt by turning a roller located in the belt's tail. (Tr. 172:22–173:4, 173:23–174:15.) The tail roller stands at about waist height and is large, measuring approximately two feet in diameter and four feet long. (Tr. 173:23–174:6, 175:17–176:1.) The rollers propel the belt at a rapid pace of 1,200 to 2,000 feet per minute. (Tr. 36:17–37:4.) KenAmerican installs guarding around the sides and top of the belt near the motorized tail rollers to protect miners from being caught in the moving parts and injured. (Tr. 175:4–9.) The operator also places guarding around the belt in other areas where miners could be pinched by the moving parts. (*See* Tr. 77:8–18.)

B. April 2014 Mine Inspection and Warning

In April 2014, MSHA Inspector Abel DeLeon traveled to Paradise #9 as part of an inspection of the underground mine. (Tr. 18:20–19:15.) Due to a jurisdictional realignment of MSHA's offices, DeLeon's office in Madisonville, Kentucky, had taken over inspections of Paradise #9 in the previous year from MSHA's Beaver Dam office. (Tr. 18:2–19.) At the mine, DeLeon traveled with Mike Harris, a safety official for KenAmerican. (Tr. 18:20–19:15.) Inside the mine, DeLeon found an area 50 to 70 feet long in which the lifeline was strung along the mine roof in close proximity to other similarly sized cables, including the communications line and the miner tracking line, on the same roof bolt plate. (Tr. 19:12–19, 29:4–7.) Concerned that a worker attempting to escape the mine could mistakenly grab one of the nearby cables instead of the lifeline, DeLeon directed Harris to move the lifeline so it was not commingled with the other cables in the entry. (Tr. 19:20–20:3.) DeLeon feared that disoriented miners could follow the wrong line and get lost during an emergency, leading the miners to suffocate. (Tr. 20:4–21.) DeLeon did not write KenAmerican a citation for the commingled wires, but instead gave the mine a warning. (Tr. 29:8–19.) Although Harris disagreed about the need to reposition the lifeline, he moved the lifeline to a different set of roof bolt plates without other cables. (Tr. 19:20–20:3, 29:14–19, 30:5–21.) When DeLeon left the mine later that day, he discussed the problem with KenAmerican's safety director, Shannon Baker, and stressed that the operator needed to fix any other instances of commingled lines. (Tr. 30:14–31:10.) DeLeon told KenAmerican the lifelines had to be far enough away from other similarly sized cables to avoid confusion, but the inspector did not explicitly tell the operator where it needed to hang the lifelines. (Tr. 30:14–31:10.)

C. June 11 Inspection and Citation No. 8513258

On June 11, 2014, Inspector DeLeon returned to Paradise #9 as part of a spot inspection.[5] (Tr. 32:1–8; Exs. GX–2, R–2.) Inside the mine, DeLeon traveled down the secondary escapeway[6] to Third Southwest Mains, an area of the mine that was developed in 2010. (Tr. 38:24–39:6; *see* Ex. R–7 at 4.) While traveling the escapeway, DeLeon came upon an area where the escapeway passed under the coal conveyor belt. (Tr. 35:15–36:5.) Although KenAmerican had installed some guarding on the belt to protect miners' heads, the guarding was limited. (Tr. 77:8–18.) Where the lifeline ran under the overpass, the sides of the belt's rollers were exposed without guarding. (Tr. 36:1–5.) The lifeline was located six to eight inches from the side of the turning belt rollers. (Tr. 36:6–16, 37:21–24.) The lifeline had slack in the line in this area near the belt. (Tr. 38:1–6.)

Further into the mine, DeLeon discovered an area where the lifeline was suspended from the same roof bolt plate as other similarly sized cables. (Tr. 38:12–23, 58:8–21.) DeLeon believed these conditions existed for two crosscuts, or a distance of 100 to 130 feet. (Tr. 38:12–23, 56:8–13.) The affected area was approximately one mile from the three working sections in Paradise #9. (Tr. 38:24–39:16, 10:9–14; *see* Ex. R–7 at 1.) Miners from all three working sections would pass the area while exiting the mine. (Tr. 38:24–39:16.)

Based on his observations, DeLeon issued Citation No. 8513258, alleging a violation of 30 C.F.R. § 75.380(d)(7)(iv):

> The lifeline in the primary [sic] [escapeway] is not being maintained in a manner for miners to use effectively to escape. The lifeline is running within inches of a belt return roller of the 2nd Southwest belt line underpass on the 2nd Southwest roadway. The lifeline is also entangled within communication and CO2 [sic] monitor cables for two crosscuts (XC68–XC69) on the 3rd [Southwest] roadway. This condition would cause a delay in a miner escaping the mine during an emergency by following a cable instead of the lifeline. A miner could become entangled in the belt roller[,] causing him fatal injuries.

(Exs. GX–1, R–1.) Because the conditions would delay miners in an emergency, DeLeon marked the citation as reasonably likely to result in fatal injuries to 30 persons and S&S.

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[5] In addition to regular examinations, MSHA conducts spot examinations of mines that liberate large amounts of methane gas. (Tr. 32:9–20.) KenAmerican's Paradise #9 liberated more than 500,000 cubic feet of methane per day and was thus subject to MSHA's ten-day spot inspection. (Tr. 32:9–33:18.)

[6] Inspector DeLeon initially believed the conditions he found were near an underpass in the primary escapeway. (Tr. 56:25–57:4.) DeLeon did not specify the location of the underpass in his notes or in the citation, and at hearing he could not identify the location of the cited conditions on a mine map. (Tr. 59:2–60:12.) On cross examination, DeLeon acknowledged that he likely was in the secondary escapeway. (Tr. 58:21–59:1.)

DeLeon characterized the operator's negligence as "moderate." To abate the violation, KenAmerican Foreman James Pendegraff moved the lifeline to a row of roof bolts in the middle of the entry and repositioned the lifeline away from the other cables. (Tr. 73:23–74:20, 78:5–79:10.)

D. June 23 Inspection and Citation Nos. 9041084 and 9041085

On June 23, Inspector DeLeon returned to Paradise #9 for another spot inspection of the mine. (Tr. 44:9–23.) At the mine, DeLeon traveled to the No. 1 Unit on the First Northwest Submains, an active mining section. (Tr. 44:24–45:5.) There, DeLeon discovered that the lifeline again had been strung alongside other cables of similar size, including the communications line. (Tr. 46:1–4; Ex. R–17.) KenAmerican had hung the lifeline together with the other cables for approximately 800 to 950 feet from crosscut number two to crosscut number 16, the crosscut closest to the active mining face. (Tr. 45:2–5, 46:1–8, 95:12–23.) KenAmerican advanced the active section by two to six crosscuts per week, so DeLeon surmised the operator had installed the commingled lines after the inspector's citation on June 11. (Tr. 45:14–25, 47:25–48:10.)

Based on his observations, DeLeon issued Citation No. 9041084, alleging a violation of 30 C.F.R. § 75.380(d)(7)(iv):

> The lifeline coming off of Unit #1 in the primary escapeway from [crosscut] #2 to #16 was intersecting with the communication line and tracking line. Communication line and tracking line are all approximately the same size in diameter. A major emergency event would result in miners being confused with which line was for escape. This hazard would result in fatal injuries.
>
> Location: 1st Northwest Submains, primary escapeway.

(Exs. GX–3, R–3.) DeLeon marked the citation as S&S and reasonably likely to result in fatal injuries to 15 miners, the number of miners on the section. (*Id.*; Tr. 48:25–49:9.) DeLeon characterized KenAmerican's negligence as "high" because the operator had hung the cables after the inspector's recent citation. (Tr. 47:25–48:10.) To abate the citation, KenAmerican's James Pendegraff and several other miners moved the lifeline from the right-most roof bolt plate to a roof bolt plate in the middle of the entry. (Tr. 97:4–98:6; Ex. R–8.)

After KenAmerican abated the citation, Inspector DeLeon continued his examination of the mine. In the Third Southwest header, DeLeon inspected the exchange point for two coal conveyor belts placed one on top of the other. (Tr. 172:13–21, 174:24–175:3, 185:22–186:9.) The lower belt was approximately waist-high. (Tr. 174:4–6.) Around the perimeter of the lower belt, KenAmerican had installed metal panels as guarding. (Tr. 173:17–22.) KenAmerican also placed hog wire fencing on top of the metal panels, forming an enclosed box around the end of the belt where the tail roller created a pinch point. (Tr. 172:13–21, 174:24–175:9, 186:10–13.) Although the hog wire was strong material, it had openings of approximately 2.5 inches by 3.5 inches in size. (Tr. 172:17–21.) The vertical distance from the hog wire to the tail roller was

only a few inches. (Tr. 179:13–20.) DeLeon estimated that the horizontal distance from the back end of the metal panel guarding to the tail roller was shorter than arm's length or approximately 12 to 18 inches, though he did not measure the distance with a tape measure. (Tr. 179:21–180:8, 188:2–10.) DeLeon thus believed a miner working in the area could put an arm through one of the hog wire openings and contact the moving tail roller. (Tr. 177:12–178:2.)

Based on his observations, DeLeon issued Citation No. 9041085, alleging a violation of 30 C.F.R. § 75.1722(b):

> The guarding material on the belt head tail piece at the 3rd Southwest header was not adequate. The openings were 2.5" by 3.5" by 2' long. A miner would be able to come in contact with the moving tail roller. This would result in permanently disabling injuries from loss of fingers and/or limbs.

(Exs. GX–4, R–4.) DeLeon marked the citation as S&S and reasonably likely to result in permanently disabling injuries to one miner. (*Id.*; Tr. 184:10–22, 189:7–17.) DeLeon characterized KenAmerican's negligence as "moderate" because KenAmerican had installed some guarding, albeit inadequately. (Tr. 185:3–9.) KenAmerican abated the citation by staggering a second layer of hog wire on top of the tail roller, cutting in half the size of the openings. (Tr. 178:3–10.)

KenAmerican's Baker later traveled to the belt transfer point and measured the horizontal distance from the side of the metal panel guarding to the side of the tail roller, which he determined to be three feet and nine inches. (Tr. 198:16–199:19.) Baker noted that the horizontal distance from the back of the metal panel guarding to the tail roller was greater than three feet and nine inches. (Tr. 199:7–11.)

IV. PRINCIPLES OF LAW

A. Significant and Substantial

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

The Commission has recently explained that in analyzing the second *Mathies* element, Commission Judges must determine "whether, based upon the particular facts surrounding the

violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In evaluating the third *Mathies* element, the Commission assumes the hazard identified in the second *Mathies* element has been realized and determines whether that hazard is reasonably likely to cause injury. *Id.* at 2045 (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161–62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

The Commission has further emphasized that evacuation standards such as section 75.380(d)(7)(iv) are "intended to apply meaningfully only when an emergency actually occurs." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011), *aff'd sub nom. Cumberland Coal Res., LP v. Fed. Mine Safety & Health Admin.*, 717 F.3d 1020 (D.C. Cir. 2013). Therefore, "when applying the *Mathies* analysis with respect to escapeway violations, a Judge is to consider the S&S nature of those violations within the context of an emergency." *Big Ridge, Inc.*, 36 FMSHRC 1115, 1117 (May 2014) (citing *Cumberland*, 717 F.3d at 1027–28).

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

B. Negligence

The Commission evaluates the degree of negligence using "a traditional negligence analysis." *The American Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017) (quoting *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted)). Because the Commission is not bound by the Secretary's regulations addressing the proposal of civil penalties set forth in 30 C.F.R. part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Id.* (citing *Mach Mining, LLC*, 809 F.3d at 1263–64). Under a traditional negligence analysis, an operator is negligent if it fails to meet the requisite standard of care. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). In determining whether an operator met its duty of care, the Commission considers what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *Id.* at 1702 (citation omitted). In making a negligence determination, a Judge is not limited to an evaluation of allegedly "mitigating" circumstances, but may consider the totality of the circumstances holistically. *Id.*

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. The Lifeline Violations – 30 C.F.R. § 75.380(d)(7)(iv)

1. Interpretation of 30 C.F.R. § 75.380(d)(7)(iv)

Section 75.380(d)(7)(iv) requires lifelines in underground coal mines to be "[l]ocated in such a manner for miners to use effectively to escape." 30 C.F.R. § 75.380(d)(7)(iv). Accordingly, a violation of the regulation occurs where miners cannot "effectively" use the lifeline to escape the mine in an emergency. The Secretary asserts that the standard's requirements differ from mine to mine depending on conditions at the mine. (Sec'y Reply at 1–2.) The Secretary further asserts that to be effective the lifeline at Paradise #9 should have been hung separately from other cables of similar size. (*Id.*; *see* Tr. 107:19–108:5.)

Respondent challenges the Secretary's interpretation of the regulation and asserts that the miners in Paradise #9 could still effectively use the lifeline to escape while strung to the same roof bolt plates as other wires. (Resp't Br. at 3–10.) KenAmerican asserts that the Secretary's interpretation of the standard is unreasonable, and therefore should not receive any deference. (*Id.* at 7–10, 160:16–25; Ex. R–9.)

Regulatory interpretation is a two-step process. First, unambiguous regulatory provisions "must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such meaning would lead to absurd results." *Jim Walter Res., Inc.*, 28 FMSHRC 579, 587 (Aug. 2006) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987), and *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). The meaning of regulations is "ascertain[ed] . . . not in isolation, but rather in the context in which those regulations occur." *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681 (Dec. 2010) (citing *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 & n.7 (Feb. 2004)). Second, if the meaning of the regulation is ambiguous, the Secretary's reasonable interpretation of the regulation is entitled to deference. *Mach Mining, LLC*, 34 FMSHRC 1784, 1806 (Aug. 2012). Courts defer to an agency's interpretation of its own regulation, which may be advanced in a legal brief, unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). However, the courts have withheld such deference where the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (citations omitted).

First, I must determine whether the regulation is unambiguous. I begin with the text of the regulation. Lifelines must be "[l]ocated in such a manner for miners to use effectively to escape." 30 C.F.R. § 75.380(d)(7)(iv). Rather than providing for a singular method of compliance, the regulation establishes a performance-oriented standard that mines must meet. *See MSHA, Training Questions for Emergency Mine Evacuation, Emergency Temporary Standard Compliance Guide* 4, http://arlweb.msha.gov/REGS/COMPLIAN/Guides/MineEvacETS/MineEvacETSComplianceGuide.pdf. To understand what this performance standard requires, I first must find the meaning of "effectively." The Secretary's regulations do not define "effectively" for the purposes of section 75.380(d)(7)(iv). The Oxford

Dictionary defines "effectively" as "in such a manner as to achieve a desired result." *Effectively*, *The New Oxford American Dictionary* (2d ed. 2005). The desired result of the lifeline standard is for miners to escape the mine quickly. *See* 71 Fed. Reg. 71,430, 71,431 (Dec. 8, 2006). Accordingly, section 75.380(d)(7)(iv) requires mine operators to provide a lifeline that is located in such a manner for miners to use to escape the mine quickly.

Next, I look to the phrase "positioned in such a manner" for context. MSHA has provided little firm guidance regarding how lifelines should be hung to satisfy this requirement. (*See* Tr. 80:7–23, 82:2–15, 109:14–22.) In comments accompanying the rulemaking, MSHA stated simply that "[p]roper positioning of the lifeline regarding height, accessibility, and location *as determined by mining conditions* improves the ability of miners to effectively use lifelines to escape during emergency situations." 71 Fed. Reg. at 71,437 (emphasis added). Thus, the agency drafted the regulation with an understanding that its requirements would shift as mining conditions dictated.

Given the intentional flexibility of the standard, I conclude that the regulation's meaning is ambiguous insofar as it depends on particular mining conditions.

Having found the regulation to be ambiguous, I next must determine whether the Secretary's interpretation is reasonable and entitled to deference. Here, the Secretary interprets the regulation to require that lifelines at Paradise #9 be hung from separate roof bolt plates than other cables of similar size. (Sec'y Br. at 4–13; Sec'y Reply Br. at 1–2.) Inspector DeLeon testified that lifelines must be "separate and distinct" from other cables to be effectively used to escape the mine. (Tr. 107:19–108:5.) DeLeon explained that in the smoke and confusion of an emergency, a miner could follow a cable rather than the lifeline and get lost in the mine. (Tr. 20:4–24.) Specifically, a miner forced to release the lifeline could grasp another cable in the dark mistakenly believing the commingled cable to be a lifeline. (Tr. 106:10–24.) Hanging the lifeline alongside similarly sized cables could cause confusion and delay the miners' escape. (Tr. 46:21–47:13.) DeLeon further averred that although MSHA has not issued written guidance for mines about the placement of lifelines, the agency trains its inspectors that lifelines should not be commingled with high voltage power lines or other cables of similar size. (Tr. 81:9–82:15.)

Respondent asserts that the Secretary's interpretation of the standard creates a per se rule against hanging a lifeline on the same roof bolt plate as other similarly-sized cables. (Resp't Br. at 78.) However, the Secretary has simply stated that under the standard, the lifeline should not be commingled with other cables and should be separate and distinct. (Sec'y Br. at 4–13; Sec'y Reply Br. at 1–2.) Although terminating the two disputed violations ultimately required KenAmerican to move the lifeline to a separate roof bolt plate, the record suggests that this abatement measure was specific to Paradise #9 based on how KenAmerican developed the mine and installed its roof bolts, power center, and cable system. (Tr. 74:2–6, 98:1–6, 31:11–24, 51:8–52:8, 83:24–85:1.) Whether a lifeline would need to be attached to a separate roof bolt plate in another mine would depend on the type and size of the roof bolt plate, which in turn depends on the mine's roof and structure. In other words, a lifeline's location for miners to use effectively to escape depends on the mine's conditions, as MSHA has stated. Accordingly, I decline to adopt Respondent's position that the Secretary's interpretation of the standard creates a per se rule requiring mine operators to attach lifelines to separate roof bolt plates. Rather, I determine that

the Secretary's interpretation requires mine operators to locate lifelines separately and distinctly from other similar-sized cables as determined by mine conditions for miners to use the lifelines effectively to escape.

Respondent further asserts that the Secretary's interpretation is unreasonable. (Resp't Br. at 8–10.) Respondent argues that the Secretary's interpretation is arbitrary because a disoriented miner could still grab the wrong cable even if the lifeline is hung from a separate roof bolt plate. (*Id.* at 8.) Respondent contends that the only way to completely prevent such speculative confusion would be to place the lifeline in a separate entry from the other cables. (*Id.*)

Despite Respondent's arguments, the standard requires lifelines to be located effectively for miners to escape – the operative term being "effectively." Here, Inspector DeLeon determined that having the lifeline commingled with other cables in Paradise #9 could more than likely lead to confusion, thus creating delay and reducing the ability of miners to use the lifeline effectively to escape. DeLeon has worked for MSHA since 1998 and has been a field office supervisor since 2008, was a coal miner in Kentucky and Virginia for 11 years, and holds an associate's degree in mining technology. (Tr. 15:14–16:21, 17:3–21.) I credit DeLeon's opinion that commingling the lifeline could tend to cause a delay in escaping. DeLeon further testified that MSHA teaches inspectors to separate lifelines from similarly sized cables to limit confusion. (Tr. 81:9–82:15.) Although hanging lifelines in separate entries may further eliminate potential confusion, the existence of a potentially safer alternative does not negate DeLeon's determination here that placing the lifeline where it commingled with other cables could delay and reduce the ability of miners to use the lifeline to effectively escape. Further, there is no evidence in the record suggesting that the Secretary arbitrarily declined to adopt such a requirement that a lifeline be given a separate entry altogether given that such a requirement would depend on each mine's specific conditions.

Respondent also asserts that the Secretary's bright-line rule runs contrary to MSHA's guidance, which emphasizes that the standard's requirements will change from mine to mine. (*Id.* at 8–9 (citing 71 Fed. Reg. at 12,261, 71,437).) Although MSHA has noted that the standard's requirements may vary, guidance suggesting flexibility does not forestall MSHA from barring in all instances those practices the agency deems unacceptable, such as commingling lifelines with other cables.

Respondent finally avers that the Secretary's interpretation deviates from previous interpretations, as prior inspectors declined to cite Paradise #9 for the same lifeline conditions. (Resp't Br. at 9.) However, the Commission has held that "[a]n inconsistent enforcement pattern does not estop MSHA from proceeding under the interpretation of the standard that it concludes is correct." *U.S. Steel Mining Co.*, 15 FMSHRC 1541, 1547 (Aug. 1993) (citing *U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1142 (Sep. 1988)). Thus, lax prior enforcement does not demonstrate arbitrariness in MSHA's current interpretation. I also note that Inspector DeLeon, a field office supervisor, was only recently assigned to Paradise #9 after the mine's transfer to MSHA's Madisonville office's jurisdiction. (Tr. 18:2–9.) Furthermore, two months prior to issuing this citation, Inspector DeLeon verbally warned KenAmerican that hanging the lifeline from the same roof bolt plates as other cables constituted a violation, giving advanced notice to the operator. (Tr. 29:8–19.)

After careful consideration, I determine that Respondent's legal arguments do not undermine Inspector DeLeon's testimony, which I credit based on his experience. Given the evidence before me, I determine that the Secretary's interpretation of section 75.380(d)(7)(iv) demonstrates a fair and considered judgment on the requirements. Accordingly, I defer to MSHA's interpretation that the standard requires lifelines at the Paradise #9 mine to be hung from separate roof bolt plates apart from other cables of similar size.

2. Citation No. 8513258

a. Violation – Citation No. 8513258

The Secretary can prove a violation of section 75.380(d)(7)(iv) by demonstrating that the mine operator has not installed a lifeline in a manner that miners can use effectively to escape the mine quickly. For Citation No. 8513258, the Secretary asserts that Respondent violated section 75.380(d)(7)(iv) in two ways. (Sec'y Br. at 6–8.) First, the Secretary states that KenAmerican violated the standard by routing the lifeline too close to an unguarded section of the coal conveyor belt. (*Id.*) Second, the Secretary contends that Respondent committed a violation by attaching the lifeline to the same roof bolt plates as other cables. (*Id.*)

Respondent asserts that the Secretary has not demonstrated a violation by a preponderance of the evidence.[7] (Resp't Br. at 10–23.) Respondent emphasizes that the evidence supports a finding that the lifeline's placement would not affect the miners' ability to escape. (*Id.*)

KenAmerican's witnesses, Pendegraff and Baker, testified that the operator had trained miners to break the zip ties and pull the lifeline down from the mine roof when visibility is limited. (Tr. 120:23–121:20, 122:17–23, 127:6–21, 158:1–11.) Pendegraff further testified that miners could identify the lifeline by the directional cones and the nylon rope's braided texture, even while wearing gloves. (Tr. 135:5–16, 149:14–23, 161:7–16; *see* Ex. R–10.) He testified that if miners were to follow the wrong cable, they may be able to follow that line out of the mine. (Tr. 55:17–25, 116:22–117:6.) Regarding the lifeline's proximity to the coal conveyor belt, KenAmerican trained its staff to shut down the belt lines during an emergency to reduce the threat to escaping miners. (Tr. 76:16–77:7.) Additionally, because some guarding on the conveyor protected passing miners, KenAmerican argued that miners again could break the zip ties and pull the slack lifeline away from the belt. (Tr. 77:8–18, 128:1–10.)

On the other hand, although some guarding was in place to protect miners, the guarding was limited and would primarily protect the miners' heads. (Tr. 77:8–18.) Inspector DeLeon was concerned that miners could get their hands or arms caught in the belt's turning rollers, thus potentially harming miners and delaying their escape during an emergency. (Tr. 35:18–36:5, 36:14–37:24.) DeLeon believed such an accident was more likely because the lifeline was not

[7] Respondent points to the Commission's holding in *Cumberland Coal*, 33 FMSHRC 2357, and the Administrative Law Judge's holding in *Twentymile Coal Co.*, 32 FMSHRC 628 (June 2010) (ALJ), as support for KenAmerican's position. (Resp't Br. at 11–12.) Although those cases dealt with the same standard, the violations were factually distinct. Moreover, the violation was affirmed in both instances. Respondent's position lacks a logical foundation.

taut. (Tr. 38:1–11.) MSHA's Jon Newbury similarly believed miners using the lifeline were at risk of contacting the belt rollers. (Tr. 168:19–169:1.) Inspector DeLeon also testified that miners in an emergency may act differently than trained. (Tr. 113:2–21.) Although regular procedure would see the belt shut off in an emergency, DeLeon questioned whether miners would follow such procedures during a major event forcing miners to flee Paradise #9 on foot. (Tr. 76:12–77:7, 105:11–16.)

Indeed, many underground mine tragedies have occurred because procedures were not followed, proving the old adage true that even the best laid plans often go awry. As the Commission has indicated, the training of miners on escape procedures does not mitigate the seriousness of a violation. *See Cumberland Coal*, 33 FMSHRC at 2369 (citations omitted).

As already discussed, section 75.380(d)(7)(iv) required KenAmerican to route its lifelines in the Paradise #9 mine to roof bolt plates separate from other cables in the mine, so miners could use the lifelines effectively to escape the mine. *See* discussion, *supra* Part V.A.1. It is uncontroverted that KenAmerican had located its lifeline alongside other similarly sized cables for 100 to 130 feet in the secondary escapeway. (Tr. 38:12–23.) Alone, this is sufficient to show a violation. Furthermore, I credit Inspector DeLeon's testimony regarding the lifeline's proximity to the conveyor belt and determine that miners using the lifeline were at risk of contacting the belt. The potential smoke and darkness caused by a mine emergency could easily lead a frantic miner attempting to locate the lifeline to accidentally come into contact with the belt. Accordingly, miners exiting near the belt overpass would not be able to use the lifeline effectively to escape the mine quickly and safely. Given the evidence before me, I determine that KenAmerican violated 30 C.F.R. § 75.380(d)(7)(iv) by locating the lifeline alongside other similarly sized cables and close to the belt line in the Paradise #9 mine.[8]

b. S&S and Gravity Determination

The Secretary asserts that the lifeline violation was S&S and reasonably likely to result in fatal injuries to 30 miners. (Sec'y Br. at 9–14.) In contrast, Respondent asserts that the violation was not S&S because the conditions were unlikely to result in injuries and would result only in lost workdays rather than fatalities. (Resp't Br. at 25–30.) Respondent further asserts the conditions would only have affected two miners. (*Id.*)

[8] Respondent also asserts that the citation should be vacated because KenAmerican lacked fair notice that commingling the lifeline with other cables would result in a violation. (Resp't Br. at 23–24.) KenAmerican received actual notice of the Secretary's interpretation when Inspector DeLeon warned the mine in April. (Tr. 18:20–19:24, 30:14–31:10.) "Due process is satisfied when an agency gives actual notice of its interpretation prior to enforcement." *Tilden Mining Co., LC*, 36 FMSHRC 1965, 1970–71 (Aug. 2014) (citations omitted). Regardless, in *Energy West Mining Company*, the Commission held that a mine operator lacking actual notice still had fair notice of a violation because a reasonably prudent miner familiar with the mining industry would have understood the requirements of the standard. 17 FMSHRC 1313, 1317–18 (Aug. 1995). Here, only a relatively small length of lifeline was commingled with other cables. The fact that KenAmerican had separated the lifelines from other cables for the other areas Inspector DeLeon inspected strongly suggests a reasonably prudent miner would have understood that the lifeline should not be commingled.

My determination that KenAmerican violated section 75.380(d)(7)(iv) establishes the first element of the *Mathies* test for an S&S violation. The second element of the *Mathies* test asks whether the violation created a reasonable likelihood the hazard against which the standard is directed would have occurred. *Newtown Energy, Inc.*, 38 FMSHRC at 2038. Here, section 75.380(d)(7)(iv) was promulgated to reduce the hazard of miners becoming disoriented and unable to evacuate a mine quickly and safely during an emergency. *See* 71 Fed. Reg. 71,430 (Dec. 8, 2006) (addressing standards for emergency mine evacuations). Inspector DeLeon testified that the lifeline's positioning could confuse a miner and cause the miner to follow an incorrect route while trying to escape. (Tr. 48:11–24.) DeLeon stated that a miner caught in the smoke and darkness of a mine emergency would be unable to see his hand in front of his face, let alone navigate a mine entryway. (Tr. 35:8–14.) A miner walking blindly through the mine could be forced to let go of the lifeline for a number of reasons. (Tr. 72:12–73:2, 106:10–107:18.) On direct examination, KenAmerican's Baker admitted that miners in an emergency could be confused by the cables hung in close proximity to each other and thereby slowed down while attempting escape. (Tr. 163:15–25.) In addition, DeLeon testified that a miner making contact with the coal conveyor belt could become entangled and injured. (Tr. 35:23–36:5, 36:23–37:4.) Given this evidence, I determine that the violation contributed to the hazard of a miner being unable to quickly or safely escape in the event of an emergency.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. Here, Inspector DeLeon testified that a lost and disoriented miner could run out of oxygen while attempting to escape the mine. (Tr. 25:18–26:5.) In addition, miners delayed or not following a lifeline during an emergency could be unable to reach a refuge chamber to get help. (Tr. 26:18–23.) DeLeon averred that the consequences could be particularly disastrous in a mine as large as Paradise #9. (Tr. 26:18–23.) Miners escaping the mine on foot would need several caches of SCSRs to get out of the mine. (Tr. 27:3–25.) DeLeon asserted that a miner lost in an emergency could die if he ran out of oxygen. (Tr. 48:11–24.) Indeed, the regulatory history of the emergency mine evacuation standards notes that toxic gas and reduced oxygen levels are potentially fatal hazards and are often undetectable. 71 Fed. Reg. at 71,445. Given the evidence before me, I find that during a mine emergency a disoriented miner unable to quickly or safely escape the mine could reasonably suffer fatal injuries. Accordingly, the Secretary has satisfied the third and fourth elements necessary to show a violation is S&S.

As the Secretary satisfied all four *Mathies* elements, I conclude that Citation No. 8513258 was properly designated as S&S and reasonably likely to result in a fatal injury.

Respondent next challenges the Secretary's claim that the conditions would affect 30 miners. (Resp't Br. at 25–30.) In support, KenAmerican points to Inspector DeLeon's mistaken belief that the cited conditions were in the mine's primary escapeway. (*Id.* at 26–28.) Respondent also points to a separate citation Paradise #9 received for a violation of section 75.380(d)(7)(iv) citing just two persons. (*Id.* at 26; Ex. R–16.)

KenAmerican employed 15 miners on each of the three working sections at Paradise #9. (Tr. 38:24–39:23.) When miner shifts overlapped, the number of miners in the mine doubled. (Tr. 40:6–20.) Miners from all three active sections would have to pass the cited areas to escape

the mine. (Tr. 39:7–16.) Inspector DeLeon explained that, in an emergency, all the miners could follow a disoriented colleague and be lost in the mine. (Tr. 20:24–21:10.) Moreover, Pendegraff testified that miners on a unit were trained to first gather at a central location during an emergency to discuss their route of escape with their foreman. (Tr. 121:25–122:10.) All the miners on the unit would then travel together along the lifeline. (*Id.*)

Although DeLeon initially suggested that miners would first attempt to flee the mine through the primary escapeway, he later explained that miners would use the easiest escape route. (Tr. 41:3–24, 102:13–103:2.) KenAmerican used the secondary escapeway in Paradise #9 as the mine's supply road. (Tr. 103:9–17.) Furthermore, evacuation standards are "intended to apply meaningfully only when emergency actually occurs." *Cumberland Coal Res.*, 33 FMSHRC at 2369. Accordingly, it is fair to assume the occurrence of an emergency forcing miners to use the lifeline in the secondary escapeway at this part of the mine.

Although another inspector in a separate incident cited a lifeline violation as affecting only two persons, the facts surrounding that incident are not before me. (Ex. R–16.) Inspector DeLeon did not have sufficient evidence to discuss that citation. (Tr. 83:18–22.) KenAmerican did not present further evidence regarding that citation. Accordingly, I afford it minimal weight.

I credit Pendegraff's testimony that all miners on a unit would gather in an emergency given its consistency with DeLeon's testimony and Pendegraff's role as a shift foreman. (Tr. 118:18–24.) I credit DeLeon's testimony and find that a confused and disoriented miner would delay the escape of all the miners on a unit. I further recognize that those miners traveling with their unit would slow to help a miner caught in and injured by the coal conveyor belt. Indeed, the sad annals of mining disasters are filled with stories of miners ignoring their own well-being in an attempt to help their fellow miners. *See, e.g.*, *Jim Walter Resources*, 28 FMSHRC 579 (Aug. 2006) (describing miners rushing to help the victims of a first explosion killed in a second blast). Given the evidence before me, I agree with DeLeon's determination and find that 30 miners were affected by the violation.[9]

Accordingly, I conclude that the Secretary has demonstrated that the violation was S&S and reasonably likely to result in fatal injuries to 30 miners.

c. Negligence Determination

The Secretary asserts that the violation was the result of KenAmerican's moderate negligence because MSHA recently had warned the operator that it needed to fix any areas where the lifeline commingled with other cables. (Sec'y Br. at 12–13.) Respondent contends that the negligence level should be low because it did not know the cited conditions were a violation. (Resp't Br. at 30–32.)

In evaluating negligence, I must consider the actions that a reasonably prudent operator would have taken under the circumstances presented that are relevant to the operator's obligation to comply with a standard. *See Brody Mining, LLC*, 37 FMSHRC at 1703. Inspector DeLeon

[9] Given the testimony, Inspector DeLeon could have determined the conditions affected even more miners (*See* Tr. 38:24–39:6, 40:6–20), although a higher number of miners affected would not have impacted the Secretary's proposed penalty calculation. 30 C.F.R. § 100.3(e).

warned KenAmerican two months prior to this citation that the operator needed to fix any areas in Paradise #9 where the lifeline was still hung from the same roof bolt plates as other cables. (Tr. 29:8–19.) Additionally, the operator should have found any remaining violations during its pre-shift examinations of the mine's travelway. (Tr. 42:10–18.) DeLeon and Newbury explained that the cited conditions were obvious. (Tr. 168:15–169:12.) Given this evidence, I determine that KenAmerican was negligent because it should have known of the violative conditions and taken action to fix any defective portions of the mine's lifeline after DeLeon's initial warning.

Nevertheless, Inspector DeLeon believed KenAmerican had simply overlooked the cited conditions because they were relatively far from the active mining sections. (Tr. 47:14–24.) Moreover, the violation was not extensive, affecting only 100 to 130 feet of the lifeline. (Tr. 38:12–23, 56:8–13, 73:23–74:6.)

Given the small extent of the conditions and their remoteness from the active mining section, I conclude that although KenAmerican was negligent, the level of negligence was moderate. Along the full spectrum of negligence, I determine that KenAmerican's actions fall at the lower end of moderate.

3. Citation No. 9041084

a. Violation – Citation No. 9041084

For Citation No. 9041084, the Secretary claims that KenAmerican violated 30 C.F.R. § 380(d)(7)(iv) by routing the lifeline along the same roof bolt plates as other similar sized cables for approximately 15 crosscuts in First Northwest Submains, an active mining section. (Sec'y Br. at 8–9; Ex. GX–3.) Respondent again asks that the citation be vacated (1) because the Secretary's interpretation of the regulation was unreasonable, (2) because the operator lacked sufficient notice that the conditions constituted a violation of the regulation, and (3) because the Secretary failed to prove a violation by a preponderance of the evidence. (Resp't Br. at 34–40.) In addition to repeating its previous arguments, Respondent suggests that hanging the lifeline from the same roof bolt plates as other cables was safer than placing the lifeline in the middle of the entry, where it crossed above the section's power center and other equipment. (Resp't Br. at 39.)

I have already determined that the Secretary properly interpreted section 75.380(d)(7)(iv) to require KenAmerican to route its lifeline down a different lane of roof bolt plates than other similar sized cables at the Paradise #9 mine. *See* discussion, *supra* Part V.A.1. Here, it is undisputed that KenAmerican hung the lifeline from the same roof bolt plates as the carbon monoxide line and the communications line for a distance of 800 to 950 feet coming off the working section to the sixteenth crosscut. (Tr. 46:1–8, 130:1–10; Ex. R–17.) Inspector DeLeon determined that the lifeline was too close to the other cables, which could prevent or delay a miner from escaping the mine in the event of an emergency. (Tr. 46:21–47:13; Ex. GX–5 at 4 [11].) Inspector DeLeon did not specify how KenAmerican needed to place its lifeline to abate the citation; rather, the operator chose to move the lifeline to the center of the entry. (Tr. 88:11–16, 97:4–98:6.) KenAmerican instead could have left the lifeline on the side of the entry and

moved the other cables to the center. (Tr. 108:13–23.) Moreover, the cited conditions stretched for fifteen crosscuts, far beyond the location of the power center and other equipment closest to the mine face. (Tr. 146:4–24.) KenAmerican had ample opportunity to relocate the lifelines to separate roof bolt plates as the active section advanced. (*Id.*)

Given the evidence before me, I conclude that KenAmerican committed a violation of 75.380(d)(7)(iv) by locating the lifeline too close to the other cables in First Northwest Submains such that miners could be prevented or delayed from escaping in the event of a mine emergency.

b. Gravity and S&S Determination

My determination that KenAmerican violated section 75.380(d)(7)(iv) establishes the first element of the *Mathies* test for an S&S violation. In regard to the second *Mathies* element, section 75.380(d) aims to reduce the hazard of miners becoming disoriented and delayed in escaping in an emergency. *See* 17 Fed. Reg. 71,430. Here, the lifeline was commingled with other cables for a greater length than the previous lifeline violation. Both Inspector DeLeon and Pendegraff testified that such placement could confuse and potentially slow down a miner attempting to escape a mine during an emergency. (Tr. 48:11–24, 163:15–25.) Thus, consistent with the prior determination on the previous lifeline violation, I determine that this second lifeline violation contributed to the hazard against which section 75.380(d)(7)(iv) is directed.

In terms of the third and fourth *Mathies* elements, I have already found that a disoriented miner could run out of oxygen while attempting to escape the mine because miners rely on the lifeline to access caches of SCSRs. *See* discussion, *supra* Part V.A.2.ii. Here, the danger to miners is even more pronounced because of the greater length of lifeline affected and this particular violation's proximity to the active mining face in a gassy mine. As explained previously, the hazard of having a disoriented miner delayed in escaping a mine in an emergency could reasonably result in a fatality. (*Id.*) I thus conclude that the Secretary, having satisfied all four *Mathies* elements, properly designated Citation No. 9041084 as S&S.

Relying upon the same argument as before, the Secretary alleges that the violation was reasonably likely to affect 15 miners. (Sec'y Br. at 14.) Respondent, again, challenges this designation. (Resp't Br. 28–30, 41.) I have already found that the prior violation affected all miners inby the cited condition. *See* discussion, *supra* Part V.A.2.ii. In this violation, the cited lifeline portion was near one active working unit and was not in proximity to the other two working units. (Tr. 49:3–9; Ex. GX–5 at 4 [10–11].) DeLeon concluded, therefore, that the violation only affected one working unit, consisting of 15 miners. (*Id.*) Because miners were trained to escape together with their unit and the cited lifeline portion came directly off the working section, all miners working in the section would likely have to locate and pick up the lifeline along this particular portion. (*See id.*; Tr. 121:25–122:10.) Thus, given the evidence before me, I agree with DeLeon's determination and conclude that the violation affected 15 miners.

c. Negligence Determination

The Secretary asserts that KenAmerican exhibited high negligence by failing to properly position its lifeline in First Northwest Submains because the operator developed the section and hung the lines after Inspector DeLeon's one prior warning and one prior citation. (Sec'y Br. at 12–13.) Respondent defends its actions by stating that it did not know that it was required to locate the lifeline away from other cords on the active mining section. (Resp't Br. at 41–42.) Respondent asserts that it had been its normal practice to place the beginning of its lifeline on the right of a unit's power center, which meant attaching the lifeline to the same roof bolt plate as the communications and tracking cables. (Resp't Br. at 41.) Respondent believed the lifeline was compliant with the standard in part because other inspectors had observed the same conditions and had not cited KenAmerican. (*Id.* at 41.) Respondent also asserts that Citation No. 8513258, the previous lifeline citation, did not serve as a warning because it did not involve a portion of the lifeline that was coming off an active unit. (*Id.* at 41–42.)

The Commission has recognized that high negligence "suggests an aggravated lack of care that is more than ordinary negligence." *Brody Mining, LLC*, 37 FMSHRC at 1703 (citation omitted). Here, Inspector DeLeon twice warned KenAmerican orally and by citation that it needed to ensure lifelines were separate from other cables in the mine. In April 2014, DeLeon conveyed this warning directly to Shannon Baker, KenAmerican's safety director. (Tr. 30:22–31:10.) Then on June 11, 2014, DeLeon cited the operator for the same problem in another area of the mine. (Ex. GX–1.) In this instance, Inspector DeLeon believed that KenAmerican had installed the length of the commingled lifeline and cables after he had issued the previous lifeline violation, Citation No. 8513258, two weeks prior. (Tr. 45:6–13.) DeLeon testified that based on typical production, assuming no breakdowns, the operator would advance into the mine two to six crosscuts each week. (Tr. 45:17–21.) He, therefore, concluded that the operator moved at least eight or nine crosscuts from when he issued Citation No. 8513258 to when he issued Citation No. 9041084.[10] (Tr. 45:21–25.)

DeLeon's warning and subsequent citation placed KenAmerican on notice that it needed to be more careful when routing lifelines through the mine. Despite these warnings, Inspector DeLeon alleged that KenAmerican continued for two more weeks to position the lifeline next to two other cables of similar size as the company advanced the mine face in First Northwest Submains. (Tr. 152:11–25.) The operator improperly hung the lifeline for more than 800 feet in an area where miners constantly worked and traveled. (Tr. 46:1–8.)

At hearing, however, KenAmerican explained that the company did not want to place the lifeline directly above the power center, which was located at the active unit. (Tr. 129:6–18.) As

[10] I recognize that based on DeLeon's production range, the operator may have advanced anywhere from four to twelve crosscuts after the first lifeline violation's issuance. Thus, the operator may have installed a portion of the cited lifeline before DeLeon issued the prior lifeline citation. Regardless, KenAmerican had received a warning about the lifeline prior to Citation No. 8513258's issuance, and a preshift examination should have revealed and prompted the operator to fix any defective portion of the lifeline. I also note that the portion of lifeline cited in this instance was much longer than in the previous citation and came directly off the working section, making the violation much more obvious.

the unit advanced, the power center and lifeline moved up with it. (Tr. 152:11–22.) The power center was eight to ten feet wide and prevented KenAmerican from using the two center rows of roof bolt plates. (Tr. 144:7–14, 129:6–18, 130:1–133.10; Ex. R–17.) As a result, KenAmerican hung the lifeline from the right-most row of roof bolt plates alongside other cables. (Tr. 129:6–18, 130:1–133:10; Ex. R–17.) KenAmerican offers a reasonable explanation for placing the lifeline to the right in order to prevent it from intersecting with the power center. This could explain the operator's assertion that other inspectors did not object to the lifeline's placement near the face. However, it does not forgive Respondent's duty to move the lifeline away from other cables as soon as the power center was out of the way. Indeed, the operator failed to re-adjust the lifeline located outby the power center as it advanced. The power center measured only 16 feet long, whereas the lifeline was commingled with the other cables for 800 feet or approximately 15 crosscuts. (Tr. 144:7–14, 46:1–8.)

Based on the facts as a whole, I find that KenAmerican disregarded MSHA's prior warnings about the position of the lifeline in Paradise #9. Respondent ignored MSHA's warnings despite the minimal effort necessary to properly hang the lifeline and the potentially dire consequences for miners unable to escape the section in an emergency. I determine that Respondent was highly negligent in ignoring MSHA's warnings and refusing to separate the lifeline from other cables.

B. The Guarding Violation – 30 C.F.R. § 75.1722(b)

Section 71.1722(b) requires that guarding at "conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley." 30 C.F.R. § 75.1722(b). In context, the guarding must be sufficient to protect persons from injury by "exposed moving machine parts." 30 C.F.R. § 75.1722(a).

In guidance for what the standard requires, MSHA has stated that guarding must "[b]e of such construction that openings in the guard are too small to admit a person's hand," and "[b]e of sufficient size to enclose the moving parts and exclude the possibility of any part of a person's body from contacting the moving parts while such equipment is in motion." V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Subpart R, at 155–56 (2015). In addressing the mirror regulation for above-ground coal mines, the Commission emphasized that the standard "imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, [the Commission] ha[s] emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sep. 1984) (citing *Great Western Elec.*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Indus.*, 3 FMSHRC 2526, 2531 (Nov. 1981)). Accordingly, the test is whether there is a reasonable possibility that miners could come in contact with the moving machinery, which includes a "minimal" possibility of contact. *Id.*

1. Violation – Citation No. 9041085

For Citation No. 9041085, the Secretary asserts that KenAmerican violated 30 C.F.R. § 75.1722(b) because miners could reach through the openings in the hog wire guarding over the coal conveyor belt and make contact with the tail roller. (Sec'y Br. at 14–17.) In contrast, Respondent contends that the cited guarding was sufficient to prevent miners from contacting the tail roller. (Resp't Br. at 44–45.) In support, Respondent points to the testimony of KenAmerican's Shannon Baker, who measured the distance from the side of the metal panel guarding surrounding the belt's perimeter to the nearest moving part of the belt. (*Id.*)

Baker found that the lateral distance from the metal panel guarding around the sides to the nearest moving part of the belt was three feet and nine inches. (Tr. 198:16–199:6.) Baker noted that the distance from the end of the metal panel guarding to the tail roller was greater than three feet and nine inches. (Tr. 198:16–199:6.) DeLeon, however, estimated that the distance from the metal panel guarding to the tail roller was less than an arm's length or approximately 12 to 18 inches. (Tr. 179:13–180:13.) DeLeon admitted that he did not measure the distance with a tape measure. (Tr. 188:8–13.) DeLeon also acknowledged that a miner would not be able to get his fingers through the metal panel guarding surrounding the perimeter of the belt tail. (Tr. 173:17–22.) He noted, however, that the hog wire on top was only a few inches above the tail roller, which Baker neither measured nor disputed. (Tr. 179:13–20, 199:14–200:3, 201:23–2.)

DeLeon explained that he was concerned a miner working in the area could slip and fall over the side metal panel guarding and reach through the hog wire openings on top to the belt tail roller because the belt and side metal panel guarding only rose to waist height. (Tr. 174:4–6, 176:20–177:1, 178:23–179:9, 199:20–200:3.) Because the mine floor around the tail roller was muddy and "soupy," DeLeon believed a miner working there could slip over the side guarding and on top of the hog wire. (Tr. 178:23–179:20.) Not only did DeLeon fear a miner could fall onto the hog wire, he also observed a grease hose sticking out of the guarding that he believed could easily slip through. (Tr. 183:3–184:3.) DeLeon was concerned that a miner would reach into the hog wire to pull out the grease hose, which was used at least once a day. (*Id*.) DeLeon also observed a hawkeye used to test the belt's slip sequence, which miners would also occasionally access near the cited area. (Tr. 183:18–23, 184:4–9.)

Given this evidence, I credit DeLeon and find that a miner could reach through the hog wire and contact the tail roller even if the perimeter guarding were three feet and nine inches from the belt. Given the mine floor conditions and low height of the guarding, I determine that it was reasonably possible that a miner working in the area could fall onto the guarding, reach over, and slip his hand or arm through the hog wire, contacting the moving tail roller only a few inches below. Accordingly, I conclude that the Secretary has shown a violation of section 75.1722(b).

2. Gravity Determination and S&S

KenAmerican's violation of section 75.1722(b) establishes the first element of the *Mathies* test for an S&S violation. For the second element, section 75.1722(b) requires guarding be sufficient in order to "prevent a person from reaching behind the guard and becoming caught between the belt and pulley." 30 C.F.R. § 75.1722(b). Inspector DeLeon testified that the

guarding he observed could allow a miner to contact the pinch point between the tail roller and the mine conveyor belt.[11] I credit DeLeon's testimony and find that the insufficient guarding contributed to the hazard against which the standard is directed.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. Several miners normally worked in the area performing maintenance on the belt and cleaning the exchange point. (Tr. 193:12–20.) DeLeon also observed a grease hose sticking out of the guarding, which was used by a miner at least once a day. (Tr. 183:3–184:3.) Inspector DeLeon averred that a miner exposed to the rotating tail roller would be mangled, causing permanently disabling injuries. (Tr. 184:10–22, 187:7–17.) Given this evidence, I find that a miner contacting the tail roller would be reasonably likely to suffer serious injuries, including loss of limbs. Accordingly, the Secretary has satisfied the third and fourth elements necessary to show a violation is S&S.

The Secretary has satisfied all four elements of the *Mathies* test. I therefore conclude that the violation was S&S.

3. Negligence Determination

The Secretary asserts that the violation resulted from KenAmerican's moderate negligence. (Sec'y Br. at 15–17.) Respondent, in contrast, contends that there are considerable mitigating circumstances and the operator's negligence was low. (Resp't Br. at 46.)

DeLeon testified that the hog wire guarding on the tail roller was nearly new, having been installed within the last two shifts because it appeared shiny and was not covered in rock dust. (Tr. 193:2–11; Ex. R–5 at 16.) Nevertheless, DeLeon believed the operator should have discovered the insufficient guarding in that period because belt examiners should have checked the area for hazards. (Tr. 194:7–10.) Abating the violation was simple, as KenAmerican needed only to overlap a staggered, second layer of hog wire on top of the area. (Tr. 178:3–10.)

Given the evidence as a whole, I find that KenAmerican should have known that the guarding in place was insufficient. I conclude that Respondent displayed moderate negligence in failing to install proper guarding, but again on the lower end of the spectrum for moderate negligence.

C. Penalty

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty, including the operator's history of previous violations; the appropriateness of the penalty relative to the size of the operator's business; the operator's negligence; the penalty's effect on the operator's ability to continue in business; the violation's gravity; and the

[11] Respondent asserts that the miners working in the area were trained to avoid hazards and therefore were not reasonably likely to fall into the moving tail roller. (Resp't Br. at 45–46.) Mine operators, however, cannot rely on miners' training to defeat a finding of S&S. *See Cumberland Coal*, 33 FMSHRC at 2369 (citations omitted).

demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary proposed a penalty of $15,570.00 for Citation No. 8513258, $48,472.00 for Citation No. 9041084, and $1,795.00 for Citation No. 9041085. The parties have stipulated that the proposed penalties would not affect Respondent's ability to remain in business. (Joint Ex. 1.) KenAmerican operates a large business with Paradise #9 producing over two million tons of coal annually. (Ex. R–6.) The parties further stipulated that KenAmerican abated the violations in good faith. (Joint Ex. 1.) In regard to the operator's general history of previous violations, KenAmerican had a total of 727 violations from March 3, 2013, to June 10, 2014. (Ex. GX–6 at 17.)

For Citation No. 8513258, I have affirmed the violation and gravity determination, but found the negligence level to be on the lower end of moderate. Respondent does not have an extensive history of violations of section 75.380 in the two years prior to this violation. (Ex. GX–6, R–15.) Considering all the facts and circumstances set forth above, I hereby assess a civil penalty of $11,000.00.

For Citation No. 9041084, I have affirmed the violation and the gravity and negligence determinations. As noted above, Respondent does not have an extensive history of violations of this standard. (Ex. GX–6, R–15.) In addition to the operator's limited history of violations of this standard, I also consider Respondent's reasonable explanation for placing the lifeline to the side to prevent it from intersecting with the power center, which places the level of negligence on the lower end of high. Reviewing the evidence as a whole, I determine that a penalty of $38,750.00 is appropriate for this violation.

For Citation No. 9041085, I have affirmed the violation and gravity determination, but again found the negligence level to be on the lower end of moderate. Respondent has been cited twice for section 75.1722(b) in the two years prior to this violation, which I do not consider to be extensive. Considering all of the facts and circumstances set forth above, I hereby assess a civil penalty of $1,200.00.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation Nos. 8513258, 9041084, and 9041085 are **AFFIRMED**.

WHEREFORE, Respondent is **ORDERED** to pay a penalty of $50,950.00 within 40 days of this Decision.[12]

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

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[12] 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.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 5, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. HOLLISTON SAND COMPANY INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. YORK 2015-0136 A.C. No. 37-00093-386771 Mine: Slatersville Plant

DISMISSAL ORDER

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977.[1] On March 21, 2016, the Secretary, through a Conference and Litigation Representative, filed a Motion to Approve Settlement. The Citation in issue, citing 30 C.F.R. §46.7(a),[2] alleged the occurrence of a serious event. The text of that Citation asserted:

> An accident occurred on April 27, 2015 at 2:30 PM, an apprentice mechanic was cleaning tools for another mechanic using Cyclo brake and parts cleaner [aerosol can] spraying over a 40 gallon rubber maid trash can and then wiping the tools down. The last tool he cleaned was a striker used to ignite acetylene/oxygen torches. He sprayed the striker down and as he was wiping the striker a spark occurred that ignited the rag. He dropped the rag into the trash can. The cleaner residue on the bottom of the trash can ignited and flashed up into his face. The employee received burns to his face, lips and nose. He was wearing safety glasses and latex gloves at the time of the accident. A parts cleaner cabinet was located

[1] It is **DETERMINED** that the Conference and Litigation Representative (CLR) is accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994). At some point, Attorney for the Secretary James Polianites became involved to some degree with this matter.

[2] 30 C.F.R. § 46.7 titled, "New task training," provides at subsection (a): "You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program. This training must be provided before the miner performs the new task."

> five feet from where the accident occurred. The employee received Haz-com training. The employee did not specifically receive task training using the Cyclo brake and parts cleaner aerosol can, this is a flammable product. Photos taken.

Citation No. 8803673.

The citation was abated after the injured employee received task training. *Id.*

As noted, on March 21, 2016, the CLR filed his Motion for Decision and Order Approving Settlement. That Motion, reciting the Secretary's boilerplate language to the effect that, notwithstanding section 110(k) of the Mine Act, the requirements for settlement approvals are exclusively within the Secretary's domain, asserted:

> In reaching this settlement, *the Secretary has evaluated* the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. *The Secretary has determined* that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above.

Motion at 2 (emphasis added).

The Motion then gave a nod to the Commission's decisions in *The American Coal Company* and *Black Beauty Coal Co*.,[3] offering the following alternative information in support of the penalties agreed to by the parties:

> The CLR requests that Citation No. 8803673 be modified to Unlikely and Not Significant and Substantial. The respondent would argue the accident victim had received training during employment at non-mining locations and additional training while employed by the mine operator. The training provided based on the affidavit of the employee did not specifically cover cleaning spark making tool with an extremely flammable solvent.

Motion at 3.

On October 20, 2016, the Court requested additional information in support of the Motion, reciting the text of the alternative information, as set forth above. The Court advised that

[3] The Court notes that the Commission had issued its decision in *The American Coal Company*, reaffirming that Congress authorized the Commission to review in detail settlements of contested civil penalties before approving them. *The American Coal Co.,* 38 FMSHRC 1972 (Aug. 2016) (citing *Black Beauty Coal Co*., 34 FMSHRC 1856, 1862 (Aug. 2012)). Even with that acknowledgement, the Secretary still insisted that he "believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k)." Motion at 2.

the alternative information did not offer any basis to approve the modification to non-S&S and unlikely — especially since an injury did occur.[4] As is evident from the above, the Secretary did not weigh in on the Respondent's contention, and the assertion that, "the training provided based on the affidavit of the employee did not specifically cover cleaning spark making tool with an extremely flammable solvent," seemed to detract from the claimed settlement basis, not support it. Accordingly, the Court asked for an explanation of the grounds for the proposed modifications for the citation, including how the Haz-com training that the miner in question received supports the proposed change to the gravity of the citation.

No explanation was ever forthcoming and it was not until June 20, 2017, that CLR Ridley sent an e-mail to the Court and the Respondent's counsel informing of the Secretary's decision to vacate the citation at issue in this matter. Thereafter, on June 30, 2017, the Secretary filed the instant motion to dismiss.

Although the Secretary's discretion to vacate a citation or order is not subject to review, *RBK Contr. Inc.*, 15 FMSHRC 2099 (Oct. 1993), it is disconcerting that the response to the reasonable request for genuine supporting information to support the original settlement motion was met with the decision to vacate. Here the decision to vacate arose under circumstances *where a miner was injured, receiving burns to his face, lips and nose*. It also occurred under circumstances where the original settlement motion maintained the penalty as proposed but, as explained, above offered nothing to support modifying the event to unlikely and not significant and substantial. Thus it is noted that under these peculiar circumstances, this decision to vacate comes from the same Secretary of Labor who, despite Congress' command in section 110(k) of the Mine Act, wishes to expand his authority to settle matters before the Commission without providing facts in support of compromise, mitigation or settlement to the Commission.

Despite the curious circumstances, for now, the Secretary continues to have the authority to vacate citations and the Court has no alternative but to dismiss this matter.

WHEREFORE, this case is **DISMISSED.**

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

[4] In the Court's view, the significant and substantial test is, at its heart, a tool of prognostication. As the accident occurred here, no forecast of reasonable likelihood is needed. To engage in such a theoretical exercise would much like predicting the weather for Wednesday on the following day, as the previous day's weather is known and established. Thus, in both instances, actual experience overtakes theory.

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/JM

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September 7, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RICKEY SIMMONS, Complainant v. B&N COAL, INCORPORATED, Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. LAKE 2017-392 MORG-CD-2017-16 Orange Strip Mine Mine ID: 33-01925

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge Bulluck

This matter is before me upon Application for Temporary Reinstatement filed by the Secretary of Labor ("Secretary") on August 11, 2017, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(c)(2), requesting an order requiring B&N Coal, Incorporated ("B&N Coal") to temporarily reinstate Rickey Simmons to his former position as a heavy equipment operator at B&N Coal's Orange Strip Mine, or to a similar position within the same commuting area, at the same rate of pay and benefits. Section 105(c) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety-related protected activity, and authorizes the Secretary to apply to the Commission for temporary reinstatement of miners, pending full resolution of the merits of their complaints. The Application is supported by Declaration of MSHA Special Investigator William Wilson, and a copy of the Discrimination Complaint filed by Simmons with MSHA on July 6, 2017. The Application alleges that Simmons was terminated by B&N Coal because he refused to operate the rock truck that he believed to be unsafe.

B&N Coal elected to waive its right to a hearing, and by agreement of the parties, on August 25, 2017, simultaneous briefs were filed. B&N Coal's Opposition denies that Simmons had been terminated for any discriminatory reason, and is supported by Affidavits of Roger Lee Newberry, B&N Coal truck driver; Douglas Smith, B&N Coal equipment operator; Bradley Bettinger, B&N Coal equipment operator; Paul Gill, B&N Coal foreman; Kevin Marshall Burns, Jr., B&N Coal mechanic/welder; Brian Warner, B&N Coal equipment operator; Jim Yeagle, B&N Coal equipment operator; and Brian Cunningham, B&N Coal Chief Financial Officer.

Procedural Framework

The scope of this proceeding is governed by the provisions of Commission Rule 45(c), which limits the inquiry to a "not frivolously brought" standard by providing that "[i]f no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement." 29 C.F.R. § 2700.45(c).

It is well settled that the "not frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In *Jim Walter Resources, Inc. v. FMSHRC*, the 11th Circuit Court of Appeals explained the standard as follows:

> The legislative history of the Act defines the 'not frivolously brought' standard as indicating whether a miner's 'complaint appears to have merit' -- an interpretation that is strikingly similar to a reasonable cause standard. In a similar context involving the propriety of agency actions seeking temporary relief, the former fifth circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous*.'
>
> . . .
>
> Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a disproportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of the employer's right to control the makeup of his workforce under section 105(c) is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor.

920 F.2d 738, 747-48 n.11 (11th Cir. 1990) (citations omitted) (footnotes omitted).

Ruling

The Mine Act accords to miners and miners' representatives protection from discharge or other discriminatory acts, based on their exercise of any statutory right under the Act. 30 U.S.C. § 815(c). The Commission has consistently held a miner seeking to establish a prima facie case of discrimination to proving that he engaged in activity protected by the Act, and that he suffered adverse action as a result of the protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (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, 817-18 (Apr. 1981).

The Secretary's allegations are based on the findings of Special Investigator William Wilson. Wilson found that on June 29, 2017, B&N Coal foreman Paul Gill instructed Rickey Simmons to operate rock truck no. 670, that Simmons discovered that the truck's CB radio and rearview camera were not functional, that these unsafe conditions almost resulted in two collisions with another truck, and that Simmons reported these conditions to the mechanic at the end of his shift. On the following day, June 30, Gill assigned Simmons to operate rock truck no. 670, and Simmons refused to operate it because it had not been repaired. Gill became angry at Simmons' refusal, they agreed to meet off-site to fight, and Gill then left the area. A few hours later, Gill found Simmons where he was working and discharged him. Wilson concluded that Simmons' complaint, asserting that he was discharged for engaging in protected activity, was not frivolously brought.

B&N Coal's Opposition to the Application, supported by Affidavits, seeks to establish that the complaint was frivolously brought by asserting that Simmons did not engage in protected activity when he refused to operate rock truck no. 670, and that B&N Coal was not motivated by his refusal when it terminated him on June 30. In their Affidavits, Newberry, Smith, Bettinger, Gill, Burns, Warner, and Yeagle asserted that rock truck no. 670 was not unsafe to operate on June 29 or 30. Newberry and Bettinger averred that there was no near-collision between Simmons and another truck driver on June 29, and Burns asserted that Simmons never reported to him that rock truck no. 670 was unsafe. According to Newberry, Smith, Bettinger, Gill, and Warner, Simmons threatened Gill with physical harm on June 30. Smith, Burns, Bettinger, and Gill assert that Gill reassigned Simmons to work with Burns in the capacity of mechanic and, by Gill's and Burns' account, Gill fired Simmons later that morning. B&N Coal contends that Simmons' refusal to drive the truck was not protected, and that he was fired for threatening Gill with physical violence.

While I have carefully considered B&N Coal's Opposition, the differing accounts of events precipitating the discrimination complaint are not appropriately resolved at this stage of the proceedings. *Sec'y of Labor on behalf of Nickoson v. Mammoth Coal Co.*, 34 FMSHRC 1252 (June 2012); *see Sec'y of Labor on behalf of Williamson v. CAM Mining LLC*, 31 FMSHRC 1085 (Oct. 2009). The Secretary has set forth allegations of adverse treatment, close in proximity to the protected activity, so as to create a nexus sufficient to raise an inference of discrimination. I also note that B&N Coal has not challenged the Secretary's allegation that responsible management officials had knowledge of Simmons' work refusal. At best, B&N Coal has shown intent to defend its actions at hearing on the basis of legitimate business-related, non-discriminatory reasons. At this juncture it is emphasized that the Secretary ultimately bears the burden of proving discrimination by a preponderance of the evidence, in order to sustain a violation under section 105(c). Accordingly, since the allegations of discrimination, as set forth in the Secretary's Application, have not been shown to be clearly lacking in merit, it must be concluded that they are not frivolous and, therefore, satisfy the lesser threshold in this proceeding.

WHEREFORE, the Application for Temporary Reinstatement is **GRANTED**, and it is **ORDERED** that B&N Coal, Incorporated **TEMPORARILY REINSTATE** Rickey Simmons to the position of heavy equipment operator at B&N Coal's Orange Strip Mine, or to a similar position within the same commuting area, at the same rate of pay and benefits, effective this date, September 7, 2017.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 13, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. KEITH MILLER, employed by OAK GROVE RESOURCES, and CHASE GUIN, formerly employed by OAK GROVE RESOURCES, and WILLIAM EDWARDS, employed by OAK GROVE RESOURCES, Respondents.	CIVIL PENALTY PROCEEDINGS Docket No. SE 2017-0092 A.C. No. 01-00851-428926 A Docket No. SE 2017-0093 A.C. No. 01-00851-428927 A Docket No. SE 2017-0094 A.C. No. 01-00851-428928 A Mine: Oak Grove Mine

ORDER DENYING SECRETARY'S MOTION FOR PROTECTIVE ORDER

Before: Judge Feldman

These matters concern 104(d)(1) Citation No. 8520686 and 104(d)(1) Order No. 8520687 issued on April 26, 2013, at the Oak Grove Mine for impermissible coal dust accumulations and inadequate preshift examinations in violation of the Secretary's mandatory safety standards in sections 75.400 and 75.360(a)(1), respectively.[1] 30 C.F.R. §§ 75.400, 75.360(a)(1). There were three operational shifts at the Oak Grove Mine at the time the citation and order were issued. On April 13, 2017, four years after the issuance of the aforementioned citation and order, the Secretary filed petitions for assessment of civil penalty pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c) ("Mine Act" or "Act"), seeking to impose personal liability against each of the captioned shift foremen for the violations cited in

[1] 104(d)(1) Citation No. 8520686 and 104(d)(1) Order No. 8520687, issued to Oak Grove Resources, were resolved by means of a Decision Approving Settlement issued on March 22, 2016. Docket Nos. SE 2014-147, SE 2014-231.

104(d)(1) Citation No. 8520686 and 104(d)(1) Order No. 8520687 issued on April 26, 2013.[2] The 110(c) investigation in these matters was reportedly completed on December 11, 2016, more than three and a half years after the issuance of the underlying citation and order.

The Respondents seek to depose an MSHA official familiar with its investigative procedures at its Technical Compliance and Investigation Office ("TCIO") to determine the reason for the approximate four year interval between the issuance of the underlying citations and the filing of the subject civil penalty petitions. The Secretary has filed a Motion for Protective Order seeking to prevent such discovery,[3] asserting that justification for the four year interval is irrelevant since the petitions were filed within the general five year statute of limitations for filing civil suits provided in 28 U.S.C. § 2462.[4] Sec'y Mot. at 4. The Secretary also contends that the amount of time taken to initiate and conduct the investigation is irrelevant, arguing instead that the Respondents were notified of the proposed civil penalties shortly after the December 11, 2016, culmination of the relevant investigation.[5] *Id*. at 4-5.

Alternatively, the Secretary asserts that the information sought by the Respondents is protected by the following privileges: (1) the deliberative process privilege, (2) the investigative process privilege, (3) the attorney-client privilege, (4) the work-product privilege, and (5) the qualified immunity for government officials privilege. Sec'y Mot. at 6-12. In seeking discovery, the Respondents represent that they "are not seeking to question the thought process that resulted

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[2] Section 110(c) of the Mine Act provides that "[w]henever a corporate operator violates a mandatory health or safety standard … any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation shall be subject to the same civil penalties" as the corporate operator. 30 U.S.C. § 820(c).

[3] The Secretary filed his Motion for Protective Order on June 20, 2017 ("Sec'y Mot."). The Respondents filed their Opposition on June 27, 2017 ("Resp't Opp."). Following Judge Andrews' recent July 20, 2017, Order in Docket No. PENN 2017-109, concerning a substantially similar discovery issue, the parties were invited to submit supplemental briefing to address any issues they deemed relevant that were the subject of Judge Andrews' Order. The Respondent filed a Letter in response on August 4, 2017 ("Resp't Supp. Br."). On August 10, 2017, the Secretary filed a supplemental brief ("Sec'y Supp. Br. A") which included copies of the Secretary's request for certification for interlocutory review of Judge Andrews' discovery Order ("Sec'y Supp. Br. B"), which was denied by Judge Andrews, and the Secretary's Petition for Interlocutory Review of Judge Andrews' Order by the Commission ("Sec'y Supp. Br. C").

[4] 28 U.S.C. § 2462 states, in pertinent part: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

[5] Neither the Commission nor the Courts have identified a clear objective standard for determining when a 110(c) investigation terminates. The Secretary contends that the subject investigation terminated when TCIO forwarded the case to the Office of Assessments on December 11, 2016. Sec'y Mot. at 4-5.

in assessment of the penalty, but only the basis of the delay and whether [the] delay can be justified." Resp't Supp. Br. at 3.

Section 105(a) of the Mine Act provides, in essence, that the Secretary shall file a petition for assessment of civil penalty within a reasonable time after issuance of a citation or termination of a relevant inspection or investigation.[6] 30 U.S.C. § 815(a). Commission Rule 56(b) provides that "[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(b).

In arguing that the length of a 110(c) investigation period is beyond review so long as a civil penalty notice is issued within a reasonable time after completion of the reported investigation period, the Secretary relies on the D.C. Circuit's decision in *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005). Sec'y Mot. at 4. The Secretary's reliance on *Twentymile* is misplaced. It is true that *Twentymile* dealt with the reasonableness of the time period between the culmination of the Secretary's investigation and the issuance of the civil penalty petition, rather than whether the investigation was completed within a reasonable period of time. However, *Twentymile* concerned an elapsed period of approximately 17 months between the issuance of the subject 104(g)(1) withdrawal order and the related penalty petition, a far cry from the approximate 48 month interval in this matter. *Twentymile*, 411 F.3d at 258. Thus, *Twentymile* did not involve the magnitude of delay presented in this case.

Moreover, in *Twentymile*, the investigation was initiated and completed during the period between the issuance of a June 2000 withdrawal order and the issuance of an accident investigation report in January 2001, an interval of six months. *Id.* at 258. I question whether the Court in *Twentymile* would have reached the same conclusion if confronted with the facts of this case, where the investigation was initiated and completed between April 2013 and December 2016, an interval of 44 months. Consequently, the Court in *Twentymile* may not have deferred to the Secretary's interpretation of section 105(a) that consideration of the reasonable time period begins with the issuance of an investigation report if it were clear that the investigation was not initiated and conducted in a timely manner. In any event, the Court in *Twentymile* was not confronted with the Secretary's contention in this case that a reasonable time period for filing 110(c) petitions begins when TCIO forwards the case to the Office of Assessments.

I am cognizant of the Secretary's reliance on Supreme Court cases that have held that the Government is not jurisdictionally barred from bringing an untimely action unless Congress has expressly provided by statute or pertinent legislative history that such untimeliness precludes further Government enforcement action. Sec'y Supp. Br. C at 6-7 (citing *United States v. Montalvo-Murillo*, 495 U.S. 711, 721 (1990) (holding that a failure to conduct a timely

[6] Although section 105(a) addresses the timeframe for filing petitions for civil penalties filed against mine operators under section 104(a), a number of ALJ's have found it appropriate to apply the reasonable time language in section 105(a) to personal liability civil penalties proposed pursuant to section 110(c). *See, e.g., White*, 38 FMSHRC 1881 (July 2016) (ALJ); *Dushane*, 38 FMSHRC 1834 (July 2016) (ALJ); *Trujillo*, 35 FMSHRC 1485 (May 2013) (ALJ); *Dyno Nobel East-Central Region*, 35 FMSHRC 265 (Jan. 2013) (ALJ).

preliminary detention hearing did not necessitate a defendant's release on bail as a jurisdictional remedy); *Brock v. Pierce County*, 476 U.S. 253, 265-66 (1986) (holding that the Secretary retained jurisdiction to recover misused federal grants designated for employment and training programs despite exceeding the statutory time period provided for making an official determination)). Consistent with the Supreme Court cases relied on by the Secretary as well as *Twentymile*, it is apparent that untimeliness does not preclude the Government's jurisdictional authority.

However, the Secretary's authority is not unfettered in that the exercise of authority must be reasonable and free of any abuse of discretion.[7] In this regard, the Court in *Twentymile* left open the possibility that there may be instances where it is appropriate to set aside the Secretary's untimely recommendation for penalty upon a showing of prejudice. *Twentymile*, 411 F.3d at 262. Similarly, the Commission has stated that the timeliness requirement in section 105(a) of the Act "does not impose a jurisdictional limitation[] . . ., but rather turns on whether the delay is reasonable under the circumstances of each case." *Sedgman*, 28 FMSHRC 322, 338 (June 2006). In fact, the Commission expressly noted that the Court in *Twentymile* did not overturn Commission precedent allowing for the reviewability of untimeliness. *Id*. at 339. Thus, I am not persuaded by the Secretary's contention that the requested discovery is irrelevant because the Secretary has unreviewable authority to file a petition for assessment of civil penalty at any time within the general five-year statute of limitation period for initiation of civil suits.[8]

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[7] The Secretary cites *Baer v. United States*, 722 F.3d 168, 174 (3d Cir. 2013) for the proposition that an agency's exercise of authority with respect to "the timing, manner, and scope" of its investigation is committed to agency discretion that is beyond review. Sec'y Supp. Br. C at 6. However, *Baer* is distinguishable from this case, as *Baer* dealt with the Government as a defendant rather than a petitioner bringing a civil action. In *Baer*, the Government was protected as a defendant by sovereign immunity for damages based on an alleged failure of the Security and Exchange Commission to thoroughly examine, investigate, and timely uncover the Madoff Ponzi scheme, which the plaintiffs alleged resulted in their financial loss. *Baer*, 722 F.3d at 168. In this case, the Secretary is the petitioner bringing a civil penalty action based on his investigation, the duration of which is subject to abuse of discretion review. *See id.* at 175 (noting that the conduct of an investigation "may amount to an abuse of discretion.").

[8] The consequences of the Secretary's assertion that the timeliness of the initiation of a 110(c) proceeding is not reviewable has been addressed by Judge Zielinski, wherein he stated:

> The legal standards applicable to determining whether a petition under section 110(c) has been timely filed, the adequacy of any required justification for delay, the requirements for a showing of prejudice, and the relative considerations involved in the balancing of the impact of dismissal on the Mine Act's substantive enforcement scheme against concerns of procedural regularity, fair play and prejudice, have not been decided by the Commission. . . . However, because there is a potential for substantial delay in the initiation and conduct of a section 110(c) investigation[], granting the Secretary carte blanch for that part of the process may well not comport with considerations of fair play and due process for individual respondents.

Dyno Nobel East-Central Region, 35 FMSHRC at 267 n.2.

I am similarly unpersuaded by the Secretary's assertion that the date of commencement and the duration of an investigation are immaterial. It is true that the Court in *Twentymile* considered the operative time period to be between the end of the Secretary's investigation and notification of the proposed penalty. However, the Court had no reason to consider whether the investigation was initiated and conducted in a timely manner, given its duration of no more than six months, as opposed to the 44 month elapsed time period involved in this proceeding. If the date of commencement of an investigation were irrelevant, it would permit the Secretary to unreasonably delay initiation of an investigation for many years as long as completion of the investigation and filing of the related petition for assessment of civil penalty occurred within the five year statute of limitations. In other words, if the statute of limitations period was dispositive, it would render the *Twentymile* Court's consideration of the reasonable time issue moot.

With respect to relevancy, the discovery sought by the Respondents is not frivolous, in that there is reasonable cause to believe that the information sought through discovery may lead to relevant evidence on the question of the timeliness issue. The reasonable cause to believe is based on the Secretary's policy manual which provides that, absent extenuating circumstances, 18 months is the operative "investigative timeframe" for filing civil penalty petitions in 110(c) cases, computed from the date of the subject citation or order, which in this case is April 26, 2013. [9] The Secretary's investigative timeframe is instructive even though it is not a binding norm.

I am cognizant of the Secretary's argument that the provisions of Commission Rule 56(c) may preclude the discovery sought because "[t]he deposition the respondents have noticed would be oppressive, placing undue burden and expense on the Secretary." Sec'y Mot. at 6. However, resolving discovery disputes is a balancing act between the interests of a party seeking discovery and the interests of an opposing party claiming undue hardship. In the final analysis, this requires consideration of whether the request for discovery is reasonable, and, whether the requested information is available from other sources. Obviously, only the Secretary is in possession of the information and documentation related to the length of his investigation. Consequently, the Secretary's claimed prejudice is overridden by the Respondent's right to seek the information sought in discovery.

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[9] The relevant provision of MSHA's Program Policy Manual provides:

> Investigative timeframes have been established to help ensure the timely assessment of civil penalties against corporate directors, officers, and agents. Normally, such assessments will be issued within 18 months from the date of issuance of the subject citation or order. However, if the 18 month timeframe is exceeded, TCIO will review the case and decide whether to refer it to the Office of Special Assessments for penalty proposal. In such cases, the referral memorandum to the Office of Special Assessments will be signed by the Administrator.

I MSHA, U.S. Dep't of Labor, Program Policy Manual § 110 (c), at 42 (1996).

Alternatively, the Secretary asserts that even if the discovery information is relevant evidence or likely to lead to relevant evidence, the information sought is protected by the deliberative process privilege, the investigative process privilege, and the attorney-client privilege. Sec'y Mot. at 6-12. These three privileges are not applicable in that the information sought by the Respondents is chronological rather than substantive. Obviously, tracking information is not germane to the disposition of such issues as the fact of the violation, gravity, and negligence. As previously noted, the Respondents are not seeking to "question the thought process that resulted in assessment of the penalty, but only the basis of the delay and whether delay can be justified." Resp't Supp. Br. at 3. Thus, MSHA's normal 110(c) processing timeframes, as well as the relevant tracking information and documentation pertaining to the subject 110(c) investigations, are appropriate avenues of discovery.

The Secretary also asserts the qualified immunity privilege for Government officials. While I am sensitive to the Secretary's assertion, I do not believe that the appropriate TCIO official that will ultimately be deposed will be an official of such high ranking to justify the invocation of the privilege.

Finally, the Secretary asserts the work product privilege. Tracking information is not protected by the work product privilege, for such information is compiled during the course of normal administrative operations, and is not created in contemplation of litigation. In this regard, I stress that any documents made available through discovery should be limited to those that are routinely used to track case progress rather than any documents specifically prepared in anticipation of litigation.

ORDER

In view of the above, **IT IS ORDERED** that the Secretary's Motion for Protective Order **IS DENIED**.

IT IS FURTHER ORDERED that discovery, consistent with the parameters discussed in this order, shall proceed at a time that is mutually agreeable to the parties at the Secretary's office in Arlington, Virginia. Discovery shall be limited to the following information and/or documentation as requested by the Respondents:

1. Facts surrounding the normal review process within TCIO when a section 110(c) case is forwarded to it and the average time frames for such process.

2. The staffing and workload of TCIO during the relevant period between April 26, 2013, and December 11, 2016, as they pertain to such things as cases brought under section 110, 105(c) cases, and FOIA requests.

3. The dates of referral from TCIO to the Solicitor's office for review, as well as any return dates to TCIO, including a pertinent chronological printout from TCIO's tracking system pertaining to the period between April 26, 2013, and December 11, 2017. Any tracking system documents that contain opinions of reviewers or solicitors shall be redacted.

4. Any information that explains the length of time to complete the relevant 110(c) investigations that is not subject to the deliberative process privilege, such as, but not limited to, workload and personnel information.

I stress that any questions or requests for documentation concerning the thought processes that served as a basis for the Secretary's initiation of these 110(c) proceedings, or for the amount of the proposed civil penalties, is beyond the scope of permissible discovery set forth in this Order. I also note that it is neither my intention nor desire to micromanage the Secretary's enforcement program. However, the approximate four year interval between the issuance of the underlying citations and the filing of the subject petitions for assessment of civil penalty gives rise to a legitimate discovery request.[10]

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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/rd

[10] On September 7, 2017, counsel for Respondents filed a Motion for Summary Decision on the merits in the captioned matters. Despite the motion, counsel indicated a desire to go forward with discovery on the timeliness issue. Counsel also indicated that he may file a motion to dismiss on the basis of untimeliness after completion of discovery on the timeliness question. The motion for summary decision and any motion to dismiss for untimeliness, as well as any oppositions thereto, will be considered after completion of the discovery that is the subject of this Order.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 21, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. SPARTAN MINING COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2017-0455 A.C. No. 46-01544-439958 Mine: Road Fork #51 Mine

ORDER DENYING SETTLEMENT MOTION

Before: Judge Lesnick

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary has filed a motion to approve settlement. The motion states that the parties have agreed to a reduction in the penalty from $13,448.00 to $10,663.00. For the reasons set forth below, the Secretary's motion is **DENIED.**

As a preliminary matter, I note that the Secretary's motion at paragraph three highlights "maximizing" the Secretary's "prosecutorial impact" in agreeing to this settlement. Insofar as this statement, as well as other statements related to prosecutorial impact proffered by the Secretary, departs from Rule 31(b) and offers information that is superfluous to the Commission's authority to approve settlements of Mine Act disputes, *see* 30 U.S.C. § 820(k), the statement is stricken from the Secretary's motion pursuant to Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), and Rule 12(f) of the Federal Rules of Civil Procedure, Fed. Civ. P. 12(f). Under Commission Procedural Rule 31(b), a motion to approve settlement "shall include . . . facts in support of the amount of penalty agreed to in settlement," 29 C.F.R. § 2700.31(b)(1), and nothing in the Secretary's statement on "prosecutorial impact" in any way lessens the burden of the parties to show that a settlement is justified by the facts and circumstances surrounding each individual compromise. 30 U.S.C. § 820(k). The Secretary's insistence on larding settlement motions with unhelpful, extraneous language in no way changes the fact that it is the *Commission* that has *independent* "authority to assess all civil penalties provided in [the Mine] Act." 30 U.S.C. § 820(i).

This case involves two enforcement actions. The Respondent has agreed to pay the full penalty of $7,663.00 proposed for section 104(g)(1) Order No. 9070664. Section 104(a) Citation

No. 9066441 was issued for a violation of the accident reporting requirements of 30 C.F.R. § 50.10(a), and states as follows:

> The operator failed to immediately contact MSHA at once without delay and within 15 minutes upon knowledge of an explosion at the route 16 #3 shaft which resulted in serious injury to a miner on 07/29/2016. The miner succumbed to his injuries six days later on 08/04/2016. According to the 911 call center recording[,] the mine dispatcher called at 12:13 p.m. informing 911 there had been an explosion and a miner was in need of immediate medical care. The mine operator did not contact the hotline until 12:36, at least 23 minutes after the call to the 911 center was made.

In a subsequent communication with the Court, the Secretary further clarified these allegations by stating that, "[a]ccording to MSHA's accident report, the accident occurred at 'approximately 12:00 p.m.'" Notes made by the inspector who issued the citation explain that the delay in reporting the accident to MSHA was "'due to the stress of the situation.'" Motion at ¶ 4. In support of the settlement motion, the Secretary states:

> The Respondent argues that management was not negligent and that MSHA was notified as expediently as possible. . . . Given the circumstances, the short amount of time involved, the available evidence, as well as the uncertainties of litigation, the Secretary has determined that a finding of low negligence and a corresponding penalty reduction are justified. The parties agree that a penalty of $3,000.00 is appropriate, is supported by the reduction in the negligence finding and is consistent with 30 CFR Part 100.

Motion at ¶ 4.[1]

The agreed upon penalty, however, is not consistent with the plain terms of the Mine Act. In 2006, in response to the tragic accidents at the Sago Mine and Aracoma Alma No. 1 Mine, Congress enacted the Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, 120 Stat. 493 ("MINER Act"). Section 103(j) of the Mine Act requires a mine operator to notify MSHA in the event of an accident occurring at its mine. 30 U.S.C. § 813(j). Section 5(a) of the MINER Act amended Mine Act section 103(j) such that "the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred." Section 5(b) of the MINER Act amended Mine Act section 110(a) by adding a new subsection providing that failure to meet the requirements of section 103(j) relating to the 15 minute requirement "shall be assessed a civil penalty . . . *of not less than $5,000* and not more than $60,000." 30 U.S.C. § 820(a)(2) (emphasis added).

[1] Although the violation set forth in Citation No. 9066441 is designated as being the result of "moderate" negligence, the Secretary's motion does not include a request that this designation by modified to "low."

The statutory language is unequivocal. It imposes a *minimum* penalty of $5,000 for any violation of the 15 minute rule of section 103(j) without any reference whatsoever to mitigation based on the facts or circumstances of a particular situation. Nor does that statute advert to mitigation based on either a finding of low negligence or a "short amount of time involved."

Here, the Citation No. 9066441 alleges that an accident occurred that injured a miner and ultimately led to the miner's death. It also alleges that the Respondent delayed notifying MSHA beyond the 15 minute limit. Under the plain terms of the statute, which neither the Secretary nor the Court are free to disregard, the penalty for such a violation "shall be . . . not less than $5,000."

Having considered the representations and documentation submitted in this case, I therefore conclude that the proffered settlement lacks a sufficient legal basis.

WHEREFORE, the motion for approval of settlement is **DENIED** without prejudice.

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

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/rd/tas

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 25, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2016-0584 A.C. No. 46-05252-416626
ICG BECKLEY., LLC, Respondent.	Mine: Beckley Pocahontas Mine

ORDER GRANTING MOTION TO WITHDRAW CONTEST, FOLLOWING COURT'S REJECTION OF SETTLEMENT MOTION
ORDER TO PAY

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. Involved is a section 104(a) citation, alleging a violation of 30 C.F.R. §75.1725(a). The standard is titled, "Machinery and equipment; operation and maintenance," with subsection (a) providing "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately. The issuing inspector's citation asserted:

> The operator has failed to maintain the #3 Roof Bolter in operation on the left side of the #2 Section in safe operating condition. When parked on a slight grade it was observed that the park brake was not holding the machine in place and allowing it to creep very slowly downhill. The operator removed the machine from service until repairs were made. Standard 75.1725(a) was cited 6 times in two years at [the Beckley Pocahontas Mine].

Citation No. 9054430, issued May 16, 2016.

On February 16, 2017, the Secretary, acting through a Conference and Litigation Representative ("CLR") filed the Secretary's Motion for Decision and Order Approving Settlement ("Motion"). The Motion contained the Secretary's routine boilerplate language to justify the penalty reduction. That language is in contravention to Congress' command in section 110(k) of the Mine Act that no proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled *except with the approval of the Commission.* Nevertheless, the Motion proceeded to announce that "*the Secretary has evaluated* the value of compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt [and] [*t*]*he Secretary has determined* that the public

interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above." Motion at 2 (emphasis added).

On April 14, 2017, the Court advised the CLR that it had:

> reviewed the settlement motion in this matter, and would like some additional information. Specifically, the Court is concerned that the settlement motion contained no information on the Secretary's perspective. As you know, the rationale presented for the proposed reduction in penalty amount reads: 'Citation No. 9054430 remains as issued with a penalty reduction. Respondent argues that Citation No. 9054430 should be modified to non-S&S because a fatal injury was not reasonably likely to occur. Although the cited brake did need some attention because it allowed the bolter to inch forward a little at a time on a steep grade, it did hold under normal circumstances. Furthermore, the roof bolter almost always had two persons attending it when it was being operated which means there would be a person there immediately for assistance in any event caused by this brake and was thus unlikely to result in a fatal injury. The Secretary, nevertheless, while not admitting the relevancy or significance of Respondent's arguments, agrees to reduce the penalty from $1,607.00 to $1,292.00 for settlement purposes. No modifications to the citation are made.'
>
> With only a statement that the Secretary does 'not [admit] the relevancy or significance of Respondent's arguments,' the Court is left without important information. Does the Secretary agree that the assertions advanced by the Respondent raise legitimate questions of fact which can only be resolved at hearing, and therefore support the proposed settlement? We are asking for this input because the motion tells us nothing at all about the Secretary's stance in reaction to the Respondent's claims. Please feel free to provide this additional information via e-mail — there is no need for a formal amended motion.

Court's April 14, 2017 E-mail to the Parties.

The CLR responded on May 2, 2017, stating:

> As to the substance of your inquiry, please note paragraph 3 of the motion where we indicate that the Secretary has "evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial …" Given the company's arguments set forth in paragraph 5.A., we recognize that the outcome of a trial could result in the deletion of the S&S designation. Although we would disagree with such an outcome, we recognize that such an outcome is a possibility. The Secretary has determined that the agreed-upon reduction in penalty of $315 is appropriate given the dispute concerning the gravity of the violation and to ensure the affirmance of the citation as issued.

On July 21, 2017, the Court responded, advising that it:

> routinely rejects the boilerplate the Secretary inserts that he has "evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial …" because the Commission and this Court view that language as insufficient under section 110(k) of the Mine Act.
>
> That aside, it is unclear to the Court whether the other language in the motion that "[a]lthough the cited brake did need some attention because it allowed the bolter to inch forward a little at a time on a steep grade, it did hold under normal circumstances [and that] the roof bolter almost always had two persons attending it when it was being operated which means there would be a person there immediately for assistance in any event caused by this brake and was thus unlikely to result in a fatal injury," is meant to convey solely the mine operator's position or whether that language reflects, in the Secretary's view, plausible contentions which may be established at a hearing.
>
> It is therefore unclear whether the motion has merely regurgitated the Respondent's position or whether it recognizes that there is a plausible basis for the claim that the bolter would only "inch forward a little at a time on a steep grade," and similarly that there is a plausible basis for the claim that "it did hold under normal circumstances." This is not an unusual request on the Court's part. Instead the Court is trying to ferret out whether the words in the motion represent solely a one-sided representation – that of the mine operator.
>
> The Secretary himself has routinely recognized how to deal with this issue in many other settlement motions. Typically, the Secretary has stated words to the effect that there is some uncertainty about the facts and that such uncertainties can only be resolved by proceeding to a hearing. In light of those uncertainties, the Secretary has agreed to settle this matter by …. etc. Thus, without admitting to the Respondent's contentions, the Secretary at least needs to convey the element of uncertainty as to the disputed facts. Merely stating, as this motion does here that the Secretary does not "[admit] the relevancy or significance of Respondent's arguments," but "agrees to reduce the penalty … for settlement purposes" is therefore an insufficient basis for approving a settlement.
>
> The Court hopes this has been helpful and instructive as to the information needed for this and like settlements.
>
> Please reply to indicate whether the parties plan to file an amended motion, or if they prefer to have the Court issue a decision on the instant motion.

Court's July 21, 2017 E-mail to the parties

Thereafter, on August 1, 2017, the Respondent filed a "Withdrawal of Contest." The Withdrawal states that the Respondent "wishes to withdraw its opposition to the outstanding citation and related civil penalty… [and that the] Secretary of Labor does not object to this Withdrawal of Contest."

Discussion

Under Commission Rule 11 "[a] party may withdraw a pleading at any stage of a proceeding with the approval of the Judge or the Commission." 29 C.F.R. § 2700.11, *Sec. v. Performance Coal* 34 FMSHRC 587, *592, Mar. 2012. (Chief Judge Robert Lesnick and Judge Margaret Miller). As Administrative Law Judge David F. Barbour noted in *Sec. v. Consolidation Coal,* 1993 WL 396898, (Feb. 1993), "[h]aving withdrawn its contest, there remains no challenge to the Secretary's civil penalty petition, and it too is GRANTED." *Id.* Administrative Law Judge Thomas P. McCarthy observed, a Respondent's withdrawal of contest makes a current civil penalty proceeding moot and the "matter reverts back to the status quo ante prior to said contest," with the effect that the penalty as originally proposed by the Secretary is imposed. 35 FMSHRC 698, (Mar. 2013).

The Court views the events, as recounted above, as yet another example of the importance of the Commission's role in the review of settlements, per the direction of Congress under section 110(k) of the Mine Act.

Accordingly, the proposed penalty as originally assessed is hereby imposed as follows: **Citation No.** 9054430 **Assessment** $1,607.00.

It is **ORDERED** that Respondent pay a penalty of $1.607.00 within 30 days of this order.[1] Upon receipt of payment, this case is **DISMISSED**.

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

[1] 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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/JM